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MIKE LIVERMORE: Welcome to the *Free Range* podcast. I'm your host Mike Livermore. This episode is sponsored by the Program on Law, Communities, and the Environment at the University of Virginia School of Law. With me today is Moira O'Neill, a professor of urban and environmental planning here at UVA. She also has a joint appointment at the law school.

Her work focuses on land use, climate change, equity, and resilience. One particular area of her research is land use law and its relationship to housing affordability, integration, and environmental impacts in California. Hi, Moira. Thanks for joining me today.

MOIRA O'NEILL: Thank you for having me.

MIKE LIVERMORE: So you've done a ton of research on California law, California housing, California land use. And recently you put together, along with several co-authors, important report to the California Air Resources Board, which is really probably the second most important environmental regulator in the United States, which makes it one of the top five most important environmental regulators in the world.

You put together a report on California land use, law, California environmental law and housing. And this is at the nexus of lots of important issues, especially as we address climate change. So maybe we could just start off with a little bit of what the origin of this report was and what some of maybe the headline findings and so on.

MOIRA O'NEILL: Definitely. So this research funded in part by the California Air Resources Board and in part by a couple of other foundations explores essentially how land use regulation, including state and local land use law that encompasses environmental review in California, can impact approvals of different kinds of residential development. So that could include mixed-use development, transit-oriented development, 100% affordable development, or exurban greenfield development.

The primary focal point for the study was any approval that would yield five or more units of housing if it got built. And the way that my colleagues and I approached this work is that we took a deep dive into how regulation in California is written.

But we also gathered a lot of information and a lot of data on how jurisdictions in California apply law-- and that's their own law as well as state law-- so that we could answer a series of questions about the potential relationship of certain regulations or certain aspects of regulation and housing development outcomes.

And we were inspired to do this work largely because there's decades of research that explores in more general terms the relationship of what researchers have described as stringent land use regulation and housing supply and housing affordability in high cost metros. And one of the open questions that that body of work left unanswered is which specific regulations may be operating to restrict the development of different kinds of housing.

So the interest that overlapped with Air Resources Board connects in with the fact that advancing climate policy and Fair Housing policy in California theoretically depends, at least in part, on more dense development in urban areas closer to transportation and avoiding sprawl. And some of the prior research in this space that we were, I guess you'd say, in dialogue with described environmental regulation in particular and environmental review as one of the factors that could actually limit the development of dense development in urban areas.

And so we embarked on a study to try to explore whether that was, in fact, happening in specific jurisdictions by seeing how these places actually applied law over time over several years. So I can describe, definitely, some of the highlights, which is-- I think the biggest highlight is there's incredible variability in how jurisdictions imply both state environmental review, but also their own law.

And what I mean by that is it's not as simple as saying, this jurisdiction has written their law in one way and this neighboring jurisdiction has written their law in a different way. Certainly these jurisdictions that we studied have the power to do different things within land use law to some degree. But what we also found is even in situations where neighboring jurisdictions were applying either similar local law or the same state law, we saw variability in how they applied it.

And so that had implications for both how much housing might be approved but also how long it might take them to approve that housing. And that was probably one of the biggest findings, is that local conditions appear to drive outcomes more than, say, state-mandated environmental law. And then one of the other big-picture findings that was significant in the California context relates specifically to litigation and environmental review.

So one of the concerns in California is whether different parties use environmental law and environmental review, and specifically, the ability to challenge an approval under the California Environmental Quality Act, to block development.

And when we studied approvals and we studied lawsuits, we found that less than 3% of over 2,000 observations of housing approvals actually face litigation. So it doesn't mean that litigation doesn't have an impact. It's just at a rate that's far lower than a lot of the public discourse would assume based on how the dialogue was unfolding.

MIKE Super interesting stuff there. So maybe we could just start with the kind of law on the books versus law in
LIVERMORE: practice point. This is everywhere--

MOIRA O'NEILL: Absolutely

MIKE --especially in environmental law. It's everywhere in a lot of areas of law though. Let's just say in the international
LIVERMORE: context, there are lots of countries that have really wonderful constitutions prohibiting torture and guaranteeing freedom of speech. And none of that is actually implemented in practice. So there's a lot of-- it's not surprising in some sense that there's a lot of variability. But it's an important thing to get a handle on.

So as you say, there can be very similar local laws. Presumably there are some differences in the actual kind of law on the books as well. But then obviously if jurisdictions are applying the same state law, then the law on the books is going to be the same.

What are some of the local contexts then? If it's not differences in the legal regimes, the formal legal regimes that they're applying, what are some of the other factors that do drive-- I guess the outcome here is density. It's the time to approval of new housing. Maybe to just start with, what are the variables that are the outcomes of interest here?

MOIRA O'NEILL: Sure. I mean, I think let's step back, even before we talk about outcomes like time frames to approval, and think in the context of climate policy and Fair Housing policy. Let's say for example a jurisdiction writes up law locally to prefer a certain class of housing development that's meant to facilitate both climate policy and affordability. So for example, one way a jurisdiction could do that would be to create a ministerial pathway to approval for types of housing development that the jurisdiction wants to see within its jurisdiction, right?

MIKE And this would be higher density, closer to transit, more affordable housing.

