



# Happy Flying?

## *What Your Borough Should Know About Drones*

Modern technology continues to creep into the fabric of our everyday lives. Boroughs are no exception, including unmanned aircraft systems (UAS), more commonly known as drones, which have caught not only the attention of hobbyists but are also gaining steam for business and governmental uses.

Before a borough purchases and applies to use a drone or attempts to regulate drones within its boundaries, legal issues must be addressed. This article provides an overview on how a borough may be affected by drones; whether boroughs can enact ordinances to regulate their use; and 'no drone zones' and Fourth Amendment rights, along with UAS use in law enforcement.

### *Drone Registration*

To operate a drone on behalf of a government entity, an application must be filed with the Federal Aviation Administration (FAA) through either Part 107 of the FAA Modernization Reform Act of 2012 or by obtaining a federal Certification of Authorization or Waiver. Both processes require approval from the FAA, which can take both time and effort. For more information on the types of registrations and specific requirements, see [faadronezone.faa.gov/#/](http://faadronezone.faa.gov/#/).

### *Can Boroughs Limit Drone Flights?*

Some boroughs may have seen an uptick of hobbyists flying

drones. If the drone is of a particular size, then the purchaser must register with the FAA.

Hobbyists must still comply with FAA guidelines that include maintaining a visual line of sight; not operating over persons not directly participating in the operation, under a covered structure, or inside a stationary vehicle; operating only in daylight or twilight; and having a maximum ground speed of 100 mph and maximum altitude of 400 feet.

Several PA municipalities have enacted ordinances to limit the use of drones. Those ordinances were generally created for the best interests and general welfare of residents by placing

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limits on altitude and requiring permission from property owners as well as dates and hours of operation.

That was before Oct. 2 and HB 1346 was presented to Gov. Wolf, which was signed into law as Act 78 of 2018. It primarily sought to provide for criminal offenses related to the operation of an unmanned aircraft, it also amends Title 53 to prohibit local regulations of unmanned aircraft.

Therefore, any local ordinances may be preempted by the act. Specifically, the legislation “shall preempt and supersede any ordinance, resolution, rule, or other enactment of a municipality regulating the ownership or operation of unmanned aircraft unless expressly authorized by statute.”<sup>vi</sup>

## No Drone Zones

In accordance with the FAA, certain areas are out of bounds for UAS flight. For example, drones are not to be flown within five miles of an airport without first providing notice to both the airport operator and traffic control tower. It is also illegal to fly drones in or around wildfire fighting operations.

Flying a drone in or around MLB, NFL, NASCAR, or NCAA Division One football stadiums is prohibited starting one hour before and ending one hour after the scheduled event.

## Pending Criminal Legislation, Exceptions

HB 1346 amends Title 18. Assuming the bill is signed into law, it will be illegal to intentionally or knowingly (1) conduct surveillance of another person in a private place; (2) operate in a manner that places another person in fear of bodily injury; or (3) to deliver, provide transmit, or furnish contraband in violation of PA law. The following are exempt, assuming individuals are engaged in the performance of their official duties:

- Law enforcement/corrections officers,
- Firefighters,
- Emergency medical responders,
- Utility employees, and
- Government employees/agents.

The act does not address the need for government officials to comply with the constitutional rights of affected persons. This is not a blanket exception for boroughs and their employees to operate an unmanned aircraft.

In fact, Act 78 defines “private place” as a place where a person has a reasonable expectation of privacy. So, before law enforcement officers, zoning officers, or other employees operate drones in the borough, due diligence on what may (or may not) constitute a violation of one’s reasonable expectation of privacy is a must.

## Privacy Rights

The Fourth Amendment of the U.S. Constitution provides the right of people to be secure from unreasonable searches and seizures.

From 1986 to 1989, the U.S. Supreme Court issued three decisions relating to surveillance from the sky.

