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MEMORANDUM OF LAW

DATE: September 7, 2016

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: The Legality of the Proposed Model Unmanned Aircraft Systems Ordinance

INTRODUCTION

The City of San Diego (City) desires to pass an ordinance criminalizing the use of model Unmanned Aircraft Systems (UAS)[1] for persons operating their UAS in a way that threatens the personal safety or property of others. This proposed ordinance (UAS Ordinance) raises two main legal issues. First, the City needs to be able to justify treating model UAS operators differently than non-model UAS operators under the Equal Protection Clause of the United States Constitution. Second, the proposed UAS ordinance must not be preempted by federal or state law. This memorandum examines these two issues in detail, based on the proposed UAS Ordinance. (See Attachment A.)

QUESTIONS PRESENTED

1. Does the proposed UAS Ordinance violate the Equal Protection Clause of the United States Constitution by treating model UAS operators differently than other UAS operators?

2. Is the proposed UAS Ordinance preempted by federal or state law?

SHORT ANSWERS

1. Probably not. Because UAS operators are not a suspect class and UAS operation is not an immutable characteristic, the City only needs a rational basis to regulate model UAS. The rationale proposed for adopting regulations that apply solely to the use of model UAS is that federal law regulates commercial and governmental UAS use more than model UAS use. Therefore, without adequate model UAS regulations there is a potential for misuse by model UAS operators. This objective is rationally related to the regulations contained in the proposed UAS Ordinance.

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[1] UAS are perhaps better known as "drones." However, to keep consistent with federal law this memorandum will use the term UAS. The term model UAS is interchangeable with the term recreational UAS, as model UAS are those typically flown for recreational purposes only.

2. Probably not. The proposed UAS Ordinance was drafted so as to not conflict with federal or state law. It is based on existing law that has survived preemptory challenge. In addition, the UAS Ordinance is a criminal statute that does not infringe on the Federal Aviation Administration's (FAA) regulatory scheme for UAS.

BACKGROUND

UAS are becoming more ubiquitous in the City of San Diego's airspace. And, although the FAA created a detailed regulatory scheme for government and commercial UAS, recreational UAS are far less regulated. This lack of regulation currently gives the City few enforcement options when dealing with model UAS operators who use their UAS in a manner which threatens persons or property.

The proposed UAS Ordinance would give City law enforcement officials the ability to arrest and prosecute model UAS operators who violate its provisions. The proposed UAS Ordinance is patterned after similar statutes that have withstood legal challenge. It also leaves out legally uncertain privacy issues by refraining from criminalizing potential First Amendment speech activities.[2] Still, it raises two main legal issues. The first issue is compliance with the Equal Protection Clause of the United States Constitution, because the UAS Ordinance treats model UAS operators differently than other UAS operators. The second issue is whether the proposed model UAS Ordinance conflicts with either state or federal law and is, therefore, nullified. This memorandum examines these issues.

ANALYSIS

I. EQUAL PROTECTION

The proposed UAS Ordinance treats model UAS operators differently than other UAS operators, in that it criminalizes some model UAS operator conduct but does not address the conduct of commercial or government UAS operators.. The difference, however, likely does not violate equal protection principles.

The Equal Protection Clause of the United States Constitution prevents the government from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. This means that laws that treat similar groups of people unequally may be subject to constitutional review by a court. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982). A court will make a preliminary inquiry for equal protection claims, followed by an analysis based on which class of persons the law affects. *Walgreen Co. v. City and County of San Francisco*, 185 Cal. App. 4th 424, 434-35 (2010). The preliminary inquiry is whether the two or more groups affected by the law are "similarly situated." *Cooley v. Superior Court*, 29 Cal. 4th 228, 253 (2002). If the groups are similarly situated, the law must satisfy the appropriate level of scrutiny

