PACIFIC LEGAL FOUNDATION

July 10, 2019

National Conference of Commissioners
on Uniform State Laws
Uniform Law Commission
C/O Lucy Grelle
Tort Law Relating to Drones Committee
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602

Via email: lgrelle@uniformlaws.org

Re: Proposed Uniform Tort Law Relating to Drones Act

Pacific Legal Foundation (PLF) submits this comment in response to the Proposed Uniform Tort Law Relating to Drones Act. PLF is one of the nation's preeminent public interest law firms litigating in defense of property rights. PLF writes to express concerns regarding the implications of the proposed changes for property owners across the country. PLF is concerned that the proposed law is incompatible with historical protection of property rights and subjects property owners to a complex multifactor test which fails to provide bright line protection for property ownership. The proposed rule also raises significant constitutional concerns by subjecting property owners to a permanent easement of their property for public access.

While PLF recognizes that drones present a variety of new problems, the Commission should not lose sight of the need to robustly protect property from intrusion. PLF urges the Commission to reconsider its current approach and review the proposed draft to provide greater guidance and protection for property ownership.

1) The Proposed Rule Is a Radical Departure from Background Property Norms

The June 10, 2019, Memorandum in support of the most recent proposed draft claims to be adopting the "aerial trespass" doctrine that the Supreme Court provided in *United States v. Causby*, 328 U.S. 256 (1946). This is said to contrast with the "property rights approach" that is "taken in much of the scholarly literature." Memo at 3. In actuality, the "aerial trespass" doctrine, as articulated by the Supreme Court in *Causby*, is fully compatible with the robust protection of property rights against trespass.

In *Causby*, the Supreme Court considered the claim of the owner of a chicken farm located just next to an airport. The noise and glare from the planes that were flying overhead, at times as low as 83 feet above the farmland, interfered with the operations of the chicken farm and caused substantial damage. The farmer claimed ownership of all airspace rights above his property under the common law doctrine which held that "ownership of the land extended to the periphery of the universe." *United States v. Causby*, 328 U.S. at 260. On the other hand, the United States government argued that a property owner "does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy." *Id.* The Supreme Court rejected both of these extreme positions. Extending private control up to the heavens would "interfere with [the] control and development in the public interest" of navigation." *Id.* at 261. On the other hand, "if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere" and that it was "not material" whether or not the airspace was currently being physically occupied. The Court explained that "[t]he superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself" and "that invasions of it are in the same category as invasions of the surface." *Id.* at 265.

In other words, the Supreme Court adopted a position which balanced the need for navigable airspace with a "property rights approach" for ownership of the superadjacent airspace. *See* Troy Rule, *Airspace in an Age of Drones*, 95 Bos. U. L. Rev. 155, 168–69 (2015). The Supreme Court did not define how much of the airspace could be considered a part of a landowner's superadjacent property. But at the very least it is clear that any airspace that a landowner could "occupy or use in connection with the land" is considered part of a landowner's property and "that invasions of it are in the same category as invasions of the surface." *Causby*, 328 U.S. at 265; *See also Griggs v. Allegheny Cty., Pa.*, 369 U.S. 84, 87 (1962) (finding that a flight path that came within 30 feet of a residence constituted a taking). While there is some disagreement among courts, *see*, *e.g.*, *Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043, 1046 (10th Cir. 1974), this is the best reading of *Causby* and one that many courts have embraced. *See*, *e.g.*, *Speir v. United States*, 485 F.2d 643, 646–47 (Ct. Cl. 1973) (explaining that "helicopter flights at low altitudes were wrongful invasions into the airspace as to which the plaintiffs had a legally protected property interest" even without substantial interference).[1] For instance, the Supreme Court of Nevada held that

[1] Some of the confusion has to do with the fact that *Causby* and many of the subsequent cases involved takings claims against government entities, and a "substantial

the ownership of airspace below the minimum altitudes for flight "is vested in the owner of the subjacent land, who is entitled to compensation for flights invading that airspace when taken by the government." *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 659 (2006). Accordingly, it found that a local ordinance which gave airplanes a perpetual right to cross over the airspace of property at a height of under 500 feet was a per se physical taking without any requirement that the property owner prove that the use caused a substantial interference. *Id*. at 667.

In contrast, the proposed rule adopts a radically different approach. Under the proposed rule, any invasion by a drone of superadjacent airspace is not a trespass and an invasion of property rights unless the drone causes a substantial interference according to a 13-part multi-factor test. So long as a drone does not touch down on the land, it can be mere feet or inches away from home, family members, animals, or possessions without constituting a trespass. Unlike the Supreme Court's approach which classifies invasions of superadjacent airspace "as in the same category as invasions of the surface," the proposed rule makes superadjacent airspace rights second class and dramatically inferior to surface rights.

