

STATE OF MICHIGAN
IN THE SUPREME COURT

LONG LAKE TOWNSHIP,

Plaintiff-Appellee,

v

TODD MAXON and HEATHER MAXON,

Defendants-Appellants.

Supreme Court Docket No. 164948
Court of Appeals Docket No. 349230
Lower Court Case No. 18-034553-CE

**AMICI CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION
AND THE MICHIGAN MUNICIPAL LEAGUE
IN SUPPORT OF LONG LAKE TOWNSHIP**

ROBERT E. THALL (P46421)
MICHAEL W. BILA (P86365)
BAUCKHAM, THALL, SEEBER,
KAUFMAN & KOCHES, P.C.
Attorneys for Amici Curiae the Michigan
Townships Association and the Michigan
Municipal League
470 W. Centre Ave., Suite A
Portage, MI 49024
269-382-4500
thall@michigantownshiplaw.com

Dated: September 8, 2023

TABLE OF CONTENTS

	PAGES
INDEX OF AUTHORITIES.....	iv
STATEMENT OF APPELLATE JURISDICTION.....	1
STATEMENT OF QUESTION PRESENTED.....	2
I. WHETHER THE TOWNSHIP VIOLATED THE MAXONS’ FOURTH AMENDMENT RIGHTS BY USING AN UNMANNED DRONE TO TAKE AERIAL PHOTOGRAPHS OF THE MAXONS’ PROPERTY FOR USE IN ZONING AND NUISANCE ENFORCEMENT?.....	2
II. WHETHER THE EXCLUSIONARY RULE APPLIES TO THIS NONCRIMINAL ZONING DISPUTE?.....	2
INTEREST OF AMICI CURIAE AND INTRODUCTION.....	3
STATEMENT OF FACTS.....	8
ARGUMENT.....	8
I. THE TOWNSHIP DID NOT VIOLATE THE MAXONS’ FOURTH AMENDMENT RIGHTS BY USING AN UNMANNED DRONE TO TAKE AERIAL PHOTOGRAPHS OF THE MAXONS’ PROPERTY FOR USE IN ZONING AND NUISANCE ENFORCEMENT.....	8
A. STANDARD OF REVIEW.....	8
B. FOURTH AMENDMENT GENERAL PRINCIPLES.....	8
C. THE MAXONS DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY FROM AERIAL DRONE PHOTOGRAPHY OF THEIR OUTDOOR SALVAGE/JUNK YARD.....	10
D. THE TOWNSHIP’S INSPECTION WAS ADMINISTRATIVE AND THEREFORE LESS INTRUSIVE.....	18
II. THE EXCLUSIONARY RULE DOES NOT APPLY TO THIS NONCRIMINAL ZONING DISPUTE.....	19
A. STANDARD OF REVIEW.....	19
B. INTRODUCTION.....	20
C. ZONING ENFORCEMENT IN THIS CASE IS A CIVIL MATTER.....	20

TABLE OF CONTENTS

	PAGES
D. THE EXCLUSIONARY RULE DOES NOT APPLY TO CIVIL ZONING ACTIONS.....	23
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE.....	28

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<i>Air Pollution Variance Bd of the State of Colorado v W Alfalfa Corp</i> , 416 US 861, 864–65, 94 S Ct 2114, 40 L Ed 2d 607 (1974).....	19
<i>Boyd v United States</i> , 116 US 616, 633-635, 6 S Ct 524, 29 L Ed 746 (1886).....	26
<i>California v Ciraolo</i> , 476 US 207; 106 SCt 1809; 90 LE2d 210 (1986).....	Passim
<i>Carroll v United States</i> , 267 US 132, 146, 45 SCt 280, 69 LEd 543 (1925).....	9
<i>Florida v Riley</i> , 488 US 445; 109 SCt 693; 102 LEd2d 835 (1989).....	4, 13
<i>Giancola v W Va Dep’t of Pub Safety</i> , 830 F2d 547 (4th Cir. 1987).....	14
<i>INS v Lopez-Mendoza</i> , 468 US 1032, 1046 (1984).....	26
<i>Katz v United States</i> , 389 US 347; 88 SCt 507; 19 LEd2d 576 (1967).....	4, 9, 11, 12
<i>Kivela v Dep’t of Treasury</i> , 449 Mich 220, 536 NW2d 498 (1995).....	26, 27
<i>Kyllo v United States</i> , 533 US 27, 32; 121 SCt 2038; 150 LEd2d 94 (2001).....	7, 11, 14
<i>Long Lake Twp v Maxon</i> , 336 Mich App 521; 970 NW2d 893 (2021) (<i>Long Lake Twp I</i>) <i>vacated by</i> , 509 Mich 981; 973 NW2d 615 (2022) Question not answered by Court of Appeals on remand in <i>Long Lake Twp v Maxon</i> , 2022 WL 4281509 (Mich App 2022) (<i>Long Lake Twp II</i>).....	Passim
<i>Maple BPA, Inc v Bloomfield Twp</i> , 302 Mich App 505, 515; 838 NW2d 915 (2013).....	20
<i>Mapp v Ohio</i> , 367 US 643, 81 SCt 1684, 6 LEd 2d 1081 (1961).....	9, 24
<i>Matter of United States</i> , 637 F Supp 3d 343 (EDNC, 2022).....	10
<i>Ohio v Robinette</i> , 519 US 33, 39; 117 SCt 417, 136 LEd 2d 347 (1996).....	9
<i>Oliver v US, supra</i> , 466 U.S., at 181-183, 104 S Ct, at 1742-1744.....	12
<i>People v Hammerlund</i> , 504 Mich 442, 450; 939 NW2d 129 (2019).....	8
<i>People v. Jenkins</i> , 472 Mich 26, 31, 691 NW2d 759 (2005).....	19
<i>People v Slaughter</i> , 489 Mich 302, 310; 803 NW2d 171 (2011).....	8
<i>Pennsylvania Bd of Probation and Parole</i> 524 US, 362, 363, 364, 365, 366, 367.....	Passim

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<i>Rawlings v Kentucky</i> , 448 US 98, 104; 100 SCt 2556; 65 LEd2d 633 (1980).....	9
<i>Smith v Maryland</i> , 442 US 735, 740; 99 SCt 2577; 61 LEd2d 220 (1980).....	9
<i>Square Lake Hills Condo Ass'n v Bloomfield Twp</i> , 437 Mich 310, 323, 471 NW2d 321 (1991) (citing, 8 McQuillin, Municipal Corporations, § 25.53, p. 137.).....	20
<i>United States v Houston</i> , 816 F3d 282 (6th Cir. 2016).....	17, 18
<i>Warden, Md Penitentiary v Hayden</i> , 387 US 294, 87 S Ct 1642, 18 L Ed 2d 782 (1967)...	26
<i>Weeks v United States</i> , 232 US 383; 34 SCT 341 (1914).....	24
<i>Widgren v Maple Grove Tp</i> , 429 F3d 575, 585 (6th Cir 2005) (citing <i>Ehlers v. Bogue</i> , 626 F.2d 1314, 1315 (5th Cir.1980) (per curiam).....	18, 19
 <u>COURT RULES</u>	
MCR 2.310.....	25
MCR 4.101(F)(1)(a).....	22
MCR 7.212.....	28
 <u>STATUTES</u>	
MCL 125.3101.....	20
MCL 125.3407.....	21
MCL 125.3407(b).....	22
MCL 259.322.....	6, 7, 16
MCL 750.539j.....	7, 16
 <u>UNITED STATES CONSTITUTION</u>	
Amend V.....	25
Fourth Amendment.....	Passim

INDEX OF AUTHORITIES

<u>OTHER</u>	<u>PAGES</u>
14 CFR 107.....	5, 15
14 CFR 107.39.....	16
14 CFR 107.51.....	5, 15
1994 PA 12.....	21
1994 PA 13.....	21
1994 PA 14.....	21
1994 PA 24.....	21
<i>5 Search and Seizure: A Treatise on the Fourth Amendment</i> § 10.1(b) (4th ed.2004).....	18
FAA Aerospace Forecast, Fiscal Years 2021-2041. < https://www.faa.gov/sites/faa.gov/files/FY%202023-2043%20Full%20Forecast%20Document%20and%20Tables_0.pdf (last accessed September 7, 2023).....	5, 17
<i>FAA Aerospace Forecast Fiscal Years 2023-2043</i>	5
https://www.dronefly.com/police-drone-infographic . (last accessed September 7, 2023).....	6
https://www.police1.com/police-products/police-drones/articles/uas-spring-2021-update-new-faa-rules-tactical-bvlos-waivers-and-more-opsrqp40DGcJq03I/ (last accessed September 7, 2023).....	5
Long Lake Township Zoning Ordinance.....	22
Michigan Zoning Enabling Act.....	20, 21
The New York Times “ <i>Who’s Watching Your Porch?</i> ” https://www.nytimes.com/2020/01/19/style/ring-video-doorbell-home-security.html . (last accessed August 7, 2023).....	6
Township Rural Zoning Act, 1943 PA 184.....	20

STATEMENT OF APPELLATE JURISDICTION

Amici Curiae, Michigan Townships Association and Michigan Municipal League, concur with Long Lake Township’s Counter Statement of Jurisdiction and Order Appealed contained in Long Lake Township’s Supplemental Brief.

RECEIVED by MSC 9/8/2023 7:05:00 PM

STATEMENT OF QUESTION PRESENTED

I. WHETHER THE TOWNSHIP VIOLATED THE MAXONS' FOURTH AMENDMENT RIGHTS BY USING AN UNMANNED DRONE TO TAKE AERIAL PHOTOGRAPHS OF THE MAXONS' PROPERTY FOR USE IN ZONING AND NUISANCE ENFORCEMENT?

MAXONS ANSWERED: "YES"

LONG LAKE TOWNSHIP ANSWERED: "NO"

AMICI CURIAE ANSWERS : "NO"

CIRCUIT COURT ANSWERED: "NO"

COURT OF APPEALS DID NOT ANSWER.¹

II. WHETHER THE EXCLUSIONARY RULE APPLIES TO THIS NONCRIMINAL ZONING DISPUTE?

MAXONS ANSWERED: "YES"

LONG LAKE TOWNSHIP ANSWERED: "NO"

AMICI CURIAE ANSWERS: "NO"

CIRCUIT COURT DID NOT ANSWER AS IT FOUND NO FOURTH AMENDMENT VIOLATION.

COURT OF APPEALS ANSWERED: "NO"

¹ *Long Lake Twp v Maxon*, 336 Mich App 521; 970 NW2d 893 (2021) (*Long Lake Twp I*) vacated by, 509 Mich 981; 973 NW2d 615 (2022). Question not answered by Court of Appeals on remand in *Long Lake Twp v Maxon*, 2022 WL 4281509 (Mich App 2022) (*Long Lake Twp II*).

INTEREST OF AMICI CURIAE AND INTRODUCTION

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of more than 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of exchanging information and providing education and guidance to and among township officials to enhance the administration of township government services in Michigan. The Michigan Townships Association, established in 1953, is widely recognized for its expertise with regard to municipal issues. Through its legal defense fund, the Michigan Townships Association has participated as amicus curiae in numerous state and federal cases presenting issues of statewide significance to Michigan townships. This Brief is authorized by the Michigan Townships Association.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership comprises 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates its Legal Defense Fund through a board of directors. The purpose of this Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This Brief is authorized by the Legal Defense Fund's Board of Directors.²

On May 24, 2023 this Honorable Court considered the Maxons' application for leave to appeal *Long Lake Twp II* and ordered MOAA argument and briefing on "(1) whether the appellee violated the appellants' Fourth Amendment rights by using an unmanned drone to take aerial photographs of the appellants' property for use in zoning and nuisance enforcement; and (2) whether the exclusionary rule applies to this dispute."³⁴

² The Board of Directors' membership includes: MML President, Barbara Ziarko; MML Executive Director, Daniel P. Gilmartin; MML General Counsel, Christopher Johnson; and the officers and directors of the Michigan Association of Municipal Attorneys; Nick Curcio, City Attorney, South Haven, New Buffalo, and Allegan; Rhonda Stowers, City Attorney, Davison; Suzanne Curry Larsen, City Attorney, Marquette; Jill H. Steele, City Attorney, Battle Creek; Thomas R. Schultz, City Attorney, Farmington and Novi; Lauren Tribble-Laucht, City Attorney, Traverse City; Ebony L. Duff, City Attorney, Oak Park; Steven D. Mann, City Attorney, Milan; Amy Lusk, City Attorney, Saginaw; and Laurie Schmidt, City Attorney, St. Joseph.

³ *Long Lake Twp v Maxon*, 989 NW2d 810 (Mem).

⁴ The Court of Appeals has issued two opinions in this case: first the vacated opinion that this type of aerial photography is a violation of the Fourth Amendment (*Long Lake Twp I*), and then on remand finding only that the exclusionary rule does not apply to this civil dispute (*Long Lake Twp II*).

Answers to these questions are of paramount importance to municipal jurisprudence in this state, and also hold national significance. In what appears to be a matter of first impression, this case concerns the constitutionality of warrantless aerial photographs of private property taken by the government using an unmanned drone for zoning and nuisance enforcement.⁵ While the Amici Curiae agree with *Long Lake Twp II* that the photographic evidence obtained by the Township through use of the drone is not barred by the exclusionary rule (as the rule does not apply in non-criminal zoning and nuisance enforcement cases), our member municipalities need assurance that similar conduct will not subject them to potential civil liability for violating a property owners' Fourth Amendment rights. The Township's well reasoned Supplemental Brief and the arguments below clearly demonstrate that the Township's actions in this case were not in violation of the Fourth Amendment.

The Fourth Amendment of the United States Constitution protects citizens against unreasonable government searches and seizures without a warrant. This limitation on governmental authority, which is at the core of our societal expectations of government, has been litigated extensively since the amendment's ratification more than two hundred years ago.

The United States Supreme Court has ultimately come to define the Fourth Amendment's search standard in a way very much familiar to attorneys: reasonableness. In analyzing a potential search under the Fourth Amendment, the central question is whether the party allegedly searched had a reasonable expectation of privacy.⁶ The benefit of this constitutional standard is that it can be applied to many circumstances across a great span of time, even where such circumstances did not exist or were not even contemplated at the time the Amendment was ratified. Consider that there were no airplanes, helicopters, or drones to view properties from above when the Fourth Amendment was adopted. The United States Supreme Court was nevertheless able to analyze governmental use of airplanes and helicopters to view private properties from above, ultimately finding that such examinations did not constitute unreasonable searches, even without a warrant.⁷

As with helicopters and airplanes before, the increasing prevalence of commercial and recreational drone use is forcing courts to apply the Fourth Amendment to a new technology. There

⁵ A drone is also referred to as an unmanned aircraft system or UAS.

