AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

 Fall 2016

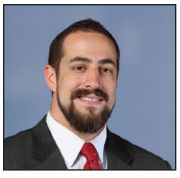
WELCOME LETTER

Friends:

We are pleased to bring you this edition of Heyl Royster's Governmental Newsletter. We strive to bring you informative and timely articles to help you navigate the complex and ever changing legal environment. This month John Heil brings you the latest changes affecting the operation of drones. This rapidly expanding frontier is a tricky area for the uninitiated and John's article brings us all up to speed. Next up, Melissa Schoenbein discusses the ins and outs of the administrative review process. Her article is of upmost importance to public bodies and practitioners alike. While you've certainly heard of the Illinois Environmental Protection Agency and U.S. Department of Transportation, many do not fully appreciate the full extent of the rule-making powers and authority of these agencies. Melissa's article offers us all a great launching pad for understanding this difficult topic. Finally, the chair of Heyl Royster's Governmental Practice Group, John Redlingshafer, offers his expertise on recent case law on the use of immunities by private non-profits.

Don't forget to sign up for the Township Officials of Illinois Annual Educational Conference (November 13-15 at the Crown Plaza in Springfield). John and I will be there speaking on several topics and we welcome you to stop by our happy hour on Monday, November 14.

If you have any questions about your specific unit of government, please contact one of our team members. We look forward to hearing from you.



Andrew Keyt
Governmental Practice Group

THE NEW DRONE REGULATIONS ARE HERE! HOW DO THEY AFFECT MUNICIPALITIES?

By: John Heil
jheil@heylroyster.com

Nearly every unit of local government will encounter questions relating to drones, or "Unmanned Aerial Systems" (UAS), in the near future. The recreational use of drones, frequently in the form of small camera-equipped "quadcopters," has expanded exponentially over the past couple of years. The Federal Aviation Administration (FAA) estimates that, in 2016 alone, 2.5 million drones will be sold in this country. The commercial use of UAS, although frequently the subject of news stories, has developed at a slower pace due to strict FAA regulations limiting non-recreational drone operations.

On August 29, 2016, however, the rules of the game changed. A new civil UAS rule took effect that makes it much easier for individuals and businesses to obtain permission to use drones. For municipalities and other governmental entities, there are challenges and benefits associated with this new landscape. Through this article, Heyl Royster's Governmental Practice Group, in association with its Drone Law Practice Group, briefly reviews the basics of the new regulations and how they affect local governments. The myriad implications of increased UAS use are far beyond the scope of this article. Of great significance to municipalities is what the FAA is not doing with its new rule: it is steering clear of a wide variety of areas typically subject to state or local control. In many respects, municipal leaders retain the authority to regulate drone use in their communities.

History and Basics of the New Rule

The FAA generally classifies drone operations as either civil (non-governmental) and public (governmental). At the behest of Congress, it separately treats drones used privately for purely recreational purposes as "model aircraft." The new

continued on Page 2

rule does not affect this classification, which will continue to allow hobbyists to register and fly drones weighing less than 55 pounds, with certain restrictions. The vast majority of UAS operations thus far encountered by local governments fit into the recreational/model aircraft category. Mishaps of all kinds, caused by adults and children, have accompanied the increasing use of drones for recreational purposes. In an effort to impose some level of accountability, the FAA now requires recreational UAS operators to register their drones online with the agency. The process is voluntary, however, and compliance has been far from universal. Unfortunately, the poor judgment and immaturity of a few operators continues to plague the recreational use of drones.

While hobbyists were flying their drones at will, anyone seeking to utilize these same devices for business purposes was, until August 29, 2016, banned by FAA regulation from doing so. Recognizing the inequity of the situation, the FAA developed a process whereby would-be commercial operators could obtain an exemption to the ban (referred to as a "Section 333 Exemption"). The exemption application process was a complicated and arduous one. It typically took 120 days and, even if granted, flights could only be conducted by a licensed airplane pilot. As one might expect, few small business owners possessed the resources or patience to commit to hiring a pilot or training for months in a Cessna. Nevertheless, certain determined business sectors incorporated drones into their operations through Section 333 exemptions. The agriculture, photography, infrastructure inspection, and real estate industries are a few of the most notable examples. Further expansion of commercial UAS required a more permissive regulatory environment.