[2] A good overview of the First Amendment issues facing any proposed UAS laws is contained in the following law review article: Marc Jonathan Blitz, James Grimsley, Stephen E. Henderson & Joseph Thai, *Regulating Drones under the First and Fourth Amendments*, 57 Wm & Mary L. Rev. 49, 80-138 (2015). The article's authors conclude that a government's ability to regulate aerial photography is uncertain.

applied by the court which is determined based on the class of persons or interests affected by the challenged law. *Romer v. Evans*, 517 U.S. 620, 635 (1996).[3]

A. Does the UAS Ordinance Affect Similarly Situated Persons?

The Equal Protection Clause applies when a law affects two or more groups of similarly situated persons in an unequal manner. *Cooley*, 29 Cal. 4th at 253. The persons need only be "similarly situated for purposes of the law challenged." *Id.* (quoting *People v. Gibson*, 204 Cal. App. 3d 1425, 1438 (1988)). For purposes of an Equal Protection Clause analysis, a corporation is considered a person. *Walgreen*, 185 Cal. App. 4th at 434.

The proposed UAS Ordinance affects UAS operators unequally. Model UAS operators will be subject to the UAS ordinance's criminal penalties; commercial and governmental UAS operators will not. Thus, a court could view UAS operators as being treated differently because model UAS operators are taken out of the greater group of UAS operators and subject to penalties that do not apply to other UAS operators. Accordingly, a court could find that the UAS ordinance affects similarly situated persons differently, meeting the threshold inquiry for an equal protection challenge.

B. Does the UAS Ordinance Satisfy the Required Level of Scrutiny?

After satisfying the threshold equal protection inquiry, a court will apply the appropriate level of scrutiny to a challenged law. A court will apply a heightened level of scrutiny to Equal Protection Clause challenges to certain classifications of persons, known as suspect and quasi-suspect classes. *Walgreen*, 185 Cal. App. 4th at 435. Laws affecting individuals based on fundamental rights or certain immutable characteristics receive strict or intermediate scrutiny. *Id.* All other laws must satisfy the rational basis test, which means that the law must be rationally related to a legitimate state interest. *Id.*; *see also City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

UAS operation is neither a fundamental right nor an immutable characteristic and UAS operators are not a suspect or quasi-suspect class of persons. Therefore, a court would review the UAS Ordinance using the rational basis test.

Laws facing rational basis scrutiny have a presumption of validity that must be rebutted by the party challenging the law. *Walgreen*, 185 Cal. App. 4th at 435. Courts will look for a "reasonably conceivable" and "plausible" rationale for the law in question. *Id.* at 436. There must be a link between "the classification adopted and the object to be obtained." *Id.* If a court finds a reasonably conceivable and plausible rationale for a law, the law survives the equal protection challenge. *Id.* at 439.

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[3]*People v. Hofsheier*, 37 Cal. 4th 1185 (2006) was overruled on other grounds in *Johnson v. Department of Justice*, 60 Cal. 4th 871 (2015), and remains intact with respect to the Equal Protection Clause and looking at persons similarly situated and the law.

The proposed UAS Ordinance subjects model UAS operators to criminal penalties. City staff assert that the main justification for limiting the proposed UAS Ordinance to model UAS operators is because commercial[4] and government[5] UAS users are subject to stricter requirements under federal law than model UAS users. If the proposed UAS Ordinance were challenged, a court would review the ordinance in conjunction with state and federal laws and determine if there is a reasonable basis for the City's added restrictions for model UAS operators. Because the City's ordinance is intended to fill the gaps and create regulations that do not otherwise exist for operators of model UAS, the City's classification of model UAS operators is reasonably related to its public safety objective.

II. PREEMPTION

The proposed UAS Ordinance would criminalize actions taking place in the City's airspace. Traditionally, the FAA has jurisdiction over the bulk of airspace regulation. Therefore, a party could challenge the UAS Ordinance by claiming that the City does not have the right to pass laws affecting airspace. This section will examine both federal and state preemption issues as applied to the proposed UAS Ordinance.

