

Date of Hearing: April 23, 2019

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1190 (Irwin) – As Amended April 12, 2019

SUBJECT: Unmanned aircraft: state and local regulation: limitations

SUMMARY: This bill would, among other things, prohibit a state or local agency from adopting any law or regulation that bans the operation of an unmanned aircraft system (UAS), authorize a state or local agency to adopt regulations to enforce federal regulations regarding UAS, and authorize a local entity to designate a recreational operating area for unmanned aircraft operation. Specifically, **this bill would:**

- 1) Prohibit any state or local agency from adopting any law or regulation that bans the operation of a UAS.
- 2) Provide that a state agency, local agency, or legislative body may adopt regulations to enforce a requirement that a small UAS be properly registered pursuant to federal law and regulations.
- 3) Provide that a state or local agency may designate recreational areas for the operation of small UAS. Require the agency to post signage at each entrance to the recreational area notifying the public that UAS may be operating in the area.
- 4) Provide that a local agency or legislative body may adopt an ordinance that enforces federal law and regulations, and adopt ordinances that prohibit the willful launch or landing of a UAS from or on public property that the local agency has deemed off limits for other activities, such as sports and kite flying, for reasonable and demonstrable public safety concerns.
- 5) Require operators of small UAS to register pursuant to federal regulations and maintain valid paper or electronic evidence of that registration and proof of passage of the Federal Aviation Administration's (FAA) aeronautical and safety test, if required by the FAA.
- 6) Notwithstanding any other law, authorize a state or local agency to require a UAS operator to provide proof of federal, state, or local registration to licensing or enforcement officials. Require an operator who fails to show proof of registration to correct the violation, as specified. If an operator fails to correct the violation within the applicable time period, authorize the state or local agency to take additional enforcement actions.
- 7) Provide that any peace officer authorized to enforce state and local laws is authorized to demand evidence of registration from a person operating an UAS.
- 8) Require that failure to show proof of FAA mandated registration will be a correctable violation for first-time offenders, and allow the state or local agency to take additional enforcement actions if the operator fails to correct the violation, as specified.

- 9) Provide that nothing in this section preempts a local public entity from enacting local ordinances pursuant to its police power that relate to the use of UAS so long as those laws or ordinances are not specifically written to ban the all operation of unmanned aircraft systems in the jurisdiction.
- 10) Provide that a state or local agency may require the operator of a small UAS for commercial purposes to maintain insurance coverage, as specified by the agency.
- 11) Require every unmanned aircraft to be operated in strict compliance with federal law and regulations.
- 12) Provide that an operator's compliance with the provisions of this section shall not be a defense to liability for invasion of privacy, as specified.
- 13) Provide that it is unlawful for any person to operate a UAS in the air, on the ground, or on the water in any of the following ways:
 - In a careless or reckless manner so as to endanger the life or property of another, as specified.
 - In violation of any flight restriction, temporary or permanent, issued by the FAA.
 - In violation of any restriction issued by the FAA applicable to the unmanned aircraft systems.
 - Knowingly or recklessly interfering with law enforcement, firefighting, or any government emergency operations.
 - Overflight by an aircraft of any lands for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent, or the person in lawful possession.
 - Weaponizing a drone or operating a weaponized drone.
- 14) Immunize public entities and public employees from liability to any person who operates a small UAS within a recreational area designated by a state or local agency for the operation of small UAS, as specified.
- 15) Immunize public entities, as defined, that own or operate a small UAS recreational area from liability for injury or death of any person or property damage resulting solely from the actions of an operator of a small unmanned aircraft system in that recreational area, if the public entity posts signs at each entrance to the recreational area notifying the public that unmanned aircraft may be operating in the area.
- 16) Provide various definitions, including, among others, that the terms "public unmanned aircraft system," "small unmanned aircraft," "unmanned aircraft," and "unmanned aircraft system," and "public entity."

17) Provide that the Legislature finds and declares that the intent of this act is to accomplish the following goals, among other things:

- To explore the development of a balanced approach to a consistent state regulatory framework for unmanned aircraft systems that can work for industry, recreational users, local government, and law enforcement.
- To protect persons and entities from invasion of their privacy and to prevent harassment of persons and entities in their public activities.
- To protect sensitive governmental and private facilities and operations from interference or unauthorized surveillance, including facilities and operations addressing emergency events, such as earthquakes, fires, and flooding.