The FAA's new rule, Title 14 of the Code of Federal Regulations part 107, is referred to as the "Small UAS Rule" or, more commonly, "Part 107." Part 107 represents the first significant effort to incorporate civil UAS into the national airspace. The process was a long one, first initiated by the FAA Modernization and Reform Act of 2012, which directed the Secretary of Transportation to prepare a comprehensive plan and proposed regulations for governing the civil use of drones. In February 2015, the FAA introduced its long-overdue proposal. After a protracted period of public comment and re-writing, the final rule was announced on June 21, 2016. As stated above, it became effective on August 29, 2016.

Part 107 dispenses with the need for formal pilot training. Instead, applicants 16 years of age or older must earn a "remote pilot certification" by passing an FAA-administered aeronautical knowledge test and a Transportation Security Administration background screening. The exam is administered electronically, and the FAA predicts a 90% passage rate assuming 20 hours of preparation. Certified remote pilots are free to operate UAS for commercial or recreational purposes. Over 3,300 people signed up for the test on the first day.

Part 107 further requires that participating drones be registered, weigh less than 55 pounds, and fly below 400 feet at groundspeeds not to exceed 100 miles per hour. Unless a specific waiver is granted, UAS operations must take place within the "visual line of site" of the operator during daylight hours, and not over people uninvolved in the flight. Notably, the new rule permits the transportation of cargo for compensation, so long as the drone remains within the visual line of site of the operator, does not cross state lines, and does not bring the total weight of the drone above 55 pounds. The "visual line of sight" requirement for cargo delivery means that Amazon and other retailers, who have expressed the intention of providing such services, will continue to lobby for further amendments to the rule.

State and Local Regulation

In December 2015 (several months before enactment of Part 107), the FAA estimated that 11 million commercial drones will be sold by 2020. Combined with the millions of consumer drones crisscrossing our nation's skies, it is clear that local governments will need to plan for addressing drone-related incidents in the coming years. In so doing, they must recognize the dividing line between the FAA's area of influence and their own.

Federal law affords the FAA with the exclusive authority to regulate use of the national airspace. This makes sense. Allowing states or municipalities to pass their own laws affecting navigable airspace could lead to a "patchwork quilt" of varying requirements that would hamstring cross-country aviation in our country. That being said, laws traditionally related to state and local police power, such as land use, zoning, privacy, trespass, and law enforcement operations, are beyond the FAA's reach. Part 107 recognizes these limitations

and, thus, permits state and local authorities to regulate certain aspects of UAS operations.

The land use and zoning powers, if utilized for the purpose of protecting persons or property, should allow for ordinances prohibiting or otherwise regulating take-offs and landings from certain designated locations. For example, municipalities are likely free to prohibit drone flights originating and concluding on or around school property and playgrounds, lest children be placed at unnecessary risk. Property rights and privacy concerns also seem ripe for state and local legislative activity. Neighbor-on-neighbor disputes caused by drone overflights are becoming common. Privacy questions relating to law enforcement's use of drones are more profound, as they implicate constitutional rights. In recognition of this potential problem, the State of Illinois passed a law designed to limit police departments' use of UAS. The Freedom from Drone Surveillance Act, 725 ILCS 167/1, in effect since 2014, generally prohibits the use of drones for aerial surveillance without a search warrant.

Local Government Uses

Much like they are for business, drones are providing municipalities with opportunities to improve the services they provide. Real-time aerial views afford increased capabilities to first responders. For example, drones using cameras and thermal imaging technology provide fire departments with the ability to better deploy personnel and equipment while fighting fires. Search and rescue personnel are benefiting from drone use, particularly in areas with vast or challenging terrain. Police uses, although limited by civil liberty concerns, are still many. Applications previously reserved for helicopters can be performed far more cheaply, and likely more safely, through UAS.

Part 107 is not intended to apply to local governments, but can. Until recently, the FAA required governmental entities to obtain a blanket public "Certificate of Waiver or Authorization" (COA) for UAS use. Although similar to the old Section 333 exemption process requiring a licensed pilot, public COAs allow applicant municipalities to self-certify their pilots and to obtain greater freedom of use if emergency circumstances warrant it. According to the FAA, public entities now have the option to fly under Part 107. This is a tempting alternative, since it relieves municipalities of the need for licensed aircraft pilots.

