STATE OF MICHIGAN
IN THE SUPREME COURT

LONG LAKE TOWNSHIP,

Plaintiff-Appellant,

v.

TODD MAXON and HEATHER MAXON,

Defendants-Appellees.

Supreme Court No.

Court of Appeals No. 349230

Grand Traverse Circuit No.: 18-034553-CE
Hon. Thomas G. Power

Filed Under AO 2019-6

LONG LAKE TOWNSHIP'S APPLICATION FOR LEAVE TO APPEAL

Todd W. Millar (P48819)
PARKER HARVEY PLC
Attorneys for Long Lake Twp
901 S. Garfield Ave Ste 200
Traverse City, MI 49686
231-929-4878
tmillar@parkerharvey.com

David A. Bieganowski (P55622)
DAVID A. BIEGANOWSKI PLC
Attorney for Defendants
400 E. Eight Street
Traverse City, MI 49685
(231) 947-6073
dbiegan@bieganowskilaw.com

William L. Henn (P61132)
Andrea S. Nester (P76879)
HENN LESPERANCE, PLC
Co-Counsel for Long Lake Twp
32 Market Avenue SW, Ste 400
Grand Rapids, Michigan 49503
(616) 551-1611 / (616) 323-3658
wlh@hennlesperance.com
asn@hennlesperance.com

William G. Burdette (P49174)
THE LAW OFFICES OF WILLIAM G. BURDETTE, PC
Co-Counsel for Defendants
13709 SW Bayshore Drive
Traverse City, MI 49684
(231) 995-9100 Ext. 2
burdette@viewofthebaylawyer.com

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STATEMENT OF JURISDICTION AND ORDER APPEALED

This application for leave to appeal is filed following the Court of Appeals' March 18, 2021 opinion, which reversed the trial court's May 16, 2019 order denying Defendants' motion to suppress evidence and remanded the case for entry of an order suppressing all photographs taken of Defendants' property from a drone. (Exhibit 1, Court of Appeals published Opinion and Dissent, Appellant's App'x 001A-015A; Exhibit 2, May 16, 2019 Circuit Court Order, Hon. Thomas G. Power, Appellant's App'x 016A; Exhibit 3, Register of Actions, Appellant's App'x 017A-018A).

This application is filed on April 29, 2021, which is within 42 days of the Court of Appeals' opinion, and is therefore timely pursuant to MCR 7.305(C)(2)(a). Accordingly, this Court has jurisdiction to consider the Township's Application for Leave to Appeal pursuant to MCR 7.303(B)(1) and MCR 7.305.

STATEMENT OF THE QUESTIONS INVOLVED

The issue raised in this case is whether the Defendants' Fourth Amendment rights were violated when Plaintiff obtained images from a drone aircraft operating in publicly accessible airspace depicting Defendants' unfenced, partially wooded, five-acre property that was being used as a commercial junk and salvage yard in violation of the local zoning ordinance. Based on over thirty years of precedent from the United States Supreme Court, the answer is, "no." In fact, the Supreme Court has held that aerial photography and "observation is no 'search' at all." The Court of Appeals here erred in concluding otherwise. This error was compounded by the fact that the Court of Appeals failed to take into consideration the totality of the circumstances at issue and instead found warrantless drone observation unconstitutional per se. Moreover, the Maxons implicitly consented to the aerial observation by virtue of the 2008 Settlement Agreement with the Township and expressly consented to both 2017 observations by virtue of a permit application. As such, the issue as properly stated is whether Plaintiff Long Lake Township violated the Maxons' Fourth Amendment rights by taking unmanned aerial photographs of the their unfenced, partially wooded, five-acre commercial junk and salvage yard?

The Township answers:	No.
The Trial Court answered:	No.
The Maxons answered:	Yes.
The Court of Appeals answered:	Yes.

INTRODUCTION

The issue raised in this case is whether unmanned aerial images from publicly accessible airspace of an unfenced, partially wooded, five-acre property used as a commercial junk and salvage yard taken for purposes of zoning enforcement violate the Fourth Amendment. Based on over thirty years of precedent from the United States Supreme Court, the answer is, "no." In fact, the Supreme Court[1] has held that aerial photography and observation is not a "search" at all. See *Dow Chemical Co v United States*, 476 US 227, 234–235, 239; 106 S Ct 1819; 90 L Ed 2d 226 (1986). The use of a drone—a common technology readily available to the public—to take the images at issue does not do violence to the Fourth Amendment and does not render them the fruit of the poisonous tree in a zoning enforcement action. The Court of Appeals erred in concluding otherwise. This error was compounded by the Court of Appeals' failure to take into consideration the totality of the circumstances at issue, which led to its overly broad conclusion that government use of drones without a warrant or traditional exception to the warrant requirement violates the Fourth Amendment per se.

Specifically, this case involves a civil lawsuit brought by Plaintiff Long Lake Township (the "Township") based on Defendants Todd Maxon and Heather Maxon's (the "Maxons") continued and expanded use of their five-acre tract of land—located in an area zoned for low density residential homes—as an unlicensed junk/salvage yard. The underlying civil action seeks a declaratory judgment and abatement of the ongoing nuisance.

As part of its civil action for abatement against the Maxons, the Township hired a company to perform three drone flyovers to determine the scope of the junk yard on the Maxon property from publicly navigable airspace. Images taken resemble those already publicly available from Google Earth, and, in fact, there is no evidence that the drone was flown in violation of applicable regulations or other law, "nor

[1] For sake of clarity, this brief will refer to the Supreme Court of the United States as the "Supreme Court," while the Michigan Supreme Court will be referred to as this "Court."

that it contained equipment or was itself technology not readily available or generally used by the public." *Long Lake Township v Maxon*, ____Mich___, ___; ____NW2d___(2021) (Judge Fort Hood, dissenting), slip op at 5.

Since *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), courts have generally employed a two-part inquiry regarding whether a Fourth Amendment violation has occurred. The first inquiry is whether the individual, by his or her conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U.S. at 361. In other words, whether the individual has shown that "he seeks to preserve [something] as private." *Id*. at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *Id*. at 361. And, under this test, the Supreme Court has already held that aerial observations do not implicate the Fourth Amendment—i.e., they do not involve either subjective or objective expectations of privacy. See *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989); *California v Ciraolo*, 476 U S 207, 211-214; 106 S Ct 1809; 90 L Ed 2d 210 (1986).

More importantly, under the totality of the facts in this case, there is no evidence that the Maxons actually held any subjective expectation of privacy regarding aerial observation—from aircraft manned or unmanned—of their five-acre property. The property at issue is not covered or fenced, is partially visible from neighboring properties, and is otherwise more appropriately characterized as "open fields" or business property, given the uses to which it is put. *Dow*, 476 US at 234–235.

Likewise, the Maxons have not established that any privacy expectation would be recognized by society as objectively reasonable based on the facts here. The imagery at issue was taken from publicly navigable airspace, in compliance with FAA regulations, and with the use of technology readily available to all members of the public. Moreover, similar images of the Maxons' property can already be viewed, for free, on Google Earth. There is no argument that the use of satellite imagery or manned aerial surveillance would have any Fourth

Amendment implication. Likewise, the drone use here did not constitute a Fourth Amendment violation.

The Maxons have raised a variety of generalized dystopian concerns ranging from the possibility of 24-hour drone surveillance to drones hovering outside a bedroom window. Of course, there very well may be situations, in hypothetical future cases, where the Fourth Amendment is implicated by the use of drone technology. And, like with all evolving technologies, reasonable people may (and do) have a range of emotions and concerns about the potential scope of their use. But based on the facts of *this particular case*, these hypothetical scenarios are no more than an Orwellian premonition.

The Court of Appeals' majority opinion implements a wholesale ban of the use of a certain type of technology without regard to the Maxons' own subjective privacy expectation or that technology's particularized use under the facts of this case. Prohibition on warrantless use of a drone over any private property is a decision that may well be in the purview of our Legislature. But the use here under the totality of the circumstances based on established Fourth Amendment precedent cannot be said to violate the Maxons' own subjective expectation of privacy from aerial observation. And, again based on thirty-years of precedent, it did not violate any objectively recognized expectation.

The Township is not carrying the torch for any hypothetical entity that may want to use a drone to peer through the windows of your home. However, limited and reasonable aerial observations are a critical tool in all sorts of civil governmental functions—from land use to environmental and natural resource regulation. And, as the Supreme Court has held, they are also a permissible tool under the Fourth Amendment. The use of a newish yet common, publicly available technology to make these observations should not change the analysis. And, more to the point, it does not change the analysis under the facts presented here.

The Court of Appeals erred as a matter of law in concluding otherwise. This Court should reverse the majority opinion of the Court

of Appeals, reinstate the trial court's order denying the motion to suppress, and remand for further proceedings.

