

DRAFT
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TORT LAW RELATING TO DRONES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

April 22, 2019 Drafting Committee Meeting

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ON UNIFORM STATE LAWS

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April 15, 2019

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1 **UNIFORM TORT LAW RELATED TO DRONES ACT**

2 **PREFATORY NOTE**

3 The development and adoption of new technologies often pose challenges to law, culture
4 and society. These challenges are likely to be exacerbated where those technological
5 developments implicate the jurisdiction and authority of multiple levels and branches of
6 government. Unmanned aircraft, commonly referred to as “drones,” are one such technology.
7 The Federal Aviation Administration (FAA) predicts that by 2022 there will be between 1.96
8 million and 3.17 million small unmanned aircraft operating in the national airspace.¹ With the
9 United States Congress and the FAA asserting jurisdiction over many aspects of unmanned
10 aircraft operations, and states and local governments asserting jurisdiction over others, a
11 patchwork quilt of regulatory and legal requirements is developing. In an area involving the need
12 to integrate unmanned aircraft into an already heavily regulated national airspace system, a
13 regulatory system that results in significant variance in requirements and controls across the
14 country promises to inhibit the appropriate and beneficial development of unmanned aircraft
15 systems for the variety of uses to which such technologies are suited.

16 The Uniform Tort Law Related to Drones Act provides a uniform state-level response to
17 the development and utilization of unmanned aircraft in a variety of circumstances within the
18 context of federal control over aviation as well as the importance of the advances promised by
19 unmanned aircraft use. The Act is premised on the idea that not all technological developments
20 require the development of technology-specific legislative or even significant changes to
21 common law doctrines. In other words, just because something is new does not mean that
22 existing law cannot apply to it. Rather than treating all aspects of unmanned aircraft operations
23 as “new” and thus requiring specific changes to existing tort law, the Uniform Tort Law Related
24 to Drones Act focuses on those aspects of unmanned aircraft that are most relevant to legal
25 analysis of their use. For example, unmanned aircraft tend to fly lower than manned aircraft; they
26 are likely to capture images or other data as an aspect of their operation; and there is a perceived
27 element of anonymity to their operation (in other words, it is not always easy to identify who is
28 operating a particular unmanned aircraft).² Where existing law is sufficient to address the
29 challenges unmanned aircraft are likely to pose to individuals and society, the Act makes clear
30 that existing rules apply to unmanned aircraft operations. However, where there is uncertainty as
31 to the law’s ability to address the salient aspects of unmanned aircraft, the Act seeks to clarify
32 the law’s application and effect.

33 That the federal government has exclusive authority over aircraft operations in the
34 national air space, as well as other attendant operational concerns, is well settled law. The
35 Federal Aviation Administration is the primary regulatory agency that addresses aviation in the
36 United States, but it does so primarily in relation to the operational aspects of flight, as well as
37 safety, crew and pilot training, and related matters. States retain authority in a number of areas
38 that do not directly regulate drone flight operations but may still have an effect on aircraft and
39 their operations, including areas such as zoning of airports and helipads, privacy law, and

¹ FAA Aerospace Forecast: Fiscal Years 2018-2038, p. 41 (March 2018).

² See, Jack Balkin, *The Path of Robotics Law*, 6 *Ca. L. Rev. Circuit* 45, 46 (2015).

1 product liability law.³ Preemption may arise in relation to these areas where state or local laws or
2 regulations directly conflict with existing federal aviation controls.

3 The application of state tort law, however, is not wholly preempted in relation to
4 airplanes and certain characteristics of drones raise more issues than others in relation to specific
5 areas of tort law. Three aspects of drones enable human activity in ways that are qualitatively
6 different from existing aircraft technologies such that the activity brings to the foreground new
7 tensions between people and drones. First, drones can fly lower with less noise and disruption on
8 the ground than existing aircraft; second, drones can remain aloft in a stationary position in ways
9 not commonly problematic with existing aircraft; and, third, drones regularly use cameras and
10 other sensors to live stream the view from the drone to the operator, to record what they see, hear
11 and sense, or to record additional data as they fly. The combination of these capabilities raises
12 questions in relation to specific areas of tort law.

