Landscape Architects May Be Liable for Climate Impacts

11/08/201811/14/2018 Andrew Wright

Flooding in Houston after Hurricane Harvey / NOAA

When a neighborhood floods, who is at fault?

A class action lawsuit in Houston (https://www.houstonpublicmedia.org/articles/news/2018/04/05/277534/homeowners-sue-costello-engineering-firm-over-harvey-flood-damage/) asks that question. The residents of a master-planned community that flooded during Hurricane Harvey are suing the engineering firm that designed the neighborhood's stormwater management system.

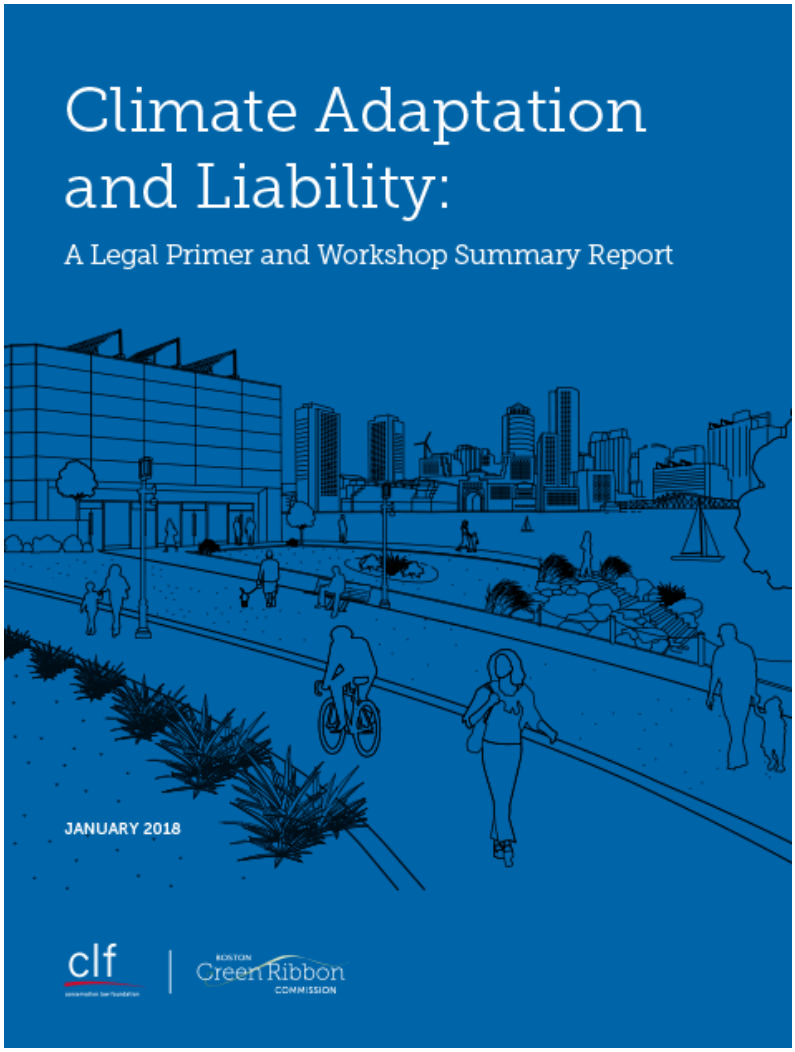
While that suit targets engineers, it nonetheless represents the heightened risk landscape architects face from climate impacts on their projects.

In a panel discussion at the ASLA 2018 Annual Meeting (https://www.aslameeting.com) in Philadelphia, Conservation Law Foundation (CLF) director of environmental planning Deanna Moran and CLF attorney Elena Mihaly gave a crash course on the changing landscape of liability in the age of climate change.

"Climate impacts are becoming more and more evident," said Moran. "What does that mean for us when we know these impacts exist? When there is more public recognition of them, but we aren't addressing them or acknowledging them in a concrete way?"

"How might a design professional –– like a landscape architect –– expose themselves to legal liability for failing to account for and adapt to climate impacts?"

Moran and Mihaly have studied these and other questions, releasing their findings earlier this year in a report (https://www.clf.org/wp-content/uploads/2018/01/GRC_CLF_Report_R8.pdf) published by the CLF.



Climate Adaptation and Liability Report / Conservation Law Foundation

Moran said there are three factors contributing to climate liability risk for design professionals:

First, increased media coverage and general awareness of climate change means landscape architects are increasingly obligated to understand the climate-related risks that might apply to any given project.

"The more we talk about risks publicly," the greater "the foreseeability of climate impacts," increasing potential exposure to liability, Moran said.

Second, government agencies are investing in increasingly-powerful modeling tools to conduct vulnerability assessments and climate adaptation planning. Often, agencies make this information public and open-source.

"These tools are more sophisticated and accurate than they've ever been," giving landscape architects access to high-quality modeling of potential impacts from climate change at a local level. With that increased access comes an increased expectation that designers and engineers will factor in potential climate impacts.

