GUNS, GREEN ENERGY, POST-COSTNER, AND POST-*KOONTZ*

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I. Zoning and the Second Amendment: Scrutinizing Scrutiny

A. *Ezell v. City of Chicago,* 846 F.3d 888 (7th Cir. 2017)

Even after *Heller* and *McDonald*, Chicago has not given up on firearms-related regulations:

> Three provisions currently remain in dispute: (1) a zoning restriction allowing gun ranges only as special uses in manufacturing districts; (2) a zoning restriction prohibiting gun ranges within 100 feet of another range or within 500 feet of a residential district, school, place of worship, and multiple other uses; and (3) a provision barring anyone under age 18 from entering a shooting range. . . .

The U.S Court of Appeals for the 7th Circuit was disturbed by the effects of Chicago's zoning strategy:

> Under the combined effect of these two regulations, only 2.2% of the city's total acreage is even theoretically available, and the commercial viability of any of these parcels is questionable—so much so that no shooting range yet exists. This severely limits Chicagoans' Second Amendment right to maintain proficiency in firearm use via target practice at a range. To justify these barriers, the City raised only speculative claims of harm to public health and safety. That's not nearly enough to survive the heightened scrutiny that applies to burdens on Second Amendment rights. . . .

The court used a two-part test to determine the validity of the regulations under the Second Amendment, following the lead of other lower courts after *Heller* and *McDonald*:

> [R]esolving Second Amendment cases usually entails two inquiries. The threshold question is whether the regulated activity falls within the scope of the Second Amendment. This is a textual and historical inquiry; if the government can establish that the challenged law regulates activity falling outside the scope of the right as originally understood, then "the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review."

> "If the government cannot establish this—if the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." This requires an evaluation of "the regulatory means the government has chosen and the public-benefits end it seeks to achieve." The rigor of this means-end review depends on "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." Severe burdens on the core right of armed defense require a very strong public-interest justification and a close means-end fit; lesser burdens, and burdens on activity lying closer to the margins of the right, are more easily justified. In all cases the government bears the burden of justifying its law under a heightened standard of scrutiny; rational-basis review does not apply.

Here is the court's conclusion regarding the first inquiry:

> Range training is not categorically outside the Second Amendment. To the contrary, it lies close to the core of the individual right of armed defense.

In a previous decision (*Ezell I*) the court had invalidated a ban on shooting ranges in the city, not a set of zoning restrictions. The court was not impressed with Chicago's second try:

> Still, the record reflects that the zoning regulations at issue here severely limit where shooting ranges may locate. The combined effect of the manufacturing-district classification and the distancing restriction leaves only about 2.2% of the city's total acreage even theoretically available to site a shooting range (10.6% of the total acreage currently zoned for business, commercial, and manufacturing use). It's unclear how many of these parcels are commercially suitable for siting a shooting range catering to the general public.

Placing shooting ranges in manufacturing districts was unusual:

> The plaintiffs presented evidence—including the testimony of two experts—showing that in other jurisdictions shooting ranges are treated as commercial uses and are often attached to gun retailers, and that banishing them to a tiny subset of the land zoned for manufacturing reduces their commercial viability based on traffic patterns, lack of arterial roads, and other impediments. Tellingly, years after *Ezell I* no publicly accessible shooting range yet exists in Chicago. We therefore agree with the district judge that the challenged zoning regulations, though not on their face an outright prohibition of gun ranges, nonetheless severely restrict the right of Chicagoans to train in firearm use at a range.

Having invalidated the manufacturing zone + 500 foot approach, the court offered guidance for the city's next try:

> A different combination of zoning rules—say, a more permissive zoning classification and a less restrictive buffer-zone rule—may well be justified, if carefully drafted to serve actual public interests while at the same time making commercial firing ranges practicable in the city.

The court would not let Chicago get away with a mere recitation of reasons for the zoning regulations:

> The City claims that confining firing ranges to manufacturing districts and keeping them away from other ranges, residential districts, schools, places of worship, and myriad other uses serves important public health and safety interests. Specifically, the City cites three concerns: firing ranges attract gun thieves, cause airborne lead contamination, and carry a risk of fire.
>
> The City has provided no evidentiary support for these claims, nor has it established that limiting shooting ranges to manufacturing districts and distancing them from the multiple and various uses listed in the buffer-zone rule has any connection to reducing these risks. We certainly accept the general proposition that preventing crime, protecting the environment, and preventing fire are important public concerns. But the City continues to assume, as it did in *Ezell I*, that it can invoke these interests as a general matter and call it a day. It simply asserts, without evidence, that shooting ranges generate increased crime, cause airborne lead contamination in the adjacent neighborhood, and carry a greater risk of fire than other uses.

Tellingly, the court analogized the city's regulatory challenge to that found in free speech cases involving adult uses:

> We explained in *Ezell I* that the City cannot defend its regulatory scheme "with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." 651 F.3d at 709 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002)). To borrow from the free-speech context, "there must be evidence" to support the City's rationale for the challenged regulations; "lawyers' talk is insufficient." *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009). Here, as in *Ezell I*, the City's defense of the challenged zoning rules rests on sheer "speculation about accidents and theft." 651 F.3d at 709. That's not nearly enough to satisfy its burden. The manufacturing-district and distancing restrictions are unconstitutional.

B. *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017)

Alameda County, California sought to use another zoning cocktail to regulate firearm retailers:

> The County of Alameda seeks to preserve the health and safety of its residents by (1) requiring firearm retailers to obtain a conditional use permit before selling firearms in the County and (2) prohibiting firearm sales near residentially zoned districts, schools and

> day-care centers, other firearm retailers, and liquor stores. The individual plaintiffs in this case, John Teixeira, Steve Nobriga, and Gary Gamaza (collectively, "Teixeira"), wished to open a gun shop but were denied a conditional use permit because the proposed location of their gun shop fell within a prohibited zone.

The U.S Court of Appeals (this time the 9th Circuit) was much less sympathetic to the Second Amendment argument of the plaintiff:

> Teixeira challenges the County's zoning ordinance, alleging that by restricting his ability to open a new, full-service gun store, the ordinance infringes on his Second Amendment rights, as well as those of his potential customers. Teixeira has not, however, plausibly alleged that the County's ordinance impedes any resident of Alameda County who wishes to purchase a firearm from doing so. Accordingly, he has failed to state a claim for relief based on infringement of the Second Amendment rights of his potential customers. And, we are convinced, Teixeira cannot state a Second Amendment claim based solely on the ordinance's restriction on his ability to sell firearms. A textual and historical analysis of the Second Amendment demonstrates that the Constitution does not confer a freestanding right on commercial proprietors to sell firearms. Alameda County's zoning ordinance thus survives constitutional scrutiny. . . .

Two elements from the 7th Circuit's *Ezell* litigation were absent here:

> But Teixeira did not adequately allege in his complaint that Alameda County residents cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular. . . .
>
> The claim that the ordinance burdens his potential customers' Second Amendment rights to obtain necessary firearms instruction and training is belied by the ordinance itself. The Zoning Ordinance limits the location of premises conducting "firearm sales." Alameda Cty., Cal., Code § 17.54.131. It does not concern businesses providing firearms instruction and training services. Accordingly, the Zoning Ordinance would pose no obstacle if Teixeira wanted to open a business at the proposed site on Lewelling Boulevard to provide firearms instruction and training.

C. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc)

Although not a zoning case, *Kolbe*, which upheld the constitutionality of a state ban on assault weapons and large-capacity magazines, included an informative discussion of the proper level of scrutiny for such Second Amendment challenges. Localities seeking to ban or regulate businesses that allow customers to use assault weapons should pay attention to this discussion:

> We conclude — contrary to the now-vacated decision of our prior panel — that the banned assault weapons and large-capacity magazines are not protected by the Second Amendment. That is, we are convinced that the banned assault weapons and large-capacity magazines are among those arms that are "like" "M-16 rifles" — "weapons that

> are most useful in military service" — which the *Heller* Court singled out as being beyond the Second Amendment's reach. See 554 U.S. at 627 (rejecting the notion that the Second Amendment safeguards "M-16 rifles and the like"). Put simply, we have no power to extend Second Amendment protection to the weapons of war that the *Heller* decision explicitly excluded from such coverage. Nevertheless, we also find it prudent to rule that — even if the banned assault weapons and large-capacity magazines are somehow entitled to Second Amendment protection — the district court properly subjected the FSA to intermediate scrutiny and correctly upheld it as constitutional under that standard of review. . . .

The court summarized the "two-part approach" used by other courts of appeals:

> Pursuant to that two-part approach, we first ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." If the answer is no, "then the challenged law is valid." If, however, the challenged law imposes a burden on conduct protected by the Second Amendment, we next "apply[] an appropriate form of means-end scrutiny." Because "*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate that rational-basis review would not apply in this context," we must "select between strict scrutiny and intermediate scrutiny." In pinpointing the applicable standard of review, we may "look[] to the First Amendment as a guide." With respect to a claim made pursuant to the First or the Second Amendment, "the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." . . .

The 4th Circuit then explained why intermediate scrutiny made more sense in this factual setting:

> First of all, intermediate scrutiny is the appropriate standard because the FSA does not severely burden the core protection of the Second Amendment, i.e., the right of law-abiding, responsible citizens to use arms for self-defense in the home. . . .
>
> Turning to the application of intermediate scrutiny, the FSA survives such review because its prohibitions against assault weapons and large-capacity magazines are — as they must be — "reasonably adapted to a substantial governmental interest." To be sure, Maryland's interest in the protection of its citizenry and the public safety is not only substantial, but compelling.
>
> Being satisfied that there is substantial evidence indicating that the FSA's prohibitions against assault weapons and large-capacity magazines will advance Maryland's goals, we conclude that the FSA survives intermediate scrutiny. Simply put, the State has shown all that is required: a reasonable, if not perfect, fit between the FSA and Maryland's interest in protecting public safety. That is our alternative basis for affirming the district court's award of summary judgment in favor of the State with respect to the plaintiffs' Second Amendment claims.

The majority was not impressed by the dissenters' views:

> [O]ur dissenting colleagues would expand that constitutional protection to even exceptionally lethal weapons of war and then decree that strict scrutiny is applicable to any prohibition against the possession of those or other protected weapons in the home. At bottom, the dissent concludes that the so-called popularity of the banned assault weapons — which were owned by less than 1% of Americans as recently as 2013 — inhibits any efforts by the other 99% to stop those weapons from being used again and again to perpetrate mass slaughters. We simply cannot agree.

II. Tilting at Windmills (and Solar Arrays)

A. *Mustang Run Wind Project, LLC v. Osage Cnty. Bd. of Adjustment*, 387 P.3d 333 (Okla. 2016)

The plaintiff sought a special use permit for a wind farm, following the lead of another successful applicant:

> Mustang Run Wind Project, LLC, (Mustang) filed an application with the Osage County Board of Adjustment for a conditional use permit involving between 9,406 and 9,453 acres of land. Mustang proposed to use the land for placing sixty-eight wind turbines on less than 150 acres and generating electricity. Public meetings on the proposed wind energy facility were held in April and May 2014. The proposed facility is close to another "wind farm" which had obtained a permit three years previously. Mustang's application included land zoned for agricultural use and was then being used for agriculture and ranching. The County Board of Adjustment denied the application.