13 The two most contentious areas of tort law related to drones are trespass to land and
14 privacy. The Act provides clarity in each of these areas while also making certain that less
15 contentious tort-related questions are also addressed. Specifically, the Tort Law Related to
16 Drones Act provides for efficient determination of rights and liabilities in relation to the
17 operation of drones:

- 18 • It clarifies that the state’s tort law applies to those who use or are responsible for
19 drone operations to the extent not otherwise provided in the Act;
- 20 • It clearly adopts the “aerial trespass” doctrine in relation to drones in the airspace
21 above private land, protecting landowner interests from intrusive drone incursions
22 while not inhibiting the ability of drones to operate in drone-navigable airspace; It
23 clarifies that intentional drone intrusions on land are trespasses to land;
- 24 • It clarifies the application of landowner duties to drones operating above or
25 having crashed or landed on the landowner’s property;
- 26 • It applies existing state tort law privacy protections to drone operations or,
27 alternatively, creates a privacy law for drones in states which do not have an
28 applicable existing privacy tort; and,
- 29 • It clarifies the application of negligence doctrines to drone operations.

30 Because the frequency of drone operations is likely to continue to increase, it is useful to
31 provide answers to questions of drone owner and operator liability in the clearest way possible.
32 The Tort Law Related to Drones Act does this through the careful consideration of the ways in
33 which drone operations are important to the application and development of state tort law.

³ See, Troy Rule, Drone Zoning, 95 N.C. L. REV. 133 (2016); Robert Heverly, The State of Drones: State Authority to Regulate Drones, 8 Alb. Govt. L. Rev. 29 (2015) FAA Office of the Chief Counsel, State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet (2015).

1 **TORT LAW RELATING TO DRONES ACT**

2 **SECTION 1. SHORT TITLE.** This [Act] may be cited as the [Uniform] Tort Law

3 Relating to Drones Act.

4 **Comment**

5
6 The title of the Act uses the commonly used word “drone” to refer to the technologies
7 that are defined and referred to throughout the Act as “unmanned aircraft.” *See*, §2(2), *supra*.
8 This choice reflects the position that while it is important to retain the federal terminology for the
9 operative provisions of the Act, it is also important to include reference to the lay terminology
10 for unmanned aircraft. As an example, while the word “drone” does not appear in the relevant
11 Federal Aviation Administration (FAA) regulations applicable to small Unmanned Aircraft
12 Systems, 14 C.F.R. Part 107, it does appear on the FAA’s web page that describes those
13 regulations. https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=22615. The term
14 “drone” appears three times in the FAA Reauthorization Act of 2018 (Public Law 115-254
15 (2018), §§351, 360 & 379), but that same Act does not define the term “drone” nor is that term
16 otherwise defined in federal statutes in relation to unmanned aircraft. States have used both terms
17 in legislation, *see*, Va. St. § 19.2-60.1 (Use of unmanned aircraft systems by public bodies;
18 search warrant required); S.D. St. 22-21-1 (Trespassing to eavesdrop--Installation or use of
19 unauthorized eavesdropping device—Drones), and some states have used both in the same
20 legislation. *See*, Fl. St. § 330.41 (Unmanned Aircraft Systems Act) (§ 330.41(c): “‘Unmanned
21 aircraft system’ means a drone and its associated elements . . .”).
22

23 **SECTION 2. DEFINITIONS.** In this [Act],

24 (1) “Person” means an individual, firm, partnership, corporation, company, association,
25 joint-stock association, or governmental entity. It includes a trustee, receiver, assignee, or similar
26 representative of any of them.

27 (2) “Unmanned aircraft” means an aircraft operated without the possibility of direct
28 human intervention from within or on the aircraft. For the purposes of this [Act], this term is
29 synonymous with the term “drone” as used in the title of this [Act].

30 (3) “Tort” means a civil wrong, other than breach of contract, for which a claim may be
31 made and a remedy obtained in the form of damages and, under appropriate circumstances,
32 injunctive relief.

33 (4) “Land Possessor” means a person who rents, leases or otherwise has a legal right to

1 be in possession of the property.

2 **Comment**

3 “Person” is defined as in FAA Regulations, 14 C.F.R. § 1.1, and includes various forms
4 of legal entities as well as individuals. While this is identical to the standard ULC definition, its
5 adoption allows consistency with federal regulations in this area.

6
7 “Unmanned aircraft” is defined in the same way that the FAA has defined the term, 14
8 C.F.R. § 1.1, but clarifies that the term in the short title has the same meaning as the technical
9 term used throughout the Act.

10
11 “Tort Law” is adapted from the definition provided by Black’s Law Dictionary (10th
12 Edition, 2014).

