Deciphering the Legal Framework for Locally Addressing Issues Interwoven with Outward Expansion from America's Central Cities

By

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ABSTRACT

American urbanism has come to be defined by migration from deteriorating urban development to new suburban development resulting in population decline within America's urban cores, or central cities. Population decline sets in motion certain self-reinforcing forces, or issues, likely to perpetuate it. These include the withdrawal of high- and middle-income households, a decline in the central city's tax base accompanied by rising local taxes and deteriorating public services, a dwindling consumer base to support utility infrastructure maintenance and improvement, and a rise in criminal activity. Federal, state and local governments have been involved in a variety of "urban renewal" strategies via studies, regulations, tax incentives and even investments of public funds, largely to no avail. During this time, what were once thought to be only urban issues have now also outwardly migrated to the suburbs.

While some may assert that the birthplace of modern U.S. Supreme Court jurisprudence defining governmental authority to regulate land use is *Euclid*, the U.S. Supreme Court outlines in this same case that the true origin of this power is the power of sovereignty, the power to govern men and things within the limits of government's dominion, except in so far as it has been restricted by the Constitution of the United States. The Court explains that the nature and extent of these powers evolve as government is confronted with new issues requiring intervention. The evolution of government's regulatory powers and how these powers have been guided and constrained is defined by the application of Constitutional principles, statutes and ordinances. From Colonial times until the Civil War, state and local government regulation existed apart from U.S. Constitutional restraint. However, with the passage of the Fourteenth Amendment, the United States Supreme Court was charged to ensure state and local legislation complied with guaranteed rights under the U.S. Constitution. The Court in *Mugler* defined regulatory authority as the "police powers." Therein, state and local governments possess the authority to determine what measures are necessary to protect the public health, safety and welfare. The Court held that valid police power regulation does not violate individual liberty or property rights. Instead of defining this power's reach, the Court chose in this and subsequent case law only to retroactively invalidate regulation bearing no substantial relation to these powers. These powers were broadly interpreted and government operated with only the threat of regulatory invalidation until *First English,* where the Court determined government may have to compensate where regulation extends beyond these powers. The Court ruled in *Penn. Central* with recent confirmation in *Ark. Game and Fish Comm'n* that regulation effects a taking where it interferes with "distinct investment-backed expectations." Since there can be no

investment-backed expectation in failure, government regulation designed to promote success should not run afoul of this constraint.

Academically proffered philosophies and factor approaches involving residential and commercial developments can be objectively examined for co-relationship with developments identified as successful or challenged within the marketplace. A code based upon development philosophies and factor approaches objectively verified as associated with successful developments would therefore not be arbitrary and unreasonable as having no substantial relation to the general welfare. Such code provisions could be designed to be applicable to all similarly situated property and to produce the widespread public benefit of promoting development success and preventing the negative community-wide effects of development failure. Such a code should not be found to exceed government's regulatory police powers, for there can be no developer economic interest supported by "distinct investment-backed expectations" in development failure.

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The current real estate market in many ways is analogous to the automobile industry of fifty years ago which produced the Edsel, a safe, reliable and comfortable car that was not appealing within the marketplace, and the infamous Corvair, which while aesthetically appealing lagged far behind the Edsel in safety, reliability and comfort. Consumer advocate Ralph Nader successfully argued that it would take government intervention to address the Corvair's inequities in design and operation. Today, before purchasing a car, the average consumer stands assured that it meets a number of governmental mandated baseline criteria concerning not only public safety via safe operation but also public health via allowable fluids consumed during operation and air and o-zone emission standards. Additionally, the consumer may avail themselves of any number of reports concerning reliability and maintenance expectations as well as safety, comfort and general appeal.

It has long been understood that a home may be the single greatest purchase that the average consumer makes.[1] An unwise purchasing decision may thus have devastating effects on the consumer just as unaddressed building standards and lack of consumer confidence resulting in market volatility can have upon developers, neighborhoods and applicable local governments.

It was not coincidence that this research was conducted in the wake of the 2008 financial crisis. It attempts to embark upon the path taken with the auto industry by identifying realistic regulatory standards as a hedge against consumer uncertainty and market volatility.

American urbanism has come to be defined by migration to suburban development. During the last half-century, American towns and cities have rapidly expanded outward from their established cores into the surrounding rural areas. The nation's population has risen, but our patterns of land use have shifted even more dramatically, transforming the United States into a largely suburban nation.[2] Americans, with their preferences for single-family homes with front and back yards, moved to the suburbs for larger and more affordable lots in so-called "family-friendly" neighborhoods.

[1] Bridget McCrea, *RE/MAX Home Buyer's Survival Guide*, xi (Sterling Publishing Co., New York, 2007).
[2] Vanessa Russell-Evans & Carl. S. Hacker, *Expanding Waistlines And Expanding Cities: Urban Sprawl And Its Impact On Obesity, How The Adoption Of Smart Growth Statutes Can Build Healthier And More Active Communities,* Virginia Environmental Law Journal Vol. 29, Issue 1 64-65 (January 2011).

Developers have responded to citizen desires by building more and more suburban homes, with little access to mass transit or to convenient retail stores. Americans are now almost totally dependent on the automobile for travel and most of our landscape has been shaped with the car in mind. This dependence has greatly accelerated suburban growth as most Americans now live, work, shop and play outside central cities in automobile-designed suburban and exurban areas that may be five, ten, or even thirty or more miles from the urban core of major metropolitan areas.[3]

From 1948 to 1990, the U.S. metropolitan-area population living in central cities declined from 64 to 39 percent.[4] Once begun, population decline set in motion certain self-reinforcing forces likely to perpetuate it. These included the withdrawal of high- and middle-income households, a decline in the central city's tax base accompanied by rising local taxes and deteriorating public services, a dwindling consumer base to support utility infrastructure maintenance and improvement, and a rise in criminal activity.[5] Since firms follow their workers to the suburbs, population decentralization is associated with job decentralization and a loss of employment opportunities for central-city residents.[6] Severe population decline may result in housing abandonment. The owners of older, deteriorating units cannot obtain high enough rental revenues to cover costs. Abandoned units produce negative effects that reduce the attractiveness of the surrounding neighborhood. Spillover effects drastically reduce the incentives of nearby owners to maintain their properties, thus generating the deterioration of whole neighborhoods.[7]

These issues have not gone unnoticed. For the last sixty years, federal, state and local governments have been involved in a variety of "urban renewal" strategies via studies, regulations, tax incentives and even investments of public funds, largely to no avail. During this time, what were once thought to be only urban issues have now also outwardly migrated to the suburbs.

A number of approaches have been advanced to counter this urban/suburban crisis. However, while much has been written explaining the phenomenon of outward

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[3] Vanessa Russell-Evans & Carl. S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and its Impact on Obesity, How the Adoption of Smart Growth Statutes can Build Healthier and More Active Communities*, Va. Envtl. L.J., v. 29, no. 1, 69-70 (2011).
[4] Casey J. Dawkins & Arthur C. Nelson, *State Growth Management Programs and Central-City Revitalization*, Journal of the American Planning Association, v. 69, no. 4, 381-396 (Autumn 2003).
[5] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 12 (The Brookings Institution, Washington, D.C., 1982).
[6] Casey J. Dawkins & Arthur C. Nelson, *State Growth Management Programs and Central-City Revitalization*, Journal of the American Planning Association, v. 69, no. 4, 381-396 (Autumn 2003) (internal citations omitted).
[7] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 25-26 (The Brookings Institution, Washington, D.C., 1982).

migration and its ensuing economic and social issues, there appears to be little broad-based research to judge the significance of the proffered approaches. As part of this dissertation process, field research was undertaken in an attempt to commence rectifying this encountered deficit.

As with this research path, this dissertation will attempt to explain outward migration and its ensuing economic and social issues through existing academic literary offerings. Legal context as the basis of the authority to act and restraint thereon will also be examined. Proffered approaches to addressing the phenomenon of outward migration and its ensuing economic and social issues will be defined. The undertaken field research will be explained and ensuing observations will be utilized to suggest future strategies complying with the legal basis of the authority to act and restraint thereon.

I. Congregate Living in Post-World War II America Occurs in the Context of Outward Expansion from its Central Cities

American urbanism has come to be defined by migration to suburban development away from existing central city development. The process of massive suburbanization in America accelerated in the wake of World War II.[8] Its acceleration was aided by the ability of veterans to receive ready home financing through the Veterans Administration and the Federal Housing Administration's home mortgage program. The federal home-mortgage interest tax deduction also provided a huge subsidy for suburban single-family home construction.[9]

America's shift to automobiles and trucks for transportation facilitated suburban growth and promoted urban, or central-city, population loss during the twentieth century. In 1945, there were 29.5 million cars, trucks, and buses in use in the United States—one for every 4.8 persons. By 1979, the number of such vehicles soared to over 137 million, one for every 1.6 persons. If trucks are included, about 50 percent of all households had more than one vehicle as of 1979, and only about one in six had no vehicle.[10] Automobiles and trucks were integrated into society by massive building and improvement of rural highways and construction of the Interstate Highway System, linking suburban developments together and facilitating a virtual "explosion" of

[8] Margaret Pugh O'Mara, *Suburbia Reconsidered: Race, Politics, and Property in the Twentieth Century*, Journal of Social History, v. 39, no. 1, 229-231 (Fall 2005).
[9] Robert Freeman, *The Elm Street Program*, Places: Forum of Design for the Public Realm vol. 18, no. 1, 36-39 (Spring 2006).
[10] Katharine L. Bradbury, Anthony Downs & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 73 (The Brookings Institution, Washington, D.C., 1982).

automotive vehicle use after 1950.[11] Between 1960 and 1980, the mileage driven by motor vehicles in America approximately doubled, allowing new development to expand apart from areas of mass transit.[12]

America's rebirth as an automobile society altered the traditional convenience of the central city. Central cities built around the use of public transit as a primary form of transportation were not designed to accommodate this shift. Before the widespread use of the automobile, central city transportation routes were railroads with commuter services, urban street railways, and, later in a few cities, rapid transit lines with multiple-unit electrified operation. Access on foot or by public transportation has been rendered less important with widespread use of the automobile. This resulted in a 72 percent drop in the number of passengers carried by public transit systems between 1946 and 1972.[13]

Increased automobile usage reduced the relative attractiveness, to both households and business firms, of large older cities resulting in central city population decline.[14] Before the automobile, central city mass transportation facilitated easy accessibility to agglomerated service amenities, employment and retail outlets. With such assets, the dominant role of the downtown was secured until automobile use became widespread. However, increased automobile usage saw central cities lose many of their locational assets. While central cities suffer from congestion, inadequate parking space, narrow streets, high land values and deteriorating surrounding neighborhoods, suburban areas have been designed for the automobile and are served by highways radiating away from existing central city development. This shift saw a 25 percent decline in the total U.S. metropolitan-area population living in central cities between 1948 to 1990.[15]

Businesses responded to this shift in population. Between 1948 and 1990, the central city's share of manufacturing employment declined from 67 percent to 45 percent.[16] By 2001, almost 80 percent of jobs in metropolitan areas were located in the

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[11] Katharine L. Bradbury, Anthony Downs & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 182 (The Brookings Institution, Washington, D.C., 1982).
[12] George W Liebmann, *Modernization of Zoning: A Means to Reform*, The Appraisal Journal, v. 70, no. 2, 226 (April 2002).
[13] Katharine L. Bradbury, Anthony Downs & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 73 (The Brookings Institution, Washington, D.C., 1982) (internal citations omitted).
[14] Katharine L. Bradbury, Anthony Downs & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 73 (The Brookings Institution, Washington, D.C., 1982).
[15] Casey J. Dawkins & Arthur C. Nelson, *State Growth Management Programs and Central-City Revitalization*, Journal of the American Planning Association, v. 69, no. 4, 381-396 (Autumn 2003).
[16] Casey J. Dawkins & Arthur C. Nelson, *State Growth Management Programs and Central-City Revitalization*, Journal of the American Planning Association, v. 69, no. 4, 381-396 (Autumn 2003) (internal citations omitted).

suburbs.[17] Just as people followed jobs, employment responded to growth in population and jobs have followed people away from central cities. This reflects an increase in local production to meet local consumption demands, as well as employer decisions to locate near available labor pools.[18] Initially, firms relocated their routine functions to suburban sites. They have subsequently moved other functions, including head offices, outside of central cities. New forms of suburban commercial clusters have mushroomed, providing alternative locations for conducting business. Today, the express highway interchange has replaced the central city and the suburban railroad station as the loci of outlying retail and service businesses.[19]

Rapid advances in telecommunications have accelerated the decentralization trends set in motion by the advent of the automobile. In 1890, the "effective radius" of U.S. cities was said to be about 2 miles, based largely on pedestrian access. This had grown to 8 miles by 1920 because of the development of public transit, to 11 miles by 1950 with the rise of automobile ownership, and to 20-24 miles by the 1970s with the construction of urban freeway systems.[20] Almost universal access to telephones has been an essential ingredient permitting relatively low-density settlements to function efficiently. Industrial plant designs favoring one-story layouts, enclosed-mall shopping centers, increased use of computers, and other communication improvements have aided dispersal of economic activity from more densely developed central cities.[21] Wireless technologies even further aides this trend.

Today, decentralization trends have accelerated as telecommunications access cannot be measured in terms of geographical distance. Employer outward migration has increased as job creation transitions away from heavy industrial production to knowledge-based jobs less oriented to physical locations.[22] In the extreme case, geography might become irrelevant. Recently, growth has extended beyond suburbs contiguous with central cities to more rural locations. What has been dubbed exurban

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[17] Nico Larco, *Suburbia Shifted: Overlooked Trends and Opportunities in Suburban Multifamily Housing*, Journal of Architectural and Planning Research, v. 27, no. 1, 84 (Spring 2010) (internal citations omitted).
[18] Katharine L. Bradbury, Anthony Downs & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 91-94 (The Brookings Institution, Washington, D.C., 1982).
[19] Harold M. Mayer, *The Study of Urbanization*, 94 (Philip M. Hauser & Leo F. Schnore, eds., John Wiley & Sons, Inc., New York, 1967).
[20] Peter Gordon & Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal?*, Journal of the American Planning Association, v. 63, 95-106 (Winter 1997) (internal citations omitted).
[21] Katharine L. Bradbury, Anthony Downs & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 74 (The Brookings Institution, Washington, D.C., 1982).
[22] Margaret O'Mara, *Landscapes of Knowledge and High Technology*, Places: Forum of Design for the Public Realm v. 19, no. 1, 48 (Spring 2007).

growth consists of low-density residential development scattered outside of suburbs and cities and commercial strip development along rural roadways.[23]

Since the 1970s, the land area occupied by urban and metropolitan areas in the United States has more than doubled, and this expansion has accelerated in recent years.[24] Nationwide, exurban development occupies five to ten times more area than urban and suburban densities, and has been growing at a rate of about 10 to 15 percent per year, which now exceeds the rate of urban development.[25] Business guru Peter Drucker's 1980s vision of office work rather than office workers doing the traveling is now a reality. Households and firms have expanded accordingly, as rural, exurban and outer suburb workplaces are growing the fastest of all.[26]

Arthur Nelson claims we must rely on the suburbs to meet our future development needs, explaining that demand for infill and redevelopment locations may still be too low to be financially feasible. Nelson reports that the Urban Land Institute (ULI) expects suburbs will play an even more important role in meeting the nation's new housing needs than in the past. Nelson asserts that future demographic shifts may increase demand for higher-density smaller lot suburban development. The Joint Center for Housing Studies at Harvard University explains that while the most recent Census Bureau county population estimates indicate that growth of exurban areas largely stalled by 2011 in response to the collapse of the homebuilding industry, given that much of the undeveloped land in metropolitan areas is located in these outlying communities, there is every reason to believe that the exurbs will once again capture a disproportionate share of growth once residential construction activity revives.[27] In a February 2012 report, the Rudin Center for Transportation at New York University noted that the twenty-first century is emerging as the century of the "super-commuter," a person who works in the central county of a given metropolitan area, but lives beyond the boundaries of that metropolitan area. Their research found that across the country, "city labor sheds (where workers live)" are expanding rapidly and super-commuter growth rates are far outpacing

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[23] David M. Theobald, *Landscape Patterns of Exurban Growth in the USA from 1980 to 2020*, Ecology and Society, v. 10, issue 1, art. 32, http://www.ecologyandsociety.org/vol10/iss1/art32/ (2005) (internal citations omitted).

[24] Richard M. Adams, Andrew J. Plantinga, & JunJie Wu, *Amenities in an Urban Equilibrium Model: Residential Development in Portland, Oregon*, Land Economics, v. 80, no. 1, 19-20 (February 2004) (internal citations omitted).

[25] David M. Theobald, *Landscape Patterns of Exurban Growth in the USA from 1980 to 2020*, Ecology and Society, v. 10, issue 1, art. 32, http://www.ecologyandsociety.org/vol10/iss1/art32/ (2005) (internal citations omitted).

[26] Peter Gordon & Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal?*, Journal of the American Planning Association, v. 63, 95-106 (Winter 1997) (internal citations omitted).

[27] Arthur C. Nelson, *The Mass Market for Suburban Low-Density Development is Over*, 44 Urban Lawyer 811, 820-822, 825 (Fall 2012).

workforce growth rates.[28] On March 5, 2013, the U.S. Census Bureau reported that about 8.1 percent (10.8 million) of U.S. workers now have commutes of 60 minutes or longer and 586,805 of these full-time workers have "mega-commutes" of at least 90 minutes and 50 miles.[29]

Outward migration has transferred service provision away from central cities and changed modern commuting patterns. For most of the twentieth century, the highway system has been the major force for continued low-density settlement and suburbanization. The barriers of distance continue to "dissolve" as factories and offices continue to move where employees want to live. Most commuting is now suburb-to-suburb, taking congestion pressures off central cities and allowing many to drive faster on less congested suburban highways. Suburb-to-central-city commuting continues to diminish as city forms evolve beyond suburban service centers towards exurban, or rural, patterns of generalized dispersion.[30]

This phenomenon has been described by many using the term urban sprawl, characterized by spread-out, low-density housing patterns.[31] Urban sprawl in the United States has its origins in the flight to the suburbs that began in the 1950s. People wanted to live outside of city centers to avoid traffic, noise, crime, and other problems, and to have homes with more square footage and yard space. As suburban areas developed, cities expanded in geographic size faster than they grew in population. This trend has produced large metropolitan areas with low population densities, interconnected by roads. Residents of sprawling cities tend to live in single-family homes and commute to work, school, or other activities by automobile. People who live in large metropolitan areas often find it difficult to travel even short distances without using an automobile, because of the remoteness of residential areas and inadequate availability of mass transit, walkways, or bike paths.[32]

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[28] Mitchell L. Moss & Carson Qing, *The Emergence of the "Super-Commuter"*, Rudin Center for Transportation, New York University Wagner School of Public Service (February 2012).
[29] *Megacommuters: 600,000 in U.S. Travel 90 Minutes and 50 Miles to Work, and 10.8 Million Travel an Hour Each Way*, Census Bureau Reports (March 5, 2013).
[30] Peter Gordon & Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal?*, Journal of the American Planning Association, v. 63, 95-106 (Winter 1997) (internal citations omitted).
[31] Cameron Speir & Kurt Stephenson, *Does Sprawl Cost Us All? Isolating the Effects of Housing Patterns on Public Water and Sewer Costs*, Journal of the American Planning Association, v. 68, no. 1, 56-57 (Winter 2002) (internal citations omitted).
[32] David B. Resnik, *Urban Sprawl, Smart Growth and Deliberative Democracy*, American Journal of Public Health, Vol. 100, Issue 10, 1853 (October 2010).

While some have argued that urban sprawl is generally characterized by leapfrog, scattered, strip, low-density, or single-use forms of development,[33] Robert Freilich, Robert Sitkowski, and Seth Mennillo assert that urban sprawl is better defined by its two dimensions of scattered, noncontiguous development, measured by the number of vacant parcels lying within predominantly developed urban areas and low-density development.[34]

II. Interwoven with Outward Expansion are Congregate Living Issues

While outward expansion and urban sprawl may be desirable to its participants, it also accompanies some less than desirable results. Population decline sets in motion certain self-reinforcing forces likely to perpetuate it. These include the withdrawal of high- and middle-income households, a decline in the central city's tax base accompanied by rising local taxes and deteriorating public services, a dwindling consumer base to support utility infrastructure maintenance and improvement, and a rise in criminal activity.[35]

a. Issues within Central Cities

Concomitantly with outward expansion and urban sprawl, central cities experience a process of deterioration and disinvestment.[36] Local government fiscal difficulties frequently accompany population loss. Government revenues tend to fall at least proportionally unless tax rates are raised. The costs of certain local government functions, including highways and sewer mains with debt service that cannot be sold and libraries and parks with operating costs that vary only slightly with usage, do not decline proportionally with population losses. Other governmental functions have a "critical mass" requirement. If the level of patronage for higher education, public transportation, public recreation, public health care, cultural centers and museums falls below that needed for economic viability, they will be forced to close or require public subsidies to

[33] David M. Theobald, *Landscape Patterns of Exurban Growth in the USA from 1980 to 2020*, Ecology and Society, v. 10, issue 1, art. 32, http://www.ecologyandsociety.org/vol10/iss1/art32/ (2005) *citing* Reid Ewing, *Is Los Angeles-Style Sprawl Desirable?* Journal of American Planning Association, 107-126 (Winter 1997).
[34] Robert H. Freilich, Robert J. Sitkowski, & Seth D. Mennillo, *From Sprawl to Sustainability: Smart Growth, New Urbanism, Green Development, and Renewable Energy*, 56 (2d ed., Chicago, Ill, American Bar Association, 2010) (internal citations omitted).
[35] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 12 (The Brookings Institution, Washington, D.C., 1982).
[36] Igal Charney, *Property Developers and the Robust Downtown: The Case of Four Major Canadian Downtowns*, The Canadian Geographer, v. 49, no. 3, 302 (Fall 2005) (internal citations omitted).

remain open. Additionally, if the local tax system is progressive, then when higher-income households leave, the remaining taxpayers have to pay even greater taxes.[37]

Deterioration and disinvestment often accompanies urban distress within the central city,[38] actually increasing the demand for costly governmental services, such as police and fire protection. The violent crime rate in large central cities is often over fifty percent higher than in their surrounding suburban counterparts.[39] These opposite effects of population loss on revenues and service needs create a "fiscal squeeze" on local governments that forces them to reduce services and/or raise taxes, thus perpetuating outward migration.[40]

Almost all American metropolitan areas have been saddled with significant amounts of deterioration and disinvestment resulting in substandard housing.[41] In response, local, state and federal governments jointly sponsored "urban renewal" efforts throughout the 1950s and 1960s to remove these structures.[42]

Initial federal efforts were criticized for replacing deteriorating dwellings with mostly upper-income homes.[43] In response, "all manner of suburban building typologies" were used in an attempt to develop "affordable housing."[44] Eventually, federal polices encouraged the construction of both high-quality single-family housing, which would supposedly trigger the passing down of decent, affordable private housing to modest-income households and public housing, which would satisfy the needs of the lowest-income groups for safe, sanitary housing with modern plumbing, electrical and heating facilities and maintenance.[45] However, instead of these federally funded housing supply strategies being perceived as a solution to central city deterioration, they were

[37] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 26-27 (The Brookings Institution, Washington, D.C., 1982).
[38] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 61-64 (The Brookings Institution, Washington, D.C., 1982).
[39] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 61-64 (The Brookings Institution, Washington, D.C., 1982).
[40] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 26-27 (The Brookings Institution, Washington, D.C., 1982).
[41] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 171 (The Brookings Institution, Washington, D.C., 1982).
[42] Edwin S. Mills, T*he Attrition of Urban Real-Property Rights*, Independent Review (Oakland, Calif.) v. 12, no. 2, 203 (Fall 2007).
[43] Edwin S. Mills, T*he Attrition of Urban Real-Property Rights*, Independent Review (Oakland, Calif.) v. 12, no. 2, 203 (Fall 2007).
[44] Robert Freeman, *The Elm Street Program*, Places: Forum of Design for the Public Realm vol. 18, no. 1, 36-39 (Spring 2006).
[45] George C. Galster, *U.S. Housing Scholarship, Planning, and Policy Since 1968*, Journal of the American Planning Association v. 74 no. 1, 6-8 (Winter 2008).

increasingly perceived as the source of such problems. This led to the Nixon administration's moratorium on all subsidized production in January 1973,[46] which has been argued as a further decline in urban revitalization.[47] Debate over the proper method of urban revitalization would continue throughout the 1970s, as Congress circumvented the 1973 suspensions by reinstating funding for these programs in 1976.[48]

These forces did not stop the outward migration away from the deteriorating residential corridors of the central city. By the mid-1980s, up to 145,000 residents abandoned their homes each year in New York City.[49] At the same time, forty-eight of America's largest cities received 42.9 percent of their total revenues from intergovernmental transfers, with 16.6 percent coming directly from the federal government.[50]

Despite the initial optimism surrounding their construction, significant deterioration plagues many of these public housing projects. They have sadly often evolved into warehouses for the most disadvantaged segments of the urban population, intensifying racial/ethnic segregation and the social isolation of their residents. Largely comprised of poor residents by policy design, public housing works to spatially anchor urban disadvantage, and may contribute to the further deterioration of surrounding neighborhoods. Public housing is thus often associated with run-down projects in distressed neighborhoods where social and physical disorder prevail, and crime flourishes.[51]

This resulted in some of America's central cities turning away from residential and commercial development towards office space. They fiercely promoted office development as a strategy to enhance their corporate and service roles. This strategy was adopted after downtown areas had severely deteriorated and land and property values

