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**New Wetlands Rule Reflects
the Supreme Court's Interpretation
of WOTUS in *Sackett***



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Cover photograph
Credit: Wetlands by Alain Audet

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• UPCOMING EVENTS •

Restore America's Estuaries
Living Shorelines Workshop

October 24 - 25, 2023
Galveston, TX

<https://bit.ly/livingshorelines2023>

Marine Resource Education Program
Southeast Fisheries Science and Management Workshop

November 13 - 17, 2023
St. Petersburg, FL

<https://mrep.gmri.org/>

Gulf of Mexico Alliance
Gulf of Mexico Conference

February 19 - 22, 2024
Tampa, FL

<https://bit.ly/gomcon2024>

New Wetlands Rule Reflects the Supreme Court's Interpretation of WOTUS in *Sackett*

Leigh Horn



In May 2023, the Supreme Court altered the interpretation of “waters of the United States” under the Clean Water Act in its landmark case, *Sackett v. Environmental Protection Agency*.¹ This alteration limits federal protection of wetlands. On August 29, 2023, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the “agencies”) issued a final rule that reflects the Supreme Court’s decision in *Sackett*. By some estimates,

this new rule could impact 63 percent of the nation’s wetlands.² Despite the rule’s stated intent to adhere to the Supreme Court’s ruling, some organizations representing development and businesses still say the new rule is overly burdensome and doesn’t do enough to limit federal authority over private land.³ What does this new rule mean for the wetlands of Mississippi and Alabama? Does it change our landscape?

First, why does it matter how the Court defines “waters of the United States” (WOTUS)?⁴ Congress passed the Clean Water Act (CWA) in 1972 to control pollution into “navigable waters.”⁵ The Act defines navigable waters as “the waters of the United States, including the territorial seas.”⁶ Therefore, the scope of the CWA is limited to WOTUS – but a definition for WOTUS was not provided in the Act itself.

Since its passage, WOTUS was mostly defined through regulations promulgated by the federal agencies charged with enforcement of the Act; however, the Supreme Court has some history of stepping in to place boundaries on its scope. One such occasion was in 2006 when the Supreme Court issued its plurality opinion regarding the definition of WOTUS in *Rapanos v. United States*.⁷ Two definitions emerged from the case: Justice Scalia’s opinion, which stated that isolated wetlands should not be considered protected under the Clean Water Act, and Justice Kennedy’s concurrence, which created the “significant nexus” test.⁸ Kennedy’s nexus test required looking at the larger picture; if a wetland had a “significant nexus” to a neighboring navigable waterway, it should be protected.⁹

In January 2023, while a decision in the *Sackett* case was still pending, the agencies issued a final rule that revised the definition of WOTUS. The rule included the protection of “adjacent wetlands” in accordance with Kennedy’s significant nexus test. In response, 27 states quickly sued, including Alabama and Mississippi, in multiple lawsuits asking the courts for injunctions to prohibit the agencies from enforcing their definition of WOTUS that included wetlands adjacent to navigable waters. In several separate opinions (hereafter referred to as the “States v. EPA Cases”), multiple lower courts granted the requested injunctions, thus requiring the agencies to apply a pre-2015 WOTUS rule in those 27 states.¹⁰

After *Sackett*, isolated wetlands are not protected under the CWA. To give effect to the Supreme Court’s decision, the agencies updated their January 2023 WOTUS rule in August to reflect this change. Any mention of a significant nexus was removed from the rule, and wetlands must now have a continuous surface connection to navigable waters in order to be federally protected. However, the pre-*Sackett* injunctions from the States v. EPA Cases meant that neither the January nor August 2023 WOTUS rules promulgated by the Agencies can be enforced in the 27 states that are

covered by those injunctions (including every state that borders the Gulf of Mexico). Instead, the 27 suing states are to continue following a pre-2015 WOTUS rule.

While the agencies distinguish between the states following the pre-2015 rule and those that will follow the amended January 2023 rule, both rules are in alignment with *Sackett*. In Alabama and Mississippi, the pre-2015 language dictating federal protection of wetlands states that “wetlands adjacent to waters . . . are not waters of the United States,”¹¹ following Scalia’s definition from *Rapanos*.

