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MIKE NAVARRE
BOROUGH MAYOR

MEMORANDUM

TO: Dale Bagley, Assembly President
Members, Kenai Peninsula Borough Assembly
Mike Navarre, Mayor

FROM: Colette Thompson, Borough Attorney

DATE: May 4, 2015

SUBJECT: Impact of Aerial Photography Project on Public's Right to Privacy Per Ordinance 2014-19-56

During the Finance Committee's meeting of April 21, 2015 Assembly Member Kelly Wolf requested a legal opinion on whether the high-resolution aerial photography project originally authorized in Ordinance 2010-19-48 unlawfully infringed upon private property owners' right to privacy. This memorandum responds to his request.

The photographs were taken May 8 to11, 2014 and May 13 to 19, 2014 using a Nikon D800 camera, that was strapped beneath a Bell 206 helicopter from a height of 2,000 feet above the surface. Navigable airspace is generally 500 feet from persons or things. The resolution was, at best, about 6 inches in that each pixel is about 6 inches square. This means the smallest feature that can be seen in each picture must be a homogenous area greater than or equal to 6-inches. While taking pictures the airspeed was 40 mph on average, with the minimum speed being 30 mph. The helicopter never hovered over any of the parcels. The camera used a 24mm wide-angle lens. At 2,000 feet elevation, the pictures mimic the image a normal naked eye would see from 3,000 feet. Accompanying this memo is a sample photograph from the project.

In 1972, the voters in Alaska approved an amendment to the Alaska Constitution that provides "The right of the people to privacy is recognized and shall not be infringed."[1] The Alaska Supreme Court has acknowledged that the specific enumeration of this right in the Alaska Constitution means it is afforded broader protection than the federal right of privacy, which is not specifically spelled out in the federal constitution.[2]

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[1] Alaska Const. art. I, § 22.
[2] *State v. Glass,* 583 P.2d 872, 879 (Alaska 1975).

Additionally, the Alaska Constitution prohibits the government from violating "the right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures."[3]

The Alaska right to privacy is not absolute or without limitations.[4] Instead, "there must be . . . a balancing of conflicting rights and interests."[5] The test for deciding whether the right to privacy has been invaded under article I, section 22 of the Alaska Constitution is:

(1) Did the person harbor an actual (subjective) expectation of privacy, and, if so
(2) Is that expectation one that society is prepared to recognize as reasonable?[6]

Here, the first question is whether the residents and property owners had an actual expectation of privacy regarding the photography of their property in the manner described above. The Alaska Supreme Court has specifically held that "citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution."[7] This basic right to privacy is for activities conducted inside Alaskan homes, and also extends to the curtilage of the home, which includes areas immediately surrounding the home in which the resident retains a reasonable expectation of privacy against unreasonable searches and seizures.[8] Therefore, it can be assumed that persons have an actual expectation of privacy concerning their homes and curtilage.

However, I have not found any Alaska cases addressing the question of whether there is a reasonable expectation that aerial pictures may not be taken of the outside of their home in the manner described above. Numerous other jurisdictions have addressed this issue in the context of searches and seizures.

In *Florida v. Riley,*[9] the U.S. Supreme Court held that a police officer's observation of the interior of a partially covered greenhouse in a person's residential back yard from a helicopter circling 400 feet above the surface did not require a search warrant. The sheriff's office had received an anonymous tip that marijuana was being raised on Riley's property. The responding officer could not see the greenhouse contents from the ground and hired a helicopter to fly over the property. He circled the property twice in a helicopter flown at 400 feet elevation and observed what he thought was marijuana growing in the greenhouse with his naked eye. (Two roof panels were missing and two sides were not enclosed.) The officer obtained a search warrant, found marijuana in the greenhouse, and charged Riley with possession of marijuana. Riley claimed that the aerial observation was a "search" that required a search warrant. In its decision, the court recognized that private and commercial flights by helicopters in public airways are routine in the U.S. "Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's

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[3] Alaska Const. art. I, § 14.
[4] *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1980).
[5] *Id.*
[6] *City and Borough of Juneau v. Quinto,* 684 P.2d 127, 129 (Alaska 1984), citing *State v. Glass*, 583 P.2d 872 (Alaska 1978).
[7] *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).
[8] *See e.g. Kelley v. State,* 2015 WL 1592043 (Alaska 2015).
[9] 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1988).

greenhouse." The record did not reveal that the officer saw any intimate details about the use of the home or curtilage, and there was no disturbance from undue noise, wind, dust or threat of injury. It concluded Riley could not reasonably expect that the contents of his greenhouse would be immune from the officer's examination.

In contrast, a different case held that a deputy sheriff causing his helicopter to be flown back and forth across the defendant's entire 20-acre ranch while looking for marijuana plants was manifestly exploratory in nature and an unreasonable governmental intrusion into the privacy of the defendant's backyard.[10]

Factors considered in deciding whether an aerial search should have had a warrant include the altitude of the aircraft, the size of the observed objects, the nature of the area observed such as the uses to which it is put, frequency of the flights, and duration of the surveillance.[11]

The facts here were there was no prolonged surveillance of any property, the flights were conducted at 2,000 feet - well within navigable airspace, there was no disturbance to the property owners, and there was no disturbance of the properties. The area observed included all properties and waterways subject to Chapter 21.18 of the borough code.

Further, while the pictures reveal larger objects such as structures and vehicles, they are not clear enough to reveal intimate details about the use of the home or curtilage. It should also be noted that aerial pictures of property are routinely taken from this height and available to the public. For example, in 2010 the Army Corps of Engineers took a series of more detailed photographs of the Kenai River Watershed to capture data. This covered much of the same area as did the borough project. Google and other companies routinely make available satellite and other aerial images of property on the internet.

The purpose for taking these pictures was to obtain a baseline record of this area as it contains significant habitat for fish and wildlife. It can be used for many purposes. One purpose is to provide baseline data to help determine which properties could be "grandfathered in" under the habitat protection code for prior existing uses. Other uses include turbidity studies, hydrological studies, geological studies, and more. These are clearly legitimate governmental purposes.

Considering all of these factors, it seems likely a court would hold it is unreasonable to expect that one's property cannot be observed and photographed in the manner used for this project, and that the photos may be posted on the borough's webpage. Therefore, in my view people's rights to privacy were not unlawfully invaded by this project.

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[10] *People v. Sneed,* 32 Cal.App.3d 535, 108 Cal.Rptr. 146 (Cal. 1973), later disapproved in *People v. Cook,* 710 P.2d 299 (Cal. 1985) to clarify people may have a reasonable expectation of privacy from airplanes and helicopters flying at legal heights such as from a helicopter hovering 20 to 25 feet above backyard.

[11] 68 Am.Jur.2d Searches and Seizures §111 and the cases cited therein.