JOINT EDITORIAL BOARD
for
UNIFORM REAL PROPERTY ACTS

June 5, 2019

To: Commissioners of the Uniform Law Conference

Re: Uniform Tort Law Relating to Drones Act

The JEBURPA is an advisory group comprised of representatives from the American Bar Association Real Property, Trust and Estate Law Section, the American College of Real Estate Lawyers, and the Uniform Law Commission (ULC), with liaison relationships with the American College of Mortgage Attorneys, the Community Associations Institute, and the American Land Title Association. The JEBURPA's purpose is to provide informed advice to the ULC with regard to uniform and model laws as they relate to real estate.

In carrying out this responsibility, members of the JEBURPA have significant concerns regarding a number of provisions of the Uniform Tort Law Relating to Drones Act (the "Act") as those provisions impact the rights of real property owners. **The JEBURPA does not support promulgation of the Act in its current form, and its members would not support the Act's enactment in the States.** The purpose of this letter is to highlight the JEBURPA's primary concerns regarding the Act, focusing specifically on its impact on the rights and obligations of real property owners.

The Act Restricts a Landowner's Control of the "Immediate Reaches" of the Airspace in a Fashion Inconsistent with Present Law and the Expectations of Most Landowners

Advances in technology have created incentives for individuals, companies and institutions to use drones to facilitate a range of activities, such as package delivery, aerial photography, and surveillance. These advances have also exposed a tension—to what extent may a landowner prevent the operation of a drone in the airspace immediately and directly above the owner's land?

Under existing trespass law in all American states, *A* can prevent *X* from traversing the surface of *A*'s land to deliver a package to *A*'s neighbor, *B*, without *A*'s prior consent. Furthermore, it is largely irrelevant to the trespass determination whether *X*'s actions would cause actual economic harm or damage to *A*. See, e.g., *Jacque v. Steenburg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997) (upholding award of punitive damages against company that traversed farmer's land to deliver mobile home to neighbor over farmer's prior objection, despite absence of physical harm/damage). Can *A* likewise prevent *X* from flying a drone across *A*'s land at a height of 15 feet to deliver that same package?

Most American landowners would answer this question with an unequivocal "yes." Under existing trespass law, if my neighbor builds a structure that "overhangs" my land without my consent, a trespass has occurred. Likewise, if the branches of my neighbor's tree grow into the airspace above my property, a trespass has also occurred.

By giving the landowner the exclusive right to prevent third-party use of this low-altitude airspace, trespass law has created an expectation among landowners that they can likewise exclude third persons from engaging in drone overflights at very low altitudes. In this way, trespass law advances the landowner's expectations of safety (e.g., that a drone would not collide with a person or structure and cause injury to persons or property) and privacy (e.g., that a drone would not be taking images of the owner or the owner's family or property).

The Prefatory Note states that the Act "clearly adopts the 'aerial trespass' doctrine in relation to unmanned aircraft in the airspace above private land," and further states that the Act "clarifies that intentional unmanned aircraft intrusions on land are trespasses to land." In fact, however, the Act would create substantial doubt about the ability of a landowner to exclude drone overflights at low altitudes. This is because § 5(a) of the Act provides that "[a] person is liable for aerial trespass if the person intentionally and without the consent of the land possessor operates an unmanned aircraft in the airspace over the land possessor's real property ***and causes substantial interference with the use and enjoyment of the property***" (emphasis added).

Under § 5(a), a court may not simply conclude that an unconsented-to drone overflight at an altitude of six feet is *per se* a trespass. Instead, to establish a trespass, the surface owner would have to demonstrate (1) that the overflight was "intentional" and (2) that it caused a "substantial interference" with the landowner's use and enjoyment of the land. To meet this latter standard, the landowner would have to demonstrate "substantial interference" through a complicated analysis of the factors articulated in § 5(b) of the Act. Under this approach, a court could conclude that an unconsented-to overflight at an altitude of six feet was not a substantial interference—and thus not an excludable trespass—for potentially any of the following reasons:

- because it occurred at night [§ 5(b)(9)];
- because it occurred while the owner was not physically present on the land [§ 5(b)(10)];
- because the owner did not see or hear the drone during the overflight [§ 5(b)(11)];
- because the drone did not cause physical damage to person or property [§ 5(b)(7), (8)]; or
- because the drone overflight occurred only once [§ 5(b)(5)].

By contrast, none of these factors would negate a surface trespass (although they might be relevant to the calculation of the landowner's damages).

Furthermore, while the Prefatory Note suggests that the Act is a straightforward application of the principles of *United States v. Causby*, 328 U.S. 256 (1946), it is instead a dramatic overextension of that case. In *Causby*, the Court did reject the notion that a landowner's exclusive control of the surface

extended to the farthest reaches of the heavens, recognizing that a farmer could not use trespass law to prevent military aircraft overflights in navigable airspace (which is part of the public domain).

Nevertheless, the *Causby* court recognized that the surface owner did have a legitimate expectation of exclusive control of very low-altitude space:

> We have said that the airspace is a public highway. ***Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere***. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.
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> The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.
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> The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The 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. ***We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*** [*Causby*, 328 U.S. at 264-265 (citations omitted; emphasis added).]

