MEMORANDUM

TO: National Conference of Commissioners on Uniform State Laws ("NCCUSL")

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DATE: May 2, 2019

RE: Comments on April 22, 2019, draft of the "Uniform Tort Law Related to Drones Act"

This memorandum provides brief comments on the NCCUSL's April 22, 2019, draft of its Uniform Tort Law Related to Drones Act (the "Act"). At the outset, I wish to convey my genuine respect for the many knowledgeable Drafting Committee ("Committee") members who, recognizing the growing need for clearer civilian drone use laws, have devoted countless volunteer hours over the past year to prepare this Act. The critiques set forth in this memorandum are in no way aimed at the Committee itself and are intended solely as constructive input on an important set of policy issues affecting millions of Americans. Moreover, I want to express wholehearted agreement with the Committee's position that many aspects of civilian drone use would be more appropriately governed at the state level than at the federal level.

Unfortunately, as a property law professor who has extensively researched and written on drone law issues over the past five years, I must strongly object to multiple provisions within the Act. The Act, while surely well-intended, is a strained attempt to apply nuisance-like principles to address an emerging set of legal issues that could be addressed far more effectively and efficiently through statutes that simply clarify and build upon centuries-old principles of property and trespass law. The Act's nuisance-like approach would surely advance the interests of the drone industry and of a handful of politically influential corporations that are hoping to integrate civilian drones into their business models. However, it would accomplish these objectives through an unpredictable balancing test that would unjustifiably erode the well-established property rights of tens of millions of American landowners.

Section 5(b)'s Conflation of Common Law Trespass and Nuisance Doctrines

The most troubling aspect of the Act is Section 5, which injects ad hoc, nuisance-like principles into trespass doctrine for intrusions of a particular type of small object into the immediate reaches of airspace above private property. In their Comment to Section 5, the Committee tries to defend this approach by claiming that its provisions merely "adopt[] the *Causby* and Restatement conceptions of aerial trespass" and "add[] additional clarity to it." Regrettably,

this characterization of Section 5 is inaccurate in at least two primary ways. First, the Committee's position tenuously presumes that a small civilian drone hovering a few dozen feet above a private backyard is substantively equivalent to the massive piloted "aircraft" that were undoubtedly in the Restatement drafters' minds when they drafted Restatement §159(2). Second, Section 5(b)'s dizzying list of 13 "relevant factors" plus "any other factor relevant to the determination of substantial interference" does anything but clarify this area of the law. Section 5(b)'s ad hoc balancing approach to drone trespass is essentially a back-door "redirection of trespass law into nuisance law", which courts have expressly identified as a pernicious and undesirable alteration of longstanding property law principles.[1] In the words of Professors Thomas W. Merrill (Columbia Law School) and Henry E. Smith (Harvard Law School), "[t]he essence of trespass is that someone has sent an object across the spatial boundary into the Blackstonian owner's column of space."[2] To suddenly impose a multi-factor balancing test to these intrusions would markedly *diminish* the clarity of property rights in low-altitude airspace—a move that would directly contravene the basic principles of time-honored Demsetzian property theory.[3] Under that well-accepted theory, civilian drone technologies and the growing conflicts they are creating over low-altitude airspace would more accurately warrant statutory changes that affirm and *more clearly define* the specific bounds of landowners' rights in the airspace above their land. The Committee's position, implied in the Comment to Section 5(b), that their new 13-factor test would provide greater "clarity" than a statute that would expressly define (in feet) the bounds of landowners' airspace rights is utterly indefensible.[4]

For obvious reasons, the drone industry and companies hoping to integrate civilian drones into their business operations tend to oppose policies that affirm landowner's property interests in their airspace and would prefer the Act's unpredictable balancing test. However, these powerful stakeholders' preference for a nuisance-like approach does not excuse the NCCUSL from ignoring the interests of millions of ordinary American citizens whose exclusion rights in the low-altitude airspace above their land would be significantly weakened if the Act were enacted in their state.

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[1] Adams v. Cleveland-Cliffs Iron Company, 602 N.W.2d 215, 221 (1999). The *Adams* court adds that balancing tests (comparable to the one found in § 5(b) of the Act) are "generally only required in a nuisance case and that it is better to preserve th[e] aspect of traditional trespass analysis requiring no proof of actual injury because the invasion of the plaintiff's right to exclude [i]s regarded as tortious by itself." *Id*., n. 11. As the Adams court further explains, imposing a balancing test to physical intrusion situations "offends traditional principles of ownership. The law should not require a property owner to justify exercising the right to exclude. To countenance the erosion of presumed damages in cases of trespass is to endanger the right of exclusion itself." *Id*.