Wetlands that are separated from navigable waters, meaning surface waters that are not visibly connected to another water body, will not be protected in any of the 50 states. Pending litigation in the 27 states that are following the pre-2015 WOTUS rule means that the matter is still in flux.

With each slight variation of WOTUS’ definition, the fate of ecosystems, clean drinking water, farming, development, and businesses is altered. However complicated the implementation may seem, *Sackett*’s definition of WOTUS is now the law in all 50 states with the agencies’ new regulation. Isolated wetlands, which may make up more than half of our nation’s wetlands, are no longer protected under federal law. 🦋

Leigh Horn is Research Counsel II for the Mississippi-Alabama Sea Grant Legal Program and editor of Water Log.

Endnotes

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2. Allyson Chiu, *Biden’s Rule, Heeding Supreme Court, Could Strip Over Half of U.S. Wetlands’ Protections*, Wash. Post (Sept. 7, 2023).
3. *Impact*, Waters Advocacy Coalition (2023).
4. 33 U.S.C. §1251 et seq. (1972).
5. *Id.*
6. *Id.*
7. *Rapanos v. United States*, 547 U.S. 715 (2006).
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9. *Id.* at 798.
10. *Texas v. United States Em’t Prot. Agency*, No. 3:23-CV-17, 2023 WL 2574591 (S.D. Tex. Mar. 19, 2023). *W. Virginia v. U.S. Em’t Prot. Agency*, No. 3:23-CV-032, 2023 WL 2914389 (D.N.D. Apr. 12, 2023). (24 states joined this case as co-plaintiffs, including Mississippi and Alabama.) *Kentucky v. United States Em’t Prot. Agency*, No. 3:23-CV-00007-GFVT, 2023 WL 3326102 (E.D. Ky. May 9, 2023).
11. 40 CFR 230.3(s).

Update: Interim Agreement Reached in Landmark Environmental Justice Case in Lowndes County, Alabama

Katie Shaw

In the heart of Lowndes County, Alabama, residents of a predominantly Black and low-income community embarked on a journey toward environmental justice. On September 28, 2018, they filed a civil rights complaint under Title VI of the Civil Rights Act of 1964, alleging claims of unequal access to basic sanitation services.¹ The complaint implicated the Alabama Department of Public Health (ADPH) and the Lowndes County Health Department (LCDH) for inadequately addressing the county's sanitation crisis and misleading the public about the health risks associated with exposure to raw sewage.

Lowndes County has been suffering from inadequate sanitation due to the absence of functional septic systems, a problem compounded by the impermeable soils prevalent in the area. Conventional septic systems, the most common option, proved incompatible with these soils. The specially engineered systems needed for these soil conditions, however, cost nearly ten thousand dollars. Sadly, many Lowndes County residents cannot afford these systems for their households, leading to reliance on straight piping, a makeshift solution involving ditches or crudely built piping systems to divert untreated wastewater (i.e., raw sewage) away from their homes.

According to Lowndes County residents, ADPH did not warn them about the health hazards of exposure to raw sewage, and enacted a law that criminalized individuals for lacking proper sanitation conditions. Particularly concerning was a 2017 study completed in Lowndes County that revealed a hookworm outbreak, which is often associated with poor sanitation conditions. Alarming, ADPH disputed these findings, announcing there was no evidence of a hookworm outbreak in Lowndes County. Furthermore, ADPH employed the criminal justice system to enforce sanitation laws, resulting in criminal fines or jail time for those with inadequate sanitation systems, effectively criminalizing poverty.²

On November 9, 2021, the U.S. Department of Justice and Department of Health and Human Services (collectively, the United States) conducted an 18-month investigation, the first cooperative effort by the United States to investigate an environmental justice issue under federal law. The United States found that ADPH had consistently neglected its duties concerning the health risks linked to raw sewage exposure and that ADPH had failed to rectify the situation. May 3, 2023, marked the end of the investigation as the United States and ADPH entered an Interim Resolution Agreement, which seeks to ensure ADPH's compliance with federal laws and their commitment to Lowndes County residents.³