LIVERMORE:

MOIRA O'NEILL: Right. But even in more sweeping terms, I think one of the first things that surprised us in terms of the distinction between how law is written and how it's applied is that one of the first steps we do in our research process is traditional legal research. So myself, my colleagues who are lawyers, and law students would help with this process.

We dive into the law on the books. So we look at all of the zoning ordinances. We look at the planning documents. So in California, it's a planning mandate state. So the general plan and specific plans have a force of law and are really critical in those jurisdictions. We also read the appropriate state law that's applicable to any proposed development of five or more units of housing within those jurisdictions.

And we summarize it in a document. And so in that summary, we're going to be able to spell out whether or not the law at the local level enables any class of housing to move through what we would describe as a ministerial process.

And a ministerial process is where the local government must issue an approval if the proposed development conforms to objective standards that are laid out within that jurisdiction's law. But most importantly, it also removes environmental review from the development approval process in California. And that's pretty important right. CEQA does not apply to a ministerially approved development.

MIKE Oh, that's interesting. This is just a feature of the state environmental laws.

LIVERMORE:

MOIRA O'NEILL: Exactly.

MIKE If the decision is classified as ministerial, then no CEQA. CEQA is the environmental review statute in California
LIVERMORE: modeled on similar to but different and important respects from the National Environmental Policy Act. So that's interesting. So there are certain classes of housing approvals. If they're counted as ministerial, then doesn't go through the environmental review process.

MOIRA O'NEILL: That's right. So the state can carve out exemptions and create different streamlining mechanisms. But a jurisdiction can also avoid CEQA, or the jurisdiction can help a development avoid CEQA review if they create a ministerial process. So discretion and creeping discretion in your local law is the hook that keeps CEQA applicable always.

And an exemption is also different than not having CEQA apply in the first place. So the interesting thing-- when we talk about what we saw on the books versus what we saw in practice, the first point. The interesting thing is we saw several jurisdictions that created a ministerial process for dense development within their jurisdictions that would seem to facilitate both Fair Housing and climate policy goals on the books.

That included the County of Los Angeles, the County of San Diego, Inglewood, Los Angeles, Fresno, Placer County in the city of San Diego. But when we actually pulled out every single approval of five or more units of housing issued over a span of four years, that means the approval could have began many, many-- the approval process could have began many, many years prior. So sometimes these documents span 10 years.

But the issuance is occurring in one of four of our study years. We found zero observations of ministerial approvals in most of those jurisdictions I just named. We only found them in the County of Los Angeles and the city of Los Angeles. So that's the first point where you see a big difference between the way the law is applied versus the way the law is written.

So that means, of all of these different observations of proposed development that we studied-- and right now I'm referencing over 2,000 observations. And what I mean by an observation is not an approval for, say, just a development of five or more units. It's just an approval that could span multiple developments. It could lead to multiple buildings.

It's just a single proposal for a development. Some of those developments are massive. Some of them are just five units. It ranges in size. So many, many housing units if built. But over 80% of them navigated their approval process through a discretionary process. So far more than just saying the majority. It's the vast majority navigate an approval process through discretionary process.

So that means that the law at the local level in many instances is not facilitating a faster process through a ministerial pathway. They are requiring that these developments navigate a process that will inherently require environmental review. So that's on some level a local choice.

Now, there are certain situations in which that may not be true. So subdivision, for example, involves state law that would necessitate discretion. But that's not true in situations where development conforms to underlying zoning and planning and there's no subdivision involved. So, for example, an apartment building in a jurisdiction that has zoning for apartment buildings of which every single one of these jurisdictions does have. So that's important.

MIKE
LIVERMORE: Yeah, no, that is super interesting just to provide some context here. In a sense, one could hear that finding and might think it's a good thing. The discretion allows local decision makers to make decisions that are good for their communities. That would be the idea of discretion.

Environmental review sounds like a good thing in asking whether a project is going to be bad for the environment, mitigating negative environmental effects. So in the sense, why isn't this just kind of an unmitigated good thing for local decision makers to have discretion for there to be more rather than less environmental review? What are the trade-offs involved here?

MOIRA O'NEILL: Well, so I think built into the question is an assumption that these individual projects go through a certain amount of in-depth environmental review that leads to good information for the neighbors or for surrounding community. I think the next thing I wanted to point out in terms of the application of law is that environmental impact reports are quite uncommon in most of the observations that we studied. And this is largely because there's a lot of environmental review happening at the planning level.

And so in some jurisdictions and then in other jurisdictions, there's a heavy reliance on what's called a mitigated negative declaration. But I'm going to focus my attention for a moment on the jurisdictions that heavily rely on specific plans and programmatic-- what we call environmental impact reports that are attached, for example, to specific plans, and the use of either exemptions or tearing associated with all of the work they've done in terms of environmental review at a larger scale than an individual proposed development.

So theoretically under that system, what you've got is in-depth environmental review to explore the potential of environmental impacts associated with development that the jurisdiction says they want within their city boundaries to facilitate their various policy goals. So the next thing we found is that the time frames for approvals for development that doesn't have to go through an in-depth environmental review process that is exempt from CEQA or is tearing off of another EIR is still navigating--

MIKE Sorry, you said EIR?

