STATE OF MICHIGAN
IN THE SUPREME COURT

LONG LAKE TOWNSHIP,

Plaintiff-Appellee,

v.

TODD MAXON and HEATHER MAXON,

Defendants-Appellants.

Supreme Court No. 164948

Court of Appeals No. 349230

Grand Traverse Circuit No.: 18-034553-CE

Hon. Thomas G. Power

LONG LAKE TOWNSHIP'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF ORDER APPEALED

Long Lake Township agrees that the Maxons have identified the relevant underlying Court of Appeals' opinion and dissent.[1] The Township would add, however, that this Court's May 20, 2022, Order vacated in full the prior Court of Appeals' opinion.

[1] See also Exhibit A, Circuit Court Order, Township App'x 001T; Exhibit B, Register of Actions, Township App'x 002T – 010T.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Whether the Defendants' Fourth Amendment rights were violated when Plaintiff obtained images from an unmanned aircraft operating in publicly accessible airspace depicting Defendants' unfenced, partially wooded, five-acre property that was being used as a commercial junk and salvage yard?

The Township answers: No.

The Trial Court answered: No.

The Maxons answered: Yes.

The Court of Appeals did not address this question on remand after its prior opinion was vacated.

II. Whether the exclusionary rule applies to bar admission of unmanned aerial photography in this civil zoning enforcement action?

The Township answers: No.

The Circuit Court found no Fourth Amendment violation and did not address the exclusionary rule.

The Maxons answered: Yes.

The Court of Appeals Answered No.

INTRODUCTION

The Maxons want this Court to decide if "police" use of "cutting-edge" technology to surveil "people's private homes" violates the Fourth Amendment. Application p 1-2. That's an interesting question that someday may well warrant this Court's attention. But it's not the one at issue in this case. This case does not, in fact, involve police, police surveillance of a person or home, or cutting-edge technology.

Instead, this case involves a civil lawsuit brought by Plaintiff Long Lake Township (the "Township") based on Defendants Todd Maxon and Heather Maxon's (the "Maxons") expanded use of their unfenced, partially wooded, five-acre tract of land—located in an area zoned for low density residential homes—as an unlicensed junk/salvage yard. As part of its civil action, the Township hired a company to perform three drone flyovers to determine the scope of the accumulating scrap and junk materials on the Maxon property from publicly navigable airspace. The combined total time for all these flights—including set up and tear down—was no more than 120 minutes. There is no evidence that the drone was flown in violation of applicable regulations or other law, "nor that it contained equipment or was itself technology not readily available or generally used by the public." *Long Lake Twp v Maxon (Long Lake I)*, 336 Mich

App 521, 549; 970 NW2d 893 (2021) (Fort Hood, J., dissenting), vacated and remanded 973 NW2d 615 (2022).[2]

Where, as here, there is no physical trespass onto a person, house, paper, or effect, courts generally apply a two-part inquiry regarding whether a Fourth Amendment violation has occurred. *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). The first question is whether the individual has "exhibited an actual (subjective) expectation of privacy." *Id.* at 361. In other words, whether the individual has shown that "he seeks to preserve [something] as private." *Id.* at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *Id.* at 361.

Under this test, the United States Supreme Court has held that aerial observations do not implicate the Fourth Amendment—i.e., they do not involve either subjective or objective expectations of privacy.[3] Based on the record, the Maxons did not have any subjective or objective expectation of privacy from

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[2] Although not necessarily material to this Court's decision on this application, the Township cannot agree that the prior Court of Appeals' opinion was vacated "on other grounds" as the Maxons repeatedly contend. See e.g., Application p 4-5, 11, 19. This Court's Order of remand did not provide any specific reasoning as to why it vacated the prior opinion *in full*, and it could have easily remanded for reconsideration of whether the exclusionary rule applied without vacating the portion of the Court of Appeals' analysis on whether the Township violated the Fourth Amendment in the first place. That's not what happened, however. "Vacated on other grounds" is not reflected by the four corners of the Order, and it's accurate instead to refer to the prior opinion simply as "vacated and remanded."

[3] See *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989); *California v Ciraolo*, 476 U S 207, 211-214; 106 S Ct 1809; 90 L Ed 2d 210 (1986).

aerial observation—be the aircraft manned or unmanned—here, either. The five-acre property is not covered or fenced, is partially visible from neighboring properties, and is otherwise more appropriately characterized as "open fields" or business property, given the uses to which it is put. The imagery was taken from publicly navigable airspace above the treeline, in compliance with FAA regulations, and with the use of technology readily available to any member of the public. Similar images of the Maxons' property can already be viewed, for free, on Google Earth. In sum, the drone use did not constitute a Fourth Amendment violation based on the totality of the circumstances in this case.

Further, the Court of Appeals appropriately concluded that the exclusionary rule does not apply to this civil zoning action. *Long Lake Twp v Maxon*, ___Mich App___; ___NW2d___, 2022 WL 4281509 (September 15, 2022) (*Long Lake II*). The exclusionary rule is a harsh remedy designed to deter future police misconduct where it has resulted in a violation of constitutional rights; it's "not designed to act as a personal constitutional right of the aggrieved party." *People v Frazier*, 478 Mich 231, 248; 733 NW2d 713 (2007). Exclusion of evidence does not correct a violation, nor does use of that evidence result in any greater violation to the subject of the underlying search. The Supreme Court has concluded that the exclusionary rule does not apply to civil cases—even when that civil action involves fees, deportation, arrest, revocation of parole status, or other consequences traditionally reserved for the criminal law. Nothing about the facts of this case compels a different result. And, on the other hand, there

is nothing about the facts or outcome of this case that would make a law enforcement officer (or any municipal official) believe that any of the extreme, dystopian concerns put forth by the Maxons would be permissible from a Fourth Amendment standpoint.

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

The fact of the matter is this: the Maxons are asking this Court to fundamentally alter decades of jurisprudence to help them get away with running a hazardous salvage yard in their wooded, unfenced, residentially zoned property to the chagrin of their neighbors and in violation of reasonable Township regulation. Junk in the woods viewed from the air is not a search and has no Fourth Amendment implications. Further, the Court of Appeals correctly held that the exclusionary rule does not apply to this civil case. This Court should deny the application. In the alternative, should this Court grant leave, it should also find that no Fourth Amendment violation occurred.

COUNTER-STATEMENT OF GROUNDS FOR REVIEW

This is not a case that currently warrants further attention from this Court. The erroneous opinion in *Long Lake I* has already been vacated in full and the Court of Appeals correctly applied the relevant law based on this Court's Order of remand in *Long Lake II*. Even accepting that these appeals have raised significant and important issues, therefore, there is no further need for this Court's involvement in the present dispute.

First, this Court already appropriately vacated the entirety of the opinion in *Long Lake I*. The Fourth Amendment analysis in that opinion wrongly distinguished decades of precedent, and, as a result, imposed a wholesale ban on the warrantless use of a certain type of technology. It had nothing whatsoever to do with the Maxons' own subjective expectation of privacy, or whether society is willing to accept that particular expectation as objectively reasonable. And, as discussed by Judge Fort Hood in her dissent and in Section I of this brief, there was no Fourth Amendment violation under the facts at issue.

Further, following remand, the Court of Appeals correctly determined that the exclusionary rule did not apply to this civil case. This decision is well supported by case law—including the cases cited by this Court in its Order of remand. See Section II below.

The Maxons have set forth argument that is neither based on the facts of this case nor supported by Michigan (or federal) law. The questions presented

by the Maxons are simply not the ones at issue here. See Application p 1-2. The application should be denied.

COUNTER-STATEMENT OF FACTS

This case involves a civil lawsuit brought by the Township based on the Maxons' continued and expanded use of their five-acre tract of land, located at 9160 North Long Lake Road, as an unlicensed junk and salvage yard. Specifically, the Township alleges that the Maxons are in clear violation of the local zoning ordinance and, as such, have created a nuisance per se on their property. The underlying civil action seeks a declaratory judgment and abatement of the ongoing nuisance. (Exhibit C, Complaint, Township App'x 011T-014T).

A prior enforcement action against the Maxons based on the use of the property as a junk yard was resolved in 2008 when the Township and the Maxons entered into a settlement agreement. At that time the Township agreed, in pertinent part, not to pursue any further enforcement action against the Maxons so long as the junk yard/salvage activities remained status quo. (Maxons' Exhibit 8). In other words, the Maxons' use of the property was essentially grandfathered in under the then-existing Township ordinances—but only so long as their use did not expand, and only so long as the Township zoning regulations remained unchanged. (Exhibit 8).

The Maxons claim that the Township had some nefarious plan to prove a zoning violation against the Maxons ten years later. That's not supported by the record. What happened, rather, was that the Maxons' land use did not remain status quo. The expanding use of the property as a junk and salvage yard was brought to the Township's attention in part by unrelated site

inspection photographs from 2016, as well as verbal and written complaints from neighboring property owners. (See, e.g., Township's COA Brief Exhibit 1; Exhibit D, Neighbor Complaint, Township's App'x 040T).

Following receipt and review of these materials—which also demonstrate that use of portions of the unfenced property as a growing junk yard *is* clearly visible from neighboring properties—the Township engaged Zero Gravity Aerial to take photographs of the Maxons' property. Drone flights were performed, and photos were taken on April 24, 2017, May 26, 2017, and May 5, 2018. (Exhibit E, Drone Photograph examples, Township's App'x 041T – 043T). Although the drone flights occurred on three separate dates, the total time involved in all three of these aerial flights—including set up and tear down—was limited to approximately 120 minutes (two hours total). (Maxons' Exhibit 14, May 2, 2019 Motion Hearing Transcript, p 39).

