

Change Language: Choose tand

## Identified Flying Objects

By Mike Ramsey | Common Ground, September/October 2015

**Drones will present associations with plenty of possibilities and problems. Will your community ground them or allow them to take flight?**

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A Hilton Head Island, S.C., resident thought she had adequate privacy to sunbathe in her backyard because of its screened-in pool and landscaping buffers. ¶ Then she noticed something flying overhead. ¶ The woman called her community association to complain about the hovering aircraft—and the man who was controlling it remotely from a golf course nearby. ¶ “She was fairly concerned he was operating this device in close proximity to her home,” says T. Peter Kristian, CMCA, LSM, PCAM, general manager of Hilton Head Plantation Property Owners Association. “I ended up having the person removed from the golf course, based on the fact that he was trespassing, not the fact that he was using a drone. I had no authority to remove him for using a drone.”

The incident, from earlier this year, raised inevitable questions about unmanned aircraft systems—more commonly known as drones—and whether the island community can or should restrict their use.

Hilton Head Plantation has been relatively friendly toward the hobbyists who fly drones for fun, but the board directed a committee member to come back with policy recommendations. Among the issues the association is exploring: What is a homeowner's reasonable expectation of privacy in an era when virtually anyone can cheaply buy a drone and send it cruising through the air, usually with a camera on board?

“There are satellites circling the Earth that can basically tell you what eye color you have,” says Kristian, a CAI past president. “However, a satellite may not have an interest in you, so it's far different than a drone hovering 20 or 30 feet above your backyard.”

Similar discussions are occurring at other associations across the country.

Board members at Ocean Reef Community Association in Key Largo, Fla., approved a measure last year that allows residents to fly drones in their backyards but only if operators don't harass, disturb or breach the peace of any resident or guest. The measure also prohibits drones with cameras unless individual property owners or managers provide written permission for their use.

“These drones could be used just to harass your neighbor, who may not know whether you have a video camera on board,” explains David C. Ritz, Ocean Reef's longtime administrator and president.

### FLYING HIGH

It's unlikely community association board members or the professionals who serve them would have anticipated dealing with these kinds of perplexing questions a decade ago when the U.S. military began using drone technology overseas. But the era of “civilian” drones is here—like it or not.

The marketplace has seen a proliferation of consumer models for aviation enthusiasts and would-be entrepreneurs. Drone sales in the U.S. are believed to be in the tens of millions of dollars annually; Bloomberg News Service, citing anonymous sources, reported online retail giant Amazon.com sells more than 10,000 of the devices per month.

What may have seemed like a fascinating novelty a few years ago is now generating mixed feelings following a series of highly publicized incidents. Errant drones have landed on the White House lawn, nearly interfered with jet takeoffs or landings and, in June, got in the way of aerial firefighting operations in California's San Bernardino Mountains. Also in June, a 2-pound model dropped from the sky during a Seattle parade and knocked a woman unconscious.

One Modesto, Calif., resident presumably was so spooked about a neighbor's homemade drone, he felled it with a shotgun; the shooter was held liable for damages in a small claims court decision this summer.

“It's just like anything new: There are so many positives, and there are so many negatives. We haven't worked out the

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negatives yet," says Bruce R. Gran, CMCA, AMS, PCAM, a management consultant in Arizona and Florida who specializes in information technology.

In Michigan, clients of lawyer Kevin Hirzel, a partner with Cummings, McClorey, Davis & Acho, have taken a range of stances. "We have a lot of communities with older residents, and they will just want an outright ban. Then you have other types of communities that will take a more moderate approach," he says.

Rather than making a hard-and-fast decision today, Hirzel says some communities have amended their bylaws to include broad language about drones that would allow for flexibility to adopt rules and regulations in the future.

Such a strategy takes into account that federal, state and local governments may enact laws about drones in coming years. More than a dozen state legislatures already have passed statutes, mostly placing controls on law enforcement agencies that wish to employ the technology.

