HOUSE BILL REPORT
SHB 2178

As Passed House:
February 17, 2014

Title: An act relating to unmanned aircraft.

Brief Description: Concerning unmanned aircraft.

Sponsors: House Committee on Technology & Economic Development (originally sponsored by Representatives Morris and Morrell).

Brief History:
Committee Activity:
Technology & Economic Development: 1/16/14, 1/24/14 [DPS].
Floor Activity:
Passed House: 2/17/14, 92-6.

Brief Summary of Substitute Bill

- Prohibits operation of an unmanned aircraft in Washington airspace if the unmanned aircraft has active sensory devices onboard that collect personal information about any individual without the individual's consent, unless the federal government has provided "specific authorization" for such operation, or certain conditions are met.
- Establishes a criminal penalty for violation with intent to capture any type of personal information.
- Establishes a private right of action for an individual whose reasonable expectation of privacy is violated.
- Includes a disclaimer that no provisions apply to prohibit, authorize, or regulate in any manner the use of unmanned aircraft by a public agency.
- States that the "reasonable expectation of privacy" is presumed violated when a person's image has been captured by an unmanned aircraft equipped with an active sensing device, and such image could not have been captured from an ordinary vantage point outside the boundaries of the property on which the person is located without the use of the unmanned aircraft.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON TECHNOLOGY & ECONOMIC DEVELOPMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Morris, Chair; Habib, Vice Chair; Smith, Ranking Minority Member; Fey, Freeman, Hudgins, Morrell, Ryu, Stonier, Tarleton and Wylie.

Minority Report: Without recommendation. Signed by 5 members: Representatives Short, Assistant Ranking Minority Member; DeBolt, Kochmar, Magendanz and Vick.

Staff: Jasmine Vasavada (786-7301).

Background:

FAA Authority.
The Federal Aviation Administration (FAA) regulates the use of unmanned aircraft (UA), commonly referred to as drones, and Unmanned Aerial Systems (UAS) in the national airspace. A UAS is the UA together with all of the associated support equipment, control station, data links, telemetry, communications, and navigation equipment necessary to operate the unmanned aircraft. According to the Government Accountability Office, current domestic use of UAS includes law enforcement, forest fire monitoring and control, border security, weather research, and scientific data collection by the federal government. The FAA projects that by 2020 United States airspace will be home to 30,000 UAS in active use at any given moment.

In 2012 Congress enacted the FAA Modernization and Reform Act (the Reauthorization Act), directing the FAA to establish a comprehensive plan for fully integrating UAS into the U.S. airspace by September 30, 2015. The Reauthorization Act ordered FAA to develop an improved and expedited process for approving applications from federal, state, and local agencies to operate UAS. Commercial operators currently cannot obtain FAA authorization, unless a public organizational sponsor accepts complete responsibility, or the operator has obtained an experimental certificate for purposes of research and development, market survey, or crew training. However, these restrictions on private commercial operation of UAS is scheduled to end when the FAA implements the comprehensive plan for full integration of UAS mandated by the Reauthorization Act.

The FAA authority preempts state or local government from enacting a statute or regulation concerning certain aspects of the operation of aircraft in the national airspace. However, states and local governments generally retain authority to limit the aeronautical activities of their own departments and institutions. In addition, under the Reauthorization Act, Congress provided that certain small UAS operated away from airports and air traffic and near the ground level are exempt from federal regulation, if they are flown for exclusively recreational, non-commercial purposes. Specifically, section 336 of the Reauthorization Act prohibits the FAA from issuing rules limiting or prohibiting model, hobby or recreational use aircraft so long as: (1) the aircraft is less than 55 pounds; (2) the aircraft does not interfere with and gives way to any manned aircraft; (3) the aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization; (4) the aircraft is flown within the line of sight of the operator and used solely for hobby or recreational purposes; and (5) the operator of the

model aircraft notifies both the airport operator and air traffic control tower if the aircraft is flown in an area within five miles of an airport. Section 336(b) also provides that the FAA maintains its authority to take enforcement action against operators who "endanger the safety of the national airspace system."