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[46] George C. Galster, *U.S. Housing Scholarship, Planning, and Policy Since 1968*, Journal of the American Planning Association v. 74 no. 1, 6-8 (Winter 2008).
[47] Bradshaw Hovey, *Building the city, structuring change: Portland's implicit utopian project*, Utopian Studies v. 9 no. 1, 68-79 (1998).
[48] *Id.*
[49] Michal Lyons, *Gentrification, Socioeconomic Change, and the Geography of Displacement*, Journal of Urban Affairs, v. 18, no. 1, 39-62 (1996) *citing* Peter Marcuse, *Abandonment, gentrification and displacement--the linkages in New York City* in *Gentrification of the City*, 153-177 (Neil Smith & Peter Williams, eds., Boston, Mass, Allen & Unwin, 1986).
[50] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 266 (The Brookings Institution, Washington, D.C., 1982).
[51] Thomas L. McNulty & Steven R. Holloway, *Race, Crime, and Public Housing in Atlanta: Testing a Conditional Effect Hypothesis*, Social Forces, v. 79, no. 2, 307-314 (December 2000) (internal citations omitted).

almost hit rock-bottom.[52] However, despite substantial efforts, many American metropolitan center cities have not returned to their status as their region's primary employment sector. A recent study found that the majority of office space in thirteen large metropolitan regions in the United States is in their suburbs. The once predominant downtown retains in some metropolitan regions only a small fraction of the metropolitan office stock.[53] Downtown properties that were rented at premium prices experienced high vacancy rates and declining rental rates, whereas exceptional growth occurred outside the central city. In just twenty years, combined metropolitan center city office space in the United States declined from 74 percent to 58 percent.[54]

The loss of population and jobs from a central city combined with fixed costs in past public infrastructure investments and various forms of social overhead forced increased tax burdens on remaining firms and households by failing to proportionally reduce the costs of providing public services. This actually incentivized additional outward expansion and urban sprawl[55] and exported center city financial woes as they attempted to offset sprawl effects by tax burden sharing with their suburbs.[56]

b. Issues within Suburbs

While residents are often lured away from older development to escape paying higher taxes used to offset the costs of governmental services provided within the central city,[57] they soon discover that their new suburban housing development may not be paying its full share of the costs of government services at its inception. One of the most common reasons for opposition to new development is that it will increase the demands on public services and infrastructure without generating sufficient additional revenues to cover the costs. Property taxes are by far the largest source of local tax revenues and the tax base in many suburbs is composed almost entirely of residential property often taxed at a lower rate than nonresidential property, thus usually providing less tax income. In theory, jurisdictions with substantial nonresidential property may be able to shift at least

[52] Igal Charney, *Property Developers and the Robust Downtown: The Case of Four Major Canadian Downtowns*, The Canadian Geographer, v. 49, no. 3, 302 (Fall 2005) (internal citations omitted).
[53] Igal Charney, *Property Developers and the Robust Downtown: The Case of Four Major Canadian Downtowns*, The Canadian Geographer, v. 49, no. 3, 303 (Fall 2005) *citing* Robert Lang, *Edgeless Cities: Exploring the Elusive Metropolis* (Brookings Institution Press, Washington, D.C. 2003).
[54] Igal Charney, *Property Developers and the Robust Downtown: The Case of Four Major Canadian Downtowns*, The Canadian Geographer, v. 49, no. 3, 302 (Fall 2005) (internal citations omitted).
[55] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 79 (The Brookings Institution, Washington, D.C., 1982).
[56] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 190 (The Brookings Institution, Washington, D.C., 1982).
[57] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 102 (The Brookings Institution, Washington, D.C., 1982).

some of the fiscal burden of new residential development onto commercial and industrial property, with higher tax rates.[58]

In fact, the public costs of creating streets, sewers, water systems, parks, and schools in new subdivisions may be so onerous that they must be spread over all the taxpayers in the broader community, not just that subdivision or area.[59] This is true for all forms of development, not just residential housing. "For more than half a century, U.S. government policies have subsidized land and housing costs through tax breaks to landowners; they have paid for new road and utility infrastructure at the edge of metropolitan areas; and they have provided both direct and indirect incentives for industries to locate in suburban areas."[60]

Many communities find themselves balancing the need to support new growth with the reality of increased infrastructure costs and areas of service provision. In many cases, this has resulted in communities keeping costs down by promoting steady growth to support existing infrastructure and pay for the costs of other recent growth. Economist Charles Tiebout described this in terms of communities achieving their "optimum size." He postulated that each community could reach "optimum size," defined in terms of the number of residents for which a bundle of public services can be produced at the lowest average cost. He felt that this should apply only where some factor or resource is fixed. If this were not so, there would be no logical reason to limit community size, given preference patterns. According to Tiebout, the limiting factor is often spatial, as with the limited land area of a community or a local beach whose capacity is limited.[61] Tiebout believed cities not limited by any factor can continue to grow in an attempt to offset at least a portion of their infrastructure maintenance costs by additional tax revenues produced by new development.[62]

The same issues encountered by central cities in service provision face suburban communities, usually amplified by a lesser pool of taxpayers on which to spread the costs of this burden and increased spatial demands. As a community grows, expenditures increase because of the expanses that must be addressed to provide services and facilities

[58] Jenny Schuetz, *Guarding the Town Walls: Mechanisms and Motives for Restricting Multifamily Housing in Massachusetts*, Real Estate Economics v. 36, no. 3, 555-586 (Fall 2008).
[59] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 175 (The Brookings Institution, Washington, D.C., 1982).
[60] Margaret O'Mara, *Landscapes of Knowledge and High Technology*, Places: Forum of Design for the Public Realm v. 19, no. 1, 48 (Spring 2007).
[61] Charles M. Tiebout, *A Pure Theory of Local Expenditures*, The Journal of Political Economy, Vol. 64, No. 5, 419-420 (Oct. 1956).
[62] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 102 (The Brookings Institution, Washington, D.C., 1982).

to the increasing population.[63] This causes communities to struggle to absorb enhanced expenditures for the erection of new school-houses, the laying out of new streets and building of sidewalks, the extension of water-supply service and the construction of new sewer mains.[64]

Communities are faced with the challenge of deciding whether to endure paying premiums for basic services or promote additional community growth to increase the tax base over which to spread these costs. Public roads in developing rural areas have to be maintained and upgraded at significant cost. The regular maintenance costs per home tend to be higher for rural subdivisions compared with their counterparts in nearby municipalities, in part because the houses are scattered over longer segments of road. When public sanitary sewers are not practicable, lots have to be larger to accommodate the house, a water well, and a septic system for waste water. Buyers in rural settings may also prefer large home sites for privacy, aesthetic, or recreational purposes. Whatever the buyers' motivation, larger rural lots mean longer road frontages and fewer separate taxpaying units per mile of subdivision road. Rural road maintenance services, including snow plowing, pothole filling, and periodic resurfacing for local roads, could run nearly twice as much per home as in urban areas.[65]

Allen Wakstein identifies the failure to effectively deal with the provision of urban services in the past as the root of contemporary problems. The debate continues as to which needs are the individual's responsibility and which are the community's. Should society provide a minimum standard of housing and health for every person? What level of education is it the responsibility of the community to provide? Should the city use public funds to build a transit system to unclog the street, a sports stadium to provide entertainment, or new port facilities for trade? Even in those areas which are accepted as the responsibility of the broader community, there is dispute as to the appropriate degree of governmental involvement and the methods and procedures to follow.[66]

J. Dixon Esseks and Kimberly Sullivan visualize the creation of new sprawling exurban development hinging on two major considerations. The first consideration is

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[63] Robert H. Freilich, Robert J. Sitkowski, & Seth D. Mennillo, *From Sprawl to Sustainability: Smart Growth, New Urbanism, Green Development, and Renewable Energy*, 55 (2d ed., Chicago, Ill, American Bar Association, 2010) (internal citations omitted).

[64] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 21-23 (University of California Press, Los Angeles, 1969).

[65] J. Dixon Esseks & Kimberly L. Sullivan, *Scattered Development*, Forum for Applied Research and Public Policy, v. 14, no. 3, 24-28 (Fall 1999).

[66] *The Urbanization of America: An Historical Anthology*, 116 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).

whether tax revenue generated by the proposed development will cover the costs that distance imposes on public service providers. For example, school districts may have to bus children five or more miles from rural subdivisions to schools in nearby towns. Upgrading farm roads to connect the new homes to state highways or major county roads can also be costly. And new residents may ask city government to extend public sewer and water lines out to scattered building sites. The second consideration is whether the additional time for responding to calls for emergency services, such as police, fire, and medical, is dangerously high. Scattered development may pose significant public safety risks as response time increases with distance.[67]

These financial and public infrastructure issues are joined by suburban built environment considerations. Much current debate about public space in the United States expresses a generalized disillusionment about the built environment, based on a widely shared belief that vast conurbations are developing that look alike from one region to the next: characterless low-density sprawls with few, if any, regional attributes. There is concern that distinctive responses to climatic and cultural imperatives have all but disappeared from new construction, as air-conditioning and television have made sitting outside to view the street or catch a breeze a thing of the past. Even topographical features are now eliminated, as hills are flattened and creeks covered over to more easily accommodate large residential subdivisions. Urban theorists have developed specialized vocabularies to designate these environments.[68]

Some argue that suburban expansion has resulted in the creation of suburban pods in which people operate. They proffer that these pods are being constructed on the distant periphery of the metropolis. In contrast to living close to the central city and its great range of offerings, construction is now on raw suburban land, far from these activities and dependent upon energy-consuming automobiles. They worry that with distance from work and services, social isolation and sterility, the benefits of urbanity to the suburban single-family home is reduced to the same anti-urban characteristics created by its predecessor, the farm.[69]

James Kunstler argues that the post-war enterprise of building suburbia as a replacement for towns and cities in the United States is a self-destructive act and the living arrangement Americans now think of as normal suburban sprawl is bankrupting us

[67] J. Dixon Esseks & Kimberly L. Sullivan, *Scattered Development*, Forum for Applied Research and Public Policy, v. 14, no. 3, 24-28 (Fall 1999).
[68] Rene Davids, *Development, Topography, and Identity: The Dougherty Valley and the New Suburban Metropolis*, Places, v. 20, no. 3, 58 (Cambridge, Mass., Fall 2008).
[69] Kenneth R. Schneider, *On the Nature of Cities: Toward Enduring and Creative Human Environments*, 59 (Jossey-Bass Publishers, San Francisco, 1979).

economically, socially, ecologically, and spiritually. He identifies the physical setting itself as a cartoon landscape of car-clogged highways, strip malls, tract houses, franchise fry pits, parking lots, junked cities, and ravaged countryside. He claims this is not merely the symptom of a troubled culture but in many ways the primary cause of our troubles.[70] Kunstler describes the current human ecology of America as a national automobile slum with an illegible sprawl of highways, junk buildings, parking lagoons and meaningless landscaped berms that compose our common surroundings.[71]

Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck claim that it is difficult to identify a segment of the population that does not suffer in some way from the lifestyle imposed by contemporary suburban development.[72] They describe "Cul-De-Sac Kids" who are deprived of traditional socializing influences. "Soccer Moms" tied to automobile lifestyles. "Bored Teenagers" and "Stranded Elderly," who find themselves in an suburban environment that is not organized to serve their needs. "Weary Commuters" whose free time is consumed by time spent in traffic. And, most tragically, "The Immobile Poor" who are economically trapped in decayed inner-city development and unable to affordably benefit from the employment and amenities found in the suburbs.[73]

Jane Jacobs notes that the migration of offices and industry to the suburbs has created intra-suburban traffic problems. She finds that whenever people are thinly settled or wherever diverse uses occur infrequently, any specific attraction causes traffic congestion. She states that the moment work is introduced into the mixture, even in a suburb, the equilibrium is lost. She concludes that "the more territory which is dull, the greater the pressure of traffic on lively districts."[74]

Urban sprawl has begun to affect older suburbs as well as central cities. While newer suburbs are the location of high tech and research office complexes, edge city hubs and expansive subdivisions with golf courses and other recreational amenities, the older suburbs of many American cities are undergoing pressures of change more commonly associated with central cities. These inner suburbs are increasingly experiencing

[70] James Howard Kunstler, Speech, *Zoning Procedures and Suburban Sprawl: A Cartoon of Human Habitat* (City Club of Cleveland, Cleveland, Ohio, Oct. 31, 1997), in Vital Speeches of the Day, 144.
[71] James Howard Kunstler, Speech, *Zoning Procedures and Suburban Sprawl: A Cartoon of Human Habitat* (City Club of Cleveland, Cleveland, Ohio, Oct. 31, 1997), in Vital Speeches of the Day, 145.
[72] Andres Duany, Elizabeth Plater-Zyberk, & Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream*, 115 (North Point Press, New York, 2000).
[73] *Id*. at 115-133.
[74] George W Liebmann, *Modernization of Zoning: A Means to Reform*, The Appraisal Journal, v. 70, no. 2, 226 (April 2002).

gentrification, commercial abandonment, aging infrastructure and declining housing prices.[75]

Some have attributed many of these issues to America's current planning methods and zoning regulations. Jane Jacobs states that government regulations and "policies are urgently needed to address the continued flight of the middle class to the outer suburbs, market towns and rural areas that is pricing out local people in rural areas, and contributing to the hyper-segregation of communities."[76]

We have now experienced over fifty years of unprecedented metropolitan growth and sustained suburbanization in the United States. Today, the daily life of at least half of the U.S. metropolitan population takes place in residential subdivisions, commercial strips, malls, and office parks, and on limited access roads and freeways. The transformation of enormous areas of agricultural and open land to accommodate a relatively modest growth in population has spurred an expanding debate about whether and how future growth should be regulated and managed. The difficult questions under debate center on the cost and desirability of the spread of residential development on the one hand, and the further decentralization of employment and retail activity on the other. The debate pits those who view contemporary forms of metropolitan development as acceptable because they result from self-regulating market mechanisms against those who point to their economic inefficiencies and social inequities. At immediate stake is the distribution of dwindling dollars for both new and existing infrastructure, including who will pay, who will benefit, and how much. In the longer term, the debate on managing future metropolitan growth is about equity and lifestyle, as sprawling new developments force not only central cities but also more mature suburban areas to decline.[77]

III. Governmental Authority

This debate may have an academic flair but its impact, conclusions and implications are real world. Due to the widespread public impact of the above-identified issues surrounding contemporary development practices, local governments are compelled to prevent additional migration away from development. As such, strategies undertaken including any new governmental regulation and policy must comport with

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[75] Heather Anne Smith & Owen J. Furuseth, *Housing, Hispanics and Transitioning Geographies in Charlotte, North Carolina*, Southeastern Geographer, v. 44, no. 2, 218-219 (November 2004).
[76] John Tomaney & David Bradley, *The Economic Role of Mobile Professional and Creative Workers and Their Housing and Residential Preferences: Evidence from North East England*, The Town Planning Review, v. 78, no. 4, 512 (2007).
[77] Anne Vernez Moudon & Paul Mitchell Hess, *Suburban Clusters: The Nucleation of Multifamily Housing in Suburban Areas of the Central Puget Sound*, Journal of the American Planning Association, v. 66, no. 3, 243-264 (Summer 2000) (internal citations omitted).

existing legal capacities, which necessarily involve the jurisprudence providing the framework and restraints upon land use regulation in America.

While some may assert that the birthplace of modern U.S. Supreme Court jurisprudence on land use regulation is *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926), the U.S. Supreme Court outlines in this same case that the true origins of this power is the power of sovereignty, the power to govern men and things within the limits of government's dominion.[78] It is old as a principle of civilized government. It is found in Magna Carta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union.[79]

The *Euclid* Court further explains that the nature and extent of these powers are not static, but evolve as government is confronted with new issues requiring governmental intervention for the benefit of the public as a whole.

> Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.[80]

This evolution is not unrestrained but is guided by the U.S. Constitution. "But although a degree of elasticity is thus imparted, not to the meaning, but to the application

[78] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386, 47 S.Ct. 114 (1926).
[79] *Munn v. People of State of Illinois*, 94 U.S. 113, 123-124 (1876).
[80] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386-387, 47 S.Ct. 114 (1926).

of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall."[81] It is also guided by the doctrine of *stare decisis* which permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* have occurred for articulable reasons, and only when the Court has felt obliged "to bring its opinions into agreement with experience and with facts newly ascertained."[82] History does not impose any rigid formula to constrain the Court in the disposition of cases. Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.[83]

Therefore, to properly understand the nature and extent of governmental regulatory powers and how they may evolve to confront current and future issues requiring governmental intervention for the benefit of the public as a whole, examination should turn to the evolution of government's regulatory powers throughout the history of American urban development and how these powers have been guided and constrained by the application of common law, Constitutional principles, statutes and ordinances in historical context.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. A body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government. From this source come the police powers, which are nothing more or less than the powers of government inherent in every sovereignty: the power to govern men and things. Under these powers, the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property. Property does become clothed with a public

[81] *Id.*
[82] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412, 52 S.Ct. 443, 449, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting).
[83] *Vasquez v. Hillery*, 474 U.S. 254, 265-266, 106 S.Ct. 617, 624-625 (1986).

interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.[84]

a. Colonial Municipalities in America

American municipalities originally came into existence by proclamation of the British Crown. From the founding of the first municipality in America, Jamestown, up until the time of the Declaration of Independence, American Colonies operated under written charters containing statements of the rights, privileges, and manner of government for each colony. Beginning with the London Company in 1607 and continuing with the Pilgrims landing at the Plymouth Colony, settlements were established where these companies could explore the new territory and develop the land for agricultural purposes. Originally, municipalities, as well as all land in the colonies, were owned and operated by these corporations. Settlers were obligated to perform certain jobs dictated by the company for the benefit of the group. In exchange, the company was to be responsible for providing the settlers with food and access to a common store. However, problems of the new frontier, including disease and famine, combined with the inequity of communal food distribution and profit sharing between all settlers, regardless of work ethic or rate of production, forced this system to evolve into private ownership of land by each freeman, or stock holder, in the company.[85]

Thereafter, settlers were no longer constrained to rely solely on the company for their sustenance. They were free to organize themselves in whatever way they saw fit. However, the colonists believed that certain powers of government such as school maintenance, care of indigent persons, assessment and collection of taxes, and the construction and operation of roads and bridges were best administered on the local level. Furthermore, they believed that the smaller the unit of government, the more easily they could check and control the power of their officers. Therefore, the settlers came to regard

[84] *Munn v. People of State of Illinois*, 94 U.S. 113, 124-126 (1876).
[85] James Mussatti, *Constitutionism: The Origin of Liberty Under the Constitution*, 1-10 (Richard Blank Publishing Co., Los Angeles, 1935) and Samuel E. Morison, *A History of the Constitution of Massachusetts*, 1-8 (Wright & Potter Printing Co., Boston, 1917).

local self-government as essential to the preservation of their liberty and organized themselves into local governments.[86]

America's first municipalities, whether described as cities or towns, developed as ports for the exchange of goods between Europe and the colonies.[87] They began small, designed to function as centers of commerce and fulfill basic human needs. As regional agricultural productivity increased, they grew as providers of market places for the exchange of goods. The development of commerce and transportation generated the consonant growth of municipalities, which not only provided selling, docking, and storage facilities, but also supplied the supporting population for the commercial activity. Economic prosperity led to physical expansion of municipal boundaries and facilitated addressing urban problems by corporate effort.[88]

Urbanization required the expansion of municipal operations. Officials were selected by popular vote to be placed in charge. Eventually, affairs were managed by public officials, including moderators, clerks, constables, assessors, treasurers, school trustees, and surveyors.[89]

Colonial urban growth led to enhanced municipal regulation of and responsibility for issues associated with congregate living. Colonial governors held local municipalities responsible for the maintenance of militias, schools, roads, bridges, and public order.[90] The problems accompanying the existence of a highway system, including paving, cleaning and upkeep, required increased exercises of municipal authority. Municipalities regulated the location and installation of roads, acted to prevent encroachments thereon and supervised their construction, paving and maintenance. While highways may have been the most rudimentary public utility necessitated by urban growth, municipal infrastructure responsibility was also extended to the construction and maintenance of bridges, wharves and other public engineering projects.[91]

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[86] James Mussatti, *Constitutionism: The Origin of Liberty Under the Constitution*, 9 (Richard Blank Publishing Co., Los Angeles, 1935)
[87] *American Urban History: An Interpretive Reader with Commentaries*, 37 (Alexander B. Callow, Jr. ed., 3rd ed., Oxford University Press, New York, 1982).
[88] Carl Bridenbaugh, *The Urbanization of America: An Historical Anthology*, 71-77 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).
[89] James Mussatti, *Constitutionism: The Origin of Liberty Under the Constitution*, 9 (Richard Blank Publishing Co., Los Angeles, 1935)
[90] James Mussatti, *Constitutionism: The Origin of Liberty Under the Constitution*, 9 (Richard Blank Publishing Co., Los Angeles, 1935)
[91] Carl Bridenbaugh, *The Urbanization of America: An Historical Anthology*, 77 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).

Municipalities were forced to bear the fiscal, as well as the physical, burdens of this infrastructure. In that limited regard, they also received gubernatorial authority to regulate and levy taxes and assessments. Some communities exacted from each inhabitant a yearly amount of labor for the construction and maintenance of streets. Others contracted for this construction and maintenance. In either case, municipalities had to levy special taxes against benefitting properties to pay for materials and/or labor.[92]

Additionally, municipalities enacted regulations to fulfill their infrastructure installation and maintenance mandate. Regulations were designed to promote street cleanliness and safety while preventing structural breakdown by regulating street installation and usage. Municipalities passed mandatory ordinances restricting the conduct of residents on streets, requiring publically funded solid waste collection and removal, and restricting and regulating the traffic on the streets, especially the weight of cart loads and the width of their wheels.[93]

Crime and disorder quickly became a community-wide concern in Colonial municipalities. Municipalities were often quick to address this concern, hiring constables in the tradition of European settlements. However, social issues accompanying urban expansion soon surpassed the ability of individual efforts or the force of public opinion to deal with these problems. Individual and group criminal activity increased in violence and frequency as municipalities grew in population. The severity of this criminal activity "required the sanctions of the law."[94]

Municipalities were left with limited capabilities to address these concerns. Often, inadequate delegated powers and limited resources restricted the efforts of local officials to adequately regulate and serve.[95] Original colonial municipalities were governed directly by the dictatorial government of the British crown, with day to day operations administered by representatives of the British government.[96] These municipalities were created by charter or grant from the provincial governors of the colonies.[97] Here the colonists were hampered by the traditional nature of the charters of

[92] Carl Bridenbaugh, *The Urbanization of America: An Historical Anthology*, 77 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).
[93] Carl Bridenbaugh, *The Urbanization of America: An Historical Anthology*, 77 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).
[94] Carl Bridenbaugh, *The Urbanization of America: An Historical Anthology*, 79 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970), *see also* Blake McKelvey, *The City in American History*, 18 (George Allen and Unwin, Ltd., London, 1969).
[95] Blake McKelvey, *The City in American History*, 20 (George Allen and Unwin, Ltd., London, 1969).
[96] Samuel E. Morison, *A History of the Constitution of Massachusetts*, 1-8 (Wright & Potter Printing Co., Boston, 1917).
[97] 1 McQuillin Mun. Corp. § 1:9 (3rd ed.)

medieval English municipal corporations, whose limitations did not accommodate adequate municipal responses to local issues in seventeenth and eighteenth century America, especially with the imperious demands for expansion and immediate activity in the New World.[98]

To address these concerns, some municipalities, especially in New England, attempted to circumvent imperial restrictions on local government regulation by embracing direct democratic government through the use of town hall meetings where authority was granted and subjected to popular consent.[99] Continued growth prompted municipalities to alter this direct democratic form of government by adding representatives in charge of city operation. New England municipalities delegated the powers held by their popular town hall assembly to selectmen chosen by popular vote. At the same time, other municipal councils, which were generally appointed by colonial governors, frequently suspended medieval restraints on municipal regulation and action found in English municipal corporation charters when their enforcement proved difficult.[100]

Eventually, formal control of and responsibility for the establishment and maintenance of American municipalities was transferred to individual colonial governments.[101] However, without independent authority to take action, municipalities were still forced to retrieve direct grants of authority from their controlling colonial government before they could adopt any regulation to address a problem. Colonial municipal regulation was necessarily reactive, founded and expanded as a consequence of the changes which occurred in the size, distribution, and composition of the population.[102]

Municipal density created proximate physical issues, such as fire.[103] As early as 1650, fire prevention and suppression was entrusted to municipalities with grants of authority to enact local ordinances outlawing the erection of wooden buildings, regulating chimneys, prohibiting bonfires, fireworks and other explosives and requiring the

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[98] Carl Bridenbaugh, *The Urbanization of America: An Historical Anthology*, 75 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).
[99] 1 McQuillin Mun. Corp. § 1:11 (3rd ed.)
[100] Blake McKelvey, *The City in American History*, 17 (George Allen and Unwin, Ltd., London, 1969).
[101] James Mussatti, *Constitutionism: The Origin of Liberty Under the Constitution*, 1-2 (Richard Blank Publishing Co., Los Angeles, 1935) and Samuel E. Morison, *A History of the Constitution of Massachusetts*, 1-8 (Wright & Potter Printing Co., Boston, 1917).
[102] Philip M. Hauser, *Urbanization: An Overview* in *The Study of Urbanization*, 27 (Philip M. Hauser & Leo F. Schnore, eds., John Wiley & Sons, Inc., New York, 1967).
[103] Carl Bridenbaugh, *The Urbanization of America: An Historical Anthology*, 76 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970), *see also* Blake McKelvey, *The City in American History*, 18 (George Allen and Unwin, Ltd., London, 1969).

