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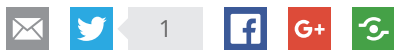
UP IN THE AIR

A Legal Guide To The Use Of Drones In Real Estate

Technology Comes With Potential Payoffs, Risks

By Paul C. Bauer | Special To Banker & Tradesman | Sep 27, 2015

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Drones, or unmanned aircraft systems (UAS), have escaped pure military purposes and exploded into the public consciousness as a commercial tool. For the real estate industry, there is great potential for UAS in many ways: providing stunning aerial photographs for marketing; using infrared cameras to locate building heat loss in energy audits; providing survey data and reference points; assisting in delineating wetlands through plant identification; and inspecting roofs.

Amazon has plans to employ UAS to streamline and expedite last mile deliveries. At the same time, however, there are regulatory hurdles and business risks to the use of UAS that property owners and real estate professionals must address.

Under current law, the use of UAS for commercial use is prohibited without a Section 333 waiver from the Federal Aviation Administration (FAA). The FAA is granting many of these waivers while it develops a regulation to address the new UAS industry. The proposed FAA regulation is out now and when finalized will govern UAS use. While a Section 333 waiver currently requires a pilot's license, the draft regulation provides for a new operator licensing process that does not require that operators be licensed pilots.

Some have challenged FAA authority to regulate UAS. This is a nonstarter for the real estate community as

the risk of an unregulated industry flying chunks of metal across the sky would soon make use of UAS unviable. This is an instance where the industry needs clear rules to promote a stable new business tool.

States are also developing or enacting laws regulating UAS in many respects including prohibiting voyeurism, protecting wildlife, prohibiting use in hunting, fishing, or trapping as well as detailing use in commercial agriculture and defining no flight zones.

Recognizing the benefits of UAS for the real estate industry, there are a number of concerns as well. Property owners will want to protect the safety and security of persons and property against both accidental occurrences as well as malicious or terrorist actions. Similarly, owners will want to protect the privacy of occupants against UAS photography. This can encompass protection against industrial espionage as well as personal privacy expectations. Finally, owners will want to protect their tenants from any nuisance that a UAS on the property might cause.

While future federal and state laws may provide some help to property owners, there is no guaranty. However, there are steps owners and real estate professionals can take now to protect themselves against risks arising from UAS.

When looking to use a UAS for property purposes, real estate professionals must hire a company with a FAA Section 333 exemption, get a copy of the exemption from the provider, and have counsel prepare a contract with the provider that includes indemnity provisions that protect against losses that could be suffered due to improper UAS use or accidents arising from such use, and specifies the date and time at which the UAS will be employed. These contracts should not be a general authorization, but should cover each UAS use so that the location, date and time can be agreed upon.

On property that is likely to experience UAS use by hobbyists or professionals (such as parking lots, fields, etc.), owners should post signs prohibiting such use without express owner permission. Similarly, owners should prohibit use of UAS on the property by tenants either in new leases or in the building rules and regulations to cover existing tenants. Further, although Amazon's UAS delivery program is some time in the future, property owners should make sure that no delivery service delivers to tenants by UAS without an agreement in place with the landlord to define flight paths, time, and allocation of liability – if such delivery is permitted at all.

The brave new world of efficiencies and capabilities from UAS promises some very real benefits for the real estate industry. At the same time, to protect against the risks inherent in this new technology, property owners cannot wait for the regulatory environment to catch up with the issues raised by UAS access of private property. It is imperative that property owners get in front of issues creating potential risk exposure to protect their property.

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