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Laws Governing Unmanned Aircraft Systems: Are They Clear & Consistent?

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Local law enforcement agencies are starting to buy and use unmanned aircraft systems (UAS), also known as drones. For instance, The Orland Park Police Department in Orland Park, Illinois, a suburb of Chicago, recently became the first municipal police department in Illinois to operate its own UAS. The department sees UAS as a means to assist in missing persons searches, photography of accident scenes, and other situations where there is an immediate threat to public safety.

UAS operations by local law enforcement agencies will become very common in the coming months and years. Under the FAA's authority – focused mostly on safety, not privacy – such operations are considered “public aircraft” and governed by a federal statute, 49 U.S.C. sec. 40102(a) (41). According to the FAA, “whether an operation qualifies as a public aircraft operation is determined on a flight-by-flight basis, under the terms of the statute. The considerations when making this determination are aircraft ownership, the

operator, the purpose of the flight, and the persons onboard the aircraft.”

For public UAS operations, the FAA issues Certificates of Waiver or Authorization (COA). These certificates permit public agencies and organizations to operate a particular UAS, for a particular purpose, in a particular area. COAs allow operators to use defined blocks of airspace and include special safety provisions unique to the proposed operations. COAs usually are issued for a specific time period (up to two years in many cases). Common public UAS uses today include law enforcement, firefighting, border patrol, disaster relief, search and rescue, and military training.

The FAA works with local police departments to develop conditions and limitations for UAS operations to ensure they do not jeopardize the safety of manned aircraft operations. Usually, COAs restrict public UAS operations over populated areas, and require that the UAS operations be observed by someone in a manned aircraft, or someone on the ground, to ensure separation from other aircraft, buildings, etc. Information about public aircraft operations can be found here: http://www.faa.gov/uas/public_operations/media/Decision_Flowcharts_for_PAO.pdf.

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When most police departments and news organizations become regular and frequent UAS operators, imagine what the sky will look like whenever there is a major traffic accident, a big fire, or a hostage standoff. The sky will be full of BOTH police drones and news drones. How will they stay separated? How will legal rules protect both safety and privacy? The laws in this area do not appear to be clear and consistent.

Besides the FAA, states are also beginning to pass laws to govern UAS operations by local police departments. Illinois recently enacted legislation governing when and under what circumstances police in Illinois can use UAS technology. It is called the "Freedom From Drone Surveillance Act." Similar UAS privacy laws have been passed in several other states including Wisconsin, Maine, Nevada, Tennessee, Vermont, Virginia, and Utah. These laws are not uniform.

For example, the Illinois and Wisconsin UAS laws are very different. The Illinois law provides that UAS operations over all private property are generally prohibited without a search warrant. In Wisconsin, UAS operations over private property are not off limits unless the property owner has a "reasonable expectation of privacy." (The U.S. Supreme Court has recognized that an expectation of privacy from aerial observation of one's private property may be unreasonable. See *California v. Ciraolo*, 476 U.S. 207(1986).)

Another example where UAS laws appear to be unclear and/or inconsistent involves how airports are supposed to be notified about local UAS operations, and reach agreements with local UAS operators about appropriate procedures. This issue is governed, in part, by the following language set forth in the federal 2012 FAA Reform and Modernization Act. Section 336 of the Act states: "When flown within 5 miles of an airport, the operator of the model aircraft provides the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport) with prior notice of the operation (model aircraft operators flying from a permanent location within 5 miles of an airport should establish a mutually agreed upon operating procedure with the airport operator . . .)" This part of the law governs only non-commercial (i.e. hobby or recreational UAS operations).

By the way, the FAA recently made available a free smartphone app to help UAS hobbyists determine whether their flying will be within 5 miles of an airport or heliport. Information about the app, called B4UFLY, can be found at: <https://www.faa.gov/uas/b4ufly/>. I recommend that all persons interested in UAS operations install the app and learn how to use it.

Commercial UAS operations near airports are subject to a much different set of rules. Until the FAA implements a comprehensive set of specific UAS regulations, commercial UAS operations are only permitted if

the user applies for and receives a "333 Exemption." (See https://www.faa.gov/uas/legislative_programs/section_333/ for more information about these exemptions.)

For commercial UAS operations near airports, the typical 333 Exemption states: "The UA [Unmanned Aircraft] may not operate within 5 nautical miles of an airport . . . unless a letter of agreement with that airport's management is obtained or otherwise permitted by a COA issued to the exemption holder."

Notice how different these rules are. Commercial UAS operations near airports are prohibited unless the operator has a letter of agreement or a COA. Hobby UAS operations near airports involve notice and "agreed upon operating procedures."

In June 2014, the FAA issued its legal interpretation of section 336 of the 2012 Act. Concerning hobby UAS operations near airports, the FAA said: "If the model aircraft operator provides notice of forthcoming operations which are then not authorized by air traffic or objected to by the airport operator, the FAA expects the model aircraft operator will not conduct the proposed flights. The FAA would consider flying model aircraft over the objections of FAA air traffic or airport operators to be endangering the safety of the NAS [National Airspace System]."

In conclusion, it appears that some of the laws governing UAS operations may be unclear and/or inconsistent. It will be interesting to see how, in the coming months and years, lawmakers, regulators, and courts modify, interpret and apply the different legal rules discussed above to UAS operations.

EDITOR'S NOTE: Russell A. Klingaman is a partner with the Hinshaw & Culbertson LLP law firm in Milwaukee, Wis. As an instrument-rated private pilot and aircraft owner, Klingaman has a special interest in aviation law, and teaches aviation law at Marquette Law School and UW-Oshkosh. Questions and comments about the foregoing topic may be directed to Russell A. Klingaman at rklngaman@hinshawlaw.com. □

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