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July 8, 2019

Ms. Anita Ramasastry
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010

Dear Ms. Ramasastry,

I write today to express my significant concerns regarding the current draft of the Uniform Tort Law Relating to Drones Act (the "Act"), and recommend that the full Uniform Law Commission ("ULC") not pass it.

The Act charts the wrong course for resolving the conflicts already occurring—and certain to become more frequent—between drone operators and property owners in the very low altitude airspace adjacent to our homes and communities. The Act effectively creates a presumptive right for drone operators to fly anywhere, even one inch above someone's backyard, while people are present for a private gathering. If the owner of the property objects to such intrusive behavior, his or her only recourse would be to sue and hope to prevail under the Act's tortuous (and non-exhaustive) 13-factor aerial trespass test. This aerial trespass scheme substantially hinders the ability of property owners to address unwanted intrusions, and is in fact, as pointed out by Professor Henry Smith in his June 20 letter (the "Smith letter") even less protective than the existing aerial trespass doctrine for manned aviation.[1] The complexity and cost of the litigation called for under this Act will almost certainly have a chilling effect on owners seeking to challenge drone operators, particularly when the operator is a well-funded multinational corporation. In fact, the Act is so skewed against property owners that it does not provide them with so much as a rebuttable presumption that a drone flying mere inches above the ground has indeed committed a trespass.

The Committee justifies this largely by claiming that drones are "aircraft" and that the airspace in which they fly is "navigable," or what the law treats as a "public highway" through which everyone has a right to transit.[2] As a result, the Committee claims, property owners simply cannot exclude drones. This is simply not the case. The Federal Aviation Administration (FAA) has made a regulatory determination that the federal legal term "aircraft" includes drones; this decision, however, is not determinative of how states should address, for purposes of trespass law, extremely low-level drone flights. Indeed, even the FAA acknowledged in a 2015 fact sheet that "[l]aws traditionally related to state and local police power—including land use, zoning, privacy, trespass, and law enforcement operations—generally are not subject to federal regulation."[3] Nor has the FAA formally redefined the "navigable airspace" to include every cubic inch of air down to the ground. Even if it were to do so, at least one federal judge has expressed grave doubts that so massive a regulatory power grab at the expense of the states is permissible under existing law or the Constitution.[4] The Committee Memorandum and the Act's Prefatory Note, however,

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[1] Smith Letter
[2] *See*, the Act, Prefatory Note. For the statutory definition of the "navigable airspace," see 49 USC § 40102(a)(32).
[3] Federal Aviation Administration, *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*, Dec. 17, 2015, https://www.faa.gov/uas/resources/policy_library/media/UAS_Fact_Sheet_Final.pdf.
[4] *Huerta v. Haughwout*, No. 3:16-cv-356 (JAM), 2016 WL 3919799 (D. Conn. July 18, 2016), at 8. "It appears from oral argument as well as from the FAA's website that the FAA believes it has regulatory sovereignty over every cubic inch of outdoor air in the United States (or at least over any airborne objects therein). If so, that ambition may be difficult to reconcile with the terms of the FAA's statute that refer to 'navigable airspace,' *see, e.g.,* 49 U.S.C. § 40103(b)…Congress surely understand that state and local authorities are (usually) well positioned to regulate what

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treat it as a given that the air adjacent to every yard, every home, every farm, and every business is no longer the owner's alone, but is in fact a public domain under federal control. One suspects that the property owners whose rights this Act so casually casts aside would disagree with this assessment.

