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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1180492

Charles K. Breland, Jr., and Breland Corporation

v.

City of Fairhope and The Battles Wharf / Point Clear Protective Association

Appeal from Baldwin Circuit Court
(CV-13-901096)

MITCHELL, Justice.

Charles K. Breland, Jr., purchased land in Baldwin County to build a housing subdivision. The subdivision he planned to construct required

filling about 10.5 acres of wetlands, which the City of Fairhope and Baldwin County opposed. Breland and Breland Corporation (collectively "the Breland parties") sued Fairhope in the Baldwin Circuit Court, claiming that they had a vested right to fill the wetlands, that Fairhope's ordinances could not prevent them from filling the wetlands, that Fairhope had acted negligently regarding Breland's application for a land-disturbance permit, and that Breland's criminal citation for beginning work without a permit should be expunged. The trial court rejected their claims following a nonjury trial.

The Breland parties have appealed the trial court's judgment to this Court. For the reasons discussed below, we affirm the judgment.

Facts and Procedural History

In 1999, Breland purchased 65 acres in Baldwin County ("the property"), which lie outside Fairhope's corporate limits but within its police jurisdiction. Breland received preliminary site-plan approval from Fairhope in 2000 to develop Battles Wharf Landing, an 18-lot subdivision on uplands within the property. Rather than developing the 18-lot project, Breland revised his plan to include 36 lots. This new plan

required filling approximately 10.5 acres of wetlands to develop 20 of the lots. To fill the wetlands, Breland had to obtain, through a joint-application process, a permit from the United States Army Corps of Engineers ("the Corps") and a certification from the Alabama Department of Environmental Management ("ADEM"). The joint application included a preliminary subdivision-plot plan.

Breland's joint application was subject to a period of public input. In 2001, Fairhope's mayor, Tim Kant, submitted a letter on behalf of Fairhope's city council objecting to Breland's application. That letter raised "environmental concerns associated with this project" and noted that filling "these natural wetlands will cut off what acts as a filter for water draining into Mobile Bay and also acts as a sponge, soaking in runoff water reducing drainage naturally." Mayor Kant testified at trial that, around the time of Breland's application, Fairhope passed a comprehensive plan directed at improving stormwater management and

commissioned a study by Audubon International, which recommended additional protections.[1]

The Baldwin County Commission also objected to Breland's application, arguing that his proposal did not conform with Baldwin County Subdivision Regulation 5.2.2 ("Regulation 5.2.2"), which provides, in relevant part:

> "No development shall be approved that proposes to fill either jurisdictional or nonjurisdictional wetlands in order to create buildable lots. ... Lots may be platted where sufficient upland areas exist to provide a building site for the principal structure and necessary ancillary facilities. Fill may be used where necessary to provide access to lots where approval for such fill has been received from the Corps of Engineers and other appropriate governmental agencies...."[2]

The County also objected on the basis of the ecological impact of the proposed development.

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[1]According to Mayor Kant, the reason for these concerns was that Fairhope was experiencing a "major influx of development" around that time, which was causing stormwater challenges and flooding problems that "put pressure on [Fairhope] to pass regulations and ordinances to deal with it."

[2]Regulation 5.2.2 was amended in 2012 to exempt landowners who have obtained filling permits from the Corps.

At the Corps' request, Breland responded to the objections to his proposal. He acknowledged that he "is required by law to obtain approval under separate authorization from the Baldwin County Planning Commission[, which] will review the project for conformity," and that "[s]hould the Commission not approve conformity, the project will not be built."

ADEM completed its review of Breland's application and issued its water-quality certification to the Corps in October 2002 ("the certification"). The next month, the Corps issued a permit to Breland, which provided authorization for him to "construct a residential subdivision" of 35 lots and "include[d] the filling" of wetlands ("the federal permit").

The federal permit was subject to several conditions and limitations. To offset the loss of wetlands, Breland had to preserve nearly 31 acres of additional wetlands on the property through a restrictive covenant that prohibited any other land disturbance. Additionally, it required Breland to purchase 24.68 mitigation credits from a mitigation bank run by Weeks Bay Watershed Protective Association, Inc. ("Weeks Bay"). The federal

permit also provided that Breland must "comply with all Federal, State, and local floodplain ordinances" and that it did not "obviate the need to obtain other Federal, State, or local authorizations required by law" or "grant any property rights or exclusive privileges." Breland purchased the mitigation credits in July 2003 for $143,144.

In 2003, Breland's project manager contacted Fairhope and County officials about developing a subdivision on the property called Loyola Park. Fairhope issued two letters in response, raising concerns that "[a]lmost all of the entire project appears to be delineated wetlands" and noting that "the Planning Commission may consider this property not suitable for platting and development because of the filling issues, drainage issues, and the health issues of building houses in a wetland." Fairhope also referred to the County's subdivision regulations, stating that in Fairhope's view of the regulations, "the uplands should be developed and not the wetlands." The County denied Breland's site plan

in part because it did not conform with Regulation 5.2.2.[3] Breland did not pursue further approval of Loyola Park.

At the time the federal permit and the certification were issued, Fairhope did not have an ordinance in place governing the filling of wetlands outside Fairhope's corporate limits. That changed in August 2006, when Fairhope enacted Ordinance No. 1313. That ordinance prohibited filling activity "until the land owner or contractor has obtained a land disturbing permit from the City of Fairhope." Ordinance No. 1313, which was enacted to "protect the water quality and environmental integrity for the area watersheds," provided that fill material could not be more than 10% "red [soil] or clay."

Over a year later, without applying for a land-disturbance permit under Ordinance No. 1313, Breland moved heavy machinery to the property to clear an entrance in preparation for filling. Before Breland

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[3]In a report on Breland's plan, County staff concluded that it "exploits the existing loophole in the regulations" -- which did "not allow lots that are entirely wetland to be platted" -- by obtaining the federal permit before securing the County's subdivision approval so that he could plat lots "that were 100% wet."

began land-disturbance activity, however, a Fairhope zoning enforcement officer issued a stop-work order because of Breland's failure to obtain a land-disturbance permit.