13
14 “Land Possessor” is adapted from the definition provided by Black’s Law Dictionary
15 (10th Edition, 2014), and is used rather than the simpler “possessor” terminology that may be
16 found in property law to avoid any ambiguity between a person who is entitled to possession of
17 the property in question and a person who might possess, own or operate an unmanned aircraft.

18
19 **SECTION 3. SCOPE.** This [Act] applies to unmanned aircraft operations and the acts
20 of those who operate, and are affected by, such operations.

21 **Comment**

22 This section makes clear that this act applies only to unmanned aircraft operations and
23 should not be read to imply changes to any other area of the tort law of any state that adopts it.

24
25 **SECTION 4. UNMANNED AIRCRAFT AND STATE TORT LAW.**

26 (a) An unmanned aircraft can be an instrumentality by which a tort can be committed
27 under the law [of this state].

28 (b) Except as provided for in this [Act], and subject to any Constitutional rights or
29 privileges, the common law and statutory tort law [of this state] shall apply to a person who owns
30 or operates unmanned aircraft within [this state], or to any other person liable under the law of
31 [this state], including common law and statutory defenses, immunities and presumptions
32 applicable in tort actions.

33 (c) In an action brought under this [Act], remedies, civil damages and other remedies

1 shall be available as provided for actions brought under tort law in [this state].

2 **Comment**

3 This section is intended to make clear that unmanned aircraft are subject to state tort law
4 to the extent such laws are not preempted by federal law.

5
6 Subsection (a) provides the general statement of applicability, while subsection (b)
7 further makes clear that the application of tort law should be consistent with the entirety of the
8 state's tort doctrine to the extent not otherwise provided in the Act, and (c) clarifies that existing
9 remedies within the state are available for tort violations under the Act.

10
11 **SECTION 5. AERIAL TRESPASS BY UNMANNED AIRCRAFT.**

12 (a) An aerial trespass occurs when a person intentionally and without the consent of the
13 landowner or land possessor operates an unmanned aircraft in the airspace over the landowner's
14 or land possessor's property causing substantial interference with the use and enjoyment of the
15 property.

16 (b) The determination of whether an unmanned aircraft's operation over property has
17 caused substantial interference with the use and enjoyment of property shall be based upon a
18 consideration of relevant factors, including:

19 (1) The nature of the use and enjoyment of the property;

20 (2) The operator's purpose in operating the unmanned aircraft over the property;

21 (3) The altitude at which the unmanned aircraft was operating;

22 (4) The amount of time the unmanned aircraft was operated over the landowner's
23 or land possessor's property;

24 (5) The frequency with which unmanned aircraft have operated over the property
25 during the relevant time period;

26 (6) Whether the landowner or land possessor has regularly consented to the
27 operation of unmanned aircraft over the property;

1 (7) The type of unmanned aircraft and the nature of its operation over the
2 property;

3 (8) Whether the operation of the unmanned aircraft directly caused physical
4 damage to persons or real or personal property;

5 (9) Whether the operation of the unmanned aircraft directly caused economic
6 damage;

7 (10) The time of day the unmanned aircraft was operated over the property;

8 (11) Whether an individual on the land saw or heard the unmanned aircraft while
9 it was over the property;

10 (12) whether and the extent to which the operation of the unmanned aircraft
11 exceeded the consent given to the operator;

12 (13) Whether the unmanned aircraft was used to harass livestock or wildlife on
13 the property; and,

14 (14) Any other factor relevant to the determination of substantial interference with
15 the use and enjoyment of land.

16 (c) All claims for trespass involving airspace intrusions by unmanned aircraft shall be
17 brought under this section.

18 (d) Repeated or continual operation of an unmanned aircraft over a landowner's or land
19 possessor's property shall not give rise to prescriptive rights in the airspace.

20 (e) There shall be a rebuttable presumption that conduct protected by the First
21 Amendment does not constitute substantial interference with the use and enjoyment of the
22 property.

1 **Comment**

2 This section establishes the cause of action for aerial trespass as the exclusive cause of
3 action for intrusions of unmanned aircraft into the airspace over land. This is a contentious but
4 principled position adopted in the Act following significant debate and consideration of a wide
5 variety of positions. The background for the approach taken here, along with its implications,
6 follows.