LIVERMORE:

MOIRA O'NEILL: Environmental Impact Report. So the parallel in federal law being an environmental impact statement.

MIKE And when you say tearing off of, maybe we could just explain that.

LIVERMORE:

MOIRA O'NEILL: Absolutely. So a specific plan, for example, may have an environmental impact report associated with it. It would have an environmental impact report associated with it to explain-- its for noticing information about potentially significant environmental impacts associated with the proposed development that that specific plan would call for if in fact development comes through the-- people propose the development consistent with what that planning document says it wants.

And that environmental impact report would also allow for development to rely on that EIR. They may have to provide additional information. And they may have to supplement depending on whether the proposed development is going to-- the most simple way I can describe it is imagine if a proposed development for the most part is going to lead to environmental impacts that go beyond what that EIR forecasted. Then there could be a circumstance in which there might be a need to supplement, create supplemental study.

But in many circumstances, there could be situations where the proposed development-- every potentially significant environmental impact that proposed development might lead to is already accounted for in the planning, Environmental Impact Report. So in that situation, they can essentially-- tearing is the informal language we use to describe what a proposed development or project proponent might do to basically satisfy environmental review requirements.

MIKE And so then, I think the point you were making there was that in a lot of cases, there's not kind of additional information that's being produced, that you're kind of operating in the context of these plans. When we talk about a plan, we're talking about a development plan over a large area where jurisdiction goes ahead and says, look, this is what our future development looks like over the next 20 or 30 years.

And then projects that are consistent with that plan, presumably the environmental impacts have already been taken into account at some level. And so there's not necessarily any additional information that needs to be created for those projects to move forward.

MOIRA O'NEILL: The only way I would change that is that the forecast won't necessarily span such a long period of time. It might not be 20 or 30 years. It's probably going to be much shorter.

MIKE Five years or whatever.

LIVERMORE:

MOIRA O'NEILL: Right. We're talking about something that's going to have much more relevance than something that's forecasting for 20 to 30 years usually. And what I'm getting into here, that's one way to deal with it and another is that it could qualify for an exemption under law.

So the state through both legislation and regulation has created different exemptions to CEQA for classes of development that basically parties have agreed are great for climate policy, are important to facilitating climate policy. And so therefore, there are various tools to exempt those proposed developments from environmental review because everybody has sort of collectively agreed they fit these different qualifiers or conditions.

And these conditions are specific enough to avoid I think the risks you were alluding to earlier when you mentioned the potential benefits of the notice and information that comes through an environmental review process. So they're in very specific locations in proximity to different kinds of infrastructure and services and transportation and of certain scale and type. And they meet a host of different conditions.

The big thing I wanted to point out in terms of the variability of how local jurisdictions apply law is that we can explore how long it takes for developments of about the same size to move through their local approval processes when they are all exempt from CEQA. And that's where we see extreme variability.

So a great example that we often have to refer to in describing our findings is San Francisco because it has unusually long time frames to approval. And that finds its way into the newspapers pretty often because it's notorious for this.

So the median time frame for approval for a development that would be an apartment building if it's built of 5 to 49 units in San Francisco if it is exempt from CEQA is still two years. And that's just for the first entitlement. That's not the building permit process. That's not getting all the way through to occupancy.

So that's a pretty big contrast with neighboring jurisdictions. I mean, San Jose is not that long. San Jose is a little closer to one year for a development of 5 to 49 units, an apartment building specifically that's exempt from CEQA.

And if you go to Southern California, it's a little bit shorter in some of those places. And if you go up to Sacramento, it's going to be closer to six months for the same type of building. So that tells you a lot about how these jurisdictions apply their local law.

MIKE And is it just kind of like paperwork sitting on someone's desk and that's why it takes two years? Or is there
LIVERMORE: something happening in the course of that process? Oh, we should just say two years is a big deal. Like money's being lost. The housing market changes. There's financing. Presumably this matters, the fact that there's a two year delay. It's not like the end of the world. But it doesn't sound like it's a good thing.

MOIRA O'NEILL: Well, it really depends on who you're talking to. So if talking to an affordable developer, that's a very long time in order to hold-- in terms of holding cost. But also the time frames in San Francisco are so long that it creates a certain amount of challenge with forecasting what you're holding time needs to be for financing. And when you're an affordable developer, you need to have a certain amount of certainty in order to structure your financing. So it does matter.

MIKE You actually have to own the property during the course of this two-year process.
LIVERMORE:

MOIRA O'NEILL: That's right.

MIKE Yeah, so you're losing money right there.
LIVERMORE:

MOIRA O'NEILL: Right. So it's really different. You're differently situated if you're a large market developer who's pursuing luxury housing as compared to an affordable developer or smaller developer that is trying to offer a more moderately priced market rate development.

You have totally different needs in terms of your financing, not to suggest easy for market rate developers necessarily. I think that I can't speak to that because I haven't spoken to every single developer. I can just tell you that in the interviews that colleagues and I conducted, it notably is most burdensome for affordable developers.

MIKE Yeah, that certainly make sense. And so, yeah, just sorry to get back to that question.
LIVERMORE:

MOIRA O'NEILL: No, that's OK.