In April 2008, the Breland parties applied for land-disturbance permits from Fairhope and the County. The County issued a permit to Breland Corporation on June 2, 2008. In the cover letter, the County stated that "it appears that the purpose of this permit is to ultimately allow for the development of a subdivision." The County reminded Breland Corporation that, as such, under its subdivision regulations, "[n]o development shall be approved that proposes to fill either jurisdictional or non-jurisdictional wetlands in order to create buildable lots," and it advised Breland Corporation to consult with the County and Fairhope "prior to moving forward with any development plans."

Fairhope never responded to Breland's permit application. But on June 9, 2008, Fairhope enacted Ordinance No. 1363, which instituted a moratorium on issuing land-disturbance permits for projects that "may result in the loss, fill or destruction of wetlands." In its preamble, the ordinance cited "substantial growth and development" locally that had

"resulted in the loss of certain sensitive environmental wetlands," which "serve a number of functions including pollution control and protection of water quality, flooding and stormwater control, and which provide habitat for fish, wildlife and vegetation." Ordinance No. 1363 was set to lapse by its own terms in October 2008.

With the federal permit set to expire in November 2008, Breland sued Fairhope in the Baldwin Circuit Court to enjoin the enforcement of Ordinance No. 1363 and to obtain a judgment declaring that Breland's land-disturbance-permit application to Fairhope should be granted. The Breland parties voluntarily dismissed that lawsuit after obtaining an extension of the federal permit.

Two days before the moratorium expired, Fairhope adopted Ordinance No. 1370. Like Ordinance No. 1313, Ordinance No. 1370 governs land-disturbance permits for projects that fill or destroy wetlands, but it imposes more detailed regulations. Ordinance No. 1370 states that the destruction of wetlands within and near Fairhope had "increased downstream water pollution, flooding, and erosion and [had] resulted in the loss of wildlife habitat." The ordinance also contains a "grandfather

clause," which exempted from its permitting process "[a]ll uses and activities that were lawful before the passage of this ordinance." The Breland parties have not attempted to obtain a permit under Ordinance No. 1370.[4]

The Breland parties contend that, between late 2008 and 2011, Fairhope officials negotiated with Breland to purchase the property. But by late 2011, Breland believed that Fairhope would not purchase the property. Without seeking further permits from Fairhope, Breland attempted to resume his attempt to fill the wetlands. Fairhope issued a second stop-work order the same day. A few days later, a Fairhope official explained to Breland that he needed to comply with multiple ordinances, including Ordinance No. 1370. Fairhope also issued a criminal citation to Breland for failing to obey a city ordinance.

The Breland parties then brought the underlying lawsuit against Fairhope in the Baldwin Circuit Court. They sought: (1) a temporary

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[4]Fairhope later adopted additional relevant ordinances, including Ordinance No. 1398, in August 2009, and Ordinance No. 1423, in May 2010. The Breland parties have not attempted to comply with these ordinances either.

restraining order and a preliminary injunction against Fairhope's attempts to stop them from filling the wetlands; (2) a judgment declaring that they had obtained a vested right to fill the wetlands; (3) a judgment declaring that Fairhope's ordinances are preempted by state law; (4) a judgment declaring that Fairhope's ordinances are improper de facto zoning regulations; (5) a verdict of negligence against Fairhope for allegedly mishandling Breland's 2008 permit application; and (6) expungement of the 2011 criminal citation issued against Breland. The trial court entered a summary judgment in Fairhope's favor, holding that the statute of limitations barred most of the Breland parties' claims. The Breland parties appealed to this Court, and we reversed the trial court's judgment and remanded the case to the trial court, holding that "each time Fairhope enforced its ordinances to stop Breland from filling activity on his property Fairhope committed a new act that serves as a basis for a new claim." Breland v. City of Fairhope, 229 So. 3d 1078, 1090 (Ala. 2016).

On remand, the trial court granted The Battles Wharf/Point Clear Protective Association's motion to intervene and held a nonjury trial.[5] In a posttrial order, it held that the Breland parties had not obtained a vested right to fill the wetlands, that state law did not preempt Fairhope's ordinances, and that Fairhope's ordinances were not improper zoning ordinances. Therefore, it held that the Breland parties' negligence and expungement claims were moot. The Breland parties then appealed to this Court.

Standard of Review

Where, as here, a trial court hears oral testimony in a nonjury trial, the ore tenus rule governs. Under that rule, the findings of the trial court are presumed correct and its judgment based on those findings will not be reversed unless the judgment is "palpably erroneous or manifestly unjust." Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002). Nevertheless, we review the trial court's "conclusions of law or its application of law to facts" de novo. Mitchell v. Brooks, 281 So. 3d 1236, 1243 (Ala. 2019).

[5]The Battles Wharf/Point Clear Protective Association is a group of nearby property-owners who objected to Breland's proposed development.

Analysis

The Breland parties raise a host of arguments on appeal, but we need not address all of them. As we explain: (1) the Breland parties' constitutional challenge to Ordinance No. 1363 is moot, and their void-for-vagueness constitutional challenge to the other ordinances is not ripe; (2) the trial court did not err in holding that the Breland parties had no vested right to fill the wetlands; (3) the trial court properly held that state law does not preempt Fairhope's ordinances; and (4) the trial court did not err in holding that Fairhope's ordinances are not de facto zoning ordinances. It is not necessary to address the Breland parties' remaining arguments.

A. The Breland Parties' Constitutional Arguments

The Breland parties contend that Fairhope's ordinances -- "especially Ordinance [No.] 1370" -- are unconstitutionally vague and allow for arbitrary enforcement. They also argue that Fairhope has denied them due process of law by refusing to apply the grandfather clause in Ordinance No. 1370 to their vested rights to fill the wetlands. The trial court did not address these arguments in its posttrial order.