maintenance of firefighting equipment.[104] This soon led to development of the first building codes in America, which also prescribed acceptable building materials and construction methods.[105] Early municipalities extended this grant of authority to create rudimentary land-use regulation to address issues affecting public health by prohibiting activities believed noxious, potentially injurious to human life, or injurious to property and property values.[106] Eventually, these building codes and rudimentary land use controls included elements of municipal planning[107] and even the establishment of urban growth boundaries prohibiting the construction of residences in farmland adjacent to municipalities.[108]

b. Municipalities Under the Constitution

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.[109]

This transformation of the American Colonies into the United States of America did not initially have a great deal of impact upon the operation of American municipalities.[110] Neither the Declaration of Independence nor the Articles of Confederation makes any specific reference to local governments of any kind. The

[104] Blake McKelvey, *The City in American History*, 17-18 (George Allen and Unwin, Ltd., London, 1969).
[105] Carl Bridenbaugh, *The Urbanization of America: An Historical Anthology*, 78 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).
[106] Juliana Maantay, *Zoning, Equality, and Public Health*, American Journal of Public Health, v. 91, no. 7, 1035-1036 (July 2001).
[107] Blake McKelvey, *The City in American History*, 15-16 (George Allen and Unwin, Ltd., London, 1969).
[108] Arthur C. Nelson, Thomas W. Sanchez, & Casey J. Dawkins, *The Effect of Urban Containment and Mandatory Housing Elements on Racial Segregation in U.S. Metropolitan Areas, 1990-2000*, Journal of Urban Affairs v. 26 no. 3 330, 342-343 (2004).
[109] *Munn v. People of State of Illinois*, 94 U.S. 113, 124 (1876).
[110] *Mayor and Recorder of City of Nashville v. Ray*, 86 U.S. 468, 476 (1873).

governmental authority of states or municipalities was not initially addressed under the U.S. Constitution. The Constitution was not originally drafted with the purpose of protecting individuals from state or local government intrusion. Its original purpose was to specifically set forth a framework for federal government in a context which was not invasive to individual rights.[111] It was not until the Tenth Amendment to the U.S. Constitution that state authority was first addressed: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." A tenet of English common law was that a municipal corporation is properly an investing of local citizens with the local government thereof, and that their laws will be binding on strangers.[112] The "to the people" reservation in the Tenth Amendment therefore placed uncertainty as to its effect on municipal authority. While American municipalities existed by virtue of colonial grants of authority prior to the revolution, the extent of this authority in the Constitutional era was undetermined. After the revolution, state legislatures assumed the role of issuing charters or other grants of authority for the establishment of municipalities.[113] However, it was not until later that this assumed role became a matter of right.[114]

This lack of clarity was aided by the expansion of municipalities into the American frontier, where their establishment often pre-dated or was concurrent with the establishment of statehood. "The planting of new towns in the West was in some respects a replication of the establishment of the colonial ports two centuries before."[115] This was usually accomplished by private land development companies from the east, often to serve as portals for the exchange and transport of goods and services between the coastal merchants and the interior. Since these land companies eyed further expansion, western municipalities often transitioned more quickly to local leadership than their New England predecessors.[116]

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[111] "Most of the framers at Philadelphia agreed that there was no need for adding a bill of rights to the new Constitution, . . . [Federalists] thought that a bill of rights was superfluous because the federal government could exercise only those powers that were expressly delegated to it – and those powers did not extend to violating individual liberties. Moreover, [James] Madison confessed his 'fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude.' Better (in other words) not to have any bill of rights than to incorporate in the Constitution weak statements that might actually leave room for the violation of the very liberties they were meant to protect." Jack N. Rakove, James Madison and the Bill of Rights in This Constitution: A Bicentennial Chronicle, 3-4 (American Political Science Association and American Historical Association, Fall 1985).
[112] *Cudon v. Eastwick*, 1 Salkeld 192, 91 E.R. 174 (Court of Kings Bench of England 1703).
[113] 1 McQuillin Mun. Corp. § 1:10 (3rd ed.)
[114] 1 McQuillin Mun. Corp. § 1:43 (3rd ed.)
[115] Blake McKelvey, *The City in American History*, 35 (George Allen and Unwin, Ltd., London, 1969).
[116] Blake McKelvey, *The City in American History*, 35 (George Allen and Unwin, Ltd., London, 1969).

Upon the establishment of statehood, these formerly self-reliant municipalities endured severe restrictions on their authority to govern and develop. Several U.S. Supreme Court cases were decided in the nineteenth century that firmly established and gradually expanded states' authority over municipalities.[117] In *Brown v. Maryland*, 25 U.S. 419, 1827 WL 3065, (1827) the Court clarified state sovereignty over pre-existing municipalities. Three years later, it established that the powers of a municipal corporation are conferred by the state in *Ronkendorff v. Taylor's Lessee*, 29 U.S. 349, 359 (1830). This was reaffirmed in *Cowles v. Mercer County*, 74 U.S. 118, 119-120 (1868) holding that "the State has never parted with its power to create and establish a corporate body with such powers and liabilities as it chooses to give," and *City of Ft. Scott, Kan., v. W.G. Eads Brokerage Co.*, 117 F. 51, (8th Circuit 1902), *cert. denied* 187 U.S. 647, 23 Supr. Ct. 846, 47 L. Ed. 348 stating that "the powers of municipal corporations are limited to those expressly granted and those fairly implied therefrom or incidental thereto, and a reasonable doubt of the existence of a power is fatal to its being. The prescription, by the statutes, under which a municipality is organized or acting, of the manner in which it shall exercise one of its powers, limits the right to exercise it to that method, and its use in any other way is *ultra vires* of the corporation, and void."

Nineteenth century municipalities, powerless to respond to the needs of growth, unsuccessfully appealed for adequate fiscal and regulatory powers to infant state legislatures who often did not recognize their need.[118] Without this additional authority, they were unable to replicate much of the public infrastructure present in Colonial port cities[119] that aided the necessary flow of goods and facilitated the rapid growth of industry.[120] In response, some municipalities attempted to utilize public funds to promote the growth of railroads and other private enterprises to address this deficit.[121] This community investment garnered mixed results,[122] causing municipalities that had loyally backed construction efforts to cry out in protest.[123]

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[117] Joan C. Mitchell, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U. L. Rev. 369 (Winter, 1984).
[118] Blake McKelvey, *The City in American History*, 42-43 (George Allen and Unwin, Ltd., London, 1969).
[119] Joan C. Mitchell, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U. L. Rev. 369, 437-438 (Winter, 1984).
[120] Blake McKelvey, *The City in American History*, 44-46 (George Allen and Unwin, Ltd., London, 1969) and *American Urban History: An Interpretative Reader with Commentaries*, 103-105 (Alexander B. Callow, Jr. ed., 3d ed., Oxford University Press, New York, 1982).
[121] Joan C. Mitchell, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U. L. Rev. 369, 437-438 (Winter, 1984).
[122] Blake McKelvey, *The City in American History*, 57 (George Allen and Unwin, Ltd., London, 1969).
[123] Blake McKelvey, *The City in American History*, 57 (George Allen and Unwin, Ltd., London, 1969).

It was this uncertainty of return on municipal investment in railroads that prompted Iowa Supreme Court Justice John F. Dillon in 1872, in the first treatise to be published on American municipal corporation law, to restate what had already been recognized as the natural scope of regulatory authority for American municipalities. "Dillon's rule," as his treatise statement of law has come to be known, provided

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in, and incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[124]

Legally powerless to create the necessary physical infrastructure and land-use regulation to accommodate the rapid expansion of population and congregate living demands created by the Industrial Era,[125] many municipalities then franchised private enterprise for public service provision, only to find themselves without legal authority to oversee the result.[126] At least half of the streets installed in municipalities remained unpaved and there was half as many miles of sewer infrastructure as streets. The lack of local building and sanitation codes allowed crowded tenement buildings to spring up with little regard for public health, safety or welfare. Residents were often forced to drink from the same river into which sewage was disposed, resulting in widespread disease, including outbreaks of cholera, typhoid fever and smallpox. The lack of social controls preventing the use of children in industry forestalled the education of the masses, as families were often forced to choose between education and survival.[127]

Urban sprawl may have first gained a foothold in America when those who could afford to flee from the noise, confusion, dirt, stench, and intolerably crowded conditions

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[124] Joan C. Mitchell, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U. L. Rev. 369, 434-438 (Winter, 1984).
[125] Vanessa Russell-Evans & Carl. S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and its Impact on Obesity, How the Adoption of Smart Growth Statutes can Build Healthier and More Active Communities*, Va. Envtl. L.J., v. 29, no. 1, 70-71 (2011).
[126] Blake McKelvey, *The City in American History*, 42-43, 60-61 (George Allen and Unwin, Ltd., London, 1969).
[127] Leon S. Marshall, *American Urban History: An Interpretative Reader with Commentaries,* 110-113 (Alexander B. Callow, Jr. ed., 3d ed., Oxford University Press, New York, 1982).

of these central cities escaped to neighboring suburbs.[128] However, in many of these suburban areas the increase in tax valuation was not at all commensurate with the demands imposed by the increase of population[129] and suburbanites who fled the central city found themselves turning back to the central city in an attempt to gain elusive basic service provision.[130] Yet the legal inability of central cities to annex growing suburban territories prevented them from diluting higher per capita costs of providing services. This raised relative per capita tax burdens in these municipalities and actually contributed to additional outward migration.[131]

When municipalities turned to their state legislatures for regulatory authority to address these ills, these state legislatures often placed the police, public buildings, and other municipal programs under ineffective state-appointed commissions.[132] Subsequent attempts to buy their way out of these problems took a heavy toll on municipalities. By 1900, the cost for the nation's municipal gas works, plants and distributing infrastructure alone was twenty times what it was in 1860.[133] "The bond issues required to finance these developments sunk the cities deeply into debt and intensified the desire of many bankers and other substantial citizens for fiscal and political reforms."[134] Lord Bryce called this type of municipal government in the United States "one conspicuous failure."[135] Political scientist Frank Prichard warned that "the ordinary administrative machinery of the government, constructed for a less complex condition of society, is proving inadequate. A more scientific construction and a more systematic operation is imperative."[136] However, it was only in reaction to worker strikes and street riots over deplorable conditions throughout America that state legislatures eventually provided municipalities the authority to regulate against and ameliorate these living conditions and

[128] George Rogers Taylor, *The Urbanization of America: An Historical Anthology*, 134 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).
[129] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 21-23 (University of California Press, Los Angeles, 1969).
[130] Kenneth R. Schneider, *On the Nature of Cities: Toward Enduring and Creative Human Environments*, 58 (Jossey-Bass Publishers, San Francisco, 1979).
[131] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 79 (The Brookings Institution, Washington, D.C., 1982).
[132] Blake McKelvey, *The City in American History*, 60-61 (George Allen and Unwin, Ltd., London, 1969).
[133] Edward C. Kirkland, *The Urbanization of America: An Historical Anthology*, 213 (Allen M. Wakstein, ed., Houghton Mifflin Company, Boston, 1970).
[134] Blake McKelvey, *The City in American History*, 61 (George Allen and Unwin, Ltd., London, 1969).
[135] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 40-41 (University of California Press, Los Angeles, 1969).
[136] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 40-41 (University of California Press, Los Angeles, 1969).

properly construct necessary physical infrastructure.[137] At that time, "sanitation and housing improvements were, some authorities claim, just one step ahead of epidemic or disaster."[138]

Many states reacted by enacting constitutional "home rule" provisions conferring upon municipalities the power to frame and adopt their own municipal charters, subject, of course, to the laws and policy of the state.[139] The purpose was to give local communities full regulatory power in matters of local concern, which were to be regarded as exclusive matters of local government. With the growing size of municipalities and the increased scope of state legislation, there were at least two reasons for providing for the empowerment of local governments to address local problems: (1) to relieve the legislature from the burden of dealing with local affairs and so leave it freer to concentrate on matters of statewide concern; and (2) the realization that local problems required more attention and comprehensive knowledge than the state could exercise.[140]

Even with such legislative authority, early municipal attempts to gain control over construction practices and regulate development and infrastructure installation were sometimes found to be legally suspect.[141] The Massachusetts Supreme Court in *Edwards v. Bruorton*, 184 Mass. 529, 532-533, 69 N.E. 328 (1904) held that the Legislature cannot constitutionally interfere with the use of property without giving compensation to the owner. The New York Court of Appeals and the Maryland Supreme Court both issued similar rulings.[142] Eventually, these same courts instead concluded that "the exercise of broad legislative powers granted to municipalities under the Home Rule Amendment is limited by whether the enactment violated State law or any other constitutional protections. The touchstone is whether the enactment falls within the broad police powers of a town to promote the public good and safety."[143]

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[137] Leon S. Marshall, *American Urban History: An Interpretative Reader with Commentaries,* 114 (Alexander B. Callow, Jr. ed., 3d ed., Oxford University Press, New York, 1982).
[138] Kenneth R. Schneider, *On the Nature of Cities: Toward Enduring and Creative Human Environments*, 50-51 (Jossey-Bass Publishers, San Francisco, 1979).
[139] 1 McQuillin Mun. Corp. §§ 1:43, 9:8 (3rd ed.)
[140] 1 McQuillin Mun. Corp. § 1:43 (3rd ed.).
[141] Frederick Law Olmsted, Jr., *The Town-Planning Movement in America*, Housing and Town Planning, the Annals 51, 172-181, (January 1914).
[142] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 3-4 (University of California Press, Los Angeles, 1969) and *Forster v. Scott*
136 N.Y. 577, 91 Sickels 577, 32 N.E. 976 (1893).
[143] *Andrews v. Town of Amherst*, 68 Mass.App. 365, 368, 862 N.E.2d 65, 69 (Mass.App. 2007).

c. Municipal Police Power Regulation

The scope of state and municipal governments' authority to regulate under the "police powers" subsequent to adoption of the Fourteenth Amendment to the United States Constitution was initially clarified in *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273 (1887). There, the U.S. Supreme Court examined the validity of a state law declaring all structures for the manufacture of intoxicating liquors to be a common nuisance and commanding the court to close and take possession thereof.[144] The Court considered whether the state law violated Section One of the Fourteenth Amendment to the United States Constitution mandating that "No state shall make or enforce any law which shall abridge the privilege or immunity of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."[145]

Prior to the adoption of the Fourteenth Amendment, state and local governments were not in the purview of the Constitution of the United States. The propriety of their regulation and activities were subject to no other limitations than those imposed by their "own constitutions or by the general principles supposed to limit all legislative power."[146] Of course the state, when providing by legislation for the protection of the public health, the public morals, or the public safety, was subject to the paramount authority of the Constitution of the United States and could not violate rights secured or guaranteed therein or interfere with the lawful powers of the federal government.[147]

At the time of the adoption of the Fourteenth Amendment, the principal that no person shall be deprived of life, liberty, or property without due process of law was already embodied in nearly all state constitutions. It was regarded as essential to the peace and safety of society that all property was held under the implied obligation that the owner's use would not be injurious to the community.[148]

Citing its opinion in *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S.Ct. 357 (1884), the *Mugler* Court held that the existing United States Constitution and its Amendments were not designed to interfere with the "police power" of the states "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its

[144] *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273 (1887).
[145] *Mugler v. Kansas*, 123 U.S. 623, 657, 8 S.Ct. 273 (1887).
[146] *Mugler v. Kansas*, 123 U.S. 623, 659, 8 S.Ct. 273 (1887).
[147] *Mugler v. Kansas*, 123 U.S. 623, 663, 8 S.Ct. 273 (1887).
[148] *Mugler v. Kansas*, 123 U.S. 623, 665, 8 S.Ct. 273 (1887).

wealth and prosperity."[149] "Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint or punishment of crime, for the preservation of the public peace, health, and morals must come within this category."[150]

The Court in *Mugler* went on to probe what state or local action constituted a compensable taking of property under the Fourteenth Amendment. "The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."[151] The *Mugler* Court acknowledged that "police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed."[152]

The United States Supreme Court in *Crowley v. Christensen*, 137 U.S. 86, 11 S.Ct. 13 (1890) built on *Mugler* by holding that "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law."[153]

The United States Supreme Court in *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499 (1894) noted that "the extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and

[149] *Mugler v. Kansas*, 123 U.S. 623, 662-663, 8 S.Ct. 273 (1887).
[150] *Mugler v. Kansas*, 123 U.S. 623, 658-659, 8 S.Ct. 273 (1887).
[151] *Mugler v. Kansas*, 123 U.S. 623, 668-669, 8 S.Ct. 273 (1887).
[152] *Mugler v. Kansas*, 123 U.S. 623, 658-659, 8 S.Ct. 273 (1887).
[153] *Crowley v. Christensen*, 137 U.S. 86, 89-90 11 S.Ct. 13 (1890).

morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."[154]

In *Gundling v. City of Chicago*, 177 U.S. 183, 20 S.Ct. 633 (1900) the Court turned its attention to the procedural side of regulation, noting that business regulations with administrative determinations as to the character, reputation and suitability of persons to be entrusted by society to sell articles and providing reasonable conditions upon the performance of which a license may be granted to sell such articles does not violate any provision of the Federal Constitution.[155]

In *Missouri, K. & T. Ry. Co. of Texas v. May*, 194 U.S. 267, 24 S.Ct. 638 (1904) the Court held that "when a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the 14th Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."[156]

With these clarifications, municipalities enacted regulations intended to make tenements more livable by limiting the number of stories, decreasing the percentage of the lot covered, and banning laundries, bakeries, and cleaning establishments from basements because of fire hazards. The separation of these businesses from tenements was one of the earliest attempts to segregate incompatible uses.[157] Validated based upon the safety, comfort, or convenience of the people, building height limitations were

[154] *Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499, 500-501 (1894).
[155] *Gundling v. City of Chicago*, 177 U.S. 183, 187-188, 20 S.Ct. 633 (1900).
[156] *Missouri, K. & T. Ry. Co. of Texas v. May*, 194 U.S. 267, 269, 24 S.Ct. 638 (1904).
[157] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 75 (University of California Press, Los Angeles, 1969).

imposed to address fire dangers.[158] These height restrictions also had the additional benefits of helping to reduce traffic congestion and preventing high buildings on narrow streets from robbing lower structures of light and air.[159]

However, efforts to separate individual land uses were still deemed in the hands of individual landowners. At that time, the only perceived legally acceptable way to segregate land uses in America was by private covenant between neighboring landowners. Landowners would covenant with each other to restrict their land to only certain uses for a specified number of years. There were inherent problems with this system. First, it did not allow for any unified segregation of land for specific purposes, a significant problem for city planners attempting to install appropriate public works infrastructure to serve new development. Second, because there was no authority compelling landowners to agree to these land use restrictions, they often chose not to thereby thwarting the efforts entirely. Third, attempting to obtain these restrictions in already developed neighborhoods proved difficult. "Where no private covenants existed, some owners found themselves the victims of blackmailers. Unscrupulous individuals would buy land in good neighborhoods with no restrictions and then extort large sums of money from neighbors under the threat of building stables or other nuisances that would ruin local values."[160]

Even when present, private covenants were found ineffective in safeguarding the residential character of existing neighborhoods. "First, they were completely impotent to regulate development around the area they covered and did not protect residential pockets from experiencing the nuisances generated by commercial and industrial development at close range. Moreover, some restrictions lost the protection of the courts because owners had not applied them uniformly, or because urban conditions did not correspond any more to the situation under which the covenant had been written. Other restrictions lost their effectiveness as judges adopted a more liberal interpretation of key clauses, for instance those pertaining to the use of land exclusively for private residences."[161]

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[158] *Welch v. Swasey*, 214 U.S. 91, 106, 29 S.Ct. 567, 570 (1909).
[159] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 75 (University of California Press, Los Angeles, 1969).
[160] Raphaël Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, Journal of the American Planning Association v. 64, no. 2, 170-188 (Spring 1998) (internal citations omitted).
[161] Raphaël Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, Journal of the American Planning Association v. 64, no. 2, 170-188 (Spring 1998) (internal citations omitted).

This provided the impetus for the establishment of public planning commissions "to plan and control the development of an entire suburban territory."[162] These efforts embraced the concept of German zoning. While German regulations focused on bulk and density, with emphasis on the control of noxious industry, relief from crowding, and protection of the countryside, American codes increasingly emphasized land use incompatibility in an attempt to protect single-family housing.[163] They were seen as a mechanism capable of "stabilizing real estate values and fostering economic growth, protecting residential areas and reinforcing spatial segregation, limiting the influence of political machines and institutionalizing scientific city planning."[164] These codes were envisioned to shield "homeowners and their families not only from the physical nuisances of high-density development, but also from the morally harmful influences of the crowded city."[165] American codes were often enacted with trepidation, which caused some municipalities to include provisions for landowners "to be paid damages under eminent domain for restricting the speculative value of their holdings."[166]

d. Restrictions on the Police Power: Substantive Due Process

This trepidation was addressed by the U.S. Supreme Court's decisions in *Chicago & A.R. Co. v. Tranbarger*, 238 U.S. 67, 35 S.Ct. 678 (1915), *Reinman v. Little Rock*, 237 U.S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511 (1915) and *Hadacheck v. Sebastain*, 239 U.S. 394, 410-412, 36 S.Ct. 143 (1915). The Court in *Tranbarger* addressed failure of a railroad to comply with state statutes by constructing openings across and through the solid embankment upon which its railroad tracks were laid to avoid flooding on adjacent parcels. The Court found that neither the provisions of the Due Process clause of the Fourteenth Amendment or the Contracts clause of the Constitution have the effect of overriding the power of state and local government to establish regulations reasonably necessary to secure the health, safety, or general welfare of the community. This police

[162] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 60-61 (University of California Press, Los Angeles, 1969).
[163] Sonia Hirt, *The Devil Is in the Definitions: Contrasting American and German Approaches to Zoning*, Journal of the American Planning Association vol. 73, no. 4, 438-440 (Autumn 2007) (internal citations omitted).
[164] Raphaël Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, Journal of the American Planning Association v. 64, no. 2, 170-188 (Spring 1998) (internal citations omitted).
[165] Raphaël Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, Journal of the American Planning Association v. 64, no. 2, 170-188 (Spring 1998) (internal citations omitted).
[166] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 60-61 (University of California Press, Los Angeles, 1969).

power was also found to embrace regulations designed to promote the public convenience or the general welfare and prosperity. It can neither be abdicated or bargained away and is inalienable even by express grant. All contract and property rights are held subject to its fair exercise.[167]

The *Reinman* case involved Little Rock's prohibition of livery stables as public nuisances within a specific district in order to protect the public health and welfare. The Court found that while a livery stable "is not a nuisance per se, it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily. The general subject of the regulation of livery stables, with respect to their location and the manner in which they are to be conducted in a thickly populated city, is well within the range of the power of the state to legislate for the health and general welfare of the people, so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district."[168] This was immediately followed by *Hadacheck* involving the validity challenge of a landowner and existing operator of an industrial use placed in a residential district by Los Angeles' ordinance establishing the city as residential with an exception for permitted businesses and providing for separate and distinct industrial districts.[169] The Court found that the Los Angeles ordinance satisfied the test outlined in *Reinman*, thereby upholding the city's regulations without awarding landowner compensation.[170]

It then did not take long for a groundswell of support for zoning to emerge across the country. American planners saw land use regulation as a way to fix many public ills. By 1919, at least ten states had authorized all or certain classes of cities to adopt zoning. In 1921, there was a flood of state zoning legislation granting cities the authority to exercise the police power to regulate the use of land as well as the height and area of buildings. Then United States Secretary of Commerce Herbert Hoover was so impressed with the importance of zoning that he appointed a special advisory committee to draft a model or standard state zoning enabling act under which municipalities could adopt

[167] *Chicago & A.R. Co. v. Tranbarger*, 238 U.S. 67, 72, 76-78, 35 S.Ct. 678, 680, 682 (1915).
[168] *Reinman v. Little Rock*, 237 U.S. 171, 176-177, 59 L. ed. 900, 35 Sup. Ct. Rep. 511 (1915).
[169] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 76 (University of California Press, Los Angeles, 1969).
[170] *Hadacheck v. Sebastain*, 239 U.S. 394, 410-412, 36 S.Ct. 143 (1915).

zoning regulations. A Model Act was published by 1924, and within one year, nearly a quarter of the states had passed enabling legislation based on this Model Act.[171]

Despite this popular support, municipal authority to enact zoning regulations was still a matter of debate, especially where no state grant of authority was provided. Municipalities often turned to public health linkages between population density, industry, and illness as justification for zoning regulations separating residences from "noxious" industrial trades and other land uses.[172]

The permissibility of zoning ordinance restrictions upon land use was determined by the U.S. Supreme Court in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926), where zoning of prime industrial land for residential purposes was claimed to have the effect of reducing the market value of the land from about $10,000 per acre to less than $2,500 per acre, thus constituting a Fourteenth Amendment unlawful deprivation of property.[173] As in prior cases, the Court hearkened back to the enforcement of nuisance-based regulation to establish the foundation of their ruling. "Whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[174] The mere fact that an industry might be diverted from its natural path[175] and some industries which are neither offensive nor dangerous might be affected[176] was not a sufficient reason for denying the proper exercise of the police power to relegate industrial establishments, including those offensive or dangerous, to localities separated from residential sections.