The Osage Nation, which objected to the permit, asserted that no board of adjustment in the state had the authority to grant a special or conditional use permit. The court was not convinced:

> A board of adjustment authorized by Pawhuska-Osage County Planning and Zoning ordinances to hear an application of a special use permit is within the board's statutory authority to hear and decide requests for a decision authorized by [43 Okla. Stat.] § 866.23. Boards of adjustment were historically given the power to "adjust" the application of zoning ordinances and the board of adjustment's authority in this case to issue a conditional use permit corresponds to that historic role. Our conclusion is consistent with viewing § 866.23 in harmony with common sense, reason, and our State Constitution, and as an effort by our Legislature to provide Oklahoma landowners a procedure seeking approval for uses of their property that would otherwise be disapproved upon application of zoning ordinances.

The court noted that the police power is a broad concept that included scenic beauty within its purview:

> The power to enact and enforce zoning laws is derived from a governmental entity's police powers. The phrase "general welfare of the public" encompasses more than public

> health, safety and morals regulations. In the context of land use the phrase includes consideration of such concepts as natural scenic beauty, quiet seclusion for residents of the community, and the economic welfare of the landowners and the community as a whole.

Nevertheless, in this instance, the board of adjustment had not justified its permit denial:

> Zoning laws, including both the granting and denial of special use permits, may not be imposed in an arbitrary and capricious manner. Property rights and the use of property are fundamental rights on which this country was established, and it is a board of adjustment's duty to determine the reasonableness of a property owner's request based upon the evidence before the board. The trial judge noted the absence of written findings by the board setting forth its reasons for denying the permit. The trial judge applied zoning ordinances and made an assessment of the reasonableness of the application as well as the objections to the proposed project. The trial judge had the entire record before him and his findings are not against the clear weight of the evidence. The trial court's judgment is affirmed.

B. *Myrick v. Peck Elec. Co.*, 164 A.3d 658 (Vt. 2017)

Vermont's high court refused to depart from longstanding precedent, refusing to validate neighbors' claims that renewable energy could comprise an aesthetic nuisance:

> For 120 years, Vermont has recognized that the unsightliness of a thing, without more, does not render it a nuisance under the law. See Woodstock Burying Ground Ass'n v. Hager, 68 Vt. 488, 35 A. 431 (1896). These consolidated cases require us to revisit whether Vermont law recognizes a cause of action for private nuisance based solely on aesthetic considerations. Appellants, a group of landowners from New Haven, appeal from the trial court's grant of summary judgment to defendants, two solar energy companies. The landowners filed suit after their neighbors leased property to the solar companies for the purpose of constructing commercial solar arrays. According to the landowners, the solar arrays constitute a private nuisance because they have negatively affected the surrounding area's rural aesthetic, causing properties in their vicinity to lose value. The trial court consolidated the cases and, noting that this Court's precedent in *Hager* bars nuisance actions based purely on aesthetics, granted summary judgment to the solar companies. We uphold Vermont's long-standing rule barring private nuisance actions based upon aesthetic disapproval alone. . . .

The court explained how unsightliness did not fit into the reach of traditional private nuisance law:

> An unattractive sight — without more — is not a substantial interference as a matter of law because the mere appearance of the property of another does not affect a citizen's ability to use and enjoy his or her neighboring land. A substantial interference requires some showing that a plaintiff has suffered harm to "the actual present use of land" or to

> "interests in having the present use of the land unimpaired by changes in its *physical* condition." RESTATEMENT (SECOND) TORTS § 821D cmt. b (emphasis added). A landowner's interest "in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress. The latter is purely an interest of personality and receives limited legal protection," since emotional distress is not an interference with the use or enjoyment of land. For example, there is a difference between, on the one hand, a complaint that solar panels are casting reflections and thereby interfering with a neighbor's ability to sleep or watch television and, on the other hand, the landowners' complaint in this case — that the solar panels are unattractive. The former involves a potential interference with the use or enjoyment of property, while the latter involves emotional distress.

A major problem with aesthetic nuisance is that it is inherently subjective:

> Additionally, a complaint based solely on aesthetic disapproval cannot be measured using the unreasonableness standard that underpins nuisance law. This is because unlike traditional bases for nuisance claims — noise, light, vibration, odor — which can be quantified, the propriety of one neighbor's aesthetic preferences cannot be quantified because those preferences are inherently subjective. The appellants find the solar panels unsightly, but other equally reasonable people may find them attractive. . . .

Curiously, subjectivity is not a problem with covenants or zoning (two legitimate ways to eliminate unsightliness):

> The judicial branch is ill-suited to be an arbiter of style or taste, and given the subjectivity of aesthetic preferences, they must remain the province of legislative decision-making in the form of zoning laws and, in specific instances, restrictive covenants that the courts are competent to interpret and apply. . . .

Despite some activity a few decades ago, Vermont's position still prevails:

> Additionally, notwithstanding our suggestion in *Coty* [*v. Ramsey Assocs.*] in 1988 that there was "[s]ome evidence of a trend" in other jurisdictions towards recognizing aesthetics as a part of nuisance law, that nascent trend has failed to materialize and the majority of jurisdictions to address the question of whether to recognize aesthetic nuisance have declined to do so.[*] 546 A.2d [196,] at 201 [(1988)]. Our decision today reaffirms that Vermont's rule barring nuisance claims based solely on aesthetics is

[*] States that have addressed whether to recognize aesthetic nuisance have, broadly speaking, taken one of three approaches: bar aesthetic nuisance suits; recognize aesthetic nuisance only when the complained-of harm includes an element of traditional nuisance, such as noise, odor, light disruption from windmills, or a physical invasion; or recognize aesthetic nuisance. The majority of states to answer the question have declined to recognize aesthetic nuisance at all. A handful of states have taken the approach of recognizing aesthetic nuisance only when the alleged aesthetic interference is accompanied by traditional elements of nuisance. An even smaller number of states recognize aesthetic nuisance, and most of those states do so only in areas that are zoned for residential use. Moreover, actions taken out of spite are different from traditional nuisance analysis. . . . Here, however, the landowners have not argued that the solar panels at issue were constructed out of spite or malice, and as such we need not address the role of aesthetics in the context of a spite case.

> aligned with the majority rule in this country. . . . We believe the majority rule to be sound.[†]

III. Field of Dreams (and Quasi-judicial and Spot Zoning) Revisited: *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24 (Iowa 2016)

The city council rezoned the movie site for Field of Dreams from A-Agricultural to C-2 Commercial in order to allow the owners to develop a baseball and softball complex, and the trial court approved. Community members opposed to the complex brought two familiar (and ultimately unsuccessful challenges to the Supreme Court of Iowa. The owners wanted to revitalize the flagging tourist attraction:

> The 1989 Field of Dreams movie was filmed primarily at the Lansing farm now located in Dyersville, in rural Dubuque County. Due to the popularity of the film, Donald and Rebecca Lansing kept the baseball field and their white farmhouse intact for visitors and tourists. The house and baseball diamond were a popular destination, and thousands of tourists visited the Lansing property each year. In recent years, however, tourist numbers have been declining. . . .

The state high court rejected the challengers' characterization of the rezoning as a quasi-judicial decision, viewing it instead as a legislative action with a limited scope of judicial review:

> [T]he underlying decision to rezone was a legislative function and the council was therefore not required to make findings of fact or provide for a more formal proceeding similar to a judicial proceeding. . . .
>
> In this case, the city council was acting in a legislative function in furtherance of its delegated police powers. The council was not sitting to "determin[e] adjudicative facts to decide the legal rights, privileges or duties of a particular party based on that party's particular circumstances." The city council decision to rezone was not undertaken to weigh the legal rights of one party (the All-Star Ballpark Heaven) versus another party (the petitioners). The council weighed all of the information, reports, and comments available to it in order to determine whether rezoning was in the best interest of the city as a whole. We therefore hold that the proper standard of review in this case is "the generally limited scope of review" we utilize in order "to determine whether the decision by the Board to rezone is fairly debatable." . . .

Even though "none of the council members expressly link[ed] their votes to the plan," the supreme court concluded the that "rezoning was passed in accordance with and in furtherance of the comprehensive plan," because

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[†] For another recent decision rejecting aesthetic nuisance, see *Laubenstein v. Bode Tower, L.L.C.*, 392 P.3d 706 (Okla. 2016), an unsuccessful challenge to a cell tower. The Supreme Court of Oklahoma explained that "[n]uisance claims founded solely on aesthetic harm are not actionable." After reviewing relevant precedents, the court noted that "[o]ur jurisprudence demands evidence of substantial interference with the use and enjoyment of property." In those cases in which claimaints prevailed, "plaintiffs faced either *physical injury* to their property or the offensive activity rendered their homes *uninhabitable*."

> [t]he council members gave full consideration to "the needs of the public, changing conditions, and the similarity of other land in the same area." The council held multiple meetings and the appropriate public hearing during which community members were able to offer differing viewpoints. All council members attended these meetings, listened, and asked questions. The city council requested and reviewed reports about water, sewage, water runoff, traffic, crime, and increased economic benefits. The council considered the unique nature of the Field of Dreams site and potential tourism benefits. . . .

The court also found that this was an *acceptable* example of "spot zoning" (which is contrary to the familiar notion that *all* spot zonings are invalid):

> As a preliminary matter, we acknowledge that the rezoning appears to constitute spot zoning. The property surrounding the new commercial area is agricultural land. The rezoning created a commercial "island" of property amidst land zoned as agricultural. However, that does not end our inquiry. The next step is to determine whether the spot zoning was valid.
>
> First, we have already determined that the rezoning was made within the scope of the city council's general police power. The decision to rezone the area for the project was made in consideration of the general health and welfare of the community. Second, the council had a reasonable basis for its decision to rezone the land despite the surrounding property. The Field of Dreams property has been a unique site for years. The baseball field on the Lansing farm has been used in the community for baseball and softball games, in addition to local and national tourism. Part of the location's charm is simply that it is a baseball field surrounded by farmland. The council made the decision to rezone and allow for more baseball fields to capitalize on this unique site and increase tourism for the City of Dyersville. Last, as we already concluded, the spot zoning is consistent with the overall comprehensive plan. The city's community builder plan expressly mentions the necessity of maintaining the Field of Dreams site and increasing tourism for the city. We agree with the decision of the district court and hold that this was not illegal spot zoning.