7
8 A common law maxim held that a landowner owned the surface of the land and the
9 ground below it and sky above it, up to the heavens and down to the center of the earth. Known
10 as the *ad coelum* doctrine, it was restated time and again by such experts as Lord Coke and
11 Blackstone. As aviation began to take hold, however, from the start of the twentieth century it
12 became quite apparent that the *ad coelum* doctrine was incompatible with air travel. As early as
13 the development of balloons and zeppelins, commentators began discussing how airspace rights
14 granted to landowners could hinder the development of air travel. In the 1946 case of *United*
15 *States v. Causby*, the U.S. Supreme Court held that the *ad coelum* doctrine was incompatible
16 with the modern world: “It is ancient doctrine that at common law ownership of the land
17 extended to the periphery of the universe - *Cujus est solum ejus est usque ad coelum*. But that
18 doctrine has no place in the modern world.” *United States v. Causby*, 328 U.S. 256, 260-261
19 (1946).

20 The *Causby* Court then held that to establish a cause of action for a taking based on the
21 use of airspace over property the property’s owner must show that the flights substantially
22 interfere with the use and enjoyment of the land. *Id.*, at 262. This test has been adopted by many
23 state and lower federal courts since *Causby* was decided, and was eventually included in the
24 Restatement (Second) of Torts, which formulated it this way: “Flight by an aircraft in the air
25 space above the land of another is trespass if, but only if, (1) “it enters into the immediate
26 reaches of the air space next to the land, and (2) it interferes substantially with the other's use and
27 enjoyment of the land.” Restatement (Second) of Torts §159(2).

28 This section adopts the *Causby* and Restatement conceptions of aerial trespass, but adds
29 additional clarity to it in light of the unique attributes of drones, namely that drones fly lower
30 than manned aircraft and are generally quieter and less obtrusive even at those lower heights.
31 The additional clarity comes from the explicit identification of a non-exclusive list of potential
32 factors for courts to consider when it is necessary to decide whether a trespass by drone has
33 occurred. This approach is contrasted with one in which landowners hold title to some either
34 undetermined or predetermined amount of airspace over their land. *See, e.g.*, Troy Rule,
35 *Airspace in an Age of Drones*, 95 Bos. U. L. Rev. 155 (2015) (arguing in favor of “new laws
36 expressly entitling landowners to exclude drones from the airspace above the surface of their
37 land to a height of 500 feet in most locations.” *Id.*, at 159).

38 Subsection (a) lays out the general test and is based on the *Causby* and Restatement
39 formulations.

40 Subsection (b) then provides an inclusive list of factors that might be considered in any
41 particular case. The list is extensive, but not exhaustive, and only those factors that are
42 potentially relevant in any particular case need be addressed.

1 Subsection (b)(1) is a consideration of the how the property is used and by whom. A
2 large, unoccupied tract of land would be viewed differently under this subsection than would a
3 small, urban plot of land on which stands an inhabited single-family home.

4 Subsection (b)(2) allows consideration of why an unmanned aircraft was being operated
5 over the property. If the operator's purpose was to harass or annoy, that would counsel in favor
6 of finding an aerial trespass on this factor, whereas one who is only transiting over the property
7 would counsel in favor finding no aerial trespass on this factor. As unmanned aircraft use
8 cameras and sensors to fly, and many of these sensors can record the data they receive, the
9 purpose or activity of recording visual, audio or other data neither favors nor disfavors finding
10 aerial trespass in any particular situation. If the purpose of the flight was to observe private
11 behavior of the occupants, the addition of a recording of that activity would support a finding of
12 aerial trespass. Where the unmanned aircraft was simply transiting the property, capturing data
13 from the property would have less probative value.

14 Subsection (b)(3) takes the height of the flight into account. A lower flight may, in
15 appropriate circumstances, favor the landowner, while a higher altitude flight would likely favor
16 the operator.

17 Subsection (b)(4) focuses the analysis on the amount of time the unmanned aircraft
18 operated over the property and should be considered in light of the size of the property and speed
19 of the unmanned aircraft. A quicker transit over property, in light of the size of the property and
20 the unmanned aircraft's speed, would favor the operator, while a longer transit, especially with
21 time spent hovering over the property, would favor the landowner.

22 Subsection (b)(5) encourages the court to consider how frequently unmanned aircraft
23 have operated over the property. This factor additionally provides context for other factors and is
24 especially relevant to factor (b)(7), below. The frequency of flights alone does not *per se* favor
25 either the landowner or the operator but may be relevant in considering additional factors. The
26 time-period during which flights took place is also likely to be relevant to this inquiry. An
27 unmanned aircraft that has been operated over land frequently over a short period of time is more
28 likely to favor a finding of intrusion upon use and enjoyment of the land, while operations that
29 have more time between them is less likely to support such a conclusion.

