

July 5, 2018

Ms. Anita Ramasastry
c/o Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602

Dear Ms. Ramasastry,

As associations representing the unmanned aircraft industry, we write to express our opposition to the current draft produced by the Uniform Law Commission's ("ULC") Tort Law Relating to Drones Drafting Committee ("Committee"). The draft in question is under consideration for the Louisville ULC meeting in July.

The Committee is comprised of accomplished state legislators, judges, academics, and private attorneys, whose expertise in the law cannot be questioned. However, the voting Committee members appear to have little direct experience with unmanned aircraft. The Reporter for the Committee (a nonvoting member of the Committee) is an expert in the field, and non-voting industry observers regularly participated in the meetings by providing feedback; nevertheless, the consensus opinions of industry are not reflected in the draft. As a result, the current draft fails both to adequately account for the exclusive role of the federal government in safeguarding aviation safety and air navigation and to strike the proper balance between innovation and personal privacy, and accordingly may stifle the development of this nascent industry across the United States and undermine the ULC's core objective of promoting legislative uniformity.

The current draft interferes with the plenary authority of the Federal Aviation Administration (FAA) by adopting a new interpretation of aerial trespass doctrine in order to give property owners a right to establish no-fly zones prohibiting any unmanned aircraft from flying below 200 feet. No-fly zones may only be established, however, by the federal government. State and local laws purporting to establish such zones (or giving property owners the right to do so) stand in direct conflict with federal regulation of air navigation, and thus are preempted by federal law.

The Supremacy Clause of the U.S. Constitution states that "the Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."¹ As noted by the Supreme Court, this gives Congress the power to preempt state law.² Preemption applies not just to statutory law, but also to state common law as embodied in tort suits.³ When a federal framework of regulation is "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,"⁴ the federal government is considered to have occupied the "field." It is well settled that Congress has occupied the field with regard to air navigation.⁵

The FAA has issued numerous letters to localities cautioning against the adoption of no-fly zones.⁶ In addition, the FAA released a UAS Fact Sheet reminding state and local jurisdictions that they lack authority to regulate air navigation.⁷ Through these letters and the UAS Fact Sheet, the FAA has made clear that regulations imposing operational bans or otherwise regulating navigable airspace are problematic.⁸ As described in the UAS Fact Sheet, "[s]ubstantial air safety issues are raised when state and local governments attempt to regulate

¹ U.S. Const., Art. VI, Cl. 2.

² See, e.g., *Arizona v. United States*, 567 U.S. 387 (2012).

³ See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

⁴ *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁵ See *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34 (1973).

⁶ See, e.g., Letter from Christopher R. Stevenson, FAA Office of the Chief Counsel, Enforcement Division, to Mark A. Winn, Assistant City Attorney, City of Petersburg (Sept. 16, 2016); Letter from Brandon C. Goldberg, FAA Office of the Regional Counsel, Southern Region to Alexander Karden, City Prosecutor, City of Orlando, Florida (Jan. 21, 2016); Brandon C. Goldberg, FAA Office of the Regional Counsel, Southern Region to Austin D. Roberson, Cobb County Attorney's Office (Jun. 9, 2016); Brandon C. Goldberg, FAA Office of the Regional Counsel, Southern Region to David Wolpin, Esq., Counsel for the City of Aventura, Florida (May 26, 2016).

⁷ *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*, Federal Aviation Administration Office of the Chief Counsel (Dec. 17, 2015) ("UAS Fact Sheet") https://www.faa.gov/uas/resources/uas_regulations_policy/media/UAS_Fact_Sheet_Final.pdf.

⁸ *Id.* at 3.

the operation or flight of aircraft” and “[a] navigable airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe and sound air transportation system.”⁹ The Committee’s proposal, if adopted by state legislatures, would intrude into this purely federal regulatory system by attempting to limit, through state property law and accompanying tort suits, the airspace available for UAS operations. Such actions would be preempted by federal law.

Industry observers, including a number of the undersigned, explained that the approach taken by the Committee was inconsistent with both federal law, which treats the airspace as a national asset to be managed at the federal level, and with the aviation law jurisprudence in tort and under the Constitution’s Takings Clause, which has long recognized that giving individual property owners a veto right over air navigation is simply not possible. This input was rejected.

The Committee’s choice to base the *per se* tort on physical trespass, and to give property owners an absolute right to exclude all unmanned aircraft from the airspace, was a deliberate one. The Committee expressly acknowledged that small unmanned aircraft¹⁰ simply do not cause the kind of injury that the traditional tort of aerial trespass recognizes—i.e., a substantial interference with the use or enjoyment of property, particularly from noise. That is because of both the small size of the typical unmanned aircraft and the short duration of its flight. But rather than acknowledge this lack of injury, the Committee decided to redefine the tort so that no impact or interference is required. Under the proposed draft, the mere presence of an unmanned aircraft of any size for any period within 200 feet over private property (or any structure on it) causes a *per se* injury.

The Committee’s choice of 200 feet was deliberate. This choice was also precipitous, as the Committee developed *post hoc* justifications after its initial vote to use 200 feet as the ceiling below which an aerial trespass would be established *per se*. Observers explained that any inflexible line in the sky would be inconsistent with aviation tort law. The 200 feet line would pose numerous evidentiary difficulties while nonetheless spawning many meritless claims. And it would prohibit many beneficial uses of unmanned aircraft to businesses, non-profit organizations, and consumers.

The approach adopted in the draft also undermines a core tenet of the ULC: “promot[ing] uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.” Uniformity ultimately requires a critical mass of states to adopt the uniform laws drafted by the ULC. By giving property owners a right to exclude *all* unmanned aircraft within 200 feet of the ground or structures, the draft goes much farther than any existing state or federal law, and is unlikely to be adopted without substantial controversy and revision by state legislatures. This would potentially create a patchwork of laws among the states, with some adopting the ULC model statute and others rejecting it in favor of laws that are more consistent with existing aviation and tort law. Those that do adopt the ULC model statute will likely face lengthy and costly litigation; even if they successfully defend their statutes, they will make it difficult or impossible for unmanned aircraft use to flourish within their borders, and the patchwork that will result will be a drag on the entire industry.

This, of course, runs counter to the ULC’s guiding principle of uniformity, and risks jeopardizing the substantial economic benefits that unmanned aircraft will bring. The UAS industry stands to create more than 100,000 new jobs and have an economic impact of \$82 billion,¹¹ but these numbers cannot be achieved if drones are subject to uncertain regulation and potential tort liability from engaging in FAA-authorized flights.

⁹ *Id.* at 2; accord Letter from Reginald C. Govan, Chief Counsel, FAA, to Victoria Mendez, Esq., City Attorney, City of Miami (Dec. 9, 2015).

¹⁰ The Committee’s discussion has, to date, focused on small unmanned aircraft, though the definition of “unmanned aircraft” in the current proposal does not have a size limitation. This leads to the counter-intuitive result that a micro-UAS—a child’s toy—causes the same *per se* injury as a much larger unmanned aircraft.

¹¹ See, e.g., <http://www.auvsi.org/our-impact/economic-report>.

In light of these concerns, we respectfully request that the ULC make this letter available to all ULC members prior to voting on the draft, and that it be posted on the website for the public to view. Further, we hope to identify ways that industry may work with the ULC in the future. As shown by our participation as observers, industry is eager to collaborate with the ULC to develop a model statute that all stakeholders can support. Such a draft will have more success at being enacted in a critical mass of states, in protecting property owners, and in ensuring the unmanned aircraft industry can flourish.

We look forward to continuing to work with the ULC.

Sincerely,