STATEMENT OF FACTS

This case involves a civil lawsuit brought by Plaintiff Long Lake Township (the "Township") based on Defendants Todd Maxon and Heather Maxon's (the "Maxons") continued and expanded use of their five-acre tract of land, located at 9160 North Long Lake Road, as an unlicensed junk and salvage yard. Specifically, the Township alleges that the Maxons are in clear violation of the local zoning ordinance and, as such, have created a nuisance per se on their property. The underlying civil action seeks a declaratory judgment and abatement of the ongoing nuisance. (Exhibit 4, Complaint; Appellant's App'x 026A-029A).

The ongoing and objectively hazardous use of the Maxons' property as a junk and salvage yard is not a new issue in Long Lake Township. A prior enforcement action against the Maxons based on the use of the property as a junk yard was resolved in 2008 when the Township and the Maxons entered into a settlement agreement. At that time the Township agreed, in pertinent part, not to pursue any further enforcement action against the Maxons so long as the junk yard/salvage activities remained status quo. (Exhibit 5, 2008, Consent Agreement; Appellant's App'x 055A-056A). In other words, the Maxons' use of the property was essentially grandfathered in under the then-existing Township ordinances—but only so long as their use did not expand, and only so long as the Township zoning regulations remained unchanged. (App'x 055A-056A).

However, the use of the Maxons' land did not remain status quo. The expanding use of the property as a junk and salvage yard as asserted in this case was brought to the Township's attention in part by unrelated site inspection photographs from 2016, as well as verbal and written complaints from neighboring property owners. (See, e.g., Appellee's Brief Exhibit 1; Exhibit 6, Neighbor Complaint, Appellant's App'x 057A). Following receipt and review of these materials—which demonstrate that the use of the unfenced property as a growing junk yard is clearly visible from the neighboring properties—the Township engaged Zero Gravity Aerial ("Zero Gravity") to take aerial photographs

of the Maxons' property.[2] Drone flights and photographs were performed on April 24, 2017, May 26, 2017 and May 5, 2018. (Exhibit 7, Drone Photograph Examples included with Maxons' reply brief, Appellant's App'x 058A-060A). These photographs were taken with a drone being flown by Dennis L. Wiand. Mr. Wiand has received a Remote Certificate for Part 107 of the Code of Federal Regulations for the commercial use of drones. (Exhibit 8, Mr. Wiand's Affidavit, Appellant's App'x 061A-062A).[3] Although the drone flights occurred on

[2] Contrary to the Maxons' assertions, the drone photographs are not the only photographs that depict a violation of the Township ordinances. Photographs taken by the Township Zoning Enforcement Officer in September 2016 from neighboring property before any drone photos were taken also depict the state of the property. Similar photos were also taken in 2017. These images also demonstrate that, contrary to the Court of Appeals' conclusion, significant portions of the property are visible from neighboring areas. See also Section I.C.

[3] During the most recent photography survey conducted by Zero Gravity on May 5, 2018, Mr. Maxon approached and began to question the drone operators who were in the local public baseball fields near the Maxons' property. Specifically, Mr. Maxon asked to see Zero Gravity's operating license and registration for the drone to which Mr. Maxon was denied. Pursuant to 49 USC § 44103(d) and the FAA Law Enforcement Guidance For Suspected Unauthorized UAS Operations, the operator of a UAS must carry a Certificate of Aircraft Registration and shall make available for inspection a certificate of registration for the aircraft when requested by a United States Government, State, or local law enforcement officer. When stating the denial for Mr. Maxon to view the operating license and registration, Zero Gravity advised Mr. Maxon to call a local law enforcement officer to whom they would then provide their license and registration as required by law. 49 USC § 44103(d). This confrontation along with the complete activities of Zero Gravity's surveying of the Maxons' property are more thoroughly described in Mr. Wiand's affidavit. (Exhibit 8, Mr. Wiand's Affidavit; Appellant's App'x 061A-062A).

three separate dates, the total time involved in all three of these aerial flights—including set up and tear down—was limited to approximately 120 minutes (two hours total). (Exhibit 9, May 2, 2019 Motion Hearing Transcript, p 39; Appellant's App'x 101A).

Additionally, in September of 2016, Todd Maxon applied for a permit to build an 800-foot long, 6-foot high perimeter privacy fence around a portion of the five-acre property at issue. (Exhibit 10, September 20, 2016 Permit Application; Appellant's App'x 124A-125A). The permit was issued on September 23, 2016 and remained valid for a full year—until September 23, 2017. (Exhibit 11, September 23, 2016 Permit; Appellant's App'x 126A). As a necessary condition of the permit application, Mr. Maxon consented to "on-site inspections by Long Lake Township Zoning, Planning, or Assessing officials that may be necessary to ascertain compliance, completion and value of the content of the land use permit." Apparently, the Maxons decided against building the fence, but project progress (or lack thereof) was not communicated to the Township Zoning official. During a site visit of the perimeter where the fence was supposed to be constructed in late September 2017, a Township inspector observed, in plain view, the condition of the property and its ongoing and expanding use as a junk/salvage yard. The inspector also took photographs at the time of his visit. And, the Maxons were subsequently notified that the permit was revoked because the fence had not been constructed within the one-year period as evidenced by the inspection. (Exhibit 12, Photographs from 2017 site inspection, Appellant's App'x 127A-137A; Exhibit 13, October 4, 2017 Letter indicating permit was revoked, Appellant's App'x 138A; Exhibit 14, Affidavit of Loyd A. Morris regarding 2017 inspection, Appellant's App'x 139A). Of note, both the April 24, 2017 and May 26, 2017 drone flyovers took place while the permit—and the associated consent to on-site inspection—was in effect.

On April 17, 2019, a zoning enforcement officer again took photographs, with permission, from locations surrounding Appellants' property. See Appellant's Court of Appeals' Brief, Exhibit 4. Google Earth historical satellite photographs likewise show how the activities on the property have changed and expanded over the years—and look remarkably similar to those images taken in the Township's drone aerial

surveillance photos. (Exhibit 15, Google Earth Images, Appellant's App'x 140A-147A).

Ultimately, based on the ground, aerial, and satellite (Google Earth) images, the Township filed the present civil suit seeking abatement of a nuisance per se (zoning violation) on August 21, 2018, asserting that the Maxons were operating an expanded junk/salvage yard on their property. As outlined in the Complaint, it is the Township's position that this use violates both the 2008 agreement and current, reasonable zoning regulations for a low density residential district. (Complaint, App'x 026A-029A).

Following a period of discovery, the Maxons moved to suppress all of the aerial photos taken by the drone and the photos taken by the official during the ground level site inspection in September 2017. The Maxons claimed the photographs are inadmissible due to the various vehicles and other materials not being visible from the nearby public road or their neighbors' properties; that the Township and Zero Gravity violated the Federal Aviation Administration (FAA) Regulations codified under 14 CFR 107 et. seq.; and that the drone photographs constituted a violation of the Maxons' Fourth Amendment right against unreasonable searches and seizures.

The Township responded by pointing out that both the first and second arguments had no basis in fact. Much of the Maxons unfenced property is, in fact, clearly visible from neighboring properties. And, there is no evidence that Zero Gravity violated any FAA regulation. Finally, regarding the application of the Fourth Amendment, three United States Supreme Court opinions have already decided the issue: aerial surveillance is not a search at all and, thus, implicates no Fourth Amendment protections. In fact, no search under the Fourth Amendment occurs from aerial observations even in circumstances where the defendants have (1) made an effort to conceal the object of the search by privacy fencing or partial enclosure in an actual structure and (2) where the object of observation appears within the clear curtilage of the home—neither of which are at issue in this case. And, this is *not* a case where the drone carried special technology unavailable to the public; likewise the drone was not used to peer into the Maxons'

residence, overhear their conversations, or track their movements. Therefore, the alternate case law cited by the Maxons was simply inapplicable.

The trial court held a hearing on the Maxons' motion to suppress on May 2, 2019. After hearing argument from the parties, the trial court denied the motion to suppress the drone photographs, finding that the aerial surveillance was not a search under Supreme Court precedent. (M Tr, 50-59; App'x 112A-121A; May 16, 2019 Circuit Court Order, App'x 016A). Of note, the trial court also denied Defendants' motion to suppress these photographs based on the permissive entry of the Long Lake officer pursuant to the terms of the permit application—specifically finding that the Township had the right to inspect the property and that the photographs were of objects in plain view. (M Tr, 47-50; App'x 109A-112A).

The Maxons filed an application for leave to appeal on June 5, 2019, and the Court of Appeals granted leave on the sole issue of whether the drone images violated the Fourth Amendment. (Exhibit 16, October 18, 2019 Order; Appellant's App'x 148A). The Court of Appeals denied leave to consider the trial court's denial of the Maxons' motion to suppress the photographs taken by the and the Maxons did not file an appeal to this Court.