"In reviewing an ordinance against a challenge of unconstitutional vagueness, '[w]e must be certain that the ordinance is so plainly and palpably inadequate and incomplete as to be convinced beyond reasonable doubt that it offends the constitution or we will not strike it down.'" Ex parte Baldwin Cnty. Planning & Zoning Comm'n, 68 So. 3d 133, 138-39 (Ala. 2010) (quoting Walls v. City of Guntersville, 253 Ala. 480, 485, 45 So. 2d 468, 471 (Ala. 1950)). We will declare an act to be void for vagueness "only if the act is so indefinite that 'a person of ordinary intelligence, exercising common sense [could] derive no rule or standard at all from the ... language,' or if it is so vague as to 'authorize or encourage arbitrary and discriminatory enforcement.' " 68 So. 3d at 139 (quoting Northington v. Alabama Dep't of Conservation & Nat. Res., 33 So. 3d 560, 567 (Ala. 2009)). In a vagueness challenge not based on the First Amendment, we examine whether the statute is vague "as applied to the conduct allegedly proscribed," not as applied to "hypothetical concerns." Id. (internal quotation marks and emphasis omitted).

It is undisputed that the Breland parties have not attempted to comply with any of Fairhope's ordinances adopted after Ordinance No.

1313. We therefore need not analyze the Breland parties' vagueness arguments as to Ordinance No. 1370, or those ordinances enacted after it, because they are "hypothetical concerns" that are not ripe for our review. Id.; see also DeBuys v. Jefferson Cnty., 511 So. 2d 196, 199 (Ala. Civ. App. 1987) (denying due-process challenge to county's failure to implement "ascertainable" standards for evaluating permit requests because plaintiffs "refused to give the Committee the opportunity to apply those standards to their requests").[6]

Breland did apply for a land-disturbance permit under the framework of Ordinance No. 1313. The Breland parties argue: "Ordinance

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[6]On a similar note, the Breland parties also argue that the moratorium imposed by Ordinance No. 1363 attempted to suspend the law in violation of Ala. Const. 1901, Art. I, § 21. The moratorium expired by its own terms in 2008, and Breland voluntarily dismissed his lawsuit challenging the validity of the moratorium after it expired and after he obtained an extension of the federal permit. Thus, this argument is moot. See Bradley Outdoor, Inc. v. City of Florence, 962 So. 2d 824, 833 (Ala. Civ. App. 2006) (holding that challenge to moratorium, which expired by its terms when a new ordinance was enacted, was mooted by the expiration of the moratorium); see also Aaron Private Clinic Mgmt. LLC v. Berry, 912 F.3d 1330, 1335 (11th Cir. 2019) (holding that challenge to temporary licensing moratorium was moot because the moratorium had expired).

[No.] 1313 references obtaining a land disturbance permit but provides no standards by which such a permit may be granted or denied. Thus, from the face of the ordinance, it appears that a permit is due to be granted merely by filing the application." Breland parties' brief, at pp. 54-55. Thus, while this argument appears in the briefing alongside the Breland parties' vagueness argument, their argument is not that Ordinance No. 1313 is void because it is unconstitutionally vague.[7] Rather, at bottom, their argument is that they are entitled to the permit by the terms of Ordinance No. 1313.

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[7]In fact, the Breland parties conceded five times in their briefing that they are obligated to comply with Ordinance No. 1313. See Breland parties' brief, at p. 24 ("Breland contends that he must comply only with Ordinance [No.] 1313...."); id. at p. 25 ("Breland acquired 'vested rights' to fill under his Permit, subject only to Ordinance [No.] 1313...."); id. at p. 29 ("Fundamental principles of fairness, due process and equity dictate that Breland has a 'vested right' to fill the wetlands with material that is compliant with Ordinance [No.] 1313."); id. at p. 68 ("Breland seeks a determination that he be permitted to fill the Property...subject only to the 'red clay' limitations contained in Ordinance [No.] 1313...."); Reply brief, at p. 35 ("Breland prays for declaratory relief establishing his right to fill the Property in compliance with the Permit, subject only to the 'red clay' provisions of Ordinance [No.] 1313...."). Taking the Breland parties' argument to mean that Ordinance No. 1313 is void for vagueness would conflict with these concessions.

On that issue, the trial court noted that, "[w]hile [it] found no good cause for the City's inaction on the [application], the parties agreed in open court that the City's failure to act on the application served as a denial" -- a finding Breland does not challenge. But the trial court did not determine what action Fairhope should have taken or would have been justified in taking. Nor, for that matter, did the trial court make factual findings in its posttrial order essential to evaluating whether Breland was entitled to the permit, and we are ill equipped to make those factual findings in the first instance on appeal.[8] Additionally, the Breland parties

[8]By contrast, in other cases in which this Court has held that a permit was wrongfully denied, there have been clear factual findings supporting that conclusion. See, e.g., Mobile Cnty. v. City of Saraland, 501 So. 2d 438, 440 (Ala. 1986) (holding that city acted arbitrarily where it routinely granted permits to other applicants, the applicant complied with all provisions of the ordinance, and the permit would have been granted absent political pressure, among other facts); Pritchett v. Nathan Rodgers Constr. & Realty Corp., 379 So. 2d 545, 548 (Ala. 1979) (holding that city acted arbitrarily by granting and denying sewer-connection permits to different applicants on a case-by-case basis and where it had not enacted a moratorium on those permits); Swann v. City of Graysville, 367 So. 2d 952, 953-54 (Ala. 1979) (noting that city had issued permits to applicants similarly situated to the plaintiff).

have not articulated a clear federal or state constitutional basis for their argument that Breland is entitled to a land-disturbance permit.

But even assuming that Breland's application met the technical requirements, an application for a permit does not automatically give the applicant a vested right to avoid compliance with later, duly enacted ordinances under a municipality's police power. Further, the trial court's unchallenged finding that Breland's application was denied by the passage of time is not "palpably erroneous or manifestly unjust." Philpot, 843 So. 2d at 125. Thus, the Breland parties' argument concerning Ordinance No. 1313 does not exempt them from compliance with Fairhope's later enacted ordinances.[9]

[9]Because the Breland parties did not obtain a permit under Ordinance No. 1313 or establish that they are entitled to it, filling the wetlands was not a "lawful use or activit[y]," and thus we reject their claim that the grandfather clause in Ordinance No. 1370 exempts them from compliance with that ordinance or that Fairhope denied them due process of law by not applying this exception to their filling efforts. And for the same reason, we reject the Breland parties' argument that Fairhope's ordinances have been improperly applied retroactively.

