TO: Uniform Law Commissioners

FROM: Paul Kurtz, Chair
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RE: Uniform Tort Law Relating to Drones Act Q&A

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What is the purpose of the Uniform Tort Law Relating to Drones Act (UTLRDA)?

The Uniform Tort Law Relating to Drones Act has been developed in response to the large number of drones expected to enter the national airspace in the immediate future. With the large influx of drones expected – in 2018 the Federal Aviation Administration estimated that by 2022 there will be more than three million drones in operation in the United States – the Uniform Law is intended to provide additional guidance to both drone operators and those who will otherwise interact with drones, especially land possessors, regarding various aspects of tort law.

What is the general approach taken by the UTLRDA?

The UTLRDA Drafting Committee has found that there are situations in which existing tort law will apply fairly straightforwardly to drones – referred to in the Uniform Law as "Unmanned Aircraft" to match the federal legislative and regulatory structure – and that there are times the application of existing tort law requires additional clarity or guidance. Someone who alleges that another used a drone to destroy personal property would therefore make out a *prima facie* case for conversion or trespass to chattels. One who alleges that another person intentionally hit them with a drone would make out a *prima facie* case for battery, and if they saw the drone before it hit them they could add a *prima facie* case for assault.

The general approach starts by making clear, where appropriate, that existing tort law applies to drones and actions taken using drones. One example included in the comment to §4 of the UTLRDA is illustrative: "A person would be liable for battery if that person intended to fly an unmanned aircraft so as to make contact with a person and contact occurred." This approach forestalls the instinctive reaction to make specific rules for a new technology just because it is new, rather than because it changes something and thus requires new or additional legal rules. That is not true for everything relating to drones, however, and the Drafting Committee has included specific provisions for areas of tort law that require them. Among these latter areas are trespass/aerial trespass and landowner duties relating to drone overflights.

What rule has the UTLRDA developed for drone overflights of private property?

Prior to the first reading of the UTLRDA at the ULC 2018 Annual Meeting, the Drafting Committee had proposed to limit how low drones could fly over private property. The proposed restriction was to require that drones not fly lower than 200 feet above ground level while over privately held property. In other words, drones that flew lower than 200 feet over private property would be presumed to be trespassing, though there were exceptions and privileges

included in the draft that would have allowed overflights in some cases. After drone hobbyists, commercial drone operators, businesses and others who anticipate robust use of drones for public safety, commercial and recreational activities strenuously objected to the 200-foot limit, the Drafting Committee abandoned the height limitation and took a new approach. Based on legal concepts developed during the early years of air travel, the UTLRDA now allows overflights unless the operation of the drone over private property "substantially interferes with the use and enjoyment of the property." A multifactor approach to the question of substantial interference is included in the UTLRDA to assist courts and litigants in determining whether overflights substantially interfere with the use and enjoyment of property.

Doesn't a "substantial interference" standard take away property owners' property rights?

The Drafting Committee is of the opinion that in the 1946 case of *United States v. Causby*, the United States Supreme Court held that in relation to aircraft traveling in navigable airspace, that airspace is held by the public, not by the landowners who own the land underneath it. This has been the rule relating to aircraft since *Causby*. As drones have been classified as aircraft by Congress and the Federal Aviation Administration, the Drafting Committee believes the law supports the application of the *Causby* rule to drones and has drafted the aerial trespass provision to provide additional guidance to decision-makers – e.g., courts, lawyers, drone operators, and property possessors – in relation to drone operations over privately-owned property. The counter-argument – that *Causby* reserved airspace near the ground to the control of the landowner, ignores the fact that the flights in *Causby* were, at times, no higher than eighty-three feet above the landowner's property (a mere eighteen feet above the tallest tree). Even at eighty-three feet above the property, the Supreme Court did not apply a "trespass to land" standard but instead applied the "substantial interference with use and enjoyment of property" standard specifically adopted in §5 of the UTLRDA. Indeed, it can be argued that drones introduce a new factor into the analysis simply because, unlike traditional aircraft, even a few feet above the ground is truly navigable airspace for drones. Because the Supreme Court has held that landowners do not "own" the navigable airspace above their properties, nothing is being "taken away" by §5 of the UTLRDA. The Drafting Committee, however, recognized that permitting unfettered drone flights over private property is untenable. Therefore, the UTLRDA provides landowners with a clear right to sue for damages or injunctions where drone flights substantially intrude on the use and enjoyment of the property, a standard based in nuisance law rather than traditional trespass to land.

Won't landowners be upset that they cannot exclude drones from above their properties?

In the early 1900s, as aircraft flights increased, landowners were having the same debates about flights at five and ten-thousand feet that drone operations are causing today. Yet no one today objects with any seriousness to the flight of airplanes or helicopters over their properties unless those flights cause some actual injury or damage to their use of the property. It has become the norm. The Drafting Committee believes a similar shift will occur with the use of drones, which will become more common and present in our skies. Where bad actors use drones to interfere with property use, property owners will have a cause of action against them under the UTLRDA.

Couldn't drones just fly above public roads and then "turn in" where they have permission to fly?

