

No Drone For You – The FAA Bans the Use of Drones in Real Estate Brokerage

By Dennis C. Valet

When I hear or see the word “drone,” an unmanned United States military airplane that conducts air strikes in combat zones comes to mind. Apparently, when the Federal Aviation Administration (FAA) defines the word “drone,” it also considers little Jimmy’s Christmas present to be the same thing as a bomb dropping warplane. According to the FAA, both are an “unmanned aircraft system”, or as it is more commonly known today, a “drone.” In fact, the FAA confirmed this divergent understanding of aircraft on the drone spectrum within a 2007 Federal Register Notice, wherein it defined a “drone” as “an unmanned aircraft... that is used... for flight in the air with no onboard pilot. These devices may be as simple as a remotely controlled model aircraft used for recreational purposes or complex as surveillance aircraft flying over hostile areas in warfare.”¹ So, the FAA treats these two completely different aircraft exactly the same when applying its regulations.

Civilian remote control aircraft technology has taken a monumental leap forward in the past few years, prompting companies such as Amazon to announce plans for widespread use of drones and giving Joe Schmo Rodeo, who lives down the block, free access to an aircraft capable of flying hundreds of feet in the air while carrying a Go-Pro or other camera device.

The FAA’s reaction to the apparent threat of skies filled with drones has been to put the lid on the drone industry almost entirely at its outset. A February 26, 2014 update on the FAA website, titled “Busting Myths about the FAA and Unmanned Aircraft,”² makes it explicitly clear that the FAA’s 2007 Federal Register Notice was still applicable – no person

may fly a drone for commercial purposes unless they are a certified pilot flying a certified aircraft with operating approval.

In its June 18, 2014 Interpretation of the Special Rule for Model Aircraft, the FAA reaffirmed its regulatory reach and stated that it considers model airplanes to be aircraft and therefore, can be regulated. However, the FAA is prohibited by the FAA Modernization and Reform Act of 2012 from promulgating any rule or regulation regarding *model* aircraft. The basis for this prohibition is the fact that model aircraft are inherently less dangerous than large aircraft, which take up significant airspace and pose a real threat to those on the ground and in the air. For once it seems that the government may have used some common sense, however, the FAA Modernization and Reform Act of 2012 contains one fatal flaw – in order to qualify as a model aircraft, the drone

must be flown strictly for hobby or recreational use.

The non-commercial use requirement is puzzling, as it does not relate in any way to the policy behind prohibiting the FAA from regulating model aircraft. If the policy behind permitting the free use of model aircraft by civilians is the fact that the aircrafts are essentially harmless because of their size and range of operation, why does it matter whether the flight is for recreational or commercial purposes? The way the restriction is currently worded, I am free to fly my drone above my own house and take pictures for my own personal use; however, if I sell the pictures to someone, my drone flight has miraculously become dangerous and needs to be regulated by the FAA.

Taking advantage of this non-commercial use requirement, the FAA began pass-



Dennis C. Valet

ing out \$10,000 fines to individuals / companies using drones for commercial purposes. Its first major fine was against Raphael Pirker who used a drone to take photographs and video near the University of Virginia for compensation.³ The FAA’s June 18, 2014 Interpretation of the Special Rule for Model Aircraft brings the threat of the very same fine into the realm of real estate brokerage. As an example of flights which it considers “Not Hobby or Recreation” (and therefore commercial) the FAA specifically lists “[a] realtor using a model aircraft to photograph a property that he is trying to sell and using the photos in the property’s real estate listing.”⁴

The FAA also fired more shots across real estate brokerages’ bows when it subpoenaed numerous New York brokerages looking for evidence of commercial drone use.⁵ These targeted threats have caused the National Association of Realtors (NAR) to recommend its members not use drones in connection with their listings.⁶ NRT, a leading brokerage nationwide, likewise has banned all of its agents in the northeast from using drones.⁷ Both policies cite the ambiguous and arbitrary nature of the restriction against commercial drone flights.

The FAA Modernization and Reform Act of 2012 requires the FAA to create rules to allow for the integration of drones into United States airspace, but the FAA’s recent reactions to the use of drones for commercial purposes understandably puts a damper on any hopes of widespread drone use by businesses, including real estate brokerages. If businesses want to break free from the FAA’s ban on commercial drone use, drone regulations must focus on the size of the aircraft and where it is operated, not the purpose for which it is being flown.

Rules developed by the FAA regarding the integration of small drones are due by August 14, 2014 (this article was written before the August 14 deadline, but they should be available as you read this) and full integration of non-governmental drones is scheduled for September 30, 2015. The FAA recently closed the window for submission of comments on its June 18, 2014 Interpretation of the Special Rule for Model Aircraft and received over 29,000 comments.⁸ While we wait for the rules, keep an eye to the sky, but only if you’re doing it for fun.

Note: Dennis C. Valet is an Associate Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Valet focuses his practice on real estate litigation with an emphasis on representing licensed real estate brokerages and their agents.