Having been involved in the Drafting Committee's ("Committee") deliberations as an observer, I have developed a deep respect for the ULC's commitment to a collegial and deliberative process. This approach is the best way to strike a balance between the interests of all stakeholders. However, that process can only function when all the stakeholders around the table are willing to compromise. This, sadly, has not been the case. For years, representatives of the "drone industry" have worked to advance policies that would give its largest commercial members the widest possible latitude to operate while holding them to the minimum level of account when their conduct offends those over whom they fly. They have lobbied Congress and regulators with the goal of preempting and blocking state and local government efforts to regulate, pursuant to their inherent police powers, drone conduct which directly impacts their jurisdictions. Now with the ULC, the industry seeks a proposal that denies individual property owners any firm right to exclude drones, no matter how low they may fly. In the course of lengthy deliberations, industry groups have demonstrated little willingness to compromise on this point. Its representatives argued against a *per se* rule, and publicly attacked the ULC for proposing one.[5] In May, industry groups even promised to "vigorously oppose" this Act if it were modified to afford property owners a presumption that "substantial interference" has occurred for a low-level overflight.[6]

I understand the incentives for private companies to seek legislation that advantages them. However, the ULC bears the responsibility of crafting sensible, rational, and fair public policy suitable for uniform adoption throughout the nation. If the ULC passes this one-sided Act, it is endorsing the subordination of the long-held legal rights of millions to the commercial interests of corporations and drone operators. Any state which subsequently enacts it will be seen to do the same. This Act will prove so controversial and lopsided that this "uniform" tort law will almost certainly fail to pass in numerous state legislatures, if it passes any at all.

The opportunity now before the ULC is to reject this proposal and return it to the Drafting Committee. The Committee's initial approach—which established a bright line *per se* trespass standard—is far simpler and cleaner, and would produce predictable outcomes for both drone operators and landowners. Protecting property rights—including a *per* se trespass standard up to a reasonable height—and advancing efficient drone operations are not mutually exclusive, and this approach should be the framework for future discussions.

Further, as the letters and comments from property law experts and organizations opposed to this draft have made clear, their expertise and voice are needed around the table if the Committee is to succeed in developing a compromise that facilitates drone activity without unduly diminishing the rights of property owners.

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people do in their own backyards… No clause in the Constitution vests the federal government with a general police power over all of the air or all objects that leave the ground."

[5] Brian Wynne, Gary Shapiro, *The Biggest Threat to Drone Innovation is a Group You've Never Heard* Of, TECHCRUNCH (Oct. 25, 2018), https://techcrunch.com/2018/10/25/the-biggest-threat-to-drone-innovation-is-a-group-youve-never-heard-of/. Industry now praises the ULC for offering the present, greatly modified, Act. Brian Wynne, Gary Shapiro, *The Biggest Threat to Drone Innovation is a Group You've Never Heard* Of, TECHCRUNCH (Jul. 3, 2019), https://techcrunch.com/2019/07/03/new-approach-to-state-drone-laws-balances-privacy-and-innovation/.

[6] *See*, Comments from NetChoice, et al, submitted May 15, 2019.

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Finally, I have included below a short and non-exhaustive list of shortcomings to the current approach which counsel strongly against passage.

1. The Act purports to transform airspace immediately above private land into a public highway, seriously degrading the long-standing property rights of owners.
Prior to the advent of manned aviation, the common law *ad coelum* doctrine provided that landowners possessed an unlimited column of airspace extending from the ground to the heavens.[7] Unquestionably, this doctrine is no longer in effect. In 1926, Congress abrogated it in the interest of fostering manned aviation.[8] Aircraft were flying longer distances at higher altitudes, and it became impractical for a pilot to secure an avigation easement from thousands of individual property owners—particularly given that these flights would take place tens of thousands of feet above the ground, where they are seldom seen and never heard. The Supreme Court subsequently upheld Congress' action in the 1946 case *United States v. Causby*.[9]

Crucially, however, neither Congress nor the high Court has acted to outright eliminate airspace property rights. Rather, both institutions have recognized a distinction between high- and low-altitude airspace. Congress reserved the former, the "navigable airspace," as an aerial highway which generally begins at an altitude of 500 feet, in which Americans have a right to transit.[10] The Supreme Court in *Causby,* meanwhile, affirmed that the latter remains, of necessity, within the possession of whoever owns the land beneath. As the opinion in *Causby* made perfectly clear, the airspace may be a public highway, but "if the landowner is to have full enjoyment of the land, ***he must have exclusive control of the immediate reaches of the enveloping atmosphere.***"[11] *Causby* remains good law; thus, there is the high altitude "navigable airspace" that constitutes an aerial public highway, and the low-altitude "immediate reaches" that is unquestionably private property attached to the land beneath.

