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FAA Drone Laws Clash with Stricter Local Rules

Frank Carollo, a longtime member of the City Council in Miami, had worked for several weeks fine-tuning a proposal to limit the use of recreational drones, the increasingly popular remote-controlled flying devices. Minutes before the start of the vote on the rules this month, lawyers from the Federal Aviation Administration called him.

The lawyers said the Miami ordinance needed to make clear that the federal agency had ultimate control over airspace. Not wanting to delay the vote, Mr. Carollo complied, deleting requirements about permitting that would have duplicated those by the F.A.A., before getting the new law approved unanimously by the City Council.

"People we had not spoken to at the F.A.A. and at companies suddenly called for amendments," Mr. Carollo said after the vote. "But there had been a void on public safety and the use of drones. We understand the F.A.A. regulates drones, but the F.A.A. doesn't have bodies on the ground to enforce their rules. That is why I believed Miami had to have its own rules."

The interjection by the federal lawyers — the first substantive conversation Mr. Carollo had with federal officials about his proposal — foreshadowed a message that the agency would send more widely just days later. The F.A.A. said it was in charge of anything in the air. The agency took the position as part of an introduction of new recrea-

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tional drone rules, which included requiring users to register in a national database starting this month.

The F.A.A.'s new stance sets up potential clashes across the country. Local and state lawmakers, concerned about the safety and privacy risks that drones pose, have been passing rules about the machines at a rapid pace.

More than 20 states approved drone laws this year, as have major cities like Chicago, Los Angeles and Miami, with many of the regulations placing tough restrictions on areas to fly and clamping down on the use of drones to snoop on neighbors.

The intervention of the F.A.A. is now frustrating local lawmakers, who complain that the agency wants them to back off their own rules — even as it is seen as too lenient on drone users.

Lawmakers said the agency's drone rules did not go as far as many states and municipalities that are explicitly banning flights within cities and over homes, strengthening privacy protections and imposing steep criminal and financial penalties on violators.

As a result, some state and city officials are digging in to defend their own drone regulations. Ted Gaines, a Republican state senator in California who recently announced he would reintroduce drone bills that had been vetoed by the governor in September, said he took issue with the F.A.A.'s message of control.

"We are a nation under the threat of terrorism, and the risks to our citizens and to our children are only greater with hundreds of thousands of these drones expected to be sold during the holidays," Mr. Gaines said.



Frank Carollo, a Miami City Council member

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Federal rules on recreational drone registration, he added, were too weak. Vowing to stick with plans to introduce his bills early next year, Mr. Gaines said: "Tell me how a registration system resolves the illegal use of drones? There is such a vacuum on practical ways to address safety."

The F.A.A. said that as the top regulator of airspace, it should handle any bans on flights or permits for drone pilots. The agency released a fact sheet on Dec. 17 on federal laws that would preempt local rules. Because the F.A.A. was given that authority by Congress, the agency said, many local or state drone rules would not stand up to a legal challenge.

"We believe the state and local government decision makers will benefit from this information, no matter what approach they take," the F.A.A. said in a statement.

Any rollback by the F.A.A. of local drone regulations would benefit one group: tech companies.

Companies such as Amazon and Google have hired dozens of lobbyists over the last year to visit aviation committees on Capitol Hill, explaining their plans to deliver packages and create entirely new segments of entertainment and sports. The companies want a light touch by regulators to help give their drone efforts the widest possible latitude.

"The F.A.A. is saying it has jurisdiction over all airspace — that means from the top of blades of grass to infinity — so I think and I hope you will start to see some rollback in these local regulations," said Tom McMahon, a vice president for the Association for Unmanned Vehicle Systems International, a lobbying group that represents drone makers.

There was not supposed to be such a divide between local and federal drone regulations. Congress instructed the F.A.A. three years ago to write laws for drones, a nascent technology at the time. Yet the agency struggled to create first-time rules for the category that would balance a public outcry over safety concerns with the economic benefits drone makers promised from the machines.

So local and state lawmakers stepped in. Many local legislators have since called for broader no-fly zones and strict privacy rules around drones. New rules also give local police officers permission to explore ways to take down errant drones without having to ask for permission from the federal authorities.