Additionally, in September of 2016, Todd Maxon applied for a permit to build an 800-foot long, 6-foot-high perimeter privacy fence around a portion of the five-acre property at issue. (Exhibit F, September 20, 2016 Permit Application; Township's App'x 044T – 045T). The permit was issued on September 23, 2016, and remained valid for a full year—until September 23, 2017. (Exhibit G, September 23, 2016 Permit; Township's App'x 046T). As a necessary condition of the permit application, Mr. Maxon consented to "on-site inspections by Long Lake Township Zoning, Planning, or Assessing officials that

may be necessary to ascertain compliance, completion and value of the content of the land use permit."

Apparently, the Maxons decided not to build the fence, but project progress (or lack thereof) was not communicated to the Township. During a site visit of the perimeter where the fence was supposed to be constructed in late September 2017, a Township inspector observed, in plain view, the condition of the property and its ongoing and expanding use as a junk/salvage yard. The inspector also took photographs at the time of his visit. And, the Maxons were subsequently notified that the permit was revoked because the fence had not been constructed within the one-year period as evidenced by the inspection. (Exhibit H, Photographs from 2017 site inspection, Township App'x 047T – 058T; Exhibit I, October 4, 2017 Letter indicating permit was revoked, Township App'x 058T; Exhibit J, Affidavit of Loyd A. Morris regarding 2017 inspection, Township App'x 059T). Both the April 24, 2017, and May 26, 2017 drone flyovers took place while the permit—and the associated consent to on-site inspection—was in effect.

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

the Township's drone aerial surveillance photos. (Exhibit K, Google Earth Images, Appellant's App'x 060T – 067T).

Ultimately, based on the ground, aerial, and satellite (Google Earth) images, the Township filed the present civil suit seeking abatement of a nuisance per se (zoning violation) on August 21, 2018, asserting that the Maxons were operating an expanded junk/salvage yard on their property. As outlined in the Complaint, it is the Township's position that this use violates both the 2008 agreement and current, reasonable zoning regulations for a low-density residential district. (Exhibit C, Township App'x 011T-014T).

Following a period of discovery, the Maxons moved to suppress all of the aerial photos taken by the drone and the photos taken by the official during the ground level site inspection in September 2017. After hearing argument from the parties, the trial court denied the motion to suppress the drone photographs, finding that the aerial surveillance was not a search under Supreme Court precedent. (M Tr, 50-59, Maxon App'x 107-116; see also Township Exhibit A). Of note, the trial court also denied Defendants' motion to suppress these photographs based on the permissive entry of the Long Lake officer pursuant to the terms of the permit application—specifically finding that the Township had the right to inspect the property and that the photographs were of objects in plain view. (M Tr, 47-50; Maxon App'x 104-107).

These appeals followed. See Maxon Exhibits 1-7; See also Township Exhibit L.

LEGAL STANDARD

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

ARGUMENT

I. The Township did not violate the Maxons' Fourth Amendment rights by taking aerial photos of their five-acre property from an unmanned aircraft.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., Am. IV. The Michigan Constitution, Const. 1963, art. 1, § 11, likewise "provides coextensive protection to that of its federal counterpart." See *Hammerlund*, 504 Mich at 451.

Since *Katz*, courts have generally employed a two-part inquiry regarding whether a Fourth Amendment violation has occurred—particularly where there is no *physical* trespass onto "persons, houses, papers, [or] effects." The first part is whether the individual, by his or her conduct, has "exhibited an actual (subjective) expectation of privacy." *Katz,* 389 US at 360 (Harlan, J., concurring). In other words, whether the individual has shown that "he seeks to preserve [something] as private." *Id.*, at 351. The second question is whether the

individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *Id.*, at 361.

The Maxons suggest that this Court instead apply the "trespass" test and find that a physical trespass occurred by virtue of the drone flying well above the Maxons' tree line.[4] But there's no case law or statute supporting the suggestion that flying above the tree line—which the FAA recognizes as publicly navigable airspace for unmanned aircraft—is a physical common-law trespass. "[M]ere observation from a vantage point that does not infringe upon a privacy interest, of something open to public view, normally implicates no Fourth Amendment constraints because observation of items readily visible to the public is not a 'search.'" *Id.* at 351. In fact, the Supreme Court has held, and later affirmed, that "visual observation is no 'search' at all," even when that observation is made from the air or memorialized with photographs. *Kyllo v United States*, 533 US 27, 32; 121 S Ct 2038, 2042; 150 L Ed 2d 94 (2001). See also *Dow Chem Co v United States*, 476 US 227, 234–235; 106 S Ct 1819; 90 L Ed 2d 226 (1986). There is no reasonable expectation of privacy when it comes to visual observations of the curtilage from publicly navigable airspace or other public vantage points. See *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989); *Ciraolo*, 476 US at 211-214. And there was not any trespass or Fourth Amendment violation here.

[4] See also sections I.C & D below

A. The Fourth Amendment does not apply to the Township's aerial observations because they were not focused on the home or its curtilage.

The first question, however, is whether the alleged "search" involved an area or object protected by the Fourth Amendment at all. The Fourth Amendment does not "prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what we have called 'open fields'—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text." *Florida v Jardines*, 569 US 1, 6; 133 S Ct 1409, 1414; 185 L Ed 2d 495 (2013). It is equally clear that

> the term "open fields" may include "any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." For example, "a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." [*Oliver v United States*, 466 US 170, 180 n 11; 104 S Ct 1735 (1984).]

See also *People v Frederick*, 500 Mich 228, 236 n 3; 895 NW2d 541 (2017). The Maxons claim that the drone "surveilled" and was "trained directly" on their home. That's not supported by the record. In fact, the Township's focus was not on the home itself or anything that could reasonably be considered within the curtilage of the home. The trial court could effectively redact the residence and its immediate yard from every image and the Township's case would remain completely intact.[5] Instead, the Township's case (and focus) is based on the usage to which the Maxons have put the remainder of their five-acre tract: i.e.,

[5] The Maxons have not made any such limited request.

the junk and salvage yard that now extends to every corner of the property, mostly in unfenced wooded areas. See Township Exhibit E & H depicting voluminous scrap and junk materials located outside the curtilage, Township App'x 041T – 043T, 047T – 058T. In sum, the images—which are focused on the "open fields" portion of the property—are not of an area subject to Fourth Amendment protection.

There are four factors to consider in deciding whether an area is within the "curtilage" for purposes of the Fourth Amendment: "[1]the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *United States v Dunn*, 480 US 294, 301; 107 S Ct 1134, 1139; 94 L Ed 2d 326 (1987). Common locations falling within the curtilage include the front porch, a side garden, and the area outside the front window or an arms-length from the house. See *Jardines*, 569 U S at 6. *Collins v Virginia*, 138 S Ct 1663, 1670-1671; 201 L Ed 2d 9 (2018) (top portion of the driveway sitting behind the front perimeter of the house and enclosed on two sides by a brick wall about the height of a car and on a third side by the house, was also found to be within the curtilage). In contrast, a barn located away from a home (and outside of a fence circling the home), was not within the curtilage. *Dunn*, 480 US at 297. And, as such, officers could peer into the barn and even illuminate its contents with a flashlight without implicating the Fourth

Amendment at all. *Id.* See also *People v Powell*, 477 Mich 860, 861; 721 NW2d 180 (2006) (area of back yard that was not enclosed and was in plain view of defendant's neighbors was not curtilage).

Here, common sense dictates that a partially wooded, unfenced junk yard does not fall within "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[6] *Ciraolo*, 476 US at 212–213. See also *Jardines*, 569 US at 7 (quoting *Oliver*, 466 US at 182 n 12). Application of each of the *Dunn* factors leads to the same conclusion.

First, the proximity to the home. *Dunn*, 480 US at 301. Both Google Earth and the drone images themselves depict the Maxon residence and what appears to be a mowed lawn immediately surrounding it. And, perhaps, it seems reasonable that part of the mowed lawn immediately surrounding the home, along with the garden and walkway, might be considered curtilage. However, the rows and rows of unused vehicles, metal parts, trailers and other salvage objects that extend along the perimeter of the property, hundreds of feet (and yards) away from the home, and even far back into the woods are not areas "immediately adjacent" to the home, nor are they included in the immediate backyard or associated with intimate activities of the home, like eating or

[6] The mere hope that the Township or neighbors will avert their eyes to areas on the perimeter of the property or that no one will see the full scope of the use except from the air does not make that space private or constitutionally protected. Neither does filling up "open fields" with scrap materials.

grilling. See *People v Radandt*, 499 Mich 988, 990–991; 882 NW2d 533 (2016) (McCormack, J., dissenting).

Second, none of these areas are included within an enclosure surrounding the home. *Dunn*, 480 US at 301. In fact, many are not even likely visible from the areas immediately adjacent to the home as they are spread throughout the five-acre parcel. In other words, some of the Maxons' neighbors may have a better view of the property at issue than the Maxons do from their actual curtilage.

