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Building community beware: Risks rising along with the tides - by Michael Duffy

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The projected scope of climate change impacts is enormous, interacting with every natural and built environment. New evidence indicates that these impacts in New England are progressing more rapidly than previously anticipated. With the exception of near Alaska, the ocean near Boston is warming more quickly than anywhere in the U.S. The National Oceanic and Atmospheric Administration (NOAA) reported that weather disasters in 2017 caused more than \$300 billion in economic losses, including damage to residential and commercial real estate development. Perhaps the most newsworthy recent examples of climate change impacts in Boston involve wide-spread flooding. Enduring back-to-back nor'easters, with water inundating parts of Boston and other coastal cities and towns, has made it abundantly clear that the impacts of climate change are here now.

Boston has been ahead of many communities in thinking about these concerns. The city released a comprehensive report in 2016 entitled Climate Ready Boston, which addressed projections, risks and initiatives for resiliency to climate change. That report states, among other impacts, that risks in Boston will grow from exposing 5% of the city to a 1% chance of yearly flooding to exposing 10 to 20% of Charlestown, East Boston, downtown and South Boston to high tide flooding every month, even without any storm impacts.

There is no silver bullet solution to the flooding risk facing Boston. Climate Ready Boston commissioned a feasibility study for a Boston harbor-wide flood protection system. That study, conducted by Sustainable Solutions Lab at the University of Mass., was released in May of this year. It opines that harbor-wide barrier solutions are not currently feasible and recommends that Boston continue to focus its climate resilience strategy on shore-based solutions.

State and local implementation of concrete, shore-based strategies, however, has been slow to materialize. Resiliency initiatives are complex and require the participation of numerous public and private stakeholders with differing interests. Thus, regulatory and statutory changes have been limited and anemic. The problems, however, are not going away. Responsibility for addressing the

impacts of climate change (and liability for failing to do so) will be spread across a variety of government and private industry stakeholders.

In January 2018, the Conservation Law Foundation, Boston Green Ribbon Commission and the Boston Society of Architects published a report based on the input of numerous industry professionals engaged to analyze the legal implications of failing to adapt to known climate risks for both public and private industry sectors. That report discloses the potential for legal liability for design professionals, contractors, developers, Realtors, insurance agents, and for government officials. One take away from this analysis is that the risks of failing to address climate change are not only catastrophic flooding impacts, but also exposure for industry professionals to potential liability for failing to address foreseeable impacts of climate change.

Potential legal exposure for design professionals and contractors includes, among other claims, negligence and breach of contract. The gating question in any negligence claim is the existence of a legal duty. Courts look to a number of factors to determine the existence of a duty, including contractual standards, the existence of known risks, applicable codes and regulations, industry custom and the foreseeability of the harm. Under Mass. law, when a design professional agrees to perform a service under contract, that agreement implies a duty to use reasonable and appropriate care and skill in the performance. In addition, for public projects Mass. adheres to the Spearin Doctrine, which holds that every set of construction plans and specifications contains an implied warranty that they are sufficient for their intended purpose and accurate as to the kind and quantity of work required. Thus, even without zoning, building or engineering standards expressly requiring climate resiliency measures, designing and building a project in an area subject to storm surge and flooding may give rise to a duty to design accordingly. Failure to account for the known risks may be both negligent also violate contractual obligations and express and implied warranties. In short, there is plenty of legal incentive for design professionals and contractors to conduct adequate due diligence and design and build for climate change resiliency.

Development in Boston is booming while the impacts of climate change are intensifying. In the Seaport, which Climate Ready Boston predicts will be increasingly under water, billions have been poured into residential and commercial development. Making that level of investment without accounting for the future value, or even the current conditions, is unwise. As the city continues to grow and coastal impacts worsen, climate resiliency strategies are likely to become regulatory requirements. Even without current comprehensive regulation, there are strong reasons for industry professionals to look to the future design needs both to add long-term value and to avoid liability from increasingly obvious risks.

For a full understanding of the issues raised herein, please contact counsel of your choice.

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