Under this agreement, ADPH has pledged to cease the criminal enforcement of sanitation laws that lead to penalties or jail time for residents unable to afford septic systems and to actively inform residents of this change in the law. Additionally, they will develop educational materials for healthcare providers regarding the risks of raw sewage exposure and conduct a thorough assessment of appropriate septic and wastewater management solutions for homes in Lowndes County. This assessment will include demographic information of households, risk of exposure to raw sewage, and other relevant data to prioritize installing sanitation systems throughout the county. Notably, in the event of non-compliance by ADPH, the United States asserts it will reopen the investigation a necessary step towards ensuring that justice prevails for the residents of Lowndes County.

Both challenges and triumphs have marked the journey towards environmental justice in Lowndes County, Alabama. In 2018, when residents filed a civil rights complaint, it shed light on the inequalities in access to basic sanitation services, exposing the inadequacies of state health departments in addressing the county's sanitation crisis.



Three years later, federal authorities investigated, and the resulting interim agreement represented a powerful victory for the community. The story of Lowndes County is a statement of the power of community activism, federal intervention, and the pursuit of environmental justice. While significant steps have been made, there is still work to be done. Straight piping is still utilized throughout the county as the only affordable answer to household wastewater, and residents will need technical and financial assistance to install specialized treatment systems to ensure adequate treatment of household wastewater. Moving forward, the hope is that this agreement will serve as a symbol of progress and push toward greater achievements in the future. 🐾

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Endnotes

1. 42 U.S.C. § 2000(d).
2. Ala. Code § 22-26-1.
3. Interim Resol. Agreement Between United States Department of Justice and the United States Department of Health and Human Services and the Alabama Department of Public Health, Dep't. of Just. No. 171-3-14, Dep't of Health and Hum. Servs. Off. for Civ. Rts. Transaction No. 22-451932 (2023).

Construction of an Alabama Coastal Bridge Creates Rift

Leigh Horn



Credit: Jimmy Pigg

The Baldwin County Bridge Company (BCBC) owns and operates the Beach Express (BEX) Bridge, a toll bridge that connects the City of Foley, Alabama to Orange Beach and Gulf Shores. Currently, the BEX Bridge serves as the only alternative to the heavily traveled Highway 59. The toll bridge covers a total of 13.5 miles and connects drivers to Alabama's beautiful beaches and popular tourism destinations. BCBC claims that John Cooper, the Director of the Alabama Department of Transportation (ALDOT), is intent on bankrupting their business by building a separate, superfluous, non-toll bridge.¹ ALDOT's project, called the Intracoastal Waterway Bridge, would be located only about a mile away from the existing toll bridge.

In the last two years, tourism to Gulf Shores and Orange Beach has been at an all-time high with people coming to the beaches in record breaking numbers.² Traffic has become an issue. The construction of a new bridge might alleviate congestion, but BCBC argues that it could have saved millions of dollars of the state's dollars by simply expanding the existing toll bridge to four lanes, rather than paying for construction of an entirely new bridge only a mile away.³

Access to the popular tourism destinations on Alabama's coast has created a tug of war between the private sector and the state, with local authorities joining on either side. The mayors of Gulf Shores and Orange Beach, the two cities that will be directly impacted by this new bridge,

disagree over the necessity of the Intracoastal Waterway Bridge. Gulf Shores Mayor Robert Craft backs the construction of the ALDOT Intracoastal Waterway Bridge, stating that BCBC and Orange Beach are only focused on profit while ignoring the future of Alabama's beaches.⁴ The Mayor of Orange Beach, Tony Kennon, stands with BCBC and the toll bridge, stating that the new state bridge project will only provide a "private drive" to a future city high school.⁵ Even judges have disagreed over construction of the Intracoastal Waterway Bridge.