B. The Breland Parties' Vested-Rights Argument

The Breland parties contend that the trial court erred when it held that they had not obtained a vested right to fill the wetlands on the property. Specifically, they argue that the permits they obtained, the $143,144 they spent on mitigation credits, and the unspecified sums they spent on consultants created a vested right to fill the wetlands when they first obtained a land-disturbance permit from the County. The Breland parties also argue that the trial court erred in applying Regulation 5.2.2 and in holding that they failed to exhaust administrative remedies before filing the underlying lawsuit.[10] Thus, the Breland parties contend, they may fill the wetlands subject only to the requirements in Ordinance No. 1313.

In Grayson v. City of Birmingham, 277 Ala. 522, 173 So. 2d 67 (1963), a case on which the Breland parties rely, this Court addressed the framework for evaluating a vested-rights claim. There, a company

[10]Because we affirm the trial court's judgment holding that the Breland parties did not obtain a vested right, it is not necessary to evaluate the merits of their argument that they were not required to exhaust administrative remedies.

obtained approval from the Jefferson County Planning and Zoning Commission to have agricultural property rezoned to residential and commercial parcels. The company then improved the commercial parcels by paving streets, adding water pipes and storm sewers, and grading, leveling, and clearing the lots, at a cost (as of the mid 1950s) of $3,518. About two years after that approval, the City of Birmingham annexed the land and rezoned the commercial parcels to residential. The company sued Birmingham to challenge the rezoning of the plaintiffs' property.

On appeal, this Court explained that such a rezoning "must stand or fall on vested rights, which, in the absence of a contract, depend for their existence on equitable fairness, both to the property owner and to the general public." 277 Ala. at 525, 173 So. 2d at 69. This Court further held that the question of vested rights is a fact-intensive inquiry in which "changes, investments, and permits" relating to the "structures initiated or completed, are made the criteria of hardships imposed on the property owner and judicially recognized to sustain the claims of vested rights." Id.

This Court noted in Grayson that the plaintiffs' investments in the property, standing alone, might "serve to establish [the plaintiffs']

contention that they have acquired a vested right in the property." 277 Ala. at 526, 173 So. 2d at 70. But the Court also weighed the landowner's interests against "the reasonable necessity for protecting and promoting the health, safety, morals, and general welfare of the public" underlying Birmingham's rezoning of the plaintiffs' property -- in that case, minimizing traffic hazards near a school. 277 Ala. at 528, 173 So. 2d at 72. As such, the landowner's loss relating to its "naked lots, which [were] without structural initiation thereon" and with "no building permit granted," was of "minor weight" compared the city's zoning responsibilities. 277 Ala at 525, 527, 173 So. 2d at 69, 71.

The Breland parties also rely on Baker v. State Board of Health, 440 So. 2d 1098 (Ala. Civ. App. 1983). In Baker, a landowner obtained a permit to install septic tanks on 3,200 square-foot lots for a mobile-home park, which was permitted under applicable regulations at that time. The landowner then spent about $32,000 purchasing equipment, clearing the property, and building roads. The mobile-home regulations were later changed to require 15,000 square-foot lots. After neighboring landowners complained about the mobile-home development and sought to enforce

regulations, the Court of Civil Appeals held that the regulation permitted the landowner to develop the park on 3,200 square-foot lots based on a grandfather clause in the new regulation. Additionally, the court found the landowners' "general equitable" arguments pertinent, noting that they "relied on the permit and expended time and money developing and improving the lots according to the regulations under which they acquired the permit." 440 So. 2d at 1100.

In both Grayson and Baker, the landowners made physical improvements to the land in reliance on the relevant government authorizations.[11] And, unlike here, there is no indication that relevant governing authorities objected to the development from the outset or during the landowners' development process. Further, the Breland parties cite no case in which an Alabama court has held that a

[11]The Breland parties also rely on Greenbriar Village, L.L.C. v. City of Mountain Brook, 202 F. Supp. 2d 1279 (N.D. Ala. 2002), aff'd in part, rev'd in part, 345 F.3d 1258 (11th Cir. 2003). There, the trial court held that the landowner had a vested right to the continuation of a city permit. As in Grayson and Baker, however, the landowner in Greenbriar Village had completed at least some improvement to the land, and, unlike here, there is no indication that the landowner lacked any applicable permits.

landowner's rights vested based solely on expenses related to permit applications, permit approvals, or development plans.[12] Yet, Breland made no physical improvements to the property despite having had the federal permit for nearly four years before Fairhope enacted Ordinance No. 1313.

Although physical improvement to property may not be required to establish a vested right in every instance, the lack of physical improvement to the property, combined with other equitable considerations outlined here, foreclose the Breland parties' vested-rights argument. First, the federal permit -- which serves as a key basis for the Breland parties' vested-rights argument -- states: "This permit does not grant any property rights or exclusive privileges." (Emphasis added.) And it is a condition of the federal permit that Breland must comply with local law. As noted, Breland's permit application was denied by the passage of

[12]In the zoning context, "[t]he general rule is that applications for building permits may be denied based on zoning regulations enacted after applications are made regardless of whether the zoning regulations were pending when the applications were made." 101A C.J.S. Zoning and Land Planning § 289 (2015).

time; thus, he was not in compliance with local law or the federal permit when he claims his rights vested.

Second, the County objected to Breland's federal permit application in part because the proposed project did not conform with its subdivision regulations. At the Corps' request for a response to that concern, Breland responded: "The applicant is required by law to obtain approval under separate authorizations from the Baldwin County Planning Commission who will review the project for conformity. Should the Commission not approve conformity, the project will not be built." Used in the context of the application process, "project" did not merely refer to construction of houses, but to filling the wetlands as well.[13] Further, the federal permit provided that "[t]he determination of this office that issuance of this

[13]See, e.g., "Federal Permit Project" description ("The authorized work includes the filling of ... wetlands ...." (emphasis added)); ADEM certification ("The Alabama Department of Environmental Management has completed its review of the above referenced proposed project to impact 10.49 acres of pine flatwood wetlands ...."); joint application to the Corps and ADEM ("The project involves the clearing, grading and filling of 10.47 acres of wetlands for the construction of 20 single family residential lots ....").

permit is not contrary to the public interest was made in reliance on the information you provided." (Emphasis added.)[14]

Breland initially followed through with his representation to the Corps when he submitted his Loyola Park site-plan proposal to the County and Fairhope. Fairhope responded first, suggesting that the proposal might not conform with the County's subdivision regulations. Proving Fairhope correct, the County rejected that proposal in part on the basis of Regulation 5.2.2. Several years after the Loyola Park plan failed, Breland embarked on his plan to fill first and seek permission later.[15]

The Breland parties contend that none of this matters because, they say, Regulation 5.2.2 does not apply to Breland's initial fill efforts and that the fill-first approach was Breland's plan all along. We need not

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[14]In fact, the Corps made specific findings in its review of the project concerning compliance with County regulations. ("[T]he applicant[s] provided that they are required by law to obtain separate approval and authorization from the Baldwin County Planning Commission for conformity ...." and "[t]he proposed project does not meet all existing zoning and land use requirements ....").