MIKE Yeah, what's going on in these two years. Are they just like-- is it just a matter of sitting there with paperwork? Or
LIVERMORE: are there meetings? Are they asking for information? Or just literally it's like taking a while to process the paperwork?

MOIRA O'NEILL: Right. So answering that question, it's always sort of project specific. So it's harder to extract at a general level, here is what's happening within these jurisdictions. But I can tell you a few things that are notable. It's pretty interesting that San Francisco has the longest time frames but doesn't on average have the largest number of approvals per project.

So your question embedded in that was this idea that maybe it's taking longer because there's more process associated with more hearings or more steps to approval or maybe it's sitting on somebody's desk. It's complicated by the fact that San Francisco actually has an extraordinarily talented planning department that is more resource and more staffed than most of the other planning departments we studied in the 27 jurisdictions that we've studied across California.

And it's also complicated by the fact that these approvals per project in San Francisco are significantly fewer than neighboring jurisdictions that have much shorter time frames. That really sort of befuddles the idea-- that doesn't lend itself to it's sitting on someone's desk in the planning department. And it also doesn't lend itself to they're imposing more steps. That's complicated.

It invites important questions about the role of politics. And of course, that's something for a political science to dive into. But it does invite important questions about how these jurisdictions are applying their own law and inviting politics into this process to the point of slowing it down in, say, San Francisco as compared to Oakland or compared to San Jose or Santa Monica.

One of the things I would say to you that's interesting about San Francisco's law as it is written that's really notable is that they actually have a clause in their city charter that allows neighbors to essentially request a discretionary public hearing for anything, even if it would just be what you might perceive to be a building permit process.

So it's an interesting provision within their local law that we don't find in other jurisdictions that could take something that might move faster theoretically under the local law, for example, if a development essentially conforms to everything the law is asking for.

So in other words, the proposed development meets all of the planning and zoning requirements in terms of both of its land use, its size, its density, but also meets all of these important objective criteria around design to the extent that they're laid out and has potentially even satisfied design review requirements. There's still an element of discretionary review afforded to neighbors through this provision that just allows a neighbor to request a special hearing.

MIKE Does that happen much?

LIVERMORE:

MOIRA O'NEILL: It does. Relative to the total number of developments that we observed in San Francisco, it's not the majority, but it happens. And that was interesting to us to see that among proposed developments that otherwise meet all of the local laws requirements.

So the only reason they're going in front of a discretionary-- the only reason they're going into a public hearing and through another discretionary review step is because somebody is able to take advantage of this provision in the charter.

MIKE Yeah. And then does that really slow things down? Or is that an automatic six months kind of thing if one of the neighbors objects and they say, I want to have a hearing? Presumably that's got to get a calendar. And people have to be there and notice for that hearing and all that other stuff.

MOIRA O'NEILL: I can't answer the question of whether it creates an automatic average time frame of an additional six months within this group of developments that we studied just because we didn't slice the data that way. We could try to look for that. But we didn't actually explore that in detail, so I can't readily answer that question.

I can say that it's adding a public hearing and a layer of process that nothing in the law even as it is written with respect to the proposed land use, the size, the scale, the design components, or the environmental review requirements would call for. So in other words, it's a bit different than a public hearing associated with what the community collectively has decided is necessary for the built environment to meet Fair Housing goals or other public policy goals or climate policy goals.

Theoretically the law represents what-- you'd hope it represents what the community says is important to them in terms of their built environment with respect not just aesthetics, but whether or not different kinds of development are going to come in to advance a variety of goals around economic development, around integration, access to different amenities, and climate. And this is sort of outside of that.

**MIKE
LIVERMORE:** I'm not sure how that lands in a sense. I could imagine someone saying, well, this is a good thing. It provides the people who are most affected by these kinds of projects, the immediate neighbors with a voice in the process.

Presumably that's the explanation for why it was included in the city charter in the first place. And it is an additional layer. So just to take that on board, what are the pros and cons of that kind of provision in the charter?

MOIRA O'NEILL: I think the most important thing to recognize is all process right can go both directions. It can absolutely empower particularly community that needs a voice in the process that may be historically has been excluded. So that's always a positive from my perspective. That's mine. And others may or may not agree with that.

But I think process can be really critical to including important voices in development processes. But it also lends itself-- of course, all process can lend itself to people exploiting process to block development. That actually would be really good for outcomes as well. So there's that inherent pro and con to all process in that sense.

But I think the second part of your question is that I think there's a measure of unpredictability that is distinct and different from process that exists in other parts of the law. So environmental review isn't necessarily unpredictable in the same way that I would just describe that charter provision.

So maybe it's not unpredictable. If you know the neighborhood that you're trying to develop in, and you know the neighbors, and you know who's going to oppose the development, possibly, it's not unpredictable in that sense. But it allows for a level of unpredictability that I think other discretionary mechanisms and process elements might not allow for.

You understand at the front end if design review is required when you propose development in the jurisdictions we've studied, the law tells you, for example, that you will need to submit your drawings and submit what you're proposing to a group of people that will determine if you've met these subjective aesthetic requirements that the community has decided or is important.

You will also for the most part whether or not you need to-- whether or not you satisfy environmental reviews exemptions in terms of what the legislature or basically the Office of Planning and Research, the guidelines associated with CEQA spell out allows for an exemption or whether or not there is an environmental impact report you can tear off of.