The *Euclid* Court noted that "the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and

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[171] James Clingermayer, *Distributive Politics, Ward Representation, and the Spread of Zoning*, Public Choice, Vol. 77, No. 4, 728 (1993).
[172] Vanessa Russell-Evans & Carl. S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and its Impact on Obesity, How the Adoption of Smart Growth Statutes can Build Healthier and More Active Communities*, Va. Envtl. L.J., v. 29, no. 1, 72 (2011).
[173] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926).
[174] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387-388, 47 S.Ct. 114 (1926) (internal citations omitted).
[175] *Village of Euclid, Ohio*, 272 U.S. at 389-390.
[176] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 389, 47 S.Ct. 114 (1926) *citing Purity Extract Co. v. Lynch*, 226 U. S. 192, 204, 33 S. Ct. 44, 47 (1912).

security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children. If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[177]

The *Euclid* Court's holding "fused the two express constitutional restrictions on any state interference with private property: that property shall not be taken without due process nor for a public purpose without just compensation into a single standard. Before a zoning ordinance can be declared unconstitutional, it must be shown to be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[178] This was followed by *Zahn v. Board of Public Works of City of Los Angeles*, 274 U.S. 325, 328, 47 S.Ct. 594 (1927), in which the Court held that with determinations of an unreasonable, arbitrary, or unequal exercise of power, the settled rule is that the Court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.[179] Two weeks later, the Court in *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675 (1927) extended this standard to the granting of zoning exceptions, noting that "state Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation."[180] The Court in *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246 (1928) validated a governmental regulation mandating the uncompensated destruction of infected trees to prevent the further spread of a non-treatable deadly tree disease. Where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.[181] Immediately thereafter in *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447 (1928), the Court noted that the governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited. Such restriction cannot be imposed if

[177] *Village of Euclid, Ohio*, 272 U.S. at 394-395.
[178] Mr. Justice Stevens in his concurring opinion in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 513-515, 97 S.Ct. 1932 (1977), subsequently adopted by the U.S. Supreme Court in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 2182 (1981).
[179] *Zahn v. Board of Public Works of City of Los Angeles*, 274 U.S. 325, 328, 47 S.Ct. 594, 595 (1927).
[180] *Gorieb v. Fox*, 274 U.S. 603, 608, 47 S.Ct. 675, 677 (1927).
[181] *Miller v. Schoene*, 276 U.S. 272, 279-280, 48 S.Ct. 246, 247 (1928).

it does not bear a substantial relation to the public health, safety, morals, or general welfare.[182] However, that same year in *City of Marysville v. Standard Oil Co.*, 279 U.S. 582, 49 S.Ct. 430, 73 L.Ed. 856 (1928), the Court summarily affirmed a Eighth Circuit Court of Appeals ruling sustaining the ability of municipalities to use the police power without fear of it constituting a taking requiring just compensation under the Fourteenth Amendment to the U.S. Constitution: "That property may be destroyed as a result of the legitimate exercise of the police power of a state is not a taking of property for public use, and does not deprive the owner of it without due process of law."[183]

In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98 (1954), the Court noted that public safety, public health, public welfare, morality, peace and quiet, and law and order are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. The concept of the public welfare is broad and inclusive and the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[184]

The Court in *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 82 S.Ct. 987 (1962) applied a "reasonableness" standard to the exercise of police powers. While it is a truism that every regulation necessarily speaks as a prohibition, if an ordinance is a valid exercise of police powers, the fact that it deprives property of its most beneficial use does not render it unconstitutional.[185] "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."[186] To justify interposing authority on behalf of the public, the interests of the public must require such interference and the means must be reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[187] The Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536 (1974) explained that in light of the Equal Protection Clause, such government action must be reasonable and not arbitrary and bear a rational relationship to a permissible governmental objective.[188]

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[182] *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448 (1928).
[183] *City of Marysville v. Standard Oil Co.*, 27 F.2d 478, 484 (8th Cir. 1928).
[184] *Berman v. Parker*, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102-103 (1954).
[185] *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 592, 82 S.Ct. 987, 989 (1962).
[186] *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594, 82 S.Ct. 987, 990 (1962).
[187] *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594-595, 82 S.Ct. 987, 990 (1962).
[188] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S.Ct. 1536, 1540 (1974).

e. Restrictions on the Police Power: Regulatory Takings

While substantive due process compliance continues as a condition precedent to valid police power regulation, the possibility of governmental regulatory activity extending so far as to constitute a taking has also emerged. Although the possibility of a regulatory taking was recognized as early as 1922 by the U.S. Supreme Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922) and restated forty years later in *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594, 82 S.Ct. 987, 990 (1962), the modern test for whether governmental regulatory action constitutes a taking finds its origins in the Court's landmark opinion in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978). The Court explained that land use regulations are valid exercises of the police power as long as they are reasonably related to the implementation of a policy expected to produce a widespread public benefit and applicable to all similarly situated property.[189] Discriminatory or "reverse spot" zoning can occur with a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.[190] "The general purport of these cases is that 'spot zoning' may be unreasonable and invalid when it singles out a small parcel of land for use classified differently from the surrounding area, primarily for the benefit of the owner of the property and to the detriment of the area and other owners therein. On the other hand, 'spot zoning' is not unreasonable and invalid if it is related to the general welfare and the best interests of the community-at-large."[191] In determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, the Court identified the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with "distinct investment-backed expectations" as relevant considerations.[192]

The Court in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138 (1980) dismissed a challenge to an "open space" zoning regulation declared in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl. The Court acknowledged its previous holdings that regulatory takings only occur when government regulation has exceeded its police power.

[189] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 2664 at Footnote 30 (1978).
[190] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 132, 98 S.Ct. 2646, 2663 (1978).
[191] *Phillips v. Vieux*, 210 Kan. 612, 615, 504 P.2d 196, 200 (1972).
[192] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2659 (1978).

The Court noted that although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. Protecting residents from the ill effects of urbanization has long been recognized as legitimate exercises of municipal police powers.[193]

This was followed by the Court in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176 (1981) stating that "where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property."[194] However, the Court in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 107 S.Ct. 2378 (1987), found that government action that works a taking of property rights implicates the "constitutional obligation to pay just compensation", regardless of whether the taking is of a permanent or temporary nature.[195] The Court in *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) overturned the requirement of an uncompensated easement as a condition of a land-use permit. The Court held that unless the permit condition serves the same governmental purpose as a legitimate development ban would, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."[196]

The Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992) blessed the ongoing expansion of the police powers by acknowledging that "prevention of harmful use" was merely an early formulation of the police power justification necessary to sustain an uncompensated regulatory diminution in value.[197] The transition from the early focus on control of "noxious" uses to the contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors.[198]

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[193] *Agins v. City of Tiburon*, 447 U.S. 255, 260-262, 100 S.Ct. 2138, 2141-2142 (1980).
[194] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68-69 101 S.Ct. 2176, 2182-2183 (1981).
[195] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.* 482 U.S. 304, 315, 107 S.Ct. 2378, 2385-2386 (1987).
[196] *Nollan v. California Coastal Com'n*, 483 U.S. 825, 837, 107 S.Ct. 3141, 3149 (1987).
[197] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026, 112 S.Ct. 2886, 2898-2899 (1992).
[198] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024-1025, 112 S.Ct. 2886, 2897-2898 (1992).

f. Restrictions on the Police Power: Unconstitutional Conditions

Municipal trepidation again arose based upon at least perceived uncertainty as to the exact boundaries of the police powers pursuant to these decisions. This trepidation combined with an increased popularity of mixed use development led many municipalities to attempt to lessen legal exposure through amelioration of the rigidness of traditional zoning regulations and practices. Strict separation of uses and parcel setbacks enacted under traditional zoning ordinances did not accommodate comprehensively-planned multi-use development.[199] Municipalities were prompted to adopt mechanisms, such as Planned Unit Developments, to circumvent this rigidness and accommodate mixed uses.[200] Zoning regulations were redrafted to incorporate a process in which an administrative board or staff could make zoning land use decisions on a case by case basis.[201] When challenged as arbitrary, courts expressed comfort with such land use regulatory schemes if the board or staff was provided adequate guidelines and parameters in which to act. "A zoning ordinance or regulation should be clear and specific, and where such a regulation is vague and indefinite it may be held invalid. The regulation should prescribe a definite standard and furnish a uniform rule of action to govern the conduct of administrative officials; and the application of the regulation may not be left to the arbitrary will of governing authorities."[202]

The Court addressed such case by case regulation in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994), where the Court held that government may not require a person to give up a constitutional right, including the right to receive just compensation when property is taken for a public use, in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. Under this doctrine of "unconstitutional conditions," there must be first a determination whether an "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. If that is found, then it must be decided whether the required degree of connection exists between the exactions and the projected impact of the proposed development.[203] The second part of the analysis requires a determination whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of the proposed development. A use

[199] Sonia Hirt, *The Devil Is in the Definitions: Contrasting American and German Approaches to Zoning*, Journal of the American Planning Association, v. 73, no. 4, 439 (Autumn 2007).
[200] Sonia Hirt, *The Devil Is in the Definitions: Contrasting American and German Approaches to Zoning*, Journal of the American Planning Association, v. 73, no. 4, 436 (Autumn 2007) (internal citations omitted).
[201] Eli Goldston and James H. Scheuer, *Zoning of Planned Residential Developments*, Harvard Law Review, Vol. 73, No. 2, 252 (Dec. 1959).
[202] *Town of Hobart v. Collier*, 3 Wis.2d 182, 188, 87 N.W.2d 868, 872 (1958) *citing* 62 C.J.S. Municipal Corporations § 226(6) b.
[203] *Dolan v. City of Tigard*, 512 U.S. 374, 385-386, 114 S.Ct. 2309, 2317 (1994).

restriction may constitute a "taking" if not reasonably necessary to the effectuation of a substantial government purpose. "Rough proportionality" encapsulates the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[204] In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999), the Court discerned that this "rough proportionality" test used to determine whether dedications demanded as conditions of development are proportional to the development's anticipated impacts does not extend beyond the special context of exactions.[205]

g. Current Municipal Police Power Regulation

The necessary uniqueness of each individual zoning case has done little over time to relieve municipal trepidation over discriminatory and spot zoning allegations and compensation demands for loss of "investment-backed expectations." Likewise, "one cannot know whether a takings claim is invalid without knowing what standard it has failed to meet."[206] The Court in *Arkansas Game and Fish Comm'n v. United States*, No. 11–597, 568 U. S. ____ (Dec. 5, 2012), most recently held that when regulation or temporary physical invasion by government interferes with private property, time is a factor in determining the existence of a compensable taking. Also relevant is the degree to which the invasion is intended or is the foreseeable result of authorized government action. So too, is the character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use. Severity of the interference figures in the calculus as well. While a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove a taking. Every successive trespass adds to the force of the evidence.[207]

Additionally, understanding the highly politicized and sometimes unpredictable nature of today's planning and zoning process,[208] developers have also often requested variances or exceptions from zoning, and local governments, under pressures of growth, finances, or political coalitions, may readily accommodate some types of growth while

[204] *Dolan v. City of Tigard*, 512 U.S. 374, 388-392, 114 S.Ct. 2309, 2318-2320 (1994).
[205] *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-703, 119 S.Ct. 1624, 1635 (1999).
[206] *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*, 560 U.S. ___, 130 S.Ct. 2592, 2603 (2010).
[207] *Arkansas Game and Fish Comm'n v. United States*, No. 11–597, slip op. at 14-15, 568 U. S. ____ (Dec. 5, 2012).
[208] David Brain, *Democracy and Urban Design: The Transect as Civic Renewal*, Places, v. 18, no. 1, 18-23, (Spring 2006).

trying to resist others.[209] When development decisions are made on this basis, the importance of plans and community requirements are diminished, presenting an opportunity for the side with the most political and financial power to win.[210] Studies tend to indicate that local government and the general public are weaker partners in their relations with business, with the latter in a privileged position by virtue of control over capital and investment decisions that affect local politicians' capacity to govern.[211]

In recent years, national focus seems to have turned from attempting to rectify these perceived process and procedural weaknesses toward developing planning and zoning philosophies and factor approaches that will stave off claims of loss of investment-backed expectations while functioning within current political realities. A multitude of philosophies and factor approaches are currently being advanced in this regard. These philosophies and factor approaches commonly involve the attraction and retention of residents to residential developments and consumers to commercial developments. These philosophies and factor approaches were generally found to be subjectively asserted. Empirically, "little work has been done on the specific neighborhood factors affecting mobility behavior."[212]

An extensive literature review of academic peer-reviewed journal articles yielded a great deal of commentary from academic researchers and practitioners discussing the merits and perils of the professed philosophies and factor approaches. However, it revealed little detailed field research data testing these claims. The conducted research was invariably of a limited scope, restricted not only in geographic area (generally a single city) but was also limited in scope of study, usually focusing on only a single development located in a specific marketplace. Little objective multi-factor field research involving these philosophies and factors was found. John Tomaney and David Bradley in their article *The Economic Role of Mobile Professional and Creative Workers and Their Housing and Residential Preferences: Evidence from North East England* state "The significance of residential sites with exceptional amenities and intra-regional accessibility in terms of their contribution to economic development has been relatively

[209] Paul G. Lewis, *Offering Incentives for New Development: the Role of City Social Status, Politics, and Local Growth Experiences*, Journal of Urban Affairs, v. 24, no. 2, 143 (2002).
[210] Allan Jacobs, *The Rincon Hill Projects*, Places, v. 16, no. 2, 25 (Cambridge, Mass., Spring 2004).
[211] Paul G. Lewis, *Offering Incentives for New Development: the Role of City Social Status, Politics, and Local Growth Experiences*, Journal of Urban Affairs, v. 24, no. 2, 144-145 (2002) (internal citations omitted).
[212] Barrett A. Lee, R.S. Oropesa, & James W. Kanan, *Neighborhood Context and Residential Mobility*, Demography, Vol. 31, No. 2, 250 (May, 1994).

neglected. Much more research is needed in this hitherto little studied area."[213] Barrett Lee, R.S. Oropesa, and James Kanan echo this finding in their article *Neighborhood Context and Residential Mobility*, reporting that "objective neighborhood attributes that may affect mobility directly have been overlooked in decision-making research."[214] Without such objective research-based data, any type of governmental regulation in response to the professed philosophies and factor approaches identified in the academic peer-reviewed journal articles could be challenged as based upon mere conjecture and thus arbitrary and capricious and violative of the standard for valid governmental regulation provided by the United States Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778 (1984).[215] This is also problematic in light of the *Euclid* Court's standard for valid exercise of the police power: that any regulation enacted be not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[216]

IV. An Objective Examination of the Relationship Between Identified Philosophies and Factor Approaches and Successful Development Within the Marketplace

Responding to this identified deficiency, field research was conducted in an attempt to glean broader-based objective data for the philosophies and factor approaches encountered during the academic literature review. The work of Earl Babbie, Campbell Professor Emeritus in Behavioral Sciences at Chapman University and author of *The Practice of Social Research*, was consulted for guidance in field research design, administration and analysis. Babbie explains that researchers look for regularity in social behavior through careful observation and measurement, the discovery of relationships, and the framing of models and theories.[217] In his book *Survey Research Methods*, Babbie cautioned that in practice, the researcher deals with phenomena that also come under the purview of his or her held ideology. The danger is that the researcher may be so personally committed to a particular ideological stance that the commitment prevents maintaining openness.[218] To counter this, the objective standard of success and failure

[213] John Tomaney & David Bradley, *The Economic Role of Mobile Professional and Creative Workers and Their Housing and Residential Preferences: Evidence from North East England*, The Town Planning Review, v. 78, no. 4, 527 (2007).
[214] Barrett A. Lee, R.S. Oropesa, & James W. Kanan, *Neighborhood Context and Residential Mobility*, Demography, Vol. 31, No. 2, 253 (May, 1994).
[215] 467 U.S. 837, 844, 104 S.Ct. 2778 (1984).
[216] *Village of Euclid, Ohio*, 272 U.S. at 394-395 (internal citations omitted).
[217] Earl Babbie, *Survey Research Methods*, 20 (Second Edition, Wadsworth Publishing Company, Belmont, California, 1990).
[218] Earl Babbie, *Survey Research Methods*, 27 (Second Edition, Wadsworth Publishing Company, Belmont, California, 1990).

was selected to compare the philosophies and factor approaches against. Jane Jacobs, in *The Death and Life of Great American Cities*, explains that cities are an immense laboratory of trial and error and failure and success. This is the laboratory in which city planning should have been learning, forming and testing its theories. Instead, practitioners and teachers of this discipline have ignored the study of success and failure in real life.[219] Robert Owens explains there is a significant need for quality objective-based analysis that could be used to lower a portion of development risk.[220] After interviewing several developers on this topic, Owens reports in his article *Subdivision Development: Bridging Theory and Practice* that

> A topic emphasized by all the developers contacted involved the unusually high risks that go with land development. Several mentioned that the average person has difficulty grasping the many potential problem areas. According to the developers, these risks are many and varied and virtually impossible to fully anticipate. For example, three common refrains were meeting governmental and utility regulations, dealing with neighbor complaints, and correcting unforeseen environmental problems. Of course, the developers pointed out the very real market risk that the lots may be the wrong size, offered at the wrong asking price, or in the wrong location to satisfy the customer.[221]

Owens proposes an examination of all aspects of successful and unsuccessful developments in an area be undertaken as a basis for ascertaining success.[222]

Commenting on the limitations of their own land use research, Barrett Lee, R.S. Oropesa and James Kanan advise that researchers should move up the geographic scale. Such an approach provides variation in the market variables with a sample spanning numerous cities and metropolises. By taking multiple locations into account, "it promises a more definitive assessment of the connection between community context and mobility than we have been able to offer."[223]

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[219] Jane Jacobs, *The Death and Life of Great American Cities*, 6 (Vintage Books Edition, Random House, Inc., New York, 1992).
[220] Robert W. Owens, *Subdivision Development: Bridging Theory and Practice*, The Appraisal Journal, v. 66, no. 3, 274-281 (July 1998).
[221] Robert W. Owens, *Subdivision Development: Bridging Theory and Practice*, The Appraisal Journal, v. 66, no. 3, 274-281 (July 1998).
[222] *Id.*
[223] Barrett A. Lee, R.S. Oropesa, & James W. Kanan, *Neighborhood Context and Residential Mobility*, Demography, Vol. 31, No. 2, 264-265 (May, 1994) (internal citations omitted).

Babbie explains that research aims at the observation and understanding of overall patterns of co-relationship, in this case with a development. The utility is in its generalizability. The larger the scope of phenomena it explains, the more useful it is. The goal of research is normally to expand the explanatory power of findings throughout the population.[224] The field research was designed to ascertain the relationship of the philosophies and factor approaches encountered during the academic literature review with developments identified as successful and challenged within the marketplace.

The field research was not designed to determine the reasons why each development studied was successful or challenged. It was designed to record which philosophies and factor approaches were present within and/or proximate to each development studied. Upon completion of the field research, results from all of the studied developments identified to be successful were be compiled to determine which philosophies and factor approaches, if any, were common amongst these developments. The same process was undertaken for the results from all of the studied developments identified to be challenged. After these results were compiled, each set of results was compared to determine which philosophies and factor approaches, if any, were more prevalent in the compilation of developments identified to be successful than in the compilation of developments identified to be challenged, were prevalent in both, or were more prevalent in the compilation of developments identified to be challenged than in the compilation of developments identified to be successful.

Babbie notes that questionnaire items must be clear and unambiguous so that the respondent knows exactly what question he or she is expected to answer. The respondent should be able to read an item quickly, understand its intent, and select or provide an answer without difficulty.[225] All field research questions were designed as short descriptive phrases of philosophies and factor approaches. Closed-ended questions, where the respondents were asked to select their answer from among a list provided, were utilized. Two recognized guidelines were followed in the construction of the closed-ended questions.[226] The response categories provided were exhaustive, including all possible responses, and the answers were mutually exclusive so that the respondents did not feel compelled to select more than one. For every field research question asked that did not require a yes or no answer, standardized sliding scales were utilized to document the proximity to or presence of philosophies and factor approaches within and

[224] Earl Babbie, *Survey Research Methods*, 24-25 (Second Edition, Wadsworth Publishing Company, Belmont, California, 1990).
[225] Earl Babbie, *Survey Research Methods*, 128-130 (Second Edition, Wadsworth Publishing Company, Belmont, California, 1990).
[226] Earl Babbie, *Survey Research Methods*, 127-128 (Second Edition, Wadsworth Publishing Company, Belmont, California, 1990).

surrounding developments identified as successful and challenged. All questionnaire items were scrutinized concerning their ability to engender reliable response.[227]

County Appraiser/Assessing Officers were determined to be a knowledgeable local contact who could provide a somewhat detached perspective in selecting the developments for study and responding to questions concerning the developments. In their official capacity, each Appraiser/Assessing Officer routinely undertakes examination of the real property within their jurisdiction at a level that each property can be valued on an ongoing basis for taxation purposes. This examination and valuation process uniformly takes place across the United States utilizing a document entitled *The Uniform Standards of Professional Appraisal Practice*, which is recognized by federal law as the accepted standards for professional appraisal practice in North America.[228]

For purposes of the study, the Appraiser/Assessing Officer in each county identified one residential development that was currently facing challenges and one of its contemporary residential developments that was not and/or one commercial development that was currently facing challenges and one of its contemporaries that was not. Interestingly, some of these high population growth counties contained little new pure commercial development. In those cases, only residential or mixed use developments were studied. Studying only one pair of residential and/or commercial developments identified to be successful and challenged created paired developments for comparison. This pairing of developments was used to account for individual office sensitivities in regard to the successful/challenged distinction. Questions were also added to confirm the successful/challenged distinction. This further assured that an equal number of developments identified to be successful and challenged would be studied.

Researchers typically attempt to limit their staffs to the best available interviewers. The quality of data collected could be reduced by the decreased quality of the interviewers.[229] Additionally, there was a concern that understanding could be obscured if the discussion took place in any context other than face to face. Reading historical accounts often leaves one longing for the understanding gained by actual observation. Physical presence would allow viewing and photographing of the developments for future reference as well as provide an increased sense of context.

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[227] Earl Babbie, *Survey Research Methods*, 129 (Second Edition, Wadsworth Publishing Company, Belmont, California, 1990).
[228] *See* The Financial Institution Reform, Recovery and Enforcement Act of 1989 (Pub. L. 101-73).
[229] Earl Babbie, *Survey Research Methods*, 65-66 (Second Edition, Wadsworth Publishing Company, Belmont, California, 1990).

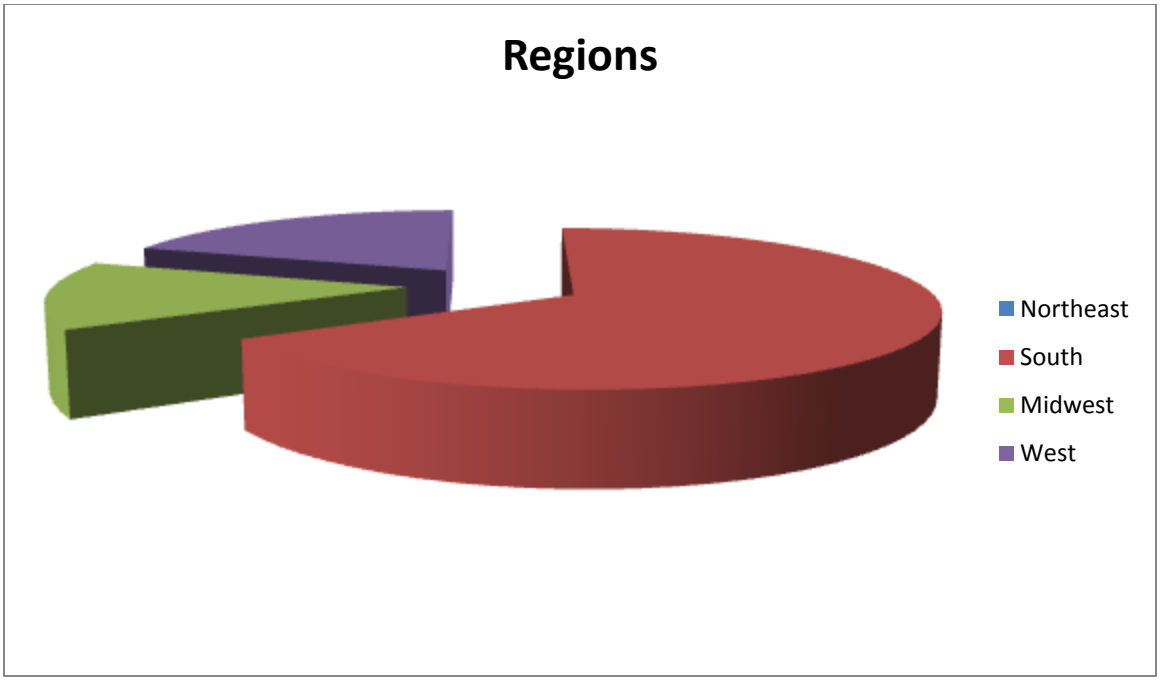
This concept was discussed with a fellow doctoral researcher who was involved in examining issues of governmental regulation, including the driving forces supporting urban concentration: convenience, quality of life, and safety and security. It was determined that both inquiries were compatible in process and subject pool and thus a single questionnaire could be designed and administered with individual sections accommodating unique research needs. This allowed a combining of physical and financial resources essential to the success of an undertaking of the envisioned magnitude.

The field research questionnaire was utilized to compare developments identified as successful and challenged within the fifty (50) fastest growing counties across the United States between 2000 and 2010, as identified by the U.S. Census Bureau. These parameters ensured a nationwide sample base in which local economic conditions supported growth. Responses were received concerning 128 distinct developments, 64 identified as successful paired with 64 identified as challenged, throughout the United States.

The following results were gleaned via administration of the questionnaire. The data is reported as a "frequency," defined as a description of the number of times the various attributes of a variable are observed in the sample, a "percentage," computed by dividing a frequency by the number of observations or a "mean," defined as an average computed by summing the values of several observations and dividing by the number of observations.[230] This is done to ascertain a co-relationship and reflect descriptive characteristics associated with the development[231] but not to assume a cause-effect relationship. Cause-effect statistical analysis was rejected. Albert Wilson explains that the assertion that a cause-effect relationship can be demonstrated by a test of significance within the regression model is an assertion that is not correct. One of the reasons for this is that a regression relationship is itself a hypothesized relationship. One cannot test a hypothesis with a hypothesis.[232] Not all questions in the questionnaire were connected by the respondents to every development. When viewing each chart, the *N number* reflects the number of developments out of the 128 possible for which a recordable response was provided by the corresponding assessing/appraising officer.