A. Federal Preemption of the Proposed UAS Ordinance

Article VI of the United States Constitution declares federal law to be "the supreme Law of the Land." This article is known as the Supremacy Clause. The Supremacy Clause allows federal law to nullify state or local law by preemption if the offending state or local law frustrates the federal law in a variety of ways. *See generally Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). Preemption can occur whenever federal law, either expressly or impliedly, occupies the same field as a competing state or local law. *See Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (known as "express preemption" or "field preemption," respectively). Such preemption must be unmistakable. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Preemption also occurs when federal and state or local laws conflict. *Id.* at 525-26 (known as "conflict preemption"). A final type of preemption exists when a state or local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as applied. *Id.* at 526 (known as "obstacle preemption").

Federal law contains almost all regulations on the use of airspace. Congress gave the United States Government the sole authority over the use of national airspace. 49 U.S.C. § 40103(a)(1). While not all aspects of aviation are federally preempted, federal courts have found "implied federal preemption of the entire field of aviation safety." *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999). This means that Congress has granted the FAA broad authority to regulate "airspace use, management and efficiency, air traffic control, safety, navigational facilities, and aircraft noise at its source." *States and Local Regulation of*

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[4] Commercial UAS are subject to the requirements of "Part 107" (14 C.F.R. 107, effective on 29, August 2016) including possible airworthiness certifications or waivers found in Section 333 of the FAA Modernization and Reform Act of 2012.

[5] Government UAS users must meet the definition found in 49 U.S.C. § 40102(a)(41) and are subject to the qualifications found in 49 U.S.C. § 40125.

Unmanned Aircraft Systems Fact Sheet, Federal Aviation Administration Office of the Chief Counsel (December 17, 2015) (citing 49 U.S.C. §§ 40103, 44502, and 44701-44735).

The federal government has left some aspects of aviation law to the states. According to court decisions, this includes state products liability claims and state criminal statutes prohibiting the reckless operation of manned aircraft. *See Public Health Trust of Dade County v. Lake Aircraft Inc.*, 992 F.2d 291 (11th Cir. 1993) (state law claim for negligent design of an airplane seat not preempted by federal law); *Lewis v. Lycoming*, 957 F. Supp. 2d 552 (E.D. Pa. 2013) (state products liability claims not preempted by federal aviation regulations); *and People v. Valenti*, 153 Cal. App. 3d Supp. 35 (1984) (state criminal statute prohibiting reckless operation of manned aircraft not preempted by FAA regulations). These cases show that courts uphold state laws affecting airspace despite the broad jurisdiction given to the federal government by Congress where those state laws do not conflict with existing federal law.

The FAA is an administrative agency, with a limited criminal enforcement function. *See* 49 U.S.C. §§ 40103, 44502, and 44701-44735. Because of this, state courts have ruled that state criminal law is not preempted by FAA aircraft regulation. *See Valenti*, 153 Cal. App. 3d Supp. at 35-41; and *Ward v. State*, 280 Md. 485, 498-499 (1977). This Office relied heavily on the *Ward* and *Valenti* cases when drafting the proposed UAS Ordinance. In the *Ward* case, the Maryland Court of Appeals upheld a state criminal conviction for piloting an aircraft while under the influence of alcohol despite the defendant's argument that the state law was preempted by federal aircraft regulations. *Ward*, 280 Md. at 500 (1977). The defendant argued that the Maryland law merely duplicated existing FAA prohibitions. *Id.* at 487. However, the court held the difference was that the "sanctions prescribed" by the Maryland statute were criminal instead of administrative, so the state law was not preempted. *Id.* at 497-498. In the *Valenti* case, a California appellate court upheld a conviction for a pilot who was charged with violating California's careless or reckless flying statute. *Valenti*, 153 Cal. App. 3d Supp. at 40. The pilot's federal preemption challenge failed because the California law did not "stand as an obstacle to Congressional purposes and objectives" and it was the "clear intent of Congress that criminal prosecution of the proscribed conduct be left with the states." *Id.* (quoting *Ward*, 280 Md. at 498-499). These two cases show that states do have the ability to criminalize conduct occurring in the airspace, so long as the state law does not conflict with federal law.

