

Puerto Rico District Court Declines to Address Preemption Challenge to San Juan Drone Regulation

By John W. Scott and Charles D. Tobin

A federal court in Puerto Rico recognized support for the argument that federal law preempts drone restrictions in local ordinances – an issue of concern for newsrooms that have launched expanded aerial news coverage – but ultimately decided not to reach the issue. [Pan Am v. Municipality of San Juan](#), No. 18-1017 (PAD), 2018 U.S. Dist. LEXIS 208014 (D.P.R. Dec. 10, 2018). The U.S. District Court partially granted a preliminary injunction enjoining other aspects of the local ordinance regulating commercial speech.

Background

To date, only one federal court decision has addressed whether a local drone ordinance is preempted by federal law. The District of Massachusetts in *Singer v. City of Newton* found that while the FAA did not intend to occupy the entire field of drone regulation, local ordinances that directly conflict with federal rules will be preempted. 284 F. Supp. 3d 125, 130 (D. Mass. 2017).

The City of Newton passed an ordinance in 2016, which regulated drone flight within the city. Dr. Michael Singer, a resident of Newton, filed a complaint seeking declaratory and injunctive relief against enforcement of the Newton ordinance. Dr. Singer alleged that he was “certified as a small unmanned aircraft pilot, pursuant to 14 C.F.R. Part 107.” He plead that he was the owner of “two commercial-grade sUAS rotorcraft weighting over .55 pounds,” and that he “has operated sUAS over public and private lands in Newton and Needham, Massachusetts, in accordance with 14 C.F.R. § 101 or § 107.” Dr. Singer challenged four separate provisions of the Newton ordinance, which required drone operators to register with the City Clerk’s Office, and prohibited drone flight without express permission from property owners, within the city. The court found that federal law preempted each of these restrictions in the Newton ordinance.

As to Sections (c)(1)(a) and (c)(1)(e) of the Newton ordinance, which required operators secure permission for flights over both public and private property within the municipality, the court held that these restrictions “certainly reach[] into navigable airspace” and “this alone is grounds for preemption.” The court found these two provisions together operated as a complete “ban on drone use within the limits of Newton.” The court found this restriction conflicted with the FAA’s general obligation to “use navigable airspace efficiently,” as well as

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the specific directive from Congress to “develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft system into the national airspace system.” With regards to the other provisions in the ordinance, requiring registration of drones and prohibiting flights out of visual line of sight of operator, the court held that these provisions also infringed on the FAA’s regulatory authority.

The court left open the possibility that a local municipality could regulate certain other aspects of drone flight. But the court expressly found that municipalities could not regulate drones in such a way as would affect the operation of the national airspace – this, the court stated is the sole province of the federal regulatory system and Congress.

The Puerto Rico Ruling

Since *Singer* was decided in 2017, drone operators and municipalities alike have waited to see if any other court would endorse or challenge the District of Massachusetts’s reasoning on the scope of federal preemption of local drone laws.

The plaintiffs in *Pan Am v. Municipality of San Juan* sought to enjoin a city ordinance that regulated the operations of businesses in Old San Juan during the 2018 San Sebastian Street Festivities, an annual multi-day event showcasing commercial, cultural, and artistic elements of Puerto Rican culture. In general, the challenged provisions sought to regulate the manner in which commercial advertisements could be displayed during the festival, such as restricting “inflatables,” requiring permitting for advertisements in certain areas and preventing property owners from leasing property for advertisements. Section 22 of the ordinance also specifically prohibited “the use of flying items, equipment or objects such as helicopters and drones during the Festivities, except those authorized by government agencies with authority in law, and those belonging to the Municipality, sponsors and parties responsible for production” (emphasis supplied). The plaintiffs were affiliated companies who in previous years had engaged in commercial activities throughout the festival.

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The vast majority of the court’s analysis in *Pan Am* focused on whether the restrictions on commercial free speech violated the First Amendment. The court applied the Supreme Court’s test for commercial speech restrictions articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561-62 (1980). This case articulated a four part test the government must satisfy in order to justify restrictions on commercial speech:

- (1) the speech concerns a lawful activity and is not misleading;
- (2) the government’s asserted interest in restricting speech is substantial;
- (3) the restriction directly advances the asserted governmental interest; and
- (4) the restriction is not more extensive than necessary to meet that interest

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Id. at 566.

The court also analyzed the Supreme Courts' decision in *Reed v. Town of Gilbert*, 135 S. Ct 2218, 2226 (2015), and found that under *Reed's* formulation the speech restrictions contained within the ordinance were content-based, and therefore subject to strict scrutiny. Nevertheless, the court declined to apply *Reed*, concluding that the Supreme Court had not expressly extended its holding to commercial speech and several other courts had analyzed the intersection of *Reed* and commercial speech and concluded that *Reed* did not apply because it did not mention *Central Hudson* or its progeny. Ultimately, the *Pan Am* court instead applied the *Central Hudson* test.

Analyzing the record regarding the specific challenged ordinances, the court concluded that the first prong of *Central Hudson* was met. Further, the court concluded that the government had articulated substantial interests the ordinances were intended to advance. The court however, ultimately found that the record failed to show that those interests were real, or linked those interests to the specific restrictions in question. Based upon the factual record, the court granted in part, and denied in part, the motion for injunction as to the discrete sections of the ordinance.

The plaintiffs also argued that Section 22 was preempted by the federal Part 107 regulations for drone flights in the national airspace. This ordinance prohibited use of drones during the festivities, except as "authorized by government agencies with authority in law." The court did note that "there is authority to support" a preemption challenge to local drone laws, and cited to *Singer v. City of Newton*. But the court found that there was no need to reach the issue of federal preemption because the record established that the plaintiffs intended to use drone operators authorized by the FAA. For that reason, the court concluded the plaintiffs' proposed flights would be "authorized by the government agencies with authority in law," as the ordinance requires. The court therefore declined to enjoin the city from enforcing that aspect of the ordinance.

While *Pan Am* decision gave drone operators and municipalities some indication that other courts would follow *Singer's* lead, litigants continue to wait for a more definitive holding on the issue of local drone law preemption.

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