[15]Even then, when the County issued its land-disturbance permit in 2008, it reminded Breland yet again of the need to comply with Regulation 5.2.2.

decide whether the Breland parties are correct.[16] Rather, we consider it relevant that Breland unambiguously represented to the Corps that the "project" would not be built if it did not conform with the County's subdivision regulations and that Fairhope and the County have consistently objected to the filling on the basis of the County's subdivision regulations. Similarly, the Breland parties' additional argument -- that the County has since amended Regulation 5.2.2 to allow Corps-approved wetlands filling -- does not alter this analysis. That amendment took place after Fairhope enacted the ordinances at issue here. And had Breland not represented to the Corps that he would comply with the County's subdivision regulations, it is unclear whether the Corps would have issued the permit in the first place.

Finally, based on this Court's equitable analysis in Grayson, we consider "the reasonable necessity for protecting and promoting the health, safety, morals, and general welfare of the public." Grayson, 277

[16]We do note, however, that the Breland parties' fill-first position is inconsistent with Breland's representation to the Corps and his Loyola Park proposal in 2003.

Ala. at 528, 173 So. 2d at 72. Fairhope is empowered to adopt ordinances "to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience" of citizens within its police jurisdiction. § 11-45-1, Ala. Code 1975. The Breland parties have presented no convincing evidence that Fairhope has arbitrarily targeted them or the property. In fact, Fairhope approved Breland's initial development plans for the property in 1999, and Fairhope's actions corroborate its stated concerns about growth and environmental management. Thus, the record supports the trial court's finding that the ordinances at issue were "designed to minimize potential harm and impacts to the environment and adjacent property owners."

We acknowledge that the Breland parties have expended significant time and resources on this project.[17] But, under this Court's framework

[17]There is evidence in the record suggesting that the sum Breland spent on mitigation credits may not be lost. The owner of Weeks Bay testified that the mitigation credits have a market value that has increased from $5,800 per credit at the time Breland purchased them to between $13,000 and $15,000 per credit at the time of trial. She further testified that Weeks Bay "would buy them back today" if the Corps approved.

in Grayson, we must balance those expenses against other equitable considerations. Given the equitable considerations here, we conclude that the trial court did not err in holding that the Breland parties failed to obtain a vested right to fill the wetlands. See Grayson, 277 Ala. at 528, 173 So. 2d at 72 ("Where the [trial court's] decree correctly determines the equities of the case, as here, ... the case will be affirmed.").

C. The Breland Parties' Preemption Arguments

The Alabama Constitution states that "[t]he legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with general laws of this state." Ala. Const., 1901, Art. IV, § 89. The Legislature, in turn, has given municipalities the authority to "adopt ordinances and resolutions not inconsistent with the laws of the state." § 11-45-1, Ala. Code 1975. Given those principles, this Court has identified three instances in which state law preempts municipal ordinances: (1) when the statute expressly "defines the extent to which its enactment preempts municipal ordinances"; (2) "when a municipal ordinance attempts to regulate conduct in a field that the legislature intended the state law to exclusively occupy" -- that is, "field preemption";

and (3) "when a municipal ordinance permits what a state statute forbids or forbids what a statute permits." Ex parte Tulley, 199 So. 3d 812, 821 (Ala. 2015).

The Breland parties contend that Fairhope's ordinances are invalid for two reasons: (1) the Alabama Environmental Management Act, § 22-22A-1 et seq., Ala. Code 1975 ("AEMA"), and the Alabama Water Pollution Control Act, §22-22-1 et seq., Ala. Code 1975 ("AWPCA") preempt the field of wetlands regulations, and (2) because ADEM issued the certification in accordance with the AWPCA, Fairhope's ordinances improperly conflict with state law. We address each argument.

1. The AEMA and the AWPCA Do Not Preempt the Field of Wetlands Regulation

For state law to preempt an entire field, "'"'an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way.'"'" Peak v. City of Tuscaloosa, 73 So. 3d 5, 19-20 (Ala. Crim. App. 2011) (quoting Gann v. City of Gulf Shores, 29 So. 3d 244, 251 (Ala. Crim. App. 2009), quoting other cases). To make that determination, we look to the text of the relevant statutes. Ex parte

Waddail, 827 So. 2d 789, 794 (Ala. 2001). The presence of "extensive regulation is not sufficient to establish that the State intended to preempt an entire field." Peak, 73 So. 3d at 24. Notably, however, the Breland parties rely on the text of the AEMA and the AWPCA to establish field preemption -- not the regulations approved under those statutes. See Breland parties' reply brief, at p. 9-10.

Concerning the AEMA, the Breland parties focus on a provision of that statute setting forth the Legislature's express purpose. See § 22-22A-2, Ala. Code 1975. Specifically, the Breland parties point to the Legislature's goal of providing "a comprehensive and coordinated program of environmental management," the elimination of overlapping or duplicative efforts "within the environmental programs of the state, and a "unified environmental regulatory and permit system." The Breland parties also argue that the Legislature intended to "retain for the state" control over its air, land, and water resources. Thus, according to the Breland parties, this evidences the Legislature's "clear preemptive intent." Breland parties' brief, at p. 38.