Class G airspace is a civil airspace designation by the FAA, defined as airspace that is not designated as Class A, B, C, D, or E, and is considered uncontrolled. Class G airspace generally lies between the surface and the base of the overlying Class E airspace. Air traffic control does not control air traffic in Class G airspace.

Six Test Sites.
In December 2013 the FAA announced the selection of six public entities that will develop unmanned aircraft systems research and test sites around the country, focused on researching certification and operational requirements necessary to safely integrate UAS into the national airspace over the next several years. The FAA has established certain requirements for test site operators to help protect privacy. Operators must have publicly available privacy policies and a written plan for data use and retention. In addition, test site operators will be required to comply with federal and state privacy laws. Thus, state privacy regulation of UAS has not been preempted by Congress at this point in time.

Expectation of Privacy.
The Supreme Court has addressed in many cases the question of whether the government has committed an unlawful search or seizure in violation of the Fourth Amendment of the Constitution. Certain forms of government surveillance, when conducted without a search warrant, may violate the Fourth Amendment where the criminal defendant had a subjectively and objectively reasonable expectation of privacy that was violated by the search. In its jurisprudence, the Supreme Court has developed doctrines that exclude from Fourth Amendment protection, under certain circumstances, activities occurring in plain view, in open fields, or disclosed to third parties, finding that there is no reasonable expectation of privacy under such circumstances. Under the facts of one case, the Supreme Court has stated that there is no reasonable expectation of privacy from naked-eye observations made from public navigable airspace. In contrast, in another case, the Supreme Court has indicated, but not held, that government's use of highly sophisticated surveillance equipment not generally available to the public, without a warrant, may violate the Fourth Amendment.

The concept of whether there is a reasonable expectation of privacy may also be referenced in federal or state statute granting a cause of action for different privacy invasions and in judicial interpretation of whether the common law tort of invasion of privacy has occurred. These applications of the "reasonable expectation of privacy" concept may at times be informed by the Fourth Amendment jurisprudence, but Fourth Amendment decisions are generally not directly applicable to the interpretation of these other causes of action.

First Amendment.
In seeking to address privacy concerns triggered by the use of UA by private entities (who are not bound by Fourth Amendment restrictions, applicable only to government), the extent of their First Amendment privilege to gather information becomes relevant. The First Amendment does not invalidate every burden that may incidentally result from the enforcement of civil and criminal statutes of general applicability. As such, laws in a number

of areas, including trespass and invasion of privacy, have been enacted by states or derived as a matter of common law that to some extent work to establish boundaries on the First Amendment right to gather information.

Summary of Substitute Bill:

No person may operate an UA in Washington airspace if the unmanned aircraft has active sensory devices onboard that collect personal information about any individual without the individual's consent, unless the federal government has provided "specific authorization" for such operation, or certain conditions are met. Unmanned aircraft must be clearly and conspicuously labeled with the name and contact information of the aircraft's owner and operator and may not have an active sensing device onboard that collects personal information about any individual without the individual's consent.

Definitions.
"Unmanned aircraft" means an aircraft operated without a physical human presence onboard. "Washington airspace" means all airspace within class G airspace and not otherwise classified as controlled by the FAA. "Active sensing device," means a sensing device that is acquiring personal information from its surroundings, as distinguished from a sensing device when such functionality is dormant. "Personal information," means any information that: (1) describes, locates, or indexes anything about an individual including, but not limited to, his or her social security number, driver's license number, agency-issued identification number, student identification number, real or personal property holdings derived from tax returns, and his or her education, financial transactions, medical history, ancestry, religion, political ideology, or criminal or employment record; or (2) takes the image of a person taken from any location in the Washington airspace, when the person whose image has been captured is on private property, the landowner and tenants with a right to occupy the property have not consented to the capture of images of their person on the property, and the taking of such image is in violation of the reasonable expectation of privacy of the person. A violation of the "reasonable expectation of privacy" is presumed when a person's image has been captured and such image could not have been captured from an ordinary vantage point outside the boundaries of the property on which the person is located without the use of the UA.