As in *Ward* and *Valenti*, the proposed UAS Ordinance creates only criminal penalties and does not attempt to add any requirements to existing federal UAS regulations. *See Valenti*, 153 Cal. App. 3d Supp. at 35. For example, most of the proposed UAS Ordinance relies on existing FAA regulations in determining what conduct is punishable. There are no City specific height limits, weight requirements, or other such definite prohibitions which would run the risk of conflicting with federal regulations.

Subsection 52.5403(a) of the proposed UAS Ordinance, which concerns careless or reckless conduct, is patterned on the statute upheld in *Valenti*, only it applies to model UAS operators instead of manned aircraft. *See Valenti*, 153 Cal. App. 3d Supp. at 40. The offense set forth in subsection 52.5403(a) will likely survive a federal preemptory challenge because it criminalizes conduct through criminal penalties and courts agree that creating criminal penalties for similar conduct is a state issue.

Subsections 52.5403(b) and (c) of the proposed UAS Ordinance, concerning violations of flight and other FAA restrictions, criminalizes conduct which would also be a violation of FAA administrative regulations. The FAA proscribes no criminal penalties for violations of this same conduct. Accordingly, there is no conflict between the UAS ordinance and federal law, because these laws proscribe different sanctions. Therefore, there is no reason to believe that the UAS Ordinance would obstruct the federal UAS regulatory scheme in that the UAS Ordinance proscribes criminal penalties, something courts have ruled has been left to the states. *See Valenti*, 153 Cal. App. 3d Supp. at 40.

Subsection 52.5403(d) of the proposed UAS Ordinance creates a criminal penalty for model UAS operators who interfere with emergency operations. This type of conduct is not explicitly based on existing federal law, and there is no precedent for such a law surviving a preemptory challenge. Still, criminalizing this conduct does not conflict with or frustrate the FAA regulatory scheme. The only somewhat similar federal provision is found in 14 C.F.R. § 91.13, which prohibits "careless or reckless operation" of any aircraft, and a challenger may argue that this subsection is adding requirements above and beyond the federal regulations. However, the UAS Ordinance's prohibition against interfering with emergency operations doesn't conflict with or obstruct that federal rule because it merely better describes conduct that would already fall within the careless or reckless standard. The UAS Ordinance prohibition also falls within the criminal law area left to the states as discussed in *Valenti* and *Ward*. *Valenti*, 153 Cal. App. 3d Supp. at 40.

The proposed UAS Ordinance would likely survive a federal preemption challenge because it is crafted to exist in a criminal enforcement area traditionally left to the states, and it does not conflict with existing federal law. The UAS Ordinance does not add any new requirements to existing federal UAS regulations, and does not include any administrative penalties. There are indications that the FAA desires to leave some room for state and local government UAS ordinances. *See* League of California Cities Press Release, *New FAA Drone Rules Reject Federal Preemption of State and Local Drone Laws*, June 23, 2016. Accordingly, it would be difficult for a challenger to argue that any of its provisions conflict with existing federal UAS law.

B. State Preemption of the UAS Ordinance

Preemption principles similar to those found in a federal preemption analysis apply when a local law conflicts with a California state law. *Sherwin-Williams Co. et al. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993). Any local laws that "duplicate, contradict, or enter[] into an area fully occupied by [state] general law, either expressly or by legislative implication" create a conflict. *Id.* (citations omitted). "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." *Id.* (citations omitted).