I mean, those kinds of process requirements are things that you can anticipate. Possibly you cannot anticipate how long it will take to get through them. That's something that you may not be able to predict. And that's problematic for affordable developers. But broadly I think in the other areas, you know going in that these are processes that you have to navigate through if you're going to develop in these jurisdictions. And I say that's true across all of our jurisdictions.

I think the interesting thing about this one provision I was mentioning is that it's triggered by basically a neighbor or an interested party. It's not triggered by, say, the fact that your-- I don't know. It's not triggered by whether or not qualify for a CEQA exemption, for example. Does that make sense, the distinction?

MIKE Yeah, like there's just someone that lives nearby, I guess, right?

LIVERMORE:

MOIRA O'NEILL: Right or just as an interested party.

MIKE An interested party? Now, that sounds really broad. I could potentially be interested in what goes on in San

LIVERMORE: Francisco. Presumably, there are limits on that.

MOIRA O'NEILL: There are limits, yes. But I'm just saying that it's not as predictable, I think, as some of the other processes.

MIKE Right. That's interesting. So you mentioned that possibly part of what's going on in San Francisco beyond this

LIVERMORE: have additional neighbor-- I don't know if I would call it a good neighbor provision. Maybe it's a bad neighbor provision.

Whatever it is, it's the provision that allows neighbors to initiate what could potentially be a time consuming, costly process, that there's kind of-- it's not that the San Francisco Planning Board is understaffed or incompetent or anything like that. If anything, they're pretty well staffed up.

But you did mention a role for politics. And I'm just curious. Your study really is in the technical aspects of these decisions. What is the law? What are the rules? How are they being applied? You have these plans. You've got these individual decisions. And they fit with the plans. And it's very formal.

I don't know if bureaucratic is the right word. It's very legalistic. And there are good things about that obviously in a certain sense. It's good for lawyers obviously, but it's also-- hopefully the idea would be maybe predictable as you say. There's various values there. People have notice about what the requirements are and so on.

But you mentioned that there's also some politics in play. So I'm just wondering, what are the politics that we're talking about there? Politics is a word that is pretty open textured. Lots of people use that word in different kinds. We could be talking about corporate politics or office politics. We could be talking about electoral politics. We could be talking about family politics or whatever. So what is the nature of politics as it gets kind of-- as it plays its role in these decisions?

MOIRA O'NEILL: Well, so I just want to take a step back and say that I didn't study-- my colleagues and I are not political scientists. And we didn't study the specifics of San Francisco politics or any other space or place that we studied within this land use study.

But what I can tell you is that there's no question from our data that there are certain processes that seem to open the door for political disputes or the opposition to development. Even if it's opposing development that appears to advance the city's local policy on housing as it's written in its law, it seems to make space for that is the best way I would say it.

So I think to kind of come back to that provision I was describing, there were a group of developments that would have proposed, for example, apartment buildings within San Francisco that conformed to every single provision of local law and planning within the city. And that group of apartments that people requested this special hearing in front of the planning commission, that's putting politics into it because this special hearing is one that would not otherwise be required by the law.

So that opens the door for a political squabble, I guess you could say, I mean, to enter into this approval process. I mean, theoretically, that could occur in any discretionary process in general because in the discretionary process, the local jurisdiction has the right to either imply conditions of approval in certain instances in California or to say no altogether.

So for example, if some development conforms to certain law or is only requesting certain kinds of conditional use permits, there's law in the state of California that limits the jurisdiction from saying no. But they can apply conditions of approval that can take that approval process, make it longer or more difficult. If they're applying for rezoning, for example, it's possible they could say no altogether.

So theoretically, that always invites politics. But what I'm also describing in this context of San Francisco is a situation in which now you're not even talking about a hearing associated with a variance or a rezoning. You're just talking about a hearing that's associated with the party asking for one that the law as it is written doesn't otherwise require. And so now you're just inviting more politics into the process.

**MIKE
LIVERMORE:** Yeah. I mean, this might be a peculiarity that I have. But politics, again, it's a funny word. It gets used in lots of different ways. I don't know that I necessarily think politics is a bad thing. Politics can be good. We live in a democracy. And we have to get along with each other. And part of that's politics. And that's how we debate and discourse and everything else.

So I'm wondering how we-- I just had to think about the introduction of politics into these processes. Is it bad to have politics involved? And when we talk about politics, are we talking about just people complaining or there's electoral politics involved like where there's campaign contributions or something like that or that politics are imbalanced in some way?

So it's really about the interest of very powerful people. And the interest of less powerful people aren't as-- are kind of overwhelmed. Or is it just-- it would be better. There would be something desirable about having this process of approvals basically for housing be kind of purely technocratic or purely legal in the sense that it just operates independently from any broader conversation, like we make our plan.

That's the point where we want to have politics. Maybe that is kind of my question. Are we trying to coordinate politics versus administration? That's something that we talk about in other areas of law, is that we have our time for politics.

And that's when we write the plans or we write the rules or we write the law. And then we want to be neutrally applying these decisions to individual cases. And is the problem there that we're having, as you see it, the politics are intruding into that process that's supposed to be nonpolitical or neutral?