Will Sleeth III, a partner at LeClairRyan in Williamsburg, Va., says community association boards should try to be open-minded about the impending drone boom.

"There's always a concern that, whenever a new technology comes along, associations are going to overly regulate it," he says. "And then there will be a big push for the federal government to come in and pre-empt a ban, much like it did with satellite dishes.

"A good happy medium would be for the association to make sure it has the authority in its declaration to adopt reasonable rules and regulations regarding drones," Sleeth adds. "Then, as the technology develops, the board can adapt the rules and regulations to the changing context."

Is it a given that boards can legally regulate drones?

Atlanta lawyer George Nowack is doubtful, especially when it comes to single-family home communities. The founding partner of Weissman, Nowack, Curry & Wilco says he's not convinced associations can impose rules for the "airspace" over individually owned lots.

"I'm not sure that I agree an association has the right to say I can't fly my drone over your lot, or—saying it a different way—you can only fly your drone over your own property," says Nowack, a fellow in CAI's College of Community Association Lawyers (CCAL) and a CAI past president. "It's not the role of the association to protect a person's privacy, as it relates to drones."

It may be better to let legislators deal with the issue, he adds.

## WAITING IN THE WINGS

Though the drone industry is still in its early days, it's not quite the wild West in the skies.

The Federal Aviation Administration expects hobbyists to keep small drones, like any other remote-controlled aircraft, within their line of vision and to fly only in daylight conditions. Those who use drones for recreation are expected to stay below a ceiling of 500 feet, not to fly near crowds, and to stay outside a 5-mile radius of airports unless they have permission from the tower. (Both Hilton Head Plantation and Ocean Reef are near small airports, so hobbyists in these associations are expected to get the OK from local aviation officials.)

Once the FAA finalizes rules for their commercial use, drones will become even more common (see "Clearing the Air," below). In the interim, business owners can ask the federal government for permission to use the devices. A growing number of individuals and companies have obtained a waiver under the government's rigorous selection process. In these instances, according to people familiar with FAA's process, licensed pilots are expected to operate the drones.

"The FAA really wants to make sure the person understands how the airspace works, so if someone throws up a drone near an airport, he or she understands how traffic is entering and leaving," says Tim Adelman, a shareholder for LeClairRyan in Annapolis, Md., who advises drone manufacturers and businesses that are purchasing their products.

Railroad companies, film production studios, agricultural firms and real estate agencies, among others, have sought permission to use drones, Adelman says. Many more businesses are expected to enter the marketplace once the FAA system, including a certification process for operators, is finalized. Deliveries via drones are further away.

## ALLIES IN THE AIR?

Community association professionals already are anticipating some of the ways vendors will use drones for their

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benefit, though they say boards should make sure any drone-equipped vendors carry proper insurance coverage.

Browning Reserve Group of Sacramento, Calif., has occasionally employed drones over the past few years to help with visual surveys of properties, including roofs, says Robert Browning, PCAM, RS, president of the company that conducts reserve studies in Western states and Mexico.

"We're able to fly the drone up and do a complete inspection ... without actually walking on the roof and causing any harm," he says. "We also can fly the perimeter of a pond. Before, we'd have to get in a boat and go all the way around the pond."

Browning anticipates his company will use the technology more frequently once the FAA rules are formalized. His company has a state-of-the-art model—a \$1,500 DJI Phantom—ready and waiting in the wings.

"Since the drones are getting so much publicity, and a lot of it bad publicity, we've really pulled back on our use of them," Browning says. "If we think it's easier to use a drone, with our client's permission, we do it, but we're careful not to charge them for it."

The next line of discussion is probably about whether associations themselves will employ drone technology for tasks such as code enforcement or security. Experts say the concept is certainly worth considering, but they discourage dabbling in drones until the FAA regulations are in place.