⁶ See *Katz v United States*, 389 US 347; 88 SCt 507; 19 LEd2d 576 (1967), which will be analyzed herein with regard to the two-part reasonable expectation of privacy test.

⁷ See the following cases that will be reviewed herein in more detail: *California v Ciraolo*, 476 US 207; 106 SCt 1809; 90 LEd2d 210 (1986); and *Florida v Riley*, 488 US 445; 109 SCt 693; 102 LEd2d 835 (1989).

will no doubt be future technologies that require future analysis, but the time has come to answer the question: What is the reasonable expectation of privacy with regard to aerial photos from a drone?

This question is an important one, and is the lone reason that we write to this Honorable Court today urging you to weigh in on this issue. This question has importance not only in the State of Michigan but likely across the nation. The use of both recreational and commercial drones has exploded in the past few years, with drones being widely available at stores like Best Buy and online through Amazon. The Federal Aviation Administration (FAA) provides some very salient information in its *FAA Aerospace Forecast Fiscal Years 2023-2043*.⁸ Drone registration requirements went into effect December 21, 2015, and through December 2022, almost 1.47 million new model owners (hobby users) had registered.⁹ The FAA estimates that the number of drones used by hobby users will saturate at around 1.82 million units over the next five years.¹⁰ The FAA further estimates there were around 727,000 commercial drones registered by the end of 2022.¹¹ The speed of new commercial registrations is expected to continue to grow at an even higher rate than new recreational/hobby drone registrations.¹² By 2027, the commercial drone fleet could be around one million by 2027.¹³ All of these drones will be operated in the lower airspaces contemplated in this case. The Code of Federal Regulations generally requires that drones cannot be operated at an altitude higher than 400 feet above ground level, unless the small unmanned aircraft: (1) is flown within a 400-foot radius of a structure; and (2) does not fly higher than 400 feet above the structure's immediate uppermost limit.¹⁴

In addition to the hobbyist and commercial sectors, local municipalities also use drones for many of their governmental functions. Drone use by law enforcement agencies has, in fact, become one of the top uses for drones in recent years.¹⁵ Law enforcement may use drones for search and

⁸ FAA Aerospace Forecast, Fiscal Years 2021-2041. https://www.faa.gov/sites/faa.gov/files/FY%202023-2043%20Full%20Forecast%20Document%20and%20Tables_0.pdf (last accessed September 7, 2023.) (Discussion on drone use begins on page 44.)

⁹ *Id.*, 45.

¹⁰ *Id.*, 54.

¹¹ *Id.*, 4.

¹² *Id.*, 57, 58.

¹³ *Id.*, 64.

¹⁴ 14 CFR 107.51. Exhibit A contains all the regulations for drones under 14 CFR 107.

¹⁵ <https://www.police1.com/police-products/police-drones/articles/uas-spring-2021-update-new-faa-rules-tactical-bvlos-waivers-and-more-opsrqp40DGcJq03I/> (last accessed September 7, 2023).

rescue; traffic collision reconstruction; active shooter investigations; crime scene analysis; crowd monitoring; and surveillance.¹⁶ Moreover, drones can be used by municipalities to monitor and inspect for zoning and nuisance code enforcement; property inspections for appraisals and tax assessment; disaster response; fire scene investigation; GIS mapping; and environmental assessments to determine contaminants that might otherwise be hidden, such as illegal chemical barrels or piles of tires stored outside. In considering the Fourth Amendment's application to the governmental use of drones to view private property from above, it should not be unexpected or surprising to a property owner to know that a drone flew over their property and took a picture of openly exposed junk piles. The reasonable expectation of privacy has diminished with regard to items stored in the open outdoors.¹⁷ We live in a digital world with drones and cameras as a norm.

Courts have previously considered the pervasiveness of a technology in our society to aid in determining whether a reasonable expectation of privacy exists. It is commonly understood and largely unheralded that, upon stepping outside your door, your activities (such as the outdoor storage of personal property) may be caught on camera. Millions of homeowners have video doorbells or webcam surveillance that record outdoor activity around their property and in the neighborhood generally.¹⁸ Further, high-definition cameras are commonplace in the cell phones used by most Americans, allowing fine details to be discerned even from considerable distances. Moreover, anyone with a cell phone or computer and internet access can view almost every property in the world from above using Google Earth or similar products. The view from Google Earth and the view from the Township drone are practically identical.¹⁹ Billions of people may view the Maxons' property from above; there cannot be a reasonable expectation of privacy from an infrequent short drone flyover looking down upon their property.

Although this case no doubt has significant statewide and national importance, a ruling in this case must be based on facts of this case alone: three aerial fly-overs amounting to less than two hours of total airtime over two years, strictly photographing outdoor, open areas of property

¹⁶ <https://www.dronefly.com/police-drone-infographic> (last accessed September 7, 2023).

¹⁷ It should be noted that states may pass laws to further protect a reasonable expectation of privacy with regard to drones such as MCL 259.322 which protects individuals from certain intrusions.

¹⁸ "According to data from the NPD Group, a market research firm, sales of smart doorbells alone increased by 58 percent from January 2019 to January 2020." The New York Times "Who's Watching Your Porch?" <https://www.nytimes.com/2020/01/19/style/ring-video-doorbell-home-security.html> (last accessed August 7, 2023).

¹⁹ Township Supplemental Brief, page 20.

from publicly navigable drone airspace above the property.²⁰ It is not, as the majority in *Long Lake Twp I* was concerned, “directly up to an open bathroom window,” nor was the drone “stealthi[ly] navigat[ing] into much tighter and more secure spaces” than a large aircraft as the Maxons’ discuss.²¹ The majority in *Long Lake Twp I* and the Maxons’ arguments regarding the Fourth Amendment are driven by unfounded fears about egregious conduct that did not occur in this case. This Honorable Court would not hold as unconstitutional a police officer’s passing view of a home from the public roadway simply because, in theory, the officer could have wandered up to the home, climbed in the window, and begun rifling through the homeowner’s drawers. No more here should this Honorable Court hold aerial photography from publicly navigable drone airspace above property unconstitutional simply because the drone could have physically navigated down to the window level of the house and peered inside.

As correctly noted by the late Judge Karen M. Fort Hood dissenting in *Long Lake Twp I*:

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 with 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 suggest all of these things are true – then precedent provides that a Fourth Amendment violation has not occurred.²²

The Maxons’ desire to prohibit constitutionally acceptable conduct based merely on an apprehension of more extreme, and entirely hypothetical, scenarios is inappropriate. What was viewed by the drone, the expansion of a junk/salvage yard in violation of the Township’s Zoning Ordinance, was nothing more than what could be legally viewed from a plane or helicopter during a legally permissible warrantless search. It would be incongruous to determine the use of publicly available low cost drone technology to take above ground aerial photos for zoning nuisance abatement is a Fourth Amendment violation, while use of a much more costly helicopter or airplane to take the exact same photos is not. This is a distinction without a difference. As will be discussed herein, well established case law and the framework for Fourth Amendment analysis clearly supports the constitutionality of the reasonable warrantless drone use by the Township to take overhead photos in this zoning abatement matter.

²⁰ Township Supplemental Brief, pages 14-15.

²¹ Maxons’ Supplemental Brief, page 6. Further, peeping in a window is already a crime in Michigan. See MCL 259.322 and MCL 750.539j.

²² *Long Lake Twp I*, 336 Mich App, 546.

Even if this Honorable Court were to find that the Township’s drone search was unconstitutional, the aerial photos taken from the drone would not be suppressed under the exclusionary rule. The exclusionary rule works to exclude evidence taken though unconstitutional means in a criminal context. As will be discussed herein, the exclusionary rule does not apply to this purely civil zoning ordinance nuisance abatement action. The Township’s attempt to abate the nuisance in the circuit court action was a non-criminal matter. Further, the Township’s Zoning Ordinance itself has no criminal component for violations. Violations are municipal civil violations that are also subject to nuisance abatement. As argued below, the circuit court properly denied the Maxons’ motion to suppress the photos, and the Court of Appeals in *Long Lake Twp II* properly decided that the exclusionary rule could not apply to bar the evidence in this type of case.

STATEMENT OF FACTS

Amici Curiae adopt the Township’s Counter-Statement of Facts as contained in the Township’s Supplemental Brief

ARGUMENT

I. THE TOWNSHIP DID NOT VIOLATE THE MAXONS’ FOURTH AMENDMENT RIGHTS BY USING AN UNMANNED DRONE TO TAKE AERIAL PHOTOGRAPHS OF THE MAXONS’ PROPERTY FOR USE IN ZONING AND NUISANCE ENFORCEMENT.

A. STANDARD OF REVIEW.

This Honorable Court reviews “de novo” a trial court’s ultimate decision on a motion to suppress on the basis of an alleged constitutional violation.”²³ “A court’s factual findings at a suppression hearing are reviewed for clear error, but the application of the underlying law – the Fourth Amendment of the United States Constitution ... – is reviewed de novo.”²⁴

B. FOURTH AMENDMENT GENERAL PRINCIPLES.

The Fourth Amendment of the United States Constitution provides:

The 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

²³ *People v Hammerlund*, 504 Mich 442, 450; 939 NW2d 129 (2019).

²⁴ *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011) (footnote citation omitted).

particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is enforceable upon states through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.²⁵ Importantly to this case, the Fourth Amendment does not prohibit all searches, but instead prohibits **unreasonable** searches.²⁶ The Supreme Court has “long held that the ‘touchstone of the Fourth Amendment is reasonableness.’”²⁷

The 1967 seminal case of *Katz v United States, supra*, set forth the modern framework for analyzing the reasonableness of warrantless searches under the Fourth Amendment and discarded older case law as no longer controlling. In *Katz*, the FBI attached an eavesdropping device to the outside of a public telephone booth Katz used to communicate illegal wagers across state lines. The Court ruled that Katz’s Fourth Amendment rights had been violated.²⁸

The lasting importance of *Katz*, however, comes from Justice Harlan’s concurrence, where he synthesized the Court’s opinion into the two-part “reasonable expectation of privacy” test to determine whether government agents have conducted an unconstitutional Fourth Amendment warrantless search. Justice Harlan’s two-part test dictates that a search occurs if state actors (1) violate “an actual (subjective) expectation of privacy,” and (2) “that the expectation be one that society is prepared to recognize as ‘reasonable.’”²⁹ Later courts have further explained this test as “whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy, [and] whether the individual's subjective expectation of privacy is [objectively] one that society is prepared to recognize as reasonable.”³⁰

In applying the test for reasonableness, this Honorable Court must make its determination based upon the totality of the circumstances in this case.³¹ In doing so, this Court must determine whether the Maxons had a reasonable expectation of privacy from a drone conducting aerial photography over the outdoor vehicles and piles of junk in a salvage/junk yard located on their property. As will be explained below, even if the Maxons had a subjective expectation of privacy in their outdoor activities, which is questionable in this case, such expectation is not considered

²⁵ *Mapp v Ohio*, 367 US 643, 81 SCt 1684, 6 LEd 2d 1081 (1961).

²⁶ *Carroll v United States*, 267 US 132, 146, 45 SCt 280, 69 LEd 543 (1925).

²⁷ *Ohio v Robinette*, 519 US 33, 39; 117 SCt 417, 136 LEd 2d 347 (1996) (citation omitted).

²⁸ *Katz v United States*, 389 US, 352.

²⁹ *Id.*, 361 (Harlan, J., concurring).

³⁰ *Smith v Maryland*, 442 US 735, 740, 99 SCt 2577, 61 LEd2d 220 (1979) (internal quotation marks and citations omitted).

³¹ *Id.* See also *Rawlings v Kentucky*, 448 US 98, 104, 100 SCt 2556, 65 LEd2d 633 (1980).

reasonable by a society that frequently uses drones to conduct aerial photography. Drone use in a safe and non-hazardous manner is now commonplace by both the general public and government, as highlighted by the statistics above. The government drone in this case was making a visual observation from a place where the public could make the same observation. Additionally, the overhead view was no different than what could be seen from a plane or helicopter, or indeed from a satellite image on Google Earth.

C. THE MAXONS DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY FROM AERIAL DRONE PHOTOGRAPHY OF THEIR OUTDOOR SALVAGE/JUNK YARD.

The Maxons have numerous vehicles and junk piles across a large area around their property. It is claimed by the Maxons that this area, encompassing essentially their entire property, is within the curtilage of their home. The curtilage of a home is “the area to which extends the intimate activity associated with the sanctity of a man’s home and the privacy of life,”³² and generally receives a heightened level of Fourth Amendment protection.

“Courts look at four factors to determine whether a part of someone’s property falls within curtilage or open fields. These are the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. The Supreme Court has suggested that curtilage is an intuitive concept—in most cases, the curtilage will be clearly marked ... as the area around the home to which the activity of home life extends.”³³

The Supreme Court in *Ciraolo* indicated that:

The 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. The claimed area here was immediately adjacent to a suburban home, surrounded by high double fences. This close nexus to the home would appear to encompass this small area within the curtilage.³⁴

From this understanding of curtilage, it is highly doubtful whether the salvage/junk yard on land not near the home would qualify as part of the curtilage of the home. This area is massive, unfenced, and has little to do with protection and privacy of the family. Nor is it somehow related

³² *California v Ciraolo*, 476 US, 212 (citations omitted).

³³ *Matter of United States*, 637 F Supp 3d 343 (EDNC, 2022) (internal citations omitted).

³⁴ *Id.*, 212-213.

to the domestic character of an activity intimately linked to the home. For the curtilage to continue to possess a legally distinct meaning, its boundaries must not be extended anywhere across a piece of property simply because the residents wish it to. Even if this Court chose to accept that this area is within the curtilage of the home, such a determination is not dispositive. As the Court in *Ciraolo* indicated:

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations ***from a public vantage point where he has a right to be and which renders the activities clearly visible.***³⁵

In further explaining this concept, the Court in *Ciraolo* indicated that:

a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.³⁶

Thus, even if an area is within the curtilage, it is not provided Fourth Amendment protection if it is knowingly exposed to public view.³⁷

In this case, the Maxons have neither a subjective nor objective expectation of privacy regarding aerial views of their outdoor salvage/junk yard. The Maxons made no attempt to shield these outdoor uses from such aerial observations (i.e. tarp coverings or under shelter), nor indeed from ground-level observations (having elected not to install a fence despite obtaining a permit). As such, it is unlikely that the Maxons can truthfully claim that they had a subjective expectation of privacy.