Third, the nature of the uses to which the area is put: the area at issue is used as a junk and salvage yard.[7] *Id.* Storage of acres and acres of salvage materials, both out in the open and amongst the woods, is not a use associated with a home, or even with housing or residential areas generally. And, as noted above, wooded areas can be considered 'open fields' for Fourth Amendment purposes. *Oliver*, 466 US at 180 n 11. The intimate activities associated with intimate family privacy do not reach to scrap and junk discarded in the woods. This use is not one that weighs in favor of finding that the relevant portions of the photos involve anything resembling curtilage.

Finally, as the images taken from the neighboring property depict—the Maxons have not taken any steps to hide the various materials from the

[7] Although the parties might dispute the *extent* of the use, it is not in serious dispute that this is the use to which the Maxons have put this particular property. Even the satellite imagery depicts that dozens of vehicles and other objects in various states of disrepair litter the property outside the immediate area surrounding the home. Exhibit K, Township App'x 060T – 067T.

neighbors or passers-by. Although they asked for and received a permit, the Maxons did not build any privacy fence. In other words, "[i]t is clear from the record that [the] defendant expended no effort whatsoever to protect [the] claimed expectation of privacy in the area." *Powell*, 477 Mich at 861. Because the areas photographed by the Township though aerial observation are not within the curtilage, the Fourth Amendment is not applicable. Even if there was a "trespass" (which there was not as described below) activities conducted in what are essentially open fields do not enjoy Fourth Amendment protections. *Oliver*, 466 US at 178, 181.

What's more, even assuming that some portions of the property at issue have characteristics of both open fields and curtilage, aerial photography of this sort of 'quasi-curtilage' from aerial views does not constitute a search. *Dow*, 476 US at 236–237. As described by the Sixth Circuit, the surveillance of the Dow property in Midland, Michigan involved at least six flyovers and was done with detailed imaging equipment:

> [O]n February 6, 1978, EPA contracted with Abrams Aerial Survey Corporation, a private company located in Lansing, Michigan, to take aerial photographs of the Dow plant. EPA's stated purposes for the aerial surveillance were to create visual documentation of smokestack emissions and to obtain perspectives on the layout of the plant and its relationship to the surrounding geographic area. EPA directed Abrams to take the pictures at particular altitudes and angles; EPA informed Abrams that emissions would be more visible in early morning or late afternoon, but left the actual time of the flight to Abrams' discretion.
>
> Abrams performed the overflight in the afternoon on February 7, 1978. The aircraft made *at least* six passes over the plant at altitudes of 12,000, 3,000, and 1,200 feet. **Abrams used a Wild RC–10 aerial mapping camera to take approximately 75**

> **color photographs of various parts of the Dow plant. Because of Abrams' sophisticated photographic equipment, the photographs contain vivid detail and resolution; some of the photographs can be enlarged to a scale of 1 inch equals 20 feet or greater, without significant loss of detail or resolution. The District Court found that when enlarged in this manner and viewed under magnification, the photographs show equipment, pipes and power lines as small as ½ inch in diameter**. [*Dow Chem Co v US By & Through Burford*, 749 F2d 307, 310 (CA 6, 1984), aff'd sub nom. *Dow Chem Co v United States*, 476 US 227; 106 S Ct 1819; 90 L Ed 2d 226 (1986).]

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

The Maxons' junk and salvage yard area (even if unlicensed) is much more akin to a business than a home. A "businessman" has a constitutional right to be free from official entries upon his commercial property. But the Court found that no such protections existed regarding aerial photography of the exterior of the business. This was true even though Dow took significant measures to safeguard the property from ground level observation. The Maxons took no such safeguards here, apart from keeping the accumulating junk in their backyard instead of out front. As such, like in *Dow*, the Fourth Amendment is not implicated here.

B. Defendants did not have a constitutionally protected subjective or objective expectation of privacy.

Even regarding curtilage, however, an expectation of privacy is legitimate only if the individual exhibited an actual, subjective expectation of privacy *and* that actual expectation is one that society recognizes as objectively reasonable.

Bond v United States, 529 US 334, 338; 120 S Ct 1462; 146 L Ed 2d 365 (2000); *People v Perlos*, 436 Mich 305, 317; 462 N W 2d 310 (1990). Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the alleged intrusion. *Id*. at 317–318.[8]

Over thirty years ago, the Supreme Court held that individuals do not have any subjective or objective expectation of privacy from aerial observations—even where significant efforts are undertaken to shield items from street level observations (such efforts were not taken in this case). *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989); *California v Ciraolo*, 476 U S 207, 211-214; 106 S Ct 1809; 90 L Ed 2d 210 (1986). The facts of this case—including that the aircraft was unmanned—do not warrant a different conclusion.

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

To determine whether a subjective expectation of privacy existed, courts consider whether an individual "took normal precautions to maintain his privacy—that is, precautions normally taken by those seeking privacy." *People v Smith*, 420 Mich 1, 27–28; 360 N W 2d 841 (1984). Apart from keeping the bulk of their salvage materials out of the front yard, the Maxons have not pointed to any acts they took to seek privacy in this case. The Maxons' property

[8] The majority opinion in *Long Lake I* is fundamentally flawed because it failed to consider the totality of the circumstances *in this case*. Instead, the court opted for a wholesale ban of drone use without a warrant. This is irreconcilable with both Michigan and federal jurisprudence.

was not fenced in, covered, or enclosed. The vehicles and other salvage materials are strewn about the wooded area and all along the boundaries of the five-acre parcel. Some of the scrap is visible from neighboring properties as evidenced from ground-level images taken in 2016 and 2017. App'x 047T – 058T. See also Exhibit 4 to the Township's Court of Appeals Brief depicting 2019 ground-level images. In fact, the visible state of the property caused neighbors and other individuals in the area to complain to the Township long before any drone images were taken. (App'x 040T). Any plane, helicopter, satellite, or drone could easily and lawfully view the contents of the junk yard from above. As such, the general state of the property is not private, and the Maxons have not acted in a way that would suggest it was subjectively intended to be kept private.[9]

The fact that the Maxons' property would be visible from any plane or aircraft—manned or unmanned—flying from publicly navigable airspace

[9] Respectfully, the Township disagrees with the Court of Appeals prior conclusion in *Long Lake I*, now repeated by the Maxons, that "unrefuted photographic exhibits of defendants' property taken from the ground seem to establish a reasonable expectation of privacy against at least casual observation from a non-aerial vantage point." The Township itself took (with permission) and submitted as evidence several photographs depicting the state of the property from neighboring land. As these images show, the general use of the property as a junkyard was not hidden. The question here is not whether the *full* scope of the property could be observed from a neighboring property or road. It is axiomatic that the very center of a five-acre wooded lot would not likely be visible from the perimeter. But wooded property does not mean that the owners have manifested an actual expectation of privacy from aerial observation—or even from casual observation from neighbors. The Maxons had no such expectation.

obviates any subjective privacy expectation. This is true even where a party takes some steps meant to create privacy (which the Maxons did not). In fact, in *Riley* the Supreme Court concluded that the defendant "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter" flying at a legal altitude—400 feet—despite having erected fences around the property. "Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was." *Riley*, 488 US at 449–450. The Court further noted that the defendant "no doubt *intended* and *expected* that his greenhouse would not be open" to ground level inspection. *Id.* at 450 (emphasis added). However, because the sides and roof were left partially open, the contents were subject to viewing from the air without Fourth Amendment implications. *Id.*

To be clear, the Township's imaging in this case did *not* occur within the Maxons' home. The Township did not take any images of the inside of the Maxons' residence, nor did it capture any "private, intimate details" of the Maxon's home.[10] Compare Application p 22-23. And, there is no evidence that

[10] Not only is there no evidence that the drone in this case "penetrated the walls of the home itself," but there is *voluminous* evidence that the Township had no interest whatsoever in looking at anything within the Maxons' residence or at the Maxons themselves. See Application p 20.

the Township or Ground Zero violated any statute or regulations, or used a technology that is not otherwise widely available.[11] See also section I.C below.

Although the Maxons applied for a permit to build a privacy fence in 2016, it was never actually built. In other words, unlike *Riley*, there were not even any precautions taken against "ground-level observation" in this case. What's more, the Maxons *consented* to Township searches or observations of their property in their permit application. (Township App'x 044T-045T). As the trial court concluded, the zoning inspector had permission to observe the Maxon property from ground level where the fence was supposed to be. Both the April 24, 2017, May 26, 2017, drone flyovers took place while the permit—and the associated consent to in-person, ground level inspection—was in effect. As the zoning official already had permission to physically enter onto the property during those times for an inspection—which would have also permitted him to observe the zoning violations in plain view—it is simply unreasonable to conclude that the Maxons had any subjective expectation of privacy regarding the condition of their property (i.e., its extensive use as a junk/salvage yard) from the air. It is well-established that a physical presence is much more intrusive than observations from the air or other public vantage point. See, e.g., *Katz*, 389 US at 351.

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[11] *Kyllo v United States*, 533 US 27, 37; 121 S Ct 2038, 2045; 150 L Ed 2d 94 (2001), involved thermal scanning technology "not in general public use" to "explore details of the home" that would have been unknowable without physical intrusion into the home. Neither of these criteria are at issue in this case.

It is also reasonable to conclude that the Maxons were effectively on notice that their property would likely garner some level of heightened scrutiny based on the prior 2008 consent agreement. See *Maryland v King*, 569 US 435, 447; 133 S Ct 1958, 1969; 186 L Ed 2d 1 (2013) (in certain situations "an individual is already on notice" that some reasonable monitoring is to be expected). As outlined in the Complaint in this case, the consent agreement only permitted the Maxons to continue with the nonconforming use of their property if it remained status quo. (Maxons' App'x 037-038; Township App'x 011T-014T). The use did not remain status quo, and Township oversight could have reasonably, and subjectively, been expected.