In a published opinion dated March 18, 2021, a 2-to-1 panel of the Court of Appeals reversed the trial court decision on the motion to suppress. (See App'x 001A-015A). Instead of applying clear precedents regarding aerial surveillance, the Court of Appeals found that cases involving infrared surveillance of the inside of a home and eavesdropping were controlling, and that drone use would be a violation of privacy "whether the drone flew as high as a football-field length or flew directly up to an open bathroom window." *Long Lake Twp v Maxon*, slip op at 9.

Judge Fort Hood dissented from the opinion, concluding:

> The majority contends that drone observation is, by nature, similar to the intrusive surveillance that occurred in *Kyllo*. However, *Kyllo* involved infrared thermal imaging

of the defendant's home. Our Supreme Court concluded with respect to that surveillance:

> Where, as here, the Government uses a device that *is not in general public use*, to explore details of the home that *would previously have been unknowable without physical intrusion*, the surveillance is a 'search' and is presumptively unreasonable without a warrant. [*Kyllo*, 533 US at 40 (emphasis added).]

In my opinion, the fundamental import of *Ciraolo*, *Riley*, and *Kyllo*, is that if the drone that was used to view defendants' property in this case was a technology commonly used by the public that observed only what was visible to the naked eye and that was flown in an area in which any member of the public would have a right to fly their drone—and the record suggests that all of these things are true—then precedent provides that a Fourth-Amendment violation has not occurred. See *Ciraolo*, 476 US at 215; *Riley*, 488 US at 450; *Kyllo*, 533 US at 40. [*Long Lake Twp v Maxon*, Judge Fort Hood dissenting, slip op at 3.]

Further, the dissent rejected the application of *Stone* (this Court's prior decision on eavesdropping):

> The majority addresses this idea by noting that a person's reasonable expectation of privacy does not evaporate simply because an invasion into privacy becomes technologically feasible. I agree, but I find the majority's extension of that logic to create a Fourth-Amendment violation in this case problematic, particularly in light of the cases the majority relies upon: *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001), and *Kyllo*. In *Stone*, our Supreme Court held, on the basis of Michigan eavesdropping statutes, that a person has a reasonable

> expectation of privacy in certain telephone conversations despite the fact that technology makes it possible for others to eavesdrop on those conversations. *Stone*, 463 Mich at 568. Outside of the idea that advances in technology do not automatically obfuscate a person's reasonable expectation of privacy, *Stone* has little import to the case at hand. Similarly, and as noted above, *Kyllo* involved infrared thermal imaging of the defendant's home, and it was fundamental to the result in that case that the technology employed by the police was both invasive and not ordinarily available or used by the general public. *Kyllo*, 533 US at 34, 40. [*Long Lake Twp v Maxon*, Judge Fort Hood dissenting, slip op at 4.]

It remains the Township's position that the Court of Appeals majority clearly erred in its application of Fourth Amendment precedent to this case, which implicates a topic of State-wide import. As such, the Township has filed this timely application for leave to appeal to this Court.

GROUNDS FOR REVIEW

Grounds for consideration of this application for leave to appeal exist pursuant to MCR 7.305(B)(2), (3), and (5). First, the issue raised—ostensibly whether reasonable use of unmanned aircraft for aerial observations in publicly navigable airspace is a violation of the Fourth Amendment—is certainly one of significant public interest. MCR 7.305(B)(2). From local sporting events, to the nightly news, to an afternoon at the park, widespread drone use is simply commonplace. As noted in Judge Fort Hood's dissent, drones are generally widely available to the public and are commonly used by private individuals, commercial operators, and governmental entities like the Township. As of the drafting of this brief, there were 873,450 drones registered with the FAA.[4] And, many drones used for private or recreational purposes are not required to be registered all.[5] Drones themselves can be relatively inexpensive, and wide selections are available at common retailers like Amazon and Best Buy.

Contrary to the conclusion of the Court of Appeals' majority, reasonable and limited aerial observations by governmental entities and agencies—including those with the aid of drone technology—are also commonplace and will undoubtedly be affected by the published opinion in this case. Particularly in the civil context, drones are used for several legitimate and important governmental purposes, from land use restrictions (like this case), to GIS mapping, to ensuring environmental and natural resource protections and compliance. None of these have anything to do with the dystopian concerns raised by the Maxons or imagined by the Court of Appeals. And, in nearly all these examples, the government is doing no more than any ordinary citizen could (and does). The broad brushstrokes of the Court of Appeals' split decision will not only impact the admissibility of the photographs in this case, but

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[4] Federal Aviation Administration, UAS by the Numbers, <https://www.faa.gov/uas/resources/by_the_numbers/> (accessed April 22, 2021).

[5] Federal Aviation Administration, Register Your Drone, < https://www.faa.gov/uas/getting_started/register_drone/> (accessed April 22, 2021).

will undoubtedly prevent many legitimate and desirable government uses of this technology at the state and local levels.[6]

Not only does this application raise an issue of significant public interest, but it also involves a clearly erroneous published opinion regarding an issue of major significance in this State's jurisprudence. MCR 7.305(B)(3), (5). Of greatest concern, the Court of Appeals' Fourth Amendment analysis wrongly distinguished decades of precedent decision, and, as a result, currently imposes a wholesale ban on the warrantless use of a certain type of technology. The Court of Appeals' application of Fourth Amendment law in this case had nothing whatsoever to do with the Maxons' own subjective expectation of privacy, or whether society is willing to accept that particular expectation as objectively reasonable. Nor did it involve any consideration of the totality of circumstances present *in this case*. As was aptly noted by Judge Fort Hood's dissent:

> [W]hile I too have concerns about the potentially intrusive nature of drones, I would not categorically conclude that the use of drones without a warrant violates the Fourth Amendment where one is used to view what is otherwise plainly visible to the naked eye from airspace navigable by the public. That type of rule may be crafted by the Legislature, but for the purposes of our review, **I would think that whether an unreasonable search has occurred for Fourth Amendment purposes should continue to be a question we address on the basis of the totality of the circumstances in each case**. [*Long*

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[6] Moreover, the statewide and national attention the legal issues raised in this very case have already garnered is proof positive that this issue is one of statewide import that warrants this Court's review. From drone manufacturers and enthusiasts to national thinktanks, much ink has already been spilt regarding the basis (or lack thereof) for the Court of Appeals opinion. And, because this case undoubtedly raises an issue of significant public interest involving a common and ever more pervasive technology, this Court should have the final word.

> *Lake Twp v Maxon*, Judge Fort Hood dissenting, slip op at 4 (emphasis added).]

To be clear, the Township's imaging in this case did *not* occur within the Maxons' home. The Township did not take any images of the inside of the Maxons' residence, nor does it seek to admit any images of the contents of the home. And, it did not involve any violation of law or regulations, or a technology that is not otherwise widely available. As such, the Court of Appeals erred by basing its holding on *Kyllo* and *Stone*.

For example, in *Kyllo v United States*, 533 US 27, 37; 121 S Ct 2038, 2045; 150 L Ed 2d 94 (2001), the Supreme Court considered whether a thermal scanner—used in an effort to determine whether the amount of heat emanating from the defendant's house was consistent with indoor marijuana growth—was a violation of the Fourth Amendment. The Court's ultimate conclusion that use of the thermal scanner constituted a search and violated the defendant's Fourth Amendment rights was qualified on two factors unique to *Kyllo*, neither of which are present in this case:

> We think that obtaining by *sense-enhancing technology any information regarding the interior of the home* that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," constitutes a search—at least *where (as here) the technology in question is not in general public use*. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. *On the basis of this criterion*, the information obtained by the thermal imager in this case was the product of a search.
>
> * * *
>
> Where, as here, the Government uses *a device that is not in general public use*, to explore details of the home that *would previously have been unknowable without physical intrusion*, the surveillance is a "search" and is

> presumptively unreasonable without a warrant. [*Kyllo,* 533 US at 34-35, 40 (emphasis added).][7]

Again, contrary to *Kyllo*, the technology at issue here is one that is in general public use. And, the details of the property were not otherwise "unknowable" without physical intrusion.

Similarly, *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001), is likewise not persuasive—and clearly not a basis for deviating from *Ciraolo*, *Riley*, or *Dow*. As noted by Judge Fort Hood's dissent, *Stone* was based on Michigan's eavesdropping statues. In fact, this Court made clear that it was not relying upon "Fourth Amendment jurisprudence," instead relying "only on the eavesdropping statutes' language." *Id.* at 564. As such, *Stone* is not inherently applicable to *any* Fourth Amendment analysis, let alone one set forth under completely different facts.