A similar suggestion was made and rejected in relation to airplanes in the early development of manned aircraft. *See*, Stuart Banner, WHO OWNS THE SKY: THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON (2008). Such an approach was not appropriate then and it is not appropriate now. Flying over roads is inefficient, does not address a multitude of uses that don't involve simple traversing of space – such as photography and surveying – and puts the drone over a road where any failure would have an increased chance of involving a person or vehicle. In addition, as the FAA prohibits operating Unmanned Aircraft over people or vehicles, a state law that demanded flying over roads or streets would be in direct conflict with FAA requirements.

Why hasn't the UTLRDA at least established a presumptive "no fly zone" at a set height or according to the height of improvements on the property?

The Joint Editorial Board for Uniform Real Property Acts ("JEB") and the American Bar Association Section of Real Property, Trust and Estate Law (RPTEL) have advocated for property owner rights to exclude drones from the airspace above their property. For example, the RPTEL argued for a "zone in which property owners could exclude unmanned aircraft" (RPTEL letter of June 25, 2019). Similarly, the JEB argued that "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." (JEB Letter of June 5, 2019). These approaches are consistent with the first draft of the UTLRDA presented to the Commissioners in July of 2018.

In adopting the "substantial interference" standard, the Drafting Committee explicitly rejected the "per se trespass" approach as unworkable. Interested stakeholders made clear to the Drafting Committee that a set height under which drones could not operate was unacceptable and that inclusion of such a provision would lead to fierce opposition to the UTLRDA to the extent that its passage in the states would likely be prevented. When, late in the drafting process, a "lower than structures" approach was presented to the Drafting Committee at the request of the JEB, this approach was also rejected as being untenable, as flight levels would necessarily change from property to property, making flight planning and transit a complicated maze of varying height requirements. This concern is reflected in the stakeholder letter of July 1, 2019.

Does the UTLRDA provide other tort remedies aside from aerial trespass?

Yes. The UTLRDA explicitly provides in §4 that the tort law of a state applies to drone operations. If a drone operator negligently operates a drone such that injury to a person or property occurs, the operator would be liable under standard tort law negligence concepts. Similarly, if a drone operator intentionally hits another person with a drone, the operator would be liable for the tort of battery. A drone operator that intentionally makes someone think they are going to hit them with a drone would be liable for the tort of assault. Nothing in the UTLRDA is intended to or does undermine these outcomes. In addition, intentional contact with property or persons would be either a trespass to land under §6 in the former case or battery under §4 – the general tort applicability provision – in the latter case.

Does the UTLRDA restrict the kinds of remedies that a plaintiff may obtain?

No. The UTLRDA specifically provides in §4 that remedies available under state law for violations of tort law are available in any action relating to drones. If state law provides injunctions or damages relating to a specific tort cause of action, those same remedies will be available for actions relating to drones, including those brought under §5's aerial trespass rule.

How are the presumptions in favor of law enforcement, public safety and First Amendment activity expected to work?

The Drafting Committee included three presumptions in the UTLRDA Aerial Trespass provision in §5 relating to law enforcement, public safety operations and First Amendment activity. In each case, the presumption would not condone what is otherwise an aerial trespass but would instead provide a trigger during litigation for cases where the facts do not clearly support a finding of substantial interference with use and enjoyment of property to be dismissed either on motion for dismissal or summary judgment. Law enforcement and public safety are often privileged to enter property. The JEB and the RPTEL both raise concerns regarding the presumption for acts protected by the First Amendment, arguing that the presumption effectively makes a challenge to such activity impossible. The First Amendment privilege was included to allow for robust use of drones in what the Drafting Committee viewed as an important and growing use of drones in news reporting and news gathering. The Drafting Committee neither created nor intended to create a license to trespass with these provisions, which is why they are treated as rebuttable presumptions and not firm privileges that cannot be overcome under any circumstances.

What does the UTLRDA provide in the way of privacy protections?

The Drafting Committee was acutely aware of concerns about the potential for privacy violations by those using drones. This was raised by the RPTEL, which objected that the Act "allows images of people and places not visible at street level and the public way line to be obtained and retained." The Committee debated these issues at length, over several meetings. Drones are just one technology that can be used to invade privacy, but because drones are new technologies, their use in this way often leads to demands for drone-specific responses. Is a drone hovering over a neighboring property any different than a person standing on the balcony of a neighboring property with a zoom lens camera? The Drafting Committee understood that privacy is a complex and multifaceted area of the law with significant differences in kinds and strengths of protections granted by the states either by statute or by case law. Some states even criminalize such activity under certain circumstances. Rather than attempt to put in place a provision that might conflict or interfere with other, non-drone privacy provisions, the Drafting Committee made clear in §8 that drones are covered by a state's privacy laws, leaving further development of privacy's substantive protections to the individual states.

Can a landowner shoot down a drone under the UTLRDA?

No. Destruction of an aircraft in flight is a federal crime. (18 U.S.C. §32). The UTLRDA prohibits any *active* measures taken to disable or destroy a drone in flight in §7. This prohibition does not apply to things like building a patio wall, a fence at the border of property, or any other use of property, but does prohibit shooting down drones with a gun or other devices intended to disable or destroy them.