Considering all these factors, it cannot be said that the Defendants demonstrated *any* subjective expectation of privacy from aerial surveillance—either from manned or unmanned aircraft.

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

Even where significant effort has been made to shield property from ground level observation (something that has not been done here), the Court has found that society would not recognize such a subjective expectation of privacy where property was otherwise visible from the air. As was summarized by Judge Fort Hood:

> the fundamental import of *Ciraolo*, *Riley*, and *Kyllo*, is that if the drone that was used to view defendants' property in this case was a technology commonly used by the public that observed only what was visible to the naked eye and that was flown in an area in which

> any member of the public would have a right to fly their drone—and the record suggests that all of these things are true—then precedent provides that a Fourth-Amendment violation has not occurred. See *Ciraolo*, 476 US at 215; *Riley*, 488 US at 450; *Kyllo*, 533 US at 40. [*Long Lake I*, 336 Mich App at 546 (Fort Hood, J., dissenting).]

Again, the Maxons were operating an ongoing and growing salvage yard—a nuisance per se—in a quiet residential area. Neighbors complained to the Township. Neighbors could see parts of the salvage yard from their properties. Certainly, the scope and contents of the Maxon property were topics of both interest and concern in the neighborhood. There is simply no evidence that the drone used here did anything that a private individual could not have done with their own device. As the Supreme Court has held, the government cannot reasonably be expected to avert their eyes from activity that could have been observed by any member of the public. See *California v Greenwood*, 486 US 35, 39–41; 108 S Ct 1625; 100 L Ed 2d 30 (1988).

The Maxons assert that drones can be small, relatively inexpensive, less noisy, and more readily available and that this should make their use prohibited or objectively unreasonable under the Fourth Amendment. Again, the Township and Supreme Court precedent disagree. In fact, the inexpensive and wide-spread availability of drones cuts against finding a Fourth Amendment violation. See *Kyllo*, 533 US at 34-40. And the noise level of an average drone (or, more importantly, the drone used here) is immaterial to the question of whether an expectation of privacy is real or reasonable. It may be, in fact, that a helicopter hovering 400 feet above a mostly enclosed property while officers

lean over to get a good look through the cracks would objectively feel *much* more intrusive than a drone. See *Riley*, 488 US at 449–450. But even that is not a search. *Id.* And whether or not an individual is aware that their property is being observed is also not relevant to whether a trespass occurred or whether any reasonable expectation of privacy exists.[12]

Even assuming for argument's sake that the Maxons did not expect that the contents of salvage yard would become known to the Township or other members of the public, an expectation of privacy does not give rise to Fourth Amendment protection "unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 US at 39–41. Whether by plane, helicopter, or Google Earth, substantially similar aerial views and still images were already available to any member of the public. Given the pervasive nature of all of these technologies, it cannot be concluded that the Maxons have an objectively reasonable expectation of privacy with regard to aerial views of their junk yard—regardless of whether those images are from a satellite, a helicopter, or a drone.

Furthermore, a civil action for abatement like the one at issue in this case is something that a private citizen may pursue themselves.[13] In other words, there is nothing to prevent a private citizen from taking drone footage *and*

[12] The Maxons simultaneously argue that drones might go unnoticed and that they noticed and were bothered by the Zero Gravity drone. Either way, the noise of the drone does not establish a constitutional issue in this case.

[13] See Section II.C below

subsequently using that drone footage in a nuisance action seeking abatement against the Maxons. As such, from the unmanned aerial photographs to the filing of the civil action, the Township has done nothing more than a private individual could otherwise lawfully do.[14] See also See *United States v Houston*, 813 F3d 282, 287–90 (CA 6, 2016).

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

The Maxons cannot satisfy either prong of the *Katz* analysis.

C. The "trespass" test does not apply to the facts of this case.

The Maxons' argue that this Court should apply the "trespass" test in lieu of the *Katz* analysis outlined above. This argument is unpreserved.

[14] What's more, there is no evidence that the camera or drone used was a type not in general public use.

Nevertheless, even if it were, there was no trespass onto the Maxons' person, house, papers, or effects in this case. The end result is the same.

The Township agrees that, generally, the "trespass" analysis has been considered alongside the *Katz* analysis. See *United States v Jones*, 565 US 400, 404-405; 132 S Ct 945; 181 L Ed 2d 911 (2012); *Grady v North Carolina*, 575 US 306, 307; 135 S Ct 1368; 191 L Ed 2d 459 (2015); *Johnson v VanderKooi*, ___Mich ____, 2022 WL 2903868 (Docket No. 160958, July 22, 2022). And the trespass test indeed harkens back to pre-*Katz* Fourth Amendment applications. "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Jones*, 565 US at 406. In other words, "the common-law trespassory test" applies where there is an actual *physical trespass onto* a person, house, paper, or effect. *VanderKooi*, 2022 WL 2903868, at *6, quoting *Jones*, 565 US at 409. Unlike *Jones* (physical trespass onto vehicle), *Grady* (physical trespass onto person), or *Vanderkooi* (physical trespass onto person), this case does not involve any physical trespass onto any person, house, paper, or effect.[15] See also *Johnson*, ___Mich at ____, (Clement, J., concurring) (recognizing that analysis under the *Katz* test would be appropriate where information was gathered by electronic means but there is no physical trespass

[15] Another case cited by the Maxons, *Collins v Virginia*, ___US ___, ___; 201 L Ed 2d 9; 138 S Ct 1663 (2018), likewise involved an officer's physical presence inside a partially enclosed portion of the defendant's driveway that abuts the house. It does not support a finding of a common-law trespass here.

onto a person). The application of the law as developed by *Katz* and its progeny was specifically to address situations where, like here, there was no physical trespass. *Katz*, 389 US at 353. The *Katz* test is the appropriate application of the law.

The Maxons argue that this Court could simply find that flying a drone hundreds of feet above someone's property was a "trespass" for purposes of the Fourth Amendment and that this would not impact recreational or other uses. That's not true. "[T]he common-law trespassory test" refers to a physical tort or invasion, i.e., where there is an actual *physical trespass onto* a person, house, paper, or effect. *VanderKooi*, 2022 WL 2903868, at *6, quoting *Jones*, 565 US at 409. Hoping that an "average homeowner is unlikely to quibble" with such use does not mean it wouldn't be actionable in civil or criminal contexts if declared a physical trespass in the context of this civil zoning enforcement case. See Application p 19. It's not realistic to suppose otherwise.

Application of common law "trespass" to airspace above the tree line would also create a conflict with the federal law. The FAA has exclusive authority to determine the airspace in which a person may operate a drone. 14 CFR part 107, the small UAS rule, allows operations of drones or unmanned aircraft system under 55 pounds at or below 400 feet above ground level for visual line-of-sight operations.[16] And Michigan law similarly provides:

[16] The Maxons make a lot of guesses about the height of the drone in their application. Guesswork by counsel in an appellate filing is not substitute for

> A person that is authorized by the Federal Aviation Administration to operate unmanned aircraft systems for commercial purposes may operate an unmanned aircraft system in this state if the unmanned aircraft system is operated in a manner consistent with federal law. [MCL 259.311]

The Zero Gravity operator here was so licensed. Mr. Wiand has received a Remote Certificate for Part 107 of the Code of Federal Regulations for the commercial use of drones. (Maxon Exhibit 13, Mr. Wiand's Affidavit, 0056). "[T]here is no evidence that the drone in this case was flown in violation of the law or applicable regulations, nor that it contained equipment or was itself technology not readily available or generally used by the public." *Long Lake I*, 336 Mich App at 549 (Fort Hood, J., dissenting). See also *Michigan Coal of Drone Operators, Inc v Ottawa Cnty*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2022 (Docket No. 359831) (finding local ordinance conflicted with FAA sovereignty and the UASA) (Exhibit M), p 3.

The Maxons claim that the drone operation was unlawful because it violated MCL 259.322(3), which provides that "[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." But this statute only

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evidence and none of these suppositions are based on any evidence of record. See Application p 21. The Township came to the motion hearing in this case with the drone operator ready to testify, but the trial court declined to make a record. At the end of the day, the photos clearly demonstrate that the drone was *well* above the tree line.

prohibits recording of an "individual." MCL 259.322(3).[17] It does not apply to images taken of property. And, at any rate, the above-the-tree-line images of the Maxon property do not violate any statute or *reasonable* expectation of privacy. See Section B.1 above.

The Maxons further argue that a physical trespass does not require "boots on the ground." Application 14. But it does require physical touch and occupation—not aerial observations (or observations generally—see *Katz*). See, e.g., *Jones*. And there is no case law or statute supporting the Maxons' suggestion that flying well above the tree line—which the FAA recognizes as publicly navigable airspace for unmanned aircraft—is a physical trespass or touch of any kind.

Application of common law "trespass" to airspace hundreds of feet up would further arbitrarily prohibit nearly all meaningful use of drones by local units of government. Particularly in the civil context, drones are used for several legitimate and important governmental purposes, from land use restrictions (like this case) to GIS mapping, to ensuring environmental and natural resource protections and compliance. None of these have anything to do with the dystopian concerns raised by the Maxons. And, in nearly all these examples, the government is doing no more than any ordinary citizen may also

[17] The last antecedent rule of statutory construction would not reasonably apply here because the latter part of the sentence in MCL 259.322(3) also refers to the "individual's" expectation of privacy. See *Dye by Siporin & Assoc, Inc v Esurance Prop & Cas Ins Co*, 504 Mich 167, 192; 934 NW2d 674 (2019). The word "individual" modifies each item in the list.

presently do. Each would also become a "trespass" under the analysis offered by the Maxons here.