IV. Applying Koontz in State and Federal Courts

A. *Harstad v. City of Woodbury,* 902 N.W.2d 64 (Minn. Ct. App. 2017)

The city conditioned approval of a residential subdivion on payment of a road assessment:

> The city's ordinance provides that it may not approve a proposed subdivision that is "deemed premature." Woodbury, Minn., Code of Ordinances, § 21-16 (2016). The city may deem a subdivision "premature" if streets "to serve the proposed subdivision" are not "available," which is defined as streets "existing or readily extended and funded" as "consistent with the phasing in the comprehensive plan." Id. § 21-16(e). The city's

> resolution provides that a new residential development "pays its own way" and "all associated costs" for "public infrastructure" will "be the sole responsibility of the developing property owner." Relevant to this appeal, the city's resolution directs that roadway improvement costs "will normally be collected at the time a property develops per a negotiated major roadway contribution," also called a "major roadway assessment" (MRA). According to a city official, "prematurity can be avoided if an agreed upon MRA contribution is made."
>
> The resolution also sets out a formula to calculate the MRA, dividing the total expected cost of improvements by the net developable acreage in each phase to arrive at a per-acre fee. Based on the MRA formula, the city estimated that phase-two developers must pay $20,230 per acre to fund necessary road improvements. The record evidence established that the city used this per-acre estimate as a "proposal" in "opening negotiation with the development community." The city memorialized the final MRA imposed against a developer in an agreement and described it as a "negotiated contribution." . . .

The Minnesota intermediate appellate court affirmed the grant of summary of judgment to the landowner because the city was not authorized to impose the road assessment:

> [T]he MRA is invalid and unenforceable because the city lacked express or implied authority under Minn. Stat. § 462.358, subd. 2a, to impose the MRA as a condition of approving a developer's subdivision application. Accordingly, the district court did not err in granting Harstad judgment on its MRA claim. . . .

The landowner did not meet with success in his takings claim. First, the claim was moot:

> It is undisputed that Harstad did not pay the MRA because it sued the city before completing the subdivision-approval process. Because we hold that the MRA is unauthorized, the proposed MRA is invalid and the city cannot impose or collect the MRA from Harstad. Therefore, Harstad's takings claim is moot.

Second, the landowner did not demonstrate a *Koontz* exaction taking had occurred:

> Harstad nonetheless argues that the city's mere demand for the MRA during the approval process was a temporary regulatory taking. Harstad contends that the MRA "was an imposition that thwarted the use and development of [its] property from the time of the City's demand until it was declared illegal." Harstad relies on *Koontz v. St. Johns River Water Mgmt. Dist.*, which held that a local government's imposition of a monetary exaction against a landowner as a condition of granting a land-use permit must have a "nexus" and "rough proportionality" with the purpose served by the exaction. 133 S. Ct. 2586, 2599-2600, 186 L. Ed. 2d 697 (2013); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1942-43, 198 L. Ed. 2d 497 (2017) (discussing regulatory takings).
>
> Unlike in *Koontz*, where the local government denied the land-use application because the landowner refused to yield to the government's demands, the city here has

> not collected the assessment on which the takings claim is based, nor did it deny the Bailey Park application based on Harstad's refusal to pay the MRA. *Koontz* stated that "[w]here the permit is denied and the condition is never imposed, nothing has been taken." Id. at 2597. That principle applies here. Because the city has not denied the Bailey Park application or imposed the MRA, nothing has been taken. Because we hold that the MRA is invalid and unenforceable, we conclude that the district court did not err in dismissing Harstad's takings claim as moot.

B. *Alpine Homes, Inc. v. City of W. Jordan*, 2017 Utah LEXIS 119, 2017 WL 3445205

Several developers claimed that the city had violated state legislation by failing to spend impact fees "on specified categories of expenditures within six years." They made several claims for relief:

> The developers' first claim for relief in the operative complaint is for a declaratory judgment. The district court dismissed only the last portion of that claim, which sought a declaratory judgment that West Jordan must refund all or part of the impact fees to them. Neither party addresses this claim on appeal, so we make no ruling as to the declaratory judgment action. . . . The developers' second through fifth claims for relief seek a refund of the allegedly misspent or unspent impact fees either because of an unconstitutional taking or as a claim in equity. . . .

According to the Supreme Court of Utah, the city did not have a *Koontz* problem:

> The developers' allegations here that West Jordan either failed to spend impact fees within six years or spent the fees on impermissible expenditures are inadequate to support a takings claim. It does not matter that these claims would not be ripe until the six-year period for spending them elapsed. The manner in which a city spends impact fees does not affect the constitutionality of the initial demand for fees, which is the focus of the *Koontz* monetary exactions analysis. That the fees were not spent within six years does not affect the analysis of whether there was a nexus or whether the impact fees were roughly proportional at the time they were exacted. The developers may not expect to be the beneficiaries of any unspent funds after six years, just as the city cannot retroactively demand payment from the developers for expenditures that exceed the impact fees revenue for necessary improvements. The developers have not cited any cases that have applied a *Nollan-Dolan* analysis to a municipality's expenditure of impact fees. And because this analysis examines the relationship between the government's demand for property and the anticipated social costs of a proposed land use, there is no logical basis for this court to expand the application of the *Nollan-Dolan* test to a time frame other than when the impact fees were exacted. Thus the developers have failed to state a takings claim for which relief can be granted.

C. *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal. App. 5th 621, 207 Cal. Rptr. 3d 729 (2016), *cert. denied*, 2017 U.S. LEXIS 6424, 2017 WL 1064331

West Hollywood has an inclusionary zoning ordinance that includes an option for "in-lieu" fees, which applied to a tear-down condominium developer:

> Croft is the developer of 612–616 North Croft Avenue, an "in-fill" complex of residential rental units in West Hollywood. In 2004, Croft applied to the City for permits to demolish two single-family homes sitting on adjacent lots and construct in their place an 11-unit condominium complex on the combined lots. In reviewing Croft's permit applications, the City determined Croft's proposed development fell under the City's inclusionary housing ordinance (the Ordinance), West Hollywood Municipal Code (WH Mun. Code) section 19.22.010 et seq., which the City enacted to increase the availability of affordable housing in West Hollywood. The Ordinance requires developers to sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an "in-lieu" fee designed to fund construction of the equivalent number of units the developer would have otherwise been required to set aside. (WH Mun. Code, §§ 19.22.030–19.22.040.) The City calculates the "in-lieu" fee according to a schedule developed via resolution by the West Hollywood City Council (the City Council). (WH Mun. Code, § 19.64.020.) When issuing its approval of Croft's permits, the City inquired how Croft would comply with the Ordinance. Croft responded it would pay the in-lieu fee.

In November, 2005, the developer agreed to pay the fee. The development was delayed because the economy soured. The city granted extensions, and the developer agreed to a new fee schedule. When he finally sought permission to build, the developer balked at the bill:

> In 2011, Croft finally requested its building permits. The City supplied Croft with the revised fee schedule, showing the fees the City required as a condition to issue the permits. According to the fee schedule, Croft would owe $581,651.15 in fees for in-lieu housing ($540,393.28), parks and recreation ($36,551.59), wastewater mitigation ($675.00), and traffic mitigation ($4,031.28). The in-lieu housing fee had nearly doubled since 2005. Croft paid the fees in December 2011, but in a letter indicated it did so "under protest" pursuant to the Mitigation Fee Act (Gov. Code, §§ 66000–66025). According to Croft, the City was unjustified and premature in its collection of fees. Croft also facially challenged the in-lieu fee under the so-called *Nollan/Dolan* line of Fifth Amendment takings cases and requested the City to furnish information regarding whether Croft had "any available process for appeal or administrative review."

The California intermediate appellate court cited a 2015 opinion of the Supreme Court of California that upheld a similar affordable housing provision (a case that the U.S. Supreme Court also chose not to review):

> The Mitigation Fee Act applies when "a monetary exaction other than a tax or special assessment … is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project … ." (Gov. Code, § 66000, subd. (b).) In *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 443–444

> [189 Cal. Rptr. 3d 475, 351 P.3d 974] (San Jose), the California Supreme Court held that an affordable housing provision similar to the Ordinance here was not an "exaction" which invoked the United States Constitution's Fifth Amendment due process takings protections. Instead, such a restriction "is an example of a municipality's permissible regulation of the use of land under its broad police power." (*Id.* at p. 457.) Although the facts here are slightly different than in San Jose because Croft challenges paying an in-lieu fee rather than actually setting aside a number of units, the reasoning in *San Jose* applies. Croft paid the in-lieu fee voluntarily as an alternative to setting aside a number of units. If a set-aside requirement is not governed by *Nollan* or *Dolan*, then "the validity of the in lieu fee—which is an alternative to the on-site affordable housing requirement—logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development's impact on the city's affordable housing need" under *Nollan* or *Dolan* either.

The court concluded that the case involved a "land use regulation," not an exaction that would be subject to *Nolan-Dolan-Koontz* analysis:

> In addition, and as in *San Jose*, the purpose of the in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from Croft's specific development project, but rather to combat the overall lack of affordable housing. This type of fee is not "for the purpose of mitigating the adverse impact of new development but rather to enhance the public welfare by promoting the use of available land for the development of housing that would be available to low- and moderate-income households." (*Id.* at p. 454.) Assuming the fee is such a land use regulation, "[a]s a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property owner's future use of his or her property." (*Id.* at p. 462.) This is especially true when the regulation, like the one here, broadly applies nondiscretionary fees to a class of owners because the risk of the government extorting benefits as conditions for issuing permits to individuals is unrealized.

D. *Home Builders Ass'n of Greater Chi. v. City of Chicago*, 213 F. Supp. 3d 1019 (N.D. Ill. 2016)

A developer seeking a rezoning for a residential project challenged an affordable housing set-aside requirement (with an "in-lieu" fee option), alleging that it effected a taking and that it was not authorized by state law:

> Plaintiff Hoyne Development LLC ("Hoyne") is a real estate developer. In 2012, Hoyne purchased commercial property in Chicago's 47th ward, intending to seek re-zoning and develop the property for residential use. Hoyne succeeded in getting the property re-zoned, but as a condition of obtaining building permits, the City of Chicago demanded that Hoyne comply with its Affordable Requirements Ordinance ("ARO"), a measure to

> increase the availability of affordable housing in Chicago. Specifically, the City required Hoyne to set aside two housing units for rent or sale to low-income residents, or pay a $200,000 fee. Hoyne complied by paying the fee. It then filed this action in state court, alleging that the ARO constitutes a taking in violation of the U.S. and Illinois Constitutions, both facially and as applied to Hoyne. Hoyne also alleged a state law claim that the City exceeded its authority under the ARO in its application of the ordinance to Hoyne. Plaintiff Home Builders Association of Greater Chicago ("HBAGC"), a real estate trade association, joined Hoyne in the facial challenge to the ordinance. The City of Chicago removed the case to this court and moves to dismiss for failure to state a claim. For the reasons set forth here, the court grants the motion and dismisses Plaintiffs' complaint without prejudice. . . .

The city argued that this was a "use restriction," not an exaction subject to *Nollan-Dolan* analysis:

> Because a permissible use restriction does not violate the Constitution, such a restriction cannot be an unconstitutional condition, and so does not even require consideration of the *Nollan/Dolan* test. *See Cal. Bldg. Indus. Assn.. v. City of San Jose*, 61 Cal. 4th 435, 460, 189 Cal. Rptr. 3d 475, 351 P.3d 974, 990 (2015), *cert. denied sub nom. Cal. Bldg. Indus. Assn. v. City of San Jose, Cal.*, 136 S. Ct. 928 (2016) ("Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval."). In this case, the City of Chicago contends that the ARO is not a dedication of property, but is simply a use restriction like the maximum rent ceilings in *Yee*, and therefore the unconstitutional conditions doctrine does not apply, even without considering the fees-in-lieu option.