The Court of Appeals also generally noted that the Fourth Amendment does not leave us at the mercy of advancing technologies. That is true. But that general principle does not mean that use of a new(er) technology is a per se Constitutional violation. And, the idea that a new technology could perhaps be used in a manner that violates the Constitution does not make *every* other use of that same technology prohibited. The Court of Appeals clearly erred in holding to the contrary based on *Kyllo* and *Stone*—and without performing an analysis based on the totality of the circumstances in this case.

The Court of Appeals was further concerned with the "targeted" or focused nature of the drone use in this case. But the Supreme Court has already specifically rejected as irrelevant the argument that focused observations have any bearing on whether aerial surveillance is even a search at all:

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[7] Justice Scalia further stated that "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Id.* at 37.

> Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment. [*Ciraolo*, 476 US 207, 214 n 2.]

Thus, the fact that the Township used "targeted" as opposed to random aerial observations does not implicate Fourth Amendment protections.

It is possible that, someday, a different governmental entity may attempt to use a drone to see into a residence or listen to private conversations, or might equip it with thermal imaging, or use it for 24-hour surveillance. Then, perhaps, the case law cited by the Court of Appeals majority and Maxons will be germane. But this is not that case. And in failing to recognize or consider the totality of the circumstances at issue here, the Court of Appeals erred as a matter of law. This error, particularly as this issue is one of statewide importance, warrants this Court's review and reversal.

LEGAL STANDARD

This Court reviews a trial court's factual findings in a suppression hearing for clear error. *People v Hammerlund*, 504 Mich 442, 450; 939 NW2d 129 (2019). This Court's review of the trial court's application of Fourth Amendment principles, however, is de novo. *Id*. See also *People v Vanderpool*, 505 Mich 391, 397; 952 NW2d 414 (2020).

ARGUMENT

I. THE TOWNSHIP DID NOT VIOLATE THE MAXONS' FOURTH AMENDMENT RIGHTS BY TAKING AERIAL PHOTOS OF THEIR FIVE ACRE PROPERTY FROM AN UNMANNED AIRCRAFT.

The Fourth Amendment provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [U.S. Const., Am. IV.]

The Michigan Constitution, Const. 1963, art. 1, § 11, likewise "provides coextensive protection to that of its federal counterpart." See *Hammerlund*, 504 Mich at 451, citing *People v Mead*, 503 Mich 205, 212; 931 NW2d 557 (2019). When "the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v Jardines*, 569 US 1, 5; 133 S Ct 1409, 1414; 185 L Ed 2d 495 (2013).

A. Overview of Fourth Amendment principles and law regarding aerial observation.

"The Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Maryland v King*, 569 US 435, 446–447; 133 S Ct 1958, 1969; 186 L Ed 2d 1 (2013). "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is 'reasonableness,' " *Id.* at 447. See also *Katz v United States*, 389 US 347, 360; 88 S Ct 507, 516; 19 L Ed 2d 576 (1967) (Harlan, J., concurring). Since *Katz*, courts have generally employed a two-part inquiry regarding whether a Fourth Amendment violation has occurred. The first inquiry is whether the individual, by his or her conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U.S., at 361. In other words, whether the individual has shown that "he seeks to preserve [something] as private." *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *Id.*, at 361. Or whether the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.*, at 353. See also *Smith v Maryland*, 442 US 735, 740; 99 S Ct 2577, 2580; 61 L Ed 2d 220 (1979); *California v Ciraolo*, 476 US 207, 211; 106 S Ct 1809, 1811; 90 L Ed 2d 210 (1986). In making the latter determination, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver v United States*, 466 US 170, 178; 104 S Ct 1735, 1741; 80 L Ed 2d 214 (1984) (citations omitted).

Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, Courts should "examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson v California*, 547 US 843, 848; 126 S Ct 2193, 2197; 165 L Ed 2d 250 (2006) (quotation and citation omitted). See also *O'Connor v Ortega*, 480 US 709, 714–15; 107 S Ct 1492, 1496; 94 L Ed 2d 714 (1987). Whether a search is reasonable "is determined by

assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.*, quoting *United States v Knights*, 534 US 112; 122 S Ct 587; 151 L Ed 2d 497 (2001).

"[M]ere observation from a vantage point that does not infringe upon a privacy interest, of something open to public view, normally implicates no Fourth Amendment constraints because observation of items readily visible to the public is not a 'search.'" *Katz*, 389 US at 351. In fact, the Supreme Court has held, and later affirmed, that "visual observation is no 'search' at all." *Kyllo v United States*, 533 US 27, 32; 121 S Ct 2038, 2042; 150 L Ed 2d 94 (2001), citing *Dow*, 476 US at 234–235. In other words, and fundamental to the Fourth Amendment's application to this case, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 US at 351.

As the Court of Appeals' majority correctly noted, the Fourth Amendment generally applies to both criminal and civil actions. See, e.g., *O'Connor v Ortega*, 480 US 709, 714–15; 107 S Ct 1492, 1496; 94 L Ed 2d 714 (1987). In delineating the constitutional safeguards applicable in civil contexts, however, the Court has also weighed the public interest against the Fourth Amendment interest of the individual at issue. *King*, 569 US at 447; *United States v Martinez-Fuerte*, 428 US 543, 555; 96 S Ct 3074, 3081; 49 L Ed 2d 1116 (1976); *Bell v Wolfish*, 441 US 520, 559; 99 S Ct 1861, 1884; 60 L Ed 2d 447 (1979) (in the civil context, "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.").

Generally speaking, searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. *United States v Karo*, 468 US 705, 714–715; 104 S Ct 3296, 3303; 82 L Ed 2d 530 (1984) (emphasis added). Of course, this case does not involve

a search of the inside of the home at all.[8] That said, courts "have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." *Oliver*, 466 US at 180 (quotation omitted). Specifically, curtilage "is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life." *Id*. In other words, "protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v Ciraolo*, 476 US 207, 212–13; 106 S Ct 1809, 1812; 90 L Ed 2d 210 (1986).

While Fourth Amendment protections may generally apply to *physical* intrusions onto the curtilage, the Supreme Court has held that individuals do not have a reasonable expectation of privacy when it comes to visual observations of the curtilage from publicly navigable airspace or other public vantage points. See *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989); *Ciraolo*, 476 US at 211-214. In *Ciraolo*, the Court found no objective expectation of privacy existed from observations of officers that took place within public navigable airspace, in a physically nonintrusive manner, despite the fact that the yard was intentionally concealed from street-level view by a 10-foot fence. *Id*. at 213–214. Furthermore, the Court was unconcerned with the fact that aircraft was focused on the property (i.e., it was not a random flyover) or that the officers were specially trained to recognize marijuana. *Id*. The Court concluded instead that "[a]ny member of the public flying in this airspace who glanced down could have seen" what the officers observed. *Id*. "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from

[8] In fact, as outlined below, the Township does not concede that its aerial observations were a 'search' at all for purposes of the Fourth Amendment.

being observed with the naked eye from an altitude of 1,000 feet." *Id.* at 215.

Finally, it is of note that, unlike the interior of a home or physical trespass upon the curtilage, "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." *Oliver*, 466 US at 178 ("an individual may not legitimately demand privacy for activities out of doors in fields, except in the area immediately surrounding the home."). With regard to aerial surveillance of the "open fields" or lands beyond the curtilage, the Supreme Court has likewise held that sophisticated aerial photography from publicly navigable airspace does not violate the Fourth Amendment—even where the property is protected by fencing and other security from ground level intrusions. *Dow*, 476 US at 238. As to the fact that photography was used in lieu of the naked-eye, the Supreme Court found that this did not alter its conclusion: "Although [the photographs] undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems." *Id.*

B. A five acre, partially wooded property used as a junk or salvage yard cannot reasonably be described as contained within the home's "curtilage." Therefore, the Fourth Amendment does not apply to the Township's aerial observations.

The Fourth Amendment does not "prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what we have called 'open fields'—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text." *Jardines*, 569 US at 6. It is equally clear that

> the term "open fields" may include "any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used

> in common speech." For example, "a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." [*Oliver*, 466 US at 180 n 11.]

To start, the Court of Appeals incorrectly declined to make any determination about whether the unmanned aerial photographs were actually focused on curtilage based on its conclusion that this issue was not "seriously" in dispute. The Court of Appeals was wrong; this issue was raised by the Township's briefings and exhibits, was raised by the amicus submission, and was also specifically addressed at oral argument. In fact, the parties reliance on (or attempt to distinguish) *Dow* is evidence of this fact.

At any rate, most of the aerial imaging at issue in this case was not focused on anything that could reasonably be considered within the curtilage of the home. In fact, neither the contents of the home, the immediate yard, the driveway, nor the garage have any bearing or import on the issues raised in this case. The trial court could effectively redact the home and its immediate yard from every image and the Township's case would remain completely intact.[9] The Township's case is based on the usage to which the Maxons have put the remainder of their five-acre tract. In other words, the portions of the property at issue are those outside of the curtilage: i.e., the junk and salvage yard that now extends to every corner of the property, including the wooded areas.