18) Make various technical and non-substantive changes.

EXISTING LAW:

- 1) Requires, under the FAA Modernization and Reform Act of 2012, the FAA to integrate UAS into the national airspace system by September 30, 2015, and to develop and implement certification requirements for the operation of UAS in the national airspace system by December 31, 2015. (Pub. Law No. 112-095.)
- 2) Defines “aircraft” as any contrivance invented, used, or designed to navigate, or fly in, the air. (49 U.S.C. Sec. 40102.)
- 3) Requires registration of an aircraft in order to operate it within the United States. (49 U.S.C. Sec. 40101.)
- 4) Requires a UAS operator to submit registration to the Administrator of the FAA or to anyone with delegated authority to enforce the Administration’s regulations. (14 C.F.R. Sec. 107.7.)
- 5) Defines an “unmanned aircraft” as an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft. (Gov. Code Sec. 853.5(a).)
- 6) Defines an “unmanned aircraft system” as an unmanned aircraft and associated elements, including, but not limited to, communication links and the components that control the unmanned aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system. (Gov. Code Sec. 853.5(b).)
- 7) Establishes that ownership of real property (land or water) includes ownership of the airspace above the property, subject to the right of flight as permitted by federal authority. (Public Utilities (Pub. Util. Code Sec. 21402.)
- 8) Specifies that flight by aircraft is lawful, unless at altitudes below those prescribed by federal authority. (Pub. Util. Code Sec. 21403.)

- 9) Defines “aircraft” to mean any manned contrivance used or designed for navigation of, or flight in, the air requiring certification and registration as prescribed by federal statute or regulation.” (Pub. Util. Code Sec. 21012.)
- 10) Establishes damages for certain trespass claims, i.e., wrongful occupation of real property claims, as follows:
 - the value of using the property, where the “value” is the greater of the reasonable rental value or the benefits obtained by the wrongful occupation;
 - the reasonable cost of repair or restoration of the property to its original condition; and,
 - the costs, if any, of recovering possession. (Civ. Code Sec. 3334.)
- 11) Defines “physical invasion of privacy” as the knowing entry on the land of another without permission, or otherwise committed a trespass, in order to capture an image, sound recording or other impression in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person. (Civ. Code Sec. 1708.8.)
- 12) Defines “constructive invasion of privacy” in terms of attempting to capture, in a manner highly offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of another person engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there was a physical trespass, if the image or recording could not have been achieved without a trespass unless the visual or auditory enhancing device was used. (Civ. Code Sec. 1708.8 (b).)
- 13) Makes it a misdemeanor to use an unmanned aircraft to impede the duties of emergency personnel at the scene of an emergency. (Pen. Code Sec. 402(a)(1)-(2).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Purpose of this bill:** AB 1190 seeks to provide a framework for state and local agencies in the development of policies regarding the local use of UAS, or drones. This bill is author-sponsored.
- 2) **Author’s statement:** According to the author:

Unmanned aircraft systems, or drones, are a rapidly-growing market. More than one million drones have been registered with the [FAA] and drone sales are expected to reach a record high in 2019. The rapid increase in the use of this new technology has led to public policy and regulatory challenges for all parties involved.

Currently, there is a lack of state guidance as where, when, and how unmanned aircraft systems can be operated safely and legally. The lack of state standards makes it difficult for drone manufacturers to direct users, particularly new users, on how to comply with the law. Further, many local jurisdictions that are concerned with protecting public safety have resorted to passing local ordinances that regulate drone use. These well intended,

local ordinances further exacerbate the challenges for drone manufacturers to educate new users and for operators to comply with the law.

The past several years have seen numerous legislative proposals related to unmanned aircraft. Many of these proposals have made it through the Legislature and to Governor's desk only to be vetoed due to a lack of a comprehensive approach to this public policy challenge. By working with industry, law enforcement, and local governments, AB 1190 seeks to provide a statewide framework for drone regulation going forward.