30 Subsection (b)(6) inquires whether the landowner has consented to unmanned aircraft
31 flights over the property. Consent does not *per se* indicate that a later unconsented to flight was
32 not an aerial trespass but is relevant to that discussion.

33 Subsection (b)(7) relates to the kind of unmanned aircraft that was involved in the alleged
34 aerial trespass, including its size and capabilities.

35 Subsection (b)(8) includes consideration of injury to the property or its owners or guests
36 in the analysis. Operation of the unmanned aircraft that caused physical or emotional damage,
37 regardless of whether the damage was intentional or the result of negligence, would favor a
38 finding of aerial trespass. In contrast, the lack of physical or emotional damage favors a finding
39 that an aerial trespass has not been proven.

40 Subsection (b)(9) adds economic damages to the considerations that are relevant to the

1 inquiry. Operations that cause economic damage, as the flights in *Causby* did to the petitioner’s
2 farming operation, are likely to be supportive of a finding of aerial trespass. As with subsection
3 (b)(9), a lack of provable economic damage favors a finding that no aerial trespass has occurred.

4 Subsection (b)(10) authorizes consideration of the time of day of the unmanned aircraft’s
5 operation over the land, and subsection (b)(11) makes clear that the extent of awareness of a
6 person on the property of the operation of the unmanned aircraft is also relevant.

7 Subsection (b)(12), following the common law and Restatement rule that exceeding
8 consent to enter land is a trespass, asks whether the operator stayed within any consent given by
9 the landowner. Where an operator remained within the consented boundaries of the landowner’s
10 permission, whether those boundaries were physical or operational, this factor is likely to favor a
11 finding of no aerial trespass. Where consent was exceeded, this factor would support a finding of
12 aerial trespass.

13 Subsection (b)(13) asks whether the unmanned aircraft was used to harass livestock or
14 wildlife on the property, and, where it was, would favor a finding of aerial trespass, while no
15 harassment would favor a finding of no aerial trespass.

16 Subsection (b)(14) emphasizes the non-exclusive nature of the factors and encourages
17 litigants and courts to consider any factors relevant to the finding whether a substantial intrusion
18 into the use and enjoyment of the property had occurred in a particular case.

19 None of the factors listed should be viewed as determinative. Instead, they should be
20 weighed and evaluated holistically. A factor that might weigh heavily in one case might be only
21 tangentially relevant in another.

22 Subsection (c) requires that all actions based on the operation of an unmanned aircraft
23 over a landowner’s land must be brought under this provision.

24 Subsection (d) precludes any unmanned aircraft operator from claiming a right by
25 prescription to the airspace above a landowner’s property. While the ability to gain such
26 prescriptive rights exists in many states in terms of land, it is not the intent of this act to allow
27 such rights in airspace, and this section precludes such an outcome regardless of the state’s
28 otherwise existing right to gain property by prescription.

29 Subsection (e) creates a rebuttable presumption that conduct protected by the First
30 Amendment does not substantially interfere with the use and enjoyment of the property, but does
31 not create a journalistic or First Amendment privilege to trespass. Just as reporters can be found
32 liable for trespass on land in non-unmanned aircraft situations, *see, e.g., J.H. Desnick v.*
33 *American Broadcasting Companies*, 44 F.3d 1345 (7th Cir. 1995) (noting, “To enter upon
34 another's land without consent is a trespass. The force of this rule has, it is true, been diluted
35 somewhat by concepts of privilege and of implied consent. But there is no journalists' privilege
36 to trespass.” *Id.*, at 1351. *See, also, Wilson v. Layne*, 526 U.S. 603 (1999) (Where police brought
37 photographer to private home when seeking to make an arrest, Justice Breyer noted: “In my
38 view, however, the homeowner's right to protection against this type of trespass was clearly
39 established long before [*Wilson*]) (Breyer, J., concurring in part and dissenting in part). Where a
40 landowner can make a strong showing that the operation of an unmanned aircraft intruded into

1 the use and enjoyment of the land through the existence of evidence satisfying multiple factors in
2 Section 5, a court should allow the action to proceed. Without strong evidence of this kind,
3 however, cases involving activity protected by the First Amendment should not be allowed to
4 proceed.

