Memorandum

To: National Conference of Commissioners on Uniform State Laws

From: Henry E. Smith, Fessenden Professor Law and Reporter for the American Law Institute's Restatement Fourth of the Law, Property

Date: July 2, 2019

Re: Further Comments on May 30, 2019 draft "Uniform Tort Law Relating to Drones Act"

In response to my June 20, 2019 memo, the drone industry in a letter of July 1, 2019 raises two points and reiterates some others. The Letter points out that I did not offer a specific alternative to the May 30 Draft's Section 5, and it asserts that all alternatives were considered in the process culminating in the current version. The Letter also reiterates its views on "aerial trespass." None of these arguments is availing.

My interest in these issues is that of a property scholar, and, as before, I write in my personal capacity, and not on behalf of the American Law Institute.

The memo dismisses my criticism because I do not put forth an alternative. This is hard to take seriously. As I said in my memo, a number of approaches are consistent with the principles I set out. The importance of those principles do not depend on selecting one alternative. For what it's worth, I consider among those superior alternatives to be the earlier drafts – flawed in some respects though they may be – and in other feedback the UFC has received from many quarters. Nowhere has it been shown that presumptions of trespass or substantial harm are unworkable – or even some set of distances within which trespass would be presumptive. Perhaps more telling is that even a wide berth for drones would be better implemented as a defense to trespass law, rather than, as the Draft does, erasing current trespass and replacing it with a bespoke regime for drones. As I said in my June 20 Memo, the law of trespass is associated with a range of common law and statutory defenses ranging from necessity to the surveyor's privilege. What mix of rules and standards depends on the nature of the potential intrusion, but there is nothing in the problem presented by drones that tailoring a defense to fit the problem – as has been done repeatedly in the past – would not serve here as well. That the Draft blows by this possibility with nary a mention is a symptom of the problem.

It is a symptom of a process gone awry. Here too I profess no direct knowledge of what went wrong – just that something must have. The Letter repeatedly assures us that all alternatives were considered and rejected for good reason. This amounts to little more than an ipse dixit and will carry no weight with a skeptical public either.

For the rest, the memo rehashes ground that has been thoroughly covered before. It touts "aerial trespass" doctrine as supplying a complete justification for the extreme – and it is indeed extreme – approach in the May 30 Draft. For reasons stated in my memo, this kind of reliance

on aerial trespass doctrine is misplaced and feeds into a false dichotomy between unreasonable extremes. Indeed, in the hands of the May 30 Draft and the Letter, the notion of "aerial trespass" becomes an empty slogan. I would reiterate that a close reading of the case law and the Restatement Second of Torts casts grave doubt on the entire framing of the Draft Act. If this is the kind of "nuance" and "compromise" that characterized the process that got us to this point, then color me skeptical.

In this connection, the Letter completely misrepresents my views on trespass and fails to mention my Memo's discussion of nuisance. As I made abundantly clear, the law of trespass is a (relatively) simple presumption that has been elaborated with exceptions and supplements – including through the law of nuisance – in order to provide a highly flexible and dynamic system for resolving an important class of land use conflicts. That was the overall import of my Memo. That the Letter seem not to even begin to appreciate this greater context suggests to me that the deference being asked for is inappropriate. I stand by every word of my previous Memo.