No matter the use for drones contemplated, local governmental officials must remain cognizant of citizens' unease with these devices. A gradual introduction of these systems may, depending upon the municipality, quell fears of government overreaching until such time as commercial drones are more readily visible in our nation's skies.

Conclusion

Local governments will be challenged in the years ahead to address the sea change in commerce, recreation, and municipal services afforded through the rapid development of UAS. Part 107, having removed a number of restrictions to drone use, may cause municipalities to consider enacting restrictions of their own. In light of the FAA's exclusive authority in the skies, they may consider ground-based restrictions for public safety purposes. They may even find that municipal drone use enhances their public safety capabilities. If you need advice about how best to negotiate the new regulatory landscape, please contact us at any time.

John Heil was a trial attorney with the Cook County State's Attorney's Office for eleven years before joining Heyl Royster. During his years as a prosecutor, he prepared and argued hundreds of motions, over one hundred bench trials, and eighteen felony jury trials. As a partner at Heyl Royster, John is a Vice-Chair of the firm's Business and Commercial Litigation Practice, Chair of the firm's Drone Law Practice, and the head of the Peoria office's Mentoring Program.

Administrative Review: A Trap for the Unwary?

By: Melissa N. Schoenbein
mschoenbein@heylroyster.com

Administrative agencies are part of the federal and state government with the power to implement legislation. Illinois administrative agencies oversee a variety of interests, including public health and assistance, transportation, education, agriculture, natural resources, law enforcement, revenue, and commerce. Well-known examples of state agencies include the Department of Agriculture, the Commerce Commission, and the Board of Education.

An administrative agency is created by an enabling statute, which provides the agency with rule-making authority and the power to make decisions. There are three avenues to review an agency's decision in an Illinois circuit court. The first is by the agency's enabling act itself; the Workers' Compensation Act is a perfect example. Second, the Illinois Administrative Review Law (ARL), 735 ILCS 5/3-101, governs the judicial review of an agency's decision if the agency's enabling act expressly adopts the ARL. Finally, if the act is silent, an administrative order can be appealed by filing a writ of *certiorari* in the circuit court.

This article describes the judicial review process under the ARL and what agencies, commissions, or boards must do when their decisions are scrutinized.

Administrative Decisions

According to the ARL, an "administrative decision" is any determination or order "which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency." 735 ILCS 5/3-101. Administrative decisions affect the rights and interests of the public.

A "decision" does not include rules or standards issued by an agency to implement the legislation it enforces, nor does it encompass regulations related to an agency's internal management. *Id*.

Decisions May be Subject to Judicial Review

Illinois circuit courts are empowered to review administrative agencies' final decisions by the ARL, 735 ILCS 5/3-101 *et seq*. The General Assembly designed the ARL to provide a straightforward way to review administrative decisions.

The first step of the administrative review process is to determine under which review provisions the appeal will proceed. A review of the agency's enabling statute will reveal if the ARL applies and vests circuit courts with jurisdiction to review administrative decisions. For example, the judicial review section of the Liquor Control Act, 235 ILCS 5/1-1 *et seq*, which established the Illinois Liquor Control Commission, adopts the ARL.

> Judicial review. All final administrative decisions of the State Commission under this Act shall be subject to judicial review pursuant to the provisions of the Administrative Review Law and the rules adopted pursuant thereto. Judicial review may be requested by any party in interest, including but not limited to the local liquor control commissioner. 235 ILCS 5/7-11.

Consequently, the Commission's administrative decisions are subject to judicial review in Illinois circuit courts.

Exhaustion of Administrative Remedies

Illinois circuit courts have jurisdiction to review an agency's final decision only if all administrative remedies are exhausted first. Depending upon the specific agency's requirements, exhaustion of administrative remedies could include an investigation, attempted settlement, a hearing before the Commission, and a motion for rehearing. Exhaustion of administrative remedies can be a long and arduous process, but it has its benefits.

"Requiring the exhaustion of remedies allows the administrative agency to fully develop and consider the facts of the cause before it; it allows the agency to utilize its expertise; and it allows the aggrieved party to ultimately succeed before the agency, making judicial review unnecessary." *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 308 (1989). Requiring parties to first pursue administrative remedies, such as a petition for rehearing, permits the agency to correct its own errors and conserves judicial resources. *Castaneda*, 132 Ill. 2d at 308.