The court found that the plaintiffs had not demonstrated enough to prevail on their takings theory:

> At least in the complaint, Plaintiffs appear to have skipped one step in the analysis. Although the complaint alleges that the building permit is conditioned on complying with the ARO (Compl. ¶ 19, 33), the complaint contains no specific allegations that the ARO is the taking of a property interest without just compensation. Instead, Plaintiffs' allegations appear to assume that a requirement that units be dedicated as affordable housing implicates the Takings Clause, and then assert that the "essential nexus" or "rough proportionality" tests are not met. . . .

In addition, the court rejected the plaintiff's "operate on" theory derived from *Koontz*:

> Plaintiffs contend that the ARO's rent/sale options "operate on" an identified property interest. Plaintiffs rely on *Koontz*, where the Supreme Court found unconstitutional a fee in lieu of an easement that "operated on" a particular property interest. *Koontz* found monetary obligations specifically tied to a piece of property to be unconstitutional, as opposed to fees not tied to a property interest. *See Koontz,* 133 S. Ct. at 2599

(distinguishing monetary demands where "the monetary obligation burdened petitioner's ownership of a specific parcel of land" from monetary demands that did not). Contrary to Plaintiffs' suggestion, however, *Koontz* does not invalidate all regulations, including non-monetary regulations, that "operate on" a particular piece of property. All property regulation, including permissible regulation, operates on specific property. Yet a zoning regulation that "operates on" some kinds of property interests, but not others, for example, does not amount to a physical invasion of the property. *See Yee*, 503 U.S. at 529-30 ("Traditional zoning regulations can transfer wealth from those whose activities are prohibited . . . . [B]but the existence of the transfer in itself does not convert regulation into physical invasion.").

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PRACTICE SHORT-TERM RENTALS

Peering into the Peer Economy: Short-Term Rental Regulation

By Dwight H. Merriam, FAICP

You will recall, or if you are a millennial (18 to 34 years old), you might have read about the mantra that James Carville dreamed up for President Bill Clinton's 1992 campaign: "It's the economy, stupid."

Today, for planners, thanks to the entirely new perspective brought to us by the millennials, our theme must be "It's the sharing economy, stupid." It is called variously collaborative consumption, the peer economy, and the sharing economy. More than half of millennials have used sharing services. It is permeating our daily lives in many ways.

This new ethic about our relationship to things, to transportation, to where we bed down, and even to other people has taken us away from owning and exclusively using, to not owning, not possessing, and not using alone. We see the sharing economy in three broad spheres—transportation, goods and services, and housing. While our focus here is on short-term rentals, it helps to understand the larger context for "home sharing."

Dwight H. Merriam

This four-bedroom colonial home in Wetherfield, Connecticut, rents for $385 per night, with a four-night minimum stay.

RIDE-SHARING REVOLUTION

Transportation may be the most obvious and most pervasive face of the sharing economy. Millennials own fewer automobiles than other age cohorts. Millennials purchased almost 30 percent fewer cars from 2007 to 2011 (Plache 2013). Why? Because they use short-term car rentals, public transportation, and ride-sharing services. They are less likely to get driver's licenses. One-third of 16 to 24 year olds don't have a driver's license, the lowest percentage in over 50 years (Tefft et al. 2013). At the same time, so we don't get too carried away with this trend, as the millennials age, they will buy more cars. Forty-three percent said they are likely to buy a car in the next five years (Kadlec 2015).

Ride sharing as a generic term encompasses short-term rentals, making your car available to others, sharing rides, and driving or riding in taxi-like services brokered online through companies like Uber.

Instead of owning a car, you can rent one on a short-term basis from companies such as Zipcar and Enterprise Rent-A-Car. Why own a car when you can conveniently pick one up curbside and use it to run errands for a few hours?

Sharing a ride and splitting the cost is made easier with services like Zimride (also by Enterprise Rent-A-Car), which links drivers with riders at universities and businesses. You boomers will remember the ride-share bulletin boards on campus. Same thing.

Got a car, not making much use of it, and interested in making some money? You can make it available to others on a short-term basis through peer-to-peer car-sharing services including Getaround, which presently operates in Portland, Oregon; San Francisco; San Diego; Austin, Texas; and Chicago. They will rent your car for you while you are away. Cars are covered with a $1 million policy, and they even clean it for you. RelayRides connects neighbors to let them rent cars by the hour or the day, and if you're traveling more than 14 days, they will take your car at the airport, rent it for you, and pay you. You can even do it for boats with Boatbound. With the help of Spinlister, you can connect with others and rent a bicycle, surfboard, or snowboard.

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Want to make some money by driving others around in your car, or are you a rider who wants to be driven? Just about everyone has heard of Uber, the leader in this form of ride sharing, which includes other services such as Lyft and now Shuddle for ferrying children around and Sidecar for both people and packages. Wireless communications, the Internet, and smartphones have made such ride-sharing and delivery services possible. This is a big deal. Lyft and Uber are worth $2.5 billion and $50 billion (more than FedEx and 405 companies in the S&P 500) respectively (Dugan 2015; Tam and de la Merced 2015). And want to be a driver but don't have a car? You can rent one from Breeze just for that purpose.

GOODS AND SERVICES PEER TO PEER

Beyond transportation, the sharing economy extends to relationships between people and service providers. There is peer-to-peer or collaborative consumption through services like TaskRabbit and Skillshare which provide help, paid or bartered, or sometimes free. Instacart will grocery shop for you and claims it will deliver to your door in an hour. You can be a shopper and delivery person for them, making up to $25 an hour.

NeighborGoods lets you share all those things you have but use so little, from leaf blowers, to pressure washers, to . . . well, take a look in your garage, that place where you used to park your car. If you live in Austin, Texas; Denver; Kansas City, Missouri; Minneapolis; or San Francisco, Zaarly seeks to create a marketplace to help freelance home-service workers connect with home owners.

There seems no end to the sharing. Fon, touting over 7 million members, lets you share your home WiFi in exchange for access. The Lending Club connects borrowers and investors, enabling, so they say, better rates than credit cards and more return for lenders than what banks offer. Over $11 billion has been borrowed since it started in July 2007, with investors earning a median of 8.1 percent. Poshmark lets you show your unneeded clothing in a virtual closet and get linked with people who share your sense of style. You can even share your dog, or become a sitter, with DogVacay and Rover helping you find a local dog sitter to care for your dog at your home or theirs.

The power of the Internet in facilitating collaborative consumption was probably best evidenced first when eBay and Craigslist provided an online marketplace never experienced before. Today, we have web-based services like Freecycle where people can post things they don't want, the remnants of our overconsumption, and others can take that flotsam and jetsam for free. Yes, for free. It solves the donor's solid waste disposal problem and provides free goods for the takers.

SHARING THE ROOF OVER OUR HEADS

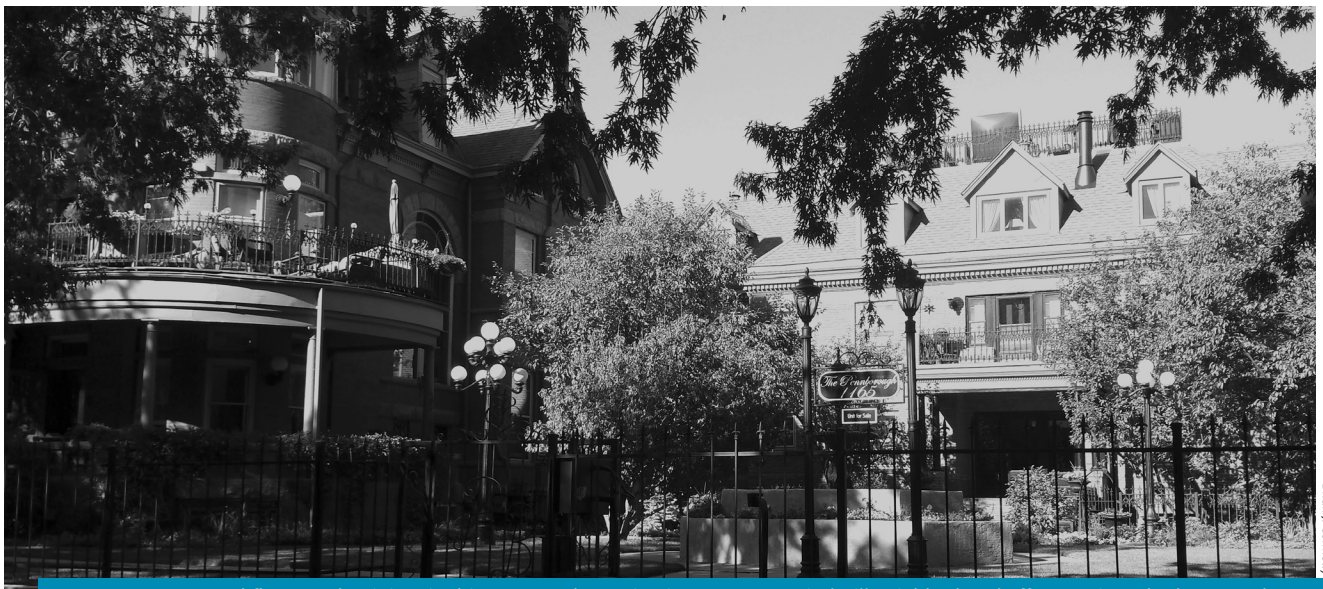
That brings us to the subject matter of greatest interest to planners—the sharing of space. Maybe it began with the sale of timeshares in the United States in 1974. These fractional interests have proved difficult to sell. Short-term vacation rentals emerged as a better way for many, linking property owners with vacationers through companies like HomeAway and its numerous related entities, claiming over one million listings. FlipKey does much the same with what it says are over 300,000 listings in 179 countries.

But Airbnb goes beyond vacation rentals. You can rent a shared or private room for a night, a whole house, an apartment for your exclusive use for a week, a British castle (Airbnb says it has 1,400-plus castles), a teepee, an igloo, a caboose, or an eight-foot by 14-foot treehouse in Illinois ($195 a night) if you wish.

The company, originally "AirBed & Breakfast," was founded in 2008 by Brian Chesky, Joe Gebbia, and later Nathan Blecharczyk. It began when Chesky and Gebbia, to help pay their rent, rented sleeping accommodations on three air mattresses in their San Francisco apartment living room and made breakfast for the guests (Salter 2012). The company is now worth $25.5 billion and joins the ranks of the rest of the great ideas we wish we had thought of first (O'Brien 2015).

GOOD OR BAD?

Are short-term rentals good or bad for your community? Like so many things, it depends.



Brian J. Connolly

A second-floor condominium in this converted mansion in Denver's Capitol Hill neighborhood offers a private bedroom and bath rental for $105 per night, with a two-night minimum stay.

Sorell E. Negro

This three-bedroom home near Miami's Coconut Grove rents for $325 per night, with a five-night minimum stay.

Affordable Housing

Short-term rentals (STRs) increase the stock of furnished, short-term accommodations. Because many of the rentals involve renting a room in a permanently occupied dwelling, they are often less expensive than commercial lodging. The benefit for home owners or long-term tenants who host STR guests is additional income, which can help offset mortgage or rent payments.

