Balancing New Technology and Privacy When Using Drones in Land Use and Construction

Article By
Virginia K. Trunkes
Robinson & Cole LLP
Data Privacy + Security Insider

The mixture of sheltering-in-place, warm weather, and increasing drone usage creates a combustible situation – literally. Drone shootings are on the rise as property owners seek to combat perceived trespass, nuisance and invasions of privacy.

These were some of the legal issues discussed during a webinar presented by the American Bar Association’s Section on Real Property Trusts and Estates (ABA RPTE) at its 32nd Annual Conference (held virtually for the first time) on May 15, 2020. The webinar focused on the legal landscape and issues to consider in counseling real estate and construction businesses on the commercial use of small unmanned aerial systems (sUAS). The panel included attorneys as well as an engineer, who presented drone video footage and computer graphics used to collect data more efficiently during land use evaluation, mid-construction and post-construction.

While legal issues abound in this flourishing industry, it was the topic of privacy that dominated the discussion in the RPTE program — just as it has throughout our Digital Age. Although the Federal Aviation Administration (FAA) regulates sUAS, including restricting their flights over people and beyond the remote pilot’s line of vision, it stops short of getting involved with privacy matters. The FAA has consistently maintained that addressing privacy concerns is beyond the scope of its mission, stating: “Congress exclusively authorized the FAA to regulate aviation...
safety, the efficiency of navigable airspace, and air traffic control, among other things. ... Laws traditionally related to state and local police power—including land use, zoning, privacy, and law enforcement operations—generally are not subject to federal regulation.”

The FAA has contended that the “unique characteristics and capabilities” of drones that present “uncertainties with regard to individual privacy” have no bearing on the safe operation of the aircraft. Instead, those attributes “are generally related to technology and equipment,” such as cameras and other sensors, which features may likewise be installed on manned aircraft like helicopters. Indeed, helicopters have long been used for aerial surveys, film/television production, law enforcement, and other varied purposes.

The FAA would prefer to wait for “insight” from the UAS Integration Pilot Program (IPP). Created in 2017, the IPP assembled state, local, and tribal governments together with private sector entities, such as UAS operators or manufacturers, to test and evaluate the integration of civil and public drone operations into the country’s national airspace system. The FAA is hopeful that the IPP will advise “on how best to involve local jurisdictions in the integration of UAS into the airspace while considering local interests in conjunction with aviation safety.”

Yet, much time has passed since the IPP began, while the rate of drone use has accelerated without the collective guidance. As of March 2020, the FAA listed over 1,563,000 UAS registered UAS, comprised of 443,000 for commercial use and approximately 1,120,000 for recreational use.

Perhaps yielding somewhat to privacy advocates, in late 2019, the FAA proposed amending its regulations to require each UAS to continuously transmit their location and identification details to an online FAA tracking system. The purpose of that rule, if adopted, would be to provide “additional situational awareness to manned and unmanned aircraft,” and to allow regulators, law enforcement, and national security agencies to better and more fully monitor compliance with the existing rules and regulations governing UAS. The comments period closed on March 2, 2020, following the submission of more than 34,000 comments. (Ironically, in April, 2020, the Inspector General for the Department of Transportation issued a report finding that the FAA does not adequately secure the personally identifiable information submitted through its online UAS registration system.)

Meanwhile, several legal organizations have attempted to advocate for a formal regulatory arrangement that adequately balances the legal rights of drone users and those in their flying zone. In 2019, the American Law Institute’s (ALI) drafters of the Fourth Restatement of Property applied principles of trespass law in proposing § 1.2A – “Trespass by Overflight.” In the Comments to § 1.2A, the ALI focuses on the different levels of “possession” of airspace, acknowledging that “the protection of the right to possession attenuates the further one travels from the surface.” The Comments also note that “[t]respass and nuisance are not the only bodies of law that would address the harms caused by drone overflights ... [as] statutes and case law directly addressing privacy may apply in the context of drone overflights as well.” The draft was on the agenda of the ALI’s 2020 Annual Meeting until it was cancelled, and is not subject to approval until the 2021 Annual Meeting.
The Uniform Law Commission ("ULC") has also tried its hand in tackling drones and privacy. In 2019, it drafted a Uniform Tort Law Related to Drones Act. The proposed law focuses less on the altitude of airspace into which a drone enters, and more on whether the UAS is operated “in the airspace over the land possessor’s real property and causes substantial interference with the use and enjoyment of the property.” The drafted Act prescribes thirteen delineated factors to inform whether the operation of UAS caused the requisite “substantial interference,” and contains a rebuttable presumption that UAS do not substantially interfere with the use and enjoyment of property in certain instances. Following the receipt of numerous comments from industry stakeholders, legal scholars, and others, the ULC has postponed any action until the FAA provides further rule guidance related to UAS.

And on February 17, 2020, through the work of the ABA RPTE Section, the ABA’s House of Delegates adopted Resolution 111, by which it urged “federal, state, local, territorial, and tribal governments” to protect real property interests “with respect to any statute, ordinance, regulation, administrative rule, order, or guidance pertaining to the development and usage of unmanned aircraft systems over private property.”

Whether or not the FAA or other government entity moves forward in regulating drone privacy, commercial UAS operators can follow best practices to mitigate against a privacy invasion. The National Telecommunications and Information Administration recommends, for instance:

- informing others of the planned use of UAS and, if flying over private property, minimize operations above or otherwise obtain owner consent;
- creating and making public a privacy policy for “covered data,” e., information collected by a UAS that identifies a particular person, the individual’s name or other personally identifiable information;
- avoiding the use of UAS for the specific purpose of intentionally collecting covered data where the operator knows the data subject has a reasonable expectation of privacy;
- establishing a process for receiving privacy or security concerns, including requests to delete, deidentify, or obfuscate the data subject’s covered data, and make that process easily accessible to the public, such as by posting on the company website;
- limiting the use and sharing of covered data, and securing what data is retained; and
- monitoring and complying with “Evolving Federal, State, and Local UAS Laws.”

In the meantime, until the IPP releases recommendations that could allow for a comprehensive, unified framework in dealing with the seeming myriad of issues raised by drones, local governments, drone operators and the like will be left to their own devices.

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