- 3) **Federal regulation over airspace:** The FAA defines a drone as an unmanned aircraft and all of the associated support equipment, control stations, data links, telemetry, and communications and navigation equipment necessary to operate the unmanned aircraft. A UAS is flown either by a pilot via a ground control system or autonomously through use of an on-board computer. (*See, FAA Order 8130.34C, Airworthiness Certification of Unmanned Aircraft Systems and Optionally Piloted Aircraft.*)

Commercial applications for UAS are growing exponentially. UAS gives the news media economical and environmentally-friendly access to aerial views of traffic, storms, and other events when compared to the current use of helicopters and other manned aircraft. UAS is used in the agricultural industry to observe and measure crops while conserving resources and avoiding the use of heavy equipment. UAS may also be the future delivery system for mail order and internet companies. In fact, Amazon, the largest internet-based retailer in the United States, plans to seek FAA approval for "PrimeAir" – a new delivery system that uses small UAS to deliver packages instead of using mail trucks. According to the Amazon website, the company has UAS delivery development and testing centers in the United States, the United Kingdom, and Israel.

In 2012, Congress passed the FAA Modernization and Reform Act of 2012 (Act). The Act required the FAA to establish a framework for accelerating the safe integration of UAS into the national airspace no later than September 30, 2015, and authorized the FAA to establish interim requirements for the commercial operation of UAS. On Oct. 5, 2018, the FAA Reauthorization Act of 2018 (Reauthorization) was signed into law (Public Law 115-254), to do the following, among other things:

- Direct the FAA to authorize drone deliveries by October 2019.
- Apply greater oversight over recreational drone operators.
- Prioritize rulemaking on expanded operations of small UAS.

With this Reauthorization, the U.S. arguably follows other countries that have taken measured steps toward integrating drones into their economies. Iceland, for example, has already authorized use of drones for a food delivery service that uses GPS coordinates to find routes clear of human and natural obstacles. Similarly, Canada recently has approved numerous test flights for delivering medical and food supplies to isolated rural communities.

- 4) **This bill seeks to offer clarity to California communities wishing to regulate drones:** The federal government has exclusive authority over U.S. airspace, and Congress has charged the FAA with regulating the navigable airspace to ensure that aircraft use it safely and efficiently. The National Transportation Safety Board has clarified that a drone falls

under the definition of aircraft, which includes “any aircraft, manned or unmanned, large or small.” Because the FAA has jurisdiction over aircraft in the navigable airspace, it also has jurisdiction over drones in that airspace. This gives the FAA the power to regulate drones, creating potential problems regarding state regulation and federal preemption.

In addition, the FAA has further indicated that its jurisdiction is not limited to the minimum safe altitudes and that it “is responsible for the safety of U.S. airspace from the ground up.” (*Busting Myths About the FAA and Unmanned Aircraft*, Fed. Aviation Admin. (Mar. 7, 2014) <<http://www.faa.gov/news/updates/?newsId=76240>> [as of Apr. 17, 2019].). In achieving this goal, the FAA can provide regulations to direct aircraft on how to use the navigable airspace, but also to protect individuals and property on the ground. The breadth of this jurisdiction makes it difficult for states to establish laws that sufficiently protect individuals from drones without stepping into the FAA’s jurisdictional territory.

Accordingly, this bill seeks to provide guidance to local governments wishing to regulate drone use in their communities. As a threshold matter, and in acknowledgment of the stated goals of the federal government to integrate UAS into the national airspace, this bill makes explicitly clear that a state or local agency *cannot* adopt policies that ban the operation of UAS within their jurisdiction. Apart from that prohibition, this bill largely tells local governments what they *can* do, thereby providing guidance on what type of local regulation of drones is appropriate. Specifically, this bill would make clear that local governments can do all of the following, among other things:

- Enforce federal laws and regulations, including adopting requirements that small UAS be registered as required by federal law, clarify that law enforcement can demand evidence of registration (as required by federal law) from a person operating a UAS, and clarify that law enforcement may take additional enforcement actions as provided by law.
- Designate recreational areas for the operation of small UAS, but would require local governments to post signage notifying the public that UAS may be operating in that area.
- Require the operator of a UAS for commercial purposes to maintain insurance coverage.