In Chicago, drones are now prohibited above schools, libraries, churches and private property without permission. In Miami, drones are banned within a half-mile radius of a "large public event," and the police are able to use jamming technologies to take them down. In Los Angeles, drone users who operate near airports can face up to six months in jail.

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Now, the F.A.A. has ramped up its rule making around drones. With the fact sheet it released this month, the agency said 45 states had pursued drone laws in the last year, and it warned that the creation of a "patchwork quilt" of regulations around the nation would make the skies more dangerous.

"Substantial air-safety issues are raised when state or local governments attempt to regulate the operation or flight of aircraft," the agency said.

An official at the agency said the guidelines were released in response to questions its lawyers were getting, including from local and state lawmakers.

Drone makers and hobbyists said they had been asking the agency to put out that message to stem the tide of new laws, which they regard as overblown.

"The sharp rise in local regulations are a response by lawmakers to address concerns by their constituents who are seeing these reports," said Brendan Schulman, head of government affairs for DJI, the giant manufacturer of recreational drones, referring to widespread news accounts of incidents involving drones. "But the vast majority of operators are operating them safely."

In November, Mr. Schulman spoke at a hearing in New York City on proposed municipal rules around drones that would ban most flights in the city, require users to get licenses and insurance, and attach criminal misdemeanor penalties to violations. Mr. Schulman said the legislation would hurt businesses and prevent the city from using drones to survey buildings and power lines.

Daniel R. Garodnick, one of the City Council members who proposed the rules, said he would not back down. No blanket federal rule about the machines would address the unique concerns of New York, a target of terrorist attacks, he said.

"New York City is different from the cornfields of Iowa," Mr. Garodnick said. "That should be obvious to everyone, but that isn't reflected in F.A.A. rules."

Photo: Ryan Stone for The New York Times

Source: New York Times



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Who Owns/Controls the Airspace Below 500 feet AGL?

Before airplanes and drones existed, people owned everything above and below their land—according to the law, their rights extended “to the heavens and down to hell.” But modern aviation changed this definition in a big way. In the early 20th century Congress declared the air a public highway, which limited land rights so that people were not trespassing every time they flew. That public highway has generally been considered 500 feet and above.

But airspace from the ground up to 500 feet is a gray area—no one’s ever had to fully settle who owns this airspace. Ask someone at the FAA and they’ll tell you that the agency controls (but does not *own*) airspace down to the ground. Yet it’s clear that landowners have some claim to the air. “Everyone agrees that the owner of land also owns the airspace above the land,” Banner says.

There’s also the U.S. Supreme Court case involving a chicken farmer, *United States v. Causby*. During World War II, the army took over a municipal airport and started flying noisy aircraft over Thomas Causby’s land as low as 83 feet, which scared the hell out of his chickens—150 of them flew into the wall of their coop and died. He sued the government, and the court decided in his favor, so the government had to reimburse Causby for a “taking” of his property. “The Supreme Court said that landowners have as much airspace as can be used in connection with the enjoyment and use of the land,” says Greg McNeal, a professor of law and public policy at Pepperdine University, “In Causby, it was 83 feet. But it’s an open question above that.”

Until recently, people have had little reason to care what happens in the air above their property: there hasn’t been enough going on at low altitudes for them to notice. Over the past couple of years, though, that has changed. The FAA has already granted more than two thousand exemptions to businesses for commercial drone use. Amazon, Google and Walmart are among the com-

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panies that want to use the flying machines for home delivery. Plenty of Americans dislike the idea of drones flying over their backyards. But is there anything they can do about it?

Because there are no rules to say whether piloting a quadcopter over someone's property is trespassing, state and local governments have started making their own. In 2013 Oregon passed a law that lets a landowner sue someone if the person flies a drone below 400 feet over her land more than once without permission. California lawmakers approved a bill this summer for a drone no-fly zone up to 350 feet above private property (Gov. Jerry Brown vetoed the bill). The city of Saint Bonifacius, Minn., has banned drones from flying in city airspace below 400 feet (with a few exceptions), and many other cities and towns have passed or are considering restrictions. "The advent of drones may make the FAA more inclined to press for low-altitude regulations," says California State Sen. Hannah-Beth Jackson (D-Santa Barbara), who introduced the now-vetoed drone bill, "But historically, state and localities have mainly regulated activities taking place closer to the ground."