It determined in a California case that (1) flying over a yard at the altitude of 1,000 feet and viewing several eight- to 10-foot marijuana plants was not a search, and thus was not a violation of the property owner’s rights, as the plants were in plain view (despite being in the backyard obstructed by a fence);<sup>ii</sup> (2) in another case, an aerial mapping camera photographing the land around a large industrial complex was not protected by the Fourth Amendment;<sup>iii</sup> and (3) aerial surveillance of private property from a helicopter at an elevation of 400 feet did not violate the property owner’s rights in Florida, where the officer observed what he believed to be marijuana growing in a greenhouse.<sup>iv</sup>

The last case is most similar to situations involving unmanned aircraft, since the helicopter was at 400 feet, the top elevation permissible for drones under FAA regulations.

The Supreme Court placed stock in the fact that the helicopter was



## *Before the propellers start:*

- *Complete pre-flight due diligence;*
- *Inspect the drone for proper operation;*
- *Check if the batteries are charged;*
- *Confirm whether a search warrant is required;*
- *Check to see if an official observer is available;*
- *Confirm that the weather conditions are right for flight; and*
- *Double check whether approval must be obtained from a superior.*

not in violation of any law or regulation and did not interfere with the use of the property.

This, then, begs the question: If the police are able to view something from a drone where they have a legal right to be is there a violation of a reasonable expectation of privacy.

However, the operator should not simply rely on the fact that a drone is being flown within legally permissible altitudes, keeping the reasonable expectation of privacy at the forefront of any discussion.

## *Best Practices for Law Enforcement Use*

With the exception of Act 78, there is no enacted legislation

regarding PA law enforcement's use of drones. In fact, it only provides an exception from criminal conduct.

How can the law enforcement officer (or borough agents) best utilize a drone and not violate individuals' constitutional rights?

The International Association of Chiefs of Police issued a Concepts and Issues Paper in May 2015 related to UAS.

One of the recommendations was that before a drone is purchased, the law enforcement agency should assess the need for a UAS and how it will be used. For example, is the UAS to be used for search and rescue in remote areas, for investigating vehicle accidents, or emergency situations?

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Not only will this type of assessment help define the role for the technology, but it will also assist with what type of drone should be purchased.

Additionally, after purchase and after the FAA application is approved, but before any official flights take place, the borough should adopt an appropriate policy. It should address who may operate the UAS; necessary certifications; the role of the operator and observer; retention of digital images; and when flight operations may occur and for what purpose. Finally the policy language should address privacy concerns as well as required training.

After FAA approval has been obtained; a policy has been enacted; and the necessary training has occurred, the operator is nearly ready to take flight.



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Why so many questions? The borough and its employees are operating technology regulated by the FAA and for which the borough must do its best to ensure the rights of persons affected by its use.

There are several PA police departments approved to operate a drone, including Phoenixville Borough, Chester County. Its police have been operating an unmanned aircraft as a law enforcement tool since 2016.


Lt. Brian Marshall, the borough's licensed operator, said the drone has been helpful at crime scenes and fatal accidents and has the potential to aid missing children cases and water rescues and searches.

As it relates to privacy and law enforcement, he cautioned to check with the district attorney on whether or not authorization is necessary for a search warrant. Some counties may require district attorney approval.

Finally, prior to and after using unmanned aircraft in a borough, community engagement is recommended. Marshall said they educate their citizens so they have a better understanding of the technology and how the department uses it.

Marshall summed up that drones have been "very instrumental in the investigation of serious crimes and outdoor crime scenes. Furthermore, juries expect it."

Boroughs that want to use drone technology should do their due diligence as well as consult with their solicitor or legal counsel to ensure compliance with all federal, state, and local regulations.

**About the author:** Sheryl Brown, Esq., is a partner at Siana Bellwoar. Brown has extensive trial experience in representing public entities, having focused her practice in areas of federal Civil Rights claims, employment law, and tort claims. Learn more at [www.sianalaw.com](http://www.sianalaw.com). 

<sup>i</sup> 18 Pa.C.S.A. §3505.

<sup>ii</sup> *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>iii</sup> *Dow Chem. Co. v. U.S.*, 476 U.S. 227 (1986).

<sup>iv</sup> *Florida v. Riley*, 488 U.S. 445 (1989).