The reliance on § 22-22A-2 is misguided. The words "wetlands," "filling," and related terms do not appear in the text of the AEMA. And when the statute is read in its full context, it is clear that § 22-22A-2 attempts to create efficiencies within State agencies and programs -- not between the State and municipalities. See Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts § 24, at 167 (Thomson/West 2012) ("The text must be construed as a whole."). For example, § 22-22A-2 states that ADEM was created to "effect the grouping of state agencies," to "eliminate overlapping or duplication of effort within the environmental programs of the state," and to consolidate those responsibilities "within the Executive Branch." (emphasis added); see also § 22-22A-4, Ala. Code 1975 (consolidating various state commissions and boards under ADEM's purview); § 22-22A-9, Ala. Code 1975 (transferring funds from previous state commissions to new fund under ADEM and abolishing funds of older state commissions). Similarly, the reference in § 22-22A-2(2) to retaining control over air, land, and water resources concerns the state's relationship to the federal government, as it expressed its intent to retain that control "within the constraints of

appropriate federal law." See also § 22-22A-4(n), Ala. Code 1975 (designating ADEM as the "State Environmental Control Agency for the purposes of federal environmental law").

The Breland parties' reliance on the AWPCA fares no better. The AWPCA broadly instructs ADEM to "receive and examine applications, plans, specifications, and other data and to issue permits for the discharge of pollutants" into state waters. § 22-22-9(g), Ala. Code 1975. Like the AEMA, the AWPCA contains no specific references to wetlands, and the Breland parties do not rely on any regulations promulgated under the AWPCA to establish field preemption. Further, the express purposes of the AWPCA are to conserve the state's water resources and to regulate pollution in state waters. See § 22-22-2, Ala. Code 1975. Although those are also purposes of Fairhope's ordinances, they are not the only purposes; for example, Fairhope's ordinances also exist to curb flooding and erosion. See, e.g., Ordinance No. 1363 (preserving wetlands because they "serve a number of functions including pollution control and protection of water quality, flooding and stormwater control"); Ordinance No. 1370 ("The purpose of this ordinance is ... (a) protection of the quality and quantity

of all Wetlands and waters ... and (d) minimization of impacts to existing land uses and properties ... by preventing increases in flood, erosion, and other natural hazards due to destruction of Wetlands and/or Buffer areas."). And even in carrying out the responsibility to regulate pollution, the AWPCA at least implicitly contemplates municipal action in the same field. See § 22-22-9(d) ("It shall be the further duty of the commission to extend its cooperation and to advise industries and municipalities relative to the control of waste and other deleterious matter of pollutive nature and to make available to industries and municipalities the benefits of its studies and findings.").

Although the Breland parties do not rely on specific regulations indicating that the Legislature intended to preempt the field of wetlands regulation, they argue more broadly that ADEM "met its legislative charge by adopting statewide regulations for permitting filling and discharge activities in the state's wetlands." Breland parties' brief, at p. 40. But that does not mean that the Legislature has preempted all other wetlands regulations. See Tulley, 199 So. 3d at 821 (noting that municipalities may " 'enlarge[] upon the provision of a statute by requiring

more restrictions than the statute requires' " (quoting Congo v. State, 409 So. 2d 475, 478 (Ala. Crim. App. 1981))); Peak, 73 So. 3d at 24 ("[E]xtensive regulation is not sufficient to establish that the State intended to preempt an entire field."). Further, at least some regulations promulgated under the AEMA and the AWPCA require compliance with municipal- and county-approval processes. See, e.g., Ala. Admin. Code (ADEM) R. 335-6-12-.35(5)(c) ("[I]ssuance of registration [of a National Pollutant Discharge Elimination System permit] under this Chapter does not modify in any way an operator's legal responsibility or liability, to apply for, obtain, or comply with other applicable ADEM, federal, State, or local government permits, authorizations, registrations, ordinances, regulations, certifications, licenses, or other approvals not regulated by this chapter prior to commencing or continuing construction disturbance regulated by this Chapter." (emphasis added)).

For these reasons, the AEMA and the AWPCA do not "make manifest a legislative intent that no other enactment may touch upon the subject in any way" such that Fairhope's ordinances are preempted. Peak, 73 So. 3d. at 19-20.

2. Fairhope's Ordinances Do Not Conflict with State Law

An ordinance is inconsistent with state law when it "permits what a state statute forbids or forbids what a statute permits." Tulley, 199 So. 3d at 821. The Breland parties argue that the certification, issued in accordance with the AWPCA, conflicts with Fairhope's ordinances.

Assuming that a state permit, license, or certification can serve as the basis for a conflict-preemption claim, state approval for a given action does not necessarily eliminate the need to comply with local law. In Gibson v. City of Alexander City, 779 So. 2d 1153, 1153 (Ala. 2000), the Alabama Alcoholic Beverage Control Board issued a business owner a license that allowed him to sell and serve alcoholic beverages 24 hours per day, 6 days per week. Alexander City later adopted an ordinance prohibiting establishments from allowing alcohol consumption on their premises between midnight and 7 a.m., and the business owner challenged the ordinance on the grounds that it was inconsistent with Alabama law. This Court rejected his argument, holding that "[t]he challenged ordinance merely enlarges upon the statutory provisions of the Alcoholic Beverage Licensing Code; it is not inconsistent with Alabama

statutory law or the Alabama Constitution." 779 So. 2d at 1155; see also Alabama Recycling Ass'n, Inc. v. City of Montgomery, 24 So. 3d 1085, 1090 (Ala. 2009) (holding that ordinance does not conflict with statute because it "enlarges upon the provisions of the Act by adding certain restrictions" or "merely because the Act is silent where the ordinance speaks").

ADEM issued the certification as a part of the joint application and review process with the Corps, and it did not authorize the filling apart from the federal permit -- nor did it exempt landowners from compliance with local regulations. But the federal permit, issued as a part of the joint review process, expressly required compliance with local regulations. Further, the Breland parties have not identified any conditions in the certification that conflict with the standards in Fairhope's ordinances. And as the trial court found, "[n]one of the ordinances adopted by [Fairhope] prohibits the construction of a subdivision or the filling of wetlands." Thus, as in Gibson, Fairhope's ordinances "merely enlarge"

upon state law. Accordingly, the trial court did not err in holding that the ordinances do not conflict with Alabama law.[18]

D. Fairhope's Ordinances Are Not De Facto Zoning Laws

The Breland parties contend that Fairhope's ordinances have been "intentionally and systematically applied against [Breland] to prevent the otherwise lawful use and development of his wetlands." Breland parties' brief, at p. 56. Because, they claim, Fairhope has prohibited any lawful "use" of the wetlands, the ordinances are de facto zoning regulations, which are improper because they cannot apply outside Fairhope's corporate limits.