However, even if the Maxons satisfied the first part of the *Katz* test in having the subjective expectation of privacy, there is no objective expectation of privacy in this case. This conclusion is supported by application of the following cases.

First, in *California v Ciraolo*, police officers in Santa Clara, acting on an anonymous tip, used an airplane flying at 1,000 feet to look for marijuana plants in Ciraolo's backyard. The plane was used because Ciraolo shielded his backyard from ground level observation using high double fencing. Aerial photographs were taken of marijuana growing in Ciraolo's backyard using a 35

³⁵ *Id.*, 213. (emphasis added).

³⁶ *California v Ciraolo*, 476 US, 215.

³⁷ *Kyllo v United States*, 533 US 27, 32; 121 SCt 2038; 150 LEd2d 94 (2001).

mm camera. Ciraolo challenged the government's authority to observe his gardening pursuits from any place or vantage point "if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation."³⁸ Although in the curtilage of Ciraolo's home, the Court found that the observations of Ciraolo's back yard from the airplane were not an unreasonable Fourth Amendment search.³⁹

The Court in *Ciraolo* applied the *Katz* reasonable expectation of privacy test in reaching its conclusion. While the Court seemed to find it debatable whether Ciraolo had a subjective expectation of privacy from all vantage points, it nevertheless analyzed the second part of the *Katz* test to determine whether Ciraolo's subjective expectation of privacy is objectively reasonable.⁴⁰ In applying the second part of the test the Court in *Ciraolo* stated that:

In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. US, supra*, 466 U.S., at 181–183, 104 S.Ct., at 1742–1744.⁴¹

In determining that Ciraolo's expectation of privacy was not objectively reasonable based upon societal values protected by the Fourth Amendment, the Court found that:

The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace, see 49 U.S.C.App § 1304, in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. 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.⁴²

The Court's decision is precisely on point with the Township's use of the drone in this case. The overhead observations by the Township were made in a physically nonintrusive manner from an area of public airspace, where the observations of the government were the same

³⁸ *Ciraolo*, 476 US at 212.

³⁹ *Id.*, 215-216.

⁴⁰ *Id.*, 212.

⁴¹ *Id.*

⁴² *Id.*, 213-214. (Footnote omitted and emphasis added).

observations that could be taken by the public. The Maxons therefore have no objective reasonable expectation of privacy.

Following *Ciraolo*, the U.S. Supreme Court addressed a variation of the same issue in *Florida v Riley*, *supra*. In *Riley*, the police received an anonymous tip that Riley was growing marijuana on his property. In response to this tip, an investigating officer circled Riley's property twice in a helicopter at 400 feet. From this perspective, the officer observed what appeared to be marijuana growing in a greenhouse. The Court in *Riley* considered whether government surveillance of the interior of a partially covered greenhouse in a residential backyard from the vantage point of a helicopter located 400 feet above the ground constitutes an unreasonable search under the Fourth Amendment.⁴³

Although the Court in *Riley* was divided, a majority held that no warrant was required because Riley lacked an objective expectation of privacy.⁴⁴ The plurality in *Riley* indicated, similar to *Ciraolo*, that:

[T]he home and its curtilage are not necessarily protected from inspection that involves no physical invasion. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. As a general proposition, the police may see what may be seen from a public vantage point where they have a right to be. 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.⁴⁵

The Court in *Riley* relied heavily upon the fact that the helicopter at issue was operating within full compliance of FAA safety regulations when it hovered over Riley's property at an altitude of 400 feet. On this point, the Court stated:

[I]t make[s no] difference for Fourth Amendment purposes that the helicopter was flying at 400 feet when the officer saw what was growing in the greenhouse through the partially open roof and sides of the structure. We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace specified by law. But it is of obvious importance that the helicopter in this case was not violating the law, and there is nothing in the record before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to the respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage.

⁴³ *Florida*, 488 US, 448.

⁴⁴ *Id.*, 447-49, 452 (O'Connor, J., concurring).

⁴⁵ *Id.*, 449-50 (quotation marks and citations omitted).

As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment.⁴⁶

Following *Riley*, *Kyllo* is another seminal case providing guidance on this matter. *Kyllo* dealt with the use of thermal imaging devices to surveil the *inside* of someone's home, quite literally looking through walls. The use of such devices was determined by the US Supreme Court to be a Fourth Amendment violation, because the technology was found to be over intrusive and not widely available to the public. But unlike *Kyllo*, the Township's use of the drone in this case was not intrusive. The Township was not looking through a wall of the Maxons' home or at anything that was not open to public aerial view. Further, the pervasiveness of drones is quite unlike the thermal imaging devices used in *Kyllo* that were not available to the general public. While there may be instances where a drone has intruded on one's Fourth Amendment right by peering through a window, or perhaps flying into a barn, that is not the type of cases at issue here. This case demonstrates that a complete ban on warrantless drone searches is too restrictive.

The case of *Giancola v W Va Dep't of Pub Safety*, 830 F2d 547 (4th Cir. 1987), in holding that warrantless helicopter searches at an altitude as low as 100 feet did not violate a reasonable expectation of privacy, compiled several factors in reaching its conclusion, namely: "the total number of instances of surveillance, the frequency of surveillance, the length of each surveillance, the altitude of the aircraft, the number of aircraft, the degree of disruption of legitimate activities on the ground, and whether any flight regulations were violated by the surveillance."⁴⁷ Where visits are short, infrequent, and cause no notable damage to land, they may be considered constitutional.

Analyzing these cases together, it can be gleaned that there is no reasonable expectation of privacy from warrantless overhead/aerial surveillance when:

1. The observation is made in a manner that is not physically intrusive and does not interfere with the normal use of the property, and little to no undue noise, wind, dust, or threat of injury occurs.
2. The observation is made from public airspace.
3. The observation is no more than what the public could observe.

⁴⁶ *Id.*, 451.

⁴⁷ *Id.*, 551.

4. The technology used to make the observation (i.e. plane, helicopter, or drone) is pervasive enough in our society to not consider the overhead vantage point unforeseen.

Upon application of these criteria to the facts herein, the Township's actions in using the drone to take aerial photography of the salvage/junk yard do not rise to the requisite level to trigger the Fourth Amendment protection against unreasonable warrantless searches.

Notably, in applying the first criteria, the Township's drone activity did not make a physical intrusion onto the property. The frequency and time of the Township's drone use in no way interfered with the normal use of the property. No serious argument can be made that the drone produced undue noise, wind, dust or threat of injury. While the Maxons were angered by the drone activity, the genesis of their anger seems directed at the surveillance, rather than at any undue impact created by noise, wind or dust. There is no evidence to suggest that the Township's use of the drone produced these effects. A drone produces far less impact than a helicopter would at 400 feet. Additionally, and importantly, the FAA has adopted regulations regarding the use of drones, which are located in 14 CFR 107.⁴⁸ A number of these regulations are designed to assure safe use of drones. In this case, no credible evidence was presented that the operator of the drone failed to abide by the regulations. While drones do have the capability of being used in more intrusive and abusive ways than planes or helicopters because of their size and maneuverability, they can also be deployed in compliance with FAA regulations for investigative purposes in a reasonable manner that does not run afoul of the Fourth Amendment.

The level of intrusiveness of the Township's observation is further lessened by the existence of the 2008 settlement agreement. The Maxons' were under an agreement regarding the zoning use of their property, and should have been aware that the Township was likely to inspect their property to ensure compliance with that agreement. A party cannot enter into an agreement which would require at least some level of inspection by the Township, and then be surprised when such inspections are conducted.

In applying the second criteria, the FAA requires that drones generally be operated at an altitude not higher than 400 feet above ground level.⁴⁹ The Township's use of the drone was in this required area of airspace for operation; there is no evidence to the contrary. The Township and the general public have access to this area of the airspace to operate a drone over private property.

⁴⁸ See Exhibit A.

⁴⁹ Exhibit A, 14 CFR 107.51.

In applying the third criteria, the aerial photographs and observations from the drone were no more than what the public could see through similar drone use or from a helicopter or airplane. Additionally, as has been noted above, there are specific statutory provisions in Michigan that prohibit certain drone activities. These prohibitions do not include the overhead photography of a salvage/junk yard. Specifically, MCL 259.322 provides in its entirety:

(1) A person shall not knowingly and intentionally operate an unmanned aircraft system to subject an individual to harassment. As used in this subsection, "harassment" means that term as defined in section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.

(2) A person shall not knowingly and intentionally operate an unmanned aircraft system within a distance that, if the person were to do so personally rather than through remote operation of an unmanned aircraft, would be a violation of a restraining order or other judicial order.

(3) A person shall not knowingly and intentionally operate an unmanned aircraft system to violate section 539j of the Michigan penal code, 1931 PA 328, MCL 750.539j, or to otherwise capture photographs, video, or audio recordings of an individual in a manner that would invade the individual's reasonable expectation of privacy.

(4) An individual who is required to register as a sex offender under the sex offenders registration act, 1994 PA 295, MCL 28.721 to 28.736, shall not operate an unmanned aircraft system to knowingly and intentionally follow, contact, or capture images of another individual, if the individual's sentence in a criminal case would prohibit the individual from following, contacting, or capturing the image of the other individual.

(emphasis added). It is noteworthy that subsection (3) above prohibits photos of individuals, not property, in a manner that would invade the individual's reasonable expectation of privacy. This presumably would prohibit a drone from taking pictures of an individual in their home or laying out by the pool. A government drone would be similarly limited in its operation without a warrant. Again, the Township's drone was not operated and did not view anything that the general public would be prevented from viewing. Taking this a step further, the FAA prohibits a drone from being operated over a person.⁵⁰ This protects against safety hazards and also helps fight against invasion of privacy issues. The Township's use of the drone did not conflict with any of these state and federal requirements. The aerial photos of the piles of junk would not be considered something intimately private.

⁵⁰ Exhibit A, 14 CFR 107.39.

The fourth criteria addresses whether drone use is pervasive enough in our society so that it may be reasonable to assume, and not unforeseen, that a drone could fly over and observe property out in the open. As indicated in the Introduction, there are many drones in use throughout the country. As of the end of 2022, there were approximately 1.47 million hobby drone users registered.⁵¹ Commercial drones are increasing in number at a fast rate with around 727,000 commercial drones registered by the end of 2022 and estimates of around one million commercial drones by 2027.⁵² Drones are being put to a multitude of uses by government entities, commercial corporations and the general public. By their nature, drones fly over properties; to indicate that a drone's view from above is an invasion of privacy would halt the industry. As noted previously, it is not unexpected that a drone may view or photograph your property from above. This is no different than a plane or helicopter flyover. Further as indicated in the Introduction, digital photographs are common place technology included in every cell phone. Taking a digital photo today is no different than taking a 35mm over 30 years ago. It is reasonably expected that any aerial photo from a plane, helicopter, or drone would involve digital imagery. Finally, with the availability of programs such as Google Earth, most properties on earth have been and are being photographed in high detail from above for use by the general public.

When these criteria are applied to the totality of the circumstances in this case, it is evident that the Maxons did not have a reasonable expectation of privacy with regard to the Township's aerial photos from the drone. There was no infringement by the Township of the Fourth Amendment prohibition against unreasonable searches without a warrant. The trial court correctly denied the Maxons' motion to suppress the evidence.

Additionally, it is important to note that the use of technology to conduct the observation, as opposed to viewing with the naked eye, is immaterial to the Fourth Amendment analysis. The case of *United States v Houston*, 816 F3d 282 (6th Cir. 2016) is instructive. In *Houston*, ATF agents, without a warrant, installed a camera on a public utility pole approximately 200 yards away from the defendant's farmstead home, pointing it almost directly at the defendant's front door. ATF averred that the view from the camera was identical to what agents would have seen had they driven down the public road in front of the home. Over the course of 10 weeks, the ATF conducted warrantless monitoring from the camera, ultimately convicting the defendant of unlawful possession of a firearm. The 6th Circuit held that no Fourth Amendment violation occurred, chiefly

⁵¹ FAA Aerospace Forecast, Fiscal Years 2023-2043, page 45.

⁵² *Id.*, page 58 and 64.

because the defendant “had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads.”⁵³ Further, “the length of the surveillance did not render the use of the pole camera unconstitutional, because the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations.”⁵⁴

In the present case, as demonstrated by *Riley*, the Township would have been entirely within the bounds of the Constitution to charter a helicopter and hover over Maxon’s property at 400 feet to survey the property. *Houston* instructs us that the use of a more efficient technology (i.e. a drone over a helicopter) should not change the Constitutional equation.

D. THE TOWNSHIP’S INSPECTION WAS ADMINISTRATIVE AND THEREFORE LESS INTRUSIVE.

The Township’s intent and purpose in undertaking the investigation also plays a part in the Maxons’ reasonable expectations of privacy. “[T]he purpose for the interference bears upon the intrusiveness of government action. A criminal investigation is generally more intrusive than an administrative or regulatory investigation[.]”⁵⁵ The Court in *Widgren* expands on this notion:

[T]he search involved [in administrative inspections] is less of an intrusion on personal privacy and dignity than that which generally occurs in the course of criminal investigation. This is a real and meaningful distinction. The concern of the inspector is directed toward such facilities as the plumbing, heating, ventilation, gas, and electrical systems, and toward the possible accumulation of garbage and debris. These matters may be looked into in a much shorter period of time than it often takes to search for evidence of crime, and certainly no rummaging through the private papers and effects of the householder is required. Nothing is seized. A police search for evidence brings with it “damage to reputation resulting from an overt manifestation of official suspicion of crime.” A routine inspection that is part of a periodic or area inspection plan does not single out any one person as the object of official suspicion. The search in a criminal investigation is made by armed officers, whose presence may lead to violence, and is perceived by the public as more offensive than that of the inspector. Police searches are conducted at all times of the day and night, while routine inspections are conducted during regular business hours. By their very nature and purpose, police searches usually must be conducted by surprise. In contrast, some inspection programs involve advance notice that the inspector will call on a certain date, and an inspector on his rounds will sometimes agree to return at a more convenient time if the householder so requests. This permits the owner or occupant to remove or conceal anything that might be embarrassing to him.