The agency's enabling statute should be carefully reviewed to determine what steps are required to exhaust administrative remedies. The Illinois Human Rights Act, for instance, outlines specific procedures for redressing alleged employment discrimination charges. After following the procedures set forth in the Act, a party can then appeal the Commission's decision to the appropriate circuit court.

Exceptions to the Exhaustion of Remedies Doctrine

As it seems with any legal rule, there are exceptions to the exhaustion doctrine. An aggrieved party may seek judicial review of an administrative decision without exhausting administrative remedies for several reasons, including if:

- A statute, rule, or ordinance is attacked as unconstitutional on its face;
- Multiple remedies exist and at least one was completed;
- Irreparable harm would result from continued pursuit of administrative remedies; or
- Agency expertise is not involved.

Arvia v. Madigan, 209 Ill. 2d 520, 532-33 (2004).

Initiating an Administrative Appeal

The ARL requires that all judicial reviews must begin by filing a complaint and serving summons within 35 days from the date that a copy of the final decision was served. 735 ILCS 5/3-103. A decision is considered "served" when a copy is personally delivered or deposited in the U.S. mail. *Id.*

continued on Page 6

HEYL ROYSTER PRESENTS:

Employers' Day 2016

Minimizing Exposure While Protecting Your Workplace Environment

Please join us for a free Employers' Day Seminar, presented by Heyl Royster's Employment & Labor, Governmental and Workers' Compensation practices. Protect your business and get in the know on the latest issues that affect your workplace. Some of the topics include:

- Workplace Stress Claims (including PTSD)
- Freedom of Information Act Compliance
- Retaliation: Religious, Transgender
- FMLA, ADA, and Workers' Compensation Leave Issues
- 2016 FLSA Amendments: DOL New Overtime Rules
- Sexual Harassment Awareness and Prevention
- Plus much, much more

November 3rd in Naperville, IL &
November 10th in Peoria, IL

Visit www.heylroyster.com to register!

The requirements for initiating an appeal can seem stringent. For instance, rules abound on where to file, who to serve, and whom to name as defendants. Litigation often arises for failure to comply properly with initiation procedures.

Filing an Answer to the Complaint

Upon being served with the complaint, the administrative agency is required to file an answer "consisting of a record of the proceedings had before it, or a written motion in the cause or a written appearance." *Id*. at 3-106. The agency, as a defendant, does not need to respond specifically to each allegation, as is common practice in general civil litigation. *Kaminski v. Illinois Liquor Control Comm'n*, 20 Ill. App. 3d 416, 421-22 (1st Dist. 1974). A wide array of defensive motions are available to defendants, including motions to dismiss. *Davis v. Chicago Police Bd*., 268 Ill. App. 3d 851, 855 (1st Dist. 1994).

Agency Decisions are Entitled to Deference

There is a presumption that an administrative agency's actions and factual determinations are proper. *Watra, Inc. v. License Appeal Comm'n,* 71 Ill. App. 3d 596, 602 (1st Dist. 1979). However, an agency's interpretation of the law is entitled to no deference and may be determined by the reviewing court *de novo*. *Envirite Corp. v. Illinois EPA*, 158 Ill. 2d 210, 214 (1994). When there is evidence that supports the administrative agency's decision, a reviewing court will uphold the decision. The plaintiff filing the administrative review has the burden to prove that the agency's decision was incorrect. *Rasky v. Dep't of Registration & Educ.*, 87 Ill. App. 3d 580, 588 (1st Dist. 1980).

Appellate Court Review

A circuit court's order is appealable in the Illinois appellate courts under the ARL. 735 ILCS 5/3-112. A party must file its notice of appeal within 30 days of the circuit court's order on review. From that point forward, the appeal proceeds in the same manner as any other civil appeal and is governed by the Rules of Appellate Procedure.

Conclusion

The administrative review process, although full of intricacies, was not meant to be a trap for the unwary. By carefully reviewing the ARL and the controlling administrative statute or regulations well in advance of your appeal, many of these issues can be eliminated and the risk of having your review dismissed for a jurisdictional problem can be substantially reduced. If you have any questions regarding administrative appeals, please do not hesitate to contact us for assistance.

