



U.S. Department
of Transportation

Office of the Secretary
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

JUL 11 2018

Paul M. Kurtz, Chair
Mark F. Glaser, Vice Chair
Tort Law Relating to Drones Committee
National Conference of Commissioners
of Uniform State Laws
111 North Wabash Avenue, Suite 1010
Chicago, IL 60602

Re: Tort Law Relating to Drones Act – Comments Section

Dear Messrs. Kurtz and Glaser:

We are in receipt of the June 19, 2018 draft of the National Conference's Tort Law Relating to Drones Act, which we understand will be the subject of discussion at a July 20-26 Commissioners' meeting in Louisville.

We take issue with the following statement from the Comments section on page 14 of the draft document:

The Uniform Law Commission has worked in consultation with the FAA since 2015, informing the agency of the ULC's work, and worked with the FAA during the formation of the committee and the determination of the scope of the Committee's work. Multiple telephone conversations were held with the FAA's Office of the Chief Counsel and attorneys from the Office of Regulation and Enforcement at the Department of Transportation.

The subject of federal preemption was discussed, the ULC took note of the FAA's comments as well as the agency's December 17, 2015 document entitled "*State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*" which states "[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." (https://www.faa.gov/uas/resources/uas_regulations_policy/media/uas_fact_sheet_final.pdf).

Importantly, the areas of property rights, land use, and zoning are not in conflict with federal regulations. As the Supreme Court has noted "[t]he United States does not 'own' the airspace above its territorial boundaries, although it undoubtedly has considerable authority to regulate the use of that airspace." (*Massachusetts v. U. S.*, 435 U.S. 444, 473 (1978)). Consistent with this review of existing law and consultation with the FAA, the ULC decided the scope of the drafting committee's work should initially focus upon tort law.

This statement creates the incorrect impression that the Office of the General Counsel (OGC) of the Department of Transportation (DOT) and the Federal Aviation Administration (FAA) have concurred with the substance of the current draft Model Rule, based upon consultations between the FAA and the ULC. We have not so concurred. Furthermore, neither DOT nor the FAA has

taken any official position on the relationship between Federal regulation and State and local authority that would support the draft ULC proposal. Finally, neither DOT nor the FAA had a role in drafting the proposed language in the ULC's tort statute.

While it is true as a general matter, as stated in the FAA's 2015 Fact Sheet, that "[l]aws *traditionally* related to state and local police power –including . . . trespass . . . *generally* are not subject to federal regulation," (emphasis added), that simple proposition alone does not support the novel premise of the draft statute that a State or municipality may establish by law a *per se* exclusion zone of up to 200 feet, below which UAS operations would constitute a trespass upon land. There is nothing in the 2015 Fact Sheet to support such a *per se* rule, and the FAA has never, to our knowledge, taken such a position in an official agency statement, whether in an amicus curiae brief or in any proceeding in which the FAA has appeared as a party. Such a rule would be in tension with decades of established precedent in the Federal courts, which have rejected the notion of applying the traditional elements of basic trespass law to aircraft overflight of private property.

There are many aspects of aviation law and Federal preemption that are relevant to the issues raised by the proposed statute, but it would be neither appropriate nor efficient for us to debate them with the ULC here and now. It will suffice to say here that neither OGC nor the FAA has endorsed the proposed statute or the logic that underlies it.

We request that the ULC amend the language in the Model Rule to strike any reference to contacts between OGC and FAA attorneys and the ULC, so as not to leave a misleading impression of Federal endorsement of the current ULC proposal.

Very truly yours,



Steven G. Bradbury
General Counsel, United States Department of Transportation



Charles M. Trippe, Jr.
Chief Counsel, Federal Aviation Administration