None of the cases cited by the Maxons lead to a different conclusion. The quotation from *Grand Rapids Gravel Co v William J Breen Gravel Co*, 262 Mich 365, 373; 247 NW 902 (1933), is actually to a portion of the dissent—not to any Michigan "holding."[18] And the Supreme Court did not "echo[]" the view that property rights extend to the heavens (*cujus est solum, ejus est usque ad coelum et ad inferos*) in *United States v Causby*, 328 US 256, 260–261; 66 S Ct 1062; 90 L Ed 1206 (1946). Despite the historic application of similar doctrines, the Supreme Court instead concluded that they "have no place in the modern world:"

> The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim. [*Id.*][19]

The claimed "accord" from other jurisdictions likewise crumbles under even cursory examination. See Application p 17. The Colorado District Court Order is based on unique Colorado statutory law not at issue in this case. The

[18] And at issue in *Grand Rapids Gravel* was whether a party could physically construct an underpass to connect property owned by a single party on either side of the highway without implicating property rights—not fly overhead.

[19] It was, instead, the fact that repeated and frequent flights far beyond anything that occurred in this case rendered the respondents' property inhabitable that constituted a taking in that case. *Id.*

Maxons have pointed to no Michigan equivalent.[20] The Pennsylvania case involved allegations that a private security company repeatedly engaged in the flying of helicopters and drones at a low altitude, shining high-beams onto the property at issue at night from unmarked vehicles parked near the property, *and* sending employees or agents onto neighboring properties for the purpose of surveillance. *Gerhart v Energy Transfer Partners, LP*, No. 1:17-CV-01726, 2020 WL 1503674, at *7 (MD Pa, March 30, 2020). And the criminal allegation in Virginia involved a man who was alleged to have flown his drone over the neighboring property "*daily*" – not once for 6 seconds. Joe Beck, *Drone Dispute Reaches Courtroom*, The Northern Virginia Daily, <https://perma.cc/2R8L-Y5ZT> (posted October 25, 2015) (accessed November 23, 2022) ("We're not talking five or six times. . . .We're talking somewhere between 50 to 100 times.").[21]

The fundamental and unsettling change to Michigan law requested by the Maxons should not be undertaken with the belief that it is supported by jurisdictions across the country.[22] It's not. There was no physical trespass

[20] And, it very much remains an open question as to whether Colorado law would be preempted by current federal regulation regarding unmanned aircraft.

[21] Although the drone flights here occurred on three separate dates, the total time involved in all three of these aerial flights—including set up and tear down—was limited to approximately 120 minutes (two hours total). (Motion Hearing Transcript, p 39).

[22] Finally, whether or not a Kentucky criminal court might have found it lawful to shoot down a drone under facts not at issue here—the opinion cited by the Maxons does not make that finding. See *Boggs v Merideth*, No. 3:16-CV-00006-TBR, 2017 WL 1088093, at *8 (WD Ky, March 21, 2017); Application p 17.

under current Michigan or federal law. Nothing about the facts of this case warrant a change.

D. The Maxons' proposed alternative analysis is not in accord with any Michigan jurisprudence.

The Maxons alternatively encourage this Court to jettison decades of its own constitutional jurisprudence (and controlling Supreme Court precedent regarding application of the Fourth Amendment) and instead apply the "plain meaning" of the term "search" to determine whether a violation occurred. This suggestion has no foundation in Michigan law, and it is contrary to controlling federal precedent.

At bottom, this case is about whether there was a violation of the Fourth Amendment to the United States Constitution. In answering that question, this Court—and every federal court apart from the Supreme Court itself—is bound by decades of precedent interpreting the Amendment. None of these cases support the Maxons' preferred method of application. Dissenting opinions of a single Justice or appellate judge are not the law. This Court has also concluded that the Michigan Constitution, Const. 1963, art. 1, § 11, "provides coextensive protection to that of its federal counterpart." See *Hammerlund*, 504 Mich at 451. Nothing in Michigan law supports a change to our jurisprudence like the one suggested by the Maxons, either.[23]

[23] The Iowa Supreme Court followed the Gorsuch and Thomas dissents by concluding that the state constitution was no longer coexistent with the federal one. *State v Wright*, 961 NW2d 396, 411–412 (Iowa, 2021). In *Wright*, the Iowa

The Maxons further erroneously suppose that a "plain," "fair," or "ordinary" meaning test would lead to clarity in, and more uniform application of, the law. There is no reason to believe that's true. What is "plain" to one private citizen, Township official, or member of law enforcement is impossibly opaque to another. A prime example can be found in the voluminous amount of ink spilt over the "plain" meaning of statues. What's "plain" or "fair" is not always an obvious inquiry. To that end, the Maxons can't reasonably forecast how such a change would alter a century of previously decided cases.

There is no sound reason to change Michigan law and federal precedent controls the Fourth Amendment analysis.

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

As outlined above, the aerial images taken in this case do not constitute a "search" at all under any test. See *Dow*, 476 US at 234–235; *Kyllo*, 533 US at 32. And the alternative "tests" set forth by the Maxons are inapplicable based on the facts presented or incongruent with Michigan jurisprudence. That said, assuming for the sake of argument a "search" occurred, the Township still did not violate the Maxons' Fourth Amendment rights. It is "well settled that one

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court ultimately held "a warrantless search of a citizen's trash left out for collection is unlawful" because this was "a physical trespass on [the defendant's] papers and effects." *Id.* at 417, 419. No physical trespass is implicated in this case. See Section I.C. And, further, the Maxons have not made any argument based on our own State Constitution or history as to why Michigan should depart from the federal counterpart.

of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041, 2043–44; 36 L Ed 2d 854 (1973). Whether consent is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

As an initial matter, there was implicit consent to oversight of the overall condition of the property by virtue of the 2008 Settlement Agreement. (Maxon App'x 036-037). Courts have already clearly recognized the concept of implicit consent, for example, in the context of motor vehicle statutes. See *id*. See also *Birchfield v North Dakota*, 136 S Ct 2160; 195 L Ed 2d 560 (2016). The 2008 Settlement Agreement at issue here permitted the Maxons to continue with their commercial use of the five-acre property so long as it remained status quo. (Maxon App'x 036-037; Township App'x 011T-014T). In other words, the Maxons' use of the property was essentially grandfathered in under the then-existing Township ordinances—but only so long as their use did not expand. (Maxon App'x 036-037; Township App'x 011T-014T). It is inherent in that compromise, therefore, that the Township would have the ability to ensure that the use was not expanded. In other words, the necessary and reasonable implicit permission to observe the uses to which the Maxons put their property is a fundamental underpinning of the agreement. And again, considering the totality of the circumstances, the aerial drone observations here were a

completely reasonable method of ascertaining whether the terms of the agreement were violated.

Moreover, and more importantly, Todd Maxon *expressly* consented to both the 2017 aerial observations in conjunction with his application for an 800-foot-long perimeter fence. The permit was issued on September 23, 2016, and remained valid until September 23, 2017. (Township App'x 046T). As a necessary condition of the permit application, Mr. Maxon *consented* to "on-site inspections by Long Lake Township Zoning, Planning, or Assessing officials that may be necessary to ascertain compliance, completion and value of the content of the land use permit." This language does not limit the manner of inspection in any way. Whether by drone, on foot, or otherwise, inspection of the property was permissible. And, in fact, the trial court already held that the inspector had a right to be physically on the Maxons' property for an inspection even a few days after the permit expired. (Maxon App'x 105-107). Both the April 24, 2017 and May 26, 2017 drone flyovers took place while the permit—and the associated consent to inspection—was in effect.

And, it is further irrelevant that the permission was for the purpose of fence inspection. Permission to enter for one purpose does not imply that the inspector or officer should turn a blind eye to the other conditions of the property that were in plain view. Neither the law nor our jurisprudence carries and such restriction on searches pursuant to consent. At the very least, the April 24, 2017, and May 26, 2017, drone flyovers were done with consent to inspect the

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

II. The exclusionary rule does not apply to this civil zoning enforcement action.

The exclusionary rule is designed to deter police misconduct where it has resulted in a Fourth Amendment violation. It is not a constitutional right, nor is it intended to vindicate a party's constitutional rights. Rather, when deciding whether the exclusionary rule should be applied, courts consider the deterrent effect on criminal law enforcement officers, if any, against the high societal cost of excluding probative evidence.

The United States Supreme Court has consistently limited application of the exclusionary rule to criminal trials, only. Citing both the high costs of exclusion of evidence and the minimal deterrent impact of application of the rule in the civil context, the Court has concluded that the exclusionary rule does not apply even when the underlying civil action involves fees, deportation, arrest, revocation of parole status, or other consequences traditionally reserved for the criminal law. The three-part test set forth by the Maxons is not found anywhere other than their own brief. The Court of Appeals majority reached the right result with respect to the application of the exclusionary rule.[24]

[24] Of course, "application of the exclusionary rule is inappropriate in the absence of governmental misconduct." *Frazier*, 478 Mich at 250.