In May, an Alabama circuit court judge agreed with BCBC's claim that Cooper was acting in bad faith, trying to "bankrupt" the company.⁶ Alabama Montgomery Circuit Court Judge Jimmie Pool granted an injunction halting construction on the ALDOT bridge. ALDOT and Cooper argued that because of sovereign immunity, BCBC's case was moot. Sovereign immunity is a legal concept that transferred over to our courts from England – a way to shield the king, or in our case, the government from lawsuits it hasn't consented to. Judge Pool found that a bad faith exception to sovereign immunity that exists under Alabama law applied to this case and sided with BCBC. On appeal, however, the Alabama Supreme Court disagreed with Judge Pool – allowing work on the future bridge by ALDOT to continue.⁷

According to the Alabama Supreme Court, the Director of ALDOT is, in fact, protected by sovereign immunity.⁸ The Supreme Court of Alabama issued its opinion on August 25, 2023, and held that the exception cited by Judge Pool supporting the decision to grant the injunction does not apply⁹ as Cooper was sued in his official capacity as Director of the Alabama Department of Transportation. The exceptions to sovereign immunity only apply "against an individual person rather than 'the State' as such."¹⁰ Halting construction of the bridge would directly impact a contract of the State, not Cooper as an individual; therefore, according to the Alabama Constitution, "the trial court has no subject-matter to entertain" the injunction to stop construction of the ALDOT bridge.¹¹

Five days after the Supreme Court published its opinion, BCBC announced it would nearly double its toll. The website for the company blamed the increase on Cooper: "Now, as a result of the actions taken by Director Cooper, BCBC has been forced to increase the toll rates on the Beach Express Bridge."¹² The price to cross the BEX bridge increased from \$2.75 per trip to \$5.00.¹³ The toll for Orange Beach residents

did not increase, but, unfortunately, most tourism and hospitality workers whose jobs require them to be on or near the beaches live on the north side of the bridge and are not Orange Beach residents.¹⁴

As global temperatures rise, so too will the attraction of beaches. While more tourists and residents are drawn to coastal breezes, the fluctuation and uncertainty of extreme weather also threatens this way of life. Evacuation routes in the case of hurricanes will continue to be a necessity in coastal planning. The sooner either BCBC or ALDOT create an effective way to and from the island that reflects the increase of tourism and traffic, the better. 🌊

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2. Margaret Kates, *Gulf Shores, Orange Beach Tourism Keeping UP with Record Pace, CEO Says*, AL.com (Aug. 14, 2023).
3. *Baldwin Cnty. Bridge Co., LLC v. John R. Cooper, Scott Bridge Co., Inc.*, CV-2022-901306.00, Compl. (Montgomery Cir. Ct, Ala. 2022) at 18-19.
4. John Sharp, *Orange Beach and Gulf Shores Spar Over Plans for New Bridge to the Beach*, AL.com (Jul. 22, 2023).
5. *Id.*
6. *Baldwin Cnty. Bridge Co., LLC v. John R. Cooper, Scott Bridge Co., Inc.*, CV-2022-901306.00, Order on Def. Mot. to Dismiss (Montgomery Cir. Ct, Ala. 2023).
7. *Baldwin Cnty. Bridge Co., LLC v. Cooper*, SC-2023-0056, SC-2023-0354, SC-2023-0364 (Ala. 2023).
8. *Id.* at 3.
9. *Id.* at 11.
10. *Id.*
11. *Id.* at 10.
12. John Sharp, *Orange Beach Toll Bridge Owner Nearly Doubles Rate After Supreme Court Ruling, Blames ALDOT*, (Aug. 30, 2023).
13. Brad Gunther, *Baldwin Beach Express Toll Rates Nearly Double Overnight, Workers Upset*, NBC 15 News (Aug. 30, 2023).
14. *Id.*

Dividing Property – a Divisive Issue

Leigh Horn



Credit: Edd Prince

In 2007, a couple in Gulfport, Charles and Denise Hubbards, wanted to split (or “subdivide”) a lot they owned into two smaller lots. In coastal communities or other areas with high rates of development, such an action is not unique. But when this Gulfport couple attempted to split their parcel of land in two, they met with complications.