Courts generally consider four factors when defining the extent of a home's curtilage for Fourth Amendment purposes: "[1]the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *United States v Dunn*, 480 US 294, 301; 107 S Ct 1134, 1139; 94 L Ed 2d 326 (1987). By way of example, common locations falling within the

[9] Of course, the Maxons have not made any such limited request (nor would one be properly preserved before this Court); they want all images suppressed regardless of their focus.

curtilage include the front porch, a side garden, and the area outside the front window or an arms-length from the house. See *Jardines*, 569 U S at 6. *Collins v Virginia*, 138 S Ct 1663, 1670-1671; 201 L Ed 2d 9 (2018) (top portion of the driveway sitting behind the front perimeter of the house and enclosed on two sides by a brick wall about the height of a car and on a third side by the house, was also found to be within the curtilage). In contrast, a barn located 60 yards from a home (and outside of a fence circling the home), was not within the curtilage—and, as such, officers could peer into the barn and even illuminate its contents with a flashlight without implicating the Fourth Amendment at all. *Dunn*, 480 US at 297. See also *People v Powell*, 477 Mich 860, 861; 721 NW2d 180 (2006) (area of back yard that was not enclosed and was in plain view of defendant's neighbors was not curtilage).

As is clear from these examples, whether an area falls within the curtilage often requires little more than a commonsense analysis because the concept is "familiar enough that it is 'easily understood from our daily experience.'" *Jardines*, 569 US at 7 (quoting *Oliver*, 466 US at 182 n 12). Likewise, here, it only requires common sense to conclude that a partially wooded, unfenced junk yard does not fall within "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Ciraolo*, 476 US at 212–213.

Application of each of the *Dunn* factors leads to the same conclusion. First, the proximity to the home. *Dunn*, 480 US at 301. Both Google Earth and the drone images themselves depict the Maxon residence and what appears to be a mowed lawn immediately surrounding it. And, perhaps, it seems reasonable that part of the mowed lawn immediately surrounding the home, along with the garden and walkway, might be considered curtilage. However, the rows and rows of unused vehicles, metal parts, trailers and other salvage objects that extend along the perimeter of the property, hundreds of feet (and yards) away from the home, and even far back into the woods are not areas "immediately adjacent" to the home, nor are they included in the immediate backyard or associated with intimate activities of the home, like eating or grilling. See *People v Radandt*, 499 Mich 988, 990–991; 882 NW2d 533 (2016) (McCormack, dissenting).

Second, none of these areas are included within an enclosure surrounding the home. *Dunn*, 480 US at 301. In fact, many are not even likely visible from the areas immediately adjacent the home as they are spread throughout the five-acre parcel.

Third, the area at issue is used as a junk and salvage yard—and over half of it appears to be wooded.[10] *Id.* Storage of acres and acres of salvage materials, both out in the open and amongst the woods, is not a use associated with a home, or even with housing or residential areas generally. And, as noted above, wooded areas can be considered 'open fields' for Fourth Amendment purposes. *Oliver*, 466 US at 180 n 11. The intimate activities associated with family privacy and the home and its curtilage simply do not reach to junk stored in the woods.[11] This usage is not one that weighs in favor of finding that the relevant portions of the photos involve anything resembling curtilage.

Finally, as the images taken from the neighboring property depict—the Maxons have not taken any steps to hide the various materials from the neighbors or passers-by. To this point, the Township notes that although they asked for and received a permit, the Maxons did not actually build their proposed privacy fence. In other words, "[i]t is clear from the record that [the] defendant expended no effort whatsoever to protect [the] claimed expectation of privacy in the area." *People v Powell*, 477 Mich 860, 861; 721 NW2d 180 (2006). Because the areas photographed by the Township though aerial observation are not within the curtilage, the Fourth Amendment is not applicable. Individuals cannot demand privacy rights for activities conducted in what are essentially open fields. *Oliver*, 466 US at 178, 181.

What's more, even assuming for the sake of argument that some portions of the property at issue have characteristics of both open fields

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[10] Although the parties might dispute the *extent* of the use, it is not actually in serious dispute that this is the actual use to which the Maxons have put this particular property.

[11] Even the satellite imagery depicts that dozens of vehicles and other objects in various states of disrepair litter the property outside the immediate area surrounding the home. App'x 140A-147A.

and curtilage, *Dow*, 476 US at 236–237, instructs that even sophisticated photography of this sort of 'quasi-curtilage' from aerial surveillance still does not constitute a search.

As described by the Sixth Circuit, the surveillance of the Dow property in Midland, Michigan involved at least six flyovers and was done with detailed imaging equipment:

> [O]n February 6, 1978, EPA contracted with Abrams Aerial Survey Corporation, a private company located in Lansing, Michigan, to take aerial photographs of the Dow plant. EPA's stated purposes for the aerial surveillance were to create visual documentation of smokestack emissions and to obtain perspectives on the layout of the plant and its relationship to the surrounding geographic area. EPA directed Abrams to take the pictures at particular altitudes and angles; EPA informed Abrams that emissions would be more visible in early morning or late afternoon, but left the actual time of the flight to Abrams' discretion.
>
> Abrams performed the overflight in the afternoon on February 7, 1978. The aircraft made *at least* six passes over the plant at altitudes of 12,000, 3,000, and 1,200 feet. **Abrams used a Wild RC–10 aerial mapping camera to take approximately 75 color photographs of various parts of the Dow plant. Because of Abrams' sophisticated photographic equipment, the photographs contain vivid detail and resolution; some of the photographs can be enlarged to a scale of 1 inch equals 20 feet or greater, without significant loss of detail or resolution. The District Court found that when enlarged in this manner and viewed under magnification, the photographs show equipment, pipes and power lines as small as ½ inch in diameter**. [*Dow Chem Co v US By & Through Burford*, 749 F2d 307, 310 (CA 6, 1984), aff'd sub nom. *Dow Chem Co v United States*, 476 US 227; 106 S Ct 1819; 90 L Ed 2d 226 (1986).]

Nevertheless, as affirmed by the Supreme Court, the aerial observations and imaging did not violate a privacy right recognized by the Fourth Amendment. *Dow*, 476 US at 238.

In fact, the Maxons' junk and salvage yard area (even if unlicensed) is much more akin to a business than a home. As was noted in *Dow*:

> [t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle, supra,* 387 U.S., at 543, 87 S.Ct., at 1739. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000-acre outdoor manufacturing facility *without* physical entry. [*Dow*, 476 US at 236–237.]

And, of course, the Supreme Court found that no such protections existed regarding aerial photography of the exterior of the industrial complex (read: business) in that case. This was true even though Dow actually took significant measures to safeguard the property from ground level observation. The Maxons took no such safeguards here. As such, like in *Dow*, the Fourth Amendment is not implicated by similar photographs of the Maxon's salvage yard here.

In sum, the images—which are mainly focused on the "open fields" portion of the property—are not of an area subject to Fourth Amendment protection. And, even if this Court were to apply a quasi-curtilage analysis, *Dow* is controlling. Therefore, the trial court's denial of the motion to suppress should have been affirmed.

C. Defendants did not have a constitutionally protected subjective or objective expectation of privacy with regard to the aerial photography of their unfenced, five-acre junk and salvage yard. As such, the Township's drone use did not violate the Fourth Amendment in this case.

Even if this Court should conclude that a portion of the property is curtilage, the conclusion remains the same. Again, even regarding

curtilage, an expectation of privacy is legitimate only if the individual exhibited an actual, subjective expectation of privacy *and* that actual expectation is one that society recognizes as objectively reasonable. *Bond v United States*, 529 US 334, 338; 120 S Ct 1462; 146 L Ed 2d 365 (2000); *People v Perlos*, 436 Mich 305, 317; 462 N W 2d 310 (1990). Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the alleged intrusion. *Id*. at 317–318.[12]

Over thirty years ago, the Supreme Court held that individuals do not have any subjective expectation of privacy from aerial observations—even where significant efforts are undertaken to shield items from street level observations (such efforts were not taken in this case). *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989). And, likewise, the Supreme Court has already held that society does not objectively recognize any subjective expectation even if one is manifest. *California v Ciraolo*, 476 U S 207, 211-214; 106 S Ct 1809; 90 L Ed 2d 210 (1986).

The facts of this case—including that the aircraft was unmanned—do not warrant a different conclusion.

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[12] As outlined in the Grounds for Review (the arguments in which are incorporated here), the Court of Appeals did not apply any factor specific to this case; rather, it reached the conclusion that every person is entitled to Fourth Amendment protection from aerial drone observations regardless of whether those observations are from high in the air or immediately outside of one's window. Setting aside that reasonable minds may very well be concerned about drones that fly outside a home's window (which is, of course, not at all what occurred here) blanket application of the Fourth Amendment disconnected from the totality of the circumstances presented is incongruent with case law of this Court and the Supreme Court.