(quoting Wayne R. LaFare, *5 Search and Seizure: A Treatise on the Fourth Amendment* § 10.1(b) (4th ed.2004))

⁵³ *Houston*, 287-88.

⁵⁴ *Houston*, 288.

⁵⁵ *Widgren v Maple Grove Tp*, 429 F3d 575, 583 (6th Cir 2005).

Further, “courts have declined to find Fourth Amendment violations where government agents merely inspected a structure's exterior attributes or emissions, even when those inspections occurred within the property of the objecting party.” *Widgren v Maple Grove Tp*, 429 F3d 575, 585 (6th Cir 2005) (citing *Ehlers v. Bogue*, 626 F.2d 1314, 1315 (5th Cir.1980) (per curiam) (finding no Fourth Amendment violation where health inspectors surveyed the outside of the plaintiff's apartment building while on the plaintiff's property); *Air Pollution Variance Bd of the State of Colorado v W Alfalpa Corp*, 416 US 861, 864–65, 94 S Ct 2114, 40 L Ed 2d 607 (1974) (holding that no Fourth Amendment violation occurred where a state health inspector entered a corporation's property and inspected plumes of smoke emitted from the corporation's plant).

The purpose of this inspection was administrative and regulatory, not criminal. This inspection took “a much shorter period of time than it often takes to search for evidence of a crime,” it involved “no rummaging through the private papers and effects of the householder.” Further, the search was not “made by armed officers, whose presence may lead to violence, and is perceived by the public as more offensive than that of the inspector.” As stated in the Township’s Supplemental Brief and discussed further *infra*, this is not a criminal matter, but a civil, regulatory one.⁵⁶

Even if the drone entered the Maxons’ property (and we agree with the Township that it plainly did not), there is no violation of the Fourth Amendment where government agents entered the property purely to inspect the exterior elements of the property.

Additionally, while the inspection was not part of a formal inspection program, the Maxons should have been aware that their property was subject to an administrative inspection due to the nature of the settlement agreement regarding their junk/salvage yard. The Township had a right to ensure administrative compliance with the settlement agreement and ensure compliance with their Zoning Ordinance. In light of this understanding, a brief aerial flyover was not intrusive and the Fourth Amendment was not violated.

II. THE EXCLUSIONARY RULE DOES NOT APPLY TO THIS NONCRIMINAL ZONING DISPUTE.

A. STANDARD OF REVIEW.

“Application of the exclusionary rule to a Fourth Amendment violation is a question of law that is reviewed de novo.”⁵⁷

⁵⁶ See Township’s Supplemental Brief at 51.

⁵⁷ *People v. Jenkins*, 472 Mich 26, 31, 691 NW2d 759 (2005).

B. INTRODUCTION.

The Court of Appeals in its most recent opinion, *Long Lake Twp II*, correctly found that the exclusionary rule does not apply in this case. Analyzing a litany of cases, the Court of Appeals properly identified that almost categorically, the exclusionary rule does not apply in civil cases. Further recognizing that Long Lake Township's zoning enforcement is indeed a civil matter, the Court correctly held that it was not subject to the exclusionary rule. Even if a Fourth Amendment violation occurred by the Township's drone search, the photographic evidence from the drone is not subject to suppression as the exclusionary rule is inapplicable to the Township's civil zoning nuisance abatement action.⁵⁸

C. ZONING ENFORCEMENT IN THIS CASE IS A CIVIL MATTER.

Zoning enforcement cases like the one at issue here are civil matters. The Michigan Zoning Enabling Act (MZEA), MCL 125.3101, et. seq., provides the current statutory authority for townships, cities, villages, and counties to engage in zoning. Prior to the incorporation of the MZEA, zoning authority for townships was contained in the Township Rural Zoning Act, 1943 PA 184. Now, the MZEA is the sole authority for a township to exercise zoning authority.⁵⁹

Under the MZEA, a township has the authority to adopt a zoning ordinance regulating the use of land and structures in order to, among other things, promote the public health, safety, and welfare. MCL 125.3201. A zoning ordinance is defined as an ordinance which regulates the use of land and buildings according to districts, areas, or locations.⁶⁰ In this case, Long Lake Township's Zoning Ordinance, specifically, Section 19.37 regulates the Maxons' use of their property as a motor vehicle salvage/scraping yard.

In general, enforcement of a zoning ordinance regulation is intended to bring the property into compliance with the ordinance. Although the provisions of a zoning ordinance can be enforced as a criminal misdemeanor against the property owner, modern municipalities tend to avoid such prosecutions as they are both unduly costly and entirely ineffective at remedying the ongoing zoning violations. In a criminal prosecution, at best, the municipality obtains a fine and potentially needlessly incarcerates the individual: both of which actively hinder the property owner's ability

⁵⁸ Of course, we continue to stand by the earlier section of this Brief that no Fourth Amendment violation occurred at all.

⁵⁹ *Maple BPA, Inc v Bloomfield Twp*, 302 Mich App 505, 515; 838 NW2d 915 (2013).

⁶⁰ *Square Lake Hills Condo Ass'n v Bloomfield Twp*, 437 Mich 310, 323, 471 NW2d 321 (1991). (citing, 8 McQuillin, *Municipal Corporations*, § 25.53, p. 137).

to remedy the violation on their property. A zoning ordinance adopted by a municipality will designate in the ordinance whether a violation of the ordinance is a municipal civil infraction or a criminal misdemeanor. Long Lake Township's Zoning Ordinance provides that violations are a municipal civil infraction and also enforceable through injunctive action to abate a violation; it does not provide for a criminal violation.

In 1994, as a result of a package of municipal civil infraction laws, municipalities were allowed to seek enforcement of zoning ordinance violations as municipal civil infractions through district court proceedings and, importantly, to seek district court compliance orders.⁶¹ Most modern zoning ordinances have moved away from the criminal misdemeanor penalty and instead have opted for the municipal civil infraction approach for enforcement. These communities have recognized that to achieve the goals of the zoning ordinance, it is more effective to pursue civil compliance through district or circuit court than to be able to arrest violators and criminally prosecute them. The MZEA incorporated the municipal civil infraction option along with the ability to abate a violation as a nuisance per se.⁶²

MCL 125.3407 provides that:

Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land is liable for maintaining a nuisance per se. The legislative body shall in the zoning ordinance enacted under this act designate the proper official or officials who shall administer and enforce the zoning ordinance and do 1 of the following for each violation of the zoning ordinance:

- (a) Impose a penalty for the violation.
- (b) Designate the violation as a municipal civil infraction and impose a civil fine for the violation.
- (c) Designate the violation as a blight violation and impose a civil fine or other sanction authorized by law. This subdivision applies only to a city that establishes an administrative hearings bureau pursuant to section 4q of the home rule city act, 1909 PA 279, MCL 117.4q. (Emphasis added)

While it must be recognized that some zoning ordinances still allow for violations to be penalized as criminal misdemeanors, they are becoming fewer and fewer with time. Indeed here, the zoning enforcement pursued against the Maxons was a civil abatement action in the Grand

⁶¹ 1994 PA 12; 1994 PA 13; 1994 PA 14; and 1994 PA 24 (a similar provision was incorporated into the Zoning Enabling Act at MCL 125.3407).

⁶² MCL 125.3407.

Traverse Circuit Court. The initial action sought compliance with the Zoning Ordinance to abate the nuisance per se. In addition to the statutory Circuit Court abatement authority, Long Lake Township has elected in its Zoning Ordinance to designate a violation as a municipal civil infraction pursuant to MCL 125.3407(b).⁶³ There is no criminal penalty provision in the Zoning Ordinance. These violations of the Township's Ordinance are per se harmful to the public health, safety, and welfare and require abatement as soon as possible. These actions do not involve any type of forfeiture, but instead seek to compel compliance with the land use regulations. Further, the Township cannot seek the arrest or jailing of the Maxons for their violation of the Zoning Ordinance. In opposition to the intimation of the Maxon's, there is no quasi-criminal effect from the Township's zoning enforcement, nor is there any risk that the abatement action at issue would lead to some type of criminal prosecution based upon the drone photos; this is a purely civil action to protect the public and achieve compliance with land use requirements under the Zoning Ordinance.

Because it is germane to the later discussed analysis under *Pennsylvania Bd of Probation and Parole*, it is appropriate to briefly discuss the informality of zoning municipal civil infraction prosecutions. The goal with all zoning enforcement matters is to gain compliance with the ordinance provisions and to protect the public. Most of the time, enforcement begins with the Zoning Administrator or other designated enforcement official making personal contact with the violator to see if informing them of the violation will cause them to remedy the situation. This can be completely non-adversarial. If unsuccessful however, then the next step normally involves sending a letter to the violator giving them a period of time to achieve compliance. The informal attempts are to seek compliance with the zoning ordinance at as low a cost to the taxpayers as possible. This concept normally carries throughout the process.

If the violation still is not remedied after informal attempts to achieve compliance, then the violator is issued a municipal civil infraction ticket. Sometimes just a fine is sought in an attempt to get the violator to stop the violation. More often than not, however, the municipality will seek a compliance order in the District Court to require compliance with the ordinance. Per court rule, these cases are usually handled through an informal magistrate hearing unless the defendant requests a formal hearing.⁶⁴ The defendant does not have a right to a jury trial, and the municipality can call the defendant as a witness without implicating the right against self-incrimination. These

⁶³ Long Lake Township Zoning Ordinance Section 20.9.

⁶⁴ MCR 4.101(F)(1)(a).

nuisance violations are matters of public health, safety, and welfare and are normally handled quickly and inexpensively by the municipality and the courts. District Courts routinely handle numerous municipal civil infraction citations. The typical penalty is a light or no fine and an order to come into compliance in a set amount of time. Having evidentiary hearings to determine whether the exclusionary rule should suppress evidence is both not required (as this is a civil matter) and incompatible with the informal and flexible nature of these proceedings to abate the nuisance.

In light of the preceding discussion, the following section will analyze the relevant case law. This case law will clearly demonstrate that the drone photos of the Maxons' property in this civil zoning enforcement injunctive action cannot not be suppressed under the exclusionary rule where a Fourth amendment violation exists from use of the drone.⁶⁵

D. THE EXCLUSIONARY RULE DOES NOT APPLY TO CIVIL ZONING ACTIONS.

This zoning enforcement matter is entirely a civil dispute, and established Supreme Court precedent dictates that the application of the exclusionary rule in civil disputes is incredibly limited. The Court of Appeals correctly identified essentially its only application: "forfeiture actions when the thing being forfeited as a result of a criminal prosecution is worth more than the criminal fine that might be assessed."⁶⁶ The Maxon's spend a great deal of time closely analyzing numerous cases holding that the exclusionary rule does not apply in civil cases, carefully dissecting differences between those cases and the instant one. However, the Maxon's have missed the forest for the trees. As the US Supreme Court concisely stated: "we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials."⁶⁷

As previously expressed, the zoning enforcement action in this case is purely a civil action to abate the zoning ordinance nuisance violation regarding the Maxons' illegal salvage/scraping yard. Amici Curiae's search for any case law that would apply the exclusionary rule to this type of zoning enforcement or in any other zoning context was unsuccessful. Controlling case law only applies the exclusionary rule to criminal matters or quasi-criminal matters.

The exclusionary rule is not a constitutional protection, but rather a judicially created remedy to deter law enforcement officers from conducting illegal searches and seizures in violation

⁶⁵ The Amici Curiae still stand by their argument that the drone photographs of the Maxons' property were not acquired by violation of the Maxons' Fourth Amendment right against unreasonable searches without a warrant.

⁶⁶ *Long Lake Twp II* 6.

⁶⁷ *Pennsylvania*, 524 US, 363.

of the Fourth Amendment.⁶⁸ The application of the judicially created exclusionary rule is rooted in a criminal trial context.⁶⁹ *Weeks* only found application in Federal cases. It wasn't until *Mapp v Ohio*, 367 US 643, 660; 81 SCt 1684 (1961), that the United States Supreme Court expanded the exclusionary rule to state criminal trials through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The *Pennsylvania* case provides an excellent review of the application of the exclusionary rule. In *Pennsylvania* the United States Supreme Court explained that:

We have emphasized repeatedly that the governments' use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. Rather, a Fourth Amendment violation is “fully accomplished” by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can “cure the invasion of the defendant's rights which he has already suffered.” The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures. As such, the rule does not “proscribe the introduction of illegally seized evidence in all proceedings or against all persons,” but applies only in contexts “where its remedial objectives are thought most efficaciously served,” (“If ... the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted”). Moreover, because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its “substantial social costs.” *Pennsylvania*, 524 US, at 362, 363 (citations omitted).

Dispositive to the case at bar, the Court in *Pennsylvania* goes on to say that:

Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials. *Pennsylvania*, 524 US, at 363 (emphasis added) (citations omitted).

This case, involving a purely civil zoning enforcement matter with no criminal linkage of any sort, is not the case where there should be a break from all prior precedent applying this judicial rule almost exclusively to criminal matters. Indeed, the United States Supreme Court did not apply the exclusionary rule in the parole violation context where a defendant is actually subject to becoming incarcerated, unlike this case.

As indicated in the above quote, if the exclusion of evidence does not result in “appreciable deterrence,” then its use is unwarranted. In the case of a civil zoning abatement action, the exclusionary rule would have little impact, particularly because the defendant can be called as a

⁶⁸ *Pennsylvania*, 524 US, 362-63.

⁶⁹ See *Weeks v United States*, 232 US 383; 34 SCT 341 (1914).

witness and must testify without a self-incrimination defense.⁷⁰ The facts can be disclosed through the testimony of the defendants. Additionally, in the context of a circuit court case, discovery rules would permit inspection, photographing, and sampling.⁷¹

Further in consideration of the deterrence benefit are the monetary cost of a trespass action or a deprivation of constitutional rights action that can be imposed on the local governmental unit for violations of the law, which can far outweigh the benefit of using the evidence in a civil hearing context to enforce the zoning ordinance. This deterrence is sufficient to prevent willful and flagrant violations of someone's Fourth Amendment rights.

On the other hand, the exclusion of the overhead drone photos of the Maxons' property would preclude consideration of reliable, probative evidence and would impose a significant social cost. As the Court of Appeals in *Long Lake Twp I* noted, the Township had evidence of the zoning violation primarily through the complaints of neighbors and a site inspection.⁷² However, to prove that the Maxons had expanded their salvage/scraping operation in violation of the settlement agreement (which would subject the Maxons to a zoning enforcement action), the Township deemed it necessary to acquire aerial photos, similar to what someone might see on Google Earth or on county-wide, regularly managed aerial maps.

