

Legal Pitfalls HOAs Should Avoid When Using Drones

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Unmanned aircraft systems, more colloquially known as drones, were once a niche hobby for dedicated enthusiasts, but have become increasingly popular as drone size has decreased and ease-of-use has increased.

They currently represent the fastest-growing segment of the transportation sector, with over 1.7 million drone registrations and 203,000 remote pilots certified by the Federal Aviation Administration.^[1] Sales of U.S. consumer drones to dealers surpassed \$1.25 billion last year, and Goldman Sachs forecasts the drone market size to be worth \$100 billion, supported by growing demand from commercial and government sectors.^[2]

Familiarity with an iPad is nearly all an individual needs to join the ranks of amateur drone operators today. Many homeowners associations have taken reactive measures to regulate drone use by the owners in their communities as a result of growing amateur interest, and tech-savvy HOA boards of directors have begun probing a new angle of the burgeoning industry — using drones to help identify and enforce violations of HOA covenants.

The follow-up question is hardly unanticipated: How does an HOA avoid potential liability and other legal pitfalls associated with drone use?

Florida courts generally give broad protections to HOAs enforcing recorded covenants, so long as they are reasonable and within the parameters of the HOA governing documents.

Florida law does not prohibit the use of drones for purposes of inspection, and a resident's constitutional right to privacy is only implicated if an operator breaches the scope of the inspection.

Providing reasonable notice of a future fly-by (as an HOA would for an in-person inspection) can nip many potential claims in the bud. An HOA should always follow the spirit and the letter of its notice protocols and the scope of inspections specified in its governing documents.

In practice, the main hurdle to the use of drones will not be Florida courts or privacy laws, but the FAA.

The FAA classifies drone use in two main categories: recreational and commercial. If you are not flying a drone for simple amusement, then you fall under the category of a commercial drone operator, required by the FAA to pass both a proctored knowledge test and a criminal background check, among other things.

Intent is what matters to the FAA. Once the operator picks up the controls, intent binds the operator to either recreational or commercial purposes. An HOA board member who happens to be a recreational drone hobbyist cannot simply use their drone for an HOA's periodic inspections.

Once a hobbyist intends to use the drone to record images and video for use by an HOA, that hobbyist is considered a commercial drone operator and must be licensed as such.

Once a drone operator's commercial license has been obtained, the next steps involve insulating the HOA from potential legal liability. There are three main areas where an HOA could potentially find itself in legal hot water: claims of negligence, trespass and invasion of privacy.

A negligence scenario is not hard to imagine — as with all modern technology, there can be failures and malfunctions. A malfunctioning drone or a drone that has run out of power has only one direction to go and can potentially damage a resident's property during its descent. HOAs should check their liability insurance policy to see if they are covered for drone-caused damage, and consider adding that to their coverage before engaging in drone usage.

Contracting with a third-party drone operator, who holds a commercial license, to conduct inspections and having them indemnify the HOA in the event of an equipment failure and subsequent suit could be another approach, but of course such a third party should be properly vetted and have its own insurance naming the HOA as an insured party.

When it comes to trespass, a legal right to enter is generally a substantial defense. Nearly all HOAs have governing documents which contain provisions allowing the HOA's representatives to enter and inspect a homeowner's property for violations. It is paramount that an HOA treat a drone inspection with the same formalities as it would if a representative was entering a resident's property on foot.

Err on the side of caution. If advance notice is required, make sure it is given. Additionally, it is a good idea to let residents know the form the inspection will take. Don't be vague. If an HOA is going to use a drone for the inspection, let the resident know in the notice. Discuss it in HOA meetings prior to the use of drones for inspections. Be transparent.

Intentionally or unintentionally filming or recording residents inside their homes through windows opens up the actual operator, as well as the HOA, to liability. Invasion of privacy claims are highly dependent on the details of the individual case.

An HOA using a drone for a legitimate, noninvasive purpose is unlikely to incur any liability, but should take care to ensure that the use of the HOA's drone does not go beyond that. Keep the camera pointed toward legitimate HOA interests that are permitted to be inspected by the HOA's governing documents, and legal strife can be avoided.

Some HOA's documents only allow inspections of improvements that can be seen from the street or an adjoining HOA common area. Drones should not be used to inspect anything that an HOA representative is not permitted to inspect.

As drone technology improves and ease-of-use increases along with it, more and more HOAs will seek to take advantage of its benefits. Make sure your HOA board of directors is prepared before implementing drone usage into its inspection protocols.

While the board may not need approval from the owners to implement a drone inspection policy, it may be worthwhile for the board to notify the owners in advance of its intentions and seek owner input on the subject at a board meeting before making a decision. Most importantly, make sure the HOA's operator meets the criteria to perform the functions needed.