Troublingly, the Act cites *Causby* to justify effectively eliminating that distinction altogether. The Committee Memorandum expressly states that it determined that the "airspace in which drones can fly is navigable airspace of the kind described in *Causby* and the Restatement." In other words, the Act purports to bring the high altitude aerial highway Congress created in 1926 *all the way down to the ground*. As the Smith letter rightly points out, this effectively "imposes a presumptive navigation servitude on every cubic centimeter of space above the surface of the land"[12]—in other words, it eviscerates the "exclusive control" which property owners enjoy under *Causby*. That may seem like a trivial concern today, as most drone flights are infrequent, one-off events. But that will soon change. As the Prefatory Note observes, drones are rapidly proliferating and in just three years will total between 1.96 and 3.17 million, according to estimates from the Federal Aviation Administration (FAA).[13] Major companies are already testing platforms for large-scale commercial operations in populated areas; one test by Google's Project Wing

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[7] *See* Bury v. Pope, 1 Cro. Eliz. 118, 78 Eng. Rep. 375 (Q.B. 1587). *See also*, James D. Hill, *Liability for Aircraft Noise—the Aftermath of Causby and Griggs*, 19 U. MIAMI L. REV. 1, n.3 (1964).
[8] The Air Commerce Act of 1926, Pub. L. No. 69-254.
[9] 328 U.S. 256 (1946).
[10] 49 U.S.C. § 40103(b) sets out that the FAA "shall develop plans and policy for the use of the navigable airspace…" The navigable airspace is defined in 49 U.S.C. § 40102(a)(32) as "the minimum altitudes of flight prescribed by regulations." The FAA regulations which lay out the minimum altitudes are contained in 14 CFR 91.119, and generally begin at 500 feet above ground level in unpopulated areas.
[11] *Supra* note 9, at 264 (emphasis added).
[12] Smith letter, at 6.
[13] Act, Prefatory Note

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drew the ire of local residents in Canberra, Australia for the noise and frequency of overflights.[14] This the future of the drone "aerial highway": it will not be an unfrequented back road, but a vibrant freeway, and this Act places it in the backyards of millions of Americans.

2. The Act essentially empowers individuals to violate the property rights of others merely because the offending object is a drone.

Property law has long recognized the right of landowners to exclude any number of aerial intruders that cross their property line, even if the offending object does not come into contact with his real or personal property. The Restatement (Second) of Torts, Section 159(1) plainly states that "a trespass may be committed on, beneath, or above the surface of the earth."[15] The Restatement clarifies that this protection applies to, for instance, overhanging structures, telephone wires, a waving arm, a balloon, or a projectile. In these cases, owners have a right to—and expect that they can—demand the removal of the interloper. And as the Joint Editorial Board for Uniform Real Property Acts ("JEBURPA") pointed out in its letter to the ULC, given the character of existing trespass law, landowners would reasonably expect this right to apply to drones at similar altitudes.

Nevertheless, Section 5(a) of the Act proposes to radically scale back this right by adopting a nuisance-like requirement that a landowner show not only that the offending drone penetrated "the airspace over the land possessor's real property" but also that it "causes substantial interference with the use and enjoyment of the property." It is true that Restatement Section 159(2) similarly adopts, as regards manned aviation, a requirement that landowners show that an overflight caused substantial interference to prevail in a trespass claim. It is not the case, however, that this doctrine so plainly applies to drones as to be casually cross-applied, as the comments suggest.