Even though Maxons can be compelled to testify in a municipal civil infraction action, without additional evidence, such as photographs, there would be no way to determine the veracity of their statements. Indeed, Amici Curiae has learned to combat a defendant's inevitable day-of-court statement that the property is presently in compliance with the ordinance by requiring the zoning administrator to bring day-of-court photographs to court. Without current photographs, a defendant's word that the property is in compliance could be given more credibility than it deserves. This also supports the non-application of the exclusionary rule.⁷³

Further Supreme Court precedent supports the notion that civil zoning cases seeking injunctive relief, like this one, are precisely the types of cases *not* suitable for application of the exclusionary rule. "[P]roceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law. This Court has never before accepted costs of this character in applying the exclusionary

⁷⁰ (See US Const Amend V – only applies to a “criminal case”).

⁷¹ MCR 2.310.

⁷² *Long Lake Twp I*, 336 Mich App, 542.

⁷³ See *Pennsylvania*, 524 US, 364, 365.

rule.”⁷⁴ Continuing on this line, the Supreme Court stated: “Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained [...]. On the rare occasions that it has considered costs of this type the Court has firmly indicated that the exclusionary rule does not extend this far.”⁷⁵

The Supreme Court could hardly have described this case more precisely. What the Township seeks is not punishment for past transgressions, but to prevent their continuance or renewal. The costs of excluding this evidence are high: continued, flagrant violations of local zoning law which the Township unquestionably has the right to regulate. It is cases just like this one that the Supreme Court has specifically described as unsuited for the exclusionary rule.

Moreover, the *Pennsylvania* case further supports the non-application of the exclusionary rule in the civil enforcement of zoning as its application would be incompatible with flexible administrative procedures, as discussed above, used in enforcing the zoning ordinance. It could significantly alter the process used with regard to the district court municipal civil infraction action or circuit court abatement. The process would work to the detriment of the public benefit and could bog down townships with added expense, time, and formality. The deterrence benefits of the exclusionary rule do not outweigh these costs.⁷⁶

Other cases cited by the Maxons merit discussion. *Boyd v United States*, 116 US 616, 633-635, 6 S Ct 524, 29 L Ed 746 (1886), overruled in part on other grounds in *Warden, Md Penitentiary v Hayden*, 387 US 294, 87 S Ct 1642, 18 L Ed 2d 782 (1967) discusses civil forfeiture and finds that elements of those proceedings may be quasi-criminal in nature. Again, Long Lake Township’s Zoning Ordinance does not provide for any criminal penalties or forfeiture of any property to the Township. The drone photos are being used to demonstrate to the Court that a nuisance per se exists and that the nuisance must be abated.

The Maxons’ also cite *Kivela v Dep’t of Treasury*, 449 Mich 220, 536 NW2d 498 (1995), which held that the exclusionary rule does not extend to civil tax proceedings. In *Kivela*, law enforcement officers executed a warrant, seizing drugs and financial records documenting sales and purchases of narcotics by Kivela. The warrant was later found to be defective and the criminal drug charge was dismissed. However, the records seized were turned over to the Department of

⁷⁴ *INS v Lopez-Mendoza*, 468 US 1032, 1046 (1984)

⁷⁵ *Id.*

⁷⁶ See *Pennsylvania*, 524 US, 365-367.

Treasury, who issued a jeopardy tax assessment for unpaid taxes on the drug sales. The drug dealer then filed an appeal with the Tax Tribunal, claiming that the illegally seized evidence could not be used in the civil tax case.

The Michigan Supreme Court ultimately held the evidence admissible, finding that two federal circuits “have rejected the application of the exclusionary rule in civil tax proceedings.”⁷⁷ This Honorable Court found that the Michigan Constitution does not provide a greater suppression remedy than federal law.⁷⁸ This Honorable Court further acknowledged that “the United States Supreme Court recognized that the judicially created exclusionary rule is to deter unlawful *police* conduct.”⁷⁹ This case affirms that civil zoning enforcement abatement action is not subject to the exclusionary rule. In the case at bar, there is no involvement of the police and no potential criminal penalties. For cases of this nature, the exclusionary rule is simply inapplicable.

CONCLUSION

For the reasons set forth above, and in concurrence with the arguments contained in the Township’s Supplemental Brief, Amici Curiae respectfully request that this Honorable Court determine that the Township’s conduct in using an unmanned drone to take aerial photographs of the Maxons’ property for use in its zoning enforcement case did not violate the Maxons’ Fourth Amendment rights; and further determine that the exclusionary rule does not apply to this noncriminal zoning dispute.

Dated: September 8, 2023

BAUCKHAM, THALL, SEEBER,
KAUFMAN & KOCHES, P.C.

By: /s/ Robert E. Thall

Robert E. Thall (P46421)
Attorneys for Amici Curiae Michigan
Townships Association and Michigan
Municipal League

⁷⁷ *Kivela*, 449 Mich, 230.

⁷⁸ *Id.*, 234.

⁷⁹ *Id.*, 235.

EXHIBIT A

This content is from the eCFR and is authoritative but unofficial.

Title 14 – Aeronautics and Space

Chapter I – Federal Aviation Administration, Department of Transportation

Subchapter F – Air Traffic and General Operating Rules

RECEIVED by MSC 9/8/2023 7:05:00 PM

Part 107 Small Unmanned Aircraft Systems

Subpart A General

- § 107.1 Applicability.
- § 107.2 Applicability of certification procedures for products and articles.
- § 107.3 Definitions.
- § 107.5 Falsification, reproduction, or alteration.
- § 107.7 Inspection, testing, and demonstration of compliance.
- § 107.9 Safety event reporting.

Subpart B Operating Rules

- § 107.11 Applicability.
- § 107.12 Requirement for a remote pilot certificate with a small UAS rating.
- § 107.13 Registration.
- § 107.15 Condition for safe operation.
- § 107.17 Medical condition.
- § 107.19 Remote pilot in command.
- § 107.21 In-flight emergency.
- § 107.23 Hazardous operation.
- § 107.25 Operation from a moving vehicle or aircraft.
- § 107.27 Alcohol or drugs.
- § 107.29 Operation at night.
- § 107.31 Visual line of sight aircraft operation.
- § 107.33 Visual observer.
- § 107.35 Operation of multiple small unmanned aircraft.
- § 107.36 Carriage of hazardous material.
- § 107.37 Operation near aircraft; right-of-way rules.
- § 107.39 Operation over human beings.
- § 107.41 Operation in certain airspace.
- § 107.43 Operation in the vicinity of airports.
- § 107.45 Operation in prohibited or restricted areas.
- § 107.47 Flight restrictions in the proximity of certain areas designated by notice to airmen.
- § 107.49 Preflight familiarization, inspection, and actions for aircraft operation.
- § 107.51 Operating limitations for small unmanned aircraft.

Subpart C Remote Pilot Certification

- § 107.52 ATC transponder equipment prohibition.
- § 107.53 Automatic Dependent Surveillance-Broadcast (ADS-B) Out prohibition.
- § 107.56 Applicability.
- § 107.57 Offenses involving alcohol or drugs.
- § 107.59 Refusal to submit to an alcohol test or to furnish test results.
- § 107.61 Eligibility.

- § 107.63 Issuance of a remote pilot certificate with a small UAS rating.
 - § 107.64 Temporary certificate.
 - § 107.65 Aeronautical knowledge recency.
 - § 107.67 Knowledge tests: General procedures and passing grades.
 - § 107.69 Knowledge tests: Cheating or other unauthorized conduct.
 - § 107.71 Retesting after failure.
 - § 107.73 Knowledge and training.
 - § 107.74 Small unmanned aircraft system training.
 - § 107.77 Change of name or address.
 - § 107.79 Voluntary surrender of certificate.
- Subpart D Operations Over Human Beings**
- § 107.100 Applicability.
 - § 107.105 Limitations on operations over human beings.
 - § 107.110 Category 1 operations.
 - § 107.115 Category 2 operations: Operating requirements.
 - § 107.120 Category 2 operations: Eligibility of small unmanned aircraft and other applicant requirements.
 - § 107.125 Category 3 operations: Operating requirements.
 - § 107.130 Category 3 operations: Eligibility of small unmanned aircraft and other applicant requirements.
 - § 107.135 Labeling by remote pilot in command for Category 2 and 3 operations.
 - § 107.140 Category 4 operations.
 - § 107.145 Operations over moving vehicles.
 - § 107.150 Variable mode and variable configuration of small unmanned aircraft systems.
 - § 107.155 Means of compliance.
 - § 107.160 Declaration of compliance.
 - § 107.165 Record retention.
- Subpart E Waivers**
- § 107.200 Waiver policy and requirements.
 - § 107.205 List of regulations subject to waiver.

PART 107—SMALL UNMANNED AIRCRAFT SYSTEMS

Authority: 49 U.S.C. 106(f), 40101 note, 40103(b), 44701(a)(5), 46105(c), 46110, 44807.

Source: Docket FAA–2015–0150, Amdt. 107–1, 81 FR 42209, June 28, 2016, unless otherwise noted.

Subpart A—General

§ 107.1 Applicability.

- (a) Except as provided in paragraph (b) of this section, this part applies to the registration, airman certification, and operation of civil small unmanned aircraft systems within the United States. This part also applies to the eligibility of civil small unmanned aircraft systems to operate over human beings in the United States.
- (b) This part does not apply to the following:
 - (1) Air carrier operations;
 - (2) Any aircraft subject to the provisions of 49 U.S.C. 44809;
 - (3) Any operation that the holder of an exemption under section 333 of Public Law 112–95 or 49 U.S.C. 44807 elects to conduct pursuant to the exemption, unless otherwise specified in the exemption; or
 - (4) Any operation that a person elects to conduct under part 91 of this chapter with a small unmanned aircraft system that has been issued an airworthiness certificate.

[Amdt. No. 107–8, 86 FR 4381, Jan. 15, 2021]

§ 107.2 Applicability of certification procedures for products and articles.

The provisions of part 21 of this chapter do not apply to small unmanned aircraft systems operated under this part unless the small unmanned aircraft system will operate over human beings in accordance with § 107.140.

[Amdt. No. 107–8, 86 FR 4381, Jan. 15, 2021]

§ 107.3 Definitions.

The following definitions apply to this part. If there is a conflict between the definitions of this part and definitions specified in § 1.1 of this chapter, the definitions in this part control for purposes of this part:

Control station means an interface used by the remote pilot to control the flight path of the small unmanned aircraft.

Corrective lenses means spectacles or contact lenses.

Declaration of compliance means a record submitted to the FAA that certifies the small unmanned aircraft conforms to the Category 2 or Category 3 requirements under subpart D of this part.

Small unmanned aircraft means an unmanned aircraft weighing less than 55 pounds on takeoff, including everything that is on board or otherwise attached to the aircraft.

Small unmanned aircraft system (small UAS) means a small unmanned aircraft and its associated elements (including communication links and the components that control the small unmanned aircraft) that are required for the safe and efficient operation of the small unmanned aircraft in the national airspace system.

Unmanned aircraft means an aircraft operated without the possibility of direct human intervention from within or on the aircraft.

Visual observer means a person who is designated by the remote pilot in command to assist the remote pilot in command and the person manipulating the flight controls of the small UAS to see and avoid other air traffic or objects aloft or on the ground.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016, as amended by Amdt. No. 107-8, 86 FR 4381, Jan. 15, 2021]

§ 107.5 Falsification, reproduction, or alteration.

- (a) No person may make or cause to be made—
 - (1) Any fraudulent or intentionally false record or report that is required to be made, kept, or used to show compliance with any requirement under this part.
 - (2) Any reproduction or alteration, for fraudulent purpose, of any certificate, rating, authorization, record or report under this part.
- (b) The commission by any person of an act prohibited under paragraph (a) of this section is a basis for any of the following:
 - (1) Denial of an application for a remote pilot certificate or a certificate of waiver;
 - (2) Denial of a declaration of compliance;
 - (3) Suspension or revocation of any certificate, waiver, or declaration of compliance issued or accepted by the Administrator under this part and held by that person; or
 - (4) A civil penalty.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016, as amended by Amdt. No. 107-8, 86 FR 4381, Jan. 15, 2021]

§ 107.7 Inspection, testing, and demonstration of compliance.

- (a) A remote pilot in command, owner, or person manipulating the flight controls of a small unmanned aircraft system must—
 - (1) Have in that person's physical possession and readily accessible the remote pilot certificate with a small UAS rating and identification when exercising the privileges of that remote pilot certificate.
 - (2) Present his or her remote pilot certificate with a small UAS rating and identification that contains the information listed at § 107.67(b)(1) through (3) for inspection upon a request from—
 - (i) The Administrator;
 - (ii) An authorized representative of the National Transportation Safety Board;
 - (iii) Any Federal, State, or local law enforcement officer; or
 - (iv) An authorized representative of the Transportation Security Administration.
 - (3) Make available, upon request, to the Administrator any document, record, or report required to be kept under the regulations of this chapter.

- (b) The remote pilot in command, visual observer, owner, operator, or person manipulating the flight controls of a small unmanned aircraft system must, upon request, allow the Administrator to make any test or inspection of the small unmanned aircraft system, the remote pilot in command, the person manipulating the flight controls of a small unmanned aircraft system, and, if applicable, the visual observer to determine compliance with this part.
- (c) Any person holding an FAA-accepted declaration of compliance under subpart D of this part must, upon request, make available to the Administrator:
 - (1) The declaration of compliance required under subpart D of this part; and
 - (2) Any other document, record, or report required to be kept under the regulations of this chapter.
- (d) Any person holding an FAA-accepted declaration of compliance under subpart D of this part must, upon request, allow the Administrator to inspect its facilities, technical data, and any manufactured small UAS and witness any tests necessary to determine compliance with that subpart.

[Amdt. No. 107-8, 86 FR 4381, Jan. 15, 2021]

§ 107.9 Safety event reporting.

No later than 10 calendar days after an operation that meets the criteria of either paragraph (a) or (b) of this section, a remote pilot in command must report to the FAA, in a manner acceptable to the Administrator, any operation of the small unmanned aircraft involving at least:

- (a) Serious injury to any person or any loss of consciousness; or
- (b) Damage to any property, other than the small unmanned aircraft, unless one of the following conditions is satisfied:
 - (1) The cost of repair (including materials and labor) does not exceed \$500; or
 - (2) The fair market value of the property does not exceed \$500 in the event of total loss.