Causby plainly stands for the proposition that use of the airspace in the "immediate reaches of the enveloping atmosphere" is subject to the landowner's exclusive control; at these low altitudes, it does not mandate a complex balancing of burdens and benefits to landowners vis-à-vis drone operators. By requiring such balancing in all drone overflight cases—all the way to ground level—the Act as presently drafted substantially overextends *Causby*, and in the process significantly limits the rights customarily associated with land ownership.

At a minimum, a landowner may reasonably expect that she or he can prevent someone from operating a drone over their land at an altitude where the drone could come into contact with people or structures on the land. If an operator flew a drone across an owner's land at an altitude of six feet without the consent of the landowner, we are confident that any judge today would treat that as a trespass—without regard to whether it was day or night, whether the landowner was at home, or whether the overflight caused no actual physical or economic harm. But § 5(b)'s required multi-factor analysis would render

such a determination less likely; that is the very nature of factor analysis. Thus, we question whether the Act is providing greater "clarity" or instead changing existing state trespass law.

We are of the view that if the Act is not going to treat overflights below a certain altitude as a *per se* trespass, then at a minimum the Act should create a rebuttable presumption of substantial interference in favor of the landowner below a specific height threshold. At a minimum, that threshold should be no less than the height of any structure on the land.[1] In our view, this is necessary and appropriate to permit the development of case law defining "substantial interference." As drafted, the UTLRDA and its "substantial interference" standard place a heavy thumb on the scale in favor of the drone operator. As such, it seems unlikely that all but the wealthiest or most litigious of landowners will bring an action to vindicate their expectations. Creating a rebuttable presumption in favor of the landowner below a certain threshold would be more likely to result in litigation when overflights occur at very low altitudes (if not to simply discourage overflights at such altitudes)—and this is appropriate because this is precisely the situation in which overflights pose the most obvious potential risk of harm.

The Act Creates a Dubious Rebuttable Presumption for "Conduct Protected by the First Amendment"

The comments to § 5 acknowledge that there is no first amendment privilege to trespass. While a speaker may wish to engage in protected speech or protected conduct, that speaker generally may not do so in my front yard, at least without my consent. But § 5(e) creates a rebuttable presumption that conduct protected by the First Amendment does not constitute "substantial interference." As noted above, the factor analysis required by § 5(b) already makes it extremely challenging for a landowner to meet the "substantial interference" threshold; this challenge will become effectively impossible with an additional thumb on the scales in the drone operator's favor.

Properly understood, if a non-media drone operator's conduct was a "substantial interference" under the circumstances, then so should be the same conduct committed by a media drone operator. Anything else creates—or profoundly encourages—a first amendment license to trespass.

The Act Imposes on the Landowner an Unclear and Unjustifiable Duty of Reasonable Care to Drone Operators

§ 7(a) requires that "[a] landowner or land possessor shall act with reasonable care in relation to known unmanned aircraft operating in the airspace over the landowner's or land possessor's property." The comments state that this section "makes clear that a land possessor owes the same duties to unmanned aircraft operating over his or her property as are owed to persons who are on their property."

[1] To address the situation in which there is only one extremely tall structure on a large parcel of otherwise-unimproved land (e.g., a silo on a large farm), the Act could provide a lateral distance requirement (e.g., an overflight at 100 feet would not trigger a rebuttable presumption of "substantial interference" just because the parcel's tallest structure is 150 feet in height, as long as the drone was no closer than xx feet from that structure).

This simply is not true. If a particular state has, by judicial decision or statute, already imposed on a landowner a duty of reasonable care to all persons (including trespassers), then § 7(a) would merely codify existing law. By contrast, if a state has not imposed such a duty as to trespassers, or has specific limitations on the landowner's duties, this Act would impose a greater duty of care to drones and drone operators than the landowner would owe to surface trespassers.

While the scope of a landowner's duties to trespassers is debatable, it is not a subject on which there is a compelling need for uniformity. If Section 7(a) is truly intended to have landowners owe the same duties to drone operators as they owe to persons physically on the surface under other law of the state, then the text should say so explicitly.

The Act Does Not Preclude an Implication of Consent from a Landowner's Prior Silence

As noted above, the Act stacks the deck too highly in favor of drone operators. Landowners will have to meet a considerable—if not practically insurmountable—evidentiary burden to establish that an unconsented-to, low-altitude overflight constitutes a trespass. Faced with this burden, many landowners may not be inclined to pursue legal action to challenge unconsented-to, low-altitude overflights. Unfortunately, the Act does not preclude the possibility that a court might treat a landowner's prior silence as implicit consent to future overflights.

Section 5(d) does make clear that repeated overflights over a long period of time cannot result in the acquisition of a prescriptive easement. Unfortunately, nothing in the Act would prevent a drone operator from arguing—or a court from accepting the argument—that a landowner's silence in the face of prior overflights constituted consent to a later overflight. In fact, by permitting the court to consider "any other factor relevant to the determination of substantial interference," the Act plainly invites drone operators to make a "waiver by prior silence" argument.

Conclusion

For the reasons discussed above, the JEBURPA does not support promulgation of the Act in its current form, and its members would not support the Act's enactment in the States.

This letter reflects the position of the members of the JEBURPA, and does not reflect the official position of the JEBURPA's constituent and liaison organizations. The American Bar Association Real Property, Trust and Estate Law Section will separately issue its own concerns regarding the Act.