SMALL UAV COALITION
A Partnership for Safety & Innovation

December 1, 2015

Via email

Vice Mayor Daniel Valenzuela
Councilwoman Thelda Williams
Councilman Jim Waring
Councilman Bill Gates
Councilwoman Laura Pastor
Councilman Sal DiCiccio
Councilman Michael Nowakowski
Councilwoman Kate Gallego

Honorable Members of the City Council
City of Phoenix, AZ

Re: Draft Ordinance G-6086 to Regulate Unmanned Aerial Vehicles and Systems

Dear City Council Members:

The Small UAV Coalition[1] provides the following comments on draft ordinance G-6086 prepared by the Phoenix Law Department (Version 4 dated 11/20/15), which is set for consideration by the City Council on December 2. For the following reasons, the Coalition opposes the draft ordinance in its present form.

General Comments

The Coalition recognizes the draft's intention to permit commercial UAS operations authorized by the Federal Aviation Administration. In view of the generally preemptive nature of Federal law in this area, such a local ordinance is not necessary. The Coalition notes that the draft ordinance would also impose operational restrictions that in some but not all respects are similar to current restrictions imposed by the FAA in exemptions granted under section 333 of the FAA Modernization and Reform Act of 2012 (section 333 exemptions) and restrictions proposed in the FAA's small UAS Notice of Proposed Rulemaking. The proposed ordinance may have been drafted to follow FAA rules and/or guidance, but differs from existing and proposed FAA rules and guidance in several respects. In any event, whether or not a city ordinance faithfully adopts a Federal law or rule, the city ordinance is preempted under Federal law where Congress has charged a Federal agency to regulate to conduct addressed by the city ordinance.

There is the additional risk that enforcement by the City may vary in one respect or another from the FAA's enforcement of the same provision, raising additional conflict concerns.

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[1] Members of the Small UAV Coalition include 3D Robotics, AGI, AirMap, Amazon Prime Air, Botlink, DJI Innovations, Drone Deploy, Flirtey, Google [X] Project Wing, GoPro, Intel, Kespry, Parrot, PrecisionHawk, Strat-Aero, Verizon Ventures, and ZeroTech.

Specific Comments

1. Draft Sec. 23-200 (Definitions)

This section purports to exclude UAVs flown for recreational or sports purposes from the scope of section 23 of the ordinance. However, the exclusion uses the term "model aircraft" without having defined this term in the draft ordinance. If the intent of the drafters is to adopt the Special Rule for Model Aircraft in section 336 of the FAA Modernization and Reform Act of 2012 ("Special Rule") that adoption should be made explicit. Applying this draft ordinance to operations covered by the Special Rule would be preempted by Federal statute.

This section would also require each UAV to be marked, identified and operated as required by Federal law. This proposed requirement is included in the definition section. As noted above, this provision is unnecessary as it merely incorporates Federal law.

2. Draft Sec. 23-201 (Permissible Uses)

This section states that a UAV/UAS may be operated "to the full extent permitted by Federal and State law . . . ." Again this provision is unnecessary. The Coalition is also concerned with several examples listed in this section, notwithstanding their non-exclusive nature. Each of these operational limitations intrudes on the plenary statutory authority the FAA has under the Federal Aviation Act.

First, operating over an "event" would require consent of event organizers, with notice to attendees. The term "event" is not defined in the draft ordinance, and thus is too vague. Imposing a notice requirement may be practical for some events, but impractical if not impossible for other events, either because of the volume of attendees or because it not clear who is attending the event. If there is such a notice requirement, it should be imposed on the event organizer.

Second, photographing or otherwise capturing an image requires that a business operating the UAS to be licensed by the State. While businesses operating in the State of Arizona may be subject to a licensing regime, any business operating a UAV that is required to be licensed by Federal law should not be subject to duplicative or inconsistent state law. Accordingly, we request this provision be revised to exempt businesses licensed by either the Federal Aviation Administration or the U.S. Department of Transportation. We also question whether the standard of "industry custom and practice" provides adequate notice of what is required as a matter of due process.

Third, Sec. 23-201 would allow "cargo" to be delivered in compliance with Federal law. While this provision is unnecessary, we urge that "cargo" be explicitly defined to include "packages," including "express packages," so there is no doubt as to the permissibility of transporting small packages by UAV.

Fourth, Sec. 23-201 would require a UAV operator to provide notice to an airport operator for operations within 5 miles of that airport, in addition to obtaining authority from the FAA to conduct such an operation. It is the province of the FAA and not a state or city to impose such an operational limitation. At a minimum, therefore, this provision should be revised to permit operations within 5 miles of an airport *as permitted by Federal law*. In section 333 exemptions the FAA permits operations within 5 miles of an airport if a letter agreement has been obtained from the airport **or** if authorized by Air Traffic Control in a Certificate of Authorization (COA). The FAA sUAS proposed rule includes no minimum distance from an airport. Rather, proposed section 107.41 would require simply that operations in certain Class B, C, D, or E airspace (where airports are located) must be authorized in advance by the Air Traffic Control facility.

3. Draft Sec. 23-202 (Prohibited Uses)

This section suffers from the same infirmity of other sections: it proposes to regulate UAS operations in the navigable airspace, over which the FAA has exclusive authority. That there may be no conflict between Federal and local law does not rescue the local law from preemption under the Supremacy Clause of the U.S. Constitution. The Coalition is also concerned with several provisions that are indeed not identical to Federal law or rule, and therefore preempted for that reason.

For example, careless or reckless operations would be prohibited by the draft ordinance. FAA regulations prohibit the operation of an aircraft in a careless or reckless manner "so as to endanger the life or property of another," 14 CFR 91.13, and a violator of this provision faces civil penalty or certificate action from the FAA. The Coalition does not believe a person should be subject to two enforcement schemes.

Also, dropping of objects is prohibited as set forth in Arizona law. This may be an attempt to apply 14 CFR 91.15 (Dropping of objects), but it is inconsistent with proposed section 23-201, which would permit cargo operations. We note that even section 91.15 of the Federal Aviation Regulations permits the dropping of objects "if reasonable precautions are taken to avoid injury or damage to persons or property."

This section would prohibit a UAS operation within 500 feet vertical and 250 feet horizontal from a "critical facility" without written consent of the owner or operator of the facility. This section is too broad. In section 333 exemptions, the FAA has imposed a ceiling of 400 feet AGL. FAA's proposed small UAS rule would set a 500 feet AGL limit. Thus, an operation who decides to avoid this proposed ordinance by operating a UAV more than 500 feet above the facility would violate Federal law. We note further that the FAA has not proposed to restrict operations over critical facilities other than airports, although UAS operators would be prohibited under proposed rules from operating in prohibited airspace as well as in restricted airspace except as permitted by Air Traffic Control. The key point is that FAA regulates operations of aircraft in the navigable airspace. Such regulation is not a matter for state or city regulation.

This restriction regarding operations over critical facilities, like other proposed restrictions such as the prohibition from operating a weaponized UAV, are likely addressed sufficiently by

Federal, Arizona, or City of Phoenix laws that do not focus narrowly on a particular manner of operation. Thus, the Coalition believes these provisions in the draft ordinance are unnecessary.

In sum, while well-intentioned, the draft ordinance would intrude upon the authority Congress has vested exclusively in the Federal Aviation Administration (FAA), and in several instances would conflict with the FAA regulations. Thus, these provisions, if adopted by the City of Phoenix, would be preempted by Federal law under the Supremacy Clause of the United States Constitution.

We urge you to revise the draft ordinance as set forth with these comments.

Thank you for your consideration.

Sincerely,

Gregory S. Walden
Aviation Counsel