"'Zoning' is primarily concerned with the regulation of the use of property, to structural and architectural designs of buildings, and the character of use to which the property or the buildings within classified

[18]Concerning the preemption arguments, the trial court noted that the Breland parties failed to "demonstrate the existence of a justiciable controversy that would entitle [them] to declaratory judgment relief." Because we affirm the trial court's holding concerning the merits of the Breland parties' preemption claim, we need not address the Breland parties' argument that the trial court erred in holding that no justiciable controversy exists.

or designated districts may be put." Roberson v. City of Montgomery, 285 Ala. 421, 425, 233 So. 2d 69, 72 (1970). The fact that regulations limit the type of activity that can take place on real property, however, does not convert them into zoning laws. For example, the Court of Civil Appeals has held that county subdivision regulations prohibiting development of land unsuitable because of flooding or improper drainage were not zoning ordinances. See Dyess v. Bay John Devs. II, L.L.C., 13 So. 3d 390, 395 (Ala. Civ. App. 2007), cert. quashed, 13 So. 3d 397 (Ala. 2009). Applying Roberson, the court in Dyess reasoned that the regulations did not "seek to limit the actual use of the land" and that they did not "mandate certain types of land usage based upon categories, zones, or districts." Id. Rather, the court held that the regulations were "a statutorily authorized and proper exercise of the general police power to plan 'orderly development.' " Id.; see also City of Robertsdale v. Baldwin Cnty., 538 So. 2d 33, 36 (Ala. Civ. App. 1988) (holding that city's requirement for building permit outside corporate limits was valid exercise of police power).

As in Dyess, Fairhope's ordinances do not "mandate certain types of land usage based upon categories, zones, or districts." Dyess, 13 So. 3d

at 395. And as explained above, the trial court's finding that the ordinances are "designed to minimize potential harm and impacts to the environment and adjacent property owners" is not palpably erroneous. We therefore agree with the trial court that Fairhope's ordinances "were enforceable in the police jurisdiction as they are not zoning ordinances," but instead were "enacted pursuant to [Fairhope's] police power to protect public health, safety, and welfare."

Conclusion

The Breland parties have not established that Fairhope's ordinances are invalid or that they obtained a vested right to fill the wetlands on the property. Further, the Breland parties' argument that Breland's citation should be expunged is premised on the notion that he was not obligated to comply with Fairhope's ordinances in existence at the time of his citation. Because we have rejected that premise, the Breland parties' request for expungement is moot. And because we do not reverse or remand for further proceedings and there is no other apparent remedy at this stage, the Breland parties' claim that the trial court erred by allowing The Battles Wharf/Point Clear Protective Association to intervene is moot.

AFFIRMED.

Bolin, Shaw, Mendheim, and Stewart, JJ., concur.

Parker, C.J., concurs in part and concurs in the result.

Bryan, J., concurs in the result.

Sellers, J., dissents.

PARKER, Chief Justice (concurring in part and concurring in the result).

I concur in the main opinion as to all but its analysis of whether Charles K. Breland, Jr., and Breland Corporation ("the Breland parties") acquired a vested right to fill the wetlands.

> "Under either the vested rights or the estoppel standard, the developer or builder must demonstrate: (1) the existence of a valid government act; (2) substantial reliance on the governmental act; (3) good faith; and (4) that the rights are substantial enough to make it fundamentally unfair to eliminate those rights."

1 John J. Delaney et al., Handling the Land Use Case: Land Use Law, Practice & Forms § 35:3 (3d ed. 2020) (footnotes omitted). Neither the federal and county permits nor any action by the City of Fairhope created a reasonable expectation, as against the City, that development could proceed. Therefore, the Breland parties never obtained a vested right in equity. But the main opinion goes further by distinguishing expenditures from physical improvements for purposes of determining whether a developer has substantially relied. I do not see why expenditures made in reasonable reliance on an act by a government authority should not be treated similarly to improvements. See, e.g., Kleikamp v. Board of Cnty.

Comm'rs, 240 Or. App. 57, 61, 246 P.3d 56, 65 (2010) ("[A] landowner's proof of 'substantial expenditures' is the sine qua non of a vesting determination."); Cribbin v. City of Chicago, 384 Ill. App. 3d 878, 893 N.E.2d 1016, 323 Ill. Dec. 542 (2008) (holding that a developer obtained a vested right based on substantial expenditures); Town of Midland v. Wayne, 368 N.C. 55, 64, 773 S.E.2d 301, 308 (2015) ("[The] defendant in good faith reliance made substantial expenditures of money, time, and labor ..., thus supporting his common law vested right to develop the subdivision in accordance with the plan."). I would not reach such a distinction.

SELLERS, Justice (dissenting).

I respectfully dissent. Charles K. Breland, Jr., submitted an application for certification from the Alabama Department of Environmental Management ("ADEM") and for a permit from the United States Army Corps of Engineers ("the Corps"), seeking approval to fill approximately 10.5 acres of wetlands Breland had purchased in Baldwin County outside the City of Fairhope. In addition to ADEM and the Corps, Breland communicated with the Alabama State Lands Division, the United States Fish and Wildlife Service, and the Alabama Historical Commission. Breland paid between $20,000 and $30,000 in consulting fees in pursuit of the ADEM certification and the Corps permit.

ADEM provided the requested certification, and the Corps issued the requested permit. Thereafter, Breland spent another $143,144 on wetlands "mitigation credits" aimed at mitigating the impact the filling project would have on wetlands. He also conveyed a portion of his property to Weeks Bay Watershed Protective Association, Inc., as part of the wetlands-mitigation process. Eventually, Breland requested and received a land-disturbance permit from Baldwin County authorizing the

filling of the wetlands. All in all, Breland's project necessitated the involvement of two federal agencies, three state agencies and two local governments.