5 **SECTION 6. INTRUSIONS ON LAND.**

6 (a) Except as provided in subsection (b) a trespass to land by unmanned aircraft occurs
7 when an operator intentionally lands an unmanned aircraft on the land of another, or
8 intentionally causes an unmanned aircraft to come into physical contact with a structure, plant or
9 animal life, individual, or chattel on the land of another.

10 (b) A trespass to land does not occur under subsection (a) when:

11 (1) the unmanned aircraft operator is forced to land the unmanned aircraft because
12 of unexpected circumstances that reasonably justify such a landing; or,

13 (2) the unmanned aircraft malfunctions or otherwise touches down upon the
14 surface of the land because of weather or other factors beyond the operator's control.

15 (c) An operator or owner asserting the privileges provided in subsection (b) is liable for
16 any damage caused by the unmanned aircraft's operation.

17 (d) Where an unmanned aircraft has come to rest on the land of another other than by the
18 operator's consent or other than by the operator's tortious conduct, the owner or operator of the
19 unmanned aircraft has a right to recover the unmanned aircraft upon a request to the owner of
20 such property. A landowner or land possessor shall not unreasonably refuse a request to return
21 the unmanned aircraft or to permit the unmanned aircraft's owner or operator to recover the
22 unmanned aircraft from the property.

23 **Comment**

24 Section 6 makes clear that the traditional common law rules for trespass to land apply
25 when there is an intentional physical invasion of the land of another without the consent of the
26 owner or possessor of the land.

27

1 Subsection (a) provides the general rule, which is consistent with the rule as delineated in
2 the Restatement (Second) of Torts §158, which requires only intentional entering of land
3 belonging to another. No intent to harm or intent to trespass is required and proof of damage is
4 not required to make out a *prima facie* claim for trespass to land.
5

6 Subsection (b) incorporates the privilege of private necessity into the Act in a way
7 intended to be consistent with the formulation of the privilege contained in Restatement (Second)
8 of Torts §197, and subsection (c) also follows the Restatement in holding the trespasser liable
9 only for actual damages caused by the exercise of the privilege.
10

11 Subsection (d) is adapted from the Restatement’s rule for recovery of property that has
12 come to rest on another’s land. *See*, Restatement (Second) Torts §198 (providing a privilege to
13 enter another’s land at a reasonable time and in a reasonable manner to recover a chattel that has
14 come upon the land “otherwise than with the actor's consent or by his tortious conduct or
15 contributory negligence,” but holding the chattel’s owner liable for damages caused by the
16 entry). *See also*, Restatement (Second) Torts §200 (“If a chattel is where it is by reason of the
17 tortious conduct or contributory negligence of the actor, he is not privileged, except in case of
18 public or private necessity, to enter land in the possession of another for the purpose of ...
19 removing the chattel from such land”).
20

21 **SECTION 7. LANDOWNER AND LAND POSSESSOR DUTIES AND**
22 **RESPONSIBILITIES.**

23 (a) A landowner or land possessor shall act with reasonable care in relation to known
24 unmanned aircraft operating in the airspace over the landowner’s or land possessor’s property.

25 (b) A landowner or land possessor who is not otherwise authorized by federal law and
26 who initiates any counter unmanned aircraft actions in response to the flight of unmanned
27 aircraft over the land is liable in tort for any damage caused to unmanned aircraft by the counter
28 actions taken.

29 (c) A landowner or land possessor who erects obstructions with the purpose of interfering
30 with the operation of unmanned aircraft is liable in tort for any damage caused to unmanned
31 aircraft by such obstructions.

32 (d) A landowner or land possessor owes no duty to ensure that the airspace above the
33 landowner’s or land possessor’s property is free from natural or artificial obstructions.

1 **Comment**

2 This section makes clear that a landowner owes the same duties to unmanned aircraft
3 operating over his or her property as are owed to persons who are on their property. The modern
4 trend in tort law has been to adopt a “reasonableness” standard in relation to individuals who are
5 on a property, replacing the common law distinctions based on status of the person on the
6 property as an invitee, licensee or trespasser. In other words, even if a landowner believes an
7 unmanned aircraft is being operated such that its presence over the property constitutes aerial
8 trespass, it may not act in an unreasonable manner in relation to that unmanned aircraft.

