

# CONSTRUCTION TODAY

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Regulations for Aerial Drones

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# MAKE NO MISTAKE, CONSTRUCTION LIKES

# DRONES

by Nicholas A. Pasciullo, Esq., Weber Gallagher

Few industries have embraced aerial drones as thoroughly as construction. The number of aerial drones used in the industry is expected to explode this year and for the foreseeable future. “The construction industry has emerged as a key driver of the nascent commercial drone industry, which some analysts believe will top \$5 billion by 2020,” according to Fortune.com. There are now about 770,000 aerial drones registered in the U.S., according to Bloomberg News.

Construction companies are finding drones effective in capacities including security, surveying, communication and management. But a construction company operating aerial drones must balance its use against important privacy and legal concerns.

Technically, aerial drones are referred to in Federal Aviation Administration (FAA) regulations as Unmanned Aircraft Systems (UAS) or Unmanned Aircraft Vehicles (UAV). An aerial drone’s ability to rise above it all and versatility of instrument payloads make them commercially beneficial in construction, but also susceptible of invading privacy and possibly leading to litigation.

In conjunction with cameras, GPS, laser measuring systems and thermal imaging devices, aerial drones serve all aspects of construction from site surveys to construction progress to finished

product. Aerial drones reduce cost and increase accuracy of developing topographical maps, 3D mapping, construction progress, measurement overlay of photographs and post-accident reconstruction.

Commercial use is regulated through an evolving combination of governmental and private forces. Currently, the FAA regulates commercial use of aerial drones and various states regulate privacy concerns. Separately, insurance coverage and litigation help define acceptable uses and limits. Commercial use includes monitoring progress within a company or providing professional services.

For UAS weighing less than 55 pounds, the FAA regulations require the following:

#### Who may operate?

- Must be at least 16 years old
- Must hold a Remote Pilot Airman Certificate with small UAS rating or be under the direct supervision of a certificate holder.
- Must pass applicable Transportation Security Administration (TSA) vetting

## How may it be operated?

- Must undergo flight check before operating
- Below 400 feet above ground level
- Below 100 miles per hour
- Between daylight hours (30 minutes before official sunrise to 30 minutes after official sunset, local time)
- Must keep in sight (by pilot or remote observer)
- Must not fly over people
- Must not operate from moving vehicle
- Must yield to manned aircraft

Privacy remains a major concern due to an aerial drone's "unparalleled surveillance capabilities," according to a September 2016 report from AIG Liability Risk Consulting & Aerospace Solutions.

Only aerial drones operated by or on behalf of governmental entities are subject to Fourth Amendment search requirements. Private operators must obey all applicable privacy laws, particularly those specifically promulgated for aerial drone operation. Currently, only a few states have specific privacy laws concerning aerial drones use.

Most privacy laws concern the use of cameras and other high-tech equipment, such as thermal imaging and lasers with aerial drones and the storage and use of the data they collect. These laws primarily relate to the operation of aerial drones over private property or where it collects data (photos, videos, thermal imaging or measurements) from private property and generally require the permission of the property owner. But even neighbors can get into heated disputes over drones and privacy. A drone altercation in Kentucky ended up in court when a man sued his neighbor after the neighbor destroyed the drone that he claimed was hovering over his property watching his daughter sunbathe.

In addition, many laws create a private right of action against an aerial drone operator or owner for violation of private property rights and the misuse of data. For these reasons, an aerial drone owner and operator should develop internal standards for the collection, use and storage of data.

Having adequate insurance on a construction site that includes damages caused by a drone is now an important consideration. A typical commercial general liability policy will exclude coverage for aerial drone use. Liability coverage may be purchased as an endorsement or as a stand-alone policy. Construction managers should consider carefully if this policy is needed. A typical drone use policy will extend certain coverage to the operator and company for legal liability for personal injury and property damage of other and, limitedly, for accidental invasion of privacy.

Often, coverage is conditioned upon maintaining specific conditions, such as:

- Operator certification
- Permits (if required by State)
- Operating Log

- Maintenance Log
- Location of Operation
- Type of UAS and Payload Equipment

AIG has published a guide to Commercial Best Practices for aerial drone use and data collection and security that is very thorough and helpful. It is crucial that construction companies protect themselves and manage risk that can come with the use of drones.

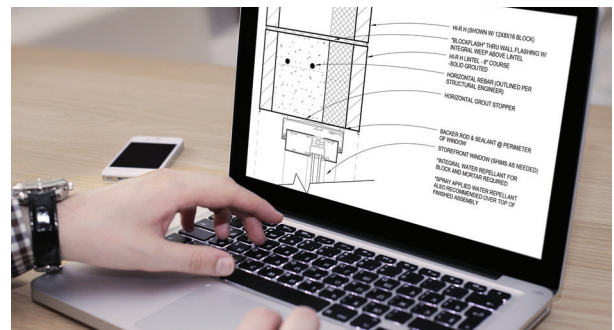
In general, best practices require the operator to take into account all physical characteristics of the project, to notify all third parties within or near the flight path and to minimize data collection, obtain permission from affected and potentially affected third parties and ensure the security of its storage and use. Finally, all aerial drones and data storage on construction projects should be equipped as best as possible against being hacked by outside persons or entities.

*Nicholas A. Pasciullo, a Partner at Weber Gallagher, represents insurance companies in property, energy, construction and engineered risks insurance matters. His work encompasses matters involving damage to onshore energy facilities, power generation equipment, pipelines transmission and distribution equipment, heavy industry, construction, refinery and gas separation, mining and other manufacturing and distribution issues. Nicholas also has extensive experience in cyber security risk. He may be contacted at [npasciullo@wglaw.com](mailto:npasciullo@wglaw.com). ■*

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