MOIRA O'NEILL: So I'm going to answer mostly from my own opinion and not entirely from data at certain points because I think in some ways that's what you're asking for.

**MIKE
LIVERMORE:**

MOIRA O'NEILL: Right. I'm going to try to contextualize it in terms of what I've learned right from this data. So I think let's contextualize it in the space of how California's law around land use operates. And first of all, I think, I personally believe that there is a role, of course, for politics in making decisions around the built environment.

And it affords people an opportunity to organize and to place pressure on their elected officials in order to see the built environment develop in a way that's going to lead to good outcomes. I think process is important to good outcomes and paramount in particular for people who've been excluded from participating in the process and making decisions about the built environment.

And I don't want to suggest at all that we should have processes that are purely technical, bureaucratic, and that we should eliminate politics from all land-use development processes. That's not what I'm trying to say and not at all, I think, what our data would necessarily support.

I think what I'm pointing out is that in the context of California, you have, of course, a political process that attaches to lawmaking, which manifests both in how you write zoning ordinances and environmental review law at the state level and also guidelines and regulations and in how you develop plans and in how you develop not just the general plan and the elements of those plans, but also specific plans if they exist and within a community.

And that makes sense. And you also have politics in the context. You have a political process associated with individual development approvals. And that makes a lot of sense in many contexts. I think the challenge is, what's the right balance? Like if you're trying to address getting to a built environment that achieves certain climate policy goals and Fair Housing goals, ideally you're thinking critically about where you allow politics to come in to different points in the decision-making process.

Now, in my personal opinion, if you're a jurisdiction that says you want to promote more affordability and you have a pretty bad situation with affordability, you might want to preference certain kinds of development that would promote affordability, for example, especially 100% affordable development.

And you might want to preference them in a way where you go through that political process at the front end when you're creating the law and you're creating the planning and particularly with the specific planning. And you're identifying areas where you want to promote affordable development. But maybe you don't want to insert a political process into every approval of an affordable development.

And possibly you don't want to do that because you know that you are risking classic-- what we call NIMBY-ism. And particularly if you're talking about neighborhoods with more opportunity or communities with more opportunity, NIMBY-ism being not in my backyard. I'm assuming everybody's familiar with that acronym.

MIKE And when you say neighborhoods with opportunity, maybe just explain what you mean by that.

LIVERMORE:

MOIRA O'NEILL: I'm definitely using language that comes from work that we did in relationship to how others have defined census tracts within California. So looking at levels of income, for example, within an area. So for example, if you want to put more affordable development in a location that's more affluent and has a track record of really high performing schools and really good environmental conditions in terms of air quality, for example, you maybe you want to create a pathway for that development to move faster through an approval process and to have more certainty around the approval process if the development meets all of the criteria that you've decided as a community through your law and planning are required for that development and both in terms of environmental review criteria but also density and use size and aesthetic review.

So I'm just saying that I think when I describe for you what's happening with in San Francisco, it seems to not-- it seems to move away from trying to strike a balance. So San Francisco, I would describe it-- if you read the law on the books and you read the programmatic statements that come out of the planning department, I would describe San Francisco's housing policy on paper to be quite progressive and really trying to advance Fair Housing goals and climate goals.

And generally speaking, that city as a whole has pretty good transportation access across most neighborhoods. So given its stated policy goals of really also wanting to promote affordability, it is surprising that affordable development, including 100% affordable development that meets planning and zoning requirements, is not somehow exempt from this charter provision that I just described for you.

To me that's an interesting outcome because it would seem to contradict the stated goals of the city. And it would seem to add another layer of politics, not just the politics that you would assume would go into the deliberation around how to construct the built environment through making the law either through the ordinance construction or the planning, or even possibly through design review, agreeing whether or not the building looks the way people want it to look. You're adding another layer of process based on none of those other criteria that I just described.

MIKE Right. So this is again just kind of a more-- and I think it's pretty close to the ground in a sense. But it is surprising in a way. It's inconsistent. And if we expect jurisdictions and people to be consistent, than it's surprising.

LIVERMORE:

It also seems in a sense not surprising because there's a certain way in which human psychology people want to have really lofty goals and to then have other people carry out those lofty goals and then to not have-- to have negative consequences themselves.

So people are happy to adopt, to endorse, and to even sit around with friends and say, oh, it would be great if there's more affordable housing. And I'll vote for people who are going to have more affordable housing. And we really need to have more density. And it would be great to have more density.

And then the next week when affordable housing proposal comes in next door or in their neighborhood, they're the first ones who oppose it. That seems like incredibly common to me. Does this just reflect that kind of basic feature of human psychology we just kind of see it written in the law and this peculiar way that you see in San Francisco?

MOIRA O'NEILL: And I don't even know if I can answer that question because I don't think I've spent enough time looking at the origins of the city charter provision to determine completely where it came from in relationship to what you just described. But I would say certainly it allows for what you describe to happen.

It really does create a pathway for, on the one hand, elected officials to say, we are very skeptical or critical of proposed development, unless it meets these public policy goals that we've stated are of highest priority and among them is promoting affordability and affordable development.

