



Rep. Chandler Swope
229W State Capitol Complex, Building 1
State Capitol
Charleston, WV 25305

RE: OPPOSE SB5

Dear Senator Swope:

As an organization that represents members who rely on unmanned aircraft systems (UAS or drones) technology in West Virginia, we are concerned about the impact SB5 would have on the advancement of the commercial drone industry in the state. The Federal Aviation Administration (FAA) has sole jurisdiction over the National Airspace System (NAS) and any attempts by the State of West Virginia to restrict the NAS are outside its authority. Furthermore, infringing on FAA jurisdiction will create a complicated patchwork of laws that will erode, rather than enhance, the advancement of the drone industry in the State of West Virginia.

The Association for Unmanned Vehicle Systems International (AUVSI) is the world's largest nonprofit organization dedicated to the advancement of unmanned systems and robotics, represents corporations and professionals from more than 60 countries involved in industry, government, and academia.

AUVSI supports section 5B-2-18 of the Bill that would establish the West Virginia Unmanned Aircraft Systems Advisory Council. AUVSI acknowledges and supports the creation of advisory councils across State and Federal levels for emerging technologies to discuss and study implementation, policy concerns, and development plans. Advisory councils are necessary to avoid overbroad and ambiguous policy language. Moreover, this Council will aid in having a clear and concise plan for development, implementation, and operation within the State of West Virginia.

AUVSI is concerned, however, with proposed section 61-16-2, which would establish a person's right of ownership of airspace above the land or water owned by that person. A person's property rights are not rights to airspace in derogation to the federal government's plenary control of the national airspace. The provision's reference to "without the interference" is ambiguous and likely unnecessary. Whatever an owner's rights under this provision, the provision recognizes that they are subject to the right of flight of aircraft, including drones. Moreover, the provision may be misunderstood and spawn litigation over when an owner's right must give way to the right of flight. A preferable alternative is to follow the aerial trespass doctrine set out in Restatement (Second) of Torts (1965).

Title 49, Part A, Section 1 of the U.S. Code, states: "The United States Government has exclusive sovereignty of airspace of the United States." This federal control of the airspace, delegated in by Congress to the Federal Aviation Administration, is a bedrock principle of aviation law that has been

affirmed by the courts for over fifty years. The “airspace” of the United States cannot be limited to anything past “[ownership] of at least as much of the space above the ground as he can occupy or use in connection with the land.” *Id.* All other airspace above property is “navigable air space, available to the public.” *Id.*

Moreover, this principle, as it applies to low level UAS flights, was reaffirmed by the federal court in *Singer v. City of Newton*.¹ That 2017 decision by the First District Court of Massachusetts held that “aviation safety is an area of exclusive federal control,” and “Congress has given the FAA responsibility of regulating the use of airspace for aircraft navigation and to protect individuals and property on the ground,” along with the mandate to safely integrate UAS into the national airspace. *Id.*

The FAA has provided guidance for state and local authorities on the federal government’s role in airspace regulation.² It clearly stated that “[a] consistent regulatory system for aircraft and use of airspace has the broader effect of ensuring the highest level of safety for all aviation operations” and that “[the] FAA has regulatory authority over matters pertaining to aviation safety.” The fact sheet also provided helpful examples for state and local officials as to what legislation and ordinances they could enact with regards to drones compared to those which fall under the FAA’s jurisdiction.

Subsection (b) of section 61-16-2 prohibits a drone flight that is operated low enough to interfere with the existing use of land to which the landowner has put the land, or unless so conducted as to be dangerous or damaging to persons or property lawfully on the land. The first prohibition is objectionable because it does not require interference, only the potential for interference. Only interference should be actionable. The second prohibition is similar to current law that prohibits acting with wanton disregard for the safety of persons or property. Given current law, this proposed prohibition is duplicative and thus unnecessary.

AUVSI also urges the legislature to use the bill to strike – rather than amend - Section 17-2A-19a, which contemplates the West Virginia Division of Highways leasing airspace. This law directly conflicts with plenary federal jurisdiction over the navigable airspace and thus is preempted. Property ownership rights in the air are not supported by current jurisprudence. Specifically, look to *United States v. Causby*, in which the Supreme Court stated: “The airspace, apart from the immediate reaches above the land, is part of the public domain.”³ And because this airspace is in the public domain, the provisions in this section that allows the sale or lease of such airspace to ‘any person, firm or corporation are inconsistent with the notion that the airspace is a public highway, again as pronounced by the Supreme Court.

This section does not establish an upper limit of the sold or leased airspace over highways and rights-of-way. Thus, any bifurcation between airspace for drones and airspace sold or leased to another person is blurred and prone to varying interpretations, substantially burdening drone operations as well as posing safety risks. While this provision is in current law, we recommend that the legislature repeal this law outright.

¹ *Singer v. City of Newton*, Case No. 17-2045 (D. Mass. 2017)

² Federal Aviation Administration. “State and Local Regulation of Unmanned Aircraft Systems Fact Sheet.” December 17, 2015. Available at: www.faa.gov/uas/resources/policy_library/media/UAS_Fact_Sheet_Final.pdf

³ *United States v. Causby*, 328 U.S. 256 (1946)

Our industry is willing to work with you and your colleagues to be a resource during the creation and development of the West Virginia Unmanned Aircraft Systems Advisory Council. Our goal is to have a fluid line of communication between your advisory council and our member companies. Many of those companies operate and manufacture within the State of West Virginia.

We greatly appreciate your consideration of our views and would be happy to address any questions you may have about policy concerning drone operations with a follow-up meeting.

Respectfully,

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