A. This is a civil case.

The Township filed a civil complaint for abatement of nuisance per se: the Township "seeks only an injunction—a remedy to enforce its ordinance against current and future violations." *Twp of Fraser v Haney*, ___Mich___; ____NW2d ___(Mich, February 8, 2022), slip op at 4 n 14. This action is not punitive in nature, contrary to the Maxons' claims. See Application p 31. No fine, imprisonment, probation or any other "penalty" for past conduct is sought in this case. The Maxons are not facing any "punishment" for their prior conduct. Rather, the Township seeks a return to the status quo: use of the property for salvage activities no greater than were present in 2008. Once the nonconforming use is abated, the matter will be resolved.[25]

A zoning enforcement action *may* be pursued by a township as a "municipal civil infraction." MCL 125.3407. As mandated by statute, the Township's ordinance designates violations as a "municipal civil infraction" and provides for a maximum $500 per day fine for each occurrence. See, e.g., Long Lake Nuisance Ordinance, Section 8, Application App'x 038T. But a "municipal civil infraction" is something that is "prohibited by an ordinance . . . .*and is not*

[25] The perfunctory language at the very end of the Complaint is nearly identical to that used in nearly every civil matter (i.e., requesting any "other costs, fees and relief that the Court deems just") (See Exhibit C, Township App'x 014T). It does not change the nature of the Complaint. Throughout the present action the Township has requested injunctive relief, only.

a crime under that ordinance, and for which civil sanctions may be ordered." MCL 600.113 (emphasis added).[26]

Even if the Township were seeking the maximum fine permitted under the law, this would not transform this matter into a criminal trial or criminal prosecution.[27] Matters involving ordinance violations "are not criminal cases within the meaning of the statutes and rules for review by this Court." *Huron Tp v City Disposal Sys, Inc*, 448 Mich 362, 365; 531 NW2d 153 (1995).[28] Likewise, penalties imposed in matters involving ordinance violations "are not

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[26] The nuisance abatement statute that the Maxons claim is "intertwined with" civil forfeiture is *not* the same one at issue in this case. See MCL 600.3801 (addressing public nuisance); Application p 33-34. The Maxons have confused public nuisance with nuisance per se. See Application p 33-34. In the case of a public nuisance, forfeiture may be ordered because the object is the subject of a violation of the Michigan penal code. See MCL 600.3801, et seq. This action does not involve the penal code or any claim of public nuisance.

[27] The Maxons suggest that this Court consider law from Georgia, Louisiana, or Alabama and conclude otherwise. See Application p 33-34. That's unnecessary; Michigan law in this area is already clear.

[28] Of further import, the line of cases finding that ordinance "prosecutions" have some criminal characteristics (i.e., could be quasi-criminal) each involved some punishment (arrest, fine, probation, or jail sentence) imposed by the local authority that is traditionally reserved for criminal proceedings. See *City of Ann Arbor v Riksen*, 284 Mich 284, 288; 279 NW 513 (1938) (individual was arrested and ordered to pay a fine); *Delta Co v City of Gladstone*, 305 Mich 50, 53; 8 NW2d 908 (1943) (considering fines collected for violations of local ordinances prohibiting acts that were also punishable by statute); *People v Goldman*, 221 Mich 646, 650; 192 NW 546 (1923)(individual placed on probation following conviction for drunk driving); *City of Detroit v Dingeman*, 233 Mich 356, 357; 206 NW 582 (1925) (individual "convicted" of reckless driving "and sentenced to serve 30 days in the Detroit House of Correction"). No punishment is sought in this case. And the application of the exclusionary rule is nevertheless appropriately limited to criminal trials – not quasi-criminal matters.

equivalent to a criminal prosecution under Michigan law." *Gora v City of Ferndale*, 456 Mich 704, 718; 576 NW2d 141 (1998); *City Disposal Sys, Inc*, 448 Mich at 365.

And, as such, constitutional rights (and associated remedies) reserved for the criminal law do not apply to civil actions involving nuisance per se. See, e.g., *Miller v Sanilac Co*, 606 F3d 240, 248 (6th Cir, 2010) (no protection for malicious prosecution because civil infraction is not a crime). For example, "[a] determination that a defendant is responsible for a civil infraction and thus subject to civil sanctions shall be by a preponderance of the evidence." MCL 600.113(3); MCL 600.8721(5). There is no right to a jury trial. MCL 600.8721(4). There is no right to counsel. See *Turner v Rodgers*, 564 US 431, 441; 131 S Ct 2507; 180 L Ed 2d 452 (2011) (holding that the "Sixth Amendment does not govern civil cases"); *In re AMB*, 248 Mich App 144, 221; 640 NW2d 262 (2001) (the analogous state right to counsel articulated in Const. 1963, art. 1, § 20 does not apply to proceedings that are civil, not criminal, in nature."). See also *In re Cox*, 129 Mich 635, 636–638; 89 NW 440 (1902). The Court of Appeals correctly found that the exclusionary rule does not apply, either.

Finally, it's notable that the Maxons' neighbors, i.e., private citizens, could have filed a substantially similar action requesting identical relief for nuisance per se based on the same zoning violations. Neighboring property owners have an equitable cause of action to enforce compliance with local zoning regulations where they can demonstrate a "substantial interest" in the outcome

different from the public at large. *Kallman v Sunseekers Prop Owners Ass'n*, LLC, 480 Mich 1099; 745 NW2d 122 (2008) (standing in action for nuisance per se brought by private persons may be proven by showing that the "defendant's activities directly affected the plaintiff[s'] recreational, aesthetic, or economic interests."). See also *Cook v Bandeen*, 356 Mich 328, 330–334; 96 NW2d 743 (1959) ("residents in the immediate vicinity" had the right to obtain injunctive relief from land use inconsistent with zoning ordinance); *Jones v De Vries*, 326 Mich 126, 128; 40 NW2d 317, 318 (1949) ("property owners in the area affected" had a right to seek equitable relief from use in violation of local zoning); *Baura v Thomasma*, 321 Mich 139, 142–143, 146; 32 NW2d 369 (1948). As neighboring residents of a low-density residential district, the Maxons' neighbors certainly have a "substantial interest" in the hazardous accumulation of junk and commercial use of the property next door.

For each of these reasons, the Court of Appeals correctly concluded that this is a civil case.

B. The exclusionary rule is limited to criminal trials and is intended to deter police misconduct; it is not intended to redress a constitutional injury or apply "generally" to all alleged Fourth Amendment violations.

"The exclusionary rule is a judicially created remedy that originated as a means to protect the Fourth Amendment right of citizens to be free from unreasonable searches and seizures." *People v Hawkins*, 468 Mich 488, 498; 668 NW2d 602 (2003), citing *Weeks v United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914), overruled on other grounds by *Mapp v Ohio*, 367 US 643; 81 S Ct

1684; 6 L Ed 2d 1081 (1961). Generally, where the exclusionary rule is applied, "evidence obtained in violation of the Fourth Amendment cannot be used in a *criminal* proceeding against the victim of the illegal search and seizure." *United States v Calandra*, 414 US 338, 347; 94 S Ct 613; 38 L Ed 2d 561 (1974) (emphasis added). The Supreme Court has "held the exclusionary rule to apply only in criminal trials," and moreover has "significantly limited its application even in that context." *Pennsylvania Bd of Prob & Parole v Scott*, ("Scott") 524 US 357, 364 n 4; 118 S Ct 2014; 141 L Ed 2d 344 (1998).

The exclusionary rule is designed to sanction and deter *police* misconduct. *People v Anstey*, 476 Mich 436, 447–448; 719 NW2d 579 (2006) (quotation omitted). See also *Calandra*, 414 US at 347 ("[T]he rule's prime purpose is to deter future unlawful police conduct . . .."). This Court has repeatedly noted that the "proper focus is on the deterrent effect on law enforcement officers, if any." *People v Frazier*, 478 Mich 231, 248; 733 NW2d 713 (2007), quoting *People v Goldston*, 470 Mich 523, 539; 682 NW2d 479 (2004). "The judicially created rule is not designed to act as a personal constitutional right of the aggrieved party." *Id*. Nor is its purpose to "redress the injury to the privacy of the search victim." *Calandra*, 414 US at 347.

The Maxons repeatedly claim that the exclusionary rule is intended to safeguard Fourth Amendment rights "*generally*." This is technically a quote from a portion of a sentence *Calandra,* but its meaning is changed dramatically by consideration of the context in which it was used in that case:

> In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, *rather than a personal constitutional right of the party aggrieved*.
>
> Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. [*Calandra*, 414 US at 348 (emphasis added).][29]

As such, the exclusionary rule has been narrowly applied: it has "never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Stone v Powell*, 428 US 465, 486; 96 S Ct 3037; 49 L Ed 2d 1067 (1976). Instead, "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.'" *Scott*, 524 US at 363, quoting *United States v Leon*, 468 US 897, 907; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

1. The Supreme Court has limited the exclusionary rule to criminal trials.

The Supreme Court has had several opportunities to consider whether "the operation of the exclusionary rule [should be extended] beyond the criminal trial context." *Scott*, 524 US at 364 (1998). Nevertheless, "[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence

[29] Context is nearly always germane and the same goes for the Maxons' citations to *Safford Unified Sch Dist No 1 v Redding*, 557 US 364, 374-375; 129 S Ct 2633; 174 L Ed 2d 354 (2009), and *Zadeh v Robinson*, 928 F3d 457, 474 (CA 5, 2019). Neither of these cases involved the exclusionary rule at all. See Application p 39.

from a civil proceeding, federal or state." *United States v Janis*, 428 US 433, 447 (1976). In fact, the Court has held that the exclusionary rule does not apply to civil tax proceedings, deportation hearings, parole revocation hearings, habeas corpus review, or grand jury proceedings. *Scott*, 524 US at 363 (exclusionary rule does not apply to probation proceedings); *INS v Lopez-Mendoza*, 468 US 1032, 1035; 104 S Ct 3479; 82 L Ed 2d 778 (1984) (exclusionary rule does not apply to deportation proceedings); *Janis*, 428 US at 454 (exclusionary rule does not apply to civil tax matters); *Calandra*, 414 US at 347 (exclusionary rule does not apply to grand jury proceedings). See also *Stone*, 428 US at 495 (exclusionary rule not applicable in habeas corpus review). In other words, even where the "civil" matter at hand involves some "penalty," the Supreme Court has nevertheless found the exclusionary rule to be inapplicable.