Yet the FAA says it controls airspace down to the soil, and that its authority generally trumps state or local laws. The FAA just released a fact sheet of its views on state and local drone regulations, in which it stated, "A navigable airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe-and-sound air transportation system." The agency recommended that any state or cities considering laws on restricting drone flight altitude consult with it first.

The FAA hasn't blocked any of the private property restrictions yet, but if it did, state and local government would probably push back, especially because state law—not federal—determines property rights. "Are all those cities and counties just going to roll over and let the FAA do what it wants?" says Troy Rule (pdf), an associate professor of law at Arizona State University, "Oh no—they're anticipating they have some rights." Rule and McNeal say it is not obvious that the FAA's authority overrides everyone else's in this scenario. "Anyone who says there are clear answers to how these questions will be resolved is advocating more than they are informing," McNeal says.

Gray skies

This issue could turn into a major headache for the drone industry. It will be more difficult for companies to deliver packages to your doorstep with drones if they have to comply with a mish-mash of standards that change from state to state and town to town. Plus, what if you live in an apartment and you give Amazon permission to deliver a package but your upstairs neighbor won't permit it? "If you're Google and Amazon, think about the advantages of just the FAA having authority over all the airspace down to the ground," Rule says, "They can fly their drone anywhere

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they want, as long the FAA gives them permission." (Amazon did not respond to requests for a comment and Google declined to comment).

State and local laws that ban drones from flying over property also create problems for everyone else who wants to use them, like realtors who want to take aerial photos or journalists who need to cover breaking news from the air or activists capturing a protest on video.

On the evening of July 26th, in Bullitt County, Ky., William Merideth's daughter came in from the backyard and told her father that she'd just seen a drone fly over their neighborhood. Merideth, 47, walked outside and watched a Phantom quadcopter glide down their street, then grabbed his shotgun. When the drone flew over his property, he blasted it down.

Soon, four men drove up to Merideth's home. One of the men, David Boggs, had just bought the drone and says he was demonstrating it to his friends and family. Merideth told local TV news station WDRB that when Boggs and his friends arrived at his place, he warned them, "If you cross my sidewalk, there's going to be another shooting." Boggs called 911 and 30 minutes later, police arrested Merideth.

The two men disagree how low Boggs flew his drone above Merideth's home—Merideth estimates about 100 feet or less, while Boggs has data that places it above 200 feet. The drone's exact altitude may not seem crucial, but it is unclear if landowners get to *decide* who can fly a drone over their property at 100 or even 300 feet, because no one has actually decided yet who owns this slice of airspace (whether you're allowed to shoot down a drone hovering over your property is an even more complicated question).

For now, businesses, landowners and everyone else is stuck waiting for a verdict on who owns the airspace below 500 feet, and what exactly that ownership entails. But in Merideth's case, he and Boggs got a definite answer to their dispute. A Bullitt County judge cleared Merideth of all charges in October, saying Boggs's drone had invaded his privacy. The judge, as quoted by the local news outlet WDRB, put it bluntly: "He had the right to shoot this drone."

Source: Scientific American



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Posted in Regulatory Matters on January 21, 2016 by The Editor, 1 Comment

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Ginger Blaisdell

From: Nyholm, Allison (Murkowski) <Allison_Nyholm@murkowski.senate.gov>
Sent: Tuesday, November 10, 2015 12:23 PM
To: Ginger Blaisdell
Subject: RE: Alaska Drone Operator Safety and Privacy Guidelines
Attachments: PHAK - Chapter 14.pdf

Categories: Drone

Congress has charged the Federal Aviation Administration (FAA) with the responsibility for setting rules and regulations regarding the operation of drones. On February 15, 2015, the FAA released its Notice of Proposed Rulemaking (NPRM) for small unmanned aircraft. This is the first step in changing regulations and rules currently in place. Right now, however, federal, state, and local laws are in flux, and do not adequately govern the rights of citizens either operating drones or being victimized by them. In Pittsburgh, a drone flew over a professional baseball game. In Los Angeles, hockey fans entering a sports arena successfully knocked a harassing drone out of the sky. A Seattle woman observed a drone outside her high-rise window videotaping her as she dressed. In Nashville, a drone interfered with a July 4th fireworks display. In all of these instances, it is unclear whether the drone operators could be held criminally or civilly liable simply for flying their drones over private property. There exists a great deal of controversy regarding even the FAA's authority to govern their usage. While it has the ability to prevent drone use near airports, but whether it has the same authority elsewhere remains in dispute.