For most of the history of aviation, drones—long referred to as "model aircraft"—were not considered "aircraft" for the purposes of federal law.[16] "Aircraft" were widely understood—including by the drafters of the Restatement and the Justices in *Causby*—to be manned vehicles markedly different than the drones at issue in this Act. *Causby*, for instance, dealt with large military aircraft which bear no resemblance to the small drones proliferating in US skies. Drones are generally small, operate almost exclusively at low—sometimes very low—altitudes, and may loiter over particular areas in a way most aircraft cannot. Manned aircraft, by contrast, are generally larger, fly at high altitudes, and for long distances. Even the Committee itself concedes in the Act's Prefatory Note and the Memorandum of June 10 (the "Memorandum") that drones and manned aircraft are fundamentally different, and so too are many of the challenges they pose. No compelling reason is given to ignore these differences and treat drones as "aircraft." The implication seems to be that, because the Federal Aviation Administration (FAA) has determined that drones are "aircraft," states ought to fall in line and modify their tort laws according to the decisions of a federal regulatory agency. That justification is severely lacking. Adopting this Act would produce outcomes that are, from the perspectives of property owners, truly bizarre.

Consider how the trespass regime created by the Act would play out in the real world. Suppose you see a stranger walking across your lawn without permission; you would be well within your rights to demand

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[14] https://www.wsj.com/articles/delivery-drones-cheer-shoppers-annoy-neighbors-scare-dogs-11545843552.
[15] Restatement (Second) of Torts § 159.
[16] *See*, Jason Snead, *The SkyPan Case: FAA Enforcement of Nebulous Drone Rules Undercuts the Rule of Law*, HERITAGE FOUNDATION BACKGROUNDER NO. 3197 (Mar. 16, 2017), https://www.heritage.org/sites/default/files/2017-03/BG3197_0.pdf.

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he immediately leave. The stranger would be compelled to do so because he is clearly trespassing; if he lingers, you are free to call the police, who could quickly resolve the situation. Any resulting litigation could be easily disposed of in court. Now consider that instead of a stranger, you see a strange drone hovering at eye level. Even assuming you can identify the operator, you have no default right to demand that the operator vacate the airspace over your lawn. The operator may not wish to; he may be engaged in a business activity, or may simply feel he has a right to fly there because the Act gives him a presumptive right to fly where he pleases. Regardless, if the operator and owner cannot come to an agreement, under this Act there is no easy resolution of this conflict because of the vague standards laid out in the Act. And lest one believe that drone operators will surely be respectful of property owners' rights and wishes in low-altitude airspace, consider that the July 1 letter from industry groups calls any comparison between a drone operating at 15 feet and a traditional trespass "facile."[17] In other words, drone users are seeking the right to operate in this space. It is therefore difficult to escape the perception that this Act empowers individuals to do things, remotely via drone, which the law otherwise clearly prohibits, such as occupying and using the property of another.

3. The Act creates a 13-factor test for proving "substantial interference" that is unworkable, burdens courts, will deter from property owners for pursuing meritorious claims, and results in unpredictable judgements.

The Act's solution to resolving the inevitable conflicts between drone operators and landowners is, remarkably, a non-exhaustive 13-factor balancing test which the Committee euphemistically calls "clarity."[18] It is difficult to take that claim seriously.

To begin, nothing is simpler or clearer than a *per se* trespass standard which affords property owners clear title to a reasonable portion of the airspace near the land, and which allows them to exclude drones from this zone as they would other similar aerial intruders. Under such a bright line rule, proving a trespass is a simple question of location; if the drone is inside one's three-dimensional property without permission, a trespass has likely occurred. Like trespass to land, specific exemptions can be made for conduct, such as emergency response or certain law enforcement activities, that are tailored to permit specific conduct without ameliorating the owner's property interest. The Committee's earlier draft adopted just such an approach, which promised to establish clear, reasonable, and predictable sets of rules under which both drone operators and landowners would understand their respective rights. One obvious benefit of this is that conflicts could be resolved relatively easily, without the bother or expense of litigation.

