



# Legal Issues Related to the Use of Drones for New Hampshire Municipalities

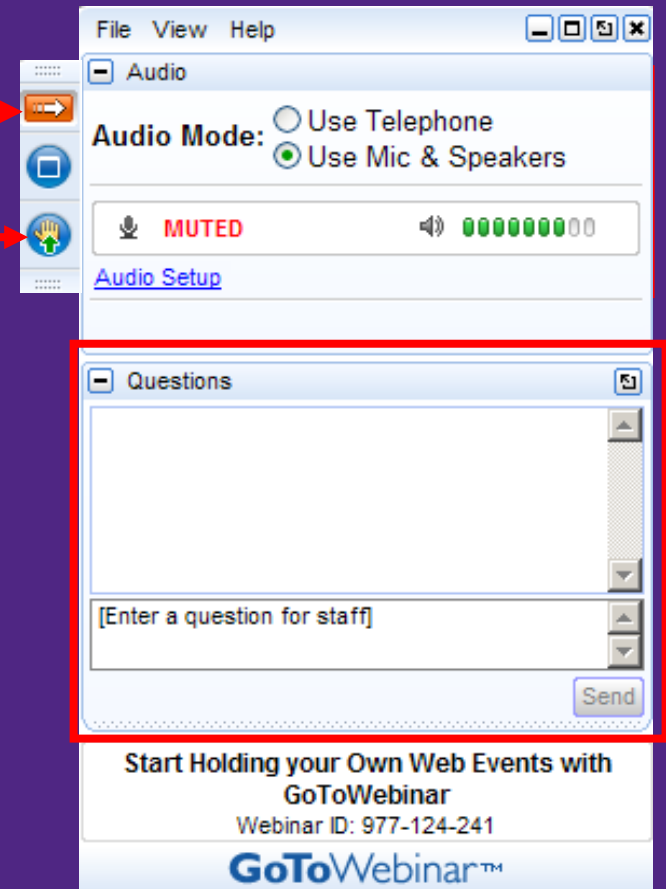
Presented by:  
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# Overview of Presentation

- I. What is an unmanned aircraft system (UAS)?
- II. What are the uses of a UAS?
- III. Risks and Benefits of UAS: public and private use
- IV. Jurisdiction of Airspace
- V. Current New Hampshire Law Related to UAS
- VI. What the future holds



# I. What is a UAS?

The Federal government refers to drones as unmanned aircraft systems.

An UAS is defined as “an unmanned aircraft and associated elements ... that are required for the pilot in command to operate safely and efficiently in the National Airspace System.”

The term encompasses the vehicle itself as well as the ground control unit.

# I. What is a UAS?



## II. What are the Uses of UAS?

- Law enforcement
- Search and rescue
- Inspection of bridges, power lines, pipelines, cell towers and standpipes
- Wetlands monitoring
- Fire detection
- Surveying
- Hobby and recreation
- Wildlife monitoring
- Aerial photography and film making
- Agriculture
- Crowd monitoring
- Construction oversight
- Planning and zoning
- Product delivery





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# III. What are the Risks and Benefits of UAS?

As the previous slide suggests, there are numerous potential private and public uses of UAS.

UAS can be equipped with high definition cameras to allow real-time monitoring and surveillance. UAS are much safer for tasks such as power line or bridge inspection. UAS can accomplish these tasks faster, cheaper, and with less risk of personal injury.

UAS can be equipped with infrared cameras to monitor fires, facilitate search and rescue, or identify wildlife.

UAS can be equipped with LIDAR to map ground contours and GIS systems to facilitate surveys.

# III. What are the Risks and Benefits of UAS?

The low cost and ease of use of UAS also create or highlight risks, including invasion of personal privacy, trespass, personal injury, and property damage.

A UAS can be used to peek into bedroom windows, monitor schools and playgrounds, cross over neighboring property, create risk to other aircraft, and damage power lines and other structures.

UAS can also be used by law enforcement to monitor crowds, observe suspects, and, in principle, can be armed.

In short, UAS can be used to monitor people and places that a person on their own would normally not be able to access.

# III. Jurisdiction of Airspace

For many years, the limits of airspace jurisdiction among Federal, State, and local governments was largely undefined.

There was simply no reason to draw lines with any precision because aircraft operations were confined to discrete areas, and largely had no great effect on most cities and towns.

# III. Jurisdiction of Airspace

So how is airspace defined?

- In the days before flight was possible, courts held that common law ownership of land extended to the periphery of the universe. United States v. Causby, 328 U.S. 256, 260-61 (1946).
- Under this theory, any overflight of property, at whatever altitude, constituted a trespass.
- Clearly impractical and downright silly in an era of satellites and airplanes.