1. The search did not violate any actual, subjective expectation of privacy.

To determine whether the subjective expectation of privacy existed, the Court should consider whether defendant "took normal precautions to maintain his privacy—that is, precautions normally taken by those seeking privacy." *People v Smith*, 420 Mich 1, 27–28; 360 N W 2d 841 (1984). In this case, there is no evidence that the Maxons actually held any subjective expectation of privacy regarding aerial observation—from aircraft manned or unmanned—of their five-acre property.

To start, several portions of the junk or salvage yard are already visible from neighboring properties. Ground level images taken in 2016 and 2017—even some with the leaves still on the trees—depict several of vehicles in various states of disrepair, rusted metal objects, several tire rims, snowmobiles, a pile of vehicle batteries, an open dumpster, a tractor and a tractor trailer among other debris. (App'x 127A-137A). In fact, the visible state of the property caused neighbors and other individuals in the area to complain to the Township long before any drone images were taken. (App'x 057A). After this civil action was commenced, a Township employee took additional photographs from the neighboring properties, again showing several vehicles, tractors, trailers, pallets, machinery, open pipes, and other salvage materials spread throughout the wooded areas of the land. As such, the general state of the property is not private for purposes of the Fourth Amendment, and the Maxons have not acted in a way that would suggest it was subjectively intended to be kept private.[13]

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[13] Respectfully, the Township is somewhat baffled by the Court of Appeals conclusion that "unrefuted photographic exhibits of defendants' property taken from the ground seem to establish a reasonable expectation of privacy against at least casual observation from a non-aerial vantage point." First, nearly all the ground level photographs of the perimeter of the property presented were submitted to the Court by the Township itself. And, second, as these images show, the general use of the property as a junkyard was not at all hidden. Finally, the question

And, to be clear, the Maxons' property would also be visible from any plane or aircraft—manned or unmanned—flying from publicly navigable airspace. The Supreme Court has already concluded that this fact obviates any actual subjective expectation of privacy. In fact, in *Riley* the Supreme Court concluded that the defendant "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter" flying at a legal altitude—400 feet—despite having erected fences around the property. "Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was." *Riley*, 488 US at 449–450. The Court further noted that the defendant "no doubt *intended* and *expected* that his greenhouse would not be open" to ground level inspection. *Id*. at 450 (emphasis added). However, "[b]ecause the sides and roof of his greenhouse were left partially open . . . what was growing in the greenhouse was subject to viewing from the air." Moreover, "private and commercial flight [by helicopter] in the public airways is routine" and there was no indication that such flights were unheard of in the area at issue. *Id*. at 450-451. In other words, even the

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here is not whether the full scope of the property could be observed from a neighboring property or road. It is axiomatic that the very center of a five-acre wooded lot would not likely be visible from the perimeter. But wooded property does not mean that the owners have manifested an actual expectation of privacy. In fact, wooded areas are most often generally considered 'open fields'—not protected by the Fourth Amendment at all. The question, rather, is whether there was a subjective manifestation of an actual expectation of privacy from aerial observation. The answer is clearly no—particularly as the Maxons did not even take reasonable steps to hide the general nature of their land use from their neighbors. There are no other facts at issue in this case that should lead to a different conclusion regarding whether the Maxons exhibited an actual subjective expectation of privacy as far as the use to which they had put their property in violation of local zoning regulations.

attempt to enclose the greenhouse from ground observation did not give rise to a subjective expectation of privacy from the air.

To this point, it is of further note that, although the Maxons applied for a permit to build a privacy fence in 2016, it was never actually built.[14] In other words, unlike *Riley*, there were not even any precautions taken against "ground-level observation" in this case. This is particularly true as the salvage materials and vehicles are spread all throughout the property and woods.

What's more, the Maxons actually *consented* to Township searches or observations of their property in their permit application. In September 2016, Todd Maxon applied for a permit to build an 800-foot long, 6-foot high perimeter privacy fence around a portion of the five-acre property at issue. (App'x 124A). The permit was issued on September 23, 2016 and remained valid for one year—until September 23, 2017. (Appellant's App'x 126A). As a necessary condition of the permit application, the Maxons consented to "on-site inspections by Long Lake Township Zoning, Planning, or Assessing officials that may be necessary to ascertain compliance, completion and value of the content of the land use permit." (App'x 124A, 139A). As part of the motion hearing regarding the drone flyovers, the trial court made the following conclusions of fact:

> A few days after [the Permit] expired, the zoning official, Mr. Morris, went on the property. It's alleged in his affidavit -- which is attached to plaintiff's response in opposition to defendants' motion to suppress, and it is Exhibit K. And it states here that, "At 12:20 hours on September 27, 12 2017, I entered Mr. Maxon's property at the northeast corner and proceeded west, along the north property line, where the majority of the fence was going to be erected. The only fencing I found was a 24-foot section on -- of six-foot-tall vinyl fencing that was leaning on trees.

[14] The two very low and small areas of fence do not actual conceal any property even from ground level. (App'x 127A-137A).

> It was while I was walking the north end of the property, that I took the photograph of the trailer."
>
> Now, the Land Use Permit application specifically authorizes Mr. Morris as the zoning official to be -- go to the property and examine the fence that is the subject of the Land Use Permit. He had -- he was there perfectly within his rights that had been authorized by the Land Use Permit application. And while he was there, at the spot -- on the spot or near the spot where the fence was supposed to be, he says he took the picture of the trailer with the stuff inside.
>
> That seems to me that that's in plain view, easily seen from the location he had a right to be, pursuant to the authorization within the Land Use Permit . . .. [M Tr 49-50; App'x 111A-112A.][15]

In other words, as the trial court concluded, the zoning inspector had permission to observe the Maxon property from ground level where the fence was supposed to be. As evidenced from the permit application, the proposed fence was to run along a significant portion of the property. Both the April 24, 2017, May 26, 2017 drone flyovers took place while the permit—and the associated consent to in-person, ground level inspection—was in effect. As the zoning official already had permission to physically enter the property during those times for an inspection—which would have also permitted him to observe the zoning violations in plain view—it is simply unreasonable to conclude that the Maxons had any subjective expectation of privacy regarding the condition of their property (i.e., its extensive use as a junk/salvage yard) from the air. It is well-established that a physical presence is much more intrusive than observations from the air or other public vantage point. See, e.g., *Katz*, 389 US at 351.

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[15] The trial court's findings of fact are reviewed for clear error. And, this portion of its legal conclusion was **not** included in the grant of leave by the Court of Appeals.

Finally, it is reasonable to conclude that the Maxons were effectively on notice that their property would likely garner some level of heightened scrutiny based on the prior 2008 consent agreement. See *Maryland v King*, 569 US 435, 447; 133 S Ct 1958, 1969; 186 L Ed 2d 1 (2013) (in certain situations "an individual is already on notice" that some reasonable monitoring is to be expected). As outlined in the Complaint in this case, the consent agreement only permitted the Maxons to continue with the nonconforming use of their property if it remained status quo. (App'x 027A, 55A-56A). The use did not remain status quo, and Township oversight could have reasonably, and subjectively, been expected.

Considering all of these factors, it cannot be said that the Defendants demonstrated any *subjective* expectation of privacy from aerial surveillance—either from manned or unmanned aircraft. The test regarding whether a purported intrusion implicates Fourth Amendment protections is conjunctive. That being the case, there is not even any reason for this Court (or the COA) to consider or decide whether the use of unmanned aircraft is acceptable under the second prong of the Katz test. Certainly, there was no reason for a wholesale prohibition of a class of technology based on the totality of the facts *of this case*. As such, this Court should grant review and reverse.

2. The search was objectively reasonable and the technology used is widely available and socially accepted under the facts at issue in this case.

Like the lack of any subjective expectation of privacy in an area easily observed from the air, the Supreme Court has likewise stated that this is not a reasonable (objective) expectation that society is prepared to honor.[16] As was stated in *Ciraolo*:

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[16] The Supreme Court has already held that an individual is able to view and photograph property below while flying above it, even if such area being viewed is within the curtilage of the home. *Ciraolo*, 476 US at 213. To that end, officers are not required to shield their eyes when passing by an individual's home, and anything that is visible to the

> Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor. [*Ciraolo*, 476 US at 213–14.]

