DRONES (AND INSURABLE RISK) ARE IN THE REAL ESTATE AIR

Date: 8 August 2018

U.S. Real Estate Alert

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Drones, also known as unmanned aircraft systems ("UAS"), are increasingly being used in the commercial sector. By 2021, the Federal Aviation Administration ("FAA") projects that the number of units in the commercial small UAS fleet will exceed 420,000 units (compared to 42,000 in 2016). By 2025, it is projected that the U.S. commercial drone sector will generate $5 billion in investments. Currently, 26 percent of all commercial small UAS are used for real estate purposes. Taking advantage of drones' ability to reach remote areas and record video or take photographs, real estate owners and lenders are using UAS for aerial photography, surveying, and inspections. By producing highly accurate and on demand "birds-eye" or 360° views, UAS are quickly becoming a very useful tool in the real estate industry. However, potential and actual users should be aware of the attendant risks that UAS use poses. Staying abreast of federal and state regulations and best practices for mitigating the risks associated with UAS use, including maintaining appropriate insurance, is critical for any entity using UAS in commercial real estate.

RISKS OF DRONE USE

Although UAS provide an efficient and useful way for real property owners and lenders to access and monitor their property, UAS users should be mindful of the applicable laws and potential liabilities that can arise from their use. Setting up a compliance program early on will be helpful as it is expected that the regulation and sensitivity to these devices will rise as they become more prevalent.

Federal and State Regulation of Drones:

The FAA is the primary regulator of the operation of UAS. On June 21, 2016, the FAA published regulations for routine commercial use of small UAS. The applicable rule, known as "Part 107," went into effect on August 29, 2016. Part 107 only applies to small UAS (i.e., UAS that weigh less than 55 pounds, including any equipment attached to it). Requirements vary in type — from registration, to pilot certification, to operation. Examples include requiring small UAS to be registered online, limiting the maximum altitude of small UAS to 400 feet above ground level and prohibiting use within 400 feet of a structure, prohibiting the operation of small UAS beyond the UAS pilot's line of sight or over any persons not directly participating in the operation, and requiring all small UAS operators to first obtain a remote pilot airman certificate from the FAA. The FAA is currently working on preparing new proposed rules for expanded drone operations and working with state and local governments to test more complex low-altitude drone operations.

In addition to federal regulations, each year more states are passing laws regulating UAS operations. In 2017, at least 38 states considered legislation related to UAS. "Eighteen states—Colorado, Connecticut, Florida, Georgia,

Indiana, Kentucky, Louisiana, Minnesota, Montana, Nevada, New Jersey, North Carolina, Oregon, South Dakota, Texas, Utah, Virginia and Wyoming—passed 24 pieces of legislation."

This alert does not discuss local/municipal laws and ordinances, but drone users should be mindful of this potential additional layer of regulation. It is not entirely clear where the lines will be drawn between federal and state regulation of UAS, but the FAA has acknowledged that certain areas—such as privacy and property/trespass issues—are best left to state regulation under traditional police powers. In fact, many state laws related to UAS have dealt with these issues. For instance, the following are examples of state laws related to UAS that have been enacted.

- Indiana created the crime of "Unlawful Photography and Surveillance on Private Property," making it a class A misdemeanor.
- Tennessee's 2016 law makes it a crime to use a drone to fly within 250 feet of a critical infrastructure facility for the purpose of conducting surveillance or gathering information about the facility.
- Arizona made it a class 1 misdemeanor to operate a UAS in violation of a federal law or regulation or to interfere with a law enforcement, firefighter, or emergency services operation using UAS.
- Connecticut SB 975 prohibits municipalities from regulating UAS.

Potential Liability from UAS

UAS users also face potential claims or actions for liability stemming from UAS use. Because UAS are able to reach remote places and take videos or photographs, depending on the jurisdiction, drone use may result in invasion of privacy claims. Nuisance and trespass actions are possible if a plaintiff can demonstrate that aerial surveillance interferes with his or her enjoyment of the land. Finally, personal and property injury are important considerations, as UAS can fall on or collide with persons or property.

Accordingly, real property owner, operators, and their lenders should be aware of the potential consequences of UAS use. The FAA has not required UAS operators to acquire insurance policies, but drone users should be mindful of the protections insurance can and cannot provide.

MITIGATING RISKS THROUGH INSURANCE

First-party property and third-party liability policies are two important tools for minimizing UAS risks. Companies using UAS for commercial purposes, such as in the operation of commercial real estate, should examine their insurance programs to see what insurance policies they already have, if any, that might provide coverage for any damages or liabilities they sustain as a result of their UAS use. Their lenders may similarly wish to review the insurance requirements in their loan documents. Note that a property owner does not necessarily avoid liability by hiring a UAS operator to perform the work.

Bodily injury and property damage claims typically fall within the "Coverage A" insuring agreement of commercial general liability ("CGL") policies. CGL policies commonly contain an "aircraft" exclusion, but often do not include a definition of "aircraft" or specifically address whether an UAS qualifies as an "aircraft" as the term is used in the policy. Although a UAS is defined as an "aircraft" under federal law, to date there has been no case law addressing whether an UAS constitutes an "aircraft" within the meaning of that exclusion. UAS users seeking to avoid possible application of the aircraft exclusion of CGL policies can seek to negotiate an exception to the

"aircraft" exclusion and/or seek to carve UAS out of the definition of aircraft — such as by adding language that when used for a defined purpose, a UAS does not qualify as an aircraft within the meaning of that exception. Additionally, UAS users can also seek to add an endorsement to an existing CGL policy to add UAS liability coverage.