# III. Jurisdiction of Airspace

With the advent of practical air travel, Congress and the courts moved on parallel tracks to define airspace more meaningfully.

- Congress passed laws decreeing:
  - the U.S. government has exclusive sovereignty of the airspace of the United States. 49 U.S.C. sec. 40103(a)(1).
  - U.S. citizens have a right of transit through the navigable airspace of the United States. 49 U.S.C. sec. 40103(a)(2).

# III. Jurisdiction of Airspace

The courts developed airspace law through the long-standing framework of the law of trespass.

- Flight by aircraft over land owned by another is a trespass if it (a) enters the “immediate reaches” of the air space next to the land, and (b) substantially interferes with the others use and enjoyment of his land. Restatement (Second) of Torts, sec. 159.

# III. Jurisdiction of Airspace

What are the immediate reaches?

Generally speaking, and depending upon the specific circumstances, the “immediate reaches” is something less than 500 feet. Restatement (Second) of Torts, sec. 159, cmt. f.

Fifty feet is considered definitely within the immediate reaches; and 150 feet is considered a question of fact for a jury to decide.

# III. Jurisdiction of Airspace

The trespass rule applies not only to overflights by aircraft, but also building eaves, overhead wires, and shots fired over the land of others. Trespass can also occur by reaching an arm over a property boundary.

E.g., Ferrone v. Rossi, 311 Mass. 591 (1942) (trespass based upon eaves and awning of building extending over another's land); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (firing guns over land of another may constitute a taking).



# III. Jurisdiction of Airspace

Most cities and towns have zoning regulations that limit the height of structures in certain areas. These regulations are based upon considerations of health and safety, as well as to protect property values.

# III. Jurisdiction of Airspace

So what does all this mean?

Under current law, there is an area of overlap between Federal, State, and local jurisdiction.

Speaking very roughly, that area of overlap exists somewhere below 500 feet above the ground.

# III. Jurisdiction of Airspace

**On December 17, 2015, the FAA published a Fact Sheet on State and Local Regulation of UAS that summarizes central principles of the boundaries between Federal, State, and local regulation.**

# III. Jurisdiction of Airspace

## *FAA FACT SHEET HIGHLIGHTS*

- Until recently, UAS weighing between 150 grams and 25 kilos used for recreational purposes were required to be registered with the FAA. A Federal court recently struck down the registration requirement for such UAS. *Taylor v. Huerta* (D.C. Cir. 5/19/17).
- UAS used for commercial purposes must still be registered.
- State and local officials may not vary the registration requirements without FAA approval.

# III. Jurisdiction of Airspace

## *FAA FACT SHEET HIGHLIGHTS*

The FAA wishes to avoid a patchwork quilt of different regulations from town to town and state to state. The FAA's goal is to keep navigate airspace free from inconsistent regulations to ensure safety.

The FAA can preempt local regulation even if it is consistent with the FAA's goals.

# III. Jurisdiction of Airspace

## *FAA FACT SHEET HIGHLIGHTS*

State and local laws regulating UAS may be permissible, but consultation with the FAA is recommended.

For example, ordinances banning any use within city limits, or within a certain distance of schools or other critical infrastructure, may be permissible with the FAA's approval.

Courts will strictly scrutinize State or local attempts to regulate overflight.

# III. Jurisdiction of Airspace

## *FAA FACT SHEET HIGHLIGHTS*

The FAA will prohibit State or local regulation of equipment or training for UAS use.

For example, if a town passes a regulation that UAS users must be licensed pilots, that regulation would probably be unenforceable.

# III. Jurisdiction of Airspace

## *So What Can State and Local Governments Regulate?*

Laws relating to land use, zoning, privacy, trespass and law enforcement operations are generally not subject to Federal regulation. For example, States can

- Regulate UAS use with respect to warrant requirements
- Prohibit UAS use to stalk or invade privacy
- Prohibit UAS use in aid of hunting, or to harass hunters
- Prohibit attaching weapons to UAS



## **IV. Current State of New Hampshire Law**

**A bill specifically related to drone use passed the House but was found inexpedient to legislate in the Senate Executive Departments and Administrative Committee. HB97 (Relative to the use of drones).**

**Drone use falls under other statutes, regulations, and common law principles.**



## IV. Current State of New Hampshire Law

**RSA 207:57 specifically prohibits drone surveillance of people lawfully engaged in hunting, fishing, or trapping.**

**The N.H. Dept. of Fish & Game has promulgated a regulation prohibiting the use of UAS to locate or attempt to locate wildlife for the purpose of taking it. Fis 312.**

## IV. Current State of New Hampshire Law

HB97, if it becomes law in its current form, would

- Prohibit all government use of UAS except (a) pursuant to a warrant, (b) when swift action is needed to prevent imminent danger to life or serious damage to property, or to prevent the imminent escape of a suspect, or (c) with the consent of the person or persons being surveilled.