Boards that step into the realm of using drones for security should do so carefully, advises Nowack, the Atlanta attorney. Residents may expect a greater level of safety knowing their association has cameras in the air, he says.

"My family gets murdered, and I say, 'Wait a second, where was the drone? Why didn't you catch this person?'" Nowack says. "It's that expectation you create. You're assuming a duty that you don't have under the law."

Another potential wrinkle involves the video generated by a surveillance drone: Who should have access to the live feed or video archive?

"(Board members) will still need to take the same precautions they're using now with other means of video surveillance," says Sleeth, the Virginia lawyer. "And that includes not showing the video to their spouses or their kids or their neighbors or things like that."

Perhaps not every association has begun thinking about all the potential problems with drones, such as who's liable if one goes down and hurts somebody or damages property. But insurers have already begun circulating policy standards for drones.

Additional insurance costs to associations will depend on factors such as the type and size of the community and whether they employ drones or allow for their recreational use, says Karyl Foray, CIRMS, who insures community associations for Deerfield, Ill.-based Rosenthal Brothers.

The additional expense could be felt as soon as next year, she says.

"It's not going to be a flat charge," Foray says. "The cost will depend on the exposure."

Looking ahead, Kristian, the manager in South Carolina, isn't sure drones would really be effective for Hilton Head Plantation for inspections or security purposes because the community has a dense tree canopy.

But never say never. Perhaps they may one day fly over the community's recreational vehicle and boat storage area, which is on 2 open acres, "rather than having someone physically inspect it," he says.

First things first, though: how to deal with the hobbyists flying drones who may infringe on someone's privacy.

"What are the rules? There aren't any rules yet," Kristian says.

*Mike Ramsey is a Chicago-based freelance writer*

## Clearing the Air

Earlier this year, the Federal Aviation Administration unveiled proposed safety rules that would govern the use of small drones (under 55 pounds) for commercial purposes in U.S. airspace.

The government was reviewing public comments on the rules as of press time. Observers say it may take several months before the FAA considers feedback, makes any changes and publishes permanent rules. Among the key elements proposed:

- Operators of "nonrecreational" drones would have to get certified and pass an FAA knowledge test every two years.
- The requirements would not be as extensive as getting a pilot's license to fly manned aircraft. Minimum operator age would be 17.
- Operators would only be able to fly a drone during daylight hours, within his or her line of vision and would have to keep the device below an altitude of 500 feet. A drone's speed would be limited to 100 mph.
- Drones could not enter airport flight paths and restricted airspace.
- They would not be allowed to fly over people, except those directly involved in the drone's flight.

"Technology is advancing at an unprecedented pace, and this milestone allows federal regulations and the use of our national airspace to evolve to safely accommodate innovation," U.S. Transportation Secretary Anthony Foxx said in announcing the proposed rules.

Once the rules become permanent, a virtual floodgate is expected to open, as companies begin offering services supplied by drones. Currently, the FAA grants waivers only to companies that meet its stringent selection process.

"My advice to companies: If you want to get into it, start doing the research now. Start finding out about the different aircraft out there, start defining your operational procedures," says Tim Adelman, a shareholder with LeClairRyan's Annapolis, Md., office who is familiar with the drone industry. "You'll probably be at the point where the rules are published and you could be ahead of the curve."

The proposed FAA rules prohibit items from being dropped by drones. But the agency reportedly is working with retail giant Amazon.com and other companies that are exploring the idea of using remote-controlled aircraft for customer deliveries across longer distances.

Observers think such drone deliveries are years away. Lawyers say community associations will be within bounds to require delivery drones to land in specified areas for safety and nuisance considerations.

"Do we want all these pizzas and all these other things flying by, or are we going to have a drone port within the community? I think that's where we need to be proactive and not reactive," says George Nowack, a founding partner of Weissman, Nowack, Curry & Wilco in Atlanta and a fellow in CAI's College of Community Association Lawyers. — M.R.

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