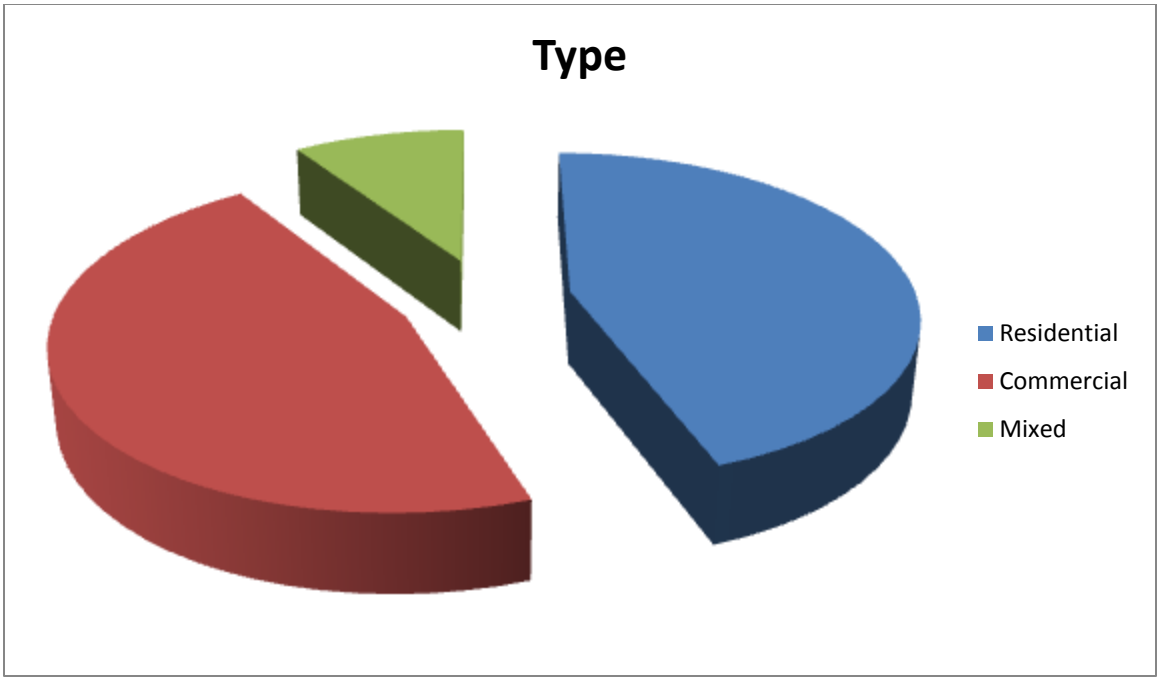
[230] Earl Babbie, *Survey Research Methods (Second Edition)* 367, 374 (Wadsworth Publishing Company, Belmont, California 1990).
[231] Earl Babbie, *Survey Research Methods (Second Edition)* 9, 369-370 (Wadsworth Publishing Company, Belmont, California 1990).
[232] Albert R. Wilson, *Proximity Stigma: Testing the Hypothesis*, The Appraisal Journal v. 72, no. 3, 253-62, 254 (Summer 2004).

At the conclusion of this field research process, data was then compiled and compared to determine the proximity to or presence of the philosophies and factor approaches within and surrounding the studied developments identified as successful and challenged. The following is descriptive background data concerning the researched developments.



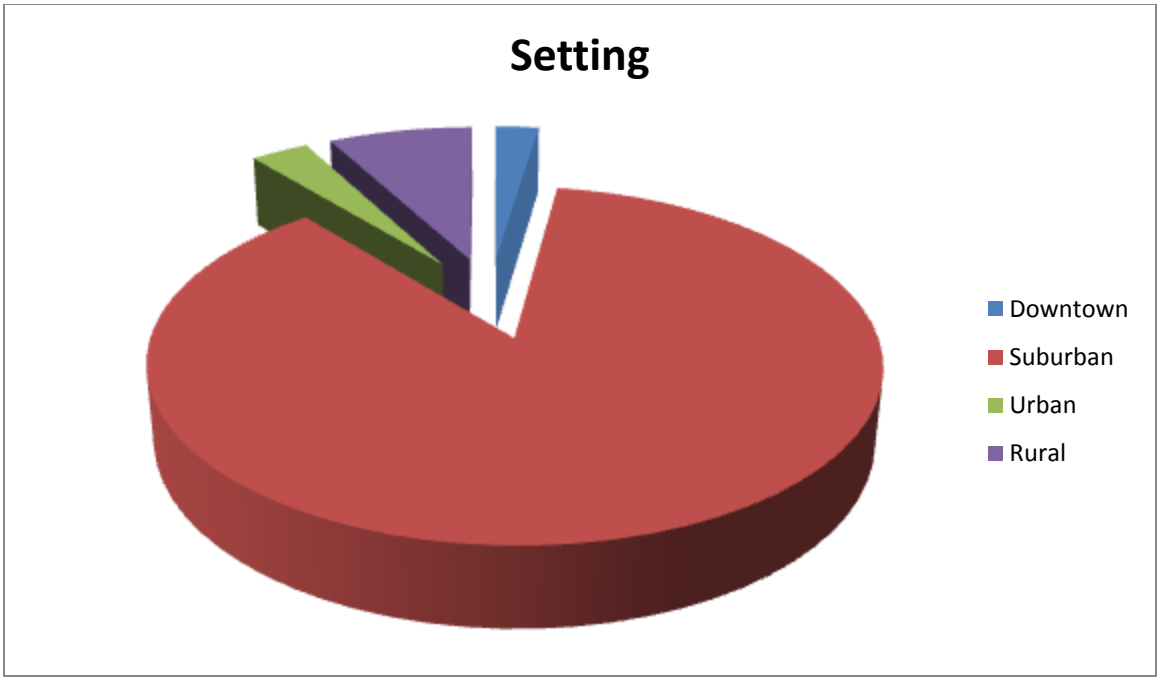
N = 128

The 2010 US Census divided the United States into four (4) regions. These regions were utilized for descriptive purposes. Interestingly, even though research sites included the Washington D.C. metropolitan area, none of the fastest growing counties was actually located in the Northeast region. Eighty-five (85) of the one hundred twenty-eight (128) sites identified, researched and visited were located in the South region, eighteen (18) in the Midwest region, and twenty-five (25) in the West region.



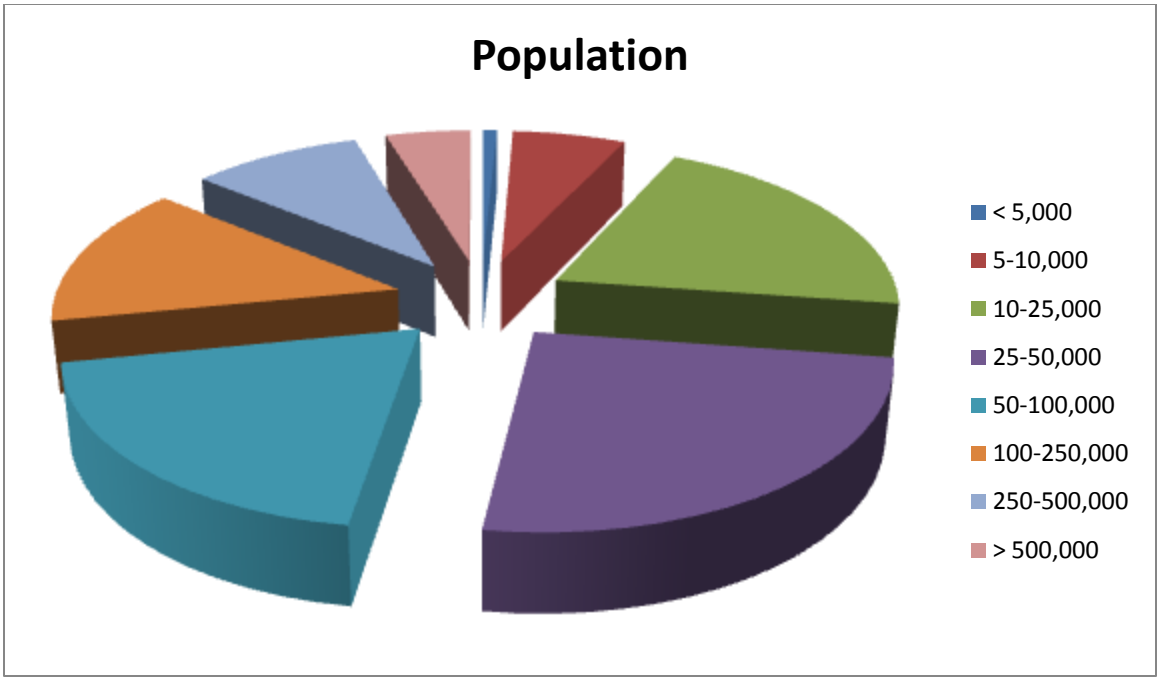
N = 128

The individual assessing/appraisal office was tasked with identifying developments in pairs. While most of the development pairs identified were residential/residential, commercial/commercial, or mixed use/mixed use, on a limited number of occasions, a residential development was paired with a mixed use development which was predominantly residential or a commercial development was paired with a mixed use development which was predominantly commercial. In all, fifty-seven (57) residential developments, fifty-nine (59) commercial developments and twelve (12) mixed use developments were studied.



N = 128

A setting classification question was included for background purposes. By far, most of the developments were located in a setting identified as suburban by the assessing/appraising officers. This constituted one hundred eleven (111) of the one hundred twenty-eight (128) sites. Of the remaining sites, three (3) were identified as being in a downtown setting, four (4) in an urban setting and ten (10) in a rural setting.



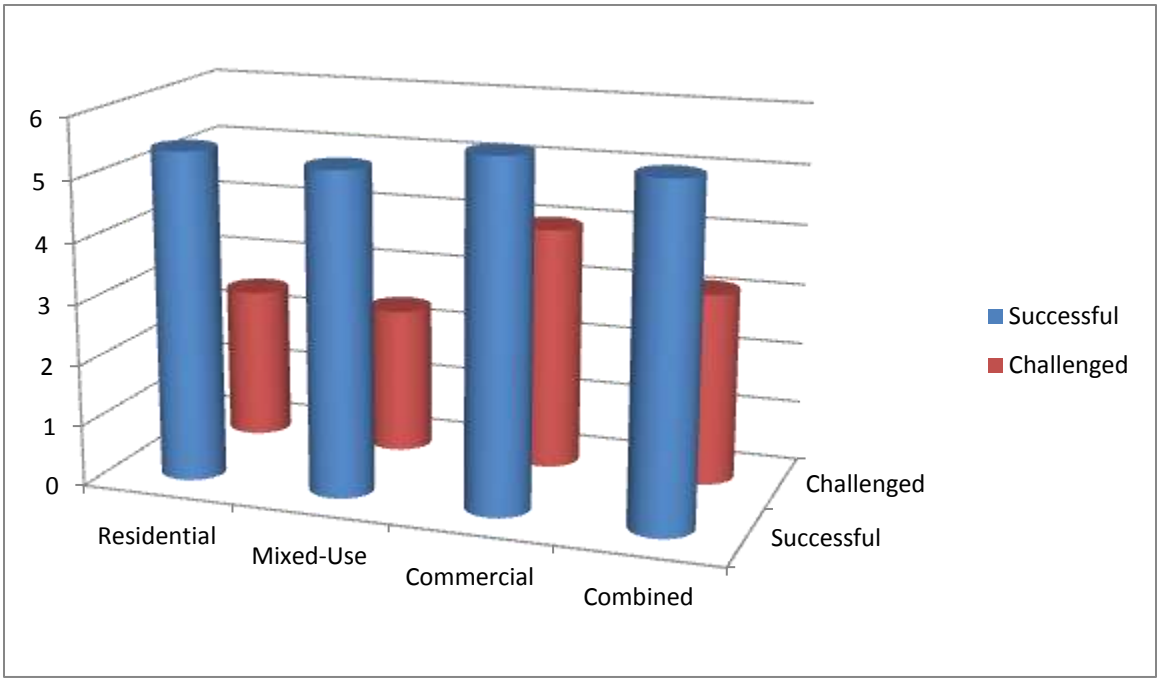
N = 128

A population classification question was included for background purposes. It was interesting that while geographically growth often seemed to occur adjacent to large metropolitan areas, the assessing/appraising officers were generally more specific and limited in their area definitions. One (1) was defined as having a population of less than five thousand (< 5,000), eight (8) with a population of five to ten thousand (5-10,000), twenty-six (26) with a population of ten to twenty-five thousand (10-25,000), thirty-two (32) with a population of twenty-five to fifty thousand(25-50,000), twenty-five (25) with a population of fifty to one hundred thousand (50-100,000), eighteen (18) with a population of one hundred to two hundred fifty thousand (100-250,000), twelve (12) with a population of two hundred fifty to five hundred thousand (250-500,000) and six (6) with a population greater than five hundred thousand (> 500,000).

Three questions were designed in an attempt to confirm disparity between the developments identified as successful and those identified as challenged. It was believed that completion and occupancy rates would apply to owner-occupied residential developments while the additional factor of rental rates might apply in apartments, mixed use and commercial settings.

COMPLETION RATES WITHIN DEVELOPMENT

(Means)

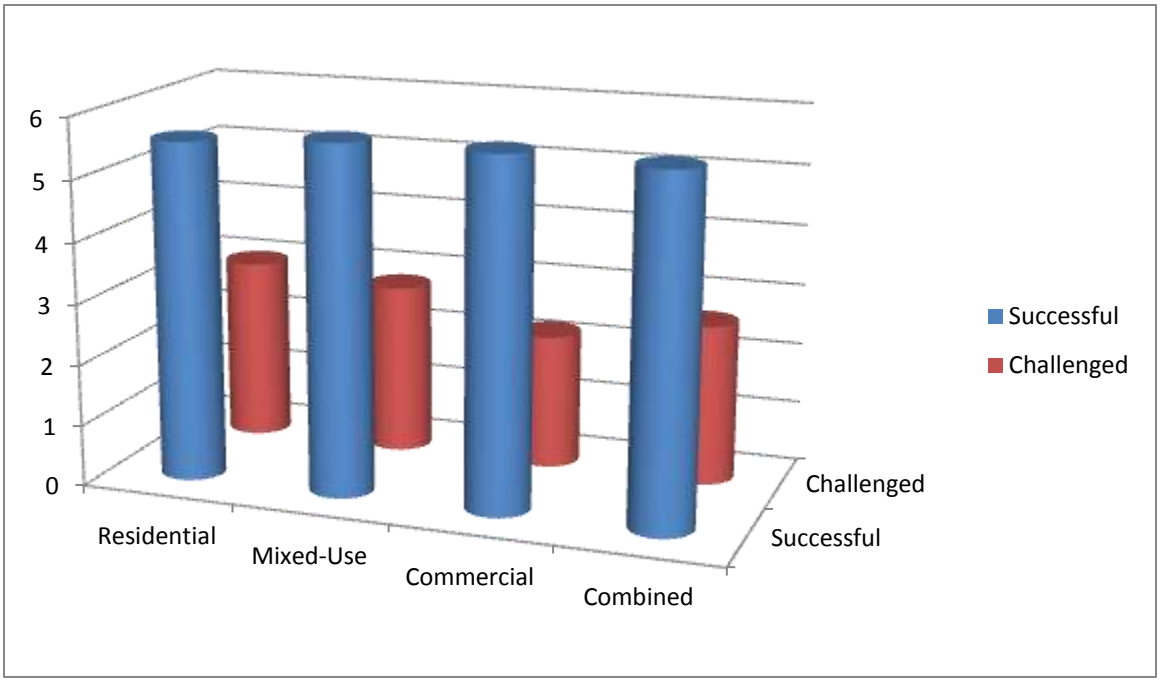


N = 127

Completion rate reflects the number of units completed within the development as opposed to those planned to be completed, as compared with other like developments within the county. The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Far Below Average receives a one (1), Below Average receives a two (2), Slightly Below Average receives a three (3), Average receives a (4), Slightly Above Average receives a five (5), Above Average receives a six (6) and Far Above Average receives a seven (7). As reflected in the foregoing chart, the residential developments identified as successful reflected a mean score in the above average range of 5.41, while the challenged residential developments only reflected a below average mean score of 2.5. This disparity remained in mixed use development, 5.29 versus 2.4, and commercial development, 5.68 versus 4.

OCCUPANCY RATES WITHIN DEVELOPMENT

(Means)

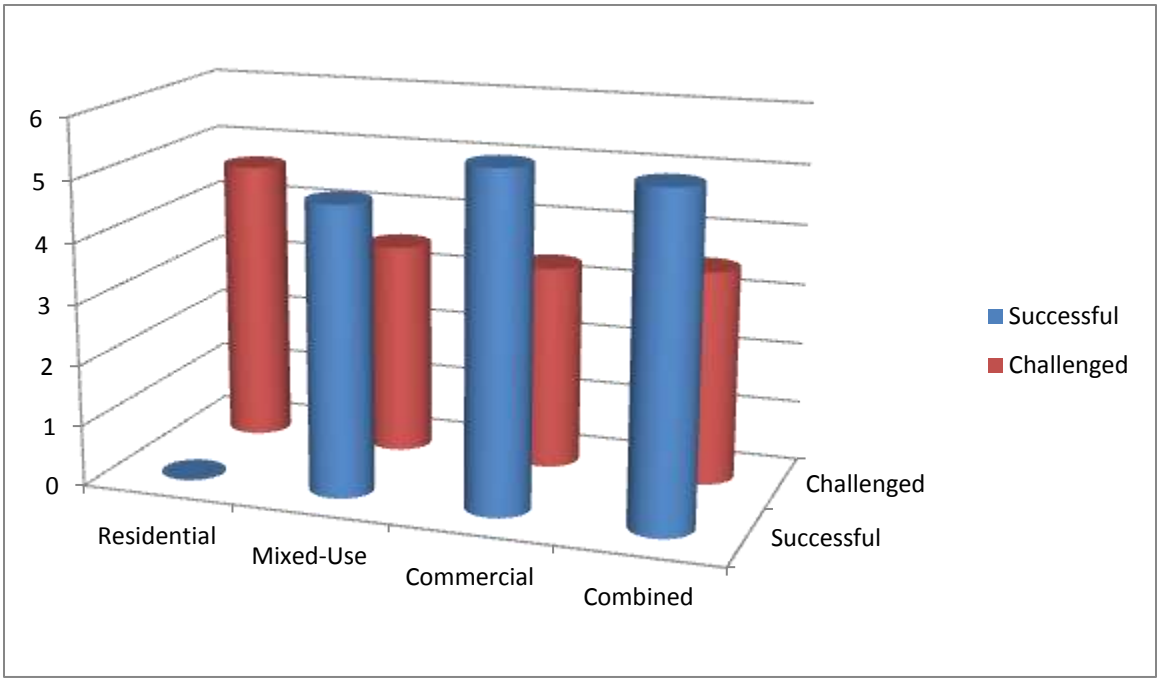


N = 128

Occupancy rates reflect the number of units occupied within the development as opposed to those completed, as compared with other like developments within the county. The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Far Below Average receives a one (1), Below Average receives a two (2), Slightly Below Average receives a three (3), Average receives a (4), Slightly Above Average receives a five (5), Above Average receives a six (6) and Far Above Average receives a seven (7). As reflected in the foregoing chart, the residential developments identified as successful reflected a mean score in the above average range of 5.56, while the challenged residential developments only reflected a slightly below average mean score of 3. This disparity remained in mixed use development, 5.71 versus 2.8, and commercial development, 5.71 versus 2.21.

SQUARE FOOT RENTAL RATES WITHIN DEVELOPMENT

(Means)



N = 55

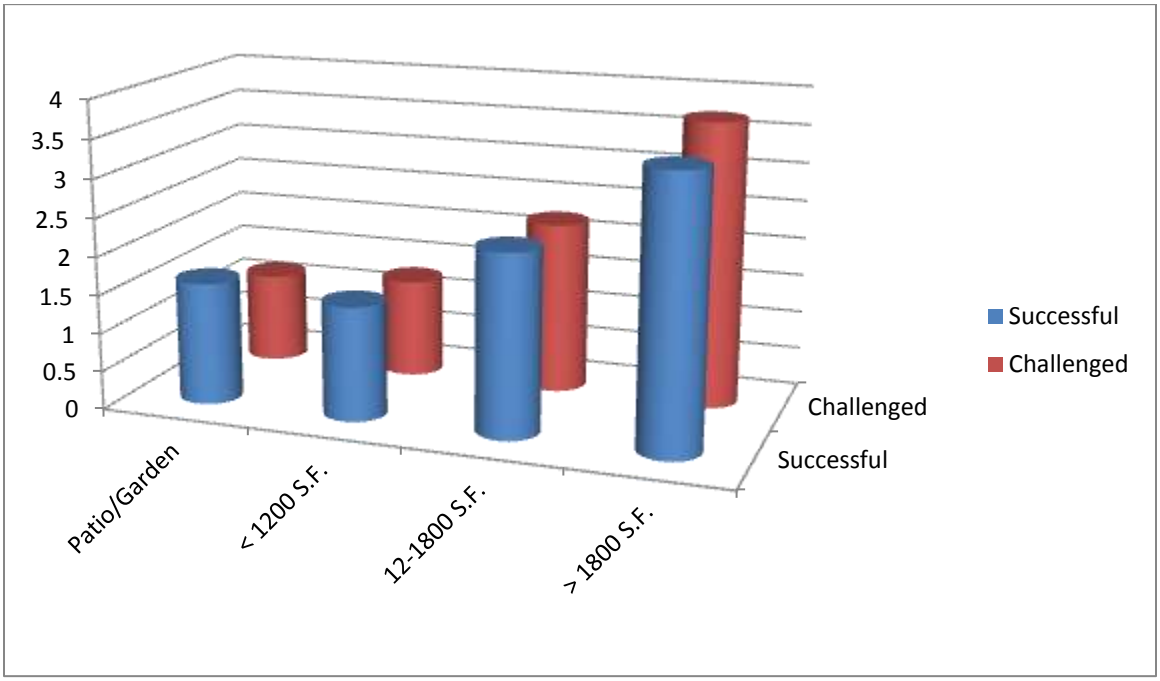
Square foot rental rates reflect the cost of renting completed units within the development as compared with other like developments within the county. The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Far Below Average receives a one (1), Below Average receives a two (2), Slightly Below Average receives a three (3), Average receives a (4), Slightly Above Average receives a five (5), Above Average receives a six (6) and Far Above Average receives a seven (7). As reflected in the foregoing chart, the residential developments identified as successful reflected a mean score of 0, while the challenged residential developments reflected a slightly above average mean score of 4.67. The reason for the mean score of 0 is that the successful residential developments comprised of owner-occupied housing and, as such, did not include rental properties upon which to base the score. The square foot rental rates score for the challenged development reflects the fact that units originally developed for owner-occupation have now entered the rental market. The disparity in mixed use development was 4.75 versus 3.5 and in commercial development was 5.5 versus 3.36.

All three questions reflected a disparity between the residential, mixed use and commercial developments identified as successful and those identified as challenged. These results reflect the type of disparities that would be anticipated with the identification.

With these perfunctory matters addressed, the survey then examined what actually comprised the residential and commercial developments being studied. For residential developments, attention was turned to the size and type of single-family residential houses comprising the developments. There was interest in observing any differences between the successful and challenged developments.

SINGLE FAMILY RESIDENTIAL SIZE AND TYPE

(Means)



N = 69

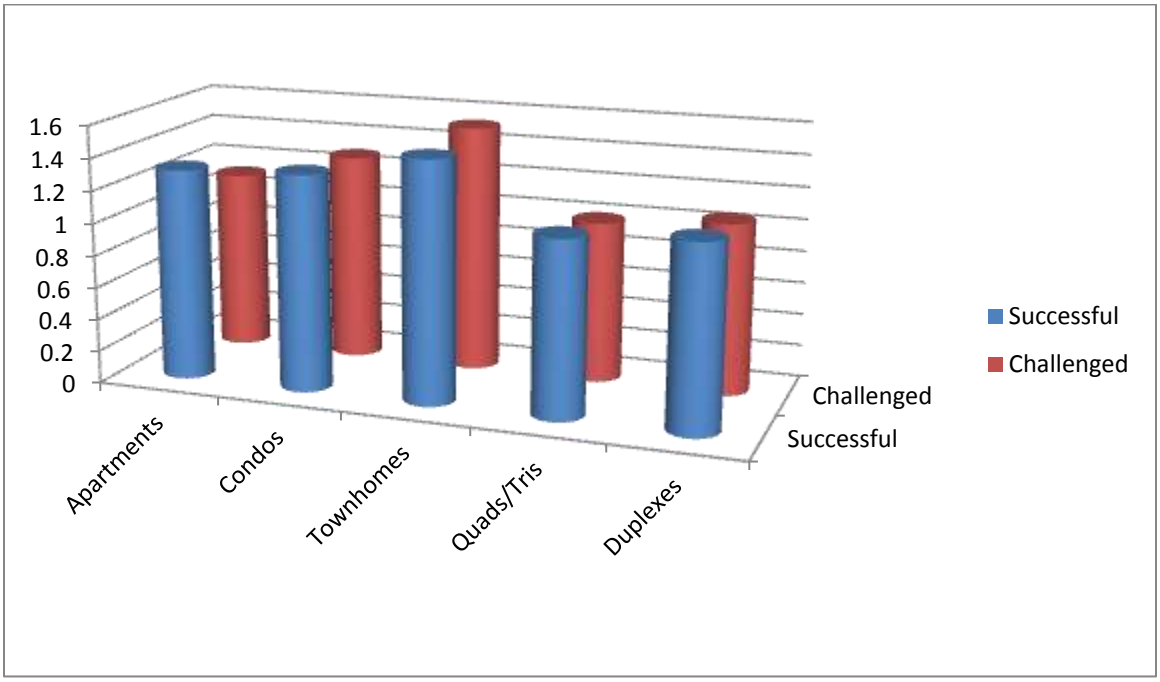
The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for Patio/Garden Homes and Single Family Homes less than 1200

square feet was only 1.6 for successful and 1.18 for challenged developments. Single Family Homes 1200 to 1800 square feet averaged in the minimum to moderate range, at 2.37 for successful and 2.24 for challenged developments. Single Family Homes above 1800 square feet averaged in the moderate to substantial range, at 3.51 for successful and 3.71 for challenged developments.

