



February 3, 2022

Senator Scott Sandall
635 N. Hillcrest Circle
Tremonton, UT 84337

RE: Oppose Utah SB 68

Dear Senator Sandall:

The undersigned organizations represent all facets of the nascent and growing commercial drone industry as well as the hundreds of thousands of recreational drone operators. We are concerned with Section 76-6-206, Criminal Trespass, which is current law, and with S.B. 68, which would revise Section 76-6-206 by adding a statutory damages remedy as well as a private right of action.

Section 76-6-206 Raises Issues of Unconstitutional Vagueness.

While Section 76-6-206 is current law, as a criminal provision is it arguably void for vagueness in failing to provide fair notice to a drone operator as to what constitutes an “unlawful entry” or “remaining unlawfully over property.” There are three aspects of the law that are vague.

First, there is no altitude above which the criminal provision would not apply. As a general matter, drone operators must fly under 400 feet above ground level (AGL), pursuant to Federal Aviation Administration (FAA) rules, specifically 14 C.F.R. 107.51(b).

Second, “remain unlawfully” includes a drone operator “not otherwise authorized to fly the unmanned aircraft over the private property[.]” As noted, Part 107 of the FAA rules *authorizes*

operations under 400 feet AGL without regard to whether the property over which the drone operates is private or public.

Third, the law does not define “remain.” While FAA guidance generally recognizes state trespass laws, it would be unreasonable to apply such laws to prevent FAA-authorized operations that simply transit private property. To survive a vagueness or overbreadth challenge, “remain” should be limited to operations that constitute “aerial trespass” under the Restatement (Second) of Torts, section 159 (or similar definition), which requires that the flight or flights occurred at a low altitude and that the flight or flights substantially interfered with the owner’s use or enjoyment of the property. A transient passing of a drone over private property, without more, should not constitute a trespass, whether civil or criminal.

Treble damages and double recovery remedies in S.B. 68 should be removed.

S.B. 68 would add both a treble damages remedy to be imposed by the prosecuting political subdivision and a private right of action with the same damages remedy. First, treble damages are typically awarded for egregious conduct or conduct that offends a particular public policy, such as violations of the Sherman Act. The conduct constituting a criminal trespass under Section 76-6-20 does not in our view warrant an award of treble damages, or statutory damages in the absence of any actual damages. Thus we recommend this provision be revised to reflect only actual (compensatory) damages.

Second, S.B. 68 would provide for an award of damages both to the government and to a private person, for the same trespass. We recommend removing such double recovery for a single trespass and either revising this provision to eliminate the private right of action or to provide only a civil recovery.

We greatly appreciate your consideration of our views and would be happy to work with your staff on revisions to this bill, including removing the ambiguities in Section 76-6-20, as well as address any questions you may have about our observations and recommendations.

Respectfully,

Gregory S. Walden
Aviation Counsel
Small UAV Coalition
gregory.walden@dentons.com

Mike Smitsky, Esq.
Association for Unmanned Vehicle Systems International
mmsmitsky@auvsi.org

Kenji Sugahara
President/CEO
Drone Service Providers Alliance
kenji@dspalliance.org

Douglas Johnson
Vice President, Emerging Technology Policy
Consumer Technology Association, producer of CES®
djohnson@cta.tech

cc: Rep. Joel Ferry