And we don't want to speed through any approval process for anything that isn't affordable development because it allows elected officials to say that at the same time that it could theoretically just create yet another way to derail affordability within the same jurisdiction.

So I don't know that it originates from that. But certainly what you just described seems like could play out quite easily with that provision. And theoretically it can play out in any jurisdiction that embeds multiple levels of discretionary review for all proposed development that conforms to underlying zoning and planning and seems to satisfy all environmental review requirements if theoretically that could play out that way everywhere.

And it is interesting. I think, at least to me, I'm thinking also for my colleagues, that we see really big differences in these time frames for approvals across different cities that have discretionary review processes. It is interesting that Oakland moves so much faster, even though on the books much of the law is very similar to San Francisco.

**MIKE
LIVERMORE:** Yeah, I mean, with speculation but just to indulge a little, what's going on there? Is it different politics? Is it the land use? When I say politics, I guess I mean different preferences actually that people are less likely to oppose development near them. Or is it just land values are different? What might help explain the differences in these jurisdictions that you said legally are pretty similar to each other?

MOIRA O'NEILL: Instead of giving you my perspective, I'll just tell you what interviews said. So participants and interviews from both places and other-- that worked in both places and also in surrounding communities described Oakland broadly as-- during that window of time of our study is they described Oakland as-- I guess the best way to describe is open for business, interested in seeing more development of housing and mixed-use development.

And you know that while there was certainly robust community organizing, the process seemed to just be-- it seemed to be a little bit easier to navigate to get to the outcome that all parties might want than in San Francisco. So satisfying the same environmental review requirements in Oakland according to interview participants just seem was more straightforward. So for example, there were affordable developers that I talked to that would never consider developing in San Francisco, even if they were working in the region.

And then comparatively, for example, developers that I talked to that worked in both San Francisco and Redwood City, which is a jurisdiction in the same region, they described both of processes could theoretically be considered complex if you're talking about reading the law. But Redwood City was quite predictable and working there was a lot more straightforward according to developers I talked to that worked in both places

MIKE Yeah, that's really interesting. I mean, it just pushed the question back a level, which is what accounts for that.

LIVERMORE: So is it a cultural difference in the relevant government bureaucracies? Is it that people on the ground are friendlier towards these types of developments? Is it just wealth, like people with more money and time have more money and time to spend fighting projects that they don't like in their backyard?

Like say you wanted to change it, I guess, right? We were to say, we don't like this situation. And we can't just change the law. I mean, I think that's a big, important takeaway here at some level, just to reiterate what you've said several times, that jurisdictions with very similar law have very different outcomes. And so it's not just about changing the law. You have to change something else. So I guess that's the question, is what is the something else or how does that change come about?

MOIRA O'NEILL: Well, this is where what I say next might be controversial for at least some people because I think can change at least some aspects of the law. You don't have to completely remove local discretion from these local governments. You don't have to disrupt the idea of people within a community having control fundamentally over their built environment. But you can curb some of this local discretion. You can intervene.

The state can step in and say, look, you have to, for example, give a notice back to a proposed developer about whether or not they're satisfying your requirements to develop by this amount of time, or you need to let them know what your decision is by this amount of time. And if they're not going to meet your requirements, you need to explain why by this amount of time.

You can curb some of that authority in a way that limits the ability for a jurisdiction to take over two years as compared to six months to address whether or not a proposed development should be approved. So it is possible to change the law. You just have to make that choice to do so.

And at the local government level, you can actually also change the law as well. You can move-- I mean, San Francisco could, and certainly different parties within San Francisco have proposed this, you could amend the city charter. You could get rid of that one clause that I mentioned, maybe not even for all development but for development that broadly people agree is important for Fair Housing goals, affordability, climate.

You could also try to modify the city charter to at least allow some development to go through a ministerial process. At the state level, there's definitely been efforts to do that. There was Senate Bill 35 that was passed years ago that moves a class of development in jurisdictions that meet certain affordability thresholds, prevailing wage standards, and different requirements. There's a whole series of requirements.

If it meets all of these criteria, it doesn't go through environmental review under CEQA. It bypasses environmental review. And so it fundamentally kind of operates in a ministerial approval pathway. So it is possible to change the law. It's just that that's pretty controversial.

**MIKE
LIVERMORE:**

Yeah, I mean, so maybe just one other zoom out kind of question which is, we've spent a lot of time talking about very detailed things, which is good. We're talking about ministerial processes and obscure provisions of city charters and hearing rights and planning boards. And it's all very detailed. It's all very procedural. It's all very legal.

And I guess the question, this kind of bigger picture question I'm curious your thoughts are, let's assume for the sake of argument that there are ways in which the California housing market broadly understood, housing government complex basically, housing regulatory complex, is not delivering the results that broadly people want in terms of encouraging infill development, encouraging density, and that's good for the environment. And lots of different ways, including climate, is good for housing affordability and so on.

If We take that to be the case as a normative matter, how much of the problem do you think of as like a technical problem with technical fixes, like, OK, we just need to get rid of this charter provision, or we need to shift discretion around a little bit from this actor to this other actor, or we need to streamline this process and so on?