The right of a landowner to control the low-altitude space immediately over his private property appears to be in conflict with the right of a drone owner to operate a drone in the same airspace. Prior to the Wright Brothers, 19th Century law followed the Latin maxim, *Cujus est solum, ejus est usque ad coelum* ("To whomever the soil belongs, he also owns the sky"). After the dawn of aviation, however, Congress passed the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, authorizing flight within "navigable airspace" – airspace later defined to be over 500 feet above ground level. In 1946, the U.S. Supreme Court confirmed that a landowner has a right to prevent "intrusions of airspace" just as he does invasions on the ground, and that he owned "at least as much of the space above the ground as he can occupy or use in connection with the land." *U.S. v. Causby*, 328 U.S. 256 (1946). It held that government flights which were so low and frequent as to interfere with the enjoyment of the land constituted a "taking." It did not, however, clarify how much of the space below the 500-foot FAA ceiling belonged to the landowner. However, conflicts between landowners and air travelers were fairly uncommon. The proliferation of ultra-light aircraft over the past decade has exacerbated the issue somewhat, but, with the growth of drone use, it is clear that the debate has been reignited and will need to be addressed formally.

In as much as today's laws provide no definite ceiling on a landowner's airspace, whether and where drones may and may not fly, remains uncertain. Is a flight 100 feet above private property allowable? What about 10 feet? When does it become trespass? The U.S. Supreme Court has already told us that a pilot's naked-eye surveillance of private property below is legal and does not constitute an invasion of privacy. *California v. Ciraolo*, 476 U.S. 207 (1986). This open airspace is simply a "public vantage point" which the government, law enforcement, or a private citizen can observe from above. Helicopters are not required to stay above the 500-foot navigable airspace floor, so the Supreme Court tells us that their observation from as low as 400 feet is legal. *Florida v. Riley*, 488 U.S. 445 (1989).

Another possible approach to the regulation of drones is to apply laws dealing with invasion of privacy. As stated in the Restatement (Second) of Torts § 159(2):

Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land. Restatement (Second) of Torts § 159(2).

However, this approach is very subjective and burdensome, requiring courts to weigh the competing interests of the parties on a case-by-case basis. More is needed.

In addition to FAA rules, state and local governments are scrambling to pass ordinances governing the use of drones. While the FAA has exclusive jurisdiction to regulate the airspace above 500 feet, states can also regulate the airspace at lower altitudes. At least 43 states have pending legislation to regulate drone use. The FAA is primarily concerned with flight safety. However, states are more concerned with privacy and nuisance issues. Alabama, for example, recently passed a law which prohibits the use of a drone to harass a hunter or fisherman. California passed a law last year prohibiting anybody using a drone from taking a picture of a person who has an "expectation of privacy." Colorado prohibits drones from being used in aiding hunters. Montana law limits the admissibility of evidence in a civil or criminal legal proceeding if it was obtained using UAVs. Tennessee makes it a misdemeanor to use drone-captured video footage of a hunter or angler without their consent. Texas passed an omnibus bill that identifies 19 lawful uses for drones – a bill criticized by some as opening the door for police abuse. In Wisconsin, weaponizing a drone is a felony and law enforcement must obtain a warrant before using one to collect evidence.

From: Ginger Blaisdell [mailto:Ginger.Blaisdell@akleg.gov]
Sent: Thursday, November 05, 2015 2:30 PM
To: Nyholm, Allison (Murkowski) <Allison_Nyholm@murkowski.senate.gov>
Subject: Alaska Drone Operator Safety and Privacy Guidelines

This document will go to our 2500 member distribution list later today.