As noted above, the FAA has long regulated the country’s airspace, and with the proliferation of drones, local governments have struggled to understand the kind of local regulations that are permissible, and the type which are likely preempted as a matter of federal law. DJI, a leading manufacturer of UAS, writes in support:

The [FAA] has for decades regulated the country’s airspace to ensure safe and efficient flight across the U.S. In 2012 under President Obama, Congress reiterated that the regulation of UAS is within FAA’s responsibility and that new federal regulations should be developed enabling broader access to this technology. Since then, the FAA has undergone numerous proceedings to regulate the use of UAS within our country’s airspace, just as they have done for other aircraft. They have instituted rules for recreational users, and a certification process (Part 107) for commercial users. Provisions of these federal regulations restrict flight above 400 feet, flight beyond visual line of sight, flight over people or flight at night. In 2017, Congress granted explicit authority for the FAA to require virtually all UAS operators to register the UAS with the FAA, and the FAA now requires registration. This registration requirement was heavily supported by

the industry and exemplifies the proactive approach seen with AB 1190. In 2018, Congress reauthorized the FAA and made numerous additional changes to further promote consumer protection and safe operation, as well as pilot emerging potential uses of UAS. DJI continues to support the implementation of these efforts.

While the FAA has and continues to lead the way on ensuring safe integration of UAS into the country's airspace, DJI believes there is an important role state and local governments can play. DJI hopes that through this bill, the many industry, local government, law enforcement and other stakeholders can find areas of agreement and put forward legislation that will promote the safe operation of UAS in California.

The City of Huntington Beach also writes in support:

The City of Huntington Beach understands that unmanned aircraft systems have the potential to revolutionize entire sectors of the local and regional economy. These technologies have the potential to allow small and large businesses alike to increase efficiencies as well as enhance a wide array of tasks including safety inspections. Keeping that in mind, the City must also ensure the integrity of public safety and enforce federal laws that mandate a safe airspace. Furthermore, the City has been unable to successfully regulate unmanned aircraft systems due to the complex intersection of Federal law. AB 1190 will finally give cities the legal authority to adopt specific regulations within their own jurisdiction.

This legislation is a notable first step in the right direction and helps to uphold a safe airspace throughout the City.

5) **Mandates and prohibitions in the bill are largely covered by existing law:** Beyond clarifying how communities may create reasonable drone regulations, this bill additionally prohibits certain behaviors. Specifically, this bill would provide that it is unlawful for a person to operate a UAS in any of the following ways:

- In a careless or reckless manner as to endanger the life or property of another.
- In violation of any restriction of the FAA.
- Knowingly or recklessly interfering with law enforcement firefighting, or any government emergency operations.
- Overflight by an aircraft of any lands for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent, or the person in lawful possession.
- Weaponizing a drone or operating a weaponized drone.

For the most part, these prohibitions are duplicative of existing law. It is already unlawful to violate restrictions issued by the FAA. Likewise, California prohibits UAS interference with law enforcement, firefighting, and emergency government operations. (*See* Pen. Code Sec. 402.) A number of California laws also, albeit in a technology neutral fashion, apply to drones with respect to torts (such as trespass and invasion of privacy) under existing law.

(*See e.g.*, Civ. Code Sec. 1708.8 forbidding invasion of privacy regardless of the manner in which the invasion takes for and Pen. Code Sec. 629.89 prohibiting all “covert entry” onto a property for installation or placement of an interception device.) Notably, the prohibition against weaponization, which has been an ongoing issue of debate in the Legislature, was also included in the Reauthorization.

The FAA is still in the process of issuing regulations required by the Reauthorization. To the extent that any of the prohibitions in this bill are in conflict with federal law or FAA regulations, they could be preempted given the FAA’s stated goal accelerating the integration of UAS into national airspace. That being said, having a consolidated list of rules that apply to UAS via statute could be very helpful to local governments in their efforts to appropriately regulate UAS in their community. The following amendments would remove any requirement imposed on the state of California by this bill. By applying this bill’s requirements only to local governments, the author hopes to ensure that the guidance this bill seeks to provide to cities and counties will survive any potential future preemption challenge. The amendments are an acknowledgment that laws traditionally related to the local police power – including land use, zoning, privacy, trespass, and law enforcement operations – generally are not subject to federal regulation.

