Eric's post the other day about CEQA and local land use regulation states an important and often-overlooked truth: environmental review can only hold up a project if it is discretionary. If local land use regulations state clearly what a developer can and cannot do, then no amount of environmental review could change a decision, and so CEQA does not apply. Eric and his research term conclude that we shouldn't blame CEQA when local governments could get rid of the problem by coming clear what they will and will not approve.

That seems right to me, but I am not sure it is as significant as it initially appears.

Why is it that local governments rely so heavily on discretionary approvals? Why *not* make things clearer? It seems to me that there are four powerful reasons why these regulations are written the way they are.

1. *Shakedowns.* If zoning and general plan laws are clear, then politicians cannot raise money from developers. If developers need discretionary government approvals, then they will make the necessary contributions. "Nice piece of property here; too bad if something were to *happen* to it." You don't have to be overly cynical to see most politicians just like to have this power.
2. *Responsiveness.* Perhaps a more benign way to put it is that local politicians want to be responsive to community concerns. They want to be able to stop development if local NIMBYs — uh…*neighbors* — don't like it. They are powerless if the laws are clear and straightforward. Needless to say, the neighbors want it that way, too.
3. *Exactions.* This is particularly the case in California and other states with tax limitation laws: they can't raise taxes, so they do so through exactions, and while it is possible to

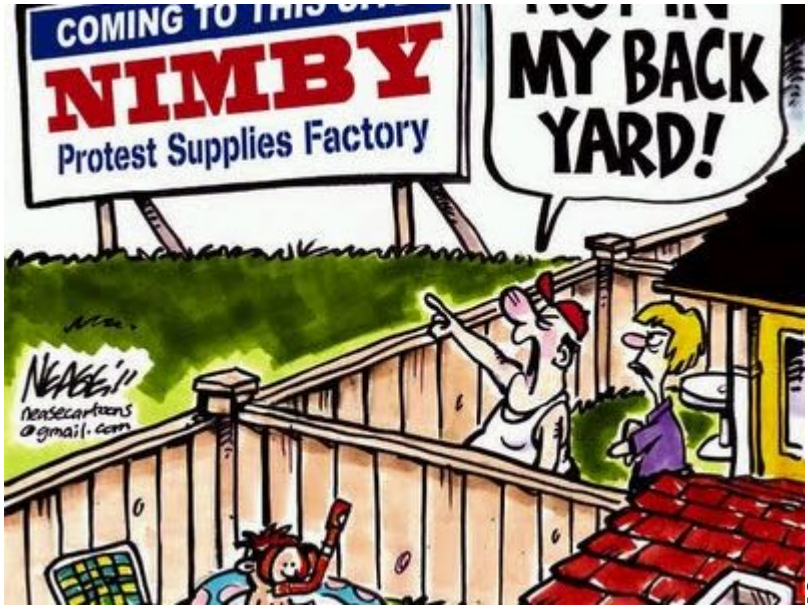
use legislative fees, the more discretion there is, the more they can raise through a deal. Besides, a lot of government needs can't be put on an algorithm, so it is easier just to negotiate the fees.

4. *Uniqueness.* There is reason why you can get specific performance for contracts for land. Land is pretty unique; each parcel has its own topography and role within a community.

The recent experience of SB 827 (Wiener) in California, which would have upzoned parcels around transit throughout the state, I think demonstrates this. You want certainty? Boy, did SB 827 give you certainty. And for that reason, it generated a storm of protest not only from local governments, but also from neighborhood groups, and (I believe mistakenly) progressive organizations throughout the state. It also was vehemently (and also mistakenly) opposed by the Sierra Club. And why? Because it destroyed discretion. The Sierra Club didn't want to narrowly tailor it. They wanted to destroy it, and were quite open about it:

> Kathryn Phillips did not mince words when she visited the Sacramento office of San Francisco state senator Scott Wiener one day this winter. The director of Sierra Club California and a decades-long combatant in the state's environmental battles, Phillips wanted Wiener to know that her group would vehemently oppose his Senate Bill 827, which both its supporters and its opponents believe could introduce the most radical changes to California's land-use policy in a generation. 'I gave him a warning,' she says later. There would be no suggested amendments from her organization. No negotiation. No compromise. 'The thing we oppose is the heart of the bill.'"

The Club opposed the bill's *entire concept.* It *wanted* the discretion because it wanted to stop what it regarded — falsely, in my view — developers running rampant throughout cities. (To its great credit, NRDC supported the bill, because it sees that increasing density around transit is crucial to achieving climate goals. I too supported the bill, although it obviously needed to be amended and watered-down. That sort of amendment was precisely what the Sierra Club rejected).



So all in all, there is a very powerful political coalition supporting discretion. And that means, in turn, that one cannot say one can avoid the CEQA problem by avoiding discretion. It's clearly true, but you can't just avoid this discretion, and that is particularly true in a state like California. There *are* states with looser land use regulation — Texas, say. California's constellation of interests makes that impossible — which overall is a very good thing, but must be recognized.

At least in California, I think a lot of discretion is inevitable. CEQA makes that discretion considerably more expensive for housing development. There are ways around it — the recent passage of AB 2162 (Lieu) is a start, Wiener will come back with a more modest bill and a smarter political strategy, and continuing to put teeth in California's Housing Element law is crucial — but even if California land use ain't got no heart, you just gotta poke around.