Even a military group gave Alaska kudos for our work on privacy – and they only had the draft document.

ginger

Chief of Staff

Office of Representative Shelley Hughes

Serving Greater Palmer

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MEMORANDUM

September 25, 2015

SUBJECT: Legal definition of "loitering"
(Work Order No. 29-LS1108)

TO: Representative Shelly Hughes
Attn: Ginger Blaisdell

FROM: Daniel C. Wayne
Legislative Counsel

You have asked if there is a legal definition of "loitering." There is no definition of "loitering" or "loiter" in the Alaska statutes. I found one use of "loiter" in state statute. AS 04.16.020(b) reads:

(b) A licensee, an agent, or employee may not knowingly permit a person to loiter within or about premises licensed under this title for the purpose of begging or soliciting a patron or visitor to purchase alcoholic or other beverages for the person who is begging or soliciting.

The statute does not define "loiter." "Loiter" is also undefined by the Alaska Administrative Code, which uses the term once. 13 AAC 02.175(e) says "No pedestrian may sleep or loiter upon a highway or, without lawful permit, obstruct free passage upon a highway."

In 1978 the Alaska Supreme Court considered an Anchorage Municipal Ordinance that read, in part, as follows:

No person will loiter in or near a thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of, inducing, enticing, soliciting or procuring another to participate in an act of prostitution. Among the circumstances which may be considered in determining whether such purpose is manifested are that such person: is a known prostitute or panderer; repeatedly beckons to, stops, attempts to stop, or engages male passersby in conversation; or repeatedly stops, or attempts to stop, motor vehicle operators by hailing, waving of arms, or any other bodily gestures.^[1]

¹ *Brown v. Municipality of Anchorage*, 584 P.2d 35, 36 (Alaska 1978).

Representative Shelley Hughes
September 25, 2015
Page 2

The court held that the ordinance was unconstitutionally vague, and regarding the term "loitering" in that context, the court said:

Applying a dictionary definition of the word "loiter", one could conclude that the ordinance makes it a crime for a previously convicted prostitute or panderer to "spend time idly;" to "linger in an aimless way;" or "to walk or move slowly and indolently, with frequent stops and pauses." As Mr. Justice Douglas observed in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164, 92 S.Ct. 839, 844, 31 L.Ed.2d 110, 116-117 (1972), the virtues of aimless strolling have been sung by such giants of American literature as Walt Whitman, Vachel Lindsay, and Henry David Thoreau. When engaged in by most citizens, such activities as sauntering down a public sidewalk or pausing on a street corner would carry no criminal liability. If a formerly convicted prostitute or panderer, however, should engage in window shopping, or standing on a street corner to wait for a bus, he or she could be found guilty of violating the Anchorage municipal ordinance without committing any overt act demonstrating that he or she induced, enticed, solicited, or procured another to engage in an act of prostitution. This would mean that a previously convicted prostitute or panderer could stand on a public street corner or walk slowly down a public sidewalk only at the whim of any police officer.^{2]}

If I may be of further assistance, please advise.

DCW:Hughes
15-466.dla

² *Id.*, page 37.

29-LS1271\W
Wayne
1/20/16

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-NINTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE HUGHES

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to operating unmanned aircraft."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 *** Section 1.** AS 02.30 is amended by adding a new section to read:

4 **Sec. 02.30.032. Failure to land unmanned aircraft at direction of peace**
5 **officer.** (a) A person commits the offense of failing to land an unmanned aircraft at the
6 direction of a peace officer if the person, while operating an unmanned aircraft,
7 knowingly fails to land the unmanned aircraft as soon as practicable and in a
8 reasonably safe manner under the circumstances when requested or signaled to do so
9 by a peace officer.

10 (b) In a prosecution under this section, it is an affirmative defense that the
11 peace officer, when requesting or signaling the defendant to land,

12 (1) was operating a vehicle, motor vehicle, aircraft, or watercraft, and
13 the vehicle, motor vehicle, aircraft, or watercraft

14 (A) did not meet lighting and audible signaling requirements of
15 law for law enforcement vehicles; and

(B) was not marked appropriately so that a reasonable person would recognize it as a law enforcement vehicle; or

(2) was not operating a vehicle, motor vehicle, aircraft, or watercraft, and the peace officer was not wearing the uniform of office or displaying a badge or other symbol of authority so as to be reasonably identifiable as a peace officer.