The Court of Appeals was correct to describe *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 700; 85 S Ct 1246; 14 L Ed 2d 170 (1965), as an "outlying case." As summarized by the majority in *Long Lake II*:

> The Court's analysis [in *One 1958 Plymouth Sedan*] linked the underlying Pennsylvania civil forfeiture proceeding to a criminal trial. George McGonigle, the car's owner "was arrested and charged with a criminal offense against the Pennsylvania liquor laws." *Id.* The "object" of the forfeiture action, "like a criminal proceeding," was "to penalize" McGonigle for the criminal offense. *Id.* Conviction would have subjected McGonigle "to a minimum penalty of a $100 fine and a maximum penalty of a $500 fine." *Id.* at 701, 85 S Ct 1246. Yet in the forfeiture proceeding McGonigle stood to lose his sedan, valued at approximately $1,000—double the maximum fine in the criminal case. *Id.* The Court reasoned: "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, *requiring the determination that*

> *the criminal law has been violated*, the same evidence would be admissible." *Id.* (emphasis added).
>
> The legality of McGonigle's possession of the sedan underpinned the Supreme Court's rationale for applying the exclusionary rule. The Court distinguished between the return of McGonigle's car and a hypothetical return of seized "contraband," such as narcotics or "unregistered alcohol." *Id.* at 698-699, 85 S Ct 1246. Application of the exclusionary rule in the latter circumstances, the Court reasoned, "would clearly have frustrated the express public policy against the possession of such objects." *Id.* at 699, 85 S Ct 1246. In other words, had the forfeiture action involved an item that McGonigle could not have legally possessed, the outcome may well have been different.

The several cases that followed *One 1958 Plymouth Sedan* properly frame the exclusionary rule's very limited application in the civil context to forfeiture actions. In *United States v Calandra*, the Court considered whether a witness could be questioned by a grand jury based on evidence obtained outside the scope of a search warrant. Even though the underlying purpose of the grand jury was to "include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions," the Court decided the exclusionary rule did not apply. *Id.* at 343. In weighing the deterrent impact on police misconduct against the high societal cost, the Court concluded:

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury. [*Calandra*, 414 US at 351–352.]

The Court also noted that, although they involve investigations into crimes, a grand jury proceeding is not a criminal trial and does not adjudicate criminal guilt or innocence. *Id.* at 349. Therefore, the rationale for exclusion of evidence during a criminal trial did not apply to a grand jury proceeding (even though the purpose of that proceeding was to investigate crime and issue indictments that might result in convictions). See *Id.*, at 344.

Two years later in *United States v Janis*, 428 US at 447, the Supreme Court held "that the exclusionary rule did not bar the introduction of unconstitutionally obtained evidence in a civil tax proceeding because the costs of excluding relevant and reliable evidence would outweigh the marginal deterrence benefits, which, we noted, would be minimal because the use of the exclusionary rule in criminal trials already deterred illegal searches." *Scott*, 524 US at 363-364.[30]

Less than a decade later, the Court concluded that the exclusionary rule did not apply a civil case regardless of whether the Fourth Amendment violation and subsequent action were pursued by the same authority. In *INS v Lopez-Mendoza*, the Supreme Court declined to apply the exclusionary rule to deportation proceedings after the respondent was illegally arrested by an INS agent at his place of employment. The Court concluded that "[a] deportation

[30] Notably, *Janis* involved an inter-sovereign situation: the information was discovered by state authorities and later used in the federal tax matter. The Court expressly noted that it was not making a decision on intra-sovereign matters because that question was not before the Court.

proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime . . .. Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing." *Id*. at 1038. The Court also stated that it was not dealing with "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id*. at 1050–1051. Accordingly, the Court concluded the exclusionary rule did not apply, citing the minimal deterrent impact and high societal cost of permitting an ongoing violation and the civil nature of the underlying proceeding. *Id*. at 1050.

Finally, in *Pennsylvania Bd of Prob & Parole v Scott*, 524 US at 362-364, the Supreme Court again declined to apply the exclusionary rule to matters outside of criminal trials, finding that "the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights." The Court concluded that "application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings." *Id*. at 364. And, "[t]he rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches." *Id*. The Court also noted that, not only has it "generally held the

exclusionary rule to apply only in criminal trials," it has, "moreover, significantly limited its application even in that context." *Scott*, 524 US at 364 n 4.

In other words, "United States Supreme Court precedent regarding the exclusionary rule's use in civil cases can be succinctly summarized as follows: it only applies in 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. That's it." *Long Lake II*, ___Mich App at ___, 2022 WL 4281509, at *5.

2. Michigan's exclusionary rule is not more expansive than the federal rule.

And, as the Court of Appeals concluded, Michigan's own constitution "tracks this restrained approach." *Id.* In fact, if anything, the participants at our 1961 constitutional convention were "attempting to allow for the possibility of a less stringent application of the exclusionary rule if allowed by federal law, rather than attempting to strengthen Michigan search and seizure protection." *People v Nash*, 418 Mich 196, 212-213; 341 NW2d 439 (1983). Specifically, this Court has remarked that

> [a]ttempts to unite Michigan and United States search and seizure law by adopting the exact language of the Fourth Amendment in the proposed Michigan Constitution were defeated. Instead, the *anti-exclusionary-rule* proviso of Const. 1908, art. 2, § 10 was amended back into the proposed constitution. [*Id.* (emphasis added).]

Currently, Const. 1963, art. 1, § 11, provides:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without

> describing them, nor without probable cause, supported by oath or affirmation. *The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.* [Emphasis added.]

"There is no indication that in readopting the language of Const 1908, art 2, § 10 in Const 1963, art 1, § 11 the people of this state wished to place restrictions on law enforcement activities greater than those required by the federal constitution. In fact, the contrary intent is expressed." *Id*. See also *People v Goldston*, 470 Mich 523, 536–537; 682 NW2d 479 (2004).[31] As plurality of this Court explained in *People v Nash*, 418 Mich 196, 214; 341 NW2d 439 (1983) (opinion by BRICKLEY, J.): "The history of Const. 1963, art. 1, § 11, and its plain import, however, suggest that its further expansion, with the concomitant expansion of the exclusionary rule to enforce it, should occur only when there is a compelling reason to do so." See *Long Lake II*, ___Mich App at ___, 2022 WL 4281509, at *5. See also *Kivela v Dept of Treasury*, 449 Mich 220, 233; 536 NW2d 498 (1995); *Sitz v Dept of State Police*, 443 Mich 744, 752–753; 506 NW2d 209 (1993); *People v Collins*, 438 Mich 8, 28; 475 NW2d 684 (1991).

In fact, citing prior Supreme Court precedents, this Court has also declined to apply the exclusionary rule in civil cases. In *Kivela*, this Court considered whether Michigan would apply the exclusionary rule in a civil tax proceeding. Applying the balancing test outlined by *Janis*, this Court concluded

[31] As such, the exclusionary rule in Michigan is "*not* based on the text of our constitutional search and seizure provision, Const. 1963, art. 1, § 11." *Goldston*, 470 Mich at 526.

that the deterrent effect would not be furthered by excluding evidence illegally sized during a prior criminal investigation from subsequent civil tax proceedings.[32]

Kivela also distinguished prior Michigan case law applying the exclusionary rule in the civil context:

> *Lebel v Swincicki*, 354 Mich 427, 435–440; 93 NW2d 281 (1958) and *McNitt v Citco Drilling Co*, 397 Mich 384; 245 NW2d 18 (1976), do not support the defendant's arguments. Although these cases state that "Michigan's exclusionary rule [has in certain cases been applied] in civil proceedings," *Lebel* and *McNitt* involved removal of blood from a living person, a degree of intrusiveness not present when police armed with a warrant search one's home. We find these cases inapplicable to the instant case. [*Kivela* 449 Mich at 236.]

Moreover, *Lebel* and *McNitt* did not have the benefit of the development of law on this issue in *Scott* or *Lopez-Mendoza* or this Court's own subsequent analysis on the scope of Michigan's exclusionary rule in relation to its federal counterpart. As recently noted by the Supreme Court, "[a]dmittedly, there was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine." *Davis v United States*, 564 US 229, 237; 131 S

[32] Other jurisdictions have reached the same, reasonable conclusion. *United States v Phillips*, 914 F3d 557, 558–559 (7th Cir., 2019) ("In other non-criminal-trial procedural contexts that have adversarial qualities and carry significant risks for defendants, the Court has found that the exclusionary rule is not worth the "substantial social costs" that would accompany it."); *Johnson & Johnson v Advanced Inventory Mgt, Inc*, No. 20-CV-3471, at *2 (ND Ill, October 2, 2020) ("The overwhelming weight of authority strongly suggests that the exclusionary rule does not apply in any civil actions."); *Francen v Colorado Dept of Revenue, Div of Motor Vehicles*, 328 P3d 111 (Colo, 2014) (exclusionary rule not applicable in license revocation hearings); *59th & State St Corp v Emanuel*, 70 NE3d 225, 232–234 (Ill App Ct, 2016).