Subpart B—Operating Rules

§ 107.11 Applicability.

This subpart applies to the operation of all civil small unmanned aircraft systems subject to this part.

§ 107.12 Requirement for a remote pilot certificate with a small UAS rating.

- (a) Except as provided in paragraph (c) of this section, no person may manipulate the flight controls of a small unmanned aircraft system unless:
 - (1) That person has a remote pilot certificate with a small UAS rating issued pursuant to subpart C of this part and satisfies the requirements of § 107.65; or
 - (2) That person is under the direct supervision of a remote pilot in command and the remote pilot in command has the ability to immediately take direct control of the flight of the small unmanned aircraft.

- (b) Except as provided in paragraph (c) of this section, no person may act as a remote pilot in command unless that person has a remote pilot certificate with a small UAS rating issued pursuant to Subpart C of this part and satisfies the requirements of § 107.65.
- (c) The Administrator may, consistent with international standards, authorize an airman to operate a civil foreign-registered small unmanned aircraft without an FAA-issued remote pilot certificate with a small UAS rating.

§ 107.13 Registration.

A person operating a civil small unmanned aircraft system for purposes of flight must comply with the provisions of § 91.203(a)(2) of this chapter.

§ 107.15 Condition for safe operation.

- (a) No person may operate a civil small unmanned aircraft system unless it is in a condition for safe operation. Prior to each flight, the remote pilot in command must check the small unmanned aircraft system to determine whether it is in a condition for safe operation.
- (b) No person may continue flight of the small unmanned aircraft when he or she knows or has reason to know that the small unmanned aircraft system is no longer in a condition for safe operation.

§ 107.17 Medical condition.

No person may manipulate the flight controls of a small unmanned aircraft system or act as a remote pilot in command, visual observer, or direct participant in the operation of the small unmanned aircraft if he or she knows or has reason to know that he or she has a physical or mental condition that would interfere with the safe operation of the small unmanned aircraft system.

§ 107.19 Remote pilot in command.

- (a) A remote pilot in command must be designated before or during the flight of the small unmanned aircraft.
- (b) The remote pilot in command is directly responsible for and is the final authority as to the operation of the small unmanned aircraft system.
- (c) The remote pilot in command must ensure that the small unmanned aircraft will pose no undue hazard to other people, other aircraft, or other property in the event of a loss of control of the small unmanned aircraft for any reason.
- (d) The remote pilot in command must ensure that the small UAS operation complies with all applicable regulations of this chapter.
- (e) The remote pilot in command must have the ability to direct the small unmanned aircraft to ensure compliance with the applicable provisions of this chapter.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016, as amended by Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021]

§ 107.21 In-flight emergency.

- (a) In an in-flight emergency requiring immediate action, the remote pilot in command may deviate from any rule of this part to the extent necessary to meet that emergency.

- (b) Each remote pilot in command who deviates from a rule under paragraph (a) of this section must, upon request of the Administrator, send a written report of that deviation to the Administrator.

§ 107.23 Hazardous operation.

No person may:

- (a) Operate a small unmanned aircraft system in a careless or reckless manner so as to endanger the life or property of another; or
- (b) Allow an object to be dropped from a small unmanned aircraft in a manner that creates an undue hazard to persons or property.

§ 107.25 Operation from a moving vehicle or aircraft.

No person may operate a small unmanned aircraft system—

- (a) From a moving aircraft; or
- (b) From a moving land or water-borne vehicle unless the small unmanned aircraft is flown over a sparsely populated area and is not transporting another person's property for compensation or hire.

§ 107.27 Alcohol or drugs.

A person manipulating the flight controls of a small unmanned aircraft system or acting as a remote pilot in command or visual observer must comply with the provisions of §§ 91.17 and 91.19 of this chapter.

§ 107.29 Operation at night.

- (a) Except as provided in paragraph (d) of this section, no person may operate a small unmanned aircraft system at night unless—
 - (1) The remote pilot in command of the small unmanned aircraft has completed an initial knowledge test or training, as applicable, under § 107.65 after April 6, 2021; and
 - (2) The small unmanned aircraft has lighted anti-collision lighting visible for at least 3 statute miles that has a flash rate sufficient to avoid a collision. The remote pilot in command may reduce the intensity of, but may not extinguish, the anti-collision lighting if he or she determines that, because of operating conditions, it would be in the interest of safety to do so.
- (b) No person may operate a small unmanned aircraft system during periods of civil twilight unless the small unmanned aircraft has lighted anti-collision lighting visible for at least 3 statute miles that has a flash rate sufficient to avoid a collision. The remote pilot in command may reduce the intensity of, but may not extinguish, the anti-collision lighting if he or she determines that, because of operating conditions, it would be in the interest of safety to do so.
- (c) For purposes of paragraph (b) of this section, civil twilight refers to the following:
 - (1) Except for Alaska, a period of time that begins 30 minutes before official sunrise and ends at official sunrise;
 - (2) Except for Alaska, a period of time that begins at official sunset and ends 30 minutes after official sunset; and
 - (3) In Alaska, the period of civil twilight as defined in the Air Almanac.

- (d) After May 17, 2021, no person may operate a small unmanned aircraft system at night in accordance with a certificate of waiver issued prior to April 21, 2021 under § 107.200. The certificates of waiver issued prior to March 16, 2021 under § 107.200 that authorize deviation from § 107.29 terminate on May 17, 2021.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016, as amended by Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021; 86 FR 13631, Mar. 10, 2020]

§ 107.31 Visual line of sight aircraft operation.

- (a) With vision that is unaided by any device other than corrective lenses, the remote pilot in command, the visual observer (if one is used), and the person manipulating the flight control of the small unmanned aircraft system must be able to see the unmanned aircraft throughout the entire flight in order to:
 - (1) Know the unmanned aircraft's location;
 - (2) Determine the unmanned aircraft's attitude, altitude, and direction of flight;
 - (3) Observe the airspace for other air traffic or hazards; and
 - (4) Determine that the unmanned aircraft does not endanger the life or property of another.
- (b) Throughout the entire flight of the small unmanned aircraft, the ability described in paragraph (a) of this section must be exercised by either:
 - (1) The remote pilot in command and the person manipulating the flight controls of the small unmanned aircraft system; or
 - (2) A visual observer.

§ 107.33 Visual observer.

If a visual observer is used during the aircraft operation, all of the following requirements must be met:

- (a) The remote pilot in command, the person manipulating the flight controls of the small unmanned aircraft system, and the visual observer must maintain effective communication with each other at all times.
- (b) The remote pilot in command must ensure that the visual observer is able to see the unmanned aircraft in the manner specified in § 107.31.
- (c) The remote pilot in command, the person manipulating the flight controls of the small unmanned aircraft system, and the visual observer must coordinate to do the following:
 - (1) Scan the airspace where the small unmanned aircraft is operating for any potential collision hazard; and
 - (2) Maintain awareness of the position of the small unmanned aircraft through direct visual observation.

§ 107.35 Operation of multiple small unmanned aircraft.

A person may not manipulate flight controls or act as a remote pilot in command or visual observer in the operation of more than one unmanned aircraft at the same time.

[Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021]

§ 107.36 Carriage of hazardous material.

A small unmanned aircraft may not carry hazardous material. For purposes of this section, the term hazardous material is defined in 49 CFR 171.8.

§ 107.37 Operation near aircraft; right-of-way rules.

- (a) Each small unmanned aircraft must yield the right of way to all aircraft, airborne vehicles, and launch and reentry vehicles. Yielding the right of way means that the small unmanned aircraft must give way to the aircraft or vehicle and may not pass over, under, or ahead of it unless well clear.
- (b) No person may operate a small unmanned aircraft so close to another aircraft as to create a collision hazard.

§ 107.39 Operation over human beings.

No person may operate a small unmanned aircraft over a human being unless—

- (a) That human being is directly participating in the operation of the small unmanned aircraft;
- (b) That human being is located under a covered structure or inside a stationary vehicle that can provide reasonable protection from a falling small unmanned aircraft; or
- (c) The operation meets the requirements of at least one of the operational categories specified in subpart D of this part.

[Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021]

§ 107.41 Operation in certain airspace.

No person may operate a small unmanned aircraft in Class B, Class C, or Class D airspace or within the lateral boundaries of the surface area of Class E airspace designated for an airport unless that person has prior authorization from Air Traffic Control (ATC).

§ 107.43 Operation in the vicinity of airports.

No person may operate a small unmanned aircraft in a manner that interferes with operations and traffic patterns at any airport, heliport, or seaplane base.

§ 107.45 Operation in prohibited or restricted areas.

No person may operate a small unmanned aircraft in prohibited or restricted areas unless that person has permission from the using or controlling agency, as appropriate.

§ 107.47 Flight restrictions in the proximity of certain areas designated by notice to airmen.

A person acting as a remote pilot in command must comply with the provisions of §§ 91.137 through 91.145 and 99.7 of this chapter.

§ 107.49 Preflight familiarization, inspection, and actions for aircraft operation.

Prior to flight, the remote pilot in command must:

- (a) Assess the operating environment, considering risks to persons and property in the immediate vicinity both on the surface and in the air. This assessment must include:
 - (1) Local weather conditions;
 - (2) Local airspace and any flight restrictions;
 - (3) The location of persons and property on the surface; and
 - (4) Other ground hazards.
- (b) Ensure that all persons directly participating in the small unmanned aircraft operation are informed about the operating conditions, emergency procedures, contingency procedures, roles and responsibilities, and potential hazards;
- (c) Ensure that all control links between ground control station and the small unmanned aircraft are working properly;
- (d) If the small unmanned aircraft is powered, ensure that there is enough available power for the small unmanned aircraft system to operate for the intended operational time;
- (e) Ensure that any object attached or carried by the small unmanned aircraft is secure and does not adversely affect the flight characteristics or controllability of the aircraft; and
- (f) If the operation will be conducted over human beings under subpart D of this part, ensure that the aircraft meets the requirements of § 107.110, § 107.120(a), § 107.130(a), or § 107.140, as applicable.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016, as amended by Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021]

§ 107.51 Operating limitations for small unmanned aircraft.

A remote pilot in command and the person manipulating the flight controls of the small unmanned aircraft system must comply with all of the following operating limitations when operating a small unmanned aircraft system:

- (a) The groundspeed of the small unmanned aircraft may not exceed 87 knots (100 miles per hour).
- (b) The altitude of the small unmanned aircraft cannot be higher than 400 feet above ground level, unless the small unmanned aircraft:
 - (1) Is flown within a 400-foot radius of a structure; and
 - (2) Does not fly higher than 400 feet above the structure's immediate uppermost limit.
- (c) The minimum flight visibility, as observed from the location of the control station must be no less than 3 statute miles. For purposes of this section, flight visibility means the average slant distance from the control station at which prominent unlighted objects may be seen and identified by day and prominent lighted objects may be seen and identified by night.
- (d) The minimum distance of the small unmanned aircraft from clouds must be no less than:
 - (1) 500 feet below the cloud; and
 - (2) 2,000 feet horizontally from the cloud.

Subpart C—Remote Pilot Certification

§ 107.52 ATC transponder equipment prohibition.

Unless otherwise authorized by the Administrator, no person may operate a small unmanned aircraft system under this part with a transponder on.

[Amdt. No. 107-7, 86 FR 4513, Jan. 15, 2021]

§ 107.53 Automatic Dependent Surveillance-Broadcast (ADS-B) Out prohibition.

Unless otherwise authorized by the Administrator, no person may operate a small unmanned aircraft system under this part with ADS-B Out equipment in transmit mode.

[Amdt. No. 107-7, 86 FR 4513, Jan. 15, 2021]

§ 107.56 Applicability.

This subpart prescribes the requirements for issuing a remote pilot certificate with a small UAS rating.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016. Redesignated by Amdt. No. 107-7, 86 FR 4513, Jan. 15, 2021]

§ 107.57 Offenses involving alcohol or drugs.

- (a) A conviction for the violation of any Federal or State statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marijuana, or depressant or stimulant drugs or substances is grounds for:
 - (1) Denial of an application for a remote pilot certificate with a small UAS rating for a period of up to 1 year after the date of final conviction; or
 - (2) Suspension or revocation of a remote pilot certificate with a small UAS rating.
- (b) Committing an act prohibited by § 91.17(a) or § 91.19(a) of this chapter is grounds for:
 - (1) Denial of an application for a remote pilot certificate with a small UAS rating for a period of up to 1 year after the date of that act; or
 - (2) Suspension or revocation of a remote pilot certificate with a small UAS rating.

§ 107.59 Refusal to submit to an alcohol test or to furnish test results.

A refusal to submit to a test to indicate the percentage by weight of alcohol in the blood, when requested by a law enforcement officer in accordance with § 91.17(c) of this chapter, or a refusal to furnish or authorize the release of the test results requested by the Administrator in accordance with § 91.17(c) or (d) of this chapter, is grounds for:

- (a) Denial of an application for a remote pilot certificate with a small UAS rating for a period of up to 1 year after the date of that refusal; or
- (b) Suspension or revocation of a remote pilot certificate with a small UAS rating.

§ 107.61 Eligibility.

Subject to the provisions of §§ 107.57 and 107.59, in order to be eligible for a remote pilot certificate with a small UAS rating under this subpart, a person must:

- (a) Be at least 16 years of age;
- (b) Be able to read, speak, write, and understand the English language. If the applicant is unable to meet one of these requirements due to medical reasons, the FAA may place such operating limitations on that applicant's certificate as are necessary for the safe operation of the small unmanned aircraft;
- (c) Not know or have reason to know that he or she has a physical or mental condition that would interfere with the safe operation of a small unmanned aircraft system; and
- (d) Demonstrate aeronautical knowledge by satisfying one of the following conditions, in a manner acceptable to the Administrator:
 - (1) Pass an initial aeronautical knowledge test covering the areas of knowledge specified in § 107.73; or
 - (2) If a person holds a pilot certificate (other than a student pilot certificate) issued under part 61 of this chapter and meets the flight review requirements specified in § 61.56, complete training covering the areas of knowledge specified in § 107.74.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016, as amended by Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021]

§ 107.63 Issuance of a remote pilot certificate with a small UAS rating.

An applicant for a remote pilot certificate with a small UAS rating under this subpart must make the application in a form and manner acceptable to the Administrator.