1 Unmanned Aircraft Operations in the National Airspace System, Docket No.: FAA-2006-25714.

2 Busting Myths about the FAA and Unmanned Aircraft, available at www.faa.gov/news/updates/?newsID=76240.

3 Interpretation of the Special Rule for Model Aircraft, Docket No.: FAA-2014-0396.

4 FAA Modernization and Reform Act of 2012, P.L. 112-95.

5 FAA v. Raphael Pirker, Decisional Order, NTSB Docket CP-217.

6 Interpretation of the Special Rule for Model Aircraft, Docket No.: FAA-2014-0396, Page 11.

7 FAA Subpoenas Practitioners Using Drones, available at www.realtormag.realtor.org/daily-news/2014/07/01/faa-subpoenas-practitioners-using-drones.

8 Field Guide to Drones and Real Estate, available at www.realtor.org/field-guides/field-guide-to-drones-and-real-estate.

9 Drone Photography NRT Policy Statement, available at www.scribd.com/doc/234981333/Drone-Photography-NRT-Policy-Statement.

10 Notice of interpretation with request for comment, available at www.regulations.gov/e#!documentDetail;D-FAA-2014-0396-0001.

FOCUS ON REAL PROPERTY SPECIAL EDITION

On the Radar — Foreclosure Update

By Alicia M. Menechino

In light of the continuing high numbers of filings of foreclosure actions in Suffolk County, it is the rare practitioner who is not faced with questions or concerns regarding foreclosure, even if tangential to the primary dispute. A brief overview of recent developments and open questions is offered to assist the learned practitioner.

Extension of Mortgage Forgiveness Debt Relief Act — What’s Happening Now?

Since 2007, the passage of the Mortgage Forgiveness Debt Relief Act has offered tax relief to homeowners who chose to sell their home in a short sale or who might otherwise be subject to a post-foreclosure deficiency judgment. The act gave relief for the “income” that becomes mandatorily reportable (Form 1099) by the lender upon such short sale or deficiency judgment of a primary home

(“principal residence”) due to the debt forgiveness and, consequently, reportable by the tax payer in their annual returns.

Often referred to as the “Qualified Principal Residence Indebtedness Exception,” the tax relief has expired by the terms of the statute as of December 31, 2013. Whether the relief will be extended yet another year will not likely be determined before November 2014.

What’s the hold-up, you might ask?

It would seem the proposal for the extension of the Mortgage Forgiveness Debt Relief Act of 2007 has been packaged with a number of other “extenders,” i.e. tax relief extensions, for wholly unrelated financial concerns. It is these unrelated extenders, in particular, one in relation to an excise tax on medical devices that helps fund the Affordable Care Act, that appear to be to blame for the packaged bill not being



Alicia Menechino

passed. Although some proactive politicians have offered bills, which single out the MFDRA for extension, they too have not yet seen success in its passage.

As a result of this political jockeying, “short sellers” of a primary residence since January 1, 2014 remain in a state of limbo as to whether the debt forgiveness income will be

exempt come tax time. Real estate practitioners representing short sellers would be wise to advise their clients of this pending issue of the potential tax liability. Of course, lender’s attorneys and foreclosure defense counsel are equally wise to keep an eye on this development in order to fully and adequately counsel our clients.

While the traditional insolvency and bankruptcy tax exceptions will continue to apply and may be alternatively applicable to your client, it is always best that the tax payer solicit the advice of a qualified accountant to illuminate each individual’s options and potential obligations as it suits their unique situation upon a short sale or deficiency judgment.

There is a general optimism that the extension will be passed, but as of the date of this writing (the ides of August), the bill tracking websites only offer a 1 percent projection of the bill’s passage. As a

result, the “across the board” forgiveness for primary residence short sales remains in question.

Extension of Hamp — We’re on for another two years

Like it or not, the famed Making Homes Affordable Program, has been approved for another two years, extending the previous December 31, 2013 deadline to December 31, 2015. Whether this is a dire outlook of the future of the mortgage banking crisis or an optimistic final “punch on the arm” remains to be seen.

Good Faith Not So Good — Spinner Strikes Again

Once again, on August 12, 2014, Suffolk County Supreme Court Judge Jeffrey Arlen Spinner offered up a decision in the action, *LaSalle Bank v. Dono et al.*, bearing Index No. 09-4422, that may strike fear into lenders.

In a motion that must have been most expertly crafted by our fellow brethren in a pro-bono / not-for-profit capacity by the Long Island Housing Services, Judge Spinner “permanently abated” years of interest, attorney’s fees, and costs in a residential foreclosure action that commenced in 2009. Five years of litigation, settlement conferences, and negotiations culminated into a judicial finding that the combined alleged actions

(Continued on page 24)

The Suffolk Lawyer wishes to thank Real Property Special Section Editor Andrew Lieb for contributing his time, effort and expertise to our September issue.