California state UAS law is fairly new and mainly addresses civil privacy concerns, so the chance of a conflict between existing state law and local law is relatively low. A flurry of recent California bills have been vetoed by the Governor. *See* Assem. Bill 1327 (2013-2014 Reg. Sess.) (regulating use of UAS by law enforcement, vetoed by the Governor); Sen. Bill 142 (2015-2016 Reg. Sess.) (prohibiting UAS flights over private property, vetoed by the Governor);

Sen. Bill 271 (2015-2016 Reg. Sess.) (prohibiting UAS flights over schools, vetoed by the Governor); Sen. Bill 262 (2015-2016 Reg. Sess.) (prohibiting UAS flights over prisons, vetoed by the Governor); *and* Sen. Bill 168 (2015-2016 Reg. Sess.) (making interfering with firefighting operations with a UAS a misdemeanor crime, vetoed by the Governor). The only bills that were not vetoed created a civil cause of action for recording "private, personal, or familial activity" on someone's property using a UAS. Cal Civ. Code §§ 1708.7-1708.9.

California also has laws governing aircraft, namely in the State Aeronautics Act, added to the California Public Utilities Code in 1953. Cal. Pub. Util. Code §§ 21001-21707. The provisions of this Act have not been extended to apply to UAS so it would not preempt the proposed UAS Ordinance.

California state laws on UAS and privacy also do not conflict with the proposed UAS Ordinance because the UAS Ordinance does not address privacy. The lack of UAS law at the state level would make it difficult for a state law based preemptory challenge to succeed.

CONCLUSION

The proposed UAS Ordinance raises legal issues of equal protection and preemption. The proposed UAS Ordinance likely would survive an equal protection challenge because the ordinance has a rational basis to that is reasonably related to its public safety objective. The primary part of that objective is to protect persons and property in the City from model UAS operators who do not obey flight restrictions. The proposed UAS Ordinance would likely survive a preemptory challenge as well, as it does not conflict with any existing state or federal laws and courts have upheld similar statutes in the past.

JAN I. GOLDSMITH, CITY ATTORNEY

By *___/s/ Noah Brazier___*
Noah J. Brazier
Deputy City Attorney

NJB:hm
ML-2016-14
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Attachment

ATTACHMENT A

Draft UAS Ordinance

§ 52.5401 Purpose and Intent

It is the purpose and intent of this Division to address the potential hazard *Model Unmanned Aircraft Systems* pose to other aircraft in flight, to persons and property on the ground, and to critical infrastructure within the City of San Diego.

§ 52.5402 Definitions

For purposes of this Division, defined terms appear in italics. The following definition applies in this Division:

Model Unmanned Aircraft System shall mean a device that is used or intended to be used for flight in the air, operated without the possibility of direct human intervention from within or onboard the device, strictly for hobby or recreational purposes. This definition includes, but is not limited to, devices commonly known as drones.

§ 52.5403 Unlawful Operation of Model Unmanned Aircraft System

It is unlawful for any person to operate a *Model Unmanned Aircraft System* in the air, on the ground, or on the water:

(a) in a careless or reckless manner so as to endanger the life or property of another. In any proceeding charging operation of an *Model Unmanned Aircraft System* in violation of this section, the court in determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing *Model Unmanned Aircraft Systems*;

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(b) in violation of any flight restriction, temporary or permanent, issued by the Federal Aviation Administration pursuant to 14 C.F.R. 91, as amended;

(c) in violation of any restriction issued by the Federal Aviation Administration applicable to "Model Aircraft," as defined in federal law; or

(d) in a manner that interferes with law enforcement, firefighting, or any other emergency rescue operations.

§ 52.5404 Enforcement Authority

The Chief of Police, or any other Director authorized by the Mayor, is authorized to administer and enforce the provisions of this Division. The Chief of Police, or any other Director authorized by the Mayor, may exercise any enforcement powers as provided in Division 1, Article 2 of Chapter 1 of this Code.

§ 52.5405 Violations and Penalties

Violations of this Division may be prosecuted as misdemeanors subject to the fines and custody provided in San Diego Municipal Code section 12.0201.

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