Applicability.
Nothing in the new chapter created by Substitute House Bill 2178 may be construed to authorize the use, prohibit the use, or regulate in any manner the use of an unmanned aircraft by a public agency.

Penalties.
A person who violates the requirements "with intent to capture any type of personal information" for an unlawful purpose is guilty of a misdemeanor.

Private Right of Action.
An individual whose reasonable expectation of privacy is violated by the use of an UA equipped with a sensing device in violation of the requirements of the act may bring an action to recover actual damages or liquidated damages in the amount of $5,000, whichever is greater, together with costs and reasonable attorneys' fees.

Additionality.
The substitute bill specifies that remedies provided by these provisions are meant to be in addition to any other requirements, rights, and remedies provided by law.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The committee was asked to take a technology-neutral look at invasive technologies. In looking at some of the issues, it was discovered that there were certain uses of UA that the FAA is not going to regulate, because of an exemption in federal law for recreational use of certain small UAs in uncontrolled air space. The state should step in here, because the federal government will not be deploying standards to protect private property. This bill only extends protection to you on your private property, which is consistent in part with the approach of an Oregon bill. The intent is to put some guard rails on the technology so that it can flourish commercially. It just says that if you have recording devices on board, you need the landowner's permission before you collect personal information. This law was written conscientiously and should be heard in the general assembly, because there is much public interest but few people have had the opportunity to learn about this bill. When the public learned of the City of Seattle's plans to use drones for police purposes, there was much opposition. People should be able to claim privacy and rights in the air above their property.

(Opposed) Some hobbyists and UA enthusiasts oppose the bill in its current form. The airspace above private property is in the public domain, and the Supreme Court has ruled that aerial images above private property may be taken without a warrant, as long as the areas observed are open to casual observation—a property owner has no reasonable expectation of privacy from above. The ability to take pictures from the air is protected under the First Amendment. There can be a public benefit from the camera footage taken by UA hobbyists. Images taken have resulted in indictments against a meatpacking company for illegally dumping pigs' blood into a river. This bill would inhibit interests in scientific and research applications of the technology. Also the criminal penalty here is a gross misdemeanor, and the bill is not acting as a scalpel to protect privacy but rather as a cudgel taking away constitutional guarantees from a subset of society. The bill should be rewritten to address specific intrusion into the curtilage of a home.

This legislation will not benefit the commercial aspects of unmanned robotics as a service. "Person" is defined to include companies, suggesting that recreational use is defined as commercial use. There is also the issue of flying over commercial land, as opposed to residential property. A company will have to send out a letter to every person in their service area who they will be flying over, in order to request everyone's consent, requiring the company to collect the peoples' name and contact information. The technology community lost the opportunity to attract a federal test site, which means many companies may be

looking to go elsewhere. It would be better to be clear that you intend to only address recreational use.

Fire commissioners support use of UAs for unmanned fire suppression and search and rescue. These aircraft can fly day and night, which is a real positive for the teams who are working to control fires. The Department of Natural Resources (DNR) also believes in the tremendous potential of this technology to yield a public benefit. The conversation around privacy is important, but there needs to be a provision that allows the DNR to use unmanned aircraft equipped with infrared cameras to get good information about the extent and nature of fires, so that appropriate resources can be deployed to protect the safety of firefighters. The DNR has been working with the FAA to test these applications, and would like to continue to have authority to conduct such testing. This technology can allow the agency to do its work at lower cost and with greater safety.

Persons Testifying: (In support) Representative Morris, prime sponsor; and Sheila Dean.

(Opposed) Mark Slayton; Jacob Kukuk, Scout Dynamics; Miland Walling, Washington State Fire Commission Association; Mary Verner and Albert Kasser, Washington State Department of Natural Resources; and Don Pierce, Washington State Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: None.