Ct 2419; 180 L Ed 2d 285 (2011). However, courts–including this Court—have since "abandoned the old, 'reflexive' application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits." *Id*. at 238.

C. The Court of Appeals correctly found that the exclusionary rule does not apply here.

The Court of Appeals correctly found that the exclusionary rule does not apply here. As summarized above, the Supreme Court has repeatedly declined to "extend the operation of the exclusionary rule beyond the criminal trial context." *Scott*, 524 US at 364 (emphasis added).[33] To that end, the Court has balanced "the prime purpose of the rule, if not the sole one"—i.e., the deterrence of unlawful *police* conduct—against "the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *Lopez–Mendoza*, 468 US at 1041. "Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." *Davis*, 564 US at 237, quoting *Hudson v Michigan*, 547 US 586, 596; 126 S Ct 2159; 165 L Ed 2d 56 (2006). The analysis must also account for the "substantial social costs" generated by the rule. *Id*.

Upon balancing these considerations, the Court has concluded that, in the civil context, the exclusionary rule does not apply regardless of whether the civil matter involved fines, deportation, arrest, revocation of parole status, or any

[33] In fact, it appears the conclusion that the exclusionary rule applies to "quasi-criminal" matters is rooted in law that has been seriously called into question by *Janis*, *Scott*, *Lopez-Mendoza*, and progeny.

other penalty traditionally reserved for the criminal law. See *Calandra*, *Janis*, *Lopez-Mendoza*, *Scott*, and *Stone*.

1. The deterrent impact is speculative at best in civil matters and the societal cost in instances of continuing wrongs is unacceptably high. Thus, balancing of the factors does not support application of the exclusionary rule.

Application of the balancing test "establishes that the exclusionary rule has no place here." *Long Lake II*, ___Mich App at ___, 2022 WL 4281509, at *6. The Court of Appeals was correct in concluding that

> There is no likelihood that exclusion of the drone evidence in this zoning infraction matter will discourage the police from engaging in future misconduct, since the police were never involved in the first place. Rather, exclusion of the drone evidence likely will deter a township employee who works in the zoning arena from ever again resorting to a drone to gather evidence of a zoning violation. This is not the purpose of the exclusionary rule. [*Id.*]

There was no collusion or unethical agreement with any law enforcement agency, whether inter- or intra-sovereign. And the Township is not pursuing any penalty whatsoever in this case; the Maxons face no "punishment" or other criminal sanction for the past *years* of violations. The proceedings are not punitive. "The exclusionary rule was not intended to operate in this arena, and serves no valuable function." *Id.* at *7.

On the other hand, the societal costs of exclusion are significant. In asking for exclusion of probative and reliable evidence detailing the Maxons' increasingly hazardous use of their low-density residential property, Defendants are essentially asking the Court to turn a blind eye to an ongoing

public nuisance. The Supreme Court has already rejected the exclusionary rule in such a circumstance:

> The first cost is one that is **unique to continuing violations of the law. Applying the exclusionary rule in proceedings 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 rule**. [*Lopez-Mendoza*, 468 US at 1046 (emphasis added).]

The *Lopez-Mendoza* Court went on to conclude that "*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, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized." *Id*. (emphasis added). But that's precisely what's happening here. The Maxons are suggesting that this Court exclude reliable evidence and permit them to continue use of their property as a hazardous nuisance per se.[34] The Supreme Court has expressly rejected use of the exclusionary rule in a civil matter in the face of such a cost.

The Supreme Court has left open the *possibility* that the exclusionary rule could be applicable in civil matters where there are "egregious violations of the

[34] Further, like the Defendant in *Lopez-Mendoza*, the Maxons would still be subject to civil proceedings for *ongoing* violation of the law. And as the Court of Appeals correctly noted, the fact that the inner portions of the property are only visible from the air would make future enforcement challenging despite the fact that the condition of the property is not in dispute, i.e., even if the Maxons disagree that they've violated the ordinance, there is no argument that the drone images are inaccurate.

Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Lopez-Mendoza*, 468 US at 1050-1051 (1984). But that is not what happened in this case. Aerial images or observations are not Fourth Amendment violations in other contexts (they are "no search at all"); their capture here by a drone can hardly be called "egregious."[35] And, to that point, it would have been (and still is) reasonable to rely on binding precedent regarding aerial observations.[36] Thus, there is neither "police" conduct nor culpability in this case and, likewise, there is no basis for application of the exclusionary rule. It is completely unclear, therefore, what criminal law enforcement deterrent benefit would be derived from application of the exclusionary rule, and it is equally clear that the cost to society would be

[35] Again, the drone flights, including set up and tear down, totaled no more than 120 minutes during three flights. Compare Application p 37 (asserting repeated searches over 14 months).

[36] The Township firmly remains of the position that the drone use here did not violate the Maxons' rights in the first instance. Nevertheless, the nature of this unresolved foundational question also weighs against exclusion. For example, there was no reason for any Long Lake official to believe that the Township was prohibited from lawfully doing what any private citizen may still lawfully do: fly a drone high above wooded property. To that end, the deterrent function is certainly minimal where aerial photos substantially similar to those taken in this case can be legally obtained by the Township or any actual police agency without a warrant from a plane or helicopter—an act that would be much louder, more invasive, would certainly draw more attention to (and have an arguably prejudicial impact on) the object of the observation, and would place a much greater burden on the taxpayer. Again, it's well established that targeted aerial photography from manned flights does not implicate the Fourth Amendment. See, e.g., *Dow Chem Co v United States*, 476 US 227; 106 S Ct 1819; 90 L Ed 2d 226 (1986).

significant if the evidence were excluded. And, on the other hand, there is nothing about the facts or outcome of this case that would make a reasonable police officer believe that any of the extreme, dystopian concerns put forth by the Maxons would be lawful or permissible from a Fourth Amendment standpoint.

The Court of Appeals reached the correct result in *Long Lake II* and the present application should be denied.

2. There is no "compelling reason" for this Court reach a different result under Michigan law.

There is no "compelling reason" for this Court reach a different result under Michigan law. *Kivela*, 449 Mich at 233. To start, Michigan applies the same balancing test analyzed above.

And, assuming for the sake of argument only that some unmanned aerial observations could be a Fourth Amendment violation, the fact that a claimant could possibly pursue other civil remedies against a municipality would be deterrent enough.[37] Even if *Bauserman v Unemployment Ins Agency*, ___Mich___; ___NW2d___, 2022 WL 2965921 (2022) (Docket No. 160813), would not apply as the Maxons argue, there are nevertheless other civil remedies for violations of the federal constitution. Parties may also seek declaratory relief. See *INS v Lopez-Mendoza*, 468 US at 1045. Each of these remedies are—unlike

[37] The Maxons do not accurately recite Michigan law regarding damages for trespass. See Application p 42. The *full* explanation in *Szymanski v Brown*, 221 Mich App 423, 430–31; 562 NW2d 212 (1997), speaks for itself.

the exclusionary rule—specifically designed as redress for a constitutional violation.

The Maxons (repeatedly) express a fear that drones might be used in a manner not at all advocated by the Township or, quite frankly, at issue in this case. But there is absolutely no evidence that exclusion of non-curtilage drone photos taken from high above the tree line in this zoning action would have any deterrent effect whatsoever on a law enforcement agency that wanted to use a warrantless search by an unmanned aircraft to peek into a home or to surveil a person, as the Maxons claim. Nor does this case provide them with any justification to do so. It is simply not the issue before this Court.

Further, none of the exaggerated hypotheticals warrant the contorted application of the law advocated by the Maxons. A "search" of medical records, financial records, or other "data" is not at issue. Michigan already has statutes to protect these "papers," as does the federal law. See, e.g., MCL 600.2157. And a physical trespass onto "papers" would be fundamentally different than taking a look at open property from the air.

Recall again that "[e]xclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Davis,* 564 US at 236 (quotation omitted) The rule is "unsupportable as reparation or compensatory dispensation" to an injured party. *Id.* quoting *Janis*, 428 US at 454 n 29. "The rule's *sole* purpose, we have repeatedly held, is to deter future Fourth Amendment violations." *Id.* at 236–237 (emphasis

added). Considering each of these factors, the Court of Appeals majority reached the correct result: the exclusionary rule clearly does not apply to this civil zoning enforcement matter under either federal or Michigan law. There is no "compelling reason" to hold otherwise.

RELIEF REQUESTED

WHEREFORE, Long Lake Township respectfully requests that this Court DENY the Maxons' application for leave to appeal. In the alternative, the Township requests that this Court GRANT leave and find that no Fourth Amendment violation occurred and that the exclusionary rule does not apply in this context. The Township respectfully requests any additional relief deemed necessary, including costs and fees in connection with this appeal.

Respectfully submitted,

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Date: November 28, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212. I certify that this document contains 15,596 countable words. The document is set in Century Schoolbook, and the text is in 12-point double spaced type.

Respectfully submitted,

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