The Committee now rejects this approach as supposedly unworkable, and instead proffers a multi-factor balancing test that transforms every dispute over a drone trespass, whether one millimeter hundreds of feet up, into a fact-intensive inquiry which can *only* be resolved in court. Alarmingly, two of these factors are "the operator's purpose" and "the nature of the [owner's] use and enjoyment of the property." The Act thus explicitly invites courts to judge the validity of a property interest based on ad hoc, highly subjective judgements about the relative value of, say, a package delivery service compared to a solitary woman's desire to relax in her backyard free of drone overflights 20 feet above. Another is a catch-all that allows courts to consider "[a]ny other factor" which might be relevant to its analysis, which will encourage drone operators to take a "throw everything at the wall and see what sticks" approach to any litigation in hopes of convincing a court to, as Smith puts it in his letter, "balance away owners' rights."[19]

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[17] Letter from Drone Industry and Stakeholders, at 3.
[18] Act, Prefatory Note.
[19] Smith letter, at 2.

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Moreover, the Act's balancing test includes factors such as time of day, whether an owner was present, and whether he observed or overheard the flight. Consequently, two cases addressing otherwise identical drone activities could face divergent rulings based on the fact that one took place at night, or when the owner was home, or that one lingered for a few moments while the other merely transited the property.

This has consequences for all parties. For landowners, victory in one case does not make one secure in his property. He may immediately face another drone incursion, necessitating another round of costly litigation which he is at risk of losing if the facts differ—or if the operator is more creative in inventing reasons to justify his activity—from the first. Owners thus face perpetual litigation. From the perspective of drone operators, this risks creating a judicially-imposed "patchwork quilt" of unpredictable legal findings. The industry has long railed against creating a patchwork—and indeed, frequently argued against a *per se* rule partially on those grounds. It is odd that industry now embraces just such a patchwork, except one that hinges not on published laws or defined property boundaries, but on highly unpredictable and unknowable conditions like owners' personal schedules.

The reason for this may be the expectation that the cost, length, and extreme uncertainty of any litigation under this Act will deter many owners from pressing claims in court. This will be particularly true when an owner is not wealthy, or when a drone operator is a well-funded and well-lawyered multinational corporation. For that class of drone operator, this Act represents the surest invitation to wide-scale operations free from any significant hindrance. This is little comfort, however, to hobby fliers or shall businesses integrating drones into their activities. Many will eventually feel the financial sting of lawsuits, and under this Act's vague construction of aerial trespass, will never be truly certain they are free of the risk of litigation.

Conclusion

For these reasons, and for those issues flagged in the comments filed from JEBURPA, the ABA Real Property, Trust, and Estate Law Section, and Professor Smith, I strongly encourage the ULC to reject this version of the Act. The proposal, simply put, treats property owners like disfavored parties *on their own property*. It presumptively grants drone operators broad rights to fly where they please, contingent only on the willingness and the capacity of a property owner to file suit. Even then, the Act invites courts to engage in an ad hoc balancing of interests such that property owners may see their rights winnowed away based on the subjective inclinations of courts and the creativity of drone operators' arguments—that is, if these owners can afford to litigate, at all.

I strongly suspect that property owners, and for that matter local communities, are unlikely to merely accept this state of affairs. As drones proliferate and as conflicts arise in greater numbers, this Act could trigger an anti-drone backlash among property owners looking for a solution to end persistent intrusions. One alternative which immediately comes to mind would be land-use laws that bar take-off and landing of drones within a given jurisdiction. Large commercial interests may be able to get around such restrictions by situating drone facilities outside jurisdictional limits and merely hovering to deliver a package or perform some other task. But for local businesses or hobby fliers, such de facto bans would be difficult to avoid. I wish to stress that this is not an optimal outcome; but, if states adopt this Act, residents may see their options for dealing with drone externalities as having been reduced to a veritable on/off switch. With little hope of defending their rights in court, they may well wish to throw that switch. And whatever doubts may exist about the ownership of the air, the ownership of the land, and the authority of state and local governments to regulate its use, is clear.

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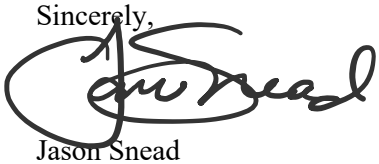
Drones can bring great benefits to our communities and our nation, and their operations should be encouraged. I hope that the ULC rejects this proposal and continues to work towards that goal by developing a truly balanced Act which not only recognizes, but properly safeguards, the property rights of citizens.

Sincerely,



Jason Snead
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