Some contend that STRs may exacerbate the shortage of lower cost rentals because landlords, attracted by the higher revenue stream from STRs, are taking apartments out of long-term rentals, especially in tight markets like New York and San Francisco (Monroe 2014; Moskowitz 2015). Others say high tenant demand and demographics are the cause of the problem, not STRs, which are a small share of the market (Lewyn 2015; Rosen 2013).

Aging in Place

Short-term rentals of rooms in homes and apartments not only provide additional revenue for those aging in place, but they may provide an opportunity for sharing of chores and bartering for services, just as accessory apartments do. This can enable older people to stay in their homes longer before transitioning to an independent or assisted living facility.

Commercial Lodging

The only possible benefit of STRs with regard to existing commercial lodging is that it may stimulate competition and lower prices for the consumer. The negatives are several. Short-term rentals may reduce commercial lodging revenues. In many situations STRs have an advantage over commercial lodging because the STRs do not pay the occupancy taxes paid by commercial lodging. Short-term rentals generally do not need the service workers employed in commercial lodging. Unions and service workers often oppose STRs.

Robert H. Thomas

This condo hotel in downtown Honolulu includes owner- and long-term renter-occupied units, privately owned units available for daily rental through the building's hotel operator, units owned by the hotel operators, and privately owned units available for short-term rental through Airbnb and similar sites.

State and Local Government

Revenues to state and local government may go down as a result of STRs because, as noted, such rentals usually do not pay the occupancy and other taxes levied on commercial lodging. Airbnb does provide 1099 forms to hosts to report their income, and it has begun collecting and remitting hotel and tourist taxes in San Francisco; San Jose, California; Chicago; and Washington, D.C. (Hantman 2015).

Health and Safety

Much of the STR market today is unregulated. Those who rent typically do not have their premises inspected to determine compliance with health, building, housing, and safety codes. For its part, Airbnb does clearly state in its terms of service that some localities have zoning or administrative laws that prohibit or restrict STRs and that "hosts should review local laws before listing a space on Airbnb."

Airbnb also provides a guide to responsible hosting on its website, and what they do address is good guidance for local planners and regulators, and thus worth reading. How many hosts read and follow up on the suggestions is another matter. Airbnb's list is still a good starting point for local action.

Many STR hosts do not have home owners and liability insurance to cover losses that may result from occupancy. There is a life safety issue here, and in the event of death, injury, or property damage, there may not be insurance coverage or sufficient assets available to cover the liability.

AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE

So said Benjamin Franklin, and it is apt here. You need only take a few relatively easy steps to get out ahead of the potential problems with STRs and capitalize on the good that such rentals can provide your community.

Moratorium

This is not a recommendation, but something worth considering. As you work down this list of

steps you will have the sense that you need to do six things at once. You do. One way to get a grip on it is take a "planning pause" moratorium on all STRs for, say, six months, during which time no one can rent. However, given that the number of such rentals in many places is still relatively small, it is unlikely that much harm will come from letting them continue on while you plan and prepare to regulate. It may not be worth the effort to have a moratorium. A moratorium takes time—for drafting, maybe some legal advice, and the expenditure of political capital in most cases—and may cause some pushback from those already renting, all of which may cost more than the planning pause is worth. Moratoria sometimes serve only to delay the inevitable hard work and are often extended. Back to Ben Franklin: "Don't put off until tomorrow what you can do today."

Education

Learn what is available out there now by going to all of the websites and services that you can find, most of which are identified here. Look online to see what STRs are being offered in your community. You may be surprised at how many of your friends and neighbors are already in the STR business. Don't forget to check Craigslist as well, and use an online search engine, such as Google, with a few key terms, like "rentals Anytown" and "house-sharing Anytown," to find other STR activity.

Conduct educational sessions in your community ("Everything You Need To Know About Short-Term Rentals") even before trying to regulate, to sensitize present and potential hosts to the need for proper code compliance, fire prevention, emergency response, following rules for rent controlled units, first aid, protecting privacy (e.g., disclosing security cameras), insurance coverage, parking, noise, smoking, pets, childproofing, operation of heating and ventilating systems (including fireplaces and heating stoves), safe access, occupancy limits, deciding what to tell neighbors, home owners association approval, tax obligations, and any required zoning approvals. These sessions may also provide an opportunity to learn who is renting and to connect with them. Consider establishing a section of your municipal website as a resource portal. You will not have all the answers to all the questions as you start, but you need to start.

Planning

Yes, planning. The rational planning model in its simplest terms is what do you have, what do you want, and how do you get it. You need to know who is renting and what is being rented to whom for how long. You need to determine what you may expect in the future. What do you think the demand is for STRs, in what mix of accommodations, and for what length of tenancy? This will prove useful to deciding whether you need to limit the number of units available for STR and to regulate the length of occupancy.

Regulate

Regulation probably will come in two forms: licensing of individual hosts to insure code compliance and general regulation (either through zoning or licensing standards) as to location, number of units, and terms of tenancy. You will have to draw the line somewhere as to what is an STR and what is simply an unregulated rental.

Conduct educational sessions in your community even before trying to regulate, to sensitize present and potential hosts to the need for proper code compliance.

Is an STR a rental of less than 30 days or 90 days, or some other somewhat arbitrary number of days, and everything else is just an unregulated rental? It is for you to decide. You will also want to consider whether owner-occupied STRs might be regulated less strictly, given that the owner is present during the STR.

Austin, Texas, has a robust program with licensing. They carve out three types of STRs: owner-occupied single-family, multifamily, or duplex units (Type 1); single-family or duplex units that are not owner occupied (Type 2); and multifamily units that are not owner occupied (Type 3). There is a three percent limit by census tract on the Type 2 single-family and duplex STRs, a three percent limit per property on Type 3 STRs in any noncommercial zoning district, and a 25 percent limit per property on Type 3 STRs in any commercial zoning district. However, each multifamily property is allowed at least one Type 3 STR, regardless of these limits.

Austin has separate application forms for Type 1 primary, secondary, and partial STRs. All of these forms include owner and property identification information as well as insurance information, number of sleeping rooms, occupancy limit, and average charge per structure. To qualify as a Type 1 primary STR, the unit must be owner occupied at least 51 percent of the time and can only be rented out in its entirety and for periods of 30 days or less. To qualify as a Type 2 secondary STR, the unit must be accessory to an owner-occupied principal residence and can only be rented out in its entirety and for periods of 30 days or less. To qualify as a Type 1 partial unit, namely a room rental, the unit must provide exclusive use of a sleeping room and shared bathroom access. Only one partial unit can be rented out at a time, to a single party of individuals, and for periods of 30 days or less. Owners must be present for the duration of the rental.

The annual licensing fee for STRs in Austin is $235. Applicants must also pay a one-time notification fee of $50.

Of course, as with all regulation there are those with schemes to beat the regulation. There are sites online that advise potential STR hosts to avoid posting on Craigslist, use Airbnb's community and social features to screen the reservations (presumably to avoid enforcement types), "hide your home" by using Airbnb's public view that only shows a large circle within which the unit is located, use word of mouth (or social networking sites) to rent the unit, and "get lost in the crowd" in that there are thousands of listings in large places like Austin (but not in the rural counties, suburbs, and small towns). This advice to those interested in breaking the law suggests that it will not always be easy for code enforcement to find the STRs. Perhaps some notice to all property owners, maybe a note with the tax bill, telling them of the need to register would help. Free, simple, online registration might increase compliance. The critical issue is life safety—you need to find all of these STRs to make sure they are safe.

San Francisco has an Office of Short-Term Rental, and in 2014 the city adopted major revisions to its planning codes for STRs. Those amendments include some useful definitions of hosting platform, primary residence, residential unit, short-term residential rental, and tourist or transient use. The code requires registration, occupancy of the unit by the owner not less than 275 days a year, maintenance of records for two years, certain insurance coverage, payment of transient occupancy taxes, compliance with the

housing code, posting the registration number on the hosting platform's listing, and a clearly printed sign inside of the front door with the locations of all fire extinguishers in the unit and building, gas shut-off valves, fire exits, and pull fire alarms. The application fee and renewal fee every two years is $50. The hosting platform has numerous responsibilities, and there are fines for violations. It is a good model from which to start.

Isle of Palms, South Carolina, regulates STRs through zoning, defining an STR to be three months or less. The city's STR standards limit the number of overnight occupants to six and daytime occupants to 40 (can we assume a wedding party or the like?), set a minimum floor area per occupant, and establish off-street parking requirements.

Monterey County, California, also regulates STRs in its zoning code, defining STRs as rentals between seven and 30 consecutive calendar days. The county considers stays of less than seven days to be a motel/hotel use. The regulation provided for administrative approval of all STRs in operation at the time of its adoption in 1997 if the property owners applied within 90 days. Most of the existing, legal STRs date from that initial round of approvals. Since then, there have been some discretionary approvals, and many STRs are believed to be operating without the required permits.

San Bernardino County, California, permits STRs, defined as rentals of less than 30 days, by zoning in the "Mountain Region" by special use permit exempting multifamily condominium units in fee simple and timeshares with a previous land-use approval. The development standards include code compliance, maximum occupancy based on floor area per occupant and the number of beds, off-street parking requirements, and signage specifications. Conditions of operations address the contents of the rental agreement, posting of the property within the unit with all the conditions of use, and details of fire safety and maintenance, even including a prohibition on the use of extension cords.

Miami Beach, Florida, prohibits STRs in all single-family homes and in many multifamily buildings in certain zoning districts.

Registering all these STRs can be burdensome. Since May 1, 2015, Nashville has issued 1,000 permits, and staff estimates the city still has 800 illegal hotels and motels (Bailey 2015). Wait times for all types permits went from 30 minutes to four hours because of all the STR registrations (Bailey 2015).

THE MAKINGS OF WORKABLE PROGRAM

Overarching issues to consider include the nature of the activity you aim to regulate, the management structure of the STR, and the limits on STR use.

What Is the Nature of the Activity You Will Regulate?

Presumably, hosting a STR is a private enterprise and almost certainly not a commercial lodging business. It is a type of lodging that is largely advertised online, through social media, and on bulletin boards. How will you draw the line between that modest, private activity and a commercial operation?

How Is It Managed?

Does the host have to be the owner, and does the host need to be there during the rental? If not, will you regulate differently in terms of numbers of units allowed, number of days per year, or terms of occupancy?

Karla L. Chaffee

This building in downtown Boston includes a two-bedroom loft apartment that rents for $245 per night, with a seven-night minimum stay.

What Is the Limit of Use?

Will you require the host to live in the residence at least some minimum number of days per year? Will you limit rentals to some maximum number of days per year? Will you define STR as a rental of 30 consecutive days or less and not regulate longer rentals in any way? Will you regulate whole-house, exclusive-use rentals differently, for example by only regulating when the house is rented for less than a week or two weeks? And will you regulate renting of rooms on a different schedule, for example by including room rentals only if they are less than one month and otherwise not regulating longer room rentals, which may be covered by zoning anyway, possibly under the definition of a rooming house? There are so many questions to be answered and so many lines to be drawn.