(c) In this section,

(1) "peace officer" has the meaning given in AS 11.81.900;

(2) "signal" means a hand motion, audible mechanical or electronic noise device, visual light device, or a combination of them used in a manner that a reasonable person would understand to mean that the peace officer intends that the person operating an unmanned aircraft land the aircraft;

(3) "unmanned aircraft" means an aircraft that is operated without direct human intervention from inside or on the aircraft.

(d) Failing to land an unmanned aircraft at the direction of a peace officer is a violation punishable as provided in AS 12.55.035 for the first offense and a class B misdemeanor punishable as provided in AS 12.55 for each subsequent offense.

* **Sec. 2.** AS 11.61.110(a) is amended to read:

(a) A person commits the crime of disorderly conduct if,

(1) with intent to disturb the peace and privacy of another not physically on the same premises or with reckless disregard that the conduct is having that effect after being informed that it is having that effect, the person makes unreasonably loud noise;

(2) in a public place or in a private place of another without consent, and with intent to disturb the peace and privacy of another or with reckless disregard that the conduct is having that effect after being informed that it is having that effect, the person makes unreasonably loud noise;

(3) in a public place, when a crime has occurred, the person refuses to comply with a lawful order of a peace officer to disperse;

(4) in a private place, the person refuses to comply with an order of a peace officer to leave premises in which the person has neither a right of possession nor the express invitation to remain of a person having a right of possession;

(5) in a public or private place, the person challenges another to fight or engages in fighting other than in self-defense;

(6) the person recklessly creates a hazardous condition for others by an act that [WHICH] has no legal justification or excuse; [OR]

(7) the offender intentionally exposes the offender's buttock or anus to another with reckless disregard for the offensive or insulting effect the act may have on that person; or

(8) the person pilots or operates an unmanned aircraft and causes the aircraft to hover

(A) in the airspace above private property or other private place without

(i) a right of possession of the property or place; or

(ii) the express invitation of the owner or other person having a right of possession of the property or place; and

(B) with the intent to obtain, produce, or transmit a picture of another person without the express consent of that person and, if that person is under 16 years of age, the parents or guardian of that person.

* Sec. 3. AS 11.61.110(c) is amended to read:

(c) Disorderly conduct is a class B misdemeanor and is punishable as authorized in AS 12.55 except that a sentence of imprisonment, if imposed, shall be for a definite term of not more than 10 days. For a conviction under this section based on conduct involving the piloting or operating of an unmanned aircraft, the court may also prohibit the defendant from possessing or operating an unmanned aircraft for a period of not more than one year.

* Sec. 4. AS 11.61.110 is amended by adding new subsections to read:

(d) In a prosecution under (a)(1) - (4) or (6) of this section, it is not a defense that, at the time of the offense, the defendant was not in the immediate vicinity or personally present if the defendant was piloting or operating an unmanned aircraft or other remotely controlled device that

(1) made the unreasonably loud noise;

(2) was present at the public or private place; or

1 (3) created the hazardous condition.

2 (e) This section does not apply to the piloting or operation or other use of an
3 unmanned aircraft system by a law enforcement agency as permitted by AS 18.65.900
4 - 18.65.909.

5 (f) In this section,

6 (1) "picture" has the meaning given in AS 11.61.123;

7 (2) "unmanned aircraft" means an aircraft that is piloted or operated
8 without direct human intervention from inside or on the aircraft.

9 * **Sec. 5.** The uncoded law of the State of Alaska is amended by adding a new section to
10 read:

11 **APPLICABILITY.** AS 02.30.032, added by sec. 1 of this Act, AS 11.61.110(a), as
12 amended by sec. 2 of this Act, AS 11.61.110(c), as amended by sec. 3 of this Act, and
13 AS 11.61.110(d) - (f), added by sec. 4 of this Act, apply to conduct that occurs on or after the
14 effective date of this Act.