## IV. Current State of New Hampshire Law

HB97, if it becomes law in its current form, would

- Make the government strictly liable for personal injury or property damage caused by a drone.
- Private use of UAS to “conduct surveillance” is prohibited except with permission of the persons surveiled and the owners of any structures.
- The bill is construed to give maximum protection to privacy.

## IV. Current State of New Hampshire Law

HB97, if it becomes law in its current form, would

- Make a government employee, agent or contractor who violates the statute guilty of a Class A misdemeanor, and the government entity subject to a \$10,000 fine.
- Entitle a person injured through a government's negligent use of a drone may file a civil lawsuit to recover not less than \$1,000, medical expenses, property damage, and attorneys' fees.

# IV. Current State of New Hampshire Law

## New Hampshire Privacy Statutes

**RSA 644:9 prohibits the use of any device to observe, photograph or record, the images of the private parts of any person, in any private place, or outside of any private place where they would not ordinarily be visible.**

**RSA ch. 570-A prohibits intercepting or recording communications between without the consent of all parties. Violation is a Class B misdemeanor.**

# IV. Current State of New Hampshire Law

## New Hampshire Common Law of Privacy

1. Intrusion upon seclusion.
2. Public disclosure of private facts.
3. False light publicity.
4. Appropriation of name or image.

# IV. Current State of New Hampshire Law

## New Hampshire Common Law of Privacy

“No right deserves greater protection” than the right to solitude and seclusion as the “safeguard of mediocrity” and the “stern friend” to genius. Hamberger v. Eastman, 106 N.H. 107, 112 (1964) (Kenison, C.J.).



# IV. Current State of New Hampshire Law

## New Hampshire Common Law of Trespass

Trespass is an intentional entry onto someone else's property that substantially interferes with the other person's use and enjoyment of the property.

# IV. Current State of New Hampshire Law

*Is it legal to shoot down a trespassing UAS?*

Federal law is very clear that it is illegal to fire weapons at any aircraft. Federal law will preempt State or local law authorizing firing weapons at UAS.

New Hampshire law provides that a person can use reasonable force in the defense of persons or property.

New Hampshire law prohibits the discharge of firearms within 300 feet of a permanently occupied structure. RSA 207:3-a.

## IV. Current State of New Hampshire Law

*Is it legal to shoot down a trespassing UAS?*

In Kentucky a man shot down a drone he claimed was hovering over his property while his teenage daughter was sunbathing. There was evidence the drone was flying below tree level, and that the same thing had occurred six times over the previous year. The court dismissed criminal charges against the father.

In New Jersey, a man was charged for shooting down a drone being operated by a neighbor over his own property.

# IV. Current State of New Hampshire Law

## New Hampshire Common Law of Nuisance

A nuisance is any activity that substantially and unreasonably interferes with the use and enjoyment of land of another. No physical entry on land is required.

# IV. Current State of New Hampshire Law

## New Hampshire Common Law of Nuisance

In Ferguson v. City of Keene, 111 N.H. 271 (1971), Ferguson lived next to Keene municipal airport. Airplanes used a warm-up apron within 700 feet of Ferguson's house, which broke windows, raised dust, and made conversation impossible. Ferguson sued for taking and nuisance. The court dismissed the taking claim because there was no overflight of her property, but permitted the nuisance claim to go forward.

## V. What the Future Holds

The FAA has promulgated regulations that permit commercial UAS use based upon competency and knowledge testing, and eliminating the licensed pilot requirement.

These regulations are expected to increase the commercial use of UAS.

## V. What the Future Holds

Current practice for commercial users is to subcontract UAS services to an entity that has the required licenses and carries the appropriate insurance.

The insurance industry is trying to determine how to address the risks of drones. Currently, carriers are addressing UAS under aviation insurance.

If HB97 passes in its current form, however, careful thought must be whether to employ a UAS at all.



Thank you!

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Join Legal Services Counsel Stephen Buckley, Government Affairs Counsel Cordell Johnston, and Staff Attorney Margaret Byrnes for a full day workshop on Thursday, September 14 on the Right-to-Know Law. They will address some of the most difficult issues under the law, including confidential information, electronic records and communication, procedures for nonpublic sessions, and communications outside a meeting. There will be ample time for questions and answers on all aspects of the law.

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*\*Agenda and registration information will be available in July.*





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