Author’s amendment:

Remove any requirement imposed on the State in Chapter 12.97 of the Government Code created by this bill.

The California Chamber of Commerce writes in support of this bill, “[w]hile the FAA has and continues to lead the way on ensuring safe integration of UAS into the country’s airspace, we believe there is an important role state and local governments can play. We hope that, through this bill, the many industry, local government, law enforcement, and other stakeholders can find areas of agreement and put forward legislation that will promote the safe operation of UAS in California.”

- 6) **Bill would treat recreational drone flying as a hazardous activity:** In the event that any property or persons are injured during the course of operating a UAS on public property specifically designated for UAS use, this bill would provide immunities from liability for public entities and public employees. The public entity would only need to post a sign at each entrance to the recreational area, notifying the public that unmanned aircraft may be operating in the area for the immunity to be available to the entity itself and employees. Existing law provides similar immunities for other recreational activities, including, among others, diving where prohibited, animal riding, archery, rifle shooting, and rock climbing. (*See Gov. Code. Sec 831.7.*) Arguably, recreational drone flying is not as inherently dangerous as many of these activities.

Additionally, California law generally provides public entities with broad tort immunity that insulates them from civil liability, absent a specific statute expressly waiving sovereign immunity. (Gov. Code Sec. 815(a).) As a matter of consumer protection, immunity provisions are generally disfavored because they act to preclude a party from recovering when he or she is injured. Liability acts not only to allow a victim to be made whole, but also encourages appropriate compliance with legal requirements. In the cases of this bill, immunity may act to protect a public entity or employees who acted negligently or recklessly and caused harm to individuals.

Staff notes that this bill, if passed out of this Committee, will be referred to the Assembly Judiciary Committee who has traditionally considered issues of immunity and liability as well as a matter of that committee's specific jurisdiction.

- 7) **Prior legislation:** AB 3173 (Irwin, 2018) would have made it an infraction to operate an unregistered UAS that is required to be registered under federal law.

AB 1662 (Chau, 2016) would have required the operator of any UAS involved in an accident resulting in injury to an individual or damage to property to perform certain duties.

SB 807 (Gaines, Ch. 834, Stats. 2016) provided local public entities, and public employees of local public entities, with immunity from civil liability for any damage to an unmanned aircraft or unmanned aircraft system if the damage was caused while the local public entity and employee was providing, and the unmanned aircraft system was interfering with, the operation, support, or enabling of specified emergency services.

SB 868 (Jackson, 2016) would have established rules on where and how remote piloted aircraft may operate.

AB 2320 (Calderon and Low, 2016) would have, among other things, prohibited the operation of UAS in a manner that violates a protective order, constitutes stalking, interferes with emergency response personnel, or facilitates delivery of contraband into a jail or prison.

AB 1256 (Bloom, Ch. 852, Stats. 2014) created a cause of action for the capture of a visual image or sound recording of another person with the use of an enhanced visual or audio device liable for "constructive" invasion of privacy, and made it illegal, and subject to civil liability, to attempt to obstruct, intimidate, or otherwise interfere with a person who is attempting to enter or exit a school, medical facility, or lodging, as defined.

AB 2306 (Chau, Ch. 858, Stats. 2014) expanded a person's potential liability for constructive invasion of privacy, by removing the limitation that the person use a visual or auditory enhancing device, and instead made the person liable when using any device to engage in the specified unlawful activity.

SB 15 (Padilla, 2013) would have imposed a search warrant requirement on law enforcement agency use of a UAS in certain circumstances, would have applied existing civil and criminal law to prohibited activities with devices or instrumentalities affixed to, or contained within a UAS, and would have prohibited equipping a UAS with a weapon, and would have prohibited using a UAS to invade a person's privacy.

- 8) **Double-referral:** This bill is double-referred to the Assembly Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Association for Unmanned Vehicle Systems International
California Chamber of Commerce

City of Huntington Beach
DJI, Inc.
League of California Cities

Opposition

None on file

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