After three years of litigation, the Hubbards were told by the Mississippi Court of Appeals in *City of Gulfport v. McHugh*¹ that because they did not have the required approval of their plan in writing from their neighbors and/or other interested parties, the attempt to subdivide their lot was not legal. Specifically, the Court told them that the lack of written consent from “adversely affected” and “directly interested”² persons made their efforts to divide

their land void. But who are these “adversely affected” and “directly interested” persons, and why do they matter?

Mississippi state law provides two avenues for a landowner to vacate, further subdivide, or otherwise alter “any land which shall have been laid off, mapped or platted as a city, town or village, or addition thereto, or subdivision thereof, or other platted area, whether inside or outside a municipality.”³ One is to file a petition in the local chancery court, naming any “adversely affected” or “directly interested” parties as defendants.⁴ The other is outlined in Miss. Code Ann. § 17-1-23(4), which allows a county board of supervisors or local governing authority of a municipality to grant the same relief, provided that the landowner follows these specific steps:

1. Contact “persons to be adversely affected or directly interested in the subdivision of land” to let them know of the intention to divide the lot.⁵ These parties must agree in writing to the alteration of the land; otherwise, no further action can be taken.
2. Once notice has been given to the appropriate parties and written approval has been received, the landowner must then send a petition to the Board of Supervisors of the county or the governing authorities of the municipality.
3. The petition must contain the written authorizations from the impacted parties as well as a description of the property, including the map or plat which is to be altered.
4. The petition should then be submitted to the designated local authority reviewing the request for a hearing to take place.
5. If the local authority approves the request, it “must be recorded in the appropriate location.”⁶ The original map or plat must be included in the record.

These steps primarily protect the interests of the very same “adversely affected” or “directly interested” parties that would otherwise be named as defendants in a chancery court action. Unfortunately, however, the terms “adversely affected” and “directly interested” are not defined in Miss. Code Ann. § 17-1-23(4). According to *Gulfport v. McHugh*, determining who falls into these categories is “a factual issue that should have been determined by the [Gulfport Planning] Commission,” which in that case was the applicable local authority.⁷ However, the court was also careful to point out the failure of the Hubbards to notify and obtain the consent of their neighbors to the requested subdivision, suggesting that the landowner seeking the subdivision similarly has a responsibility for identifying whose consent may be required (and actually acquiring that consent) before approaching the local authority with their petition to subdivide land.

The Mississippi Court of Appeals affirmed that interpretation more recently in *Desoto County v. Vinson*.⁸ In this case, a landowner petitioned the Desoto County Board of Supervisors to allow for his lot to be divided into two parcels, but failed to identify any “adversely affected” or “directly interested” parties in his application or provide anyone with notice of the filing of his petition. At the public meeting, the Board learned that the landowner had not discussed the

proposal with any of his neighbors, but still approved the requested division after determining that the only directly interested or adversely affected parties were the landowner himself and the owner of one immediately adjacent lot. Days later, owners of two other lots in the same subdivision appealed that decision to the local circuit court, alleging “that the board failed to ‘appropriately determine the names of persons directly interested or adversely affected by the decision of the board’ to approve the division . . . , and failed to ‘make appropriate parties aware of the proceeding and require that they agree in writing, as required by Miss. Code Ann. § 17-1-23(4).’”

On appeal, the Mississippi Court of Appeals upheld the lower court’s decision to overturn the Board of Supervisors, noting at the outset that for a court to reverse this type of decision from a local authority in the first place, it must find that the action of the local authority is “arbitrary or capricious, beyond the board’s scope or powers, or in violation of a party’s constitutional or statutory rights.”¹⁰ In reaching the same conclusion as the lower court, the appellate court reasoned that the Board’s approval of the requested subdivision was beyond its scope or powers as set forth in Miss. Code Ann. § 17-1-23(4). That statute grants boards limited powers to approve these requests, and those powers can only be exercised when the requirements of the statute are fully met. In this case, the landowner seeking the subdivision did not include the names of any directly interested or adversely affected parties in his petition to the board of supervisors, nor did he notify or obtain written approvals from any neighbors, including the one neighbor that the board actually did identify as a directly interested or adversely affected party. For any of these reasons, according to the appellate court, the lower court did not err when overturning the board of supervisor’s approval of the requested division.

