Municipalities -- Drones -- Privacy Rights

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Subject:
Municipalities -- Drones -- Privacy Rights

Mr. David M. Wolpin
Attorney for the City of Aventura
2525 Ponce De Leon Boulevard
Suite 700
Coral Gables, Florida 33134

RE: MUNICIPALITIES—MUNICIPAL CODE ENFORCEMENT—DRONES—PRIVACY RIGHTS. Authority of municipality to enact ordinance prohibiting private use of drones to invade privacy rights of citizens. s. 934.50, Fla. Stat.

Dear Mr. Wolpin:

On behalf of the City of Aventura, you ask the following:

Does section 934.50, Florida Statutes, preempt the adoption of a municipal ordinance prohibiting the use of drones equipped with imaging devices within the city's limits by private individuals and entities, when such use invades the privacy rights of the city's residents?

In sum:

Section 934.50, Florida Statutes, does not preempt the adoption of a municipal ordinance prohibiting the use of drones by private individuals for surveillance which invades the privacy rights of the city's residents.

You state that the City of Aventura is contemplating the enactment of an ordinance to prohibit the unauthorized use of surveillance drones by private persons, when such use invades the privacy rights of citizens. The proposed ordinance would track the statutory exclusions from the prohibition in section 934.50(4), Florida Statutes, and would impose civil penalties for its violation pursuant to the authority in Chapter 162, Florida Statutes.[1] The city, however, questions whether such an ordinance would be preempted by or be in conflict with section 934.50, Florida Statutes, the "Freedom from Unwarranted Surveillance Act."[2]

Initially, I would note that the discussion below generally addresses the provisions in section 934.50, Florida Statutes, and does not speak to the specific language the city may use in its ordinance.

Section 934.50(3), Florida Statutes, in prohibiting the use of drones,[3] provides:

“(a) A law enforcement agency may not use a drone to gather evidence or other information.
(b) A person, a state agency, or a political subdivision as defined in s. 11.45 may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person’s reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.”

Specific exceptions to the prohibition against the use of drones are enumerated.[4] The statute further provides remedies for violation of its terms:

“(5)(a) An aggrieved party may initiate a civil action against a law enforcement agency to obtain all appropriate relief in order to prevent or remedy a violation of this section.
(b) The owner, tenant, occupant, invitee, or licensee of privately owned real property may initiate a civil action for compensatory damages for violations of this section and may seek injunctive relief to prevent future violations of this section against a person, state agency, or political subdivision that violates paragraph (3)(b). In such action, the prevailing party is entitled to recover reasonable attorney fees from the nonprevailing party based on the actual and reasonable time expended by his or her attorney billed at an appropriate hourly rate and, in cases in which the payment of such a fee is contingent on the outcome, without a multiplier, unless the action is tried to verdict, in which case a multiplier of up to twice the actual value of the time expended may be awarded in the discretion of the trial court.
(c) Punitive damages for a violation of paragraph (3)(b) may be sought against a person subject to other requirements and limitations of law, including, but not limited to, part II of chapter 768 and case law.
(d) The remedies provided for a violation of paragraph (3)(b) are cumulative to other existing remedies.”[5]

Section 166.021(1), Florida Statutes, a provision of the “Municipal Home Rule Powers Act,” states that municipalities may exercise any power for municipal purposes except when expressly prohibited by law. Section 166.021(3), Florida Statutes, provides that pursuant to the authority set forth in section 2(b), Article VIII, Florida Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject upon which the state Legislature may act except, among other things, any subject that is expressly prohibited by the constitution or any subject that is expressly preempted to state or county government by the Constitution or by general law.[6] The term “express” as used in section 166.021, Florida Statutes, has been construed to mean a reference that is distinctly stated and not left to inference.[7]

A review of section 934.50, Florida Statutes, does not reveal an express preemption of the regulation of drones, nor do the provisions of the statute appear to be so pervasive so as to preclude any other regulation by a local government.[8] At this time, there does not appear to be a uniform state law which would preempt local regulation of the use of drones by private persons in the manner proposed by the city.

As was established in *City of Miami Beach v. Rocio Corporation*[9]:

“The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation enacted by municipalities may not conflict with state law. If conflict arises, state law prevails. An ordinance which supplements a statute's restriction of rights may coexist with that statute, whereas an ordinance which countermands rights provided by statute
must fail.”

Accordingly, it is my opinion that section 934.50, Florida Statutes, does not preempt the adoption of a municipal ordinance prohibiting the use of drones equipped with imaging devices within the city limits by private individuals and entities, when such use invades the privacy rights of the city’s residents.

Sincerely,

Pam Bondi
Attorney General

PB/tls

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[1] Chapter 162, Fla. Stat., establishes administrative enforcement procedures and a means of imposing administrative fines by local governing bodies for violations of local codes and ordinances for which no criminal penalty has been specified.

[2] While you have limited your inquiry to the impact of s. 934.50, Fla. Stat., the Federal Aviation Authority and federal law may be implicated in the regulation of drones. Regrettably, this office does not interpret federal law, so it may be advisable to contact the Federal Aviation Authority for further direction.

[3] Section 934.50(2)(a), Fla. Stat., provides:

“‘Drone’ means a powered, aerial vehicle that:
1. Does not carry a human operator;
2. Uses aerodynamic forces to provide vehicle lift;
3. Can fly autonomously or be piloted remotely;
4. Can be expendable or recoverable; and
5. Can carry a lethal or nonlethal payload.”

[4] Section 934.50(4), Fla. Stat.:

“EXCEPTIONS.—This section does not prohibit the use of a drone:
(a) To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk.

(b) If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone.
(c) If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to,
facilitating the search for a missing person.
(d) By a person or an entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license. However, this exception does not apply to a profession in which the licensee's authorized scope of practice includes obtaining information about the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons.
(e) By an employee or a contractor of a property appraiser who uses a drone solely for the purpose of assessing property for ad valorem taxation.
(f) To capture images by or for an electric, water, or natural gas utility:
1. For operations and maintenance of utility facilities, including facilities used in the generation, transmission, or distribution of electricity, gas, or water, for the purpose of maintaining utility system reliability and integrity;
2. For inspecting utility facilities, including pipelines, to determine construction, repair, maintenance, or replacement needs before, during, and after construction of such facilities;
3. For assessing vegetation growth for the purpose of maintaining clearances on utility rights-of-way;
4. For utility routing, siting, and permitting for the purpose of constructing utility facilities or providing utility service; or
5. For conducting environmental monitoring, as provided by federal, state, or local law, rule, or permit.
(g) For aerial mapping, if the person or entity using a drone for this purpose is operating in compliance with Federal Aviation Administration regulations.
(h) To deliver cargo, if the person or entity using a drone for this purpose is operating in compliance with Federal Aviation Administration regulations.
(i) To capture images necessary for the safe operation or navigation of a drone that is being used for a purpose allowed under federal or Florida law."

[5] Section 934.50(5), Fla. Stat.

[6] Section 166.021(3)(b) and (c), Fla. Stat.

[7] *See Edwards v. State*, 422 So. 2d 84, 85 (Fla. 2d DCA 1982); Op. Att'y Gen. Fla. 84-83 (1984). *Cf. Pierce v. Division of Retirement*, 410 So. 2d 669, 672 (Fla. 2d DCA 1982).

[8] *Compare* Inf. Op. to Mr. James D. Palermo, dated September 25, 2002, Florida's Beverage Law does not expressly preempt local regulation prohibiting individuals under the age of 21 from entering a bar.

[9] 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981), *petition for review denied*, 408 So. 2d 1092 (Fla.

1981).