There's like technical fixes. It's like a machine that just isn't quite working properly. We just take some of the screws. We move some of the widgets around. And then we'll get the machine working properly versus how much of this is reflecting some kind of underlying political essentially, economic reality about just conflict between people's general goals that they would like to see in the abstract versus what they want individually, who has money, who has political power.

And that the legal regulatory system reflects those underlying political and economic realities. And if we were to change it in some way, then those political and economic realities would just pop up somewhere else, that we'd be playing kind of whack-a-mole forever and ever.

So that's the question, is that are we talking about-- is the regulatory system more like the engine that we just need to fix and then it will work properly versus if we try to do that, we'll just be playing whack-a-mole indefinitely and really it's the underlying economics and politics and we have to figure out something or even culture and that that's where we should be at least partially focusing our efforts if we really want to get the outcomes that we purport to want?

MOIRA O'NEILL: Well, again, so OK, another question that requires me to step outside the data and just offer you what I think broadly. I mean, I think, of course, there's no question in my mind that the problems we observe are in relationship to underlying politics and economic realities and power imbalances in both local places but at a regional level and then across the state. And they show up in all of the different processes that I just described.

So the city charter in San Francisco isn't the reason that people might object to proposed development. It just affords people another pathway to object to proposed development. So your question, I think, is also making a statement and to the extent that the statement is there are underlying factors that just manifest in how the law is applied.

I agree with that. And it's true that there are a lot of complicated dynamics going on in California around land use. And they didn't develop yesterday. They've developed over years, decades. And fixing them is hard. But I would also say that in 2022, we are in a position where, one, we have extraordinarily pressing issues that demand really good information and really good policy making. We can't just put it to the side and say, well, we'll be playing whack-a-mole if we try to reform our policy through amending the law or changing the law.

And the fact is that the data, for example, that the group of people that I've been working with that we gathered to answer different questions is data that these jurisdictions have to produce in the business of governing and in the business of approving or denying proposals to develop land, and that one of the most important things that I've seen happen in the past few years in working with the state is that the state is getting better and better about creating transparency around how local governments apply law, and how local governments apply state law, and trying to use that data to inform policy-making.

And there are a lot of local governments as well that are really interested in doing the same within their boundaries. And it helps. I suppose you could say it helps reduce a little bit maybe the whack-a-mole effect, because when you can see in the data how law is operating and try to understand the relationship between how you're applying the law and your desired outcomes, you can start to try to peel back what part of this issue is a political, cultural, economic issue versus what part of this is a technical fix?

And then you can try to address the technical fix. And then you can try to also look at the other issues. At least look for where there are indicators that those other issues are prominent and you need to try to attend to them. I mean, that's at least sort of the way I approach this.

I think there's not a simple legislative fix or regulatory fix to address the fact that local governments in California are often fiscally under-resourced to try to accomplish any of their housing goals. We have a difficult situation with Prop 13 in California, which limits what they can do in terms of revenue. And that limits the ability of every jurisdiction to develop or subsidize affordability within their boundaries.

And so everything relies on the market. And then that creates a whole series of problems for trying to create development at multiple income levels. But that doesn't mean we couldn't do more on the regulatory side or the technical side to try to at least accelerate at least some of the development that we need to achieve our larger goals

**MIKE
LIVERMORE:** Yeah, great. I mean, I think that part of the story there is really this data and the transparency, the data that you've been using in your study and the transparency that comes about by research like you're doing maybe helps bring to light some of the good politics and some of the bad politics because it does seem like there are multiple levels of politics happening with these decisions.

And we can create structures that promote what I might call a good kind of politics that is public regarding and where we can articulate our goals for what we want. And it's out in public. It's transparent. And that's a good kind of politics. And the bad kind of politics is where people are acting selfishly.

And it's a little bit obscure. And it's a case-by-case basis, so we don't see the collective consequences of these decisions. And translating the forms where the bad politics happens into forms that we can kind of control with our better politics is maybe a good goal that we want to have.

MOIRA O'NEILL: I mean, I think it's about information. So I agree with the concept of good politics. We want deliberation. And we want process. I think we want at least some process in our decision making about how we create the built environment because we're dealing with climate-related events that are unpredictable.

And in California you're dealing also with wildfire risks. You're dealing with a range of problems that are very complicated and require really good information. And I think some of that information comes from scientists and others and land-use planning that can tell us a lot about the impact of certain kinds of development and relationship to sea level rise or wildfire risk.

But then some of that information could really be about how law is applied because if you really want to get to sustainability and equity goals, you do need to whether or not what you're doing is actually facilitating those goals. And one of the things that I observed and I think-- I'm speaking for myself now because I've done this work with colleagues. And I don't want to suggest we all are in agreement around this.

But I think sometimes there's a disconnect between what people think is happening within a jurisdiction and what's actually happening if you actually look at the documents that illustrate how they're applying their law. And that disconnect is problematic for policymaking at a local level, not just a state level. So good information, good data is valuable, not just to me identifying for you where I think a technical fix could actually work, but also broadly to having the conversation to good politics, good deliberation.

MIKE Yeah. Well, I personally think that makes a lot of sense. So, well, thanks for taking the time to chat with me
LIVERMORE: today. Moira, it's been a really interesting conversation. I've learned a lot.

MOIRA O'NEILL: Thank you for having me.

[MUSIC PLAYING]