So what lessons can be taken from the *Vinson* and *McHugh* cases? Both courts concluded that persons filing a petition to alter a plat must identify, approach, and receive written consent of their petition from “those potential ‘adversely affected’ or ‘directly interested’ parties in his or her application, as required by section 17-1-23,” and that the board of supervisors (or other local governing authority) has the ultimate authority *and responsibility* to decide who fits into the category of necessary parties.¹¹ That determination is usually a question of fact that can be resolved while a local governing authority reviews the submitted petition.



But how can a landowner know who the necessary parties are when submitting a petition when it is the local governing authority's job to determine this as a factual issue? And similarly, what criteria must a governing authority consider when evaluating which parties are "directly interested" or "adversely affected" under the statute? Unfortunately, the statute itself provides no clear guidance on how to apply those terms. In the absence of a legislative solution (i.e., amending Miss. Code Ann. § 17-1-23(4) to provide clearer and more uniform guidance), it seems as though boards, planners, and municipal governing authorities must develop their own frameworks for how to decide which parties are "directly interested" or "adversely affected."

Fortunately, counties and municipalities should expect a healthy amount of discretion in how they develop their own guidelines for complying with the terms of this statute. Recall from the *Vinson* case that courts usually do not overturn the decisions of local authorities unless those decisions are "arbitrary or capricious, beyond the board's scope or powers, or in violation of a party's constitutional or statutory rights."¹² Many counties and municipalities already have planning and zoning ordinances containing procedures for public notice, and have developed written criteria to follow when evaluating certain kinds of requests (e.g., land use changes, variances, special use permits, etc.). Planners, boards, and other governing authorities likely have some existing local examples to look to for inspiration. Depending on the location, planners might decide there is a place for some bright line rules (e.g., requiring written consent of all immediately adjacent neighbors, or consent of landowners within a given radius of the tract at issue). Other planners might prefer instead to focus on a public

notice framework that casts a much wider net to ensure that all potential adversely affected or directly interested parties are given a reasonable opportunity to come forward with concerns. There could also be a case for combining the two approaches. Whatever path is taken, the focus should be on creating a process with clear, fair, and repeatable steps for planners, local governments, and landowners to follow, and then to consistently adhere to that process. Doing so won't eliminate all disagreements over proposed divisions (an impossible task), but having an inclusive, fair, and consistently applied set of rules and criteria should go a long way towards ensuring compliance with state law as it relates to approving modifications of existing plats. 🐦

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Endnotes

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2. Miss. Code Ann. § 17-1-23(4).
3. Miss. Code Ann. § 17-1-23(4); Miss. Code Ann. § 19-27-31.
4. Miss. Code Ann. § 19-27-31.
5. Miss. Code Ann. § 17-1-23(4).
6. *Id.*
7. *City of Gulfport v. McHugh* at 8.
8. *Desoto Cnty. V. Vinson*, NO. 2021-CC-00864-COA (Miss. Ct. App. 2022).
9. *Id.*
10. *Billy E. Burnett Inc. v. Pontotoc Cnty. Bd. Of Sup'rs*, 940 So.2d 241, 242-43 (Miss. Ct. App. 2006).
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12. *Id.*

What Coastal Communities Can Do to Adapt to Changing Land Use Paradigms

Stephen Deal



Credit: Stephen Deal

Coastal communities face a number of unique environmental challenges such as sea level rise, hurricanes, and saltwater intrusion. Changes to the natural environment do not occur in a vacuum though. Cities and towns must also be cognizant of long-term economic trends, which may affect a community's ability to adapt over time. Two major trends facing all American cities right now is the collapsing market for office and retail space. In the first three months of

2023, office vacancy in the United States topped 20 percent for the first time in decades.¹ Large retail properties, such as shopping malls, are also quickly becoming a thing of the past, as it was forecasted in 2020 that 25% of the country's 1,000 malls would close in the next 3-5 years.² In such a rapidly changing land use environment, the importance of finding new uses for existing urban landscapes becomes paramount if cities are to make strides in resilience.