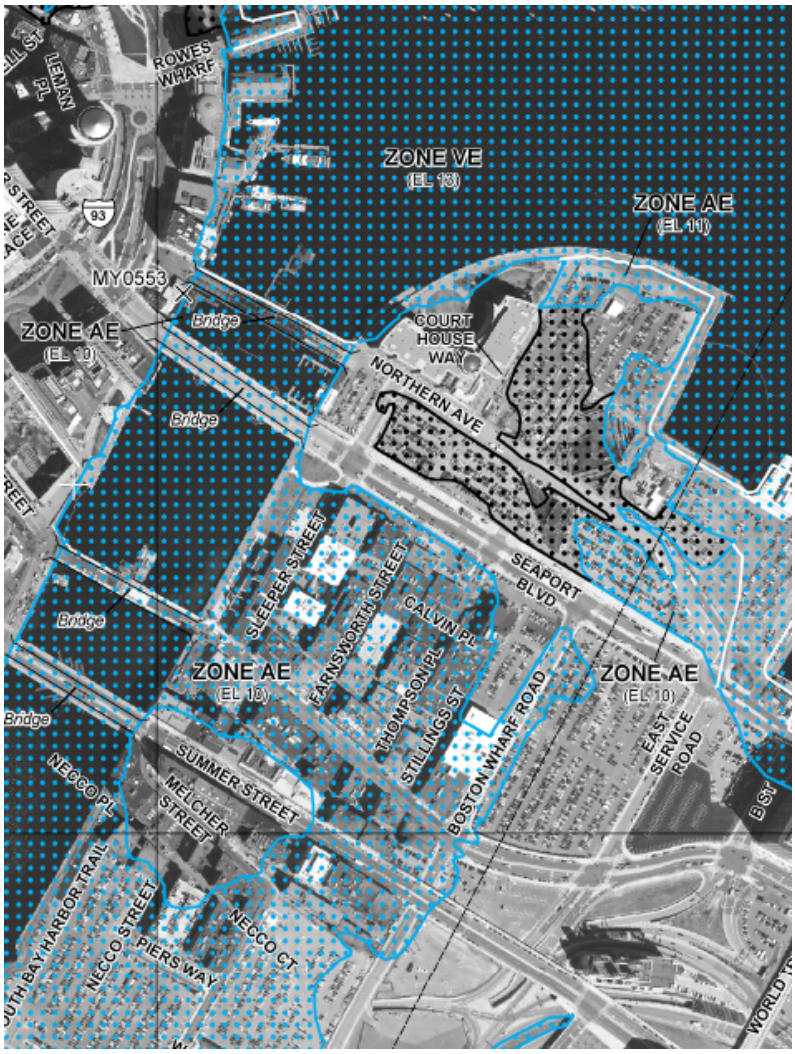
Finally, Moran argued the failure of previous litigation against major greenhouse gas emitters could lead to "a shift in focus on the design community as defendants" in the realm of climate change litigation.

Mihaly said the first two factors –– public awareness and readily-available data –– contribute to what is known as a "standard of care," a key concept in negligence litigation.

The standard of care owed by a design professional is determined by the courts on a case-by-case basis. Courts will look at a number of different factors to determine the standard of care owed by a landscape architect in any given case, including specific contract language, applicable codes and regulations, industry customs, and the foreseeability of harm.

When it comes to knowledge of future events or the foreseeability of harm, Mihaly said: "it's not just a question of 'did you know this could happen?,' but 'should you have known that this could happen?"

Because of the growing awareness of climate impacts and access to models and data, the answer to that question will increasingly be "yes."



2016 FEMA Flood Map, Boston / FEMA

Mihaly cautioned that the inherently uncertain nature of climate change is not a sufficient defense in a negligence lawsuit. "Even unprecedented events have been held, in courts of law, as being foreseeable due to modeling."

She also warned that mere compliance with a jurisdiction's building or zoning codes does not protect a designer from liability if the codes do not actually prevent the harm that the designer has a responsibility to avoid.

"Compliance alone isn't necessarily a liability shield. The key question is: do those codes and standards actually contemplate the harm you are trying to prevent against?"

Industry standards and customs also offer scant protection. "A whole practice could be relying on an unreasonable behavior, and that doesn't necessarily make it reasonable," Mihaly said, referring to the 1932 case T.J. Hooper v. Northern Barge Corp (https://h2o.law.harvard.edu/collages/35295).

In that case, a tugboat operator was found liable for cargo lost at sea because the operator did not use a radio system to receive advance warning of a dangerous weather system. At the time, it was not common industry practice for tugboat operators to use such systems, even though they were readily available.

Judge Learned Hand (https://en.wikipedia.org/wiki/Learned_Hand), writing for the court, held that while "a whole calling may have unduly lagged in the adoption of and available devices, there are precautions so imperative that even their universal disregard will not excuse their omission."

It's clear "the standard of care expected of a design professional is rising due to climate change and improvements in climate science. The threat of liability is real, and there is already litigation in this space," Mihaly said, referring to the lawsuit in Houston.

"Design professionals are the target we're seeing crop up more and more," she added.

While this changing nature of liability in an age of climate change may appear threatening, Moran and Mihaly instead argued for a positive outlook. "Liability lawsuits are incredibly effective at shifting industry perceptions and behavior," Moran noted.

"This could be an opportunity for the design community to really pioneer this space and use liability to proactive in the face of climate impacts," added Mihaly. "The threat of liability can turn what is dreamed about into the standard."

Cities, Climate Change, Landscape Architecture, Policy and Regulation, Public Spaces

2 thoughts on "Landscape Architects May Be Liable for Climate Impacts"

1. **AMERICAADAPTS**
   11/14/2018 / 11:43 am
   Environmental lawyer Margaret Peleso discusses the legal implications of sea level rise, useful to landscape architects. http://americaadapts.org/2018/04/15/you-cant-handle-the-truth-rising-sea-levels-and-the-law/

   Reply
2. **R. GUS DRUM**
   11/14/2018 / 5:40 pm
   So, in other words this article suggests that Landscape Architects should not engage in any design work in Florida, the Gulf Coast, or any property within a mile of the coastline and avoid any design work in areas that have any history of flooding or have been identified by FEMA as having any recurrence interval for flooding. Given that climate change models aren't very reliable in forecasting future rainfall, tropical storms, sea level rise or other weather anamolies that could be considered in a civil suit, it would be best to concentrate on development on high ground. New ordinances and codes along some coastlines in USA have resulted in lots of vacant land as it should be.

   Reply