- (a) The application must include either:
 - (1) Evidence showing that the applicant passed an initial aeronautical knowledge test. If applying using a paper application, this evidence must be an airman knowledge test report showing passage of the knowledge test; or
 - (2) If a person holds a pilot certificate (other than a student pilot certificate) issued under part 61 of this chapter and meets the flight review requirements specified in § 61.56, a certificate of completion of an initial training course under this part that covers the areas of knowledge specified in § 107.74.
- (b) If the application is being made pursuant to paragraph (a)(2) of this section:
 - (1) The application must be submitted to the responsible Flight Standards office, a designated pilot examiner, an airman certification representative for a pilot school, a certificated flight instructor, or other person authorized by the Administrator;
 - (2) The person accepting the application submission must verify the identity of the applicant in a manner acceptable to the Administrator; and
 - (3) The person making the application must, by logbook endorsement or other manner acceptable to the Administrator, show the applicant meets the flight review requirements specified in § 61.56 of this chapter.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016, as amended by Docket FAA-2018-0119, Amdt. 107-2, 83 FR 9172, Mar. 5, 2018; Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021]]

§ 107.64 Temporary certificate.

- (a) A temporary remote pilot certificate with a small UAS rating is issued for up to 120 calendar days, at which time a permanent certificate will be issued to a person whom the Administrator finds qualified under this part.
- (b) A temporary remote pilot certificate with a small UAS rating expires:
 - (1) On the expiration date shown on the certificate;
 - (2) Upon receipt of the permanent certificate; or
 - (3) Upon receipt of a notice that the certificate sought is denied or revoked.

§ 107.65 Aeronautical knowledge recency.

A person may not exercise the privileges of a remote pilot in command with small UAS rating unless that person has accomplished one of the following in a manner acceptable to the Administrator within the previous 24 calendar months:

- (a) Passed an initial aeronautical knowledge test covering the areas of knowledge specified in § 107.73;
- (b) Completed recurrent training covering the areas of knowledge specified in § 107.73; or
- (c) If a person holds a pilot certificate (other than a student pilot certificate) issued under part 61 of this chapter and meets the flight review requirements specified in § 61.56, completed training covering the areas of knowledge specified in § 107.74.
- (d) A person who has passed a recurrent aeronautical knowledge test in a manner acceptable to the Administrator or who has satisfied the training requirement of paragraph (c) of this section prior to April 6, 2021 within the previous 24 calendar months is considered to be in compliance with the requirement of paragraph (b) or (c) of this section, as applicable.

[Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021; 86 FR 13631, Mar. 10, 2021]

§ 107.67 Knowledge tests: General procedures and passing grades.

- (a) Knowledge tests prescribed by or under this part are given by persons and in the manner designated by the Administrator.
- (b) An applicant for a knowledge test must have proper identification at the time of application that contains the applicant's:
 - (1) Photograph;
 - (2) Signature;
 - (3) Date of birth, which shows the applicant meets or will meet the age requirements of this part for the certificate and rating sought before the expiration date of the airman knowledge test report; and
 - (4) Permanent mailing address. If the applicant's permanent mailing address is a post office box number, then the applicant must also provide a current residential address.

- (c) The minimum passing grade for the knowledge test will be specified by the Administrator.

§ 107.69 Knowledge tests: Cheating or other unauthorized conduct.

- (a) An applicant for a knowledge test may not:
- (1) Copy or intentionally remove any knowledge test;
 - (2) Give to another applicant or receive from another applicant any part or copy of a knowledge test;
 - (3) Give or receive assistance on a knowledge test during the period that test is being given;
 - (4) Take any part of a knowledge test on behalf of another person;
 - (5) Be represented by, or represent, another person for a knowledge test;
 - (6) Use any material or aid during the period that the test is being given, unless specifically authorized to do so by the Administrator; and
 - (7) Intentionally cause, assist, or participate in any act prohibited by this paragraph.
- (b) An applicant who the Administrator finds has committed an act prohibited by paragraph (a) of this section is prohibited, for 1 year after the date of committing that act, from:
- (1) Applying for any certificate, rating, or authorization issued under this chapter; and
 - (2) Applying for and taking any test under this chapter.
- (c) Any certificate or rating held by an applicant may be suspended or revoked if the Administrator finds that person has committed an act prohibited by paragraph (a) of this section.

§ 107.71 Retesting after failure.

An applicant for a knowledge test who fails that test may not reapply for the test for 14 calendar days after failing the test.

§ 107.73 Knowledge and training.

An initial aeronautical knowledge test and recurrent training covers the following areas of knowledge:

- (a) Applicable regulations relating to small unmanned aircraft system rating privileges, limitations, and flight operation;
- (b) Airspace classification, operating requirements, and flight restrictions affecting small unmanned aircraft operation;
- (c) Aviation weather sources and effects of weather on small unmanned aircraft performance;
- (d) Small unmanned aircraft loading;
- (e) Emergency procedures;
- (f) Crew resource management;
- (g) Radio communication procedures;
- (h) Determining the performance of the small unmanned aircraft;
- (i) Physiological effects of drugs and alcohol;

- (j) Aeronautical decision-making and judgment;
- (k) Airport operations;
- (l) Maintenance and preflight inspection procedures; and
- (m) Operation at night.

[Amdt. No. 107-8, 86 FR 4383, Jan. 15, 2021]

§ 107.74 Small unmanned aircraft system training.

Training for pilots who hold a pilot certificate (other than a student pilot certificate) issued under part 61 of this chapter and meet the flight review requirements specified in § 61.56 covers the following areas of knowledge:

- (a) Applicable regulations relating to small unmanned aircraft system rating privileges, limitations, and flight operation;
- (b) Effects of weather on small unmanned aircraft performance;
- (c) Small unmanned aircraft loading;
- (d) Emergency procedures;
- (e) Crew resource management;
- (f) Determining the performance of the small unmanned aircraft;
- (g) Maintenance and preflight inspection procedures; and
- (h) Operation at night.

[Amdt. No. 107-8, 86 FR 4383, Jan. 15, 2021]

§ 107.77 Change of name or address.

- (a) **Change of name.** An application to change the name on a certificate issued under this subpart must be accompanied by the applicant's:
 - (1) Remote pilot certificate with small UAS rating; and
 - (2) A copy of the marriage license, court order, or other document verifying the name change.
- (b) The documents in paragraph (a) of this section will be returned to the applicant after inspection.
- (c) **Change of address.** The holder of a remote pilot certificate with small UAS rating issued under this subpart who has made a change in permanent mailing address may not, after 30 days from that date, exercise the privileges of the certificate unless the holder has notified the FAA of the change in address using one of the following methods:
 - (1) By letter to the FAA Airman Certification Branch, P.O. Box 25082, Oklahoma City, OK 73125 providing the new permanent mailing address, or if the permanent mailing address includes a post office box number, then the holder's current residential address; or

- (2) By using the FAA Web site portal at *www.faa.gov* providing the new permanent mailing address, or if the permanent mailing address includes a post office box number, then the holder's current residential address.

§ 107.79 Voluntary surrender of certificate.

- (a) The holder of a certificate issued under this subpart may voluntarily surrender it for cancellation.
- (b) Any request made under paragraph (a) of this section must include the following signed statement or its equivalent: "I voluntarily surrender my remote pilot certificate with a small UAS rating for cancellation. This request is made for my own reasons, with full knowledge that my certificate will not be reissued to me unless I again complete the requirements specified in §§ 107.61 and 107.63."

Subpart D—Operations Over Human Beings

Source: Amdt. No. 107–8, 86 FR 4382, Jan. 15, 2021

§ 107.100 Applicability.

This subpart prescribes the eligibility and operating requirements for civil small unmanned aircraft to operate over human beings or over moving vehicles in the United States, in addition to those operations permitted by § 107.39(a) and (b).

§ 107.105 Limitations on operations over human beings.

Except as provided in §§ 107.39(a) and (b) and 107.145, a remote pilot in command may conduct operations over human beings only in accordance with the following, as applicable: § 107.110 for Category 1 operations; §§ 107.115 and 107.120 for Category 2 operations; §§ 107.125 and 107.130 for Category 3 operations; or § 107.140 for Category 4 operations.

§ 107.110 Category 1 operations.

To conduct Category 1 operations—

- (a) A remote pilot in command must use a small unmanned aircraft that—
 - (1) Weighs 0.55 pounds or less on takeoff and throughout the duration of each operation under Category 1, including everything that is on board or otherwise attached to the aircraft; and
 - (2) Does not contain any exposed rotating parts that would lacerate human skin upon impact with a human being.
- (b) No remote pilot in command may operate a small unmanned aircraft in sustained flight over open-air assemblies of human beings unless the operation meets the requirements of either § 89.110 or § 89.115(a) of this chapter.

[Amdt. No. 107–8, 86 FR 4382, Jan. 15, 2021, as amended by 86 FR 62473, Nov. 10, 2021]

§ 107.115 Category 2 operations: Operating requirements.

To conduct Category 2 operations—

- (a) A remote pilot in command must use a small unmanned aircraft that—
 - (1) Is eligible for Category 2 operations pursuant to § 107.120(a);
 - (2) Is listed on an FAA-accepted declaration of compliance as eligible for Category 2 operations in accordance with § 107.160; and
 - (3) Is labeled as eligible to conduct Category 2 operations in accordance with § 107.120(b)(1).
- (b) No remote pilot in command may operate a small unmanned aircraft in sustained flight over open-air assemblies of human beings unless the operation meets the requirements of either § 89.110 or § 89.115(a) of this chapter.

§ 107.120 Category 2 operations: Eligibility of small unmanned aircraft and other applicant requirements.

- (a) To be eligible for use in Category 2 operations, the small unmanned aircraft must be designed, produced, or modified such that it—
 - (1) Will not cause injury to a human being that is equivalent to or greater than the severity of injury caused by a transfer of 11 foot-pounds of kinetic energy upon impact from a rigid object;
 - (2) Does not contain any exposed rotating parts that would lacerate human skin upon impact with a human being; and
 - (3) Does not contain any safety defects.
- (b) The applicant for a declaration of compliance for a small unmanned aircraft that is eligible for use in Category 2 operations in accordance with paragraph (a) of this section, must meet all of the following requirements for the applicant's unmanned aircraft to be used in Category 2 operations:
 - (1) Display a label on the small unmanned aircraft indicating eligibility to conduct Category 2 operations. The label must be in English and be legible, prominent, and permanently affixed to the small unmanned aircraft.
 - (2) Have remote pilot operating instructions that apply to the operation of the small unmanned aircraft system. The applicant for a declaration of compliance must make available these instructions upon sale or transfer of the aircraft or use of the aircraft by someone other than the applicant who submitted a declaration of compliance pursuant to § 107.160. Such instructions must address, at a minimum—
 - (i) A system description that includes the required small unmanned aircraft system components, any system limitations, and the declared category or categories of operation;
 - (ii) Modifications that will not change the ability of the small unmanned aircraft system to meet the requirements for the category or categories of operation the small unmanned aircraft system is eligible to conduct; and
 - (iii) Instructions for how to verify and change the mode or configuration of the small unmanned aircraft system, if they are variable.

- (3) Maintain a product support and notification process. The applicant for a declaration of compliance must maintain product support and notification procedures to notify the public and the FAA of—
 - (i) Any defect or condition that causes the small unmanned aircraft to no longer meet the requirements of this subpart; and
 - (ii) Any identified safety defect that causes the small unmanned aircraft to exceed a low probability of casualty.

§ 107.125 Category 3 operations: Operating requirements.

To conduct Category 3 operations, a remote pilot in command—

- (a) Must use a small unmanned aircraft that—
 - (1) Is eligible for Category 3 operations pursuant to § 107.130(a);
 - (2) Is listed on an FAA-accepted declaration of compliance as eligible for Category 3 operations in accordance with § 107.160; and
 - (3) Is labeled as eligible for Category 3 operations in accordance with § 107.130(b)(1);
- (b) Must not operate the small unmanned aircraft over open-air assemblies of human beings; and
- (c) May only operate the small unmanned aircraft above any human being if operation meets one of the following conditions:
 - (1) The operation is within or over a closed- or restricted-access site and all human beings located within the closed- or restricted-access site must be on notice that a small unmanned aircraft may fly over them; or
 - (2) The small unmanned aircraft does not maintain sustained flight over any human being unless that human being is—
 - (i) Directly participating in the operation of the small unmanned aircraft; or
 - (ii) Located under a covered structure or inside a stationary vehicle that can provide reasonable protection from a falling small unmanned aircraft.

[Amdt. No. 107-8, 86 FR 4382, Jan. 15, 2021, as amended by 86 FR 62473, Nov. 10, 2021]

§ 107.130 Category 3 operations: Eligibility of small unmanned aircraft and other applicant requirements.

- (a) To be eligible for use in Category 3 operations, the small unmanned aircraft must be designed, produced, or modified such that it—
 - (1) Will not cause injury to a human being that is equivalent to or greater than the severity of the injury caused by a transfer of 25 foot-pounds of kinetic energy upon impact from a rigid object;
 - (2) Does not contain any exposed rotating parts that would lacerate human skin upon impact with a human being; and
 - (3) Does not contain any safety defects.

- (b) The applicant for a declaration of compliance for a small unmanned aircraft that is eligible for use in Category 3 operations in accordance with paragraph (a) of this section, must meet all of the following requirements for the applicant's small unmanned aircraft to be used in Category 3 operations:
- (1) Display a label on the small unmanned aircraft indicating eligibility to conduct Category 3 operations. The label must be in English and be legible, prominent, and permanently affixed to the small unmanned aircraft.
 - (2) Have remote pilot operating instructions that apply to the operation of the small unmanned aircraft system. The applicant for a declaration of compliance must make available these instructions upon sale or transfer of the aircraft or use of the aircraft by someone other than the applicant who submitted a declaration of compliance pursuant to § 107.160. Such instructions must address, at a minimum—
 - (i) A system description that includes the required small unmanned aircraft system components, any system limitations, and the declared category or categories of operation;
 - (ii) Modifications that will not change the ability of the small unmanned aircraft system to meet the requirements for the category or categories of operation the small unmanned aircraft system is eligible to conduct; and
 - (iii) Instructions for how to verify and change the mode or configuration of the small unmanned aircraft system, if they are variable.
 - (3) Maintain a product support and notification process. The applicant for a declaration of compliance must maintain product support and notification procedures to notify the public and the FAA of—
 - (i) Any defect or condition that causes the small unmanned aircraft to no longer meet the requirements of this subpart; and
 - (ii) Any identified safety defect that causes the small unmanned aircraft to exceed a low probability of fatality.