Adaptive Reuse: Its Origins and Future Challenges

Adaptive reuse can be defined simply as reusing an existing building for a different purpose.³ The first such instance of adaptive reuse in the modern era may be traced back to San Francisco in the early 1960's when developer William Maston Roth purchased the old Ghirardelli Chocolate Factory and converted the property into a high-end shopping complex.⁴ Since that time, adaptive reuse has become an accepted practice for private developers. Data gathered by Yardi Matrix found that 14 buildings were converted into apartments over the full length of the 1950's, but over the course of the 2010's that number was 778.⁵ Adaptive reuse, however, remains a small component of private development, which means that communities should consider additional incentives to bolster building reuse practices.

One tool that cities can use is an adaptive reuse ordinance. In 1999, the city of Los Angeles enacted an adaptive reuse ordinance in the downtown, which resulted in 60 downtown buildings being converted, resulting in the creation of more than 14,000 housing units.⁶ Much of the value accruing from adaptive reuse has been centered around pre-WWII buildings, but as building prices increase with new conversions opening that means the costs for adaptive reuse get pushed beyond what most redevelopment budgets allow. Also, since many of the buildings targeted for adaptive reuse are historic, a city must be mindful of the Secretary of the Interior's Standards for Rehabilitation Guidelines and other federal regulations governing the use of historic properties.

The issue of preservation versus adaptation is one that sparks considerable debate when discussing adaptive reuse. This issue has only been amplified over time, as many early urban renewal projects of the postwar period could be deemed historic by federal standards. Does a decommissioned freeway from the 50's have the same historic merit as an old factory building?⁷ Cities will generally fall on one end or the other of this ongoing debate and some value judgements about what buildings are worthy of preservation and what aren't are unavoidable. Other historic preservation models are available that may provide some level of flexibility to the discussion. In England, historic buildings are given three grades.⁸ The buildings of greatest historic interest are Grade I. The remaining two tiers are Grade II*, which are considered

highly important buildings warranting special consideration and the next level, Grade II, are structures considered worthy of preservation, but don't attain the level of historic value found in the other two grades. This approach has value as it recognizes that historic value is not uniform and that different levels of intervention may be necessary from structure to structure. For example, a structure in an area of high economic affluence will be better able to meet the highest preservation standards than a historic structure in a place where building valuations are low and financing options are scarce.

Evolving Space Needs

To understand the role adaptive reuse can play in cities, one must examine the ways in which space needs have evolved. For example, office spaces have been subject to profound changes in the wake of the pandemic as companies move to a hybrid work model.⁹ Even in major financial centers, such as London's Canary Wharf, vacancy rates are climbing. Recently the company HSBC announced it would be moving its corporate headquarters from 8 Canada Square tower in Canary Wharf to another space in London roughly half the size. This relocation means that 8 Canada Square becomes the fourth building in the Canary Wharf District to be fully vacated. In an attempt to head off this issue, many large cities have changed their zoning codes to allow for more adaptive reuse with regards to office buildings. In New York City, local leaders are exploring changing zoning in Midtown Manhattan to allow more offices to be converted into apartments.

As the economic model underpinning the retail and office sectors has changed, so too has the market for adaptive reuse. In the 60's and 70's, adaptive reuse was in its infancy. For example, artists flocked to New York City's SoHo neighborhood during this time.¹⁰ The old factory spaces, with their 18-foot ceilings and arched windows were ideal spaces for artists looking for cheap living spaces. Today SoHo is one of the city's most famous neighborhoods, renowned for having one of the largest collections of cast-iron facades anywhere in the world. Indeed, SoHo is just one noteworthy example of countless urban warehouse districts that have become outstanding neighborhoods in their own right.