Melissa Schoenbein is the Vice President of the Central District Chapter of the Federal Bar Association and serves on the Appellate Lawyers Association's Seminar Committee. She has published several articles in renowned legal publications, including *The Journal of Legal Medicine, Legal Medicine Perspectives, National Law Review*, and the *IDC Quarterly*.

Court Addresses a Private "Society" Seeking Immunity

By: John Redlingshafer
jredlingshafer@heylroyster.com

Most private "societies" or "foundations" do not have to worry about the same laws as public bodies. For example, the Board of Directors for a not-for-profit agency is typically not required to be an expert in Open Meetings and Freedom of Information laws (although, the lines are getting more and more blurred with each passing day). However, a case was recently decided where such a "society" was seeking the same protection as a public body.

An injury occurred several years ago at the Brookfield Zoo, which is operated by the Chicago Zoological Society. The Society argued that the case was not timely filed, because the society was protected by the Illinois Tort Immunity Act, which requires a plaintiff to file a lawsuit within one year of the injury. The Society argued the Act applied because it not only protects a typical public body, but also a "not-for-profit corporation organized for the purpose of conducting public business." See 745 ILCS 10/1-206. The Society felt that its "public business" was maintaining a zoo on land owned by

the Forest Preserve District of Cook County, which is also a local public entity.

The appellate court disagreed, concluding that the Society had failed to demonstrate that its activities were actually controlled by the District, and therefore, was not the same as a public body. The court noted several important facts that led to its decision, including: the District had delegated control of all daily operations of the zoo to the Society; only four members of the District's board sat on the Society's board or served among its leadership; 90 percent of the Society's leadership was not employed by the District; and that less than half of the Society's funding derived from taxes levied by the District.

The Illinois Supreme Court granted leave to hear the case and agreed with the lower court. According to the Supreme Court, "[a] not-for-profit corporation only conducts the operation of the government's public business if it is controlled by the government." *O'Toole*, 2015 IL 118254, ¶ 23. In essence, "the key inquiry in cases like this is whether the not-for-profit corporation seeking tort immunity remains subject to ""operational control by a unit of local government.'" *Id*.

In its own analysis, the Supreme Court found that the District maintained control over the real property under the zoo, and "the District and the Society share control over the other property of the zoo." *Id*., ¶ 24. However, a contract between the parties demonstrated "the Society controls the daily operations of the zoo." *Id*., ¶ 25.

That led the Court to conclude the District did not exercise operational control over the Society and as a result, the Society was not able to get the case dismissed as the one year deadline for the plaintiff to file did not apply.

John Redlingshafer is chair of the firm's Governmental Practice. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. John currently serves on the Tazewell County Board and is a past President of the Illinois Township Attorneys' Association.

Heyl Royster serves clients in every county in Illinois. We have offices in six major population centers in Illinois - Peoria, Chicago, Edwardsville, Rockford, Springfield, and Urbana - which allows us to appear in any Illinois state or federal court quickly, effectively, and cost-efficiently for our clients. Our offices collaborate with each other and with our clients to achieve client goals. Our statewide practice has earned Heyl Royster a reputation for innovation, excellence, and professionalism and brings our clients a specialized knowledge of the courts and adversaries we face.

heylroyster.com

For More Information

If you have questions about this newsletter, please contact:

Peoria & Chicago

Timothy L. Bertschy
E-mail: tbertschy@heylroyster.com

Chrissie L. Peterson
E-mail: cpeterson@heylroyster.com

John M. Redlingshafer
E-mail: jredlingshafer@heylroyster.com

Peoria Phone: (309) 676-0400
Chicago Phone: (312) 853-8700

Springfield

John O. Langfelder
E-mail: jlangfelder@heylroyster.com
Phone: (217) 522-8822

Urbana

Keith E. Fruehling
E-mail: kfruehling@heylroyster.com
Phone: (217) 344-0060

Rockford

Mark J. McClenathan
E-mail: mmcclenathan@heylroyster.com
Phone: (815) 963-4454

Edwardsville

Michael D. Schag
E-mail: mschag@heylroyster.com
Phone: (618) 656-4646