A checklist of considerations for hosts and public officials for planning, regulation, and operation might include current zoning requirements; applicable codes (sanitation, health, building, occupancy among many); business licensing; business organization (none, limited liability corporation, general or limited liability partnership, Subchapter S, etc.); home owners association covenants and restrictions; other easements, covenants, restrictions on the land; lodging to be offered (room, whole house, host-occupied, length of stay); 911 marking at the street; emergency notifications; food service (permitted? licensed?); federal, state, and local taxes; safety inspections; fire, smoke, CO_2, and other detectors; fire extinguishers; child safety; parking; insurance; emergency notifications; water and septic; safe hot water temperature; electrical and plumbing in good repair; pest/vermin-free (especially bed bugs); ventilation, heat, air conditioning adequate; no hazards; no mold or excessive moisture; working doors, windows, and screens; adequate means of egress; linen sanitation; and pool and spa maintenance.

YOU'VE MADE YOUR BED . . .

So goes the idiom from the French as early as 1590: "Comme on faict son lict, on le treuve" (As one makes one's bed, so one finds it). In planning for and regulating STRs, you will indeed be the ones making the bed, and you will have to lie in it. There are benefits and burdens in how you permit STRs and many considerations to be weighed. If you start with life-safety issues first, you can be quite certain the most important aspect of this rapidly emerging sharing economy phenomenon will be addressed. After that, it is the usual planning and politics.

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DOES YOUR COMMUNITY REGULATE SHORT-TERM RENTALS?

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PACE UNIVERSITY

Local Drone Regulation

December 7, 2017

Dwight Merriam, FAICP

Robinson & Cole LLP

Resource Materials

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JUNE 2017

PLANNING

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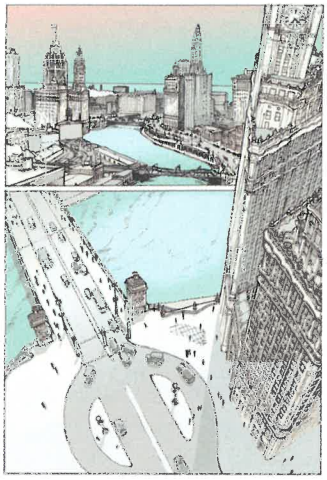

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On the cover: White oak canopy (24). Above, from left: Cleveland foreclosure quilt (12); a resident of Old Wuyan Village (32); Illustration from *No Small Plans* (52).

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COVER: PHOTO BY ANDREW GIBSON. ART CREDITS, FROM LEFT: PHOTO COURTESY KATHRYN CLARK; PHOTO BY XIN KAI ; IMAGE COURTESY THE CHICAGO ARCHITECTURE FOUNDATION

Your Launch Pad for Drone Regulations

LAW

DRONES are everywhere. The Federal Administration Aviation made drone registration mandatory in December 2015, and a year later, there were 670,000 registered; in the first three months of 2017, 100,000 more users registered. There may be close to three million in the country now, and the FAA predicts there will be seven million civilian drones by 2020. The FAA also issues Remote Pilot Certificates, which now number 37,000, enabling the use of drones in commercial operations.

Their practical uses are mind boggling and growing daily: package delivery, emergency medical response, storm tracking, finding lost people (the first may have been in Saskatchewan, Canada, in May 2013), chasing criminals, 3-D mapping, protecting wildlife by catching poachers, identifying nesting areas so impacts can be avoided, measuring deforestation, monitoring farm crops and applying pesticides or water, disaster mitigation, structural safety inspections, border patrol, construction progress reporting—to name a few.

Plus, they're just fun.

While land-use commissioners are unlikely to regulate drones directly—most of the operational aspects are not land uses—commissioners need to think about the impacts of drones and advise local decision makers to help get ahead of the rapidly emerging phenomenon. Drones can be a great tool for planning. Local regulation should facilitate their use, subject to a few important restrictions. The problem right now is some local governments are adopting local regulations without thinking through the implications.

Learn a little about drones first, then put on your thinking caps and try to look over the horizon—figuratively at least—and plan for the future of drones in your community.

Who's in charge here?

That's a good question, and there isn't a clear answer, yet. It's a little like the legal issues with fracking, or even air quality and wetlands protection. Do federal laws control, is the state the leader, or can local governments regulate?

This is the "preemption" issue. It's about who has jurisdiction. In a recent case in federal court, one man sued another for shooting down his drone when it overflew the shooter's residence. The federal judge dismissed the case, holding that the federal government had no real interest in what happened on private property at a low altitude.

By the latest count, 36 states have some kind of drone law. An excellent source is the National Council of State Legislatures and its report *Taking Off: State Unmanned Systems Policies* (ncsl.org). The Center for the Study of Drones at Bard College has also published "Drones at Home: Local and State Drone Laws," along with some other useful information, at dronecenter.bard.edu.

The division of authority, for the most part, remains unsettled, but the federal government is attempting to refine its jurisdictional reach, and some states are stepping up to lay down the law.

Civil rights and privacy

Drones put an eye in the sky at small expense. Think of the typical complaint: "Bombastic Builders, Inc. has an enormous, illegal construction and demolition debris dump in the back 40. You have to do something about it." A ground search might require a warrant or probable cause. Could you send in a drone instead?

Well, you're not quite cleared for takeoff yet.

In the 1989 case *Florida v. Riley*, a helicopter flying at 400 feet over the defendant's mobile home allowed the sheriff to obtain a warrant for what he believed was marijuana growing in a nearby greenhouse.

The Federal Aviation Administration allows drone usage at or under 400 feet.

The U.S. Supreme Court split five to four in finding that the overflight was not a search. But would that hold up today? The U.S. Supreme Court has held that aircraft can overfly properties at 400 feet and higher without a search warrant—but drones can only fly at 400 feet or lower, per the Federal Aviation Administration rules. Complicating this question, effective April 14, 2017, the FAA has virtually prohibited all drone flights at any altitude over 133 military facilities, thus exercising control over the airspace down to the ground (tinyurl.com/k2nnqfz).

Beyond illegal searches is the looming question of the threat of drones to privacy. Overflights at or above 400 feet are one thing, but a drone in the backyard at second-floor bedroom level with a camera is another.

The challenge here is to liberally permit drone uses over private property for appropriate uses while protecting civil rights and privacy. For example, requiring some local approval before flying a drone over private property may seem like a good idea, but it will slow and complicate the job of emergency responders and insurance adjusters working across

"DRONE" BY HARDO MÜLLER, FLICKR (CC BY-SA 2.0)

numerous states and municipalities that need to get damage assessments as fast as they can. Instead, regulations should at a minimum provide that if the property owner or manager expressly permits the flight, no other approval is required.

Things to consider in local regulation

Use these dos and don'ts to build your local regulations.

DON'T:

REQUIRE LOCAL LICENSES and pilot testing

ADOPT UNNECESSARILY COMPLICATED regulations subject to interpretation

ATTEMPT TO REGULATE federal airspace (navigable airspace)

BAN DRONES entirely or overly restrict them to low levels

DEAL WITH THE TECHNOLOGY and equipment—the federal government does that

DO:

LIMIT RESTRICTIONS to those essential to protect public safety, such as limiting drones over places of public assembly

CONSIDER PRIVACY, but focus on the operator, not the drone

BE PROACTIVE in promoting flexible, liberal, and generally as-of-right operations in the public interest, including surveying, agriculture, mapping, resource assessment, and reasonable investigations of potential land-use violations

MAKE SURE THERE IS UNFETTERED use of drones for law enforcement, emergency response, and damage mitigation, including damage assessments by public and private entities

Make the best of it

Drones are going to be great workhorses for us in many ways. All they need is a little nudging to be sure they are headed in the right direction—and for you to become their horse whisperer. ■

—Dwight Merriam, FAICP

Merriam founded Robinson+Cole's land-use group in 1978. He represents land owners, developers, governments, and individuals in land-use matters.

HISTORY

Members of the Civilian Conservation Corps work in Prince George's County, Maryland, circa 1935.

PHOTO COURTESY LIBRARY OF CONGRESS

The Civilian Conservation Corps

IN 1933, Congress authorized a major part of President Franklin D. Roosevelt's New Deal: the Civilian Conservation Corps. The CCC employed more than three million Depression-stricken young men during its nine years of operation.

Best known for planting billions of trees and building national and state park structures, the CCC also played an important role in disaster mitigation and recovery. When local resources were unequipped to handle the massive cleanup after the Great New England Hurricane of 1938, the CCC was mobilized to clear millions of downed trees and other storm debris—and the job was so big, it took two years and some help from the Works Progress Adminstration to complete. The CCC also constructed miles of levees, thousands of dams, and many other flood-control structures.

The program was put to rest in 1942, when the U.S. transitioned to a wartime economy and millions of men were drafted into military service, but the CCC's completed projects continue to provide economic benefits to cities across the nation.

—Ben Leitschuh

Leitschuh is APA's education associate.

RESOURCE FINDER

Like it or not, unmanned aerial vehicle (drone) use is on the rise. Prepare your community with these resources.

APA RESOURCES

Drone's Eye View, Craig Guillot *Planning,* October 2015: planning.org/planning/2015/oct/drones.htm

Know Your Drone, Monte Mills *Planning,* May 2015: planning.org/planning/2015/may/legalessons.htm

WEB RESOURCES

Cities and Drones
National League of Cities: Tinyurl.com/mnophzu

7 Ways Drones Are Helping People in Need
Smart Cities Council: tinyurl.com/n8ka2kc

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THE TENTH AMENDMENT: SANCTUARY FOR SANCTUARY CITIES

By Erich R. Eiselt, IMLA Assistant General Counsel

A Presidential Order puts sanctuary cities in the cross-hairs. But are these jurisdictions violating federal law--and does Washington D.C. have the authority to cut off their federal funding? The Tenth Amendment provides a bulwark, and cities are fighting back.

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REGULATING DRONES: WHAT MUNICIPAL LAWYERS NEED TO KNOW

By Gregory S. McNeal, Professor of Law and Public Policy, Pepperdine University; co-founder, AirMap

Crafting effective drone ordinances requires a clear understanding of FAA regulations including "Part 107." The author, who has assisted federal, state and local officials to derive drone legislation–and heads a drone industry company—provides pointers for success.

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Regulating Drones: What Municipal Lawyers Need to Know

By: Gregory S. McNeal, Professor of Law and Public Policy, Pepperdine University; co-founder, AirMap

In cities across the country, drones are taking flight. According to the Federal Aviation Administration (FAA), 2,000 new drones are being registered with the agency every day, and more than 600,000 commercial operators could be licensed by the FAA by summer 2017, with sales of recreational and commercial drones soaring to seven million in 2020.[1] Over the next ten years, drones will provide billions in benefits to our economy, creating 100,000 U.S. jobs and generating $82 billion in economic impact.[2]

Cities and counties are on the cutting edge of drone innovation. In Modesto, California, drones assist search-and-rescue efforts and deliver aerial imagery to law enforcement during criminal pursuits. In Somerville, Massachusetts, drones are improving public safety by surveying snow buildup on municipal buildings during the winter. And in Tampa, Florida, drones inspect and monitor port construction projects.