Though such warehouse conversions continue across America, the new frontiers for adaptive reuse now center around buildings that are not as easily malleable. Consider



Credit: Canary Wharf by Neil Howard

the all glass office skyscrapers of the 1960's, such as New York's Seagram Building and what type of changes would be needed to convert it to residential use. A glass skin on a building can act as a kind of greenhouse, which necessitates the addition of an extra façade to add areas of solid mass. Transforming a space to conform to a completely different land use may also entail changes in the building code. For example, there are differences between a residential building code and a hotel building code, which may entail additional work and labor on the part of the developer.

To address this, planners must carefully review their existing land use ordinances, as zoning code modifications can greatly transform the economic viability of vacant properties. In Fayetteville, Arkansas planners were noticing that many of the development requests they received often centered on the same set of properties.¹¹ These properties all shared one, major shortcoming: none of them had space to meet local parking requirements. Recognizing this as an impediment to redevelopment, planning staff approached city council to

eliminate parking requirements citywide for commercial properties. This change in parking requirements resulted in a number of vacant properties being converted to new uses. A formerly abandoned gas station was converted to retail space and a vacant building, which had stood empty for almost 40 years, has become a new restaurant. In both instances nondescript, vacant properties were brought to life through a change in building requirements.

Merging Building Rehabilitation & Coastal Mitigation

In the context of coastal communities, a building rehabilitation project that fails to take heed of future flood concerns and other environmental factors is not simply counter-productive, it is a wasted effort. To rectify this, many coastal communities have taken it upon themselves to not only assess buildings for their potential for adaptive reuse, but also to determine what design changes a building must achieve in order to be eligible for flood insurance.

In Apalachicola, Florida local leaders undertook a nonstructural flood mitigation assessment with assistance

from the Northern Gulf of Mexico Sentinel Site Cooperative and the Mississippi-Alabama Sea Grant Consortium.¹² The assessment looked at 10 sample buildings selected by the city in order to identify the appropriate flood hazard mitigation techniques for each structure. Some of the basic mitigation measures looked at include: building relocation, elevation, dry flood proofing, and wet flood proofing. The city also worked with design professionals from Florida A&M University to create four FEMA-compliant elevation options for the city's commercial historic district. A two-story vernacular mixed-use building, for example, could meet FEMA elevation requirements by elevating the commercial ground floor and utilities above the floodplain while also maintaining a separate, private entrance for second-floor residences.

For larger communities, a set of flood resilience design guidelines or a future flood risk zoning overlay are options worth pursuing as they effectively merge the policy frameworks for land use and hazard mitigation. Enacted into the city's Zoning Code in October 2021, the city of Boston's Coastal Flood Resilience Overlay District covers all areas of the city that are forecasted to be flooded with a 1% chance storm event in 2070, coupled with 40 inches of sea level rise.¹³ Design guidelines for the district take into account the existing character of the urban fabric and the city identified six most prevalent building types within the overlay area.¹⁴ Using the base building types, the document offered some simple design strategies on how to reconfigure a structure so it could meet design flood requirements. A basic residential design in Boston, such as a triple decker, could be floodproofed by taking the basement unit, moving it to a newly constructed upper floor and then converting the old unit to passive storage. If there are high ceilings on the first floor, another option would be to elevate a portion of the first floor above the design flood elevation. The resulting space below the elevated interior floor could be wet floodproofed with flood vents so water can exit and enter the space.

Conclusion

Changing demands for office and retail space means the challenge of vacant properties will become more acute in the years to come. To address this, cities can turn to adaptive reuse as a way to find new purposes for vacant properties. Adaptive reuse though is not a one size fits all solution.

Not every structure is as readily amenable to retrofits and those that are may be constrained by existing regulatory or financial arrangements. In coastal communities, environmental hazards, such as high winds and flooding, can place additional constraints on a structure's potential for reuse. However, by carefully examining the city's building inventory and land use ordinances, planners can better tailor their city's regulations to make the most out of the existing structural inventory. 🌊

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