Suburbs have traditionally been criticized for comprising only identical single-family houses and fostering homogeneous populations and privatized lives. But it is now realized that the contemporary suburb is actually a complex phenomenon, which includes residents of diverse backgrounds, pockets of public or semi-public space, and a variety of workplaces.[233]

OTHER RESIDENTIAL PRESENCE IN THE DEVELOPMENT

(Means)



N = 69

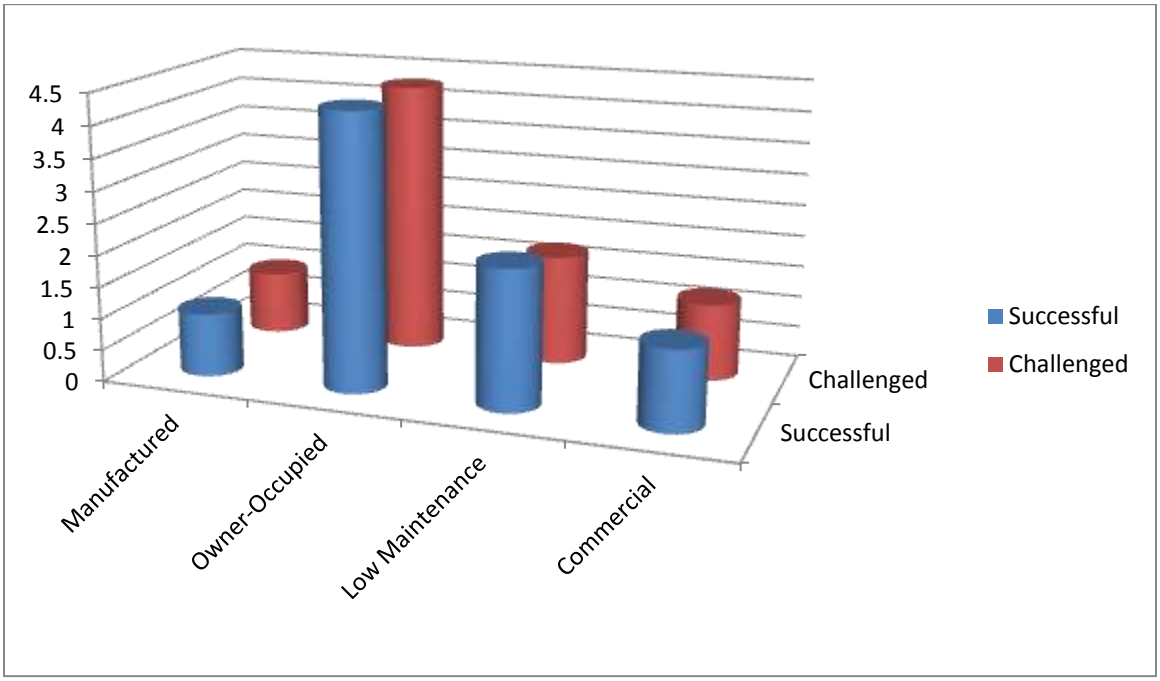
The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present

[233] Rene Davids, *Development, Topography, and Identity: The Dougherty Valley and the New Suburban Metropolis*, Places, v. 20, no. 3, 60-61 (Cambridge, Mass., Fall 2008).

within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for Apartments was 1.31 for successful and 1.12 for challenged developments; Condominiums was 1.34 for successful and 1.29 for challenged developments; Townhomes was 1.49 for successful and 1.53 for challenged developments; Quad-plexes and Tri-plexes was 1.09 for successful and not present in challenged developments; and Duplexes was 1.14 for successful and 1.06 for challenged developments.

CLASSIFICATIONS WITHIN THE DEVELOPMENT

(Means)



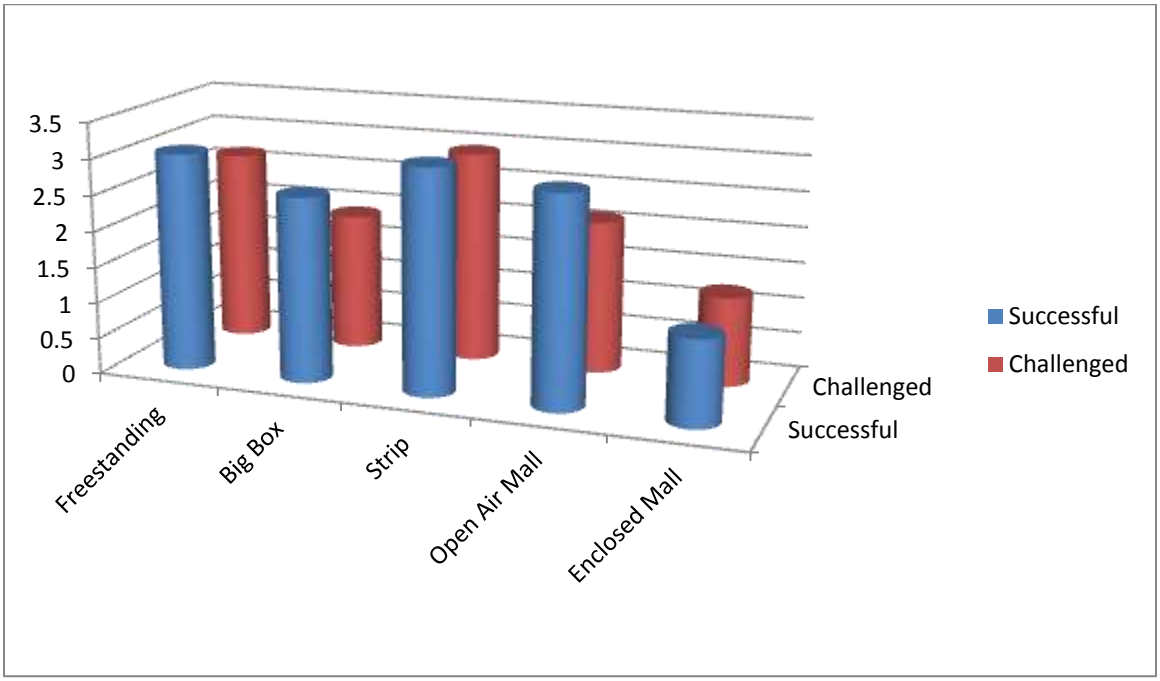
N = 69

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). There was no Manufactured Housing identified within the successful and challenged developments; the average for Owner-Occupied Housing was 4.34 for successful and 4.29 for challenged developments; Low-Maintenance Housing was 2.2 for

successful and 1.74 for challenged developments; and Commercial Development (mixed use) was 1.26 for successful and 1.21 for challenged developments.

TYPE WITHIN COMMERCIAL DEVELOPMENT

(Means)

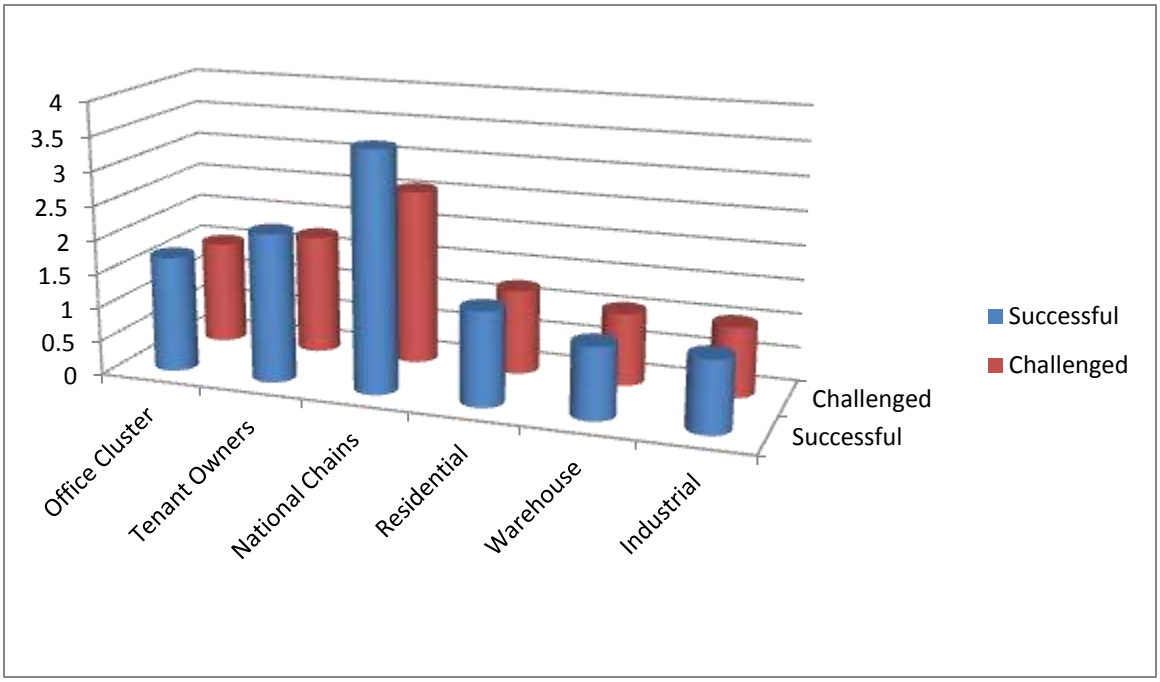


N = 71

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for Freestanding Buildings was 3.03 for successful and 2.67 for challenged developments; Big Box Stores was 2.57 for successful and 1.91 for challenged developments; Strip Shopping Malls was 3.11 for successful and 2.94 for challenged developments; Open Air Malls was 2.91 for successful and 2.12 for challenged developments; and Enclosed Malls was 1.19 for successful and 1.24 for challenged developments.

OTHER PRESENCE IN COMMERCIAL DEVELOPMENT

(Means)



N = 71

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for Office Cluster was 1.7 for successful and 1.52 for challenged developments; Tenant Owners was 2.19 for successful and 1.76 for challenged developments; National Chains was 3.51 for successful and 2.58 for challenged developments; Residential Development (mixed use) was 1.38 for successful and 1.24 for challenged developments; Warehouses was 1.05 for successful and 1.06 for challenged developments; and Industrial Development was 1.05 for successful and 1.03 for challenged developments.

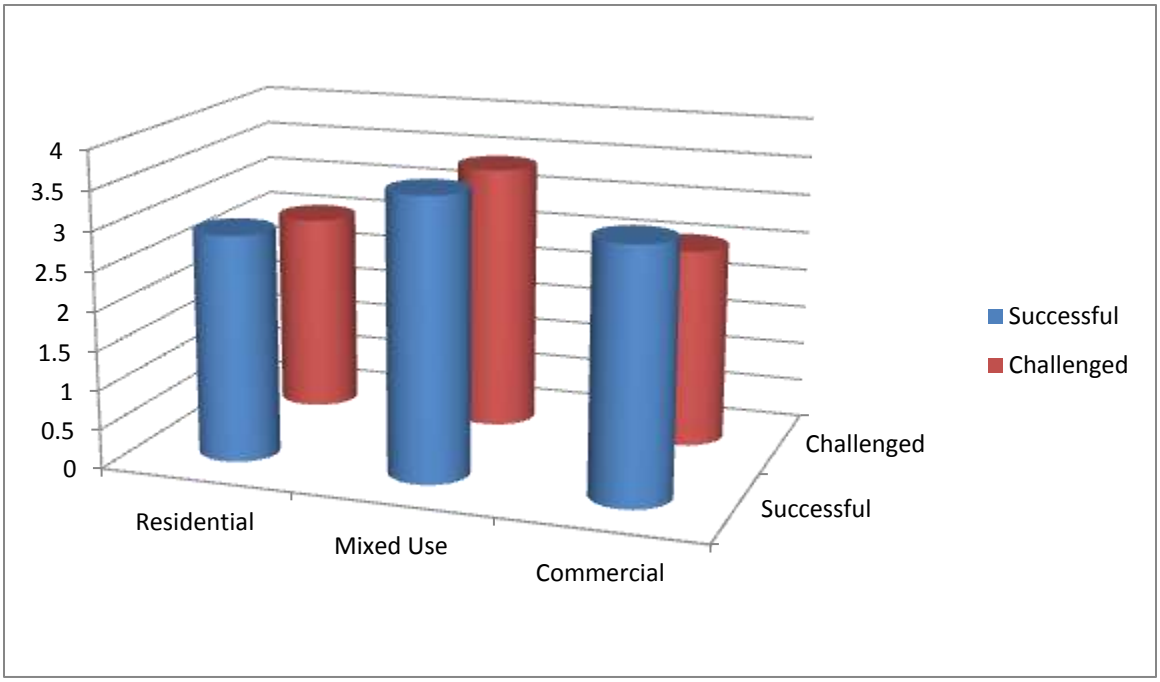
Attention is now turned to the philosophies and factor approaches advanced in response to outward migration and urban decline and degeneration that were encountered during the academic literature review. They are accompanied by tables reporting data from the corresponding questionnaire items for which they provided justification.

In the mid-1800s, it was reasoned that the tide of outward migration and urban decline and degeneration could be stemmed by creating a combination of convenience and beauty in the surroundings of daily life through securing and maintaining attractive and picturesque conditions.[234] This was modeled at the World's Columbian Exposition of 1893 for which Chicago became the "white city," an "incredible transformation of swamps and sandbars into shimmering lagoons and monumental palaces."[235] The City Beautiful movement was born advocating clean paved streets, public places surrounded by buildings in harmonious style and decorated with modern art and rivers with beautiful bridges.[236] It was concluded that Americans needed something more than sewers, elevated railways, and metropolitan water supply systems. They also needed parks and playgrounds, handsome boulevards, civic centers, and decorative monuments.[237]

[234] Frederick Law Olmsted, Jr., *The Town-Planning Movement in America*, Housing and Town Planning, the Annals 51, 172-181, (January 1914).
[235] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 33 (University of California Press, Los Angeles, 1969).
[236] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 45 (University of California Press, Los Angeles, 1969).
[237] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 44 (University of California Press, Los Angeles, 1969)

PRESENCE OF STREETSCAPING (Sidewalks, Trees, Boulevards, Plazas)

(Means)

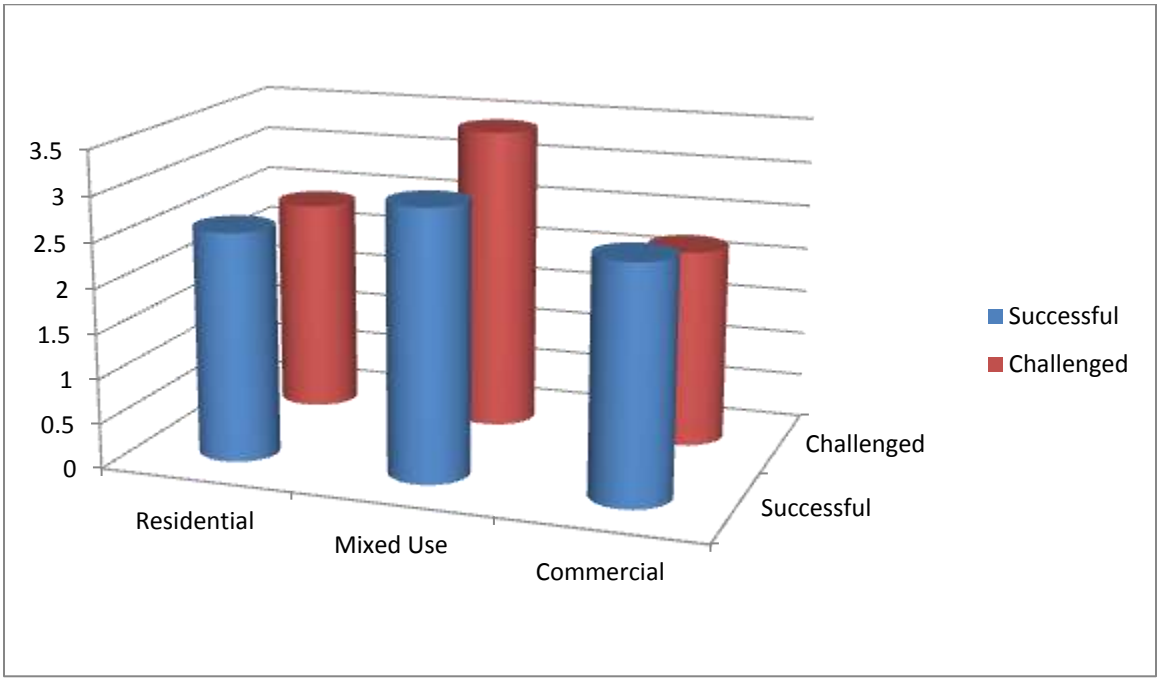


N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Streetscaping (Sidewalks, Trees, Boulevards, Plazas) in residential developments was 2.89 for successful and 2.55 for challenged developments; in mixed use developments was 3.57 for successful and 3.4 for challenged developments; and in commercial developments was 3.19 for successful and 2.54 for challenged developments.

PRESENCE OF ENTRY AND COMMON AREA LANDSCAPING/MONUMENTS/ART

(Means)

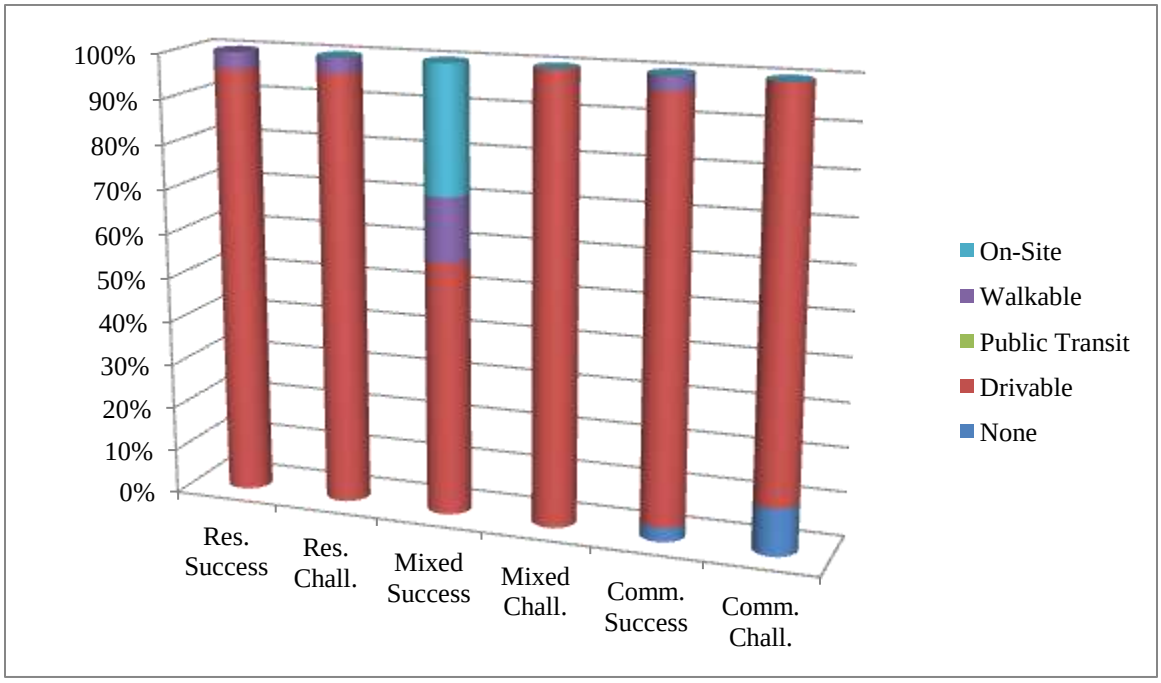


N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Entry and Common Area Landscaping/Monuments/Art in residential developments was 2.56 for successful and 2.4 for challenged developments; in mixed use developments was 3 for successful and 3.4 for challenged developments; and in commercial developments was 2.61 for successful and 2.21 for challenged developments.

LIBRARY ACCESS

(Percentages)

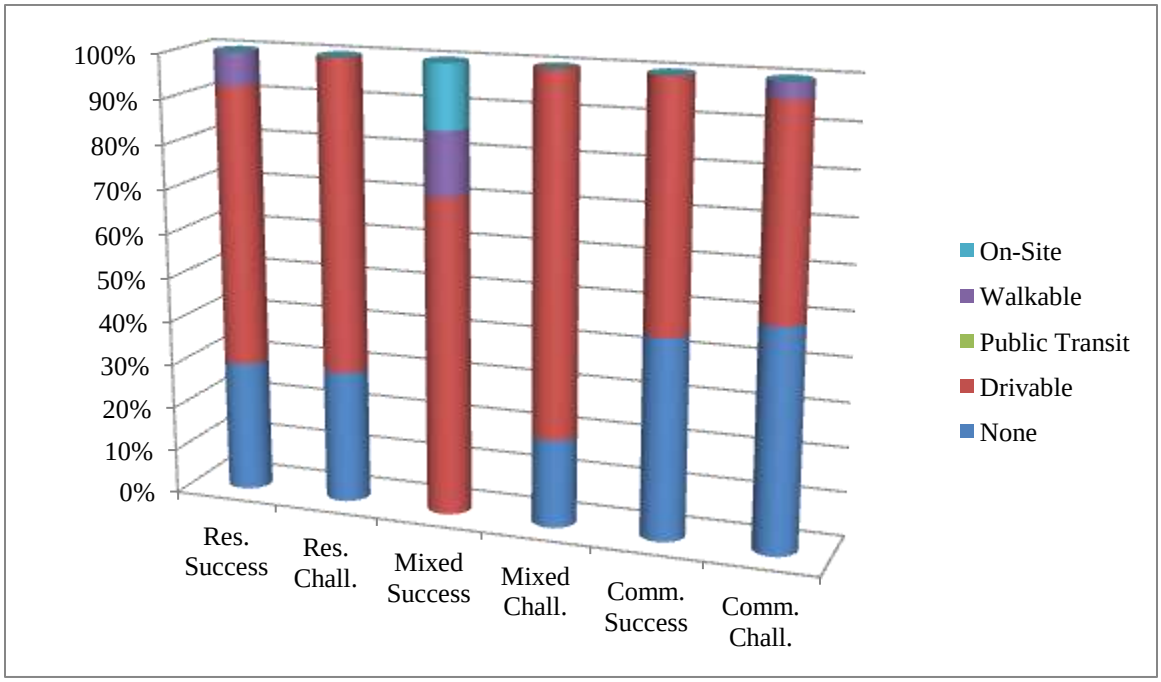


N = 128

The percentages reflect the type of access someone within the development would have to a Library (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

CULTURAL CENTER (Museum, Theater, Concert Hall) ACCESS

(Percentages)

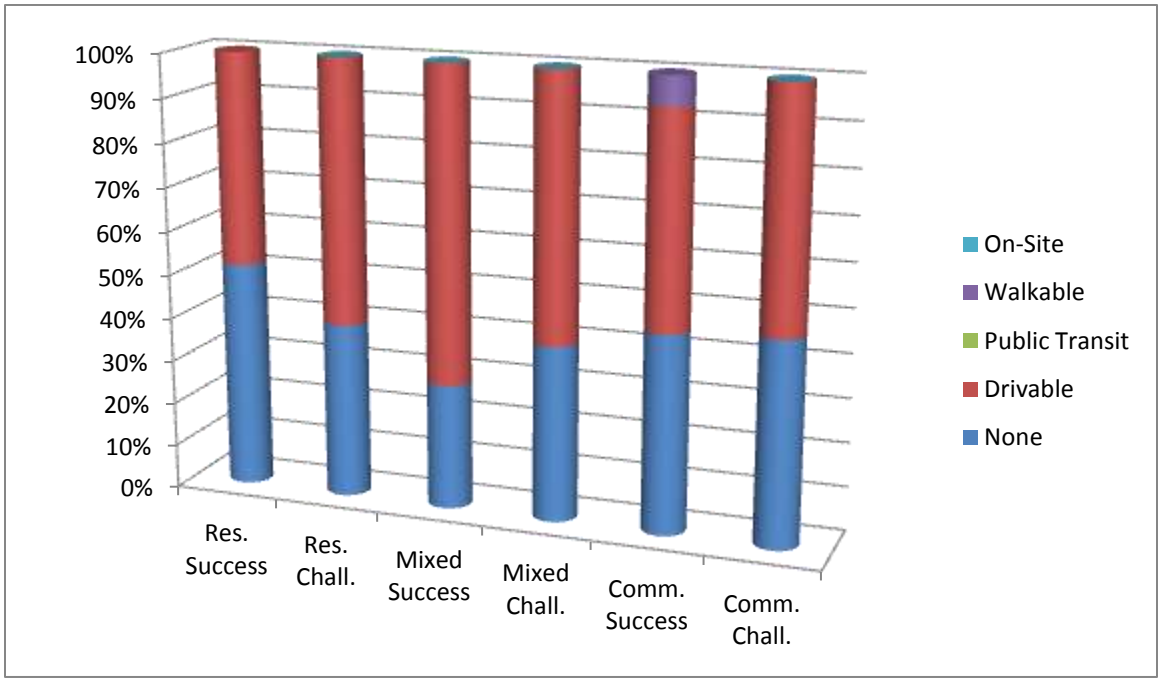


N = 128

The percentages reflect the type of access someone within the development would have to a Cultural Center (Museum, Theater, Concert Hall) (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

