



**TOWN OF LOS GATOS
COUNCIL AGENDA REPORT**

MEETING DATE: 08/18/2020

ITEM NO: 9

DATE: August 18, 2020
TO: Mayor and Town Council
FROM: Lynne Lampros, Deputy Town Attorney
SUBJECT: Introduction by Title Only of an Ordinance of the Town of Los Gatos
Amending Chapter 18, by Adding Article IX, Sections 18.90.010- 18.90.050 of
the Los Gatos Town Code Entitled Drones and Unmanned Aircraft Systems

RECOMMENDATION:

Introduction by title only of an Ordinance of the Town of Los Gatos amending Chapter 18, by adding Article IX, Sections 18.90.010-18.90.050 of the Los Gatos Town Code entitled Drones and Unmanned Aircraft Systems.

BACKGROUND:

This Ordinance was first brought to Council on August 4, 2020 (see Attachment 1). At that time, Council members made the following suggestions and requests for clarification:

1. Did the prohibition against vision enhancing devices, such as "first-person view" goggles effectively prohibit 'drone racing'?
2. Did the prohibition against the use of model or civil drones within 500 feet of any active law enforcement or emergency response incident constrain legitimate news coverage and/or impact government transparency?
3. Did the prohibition on the use of drones in a manner which harasses, stalks, annoys, disturbs, frightens etc. any person, create a law that was not possible to follow or enforce given the subjectivity of the standard?

PREPARED BY: Lynne Lampros
Deputy Town Attorney

Reviewed by: Town Manager, Assistant Town Manager, Town Attorney, and Finance Director

DISCUSSION:

To further research these issues, staff consulted with Charles Raley, Senior Attorney for the Western Team, Enforcement Division of the Federal Aviation Administration (FAA); Dan Gettinger, Founder of the Center for Study of the Drone at Bard College in New York; and Jesse Crama, local FAA certified commercial unmanned aircraft systems (UAS) drone pilot and aerial photographer and drone enthusiast. Staff also reviewed other legislation, case law, and drone publications.

In Santa Clara County, only the City of Santa Clara and the County of Santa Clara have ordinances pertaining to UAS or drones. Other California municipalities with UAS/drone laws include Los Alamitos, Yorba Linda, Calabasas, and Hermosa Beach.

The FAA regulates 'small unmanned aircraft,' defined as under 55 pounds in 14 CFR (Code of Federal Regulations) Part 107 and 49 USC (United States Code) Title VII, Chapter 448. Large unmanned aircraft, over 55 pounds, is regulated in 14 CFR Part 91.

The FAA regulates the airspace and allows local jurisdictions to regulate for traditional local police powers, such as land use, zoning, privacy, and law enforcement operations. In other words, with regard to operation of the UAS, the FAA regulates the bubble of airspace, and the municipality can regulate the ground – the radius of the operator, as well as time, place and manner, and health and safety. Such regulations ensure that problems associated with drones can be addressed at the local level. However local regulations cannot preempt federal regulation.

Council Questions:

1. While 14 CFR Part 107.31 provides that the unmanned aircraft must remain within the visual line of sight (VLOS) of the operator or visual observer, 14 CFR 107.205 does note that regulation is subject to obtaining a waiver. Accordingly, the revised ordinance (Attachment 2) allows for first-person view goggles to be worn during authorized drone racing occurring on private property with consent of the property owner.
2. 49 USC 46320 makes it a federal crime to interfere knowingly or recklessly with fire suppression, law enforcement, or emergency response effort with a civil penalty of \$20,000. UAS/drone ordinances in other California cities, such as Los Alamitos (8.52.050), Yorba Linda (8.52.030), and Calabasas (9.10.030), contain prohibitions on drone operation within 500 feet of a law enforcement, fire, or emergency incident. The prohibition against interference with emergency responders is also addressed by state law in Penal Code sections 148.2 (making it a crime to interfere with firefighting) and 402 (making it a crime to go to the scene of an emergency or the activities of Police Officers during an incident, with or without drones, for the purposes of viewing, unless it is part of the duties of that person's

DISCUSSION (continued):

employment, and while there impedes the performance of the firefighter, law enforcement officer or emergency personnel).

There is further the issue of victim privacy rights that may be infringed on as a result of photographing or videoing by drone at the scene of a crime or emergency response. That concern could be said to be addressed by proposed Town Code section 18.90.030 (17) and civil privacy law.

The issue of First Amendment protection and use of drones is still a matter of conflicting lower court rulings in the various federal Circuit courts. It has been recognized that the right to record police activity has typically involved using a handheld device to photograph or videotape at a certain distance from and without interfering with the police activity at issue. One federal trial court held that news media directing a drone to hover over the site of a law enforcement/emergency operation was a trespass. It is unclear whether that would continue to be the legal position articulated by the courts.

Consequently, staff has removed the prohibition to drone operation within 500 feet of emergency response, and instead, relies on the general prohibition against interfering with law enforcement and emergency response. Note that there is public entity and employee immunity conferred by Government Code Section 853 for damage to a UAS if the UAS was interfering with emergency medical, firefighting, or search and rescue services.

3. The proposed Town Code section 18.90.030 (16) provides that the UAS shall not be used to annoy or harass (et al) anyone. Council noted that the subjectivity of the standard could lead to difficulties in upholding or enforcing the rule as written. Staff clarified the rule with specific reference to the reasonable person standard and persons of ordinary sensibilities.

CONCLUSION:

Staff recommends that Council accept public comment and then move for the introduction and first reading of an Ordinance, by title only, amending Chapter 18, by adding Article IX, Sections 18.90.010-18.90.050 of the Los Gatos Town Code Entitled Drones and Unmanned Aircraft Systems.

ALTERNATIVES:

Council could refer the matter back to staff for consideration of any additional issues.

PAGE 4 OF 4

SUBJECT: Drones and Unmanned Aircraft Systems Ordinance

DATE: August 18, 2020

COORDINATION:

This report was coordinated through the Town Attorney's Office and the Parks and Public Works Department, and the Police Department, as well as counsel for the FAA, experts in the commercial and recreational drone fields.

FISCAL IMPACT:

There are no fiscal impacts associated with the approval of these amendments. Potential enforcement costs may be offset by penalties levied.

ENVIRONMENTAL ASSESSMENT:

This is not a project defined under CEQA, and no further action is required.

Attachments:

1. August 4, 2020 Staff Report
2. Draft ordinance – redline
3. Draft ordinance – clean version