Why does the UTLRDA use the phrase "land possessor" rather than "landowner"?

The Drafting Committee chose the term "land possessor" in place of the term "landowner" because those in possession of land are often granted authority to enforce various property related rights in relation to the land they possess. One well-known category of non-owner possessor is a person who leases or rents property from the owner. Because a landowner who is in possession of property is also a land possessor under the UTLRDA definition, but a land possessor who is not an owner is not a landowner, the Drafting Committee chose the more inclusive term "land possessor." Note that land possessors under the UTLRDA will have the rights assigned to them under state law. For example, if a person who is adversely possessing property but who has not yet met the statutory requirements to perfect the adverse claim has the right to bring property-based claims under state law, then this right likewise would be recognized under the UTLRDA.

If UTLRDA §4 covers the majority of state torts in relation to drones, why are other torts set out in other sections of the Act?

While §4 is entirely sufficient to ensure that the involvement of a drone in factual allegations will neither create a new cause of action nor void a cause of action that otherwise exists, the Drafting Committee believed it appropriate to either set uniform provisions or otherwise clarify existing law in some specific cases. This latter approach is found in section §6, which clarifies that a drone that intentionally lands on property has trespassed on land. This clarification was included to keep the "aerial trespass" and "trespass to land" distinctions clear, and to ensure that the UTLRDA is not read to diminish or change the traditional trespass to land action. UTLRDA §7 reflects the former approach and is intended to create a uniform standard of reasonableness to drones and drone operators where the state rules may otherwise vary based on the traditional common-law taxonomy of licensee, invitee or trespasser, categories the Drafting Committee concluded would be unworkable in the drone context.

Finally, UTLRDA §8, which reflects the same approach as §4 but is focused not on all torts but on privacy-related causes of action, was included because of the importance of privacy concerns in the drone context. The Drafting Committee decided it would create more confusion in the states to attempt to craft a specific drone-related privacy cause of action against a background of many differences from state to state in the current treatment of privacy claims but nevertheless included §8 to reinforce the importance of privacy questions to drone operations.

How might the decision in *Knick v. Township of Scott*, handed down by the U.S. Supreme Court in June, affect the UTLRDA?

Knick v. Township of Scott, Pennsylvania, was handed down by the U.S Supreme Court on June 21, 2019. *Knick* is a takings case that, at its heart, is about the procedure for bringing a takings claim. *Knick* invalidated a requirement announced in the 1985 case of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985) that any petitioner bringing a Fifth Amendment takings claim in federal court must first meet two ripeness requirements. The first was that any decision being challenged as a taking must be final. The second was that any state procedures that provided a method for claiming compensation – most often through a process known as inverse condemnation – had to be pursued before a §1983 civil rights action could be maintained in federal court.

In a later case, the Supreme Court held that where state litigation found that no taking had occurred, that finding was binding on state courts under the federal full faith and credit statute (28 U.S.C. §1738). *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). This meant it was very difficult, if not impossible, to bring takings challenges to local and state regulatory actions in federal court. The Supreme Court addressed this problem in *Knick* by overruling *Williamson County* and allowing takings claimants to proceed directly to federal court without the need to exhaust state remedies before suing in federal court.

For a variety of reasons, it is uncertain how the decision might affect any challenges to the UTLRDA. The first reason relates to the two ways in which takings challenges are brought: "as applied" and "facial" challenges. The more common takings challenge is the "as applied" challenge. An as applied challenge is based on a claim that the enforcement of a challenged requirement against the particular landowner is a taking. In contrast, a facial challenge is a claim that the challenged requirement cannot be constitutionally applied to anyone. Traditionally, as applied challenges involve factual inquiries relevant to a particular landowner while facial challenges do not, but as commenters have pointed out, that distinction has been significantly blurred over time in the takings context. *See*, David Zhou, *Rethinking the Facial Takings Claim*, 120 Yale L.J. 967 (2011). The "finality" provision in *Williamson Township* is still in place but is unlikely to be relevant to a facial challenge.

Whether a challenge to the UTLRDA would be brought as a facial challenge or an as applied challenge would depend on the claimant in the case and the particular facts that make up the claim. In addition, because the taking claim would most likely assert that the UTLRDA authorizes a physical invasion of property rights – a category of takings known as *per se* takings – the procedural niceties of *Knick* may not affect the claims at all.

Other takings concerns factor into the discussion, as well. States are generally thought to be immune to lawsuits in federal court for violations of §1983 due to the doctrine of sovereign immunity. *See*, Thomas Merrill, *Anticipatory Remedies for Takings*, 128 Harv. L. Rev. 1630, 1643-1647 (2015). Within the quagmire of takings jurisprudence, this likely means that *Knick* itself will have little effect on takings cases brought based on passage of the UTLRDA. If a land possessor claims that the Act constitutes a taking of her property, that constitutional question would be the same with or without the *Knick* case. The latter case simply provides an alternative initial forum in federal court.