As new uses of drones become part of everyday life, cities – and the lawyers who guide them – will also be among the first to grapple with how to balance their interest in innovation with their mandate to ensure the safety and security of residents.

Drones are governed by a rapidly evolving legal framework that presents a particular challenge to municipal lawyers. These attorneys are asking: "How can I help my city council or city manager craft drone rules that ensure both innovation and accountability? How can I stay abreast of recent developments? Does my city even have the authority to regulate drones?"

Fortunately, the legal environment for drones is becoming more clear, not less. With the advent of Part 107 (the FAA's regulations for small unmanned aircraft – drones under 55 pounds), the FAA is beginning to clarify the role that cities will play in ensuring that drones are effectively integrated into community life.

Know the Categories of Operators

Before Part 107 took effect in June 2016, pilots of unmanned aircraft were required by federal law to operate in one of the following ways: (1) as a "model aircraft" operator; (2) under an FAA exemption for non-recreational flight; or (3) as a public operator. While Part 107 has established a new avenue for drone pilots to earn access to the national airspace, the regulations that created these initial categories remain in effect, at least for the time being.

Category 1: Model Aircraft Operators under Section 336/Part 101

In 2012, the Modernization and Reform Act (Act) was signed into law. Section 336 of the Act charged the FAA with creating regulations to govern "model aircraft."

That designation, codified as Part 101 by the FAA, outlines strict criteria that now differentiate model aircraft operators from drone operators. In order to be considered a model aircraft operator, the operator must:

- Fly exclusively for hobby or recreation;
- Not operate a drone weighing more than 55 pounds;
- Not interfere with manned aircraft;
- Notify the airport operator and air traffic control tower prior notice to operation when flying within five miles of an airport;
- Register the aircraft with the FAA; and
- Operate in accordance with a community-based set of safety guidelines.

To date, the only set of community-based guidelines recognized by the FAA is the Academy of Model Aeronautics' safety code. This code prohibits model aircraft operators from flying over people or structures, and in practice, this requirement will oftentimes limit these operators to model aircraft fields and other open spaces. With that said, the vast majority of people who believe they're operating as model aircraft operators are not aware of the safety code, or choose not to operate within its parameters.

Category 2: Section 333 Exemption Holders

The Act also included a process that created Section 333 exemptions. Those exemptions allowed flight for non-recreational purposes. Before Part 107, Section 333 was the designation used by commercial drone operators to fly. To acquire the exemption, operators were required

to obtain a pilot's certificate (i.e. learn to fly a manned aircraft), and an exemption that would specify the circumstances under which these operators could fly.

Despite the introduction of Part 107 and more detailed rules for drone operations, the Section 333 exemption is still in effect for those who received it. However, these exemptions are slowly being phased out. Operators with this exemption are entitled to fly under the conditions of their individual Section 333 exemption until their exemption expires, two years after it was issued.

Category 3: Public Operators

Public agencies and those operating drones for government purposes can also apply for a Certificate of Waiver or Authorization (COA) from the FAA, defining how and where the drone can be used. This process is labor-intensive, and municipalities should carefully weigh whether it is justifiable for them to become a public operator. Becoming a public operator is an option, not a requirement. The other option available to municipalities is to have their employees pass the Part 107 test. Many cities will find that it is cheaper and easier for them to have their employees take and pass the Part 107 test, and operate municipal drones under Part 107 rules, rather than dealing with the complexity of public operator status.

Category 4: Part 107 Operators — "The New Normal"

On June 21, 2016, the FAA released Part 107 regulations that govern the use of "small unmanned aircraft," or drones, under 55 pounds. Part 107 establishes a new pathway for drone operators to access U.S. airspace, whether those operators are flying recreationally or commercially, and whether those operators are public or private.

To become a Part 107 operator, an individual must be 16 years of age or older and pass a simple knowledge test. The overwhelming majority of those who take the test are expected to pass: the FAA has announced that the present pass rate is 91% for first-time takers and they estimate that all test takers will pass on the second attempt.[3]

In return for passing the test and a TSA background check, Part 107 operators earn significant privileges. They can:

- Fly any drone weighing up to 55 pounds, up to 100 miles per hour, for any purpose;
- Fly up to altitudes of 400 feet, unless they are within 500 feet of a building;
- Fly anywhere within line of sight; or
- Fly in controlled airspace as long as they have authorization from air traffic control.[4]

Part 107 establishes a new pathway for drone operators to access U.S. airspace, whether those operators are flying recreationally or commercially, and whether those operators are public or private.

These privileges offer significant advantages over the previous operator classifications. Now, any new drone operator has a few options: 1) take and pass the Part 107 test and fly for any purpose (whether commercial or recreational) in nearly any location; or 2) elect not to take the test and be limited to model aircraft rules under Part 101, and thus a restrictive set of community-based guidelines, or (in the case of municipalities) go through the laborious process of obtaining public operators status.

It should come as no surprise that more than 16,000 people have taken and passed the Part 107 test to date.[5]

Are Part 107 operations the same as commercial operations?

Part 107 operations are often incorrectly referred to as "commercial operations." While Part 107 certainly allows the operator to conduct drone flights for business purposes, a pilot with a Part 107 certificate may operate for *any reason*, whether recreational or commercial.[6]

In fact, classifying operators as either commercial or recreational is not a particularly helpful way to think about the drone ecosystem, and municipal attorneys should caution their city council against making such simplistic distinctions. Part 107 offers privileges that either kind of operator will want to take advantage of. Moreover, commercial and recreational flights are indistinguishable from one another from the ground. Hobbyists and commercial drone operators often use the very same drone for their flights. That drone may be used by one operator to conduct a building inspection, and by another to film a ski trip. A person may be taking photos of a home for fun or for a real estate sale. The passing police officer or a neighbor will have no idea what the purpose of the operation is. Similarly, the drone may be in the exact same location, at the same time, flying in the same manner. The purpose of the operation is immaterial to the issues that it may raise in a community.

Because of this reality, local ordinances that make commercial and recreational distinctions are doomed to fail. Operators with a Part 107 certificate may be irresponsible, but if a local ordinance makes a carve-out for commercial operators, those operators may have a defense merely because they took and passed the Part 107 test. In short, the simple retreat to making a commercial versus recreational distinction will not solve any of the problems that a municipality may be concerned about. Rather, a municipality should focus on reasonable time, manner, and place rules.

Municipal lawyers, city councils, and other local stakeholders should avoid equating Part 107 operations with commercial operations, as these classifications will have very little meaning in the future of drones.

> "Part 107 is not the "commercial" rule. It is the visual line of sight rule. Recreational operators may fly under part 107, and they likely will because it gives them more privileges. Distinctions between recreational and commercial are vestiges of our old rules. Part 107 is the new normal and is the future."
>
> -Earl Lawrence,
> FAA UAS Integration Office, 2016

Category 5: The "I Don't Know, Don't Care" Operator and Creating a Culture of Accountability

While in law there are four distinct categories of operators, in actuality there remains a fifth operator– the "I Don't Know or Care" (IDKOC) operator.

This is the operator who gets a drone for Christmas, opens the box, and immediately starts flying. For municipal lawyers, this is

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the operator that makes you squirm in your seat. The IDKOC operators may believe they are model aircraft operators, but they fail to obey the safety code. They may fail to provide notice to the nearby airport. They may choose to fly where prohibited - above 400 feet, or over people, structures, or objects, recklessly endangering others.

The reality is that some operators don't follow the rules, whether it's because they weren't aware of the requirements or simply chose to ignore them. Not all IDKOC operators are bad apples. While it's not a defense, some may not have understood the rules or were discouraged by the perceived complexity of the process.

The key for regulators – whether local, federal, or somewhere between – is to empower operators that want to follow the rules, and help those who don't know and don't care learn how to act as responsible members of the community. In order to make this possible, the rules must be clear, accessible, and easy to follow.

Thanks to advances in technology, today's drones can already access detailed information about where they can and cannot fly, from nearby airspace restrictions and infrastructure (prisons or schools, for example), to real-time information about wildfires, presidential visits, or community events. Drone operators also have the ability to provide their location and flight information to airports with just a tap from digital applications – making notification a seamless process and thus, encouraging compliance with rules. This is a technology we can all imagine being implemented by cities to facilitate local rules, should they choose to do so.

Fortunately, the operators that cities want to empower – the roof inspectors, the realtors, the journalists and photographers – already want to fly responsibly. They understand that following the rules is one of the keys to a long and successful career in the drone industry. If cities make the rules clear, simple, and accessible, these operators will do their best to follow them.

Best Practices for Municipal Lawyers

Municipal lawyers are in a position to help ensure that drone rules are easy to implement and easy to follow. Already, local attorneys are beginning to receive direction from their city councils and city managers that they should craft local drone ordinances. Before a foray into the world of drone regulation, municipal lawyers should consider the following:

Does the FAA and Part 107 preempt local regulation?

Part 107 represents the minimum federal rules that govern drone operations. To date, the FAA has chosen not to issue a blanket preemption of local regulation, instead addressing preemption issues on a case-by-case basis. The FAA has pointed to "land use, zoning, privacy, trespass, and law enforcement operations" as areas that are typically outside the scope of federal regulation and potentially appropriate for local rules.[7,8] While this may seem vague at first glance, in the next section, we'll identify pitfalls that municipal lawyers should avoid when crafting rules and best practices to avoid Federal preemption.

How can municipal lawyers craft enduring ordinances?

First, ensure that the requirements of any local ordinance avoid issues that are clearly preempted by federal regulation. Cities should:

- Avoid any laws related to equipage of the aircraft.
- Avoid any laws related to knowledge testing or training.
- Avoid regulating any airspace that can be deemed as navigable airspace for manned aircraft.
- Avoid laws that are so difficult to comply with that they amount to a prohibition on operations.

Examples of drone rules that are likely to be preempted include:

- Outright bans on drones.
- Limiting drones to narrow bands of airspace, such as 100 feet above the ground.
- Requiring a flight permit that is subject to a lengthy approval process of multiple days or weeks.
- Requiring that drones have certain types of equipment like transponders or "geofencing."
- Requiring that operators in the city take a flight test.

In addition to these pitfalls, cities should consider the following best practices when crafting local drone rules:

Focus on areas of traditional local authority: Cities have substantial authority if they stay focused on regulations enacted with the stated purpose of protecting public safety, public health, aesthetics and general welfare—all regularly found to be a legitimate exercise of a state's or municipality's police power.[9] When thinking of how to draft rules, municipal lawyers should focus on a city's traditional police power in areas such as land use, zoning or law enforcement. Think in terms of how the police power allows for reasonable time, manner, and place restrictions on even protected constitutional conduct like free speech, and consider applying this to where drones may take off and land, rather than creating outright bans on the overflight activities of the drone. Another way to think about drafting rules is to focus on the conduct of the operator rather than the flight of the drone.

Leave room for flexibility: Effective drone ordinances recognize that requirements may change over time, rather than setting specific restrictions for specific areas. One approach is to craft an ordinance that states a set of "reserved powers" that may be implemented at a future date and time (permitting, notice requirements, etc.) For example, local authorities may think prohibiting drone takeoff and landing on public school property is a good idea – but may not realize that the school may want to fly a drone for science class or building maintenance. Or an airport runway may not be the right place for a drone – until an airline requests permission to use one to inspect a plane after a lightning strike. Enacting a flexible set of rules, rather than prescriptive set of rules, can allow for rules to evolve.