[2] Thomas W. Merrill & Henry E. Smith, PROPERTY: PRINCIPLES AND POLICIES 949 (3rd. ed. 2017).

[3] More specifically, under classical Demsetzian theory, the growing competition and conflicts over scarce low-altitude airspace resources resulting from the advancement of civilian drone technologies would tend to give rise to stronger and clearer property rights, not a weakening of rights. For a detailed explanation of this idea, see generally Troy Rule, *Airspace in an Age of Drones*, 95 B.U. L. REV. 155, 185-94 (2015).

[4] In Comment to Section 5, the Committee twice mentions "clarity" as a virtue of its approach before "contast[ing]" its approach to mine.

Section 7's Derogation of Landowners' Rights to Exclude

The Act's troubling disregard for landowners' existing airspace rights is also evident in Section 7(c), which would prohibit landowners from using reasonable self-help methods to exclude drones from the low-altitude airspace above their land. Landowners are unquestionably legally entitled to exclude unwanted objects from the immediate reaches of space above their land. Well-established overhang encroachment laws, condominium laws, and even eminent domain laws for avigation easements near airports all corroborate this undisputable fact.[5] Section 7(c)'s provisions prohibiting landowners from enforcing these rights through reasonable means such as physical fences or even invisible "geofencing" are wholly inconsistent with these rights' existence. Landowners have long held rights to reasonably exclude *all* other tangible objects from the low-altitude space immediately above their property. There is no justifiable reason to suddenly exempt drones from this centuries-old, important rule.

Section 8's Problematic Reliance on the Notion of a "Reasonable Expectation of Privacy"

One other noteworthy deficiency in the Act is its reliance on the idea of a "reasonable expectation of privacy" in provisions restricting drone surveillance. Section 8(a) and Section 8(c) both make use of this term when attempting to place limits on drone-assisted surveillance. To illustrate the circularity problems inherent in this term in this context: suppose that a person is sunbathing in a backyard area that is shielded by walls and trees and hence not visible from any place on the ground. If a real estate agency's drone hovers overhead to get aerial video footage of the area and happens to record footage of the sunbather, the sunbather might be able to argue that her "reasonable expectation of privacy" was violated. However, if her state legislature enacts the Act in her state and consequently there are soon frequent drone overflights above her land, those overflights could conceivably modify courts' interpretations of what constitutes her "reasonable expectation of privacy" until eventually she can assert no reasonable expectation of privacy in her secluded backyard at all. Such an outcome would undermine the basic purpose of these provisions.

The More Appropriate Policy Strategy: A Uniform State Law Clarifying the Scope of Landowners' Airspace Rights

As suggested above, an alternative approach is available to the NCCUSL that could more effectively help states address the growing incidence of conflicts between landowners and civilian drone operators. This alternative approach would involve the drafting of a relatively simple uniform state statute that more clearly defines the bounds of landowners' exclusion rights in the airspace above their land. Such a statute would not only address the civil privacy issues that are the focus of the Act but would also provide greater clarity as to criminal law and Fourth

[5] For further elaboration on this fact and relevant cited authorities, see Rule, *Airspace in an Age of Drones*, *supra* note 3, at 182-83.

Amendment issues[6] involving drones and could even increase certainty in takings law and wind energy law.[7] By clearly rooting drone law within existing property law structures, this approach would also enable local governments to eventually tailor drone use restrictions to specific neighborhoods through drone zoning ordinances and other means in ways that increase the overall efficiency of drone law.[8]

For several centuries, clearly-defined property interests and simple trespass laws have generally resulted in efficient and orderly allocations of land resources. The advent of drone technologies does not warrant a substantial deviation from this time-tested system of rules. As stated in the Committee's own Prefatory Note to the Act, "just because something is new does not mean that existing law cannot apply to it." Tragically, the Act itself disregards this principle, ignoring the fact that for centuries landowners have held rights to exclude unwanted tangible objects from the immediate airspace above their land. Just because drones are new does not mean that existing law cannot apply to them. Accordingly, I urge the NCCUSL not to approve or endorse the Act. At this pivotal moment in property law, it is imperative that the NCCUSL not succumb to special interest pressure in ways that would derogate existing property rights and harm landowners across the country. If the NCCUSL would like my assistance in drafting a simple uniform law that more clearly defines the three-dimensional bounds of landowners' airspace rights, I will be glad to begin discussions around that approach.

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[6] *See id*. at 172-74.

[7] For a full discussion of these issues, see generally *Airspace and the Takings Clause*, 90 WASH. U. L. REV. 421 (2012) and *Airspace in a Green Economy*, 59 UCLA L. REV. 270 (2011).

[8] For an exploration of the concept of drone zoning and its potential advantages, see generally *Drone Zoning*, 95 N.C. L. REV. 133 (2016).