9 Federal law prohibits destroying or otherwise interfering with an aircraft. 18 U.S.C. § 32;
10 *see also*, 49 U.S.C. § 46501 (which brings all aircraft into the “special aircraft jurisdiction of the
11 United States). As the FAA has categorized unmanned aircraft as aircraft, intentional actions to
12 shoot down, disable or capture the aircraft would be in violation of federal law, and are
13 prohibited by subdivision (b) of this section, as well. Subsection (b) thus provides a private cause
14 of action by the owner of an unmanned aircraft damaged by counter unmanned aircraft actions,
15 such as the shooting down of an unmanned aircraft or the use of radio frequency jammers or
16 other technologies to damage, destroy or interfere with the operation of an unmanned aircraft.

17 Subdivisions (c) and (d) together preserve the right of landowners to build on their
18 properties but restrict that right to the extent that the landowner’s intent is to interfere with the
19 flight of unmanned aircraft. While the Restatement (Second) of Torts definition of intent
20 provides that a person has the required intent if that person had a purpose to bring about the
21 result or knew that the result was substantially certain to result, subsection (c) adopts only the
22 purposeful portion of the intent requirement. A contrary expectation could lead to landowners
23 being unable to develop their properties simply because unmanned aircraft were known to fly in
24 the area. Proof of a purpose to interfere through the erection of structures could include the
25 landowner’s statements, the nature of the structure, and the manner and timing in which it was
26 built. If a landowner in a suburban residential area, for example, surrounded his or her property
27 with netting up to a one-hundred foot height, and that landowner did not use the netting to retain
28 things within the property such as, for example, golf balls and baseballs, the nature of the
29 structure would be probative of the landowner’s purpose to interfere with unmanned aircraft
30 flight.

31 **Alternative A**

32 **SECTION 8. UNMANNED AIRCRAFT AND VIOLATIONS OF PRIVACY.** An
33 unmanned aircraft can be the instrumentality by which a privacy-related tort may be committed
34 [under the law of this state].

35 **Alternative B**

36 **[SECTION 8. UNLAWFUL SURVEILLANCE BY UNMANNED AIRCRAFT.]**

37 [(a) Except as provided in subsection (b), a person is liable in tort for unlawful

1 surveillance by an unmanned aircraft if the person operates an unmanned aircraft to record an
2 individual or property with the intent to conduct surveillance on the individual or property
3 without consent and in a place or manner that would violate a reasonable expectation of privacy.

4 [(b) A person is not liable under this section if:

5 [(1) The operation of the unmanned aircraft is being used for a law-enforcement
6 purpose and conforms to the requirements of the Fourth Amendment, warrant, or other order
7 issued by a court;

8 [(2) The recording of the individual or property was incidental to the safe
9 operation or navigation of the unmanned aircraft for a purpose otherwise allowable under federal
10 law or the law of this state;

11 [(3) The person operating the unmanned aircraft is engaged in a business or
12 profession licensed by the state, or by an agent, employee, or contractor thereof, and the
13 operation of the unmanned aircraft was performed within the scope of practice or activities
14 permitted under the license;

15 [(4) The operation of the unmanned aircraft is being used for a newsgathering
16 purpose or is otherwise protected by the First Amendment; or

17 [(5) The person operated the unmanned aircraft in compliance with Federal
18 Aviation Administration regulations.

19 [(c) For purposes of Subsection (a), unlawful surveillance shall mean willfully capturing,
20 in a manner that is patently offensive to a reasonable person, audio or visual recordings of a
21 person conducting private or familial acts in a place where that person has a reasonable
22 expectation of privacy.]

23 **End of Alternatives**

1 **Legislative Note:** *If a state's law includes privacy-related torts, use the unbracketed Section 8. If*
2 *a state does not have privacy tort, use the bracketed Section 8.*

4 **Comment**

5
6 Unmanned aircraft have a number of characteristics that ostensibly raise concerns
7 regarding the privacy of those who can be observed by them. In addition to any actual
8 surveillance, the operation of unmanned aircraft may raise concerns among those who can see
9 the unmanned aircraft but who cannot or do not see its operator. Yet, many states already have in
10 place laws that would apply privacy principles to the operation of unmanned aircraft, though the
11 doctrines and their applications vary – sometimes significantly – from state to state. The
12 potential for introducing duplicative or conflicting provisions into state law is thus avoided by
13 making clear that existing state law should be applied to actions taken using unmanned aircraft.
14

15 This does not diminish concerns raised by specific characteristics of unmanned aircraft
16 operation, namely the low-level flights of unmanned aircraft and the perceived anonymity of
17 their operation. This explicit clarification of the application of privacy principles to the operation
18 of unmanned aircraft thus serves a signaling function for the public and the industry and makes
19 clear that the state takes privacy concerns seriously, a reassurance citizens may seek in relation to
20 the act.
21