CONVENTION CENTER/ARENA/SPORTS STADIUM ACCESS

(Percentages)



N = 128

The percentages reflect the type of access someone within the development would have to a Convention Center/Arena/Sports Stadium (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

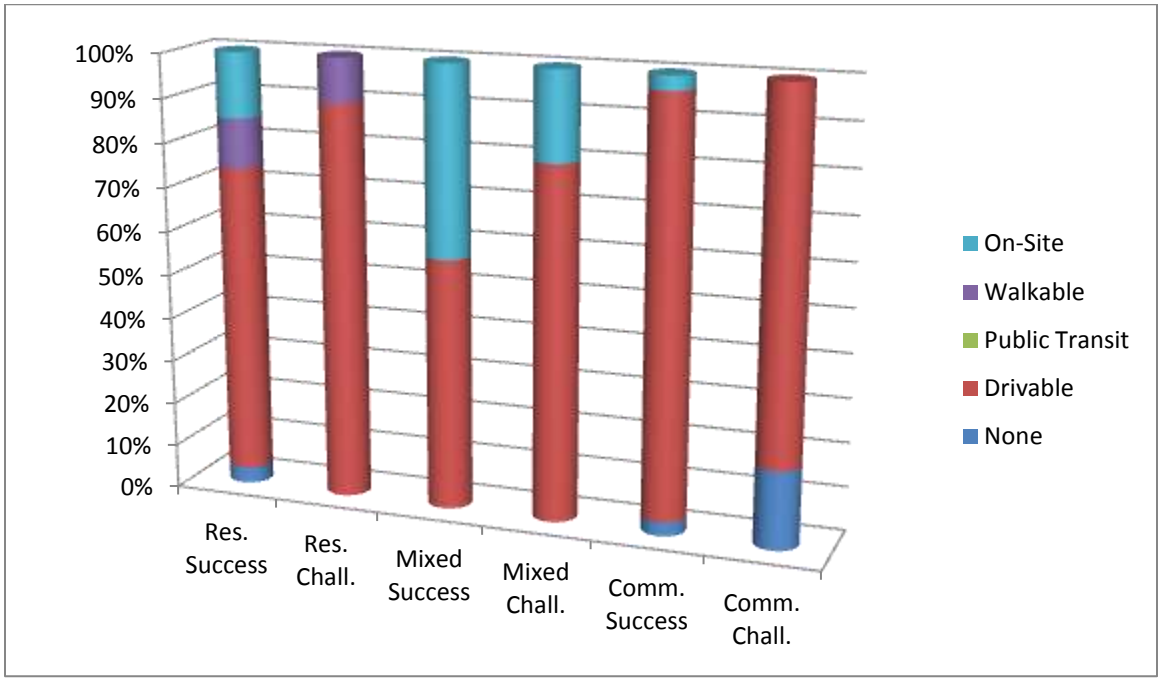
However, it was observed in 1909 that no large American cities had yet adopted a comprehensive scheme for development along economic, aesthetic, or hygienic lines.[238] The City Beautiful movement was then affected by social movements concerned with the living conditions of the working class and its emphasis turned to playgrounds, transportation, and terminals. Outdoor play space afforded such obvious relief to the

[238] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 82-89 (University of California Press, Los Angeles, 1969).

wretchedness of life in the slums that even the most callous citizens acknowledged its necessity.[239]

RECREATION/ACTIVITY/AQUATIC/FITNESS CENTER ACCESS

(Percentages)



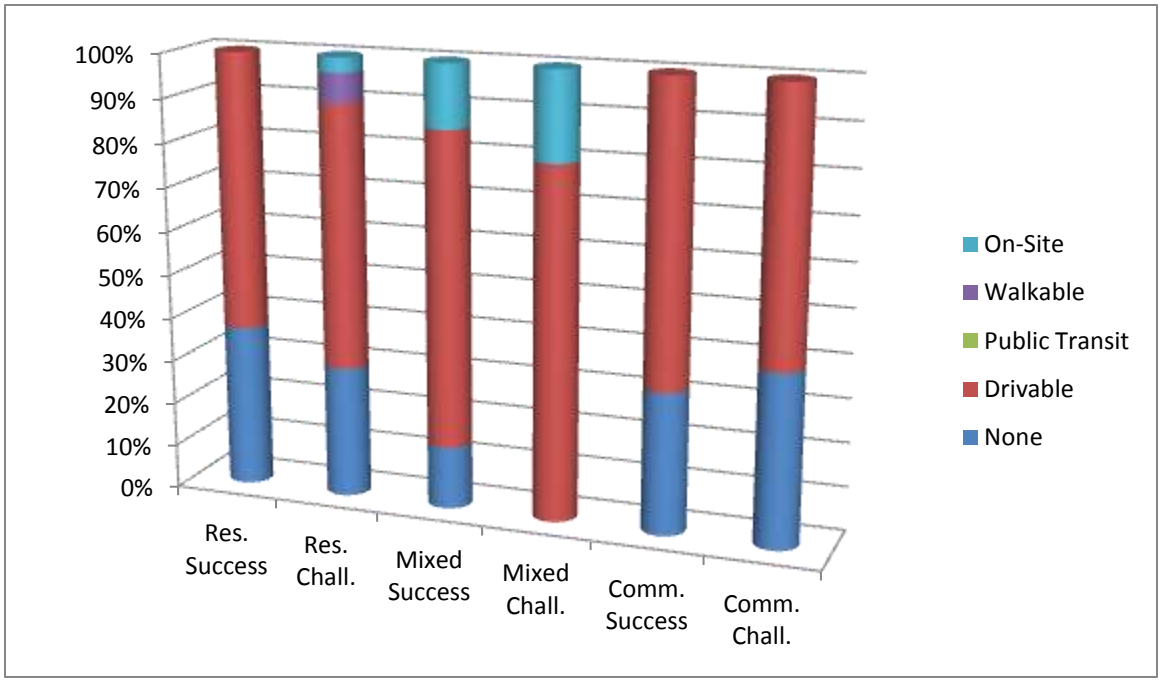
N = 128

The percentages reflect the type of access someone within the development would have to a Recreation, Activity, Aquatic or Fitness Center (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

[239] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 76, 123 (University of California Press, Los Angeles, 1969)

COUNTRY CLUB/RESORT ACCESS

(Percentages)

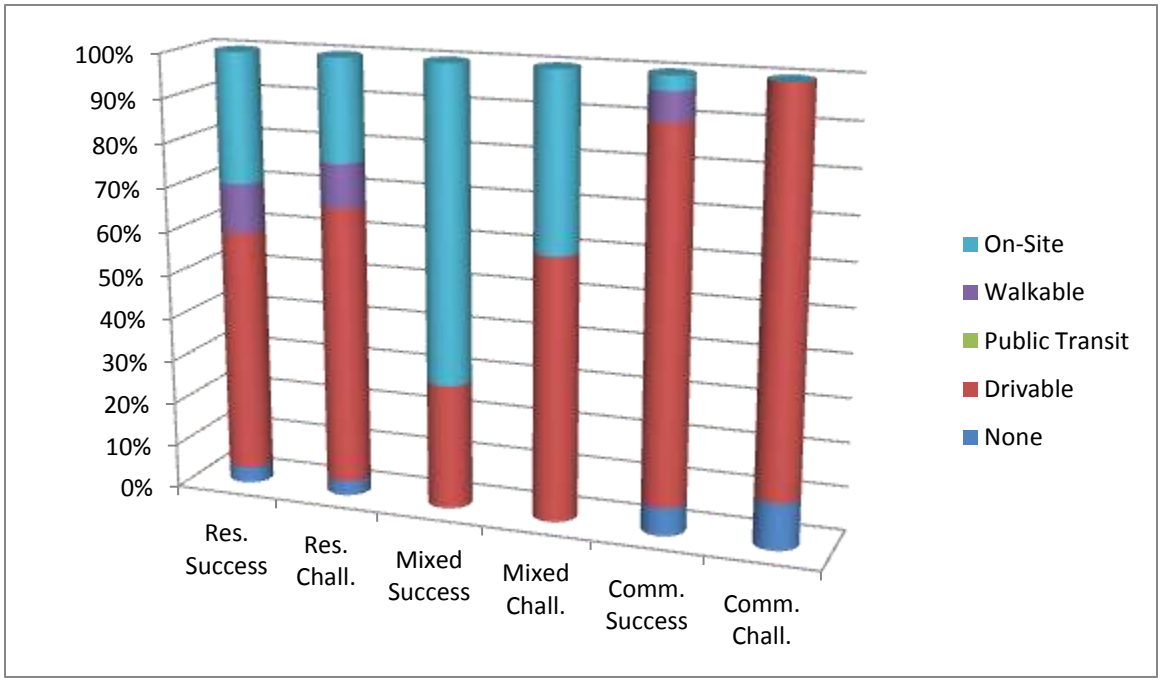


N = 128

The percentages reflect the type of access someone within the development would have to a Country Club or Resort (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

TENNIS/BASKETBALL COURTS ACCESS

(Percentages)

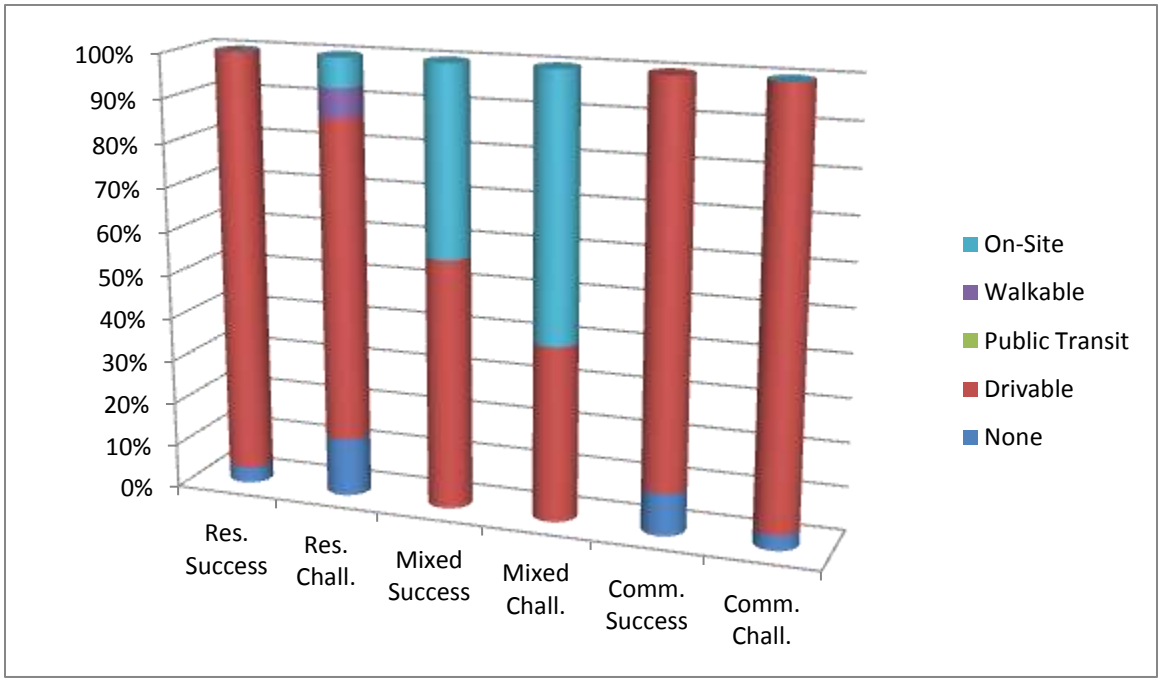


N = 128

The percentages reflect the type of access someone within the development would have to a Tennis or Basketball Court (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

GOLF COURSE ACCESS

(Percentages)

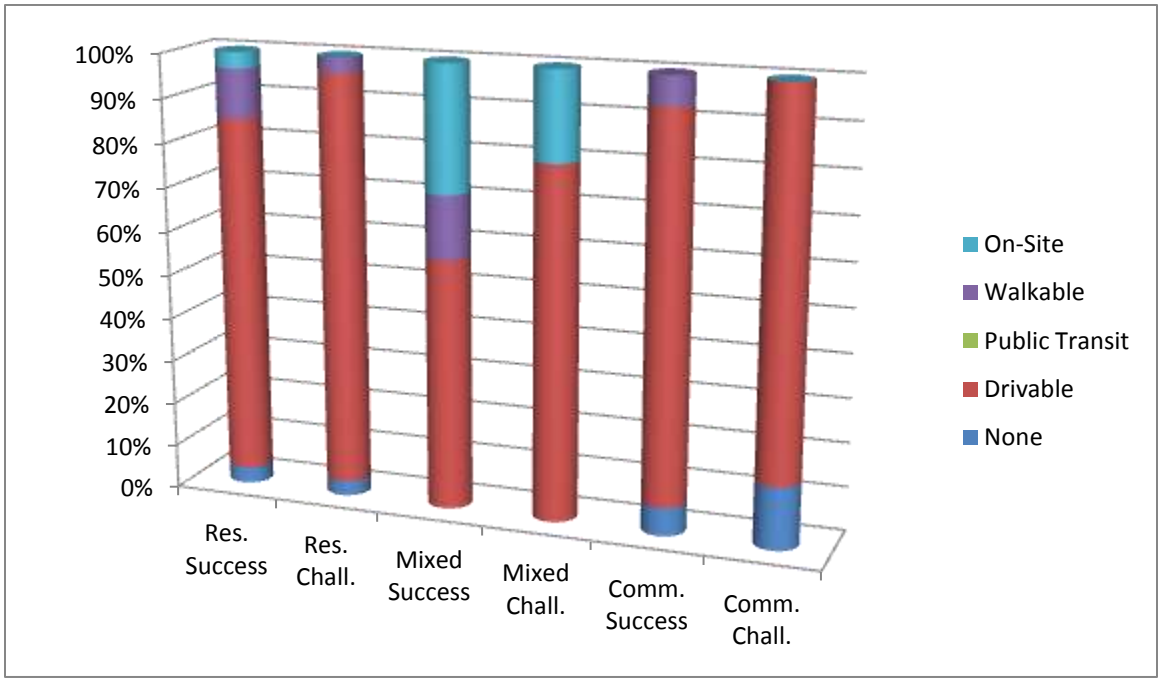


N = 128

The percentages reflect the type of access someone within the development would have to a Golf Course (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

ATHLETIC FIELDS ACCESS

(Percentages)

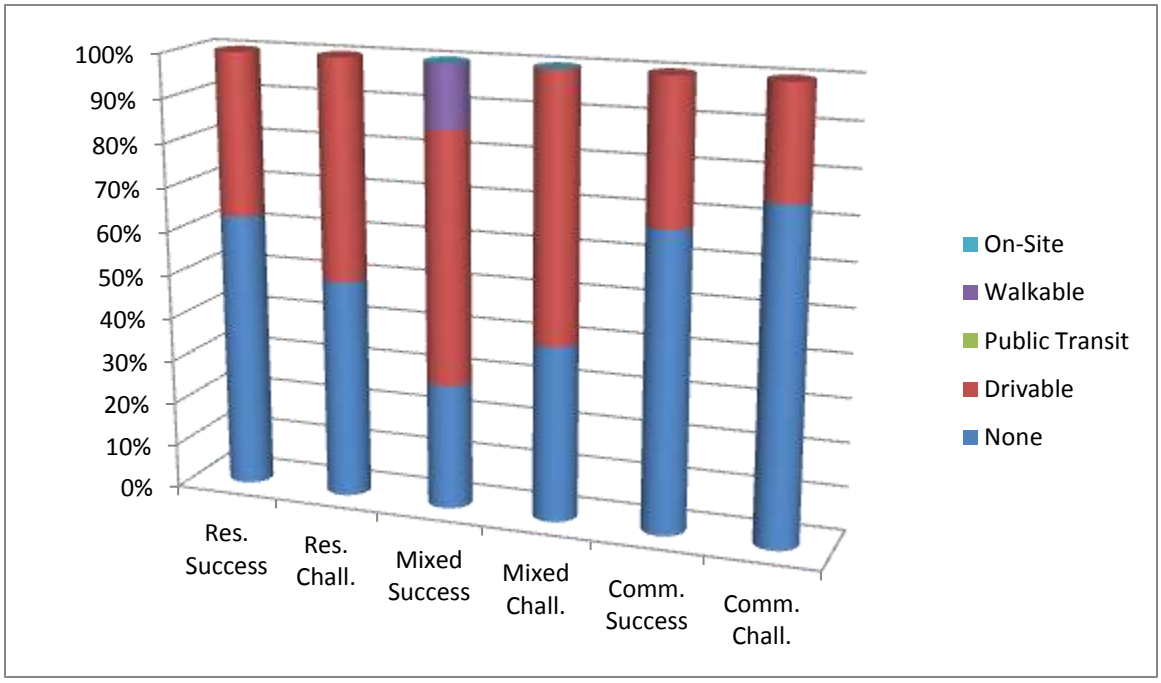


N = 128

The percentages reflect the type of access someone within the development would have to Athletic Fields (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

AMUSEMENT PARK/AQUARIUM/ZOO ACCESS

(Percentages)



N = 128

The percentages reflect the type of access someone within the development would have to an Amusement Park, Aquarium or Zoo (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

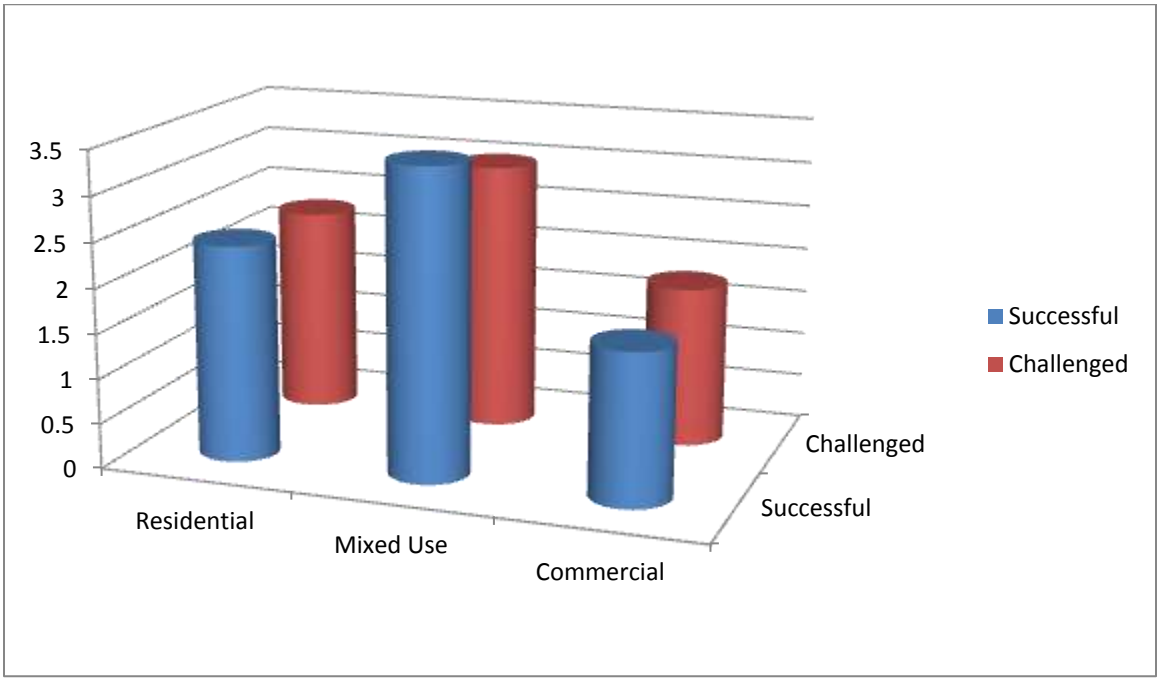
Inspired by the transformation of Chicago for the World's Columbian Exposition of 1893 and the City Beautiful movement in America, Ebenezer Howard gave birth to the British Garden City movement with the publication of *To-morrow: The Peaceful Path to Real Reform* in 1898.[240] Howard envisioned a new type of community, neither urban or rural, that combined the advantages of city and country, centered around a public garden surrounded by a range of public, cultural, and social institutions.[241] Educational,

[240] Robert Freestone, *From Garden City to Green City: The Legacy of Ebenezer Howard*, 71-72 (Parsons, Kermit C. and Schuyler, David ed., the Johns Hopkins University Press 2002).
[241] David Schuyler, *From Garden City to Green City: The Legacy of Ebenezer Howard*, 7-8 (Parsons, Kermit C. and Schuyler, David ed., the Johns Hopkins University Press 2002).

religious, recreational, employment, shopping and civic facilities would be located near residential areas. [242]

PRESENCE OF OPEN SPACE (Greenbelt, Tree Canopy, Dunes, Bluffs)

(Means)



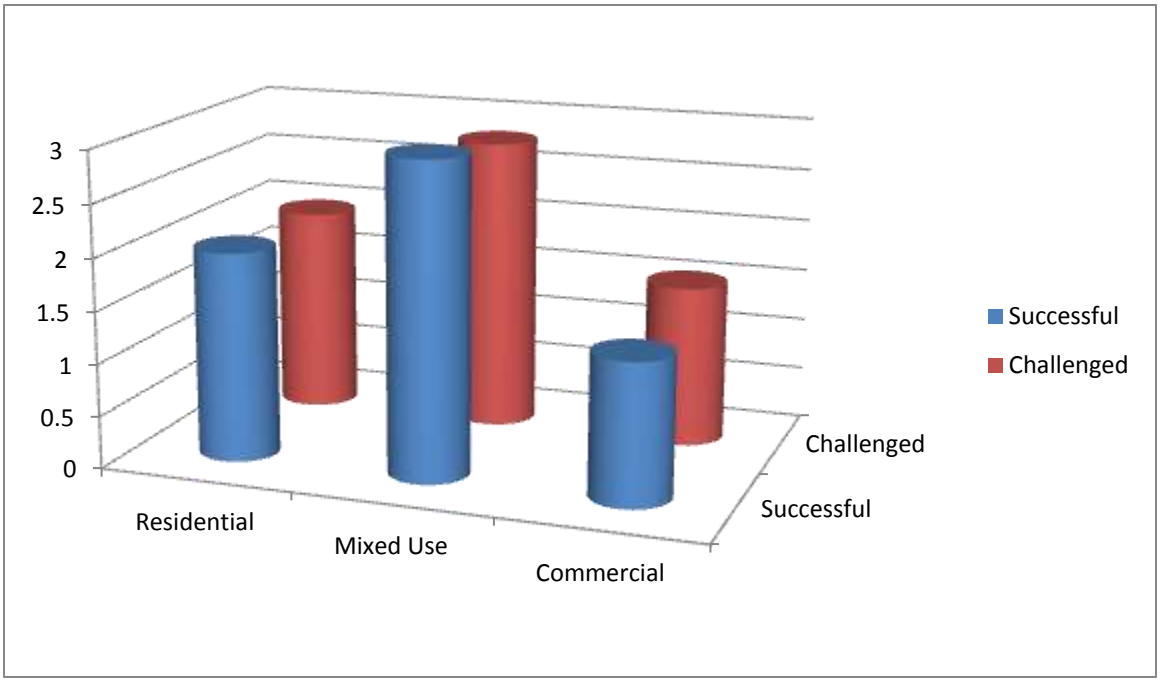
N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Open Space (Greenbelt, Tree Canopy, Dunes, Bluffs) in residential developments was 2.41 for successful and 2.3 for challenged developments; in mixed use developments was 3.43 for successful and 3 for challenged developments; and in commercial developments was 1.68 for successful and 1.79 for challenged developments.

[242] Chang-Moo Lee & Kun-Hyuck Ahn, *Is Kentlands Better than Radburn? The American Garden City and New Urbanist Paradigms*, Journal of the American Planning Association, v. 69, no. 1, 50-51 (Winter 2003).

PRESENCE OF WATER FEATURES (Wetlands, Streams, Ponds, Canals)

(Means)

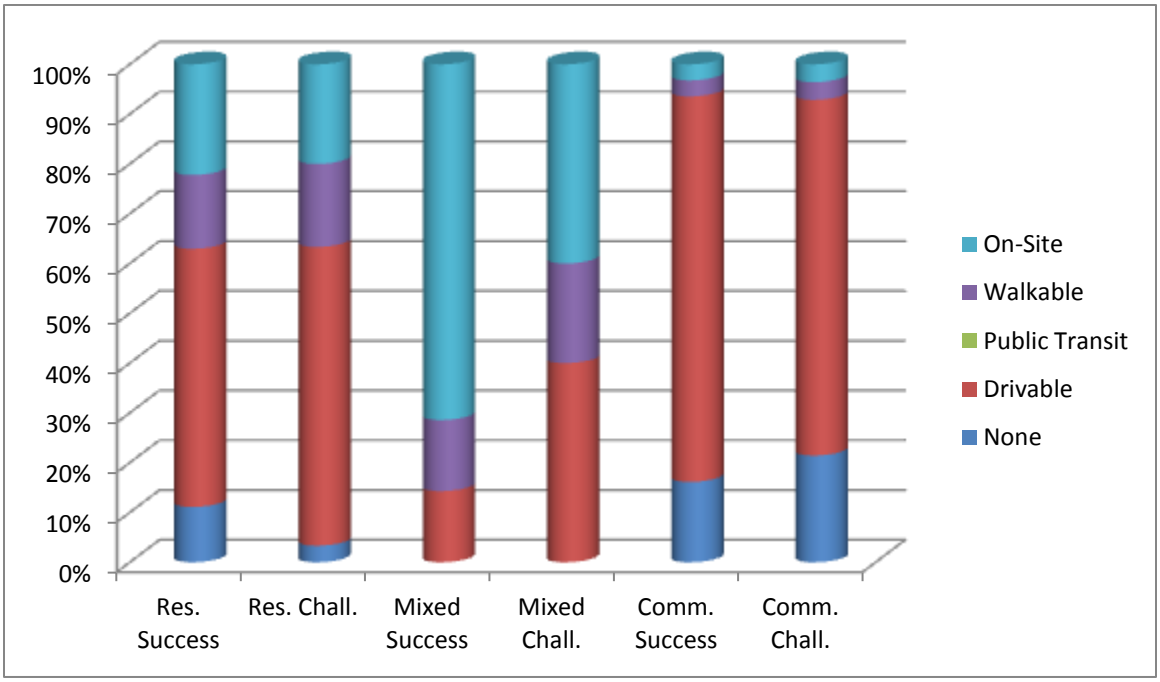


N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Water Features (Wetlands, Streams, Ponds, Canals) in residential developments was 2 for successful and 1.97 for challenged developments; in mixed use developments was 3 for successful and 2.8 for challenged developments; and in commercial developments was 1.35 for successful and 1.54 for challenged developments.