§ 107.135 Labeling by remote pilot in command for Category 2 and 3 operations.

If a Category 2 or Category 3 label affixed to a small unmanned aircraft is damaged, destroyed, or missing, a remote pilot in command must label the aircraft in English such that the label is legible, prominent, and will remain on the small unmanned aircraft for the duration of the operation before conducting operations over human beings. The label must correctly identify the category or categories of operation over human beings that the small unmanned aircraft is qualified to conduct in accordance with this subpart.

§ 107.140 Category 4 operations.

- (a) *Remote pilot in command requirements.* To conduct Category 4 operations—
- (1) A remote pilot in command—
 - (i) Must use a small unmanned aircraft that is eligible for Category 4 operations pursuant to paragraph (b) of this section; and
 - (ii) Must operate the small unmanned aircraft in accordance with all operating limitations that apply to the small unmanned aircraft, as specified by the Administrator.

- (2) No remote pilot in command may operate a small unmanned aircraft in sustained flight over open-air assemblies of human beings unless the operation meets the requirements of either § 89.110 or § 89.115(a) of this chapter.
- (b) **Small unmanned aircraft requirements for Category 4.** To be eligible to operate over human beings under this section, the small unmanned aircraft must—
 - (1) Have an airworthiness certificate issued under part 21 of this chapter.
 - (2) Be operated in accordance with the operating limitations specified in the approved Flight Manual or as otherwise specified by the Administrator. The operating limitations must not prohibit operations over human beings.
 - (3) Have maintenance, preventive maintenance, alterations, or inspections performed in accordance with paragraph (c)(1) of this section.
- (c) **Maintenance requirements for Category 4.** The owner must (unless the owner enters into an agreement with an operator to meet the requirements of this paragraph (c), then the operator must) meet the requirements of this paragraph (c):
 - (1) Ensure the person performing any maintenance, preventive maintenance, alterations, or inspections:
 - (i) Uses the methods, techniques, and practices prescribed in the manufacturer's current maintenance manual or Instructions for Continued Airworthiness that are acceptable to the Administrator, or other methods, techniques, and practices acceptable to the Administrator;
 - (ii) Has the knowledge, skill, and appropriate equipment to perform the work;
 - (iii) Performs the maintenance, preventive maintenance, or alterations on the small unmanned aircraft in a manner using the methods, techniques, and practices prescribed in the manufacturer's current maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator;
 - (iv) Inspects the small unmanned aircraft in accordance with the manufacturer's instructions or other instructions acceptable to the Administrator; and
 - (v) Performs the maintenance, preventive maintenance, or alterations using parts of such a quality that the condition of the aircraft will be at least equal to its original or properly altered condition.
 - (2) Maintain all records of maintenance, preventive maintenance, and alterations performed on the aircraft and ensure the records are documented in a manner acceptable to the Administrator. The records must contain the description of the work performed, the date the work was completed, and the name of the person who performed the work.
 - (3) Maintain all records containing—
 - (i) The status of life-limited parts that are installed on, or part of, the small unmanned aircraft;
 - (ii) The inspection status of the aircraft; and
 - (iii) The status of applicable airworthiness directives including the method of compliance, the airworthiness directive number, and revision date. If the airworthiness directive involves recurring action, the record must contain the time and date of the next required action.

- (4) Retain the records required under paragraphs (c)(2) and (3) of this section, as follows:
 - (i) The records documenting maintenance, preventive maintenance, or alterations performed must be retained for 1 year from when the work is completed or until the maintenance is repeated or superseded by other work.
 - (ii) The records documenting the status of life-limited parts, compliance with airworthiness directives, and inspection status of the small unmanned aircraft must be retained and transferred with the aircraft upon change in ownership.
- (5) Ensure all records under paragraphs (c)(2) and (3) of this section are available for inspection upon request from the Administrator or any authorized representative of the National Transportation Safety Board (NTSB).
- (d) **Compliance with parts 43 and 91 of this chapter.** Compliance with part 43 and part 91, subpart E, of this chapter fulfills the requirements in paragraphs (b)(3) and (c) of this section.

[Amdt. No. 107-8, 86 FR 4383, Jan. 15, 2021; 86 FR 13633, Mar. 10, 2021]

§ 107.145 Operations over moving vehicles.

No person may operate a small unmanned aircraft over a human being located inside a moving vehicle unless the following conditions are met:

- (a) The operation occurs in accordance with § 107.110 for Category 1 operations; § 107.115 for Category 2 operations; § 107.125 for Category 3 operations; or § 107.140 for Category 4 operations.
- (b) For an operation under Category 1, Category 2, or Category 3, the small unmanned aircraft, throughout the operation—
 - (1) Must remain within or over a closed- or restricted-access site, and all human beings located inside a moving vehicle within the closed- or restricted-access site must be on notice that a small unmanned aircraft may fly over them; or
 - (2) Must not maintain sustained flight over moving vehicles.
- (c) For a Category 4 operation, the small unmanned aircraft must—
 - (1) Have an airworthiness certificate issued under part 21 of this chapter.
 - (2) Be operated in accordance with the operating limitations specified in the approved Flight Manual or as otherwise specified by the Administrator. The operating limitations must not prohibit operations over human beings located inside moving vehicles.

§ 107.150 Variable mode and variable configuration of small unmanned aircraft systems.

A small unmanned aircraft system may be eligible for one or more categories of operation over human beings under this subpart, as long as a remote pilot in command cannot inadvertently switch between modes or configurations.

§ 107.155 Means of compliance.

- (a) **Establishment of compliance.** To meet the requirements of § 107.120(a) for operations in Category 2, or the requirements of § 107.130(a) for operations in Category 3, the means of compliance must consist of test, analysis, or inspection.

- (b) **Required information.** An applicant requesting FAA acceptance of a means of compliance must submit the following information to the FAA in a manner specified by the Administrator:
 - (1) **Procedures.** Detailed description of the means of compliance, including applicable test, analysis, or inspection procedures to demonstrate how the small unmanned aircraft meets the requirements of § 107.120(a) for operations in Category 2 or the requirements of § 107.130(a) for operations in Category 3. The description should include conditions, environments, and methods, as applicable.
 - (2) **Compliance explanation.** Explanation of how application of the means of compliance fulfills the requirements of § 107.120(a) for operations in Category 2 or the requirements of § 107.130(a) for operations in Category 3.
- (c) **FAA acceptance.** If the FAA determines the applicant has demonstrated compliance with paragraphs (a) and (b) of this section, it will notify the applicant that it has accepted the means of compliance.
- (d) **Rescission.**
 - (1) A means of compliance is subject to ongoing review by the Administrator. The Administrator may rescind its acceptance of a means of compliance if the Administrator determines that a means of compliance does not meet any or all of the requirements of this subpart.
 - (2) The Administrator will publish a notice of rescission in the FEDERAL REGISTER.
- (e) **Inapplicability of part 13, subpart D, of this chapter.** Part 13, subpart D, of this chapter does not apply to the procedures of paragraph (a) of this section.

§ 107.160 Declaration of compliance.

- (a) **Required information.** In order for an applicant to declare a small unmanned aircraft is compliant with the requirements of this subpart for Category 2 or Category 3 operations, an applicant must submit a declaration of compliance for acceptance by the FAA, in a manner specified by the Administrator, that includes the following information:
 - (1) Applicant's name;
 - (2) Applicant's physical address;
 - (3) Applicant's email address;
 - (4) The small unmanned aircraft make and model name, and series, if applicable;
 - (5) The small unmanned aircraft serial number or range of serial numbers that are the subject of the declaration of compliance;
 - (6) Whether the declaration of compliance is an initial declaration or an amended declaration;
 - (7) If the declaration of compliance is an amended declaration, the reason for the re-submittal;
 - (8) The accepted means of compliance the applicant used to fulfill requirements of § 107.120(a) or § 107.130(a) or both;
 - (9) A declaration that the applicant—
 - (i) Has demonstrated that the small unmanned aircraft, or specific configurations of that aircraft, satisfies § 107.120(a) or § 107.130(a) or both, through the accepted means of compliance identified in paragraph (a)(8) of this section;

- (ii) Has verified that the unmanned aircraft does not contain any safety defects;
 - (iii) Has satisfied § 107.120(b)(3) or § 107.130(b)(3), or both; and
 - (iv) Will, upon request, allow the Administrator to inspect its facilities, technical data, and any manufactured small unmanned aircraft and witness any tests necessary to determine compliance with this subpart; and
- (10) Other information as required by the Administrator.
- (b) **FAA acceptance.** If the FAA determines the applicant has demonstrated compliance with the requirements of this subpart, it will notify the applicant that it has accepted the declaration of compliance.
 - (c) **Notification of a safety issue.** Prior to initiating rescission proceedings pursuant to paragraphs (d)(1) through (3) of this section, the FAA will notify the applicant if a safety issue has been identified for the declaration of compliance.
 - (d) **Rescission.**
 - (1) No person may operate a small unmanned aircraft identified on a declaration of compliance that the FAA has rescinded pursuant to this subpart while that declaration of compliance is rescinded.
 - (2) The FAA may rescind a declaration of compliance if any of the following conditions occur:
 - (i) A small unmanned aircraft for which a declaration of compliance was accepted no longer complies with § 107.120(a) or § 107.130(a);
 - (ii) The FAA finds a declaration of compliance is in violation of § 107.5(a); or
 - (iii) The Administrator determines an emergency exists related to safety in accordance with the authority in 49 U.S.C. 46105.
 - (3) If a safety issue identified under paragraph (c) of this section has not been resolved, the FAA may rescind the declaration of compliance as follows:
 - (i) The FAA will issue a notice proposing to rescind the declaration of compliance. The notice will set forth the Agency's basis for the proposed rescission and provide the holder of the declaration of compliance with 30 calendar days from the date of issuance of the proposed notice to submit evidentiary information to refute the proposed notice.
 - (ii) The holder of the declaration of compliance must submit information demonstrating how the small unmanned aircraft meets the requirements of this subpart within 30 calendar days from the date of issuance of the proposed notice.
 - (iii) If the FAA does not receive the information required by paragraph (d)(3)(ii) of this section within 30 calendar days from the date of the issuance of the proposed notice, the FAA will issue a notice rescinding the declaration of compliance.
 - (4) If the Administrator determines that an emergency exists in accordance with paragraph (d)(2)(iii) of this section, the FAA will exercise its authority under 49 U.S.C. 46105(c) to issue an order rescinding a declaration of compliance without initiating the process in paragraph (d)(3) of this section.
 - (e) **Petition to reconsider the rescission of a declaration of compliance.** A person subject to an order of rescission under paragraph (d)(3) of this section may petition the FAA to reconsider the rescission of a declaration of compliance by submitting a request to the FAA in a manner specified by the Administrator within 60 days of the date of issuance of the rescission.

- (1) A petition to reconsider the rescission of a declaration of compliance must demonstrate at least one of the following:
 - (i) A material fact that was not present in the original response to the notification of the safety issue and an explanation for why it was not present in the original response;
 - (ii) The FAA made a material factual error in the decision to rescind the declaration of compliance; or
 - (iii) The FAA did not correctly interpret a law, regulation, or precedent.
- (2) Upon consideration of the information submitted under paragraph (e)(1) of this section, the FAA will issue a notice either affirming the rescission or withdrawing the rescission.
- (f) *Inapplicability of part 13, subpart D, of this chapter.* Part 13, subpart D, of this chapter does not apply to the procedures of paragraphs (d) and (e) of this section.

§ 107.165 Record retention.

- (a) A person who submits a declaration of compliance under this subpart must retain and make available to the Administrator, upon request, the information described in paragraph (a)(1) of this section for the period of time described in paragraph (a)(2) of this section.
 - (1) All supporting information used to demonstrate the small unmanned aircraft meets the requirements of §§ 107.120(a), for operations in Category 2, and 107.130(a), for operations in Category 3.
 - (2) The following time periods apply:
 - (i) If the person who submits a declaration of compliance produces a small unmanned aircraft, that person must retain the information described in paragraph (a)(1) of this section for two years after the cessation of production of the small unmanned aircraft system for which the person declared compliance.
 - (ii) If the person who submits a declaration of compliance designs or modifies a small unmanned aircraft, that person must retain the information described in paragraph (a)(1) of this section for two years after the person submitted the declaration of compliance.
- (b) A person who submits a means of compliance under this subpart must retain and make available to the Administrator, upon request, and for as long as the means of compliance remains accepted, the detailed description of the means of compliance and justification showing how the means of compliance meets the requirements of §§ 107.120(a), for operations in Category 2, and 107.130(a), for operations in Category 3.

Subpart E—Waivers

§ 107.200 Waiver policy and requirements.

- (a) The Administrator may issue a certificate of waiver authorizing a deviation from any regulation specified in § 107.205 if the Administrator finds that a proposed small UAS operation can safely be conducted under the terms of that certificate of waiver.
- (b) A request for a certificate of waiver must contain a complete description of the proposed operation and justification that establishes that the operation can safely be conducted under the terms of a certificate of waiver.

- (c) The Administrator may prescribe additional limitations that the Administrator considers necessary.
- (d) A person who receives a certificate of waiver issued under this section:
 - (1) May deviate from the regulations of this part to the extent specified in the certificate of waiver; and
 - (2) Must comply with any conditions or limitations that are specified in the certificate of waiver.

§ 107.205 List of regulations subject to waiver.

A certificate of waiver issued pursuant to § 107.200 may authorize a deviation from the following regulations of this part:

- (a) Section 107.25—Operation from a moving vehicle or aircraft. However, no waiver of this provision will be issued to allow the carriage of property of another by aircraft for compensation or hire.
- (b) Section 107.29(a)(2) and (b)—Anti-collision light required for operations at night and during periods of civil twilight.
- (c) Section 107.31—Visual line of sight aircraft operation. However, no waiver of this provision will be issued to allow the carriage of property of another by aircraft for compensation or hire.
- (d) Section 107.33—Visual observer.
- (e) Section 107.35—Operation of multiple small unmanned aircraft systems.
- (f) Section 107.37(a)—Yielding the right of way.
- (g) Section 107.39—Operation over people.
- (h) Section 107.41—Operation in certain airspace.
- (i) Section 107.51—Operating limitations for small unmanned aircraft.
- (j) Section 107.145—Operations over moving vehicles.

[Docket FAA-2015-0150, Amdt. 107-1, 81 FR 42209, June 28, 2016, as amended by Amdt. No. 107-8, 86 FR 4387, Jan. 15, 2021]