22 The provision should thus apply similarly to unmanned aircraft technology as it does to
23 other technology. If it would be a violation of privacy rights to observe a person through the
24 windows in their bedroom using a telescope or a camera with a telephoto lens, then observing
25 that person using an unmanned aircraft hovering outside the window should likewise be a
26 violation of privacy rights. If it would be a privacy violation to climb a tree near someone's
27 house and observe them that person in a yard behind a privacy fence, then it would likewise be a
28 privacy violation to fly an unmanned aircraft above the level of the fence and do the same.
29

30 Where a state has no privacy tort cause of action that would be applicable to the operation
31 unmanned aircraft, a state should adopt the bracketed §8 to provide a remedy for privacy
32 violations that occur due to unlawful surveillance conducted by unmanned aircraft. The
33 bracketed §8 provides a private right of action in tort law intended to allow a person to recover
34 damages where an unmanned aircraft is operated in such a way that it violates that person's
35 reasonable expectation of privacy. Informed by federal and parallel state laws on privacy, this
36 provision would act to protect citizens from such violations and provide a private right of action
37 for violations. As the scope of this Act is limited in application to questions arising from the
38 operation of unmanned aircraft, there is no attempt here to create a broader or more substantive
39 right, and bracketed §8 should not be read to create or imply the creation of such a right.
40

41 Subsection (a) of bracketed §8 creates the privacy tort cause of action for unlawful
42 surveillance where the unmanned aircraft is used to violate another's reasonable expectation of
43 privacy. The provision applies where intent to conduct surveillance is proven and no consent has
44 been given for the surveillance.
45

46 Subsection (b) exempts certain uses and activities from the unlawful surveillance

1 provision, including use by law enforcement in conformance with the Fourth Amendment,
2 warrant or other legal order (subsection (b)(1)), where any recordings made are incidental to the
3 operation or navigation or are otherwise permitted by federal or state law (subsection (b)(2)),
4 where the unmanned aircraft’s operation was within the scope of any license issued by the state
5 (subsection (b)(3)), where the unmanned aircraft is used for newsgathering or is otherwise
6 protected by the First Amendment (subsection (b)(4)), or where the operation was in compliance
7 with FAA regulations (subsection (b)(5)).
8

9 Bracketed §8(c) defines “unlawful surveillance” as used in this section and requires
10 initially that the capturing of recordings be willful and conducted in a manner that is patently
11 offensive to a reasonable person. Subsection (c) also requires that the content of what is captured
12 includes only recordings of persons conducting private or familial acts in places where they have
13 a reasonable expectation of privacy.
14

15 **SECTION 9. NEGLIGENCE OPERATION OF AN UNMANNED AIRCRAFT.**

16 (a) The common law and statutory negligence law of this state shall apply to an
17 unmanned aircraft operator.

18 (b) An unmanned aircraft operator acts negligently if the operator does not exercise
19 reasonable care under all of the circumstances.

20 (c) For purposes of this section, the standard of care required of an unmanned aircraft
21 operator is that level of care required by the Federal Aviation Administration or other applicable
22 federal authority, or, in the absence of an applicable federal standard of care, the level of care as
23 determined by the [law of this state].
24

24 **Comment**

25 This section explicitly incorporates the unmanned aircraft operator’s general duty of care
26 into the act and clarifies that the standard of care for an unmanned aircraft operator is a national
27 one based on the standards set by the FAA. Where the FAA has not set a standard of care in any
28 particular case, the standard of care is to be determined according to the negligence law of the
29 state.
30

31 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
32 applying and construing this [Uniform Act], consideration must be given to the need to promote
33 uniformity of the law with respect to its subject matter among the states that enact it.

1 **SECTION 11. SAVINGS CLAUSE.** This [Act] does not affect the validity or effect of
2 a notarial act performed before [the effective date of this [Act]].

3 **[SECTION 12. SEVERABILITY.** If any provision of this [Act] or its application to
4 any person or circumstance is held invalid, the invalidity does not affect other provisions or
5 applications of this [Act] which can be given effect without the invalid provision or application,
6 and to this end the provisions of this [Act] are severable.]

7 *Legislative Note:* Include this section only if this state lacks a general severability statute or a
8 decision by the highest court of this state stating a general rule of severability.

9
10 **SECTION 13. EFFECTIVE DATE.** This [Act] takes effect