The fact that an unmanned aircraft was used does not alter this conclusion based on the totality of the facts in this particular case. Unlike the Supreme Court's qualifying concerns in *Kyllo*, drones are not devices "not in general public use." *Kyllo,* 533 US at 34-35, 40. And, again unlike the qualifying factors in *Kyllo*, the drone observations in this case were not used to explore details of the home that "would

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public is not subject to Fourth Amendment protections. *Id*. As previously noted in *Florida v Riley*, 488 US 445 (1989), the United States Supreme Court even upheld the use of a helicopter, hovering over a Defendant's property at 400 feet to allow the law enforcement officers to view into a greenhouse. Such evidence collected and photographed was ruled to be properly obtained evidence not in violation of the Fourth Amendment. Likewise, the United States Supreme Court in *Dow Chemical v United States*, 476 US 227 (1986) also upheld the use of a chartered planes continued flyovers of a property and company to monitor their compliance with the EPA's regulations as not being in violation of the Fourth Amendment. As such, the Supreme Court has allowed areal naked-eye observation over an individual's property and also the taking of photographs without implication of the Fourth Amendment.

The facts of these cases lead to a plain conclusion regarding aerial observations: even where significant effort has been made to shield property from ground level observation (something that has not been done here), the Court has found that society would not recognize the clearly manifested subjective expectation of privacy because the property was visible from the air.

previously have been unknowable without physical intrusion."[17] *Id.* Accordingly, as was aptly summarized by the dissent:

> the fundamental import of *Ciraolo*, *Riley*, and *Kyllo*, is that if the drone that was used to view defendants' property in this case was a technology commonly used by the public that observed only what was visible to the naked eye and that was flown in an area in which any member of the public would have a right to fly their drone—and the record suggests that all of these things are true—then precedent provides that a Fourth-Amendment violation has not occurred. See *Ciraolo*, 476 U.S. at 215, 106 S.Ct. 1809; *Riley*, 488 U.S. at 450, 109 S.Ct. 693; *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038. [*Long Lake Twp v Maxon*, Judge Fort Hood, dissenting, slip op at 4.]

a. The drone flights here were limited and complied with FAA regulations. Any private citizen could have made similar observations and taken similar photographs with their own device.

Simply put, drones are already a common and pervasive technology. And, they are most often used for aerial photography. As noted in Judge Fort Hood's dissent, drones are generally widely available to the public and are commonly used by private individuals, commercial operators, and governmental entities like the Township. As of the drafting of this brief, there were 873,450 drones registered with the FAA.[18] And, many drones used for private or recreational purposes are not required to be

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[17] See also the "Grounds for Review," outlining the clear error in the Court of Appeals' opinion, above.

[18] Federal Aviation Administration, UAS by the Numbers, <https://www.faa.gov/uas/resources/by_the_numbers/> (accessed April 22, 2021).

registered all.[19] Drones are frequently deployed for photos at weddings and sporting events. News coverage by local and national media is regularly aided by the use of drone technology. They are a common item on Christmas wish-lists and in weekly sale advertisements. Private individuals and corporations can easily download free trials of exterior drone mapping software. Drones themselves are inexpensive, and wide selections are available both online and in common brick and mortar retailers. Most come equipped with cameras as a basic function.

Certainly, the pervasive nature of the technology at issue has significant relevance regarding whether any subjective expectation of privacy the Maxons may have held regarding aerial drone observations is one that society is willing to accept as reasonable. Aerial observations are a critical tool in all sorts of civil governmental functions and, as the Supreme Court has held, they are also a permissible tool under the Fourth Amendment. The use of a common, publicly available technology to make these aerial observations should not change the analysis. There is simply no evidence that the drone used here did anything that a private individual could not have done with their own device.

Additionally —despite the Maxons' claims—there is no evidence that any FAA violation occurred in the use of the drone in this case. In other words, the drone was using publicly navigable airspace. Specifically, the Maxons have claimed a violation based on violations of 14 CFR §107.39 Operating over Human Beings and §107.31 Visual line of sight aircraft operation.[20]

To start, the trial court specifically declined to make any findings of fact favorable to the Maxons with regard to the alleged FAA violations. (M Tr 56-57; App'x 118A-119A). This is entitled to deference. Nevertheless, the Maxons contend that because the drone was being

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[19] Federal Aviation Administration, Register Your Drone, < https://www.faa.gov/uas/getting_started/register_drone/> (accessed April 22, 2021).

[20] It is of note that the Court of Appeals opinion is unclear with regard to whether that Court actually thought an FAA violation occurred. To clarify, there has been no evidence presented that this is the case.

flown roughly 690 feet away from the operator, it was no longer within the line of sight. However, the FAA has refused to specify a specific distance that constitutes line of sight. Instead, they simply require the controller or visual observer to maintain a line of sight to the drone. FAA §107.31. Further, FAA §107.51, operational limits for small unmanned aircraft, requires a 3-mile slant visibility from the point of control. Based on the photographs taken from the drone, not only is it a partially cloudy day, but the controller and visual observer are standing in a public baseball field near the property. As such, visibility is not impeded by the height of trees or distance because the Township and Zero Gravity maintained an elevation under 400 feet, but above the trees, which allowed for continuous visibility of the drone. (App'x 061A-062A).

The Maxons also contend that the drone was being flown above humans (specifically himself and other vehicles that were in motion) in violation of Regulation §107.39. FAA Proposed Rules in the Federal Registrar, Volume 84 No. 30 published Wednesday, February 13, 2019, contains the agencies commentary describing the current regulations for operation over humans. Under heading 2. Operations Over People, it is apparent that the FAA's 2016 rule established that operation over people applies only where a small unmanned aircraft passes over any part of any person who is not directly participating in the operation or located under a structure or in a stationary vehicle.

That said, there is no evidence that the drone passed over any part of any person who was not directly participating in the operation. In fact, the photograph that the Maxons identify was not taken while the drone was located directly above any part or portion of any individual. Based on this oblique image, meaning it was taken at an angle, the drone was actually located over the Maxons property to the North. (App'x 061A-062A). No other photograph shows the drone flying directly over any individual.

Further, though some the photographs inadvertently show what is presumably the Maxons' car leaving the property, the drone was never directly over the vehicle while it was in motion. Regarding this claim, the photograph that the Maxons identify does not show the drone directly above a moving vehicle. This particular image is a NADIR

image, meaning it was taken straight down (90 degree angle to ground), and as such, the drone would be located over the trees and grass located North of North Long Lake Road. (App'x 061A-062A). Therefore, the Maxons again fail to establish a violation of any Drone law as no evidence is provided to support their claim.

Overall, the Maxons have claimed violations for which they have no proof. Their claim of not being within the line of sight is unfounded as the licensed drone operator was standing in a neighboring field where he and his observer maintained continuous visual of the drone. (App'x 061A-062A). Further, the Maxons are merely claiming the drone passed directly overheard and their vehicle while in motion without providing any evidence to support their claim. In fact, the evidence that the Maxons have provided shows the drone was, in fact, in compliance with the FAA regulations. (App'x 061A-062A). As such, the Maxons' claim that the drone was flown in violation of the FAA regulations fails.

Perhaps more importantly, the inadvertent capture of any person by the drone is a minor aspect of the overall images and is completely inconsequential to the purpose for which they were taken. The Township was not attempting to spy on the Maxons while they got into their personal vehicle. In other words, if the Maxons wanted just those portions of the image that depicted any person redacted, and this request was hypothetically granted by the court, the relevant images would still show all of the property at issue—i.e., the acres of junk and salvage that is in violation of the ordinance and causing a nuisance per se. And, again, there is no evidence that these images could not have been captured by any private person flying their own, affordable and readily accessible, camera-equipped drone within the public airspace dedicated for drone flight.

b. The Township's drone use was objectively reasonable considering the totality of the circumstances.

As discussed above, the imagery at issue took place from publicly navigable airspace and used a form of technology readily available to all members of the public. Additionally, it is also of note that the imagery

taken by the drone in this case looks remarkably like satellite images widely available from Google Earth. (App'x 140A-147A). There is no suggestion in this case that satellite imagery violates Fourth Amendment protections.[21]

In other words, any member of the public with internet access or a library card could look at images substantially similar to those taken from the drone. As the Supreme Court has held, the government cannot "reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." *California v Greenwood*, 486 US 35, 39–41; 108 S Ct 1625, 1628–29; 100 L Ed 2d 30 (1988). Otherwise stated, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 US at 351. See also *People v Frederick*, 500 Mich 228, 234–235; 895 NW2d 541 (2017) (a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do').

Even assuming for argument's sake that the Maxons did not expect that the contents of salvage yard would become known to the Township or other members of the public, an expectation of privacy does not give rise to Fourth Amendment protection "unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 US at 39–41. Whether by plane, helicopter, or Google Earth, substantially similar aerial views and still images were already available to any member of the public. And, any private individual with a drone might have observed and recorded *exactly* what the Township viewed. It is common knowledge that aerial images can be viewed from any of these

[21] And, as noted by Judge Fort Hood, there is likewise no argument that, if the Township had rented a helicopter and flown over from 200-300 feet a violation would have occurred. In fact, a helicopter even 400 feet above the ground hovering over the Maxons property would, in all likelihood, present a much larger intrusion of noise (not to mention neighborhood attention) than the drone used in this case. There is every reason to believe that a helicopter may also have inadvertently observed an individual who happened to be in the yard, even if this was not the purpose of the flight.

sources—and, with Google Earth—can even be reviewed from a computer screen without ever even visiting the Maxons' residence. Given the pervasive nature of all of these technologies, it cannot be concluded that the Maxons have an objectively reasonable expectation of privacy with regard to aerial views of their junk yard—regardless of whether those images are from a satellite, a helicopter, or a drone.