Cities may also consider how the flexibility to implement rules through administrative procedures, rather than through the ordinance itself, may provide benefits. In doing so, they can ensure the evolution of drone rules according to the needs of the city, without requiring the passage of a new ordinance or hampering local innovation.

Make communication easy (and digital) for both operators and administrators: For tech-savvy drone operators, paper permits or lengthy waiting times are likely to discourage responsible pilots from following the rules. Flight notices (the who, what, when,

and where of a flight) can be delivered and processed digitally with existing technology, while requirements about when and where is safe to fly can be posted to a city's website or delivered via an app or online map. (Full disclosure: AirMap, the company I co-founded, provides some of these services to cities).

On the Regulatory Horizon:
While drone regulation evolves rapidly at the federal level, it also follows a clear timeline of expected milestones. Over the next three years, municipal lawyers should watch for three developments in drone law.

Flights over people: At the time of this writing, the FAA has yet to publish its rules for flight over people. In the spring of 2016, the FAA's advisory rulemaking committee convened to discuss this issue and publication of the rules were expected to be announced before the end of 2016. Shortly thereafter, on January 6, 2017, Michael Huerta, Administrator to the FAA, spoke at the Consumer Electronics Show (CES) in Las Vegas, and noted various safety and security concerns. Those concerns specifically focused on the challenges law enforcement faces in identifying who is operating a drone. Those concerns postponed the publication of their rules.[10] Despite the delay, Mr. Huerta confirmed his commitment to advancing the rulemaking process for flight over people, working with both interagency partners and industry stakeholders to "ensure drones can fly over people without sacrificing safety or security."[11]

Earlier this year, I participated in a task force assembled by the FAA – MICRO ARC – that was asked to recommend regulations that would allow an unmanned aircraft to fly over people not involved in the aircraft's operations. The drone manufacturers, operators, consensus standards organizations, researchers and academics on the task force suggested the following general recommendations (among others):

- Certain small drones should require no additional operational restrictions beyond Part 107
- Larger drones may require mitigation techniques and coordination with local authorities prior to flying over people
- To fly over crowds, the operation must be conducted in accordance with a documented risk mitigation plan

The proposed rules will be released soon, and municipalities may want to consider commenting on the rules to ensure their input is included. Regardless of whether the FAA implements these regulations, the passage of new rules for flight over people will mean that flights in populated areas will become far more common, and will become a matter of concern for municipal attorneys.

Beyond Visual Line of Sight (BVLOS):
While Part 107 currently requires flights to be within the visual line of sight of the operator, when we think of the not so distant future, beyond visual line of sight (BVLOS) operations will become the norm, not the exception to the rule. Currently, under limited circumstances, the FAA has begun to administer waivers for BVLOS operations. On December 28, 2016, for example, the FAA approved a certificate of authorization for oversight of BVLOS operations at the Northern Plains UAV test site in North Dakota.[12] The FAA is currently operating on a timeline that will allow for regular BVLOS operations by 2020, with regular shorter range operations (where the operator can't see the drone, but can see the sky) as soon as 2018. In short, the present ways in which municipalities think about drones will quickly give way to new technologies and newer, more permissive federal rules.

* * * *

As these regulatory milestones become reality, drones will become more common and more important to cities and their citizens. Municipal attorneys will be responsible for crafting laws that protect residents, while ensuring that cities benefit from the contributions drones will make to our economy and society. Fortunately, this is a perfect time for cities to act: the regulatory environment is becoming clearer, and the expansion of drone technology is only beginning. My advice to municipal attorneys: for drones operated by residents, start with a common-sense and flexible ordinance that focuses on time, manner, and place restrictions and your city will be well-prepared to make the most of the drone opportunity. For more resources on how to craft an ordinance or for insights into how to create rules for drones operated by municipalities, feel free to contact me at greg@airmap.com.

Notes

1. Alina Selyukh, "FAA Expects 600,000 Commercial Drones in The Air Within a Year," NPR, (August 29, 2016) http://www.npr.org/sections/thetwo-way/2016/08/29/491818988/faa-expects-600-000-commercial-drones-in-the-air-within-a-year; *see also* Joan Lowry, "FAA Faces Big Drone Demand," Times Union, (September 16, 2016) http://www.timesunion.com/news/article/FAA-faces-big-drone-demand-9228572.php..
2. Fact Sheet: New Commitments to Accelerate the Safe Integration of Unmanned Aircraft Systems; https://obamawhitehouse.archives.gov/the-press-office/2016/08/02/fact-sheet-new-commitments-accelerate-safe-integration-unmanned-aircraft
3. Huerta, Michael, Drones: A Story of Revolution and Evolution, Consumer Electronics Show (January 6, 2017), https://www.faa.gov/news/speeches/news_story.cfm?newsId=21316.
4. Fact Sheet—Small Unmanned Aircraft Regulations (Part 107), FAA, (June 21, 2016), https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=20516.
5. Huerta *supra* note 3.
6. Unmanned Aircraft Systems (UAS) Frequently Asked Questions/Help, FAA, https://www.faa.gov/uas/faqs/ (last visited January 25, 2017).
7. State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, FAA, https://www.faa.gov/news /updates /?newsId=84369 (lastvisited January 25, 2017).
8. Skysign International, Inc. v. City and County of Honolulu, 276 F.3d 1109, 1115 (9th Cir. 2002).
9. Koscielski v. City of Minneapolis, 435 F.3d 898, 902 (8th Cir. 2006), Grace United Methodist Church v.

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City Of Cheyenne, 451 F.3d 643, 659 (10th Cir. 2006), Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 (11th Cir. 1995), *See also* FAA Docket No. 16-04-01 (Dec. 15, 2005), Aircraft Owners & Pilots Ass'n (Aopa) Members: Bill Bahlke, Reagan L. Dubose, Howard G. Soloff, Laurence K. Mellgren, David Watkins, Joseph Haughey, Robert Kwass, Herbert Jacobs, & Levent Erkmen, Complainants, 2005 WL 3722717, at *9 ("An airport may limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."); *See, e.g.*, Gustafson v. City of Lake Angelus, 76 F.3d 778, 791 (6th Cir. 1996) (city's prohibition on landing seaplanes on lake within city limits did not violate riparian owner's equal protection rights, since all similarly situated persons were similarly regulated, and ordinance was rationally related to legitimate land use concerns over noise, danger, apprehension of danger, destruction of property values, and interferences with other lawful uses of lake); Casciani v. Nesbitt, 659 F. Supp. 2d 427, 439 (W.D.N.Y. 2009), aff'd 392 F. App'x 887 (2d Cir. 2010) (finding ordinance that permitted ultralight aircraft but not helicopters "quite plainly, rationally related to the protection of the health, safety and welfare of [the municipality's] residents"); Caswell v. City of Bloomington, 430 F.Supp.2d 907, 914 (D. Minn. 2006) (city's zoning ordinance regulating land use surrounding a newly constructed runway at municipal airport passed rational-basis test, since it was rationally related to legitimate government interest of protecting public safety).

10. Michael Huerta, Drones: A Story of Revolution and Evolution, Adress at Consumer Electronics Show (January 6, 2017), https://www.faa.gov/news/speeches/news_story.cfm?newsId=21316.

11. Id.

12. Steven Crowe, *FAA to Approve Drone Flights BVLOS at Test Site*, ROBOTICS TRENDS, (December 28, 2016) http://www.roboticstrends.com/article/faa_to_approve_drone_flights_bvlos_at_test_site. ML

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that it constituted an establishment of religion and was coercive to non-Christians. He further argued that, following his objections about the prayer policy, the Commissioners refused to consider his application to join the County's Solid Waste Committee, despite the fact that he had already worked with the County on the subject of solid waste for more than three years.

The district court held in favor of the County, finding that the Commissioners' policy was merely a function of their own religious makeup, was not inconsistent with Town of Greece and did not constitute an establishment of Christianity.

The Sixth Circuit disagreed. It found that the County's policy differed significantly from that of Marsh and Town of Greece in a crucial respect—the prayer givers were not clerics or volunteers from the community, they were the County's own elected officials, who ensured that only Christian invocations would be heard at their meetings. "To exclude prayers that Jackson County Commissioners did not want to hear, the Board of Commissioners forbade anyone but Commissioners from giving prayers. Excluding unwanted prayers is not a policy of nondiscrimination. Excluding unwanted prayers is discrimination."

The Circuit also saw evidence of coercion in that all members of the public were directed to stand and bow their heads as the Commissioner's prayer was given, making it very obvious if any attendee did not follow suit. And the fact that Bormuth was ostensibly passed over for a position for which he seemed eminently qualified only added to the suspicion that allegiance to Christianity (or not objecting thereto) was a de facto predicate for consideration by the Commissioners.

DISSENT: The dissent challenged the decision on the basis of the recent Fourth Circuit *Lund v. Rowan County* opinion (upholding a North Carolina county's practice which was very similar to the Jackson County Commissioners' policy). However, as the majority noted preemptively, the Fourth Circuit subsequently reheard *Rowan County* en banc, and the coercive behavior by Jackson County would distinguish it from *Rowan County* in any event. (IMLA had questioned *Rowan County* in the November-December 2016 *Municipal Lawyer*, a decision on the Fourth Circuit's en banc rehearing in *Rowan County* is expected shortly).

http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0036p-06.pdf ML

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he did not foresee the severity of the potential injury."

The Court found the trial judge's conclusion proper, and dismissed the Appellant's argument. Next, the Appellant raised concern that the trial judge did not clearly articulate an appropriate standard of care it had to meet dispute concluding that the standard was not met. The Court disagreed; finding numerous examples of the trial judge outlining what the Appellant could have done to differently to avoid liability:

There were no instructional signs, no requirements to complete an easy trail or [a difficult trail]... no warning of serious injury, and no instruction on how to extricate oneself from the feature.

The Appellant challenged trial judge's application of "but-for" test which concluded that the Appellant caused the Respondent's injuries. The Court indicated that the Appellant could only succeed if it demonstrated that none of the causation conclusions could stand, which it could not do. The Court found that the trial judge's conclusion that the Appellant breached its duty of care and but for that breach the Respondent would not have attempted the obstacle or sustained his injury. The trial judge found that the Respondent was not contributorily negligent and cannot be found liable for falling, as the risks were not obvious. The Appellant argued that the trial judge failed to broaden his view beyond the Respondent's actions attempting to avoid the accident instead of considering the Respondent's decision to attempt the obstacle in the first place. The Court again disagreed, finding that it was reasonable for the trial judge to have that viewpoint as the trial judge had already concluded that the Appellant breached its duty of care under s.3(1) of the *Occupiers Liability Act*.

The Appellant also argued two other interpretations of the trial judge's language during the trial to indicate contributory negligence on behalf of the Respondent. The Court dismissed both, stating that it was not prepared to accept that the interpretive language used during the trial amounts to a formal admission of some liability. The appeal was dismissed and the Respondent was awarded $25,000 in costs.