When Breland obtained the ADEM certification and the Corps permit, Fairhope did not have any ordinances that governed the filling necessary for the project. But, in 2006, Fairhope adopted Ordinance No. 1313, which required a land-disturbance permit for "filling activity" and prohibited the use of fill material consisting of more than 10% red soil or clay. Ordinance No. 1313 contained no restrictions that would have prevented Breland from proceeding with the project.

Breland submitted an application for a permit under Ordinance No. 1313. Although it appears he was entitled to that permit, Fairhope simply ignored his application and adopted a temporary moratorium on issuing land-disturbance permits. Shortly after imposing the moratorium, Fairhope adopted a series of new ordinances dealing more specifically with the filling of wetlands within the City's permitting jurisdiction. Breland's position in the trial court and on appeal suggests that the requirements

of the new ordinances would have rendered his proposed project impossible or economically impractical.[19]

Thus, as a practical matter, even though Breland had taken all regulatory steps required by existing law and had spent significant funds on the project, Fairhope's subsequent adoption of new ordinances curtailed his ability to proceed. "Surely, no citation of authority is necessary to demonstrate the constitutional invalidity, on general due process grounds, of any regulatory scheme ... that fails to recognize vested rights of prior interest holders." Bingham v. City of Tuscaloosa, 383 So. 2d 542, 544 (Ala. 1980). Almost 60 years ago, this Court acknowledged the principle that, in some situations, a municipality cannot change its ordinances to the detriment of vested property owners:

> "We are quite aware that some courts ... determine the existence of vested rights in property which has been made the

[19]Fairhope's mayor indicated during the trial in this case that, when he learned of Breland's efforts to obtain a permit from the Corps, he took steps to "stand in the way" of Breland's filling project. There is some evidence indicating that the new ordinances adopted by Fairhope were aimed at hampering Breland's development plan, but they were generic enough to escape being declared as impermissibly aimed specifically at that project.

> subject of zoning amendments on the property owner's substantial change of position, financial investments, or permits granted, all relating to structures built, initiated, or authorized on the rezoned area.
>
> "Such changes, investments, and permits, relating as they do to structures initiated or completed, are made the criteria of hardships imposed on the property owner and judicially recognized to sustain the claims of vested rights. The facts in no two cases are the same."

Grayson v. City of Birmingham, 277 Ala. 522, 525, 173 So. 2d 67, 69 (1963). As Fairhope points out, the Court in Grayson ultimately held that the appellants in that case did not have vested rights in commercially zoned real property, upon which they had built roads and installed utilities, before the City of Birmingham amended its zoning ordinances to designate the property as residential. But the appellants in Grayson had expended much less than Breland expended, even taking into account the rate of inflation since Grayson was decided. In addition, the Court in Grayson noted that the appellants in that case had not obtained a building permit and had "no intention of building on [the land]." 277 Ala. at 525, 173 So. 2d at 69. Moreover, the Court acknowledged that the modest investment made by the appellants in Grayson indeed might have been

enough to establish vested rights if it were not for Birmingham's significant interest in preserving the residential nature of the surrounding area. Specifically, the Grayson appellants' small investment in the property was "of minor weight and importance in comparison with the duty on the part of [Birmingham] to foresee the traffic and pass adequate zoning regulations designed to protect pedestrians and motorists ... from loss of life or serious injury." 277 Ala. at 527, 173 So. 2d at 71-72. As Breland and Breland Corporation point out, ADEM and the Corps granted Breland permission to proceed with his fill project. Thus, those entities must have determined that the project would not have had such a detrimental effect on the environment that it should be prohibited.

In Baker v. State Board of Health, 440 So. 2d 1098 (Ala. Civ. App. 1983), the Court of Civil Appeals held that the owners of a mobile-home park with lots that were 3,200 square feet in size had a vested interest in the land and were not subject to a new regulation requiring mobile-home lots to be a minimum of 15,000 square feet:

> "[W]e find pertinent the defendants' contention that the 15,000 square foot requirement should not be enforced because of general equitable considerations. The mobile home park was

> developed under a permit that allowed 3,200 square foot lots. The owners and their successors relied on the permit and expended time and money developing and improving the lots according to the regulations under which they acquired the permit. Equity adapts relief to the case and in so doing form gives way to substance."

440 So. 2d at 1100.

Likewise, Breland expended a significant amount of money and took all steps legally required of him to begin the fill project. He paid more than $140,000 to obtain mitigation credits, paid more than $20,000 in consulting fees, and conveyed a portion of his property in connection with a conservation easement, all in the absence of any municipal wetlands regulations. He obtained all necessary permits, with the exception of a permit under Ordinance No. 1313. Instead of issuing him that permit, Fairhope simply ignored Breland's application and changed the governing law, effectively blocking him from proceeding with the project.

Property developers like Breland take on significant risk in purchasing raw land in contemplation of development. Governmental entities should not be allowed to add to that inherent risk by tacking on further regulations to prohibitively increase the costs or otherwise block

beneficial property improvements. At the time of purchase, the proper and improper uses of the property are readily discernable by a review of the local, state, and federal laws. A developer's right to use his or her property according to those applicable regulations vests when the developer expends significant time and expense in pursuit of developing the property.

The costs of obtaining regulatory approval for a development can be quite significant and consist of more than the mere completion of paperwork. In the present case, Breland did not just submit simple plans and applications to regulatory agencies. He took significant steps, such as purchasing mitigation credits and conveying a sizable piece of property to a watershed organization, as contingencies for approval of the preliminary phase of the project. After a developer has attempted to comply with the law, obtained appropriate permits, and incurred significant expense in pursuit of a development, a local governmental agency cannot deny a permit to which the developer is entitled, or change the governing regulations to effectively stop the improvements, simply because it does not like the development plans. At that point, the right to

use the property subject to the obtained applicable permitting vests, such that any additional restrictions cannot be legally imposed to thwart the approved development. To impose such subsequent restrictions amounts to an impermissible ex post facto law. Here, as in Baker, equity should recognize the hardship Fairhope's position imposes on Breland and Breland Corporation. I would reverse the trial court's judgment.