Furthermore, it is notable that a civil action for abatement like the one at issue in this case is something that a private citizen may even pursue themselves. Michigan cases have specifically held that private citizens can sue for abatement of a nuisance per se in the context of an alleged zoning ordinance violation. See *High v Cascade Hills Country Club*, 173 Mich App 622, 624; 434 NW2d 199 (1988); *Indian Vill Ass'n v Shreve*, 52 Mich App 35, 38; 216 NW2d 447, 449 (1974) ("The Supreme Court of this state has long recognized the propriety of private citizens bringing an action to abate public nuisances arising out of violations of zoning ordinances."). In other words, there is nothing to prevent a private citizen from taking drone footage *and* subsequently using that drone footage in a nuisance action seeking abatement against the Maxons. As such, from the unmanned aerial photographs to the filing of the civil action, the Township has done nothing more than a private individual could otherwise lawfully do.[22]

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[22] In the same vein, the Sixth Circuit has noted that courts should not construe the Fourth Amendment so as to give private persons or criminal the upper hand. See *United States v Houston*, 813 F3d 282, 287–90 (CA 6, 2016) ("if law enforcement were required to engage in live surveillance without the aid of technology in this type of situation, then the advance of technology would one-sidedly give criminals the upper hand. The law cannot be that modern technological advances are off-limits to law enforcement when criminals may use them freely. Instead, '[i]nsofar as respondent's complaint appears to be simply that scientific devices ... enabled the police to be more effective in detecting crime, it simply has no constitutional foundation.' *Knotts*, 460 U.S. at 284, 103 S.Ct. 1081.").

Finally, it is of note that unlike even *Ciraolo* or *Riley*, Township is interested in the overall use (and apparent misuse) of the land over the five-acre property for the purpose of public health and safety. See MCL 125.3201; MCL 41.181. They were not looking to spot an individual, or trying to see if something illegal was going on in a small fenced area of the back yard, or attempting to peer into a greenhouse or other structure only open from the top. It is simply not a secret that the Maxons use their land to store cars, trucks, various salvage-type materials and other junk. And, as such, aerial images further detailing the scope of these uses are not objectively unreasonable.

The aerial images in this case only recorded what was otherwise visible to the naked eye in an area that any member of the public could have legally observed from a manned aircraft or their own drone. In fact, the photographs taken by the drone look remarkably similar to those already publicly available, free of charge, images found on Google Earth. And, drones are not a device "not in general public use."[23] What's more, there is no evidence that the camera or drone used was a type not in general public use.

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[23] That being the case, the Court of Appeals clearly erred in its application of precedents considering technologies not in general public use that were used to invade the inner details of an individual's residence. As was summarized by Judge Fort Hood in her dissent:

> In my opinion, the fundamental import of *Ciraolo*, *Riley*, and *Kyllo*, is that if the drone that was used to view defendants' property in this case was a technology commonly used by the public that observed only what was visible to the naked eye and that was flown in an area in which any member of the public would have a right to fly their drown—and the record suggests that all of these things are true—then precedent provides that a Fourth-Amendment violation has not occurred. See *Ciraolo*, 476 U.S. at 215, 106 S.Ct. 1809; *Riley*, 488 U.S. at 450, 109 S.Ct. 693; *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038.

Considering the availability of the technology at issue, the fact that the area observed and photographed is clearly and objectively visible by use of other means—including free satellite images online, and the fact even that private citizens flying their own drones could bring a similar action against the Maxons as the Township has here, there is no reason to conclude that any subjective expectation of privacy was one that society considers objectively reasonable. That said, the Maxons cannot satisfy either prong of the *Katz* analysis and the Court of Appeals erred as a matter of law in concluding otherwise.

D. Alternatively, the Township's drone observations did not violate the Maxons' Fourth Amendment rights because the Maxons consented to the 'search' by virtue of the 2008 Settlement Agreement and 2016 Permit.

As outlined above, the aerial images taken in this case do not constitute a "search" at all. See *Dow*, 476 US at 234–235; *Kyllo*, 533 US at 32. That said, assuming for the sake of argument that they were, the Township still did not violate the Maxons' Fourth Amendment rights. It is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041, 2043–44; 36 L Ed 2d 854 (1973). Whether consent is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

As an initial matter, there was implicit consent to oversight of the overall condition of the property by virtue of the 2008 Settlement Agreement. (App'x 055A-056A). Courts have already clearly recognized the concept of implicit consent, for example, in the context of motor vehicle statutes. See *id*. See also *Birchfield v North Dakota*, 136 S Ct 2160; 195 L Ed 2d 560 (2016). The 2008 Settlement Agreement at issue here permitted the Maxons to continue with their commercial use of the five-acre property so long as it remained status quo. (App'x 027A, 055A-056A). In other words, the Maxons' use of the property was essentially grandfathered in under the then-existing Township ordinances—but

only so long as their use did not expand, and only so long as the Township zoning regulations remained unchanged. (App'x 027A, 055A-056A). It is inherent in that compromise, therefore, that the Township would have the ability to ensure that the use was not expanded. In other words, the necessary and reasonable implicit permission to observe the uses to which the Maxons put their property is a fundamental underpinning of the agreement. Likewise, considering the totality of the circumstances, there is no evidence (or argument) that the Maxons entered into the agreement against their will—it was freely and voluntarily agreed to by all parties. (App'x 056A). And again considering the totality of the circumstances, the aerial drone observations here were a completely reasonable method of ascertaining whether the terms of the agreement were violated.

Moreover, and more importantly, Todd Maxon *expressly* consented to both the 2017 aerial observations in conjunction with his application for an 800-foot-long perimeter fence. In September of 2016, Todd Maxon applied for a permit to build an 800-foot long, 6-foot high perimeter privacy fence around a portion of the five-acre property at issue. (App'x 124A). The permit was issued on September 23, 2016 and remained valid for a full year—until September 23, 2017. (App'x 126A). As a necessary condition of the permit application, Mr. Maxon *consented* to "on-site inspections by Long Lake Township Zoning, Planning, or Assessing officials that may be necessary to ascertain compliance, completion and value of the content of the land use permit." Of note, this language does not limit the manner of inspection in any way. Whether by drone, on foot, or otherwise, inspection of the property was permissible. And, in fact, the trial court already held that the inspector had a right to be physically on the Maxons' property for an inspection even a few days after the permit expired. (App'x 111A-112A). Both the April 24, 2017 and May 26, 2017 drone flyovers took place while the permit—and the associated consent to inspection—was in effect.

And, it is further irrelevant that the permission was for the purpose of fence inspection. Permission to enter for one purpose does not imply that the inspector or officer should turn a blind eye to the other conditions of the property that were in plain view. Neither the law nor our jurisprudence carries and such restriction on searches pursuant to

consent. Further, again, there is no evidence (or argument) that Mr. Maxon gave this permission against his will. As such, it is unequivocal that, at the very least, the April 24, 2017 and May 26, 2017 drone flyovers were done with consent to inspect the property.

As such, in the alternative, this Court should find that the Township did not violate the Fourth Amendment because its aerial images were taken pursuant to consent. *Schneckloth*, 412 US at 219.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Long Lake Township respectfully requests that this Court GRANT its application for leave to appeal, REVERSE the judgment of the Court of Appeals, REINSTATE the order of the trial court with regard to the surveillance photos and REMAND this case for further proceedings. In the alternative, the Township requests that this Court GRANT oral argument on the issues raised in the application. The Township respectfully requests any additional relief deemed necessary, including costs and fees in connection with this appeal.

Respectfully submitted,

/s/ William L. Henn
William L. Henn (P61132)
Andrea S. Nester (P76879)
HENN LESPERANCE, PLC
Co-Counsel for Long Lake Twp
32 Market Avenue SW, Ste 400
Grand Rapids, Michigan 49503
(616) 551-1611 / (616) 323-3658
wlh@hennlesperance.com
asn@hennlesperance.com

Date: April 29, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the length and formatting rules in Administrative Order No. 2019-6. I certify that this document contains 14,143 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

/s/ William L. Henn

William L. Henn (P61132)
Andrea S. Nester (P76879)
HENN LESPERANCE, PLC
Attorneys for Long Lake Twp
32 Market Avenue, Suite 400
Grand Rapids, Michigan 49503
(616) 551-1611
wlh@hennlesperance.com
asn@hennlesperance.com

Date: April 29, 2021