Additionally, UAS use can trigger invasion of privacy, copyright infringement, trespass and other personal and advertising injuries under the personal and advertising injury ("Coverage B") coverage section of a CGL policy. Unlike Coverage A, the Coverage B section of a CGL policy generally does not contain an aircraft exclusion. Because many UAS can be used to collect, store. and transmit data, there are cyber risks that are unique to UAS. For example: the navigational software of a UAS is hacked, causing damage to itself or third parties; a UAS inadvertently collects data or invades privacy; a UAS is hacked and data is transmitted to a third party unknowingly. It is important to understand what a currently existing CGL policy may (or may not) cover in respect of those risks at the outset and before any liability or loss occurs.

Other types of "traditional" insurance policies may be implicated by professional use of UAS for commercial purposes and this article does not discuss them all. The insurance market has responded to the prevalence and rise of UAS use. Indeed, endorsements to CGL policies are available that can either exclude or extend coverage for injuries or damages caused by UAS. Additionally, a number of insurers are offering newly created UAS-specific insurance policies. The coverages can vary — policies may insure the drone only on the ground, only in the air, or both; only certain operations may be covered.

The bottom line is that several insurance options are available to commercial real estate UAS users. Using brokers and/or policyholder coverage counsel, UAS users should take a careful look at the outset at the risks they are facing and their insurance programs to see whether the risks faced are adequately covered by existing policies.

Notes:

[1] *FAA Aerospace Forecast Fiscal Years 2017-2037*, FEDERAL AVIATION ADMINISTRATION, 32 https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2017-37_FAA_Aerospace_Forecast.pdf.
[2] Niall McCarthy, *The Commercial Drone Sector Is Set To Contribute Billions To The U.S. Economy*, FORBES (Oct. 19, 2015), https://www.forbes.com/sites/niallmccarthy/2015/10/19/the-commercial-drone-sector-is-set-to-contribute-billions-to-the-u-s-economy-infographic/#7766ee1c2bdd.
[3] *FAA Aerospace Forecast* at 33, supra note 1.
[4] Ilyce Glink, *9 ways drones are changing real estate*, CBS NEWS (Mar. 6, 2017), https://www.cbsnews.com/media/9-ways-drones-are-changing-real-estate/4/.
[5] Helen Thompson, *5 ways drones are changing real estate*, THE BUSINESS JOURNALS (Mar. 16, 2017), https://www.bizjournals.com/bizjournals/news/2017/03/16/5-ways-drones-are-changing-real-estate.html.
[6] Iain Aitch, *Drones fly into focus for commercial real estate*, REAL VIEWS (April 24, 2017), https://www.jllrealviews.com/trends/drones-fly-into-focus-for-commercial-real-estate/.
[7] Federal Aviation Administration; Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 124 (June 28, 2016) (codified at 14 C.F.R. pts. 21, 43).

[8] *See* 14 C.F.R. § 107 (2017).
[9] 14 C.F.R. § 107.3 (2017).
[10] The following restrictions are a summary of Part 107. For a more complete summary of Part 107 by the FAA, *see Summary of Small Unmanned Aircraft Rule*, FAA (June 21, 2016), https://www.faa.gov/uas/media/Part_107_Summary.pdf.
[11] For a detailed discussion on how to become a drone operator, *see Becoming a Pilot*, FAA, https://www.faa.gov/uas/getting_started/fly_for_work_business/becoming_a_pilot/.
[12] *UAS Integration Pilot Program Overview*, FAA (May 7, 2018), https://www.faa.gov/uas/programs_partnerships/uas_integration_pilot_program/
[13] http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx
[14] *Id.*
[15] State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, FAA, Office of Chief Counsel (Dec. 17, 2015), https://www.faa.gov/uas/resources/uas_regulations_policy/media/UAS_Fact_Sheet_Final.pdf.
[16] Indiana House Bill 1009 (2014)
[17] Tennessee Senate Bill 2106 (2016).
[18] Arizona Senate Bill 1449 (2016).
[19] https://www.cga.ct.gov/2017/ACT/pa/pdf/2017PA-00052-R00SB-00975-PA.pdf
[20] For example, in Washington, the right to privacy is recognized. Intrusion upon seclusion occurs when an individual "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, [and] the intrusion would be highly offensive to a reasonable person." *Peters v. Vinatieri*, 102 Wash. App. 641, 657 (2000) (quoting the Restatement (Second) of Torts § 652B (1977)).
[21] *See, Should You Be Allowed to Prevent Drones From Flying Over Your Property?*, THE WALL STREET JOURNAL (Mar. 22, 2016), https://www.wsj.com/articles/should-you-be-allowed-to-prevent-drones-from-flying-over-your-property-1463968981.
[22] *See Drone crashes into Empire State Building*, BBC (Feb. 8, 2016), http://www.bbc.com/news/technology-35525702; Nat Levy, *Man convicted after out-of-control drone hits building, knocks woman unconscious during Seattle Pride Parade*, GEEKWIRE (Jan. 16, 2017), https://www.geekwire.com/2017/man-convicted-after-out-of-control-drone-hits-building-knocks-woman-unconscious-during-2015-seattle-pride-parade/.
[23] Operation and Certification at 42183, *supra* note 1.

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