Consider the difference between how an unmanned ground vehicle and an unmanned aerial vehicle would be treated under the rule. With an unmanned ground vehicle, the instant that such a vehicle crosses onto another's property, however slightly, there would be a trespass, and the operator of the vehicle would be liable even if the vehicle causes no damage at all. Restatement (Second) of Torts § 158 (1965) ("One is subject

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interference" requirement, had been a general element of certain takings claims in many states. *See*, *e.g.*, *Kirby v. N. Carolina Dep't of Transportation*, 368 N.C. 847, 855 (2016) ("A taking effectuated by eminent domain does not require 'an actual occupation of the land,' but 'need only be a substantial interference with elemental rights growing out of the ownership of the property.'"). Accordingly, the court in *Spier* held that any invasion of airspace would be unlawful, but only a substantial interference would constitute a taking. *Speir v. United States*, 485 F.2d 643, 647 (Ct. Cl. 1973). *See also* Kyle Joseph Farris, *Flying Inside America's Drone Dome and Landing in Aerial Trespass Limbo*, 53 Val. U. L. Rev. 247, 274 (2018) ("Property owners should not lose the right to keep drones off their property merely because a drone has not seriously and frequently invaded the property to the point that the invasion rises to a constitutional taking.").

to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other."); *See also Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160–61 (Wis. 1997) (awarding extensive punitive damages to a property owner after a business repeatedly crossed his lawn despite causing only nominal actual damages). On the other hand an operator can fly an unmanned aerial drone only a few feet off the ground and escape any liability unless the drone substantially interferes with the owner's use of the property. This starkly different treatment for a substantially similar trespass cannot be justified by the aerial trespass doctrine which has traditionally applied to airplanes flying hundreds of feet above the ground.

2) **The Proposed Rule fails To Give Property Owners Substantial Certainty**

Property law has traditionally provided property owners with categorical protections against physical trespass. These protections are essential for property owners to be able to confidently take action to protect against trespass and intrusion. Aside from a set of narrow and well-defined exceptions such as private necessity or the abatement of a nuisance, private property owners know that they are free to exercise the right to exclude and to prevent unwanted entry to their property. Unlike nuisance law which expressly invokes a balancing of harm, physical trespass in the immediate reaches of a property has always given a landowner an unequivocal and sure right. *See* Kyle Joseph Farris, *Flying Inside America's Drone Dome and Landing in Aerial Trespass Limbo*, 53 Val. U. L. Rev. 247, 271 (2018).

In contrast, the proposed rule offers a property owner no certainty. A drone's intrusion on private property may or may not be privileged based on the confluence of more than a dozen factors, some of which may not be known to the property owner at the time. Each of these factors is to be "weighed and evaluated holistically." A property owner is also expected to somehow gauge the intentions of the drone operator, as drone access for "purposes protected by the First Amendment" is given additional protection above and beyond other forms of intrusion. Short of telepathy, there is no way for a property owner to be able to act with any kind of reasonable certainty.

And this is not merely an academic exercise. The proposed rule also requires a landowner to exercise "reasonable care in relation to known unmanned aircraft operating

in the airspace over the landowner's . . . property." 2019 Annual Meeting Draft Section 7(a). But in many states, a property owner does not owe a duty of care to trespassers other than to refrain from intentionally (or in some jurisdictions recklessly) causing harm. Restatement (Second) of Torts § 333 (1965). Would the proposed rule impose a greater duty of care to drones than to other surface trespassers? Or would an owner's duty of care to a known drone hinge on the outcome of an uncertain 13-factor test? It isn't clear from the current draft. And in either event, the proposed rule would greatly upset expectations and subject property owners to the risk of significant liability.

In contrast, the approach that states have begun to take with regard to drone trespass provides a far clearer bright line rule for both drone operators and real property owners. For instance, Nevada allows for trespass liability for drones that are flying less than 250 feet over the property, Nev. Rev. Stat. Ann. § 493.103, and Oregon's law imposes blanket liability for drone trespass outside of the federally defined navigation zone of 500 feet. Or. Rev. Stat. Ann. § 837.380.

3) **The Proposed Rule May Enact a Physical Taking**

Under the common law, a property owner would have a vested property interest in absolutely excluding all trespassers from the superadjacent airspace immediately surrounding his or her home. In contrast, this proposed rule would, if adopted by a state, create a permanent physical easement over the property for drone access. But as the Supreme Court has emphasized, requiring a private property owner to allow an uncompensated public access easement violates the Takings Clause of the Fifth Amendment. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 165 (1979) ("[T]he Government's attempt to create a public right of access . . . goes so far beyond ordinary regulation or improvement for navigation . . . as to amount to a taking requiring just compensation.").

If this rule goes into effect, a property owner may be subject to a continuous stream of drone traffic without any meaningful recourse. The enactment of such a law may accordingly constitute a taking which requires the government to offer just

compensation. As discussed above, this is what the Nevada Supreme Court held when it found that an ordinance giving airplanes the right to fly over a property constituted a per se physical taking. *Sisolak*, 122 Nev. at 659. Recommending that states adopt the proposed rule would subject them to potential liability for takings claims and to a stream of litigation in both state and federal court. *See Knick v. Twp. of Scott, Pennsylvania*, No. 17-647, 2019 WL 2552486 (U.S. June 21, 2019).

Conclusion

The proposed rule wreaks havoc on the ability of property owners to predictably exercise their ownership rights and could potentially subject property owners to liability based on an arbitrary and opaque multi-factor text. It would represent a radical departure from background property norms and cannot be justified by the doctrine of "aerial trespass" which has always protected the airspace immediately surrounding a property from trespass. And the proposed rule raises significant constitutional concerns because it forces property owners to allow a public access easement on their property. The Commission should reject this proposed rule.

Sincerely,

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