LARGE PARK (Trails, Playground, Picnic Area) ACCESS

(Percentages)

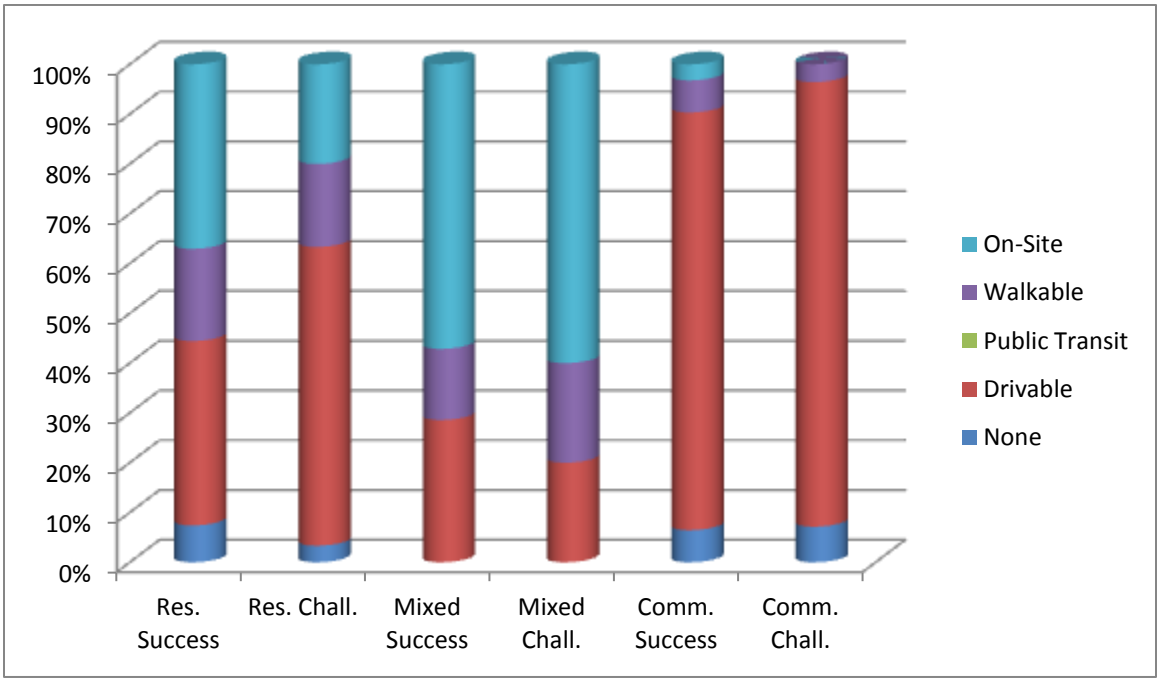


N = 128

The percentages reflect the type of access someone within the development would have to Large Parks, with trails, playgrounds and/or picnic areas (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

SMALL NEIGHBORHOOD/URBAN/POCKET PARK ACCESS

(Percentages)

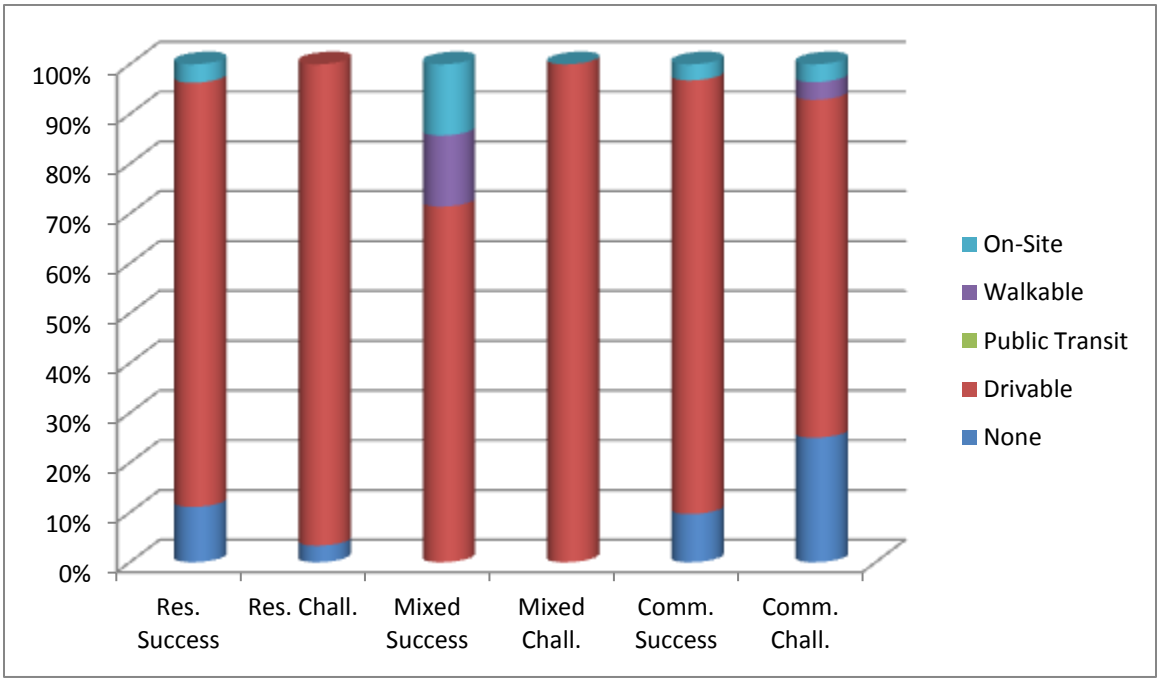


N = 128

The percentages reflect the type of access someone within the development would have to Small/Neighborhood/Urban/Pocket Parks (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

CITY CENTER ACCESS

(Percentages)

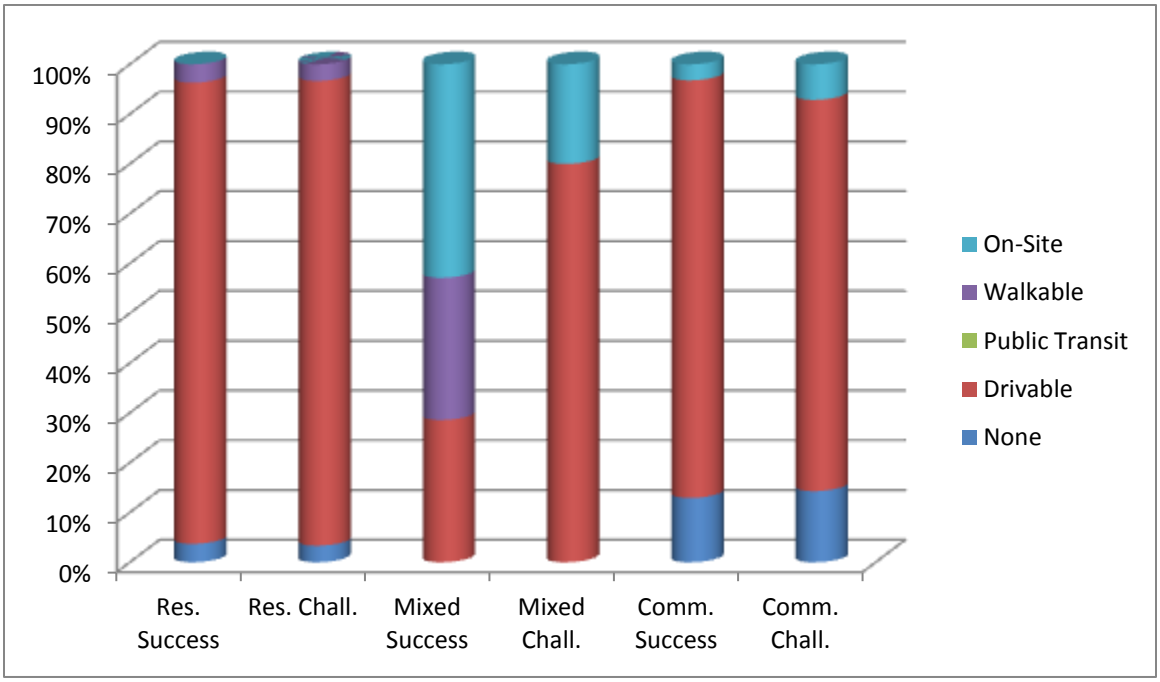


N = 128

The percentages reflect the type of access someone within the development would have to the Center City (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

POST OFFICE ACCESS

(Percentages)

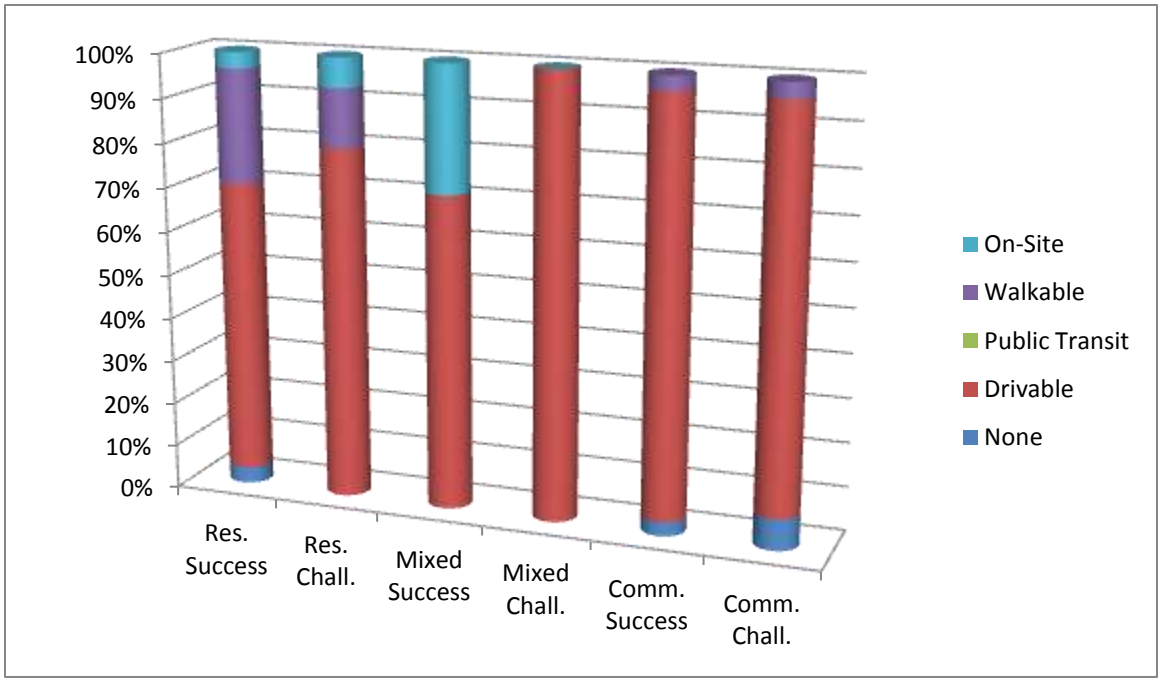


N = 128

The percentages reflect the type of access someone within the development would have to a Post Office (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

PUBLIC SCHOOL ACCESS

(Percentages)

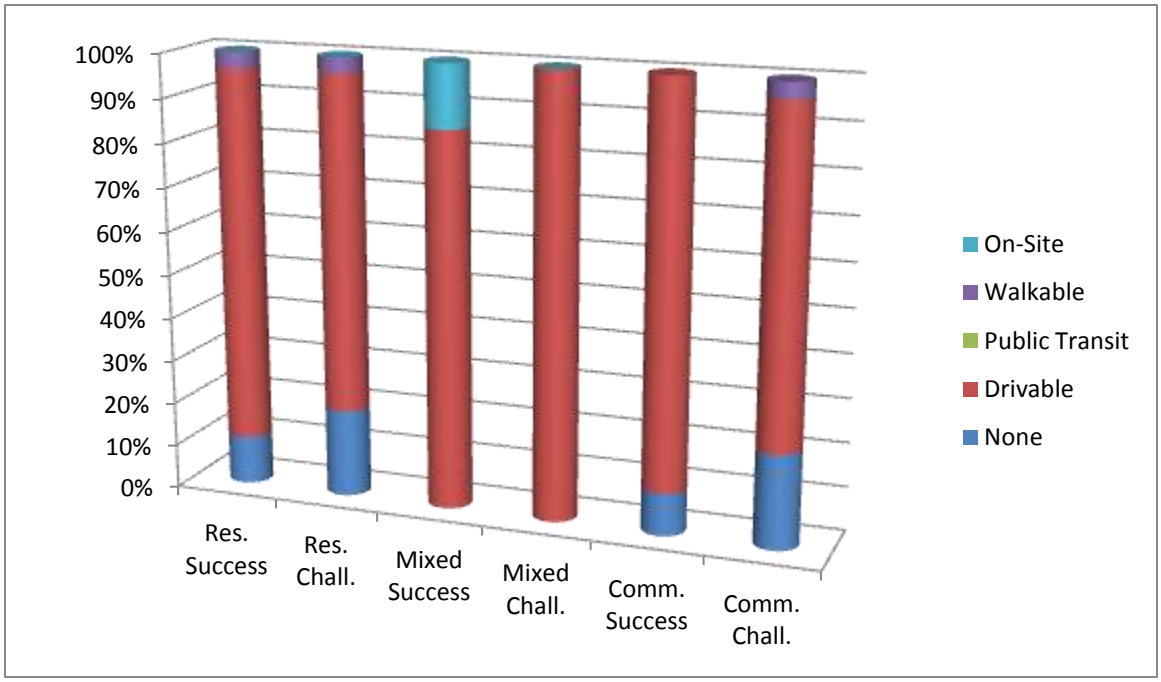


N = 128

The percentages reflect the type of access someone within the development would have to a Public School (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

PRIVATE SCHOOL ACCESS

(Percentages)

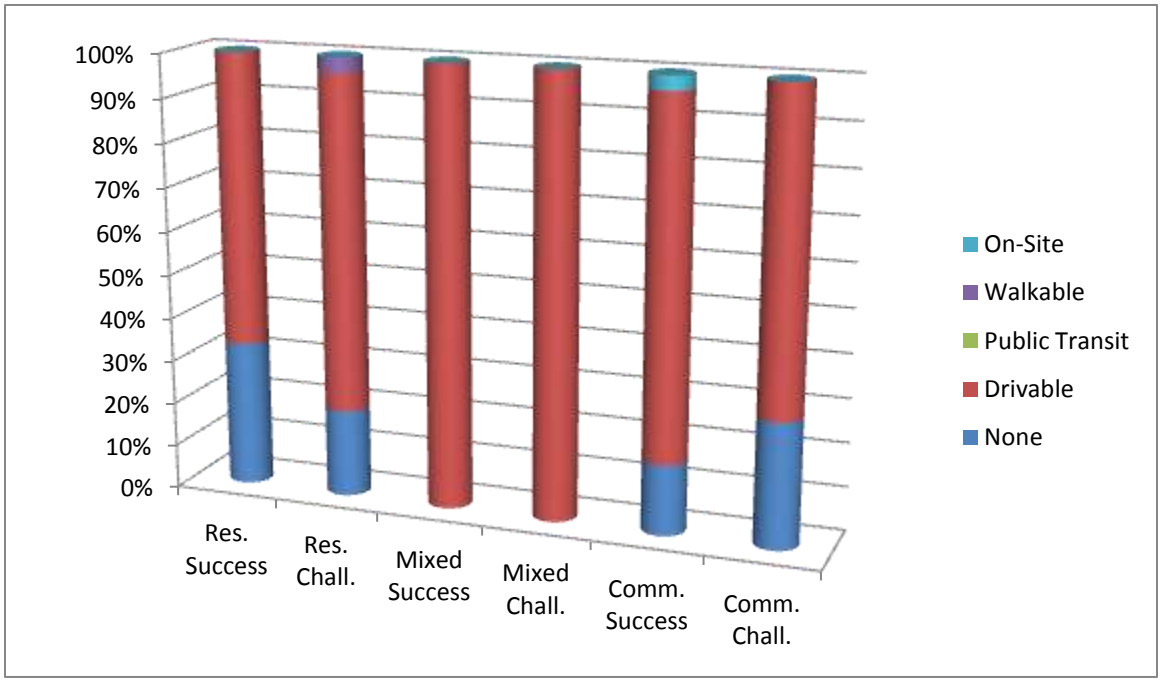


N = 128

The percentages reflect the type of access someone within the development would have to a Private School (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

VOCATIONAL SCHOOL ACCESS

(Percentages)

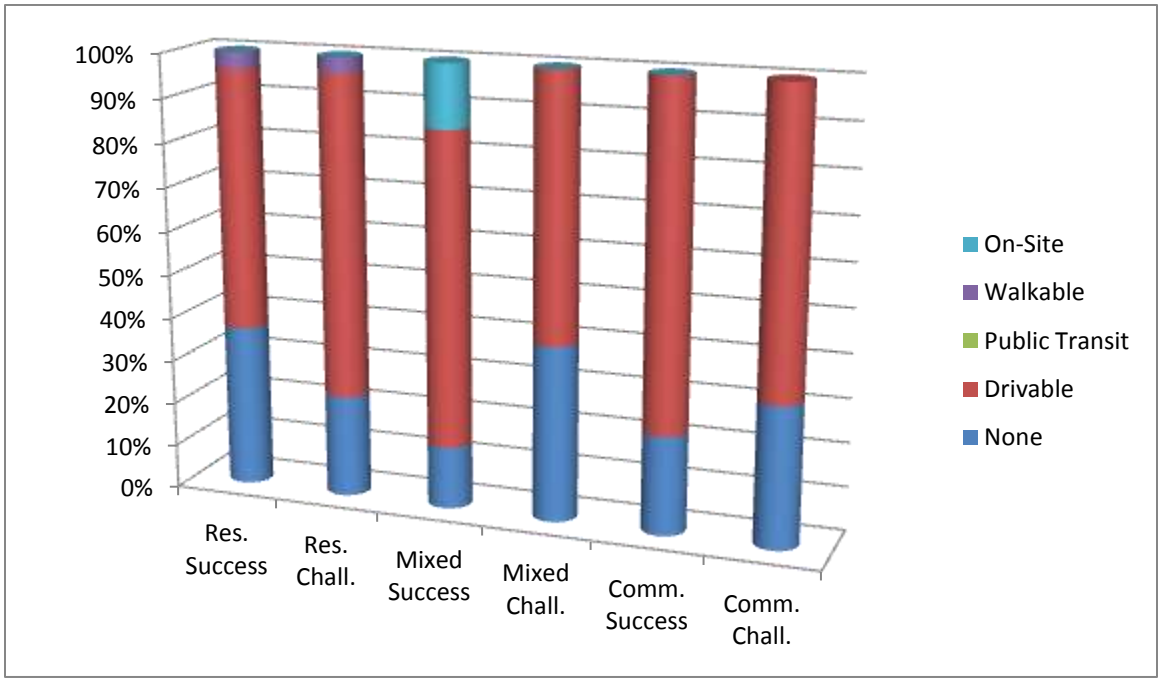


N = 128

The percentages reflect the type of access someone within the development would have to a Vocational School (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

COLLEGE/UNIVERSITY ACCESS

(Percentages)

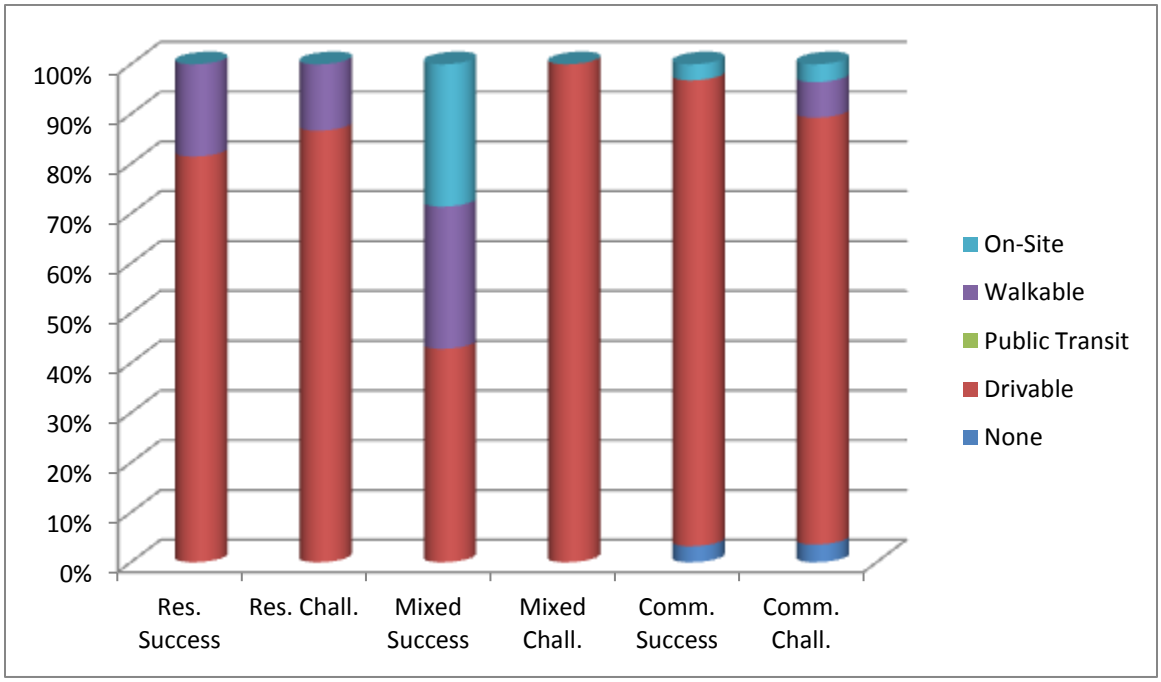


N = 128

The percentages reflect the type of access someone within the development would have to a College or University (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

RELIGIOUS ESTABLISHMENT (Church, etc.) ACCESS

(Percentages)

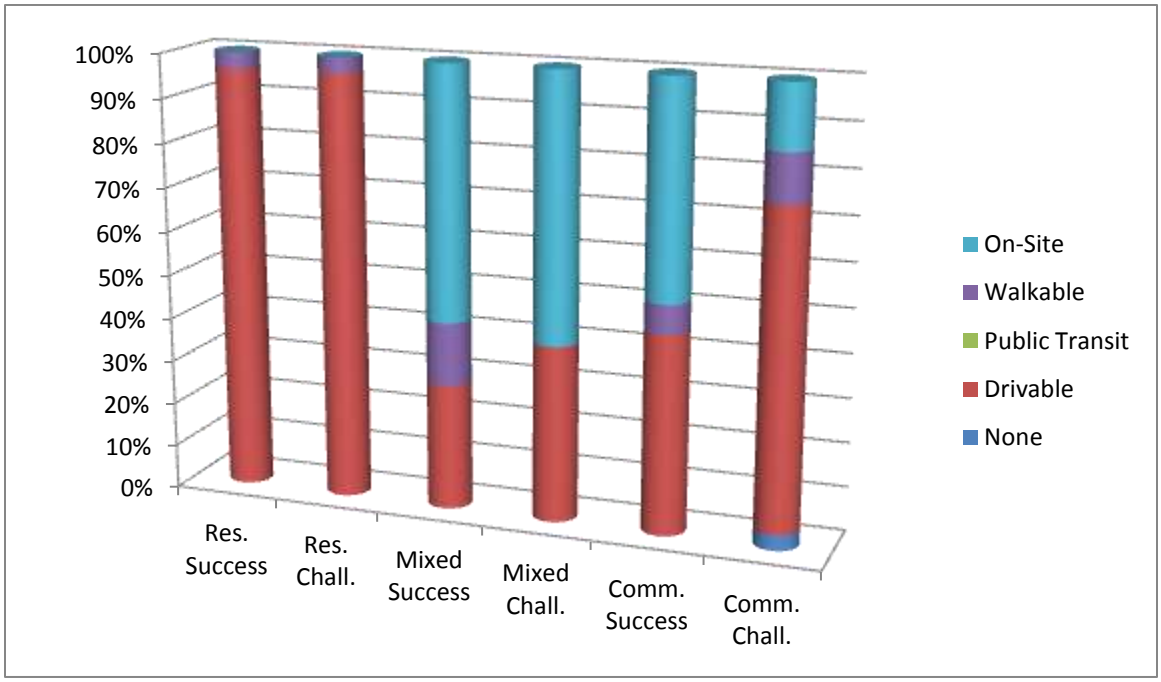


N = 128

The percentages reflect the type of access someone within the development would have to Religious Establishments, including churches (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

SERVICE ESTABLISHMENTS (Banking, Insurance, Cleaning) ACCESS

(Percentages)

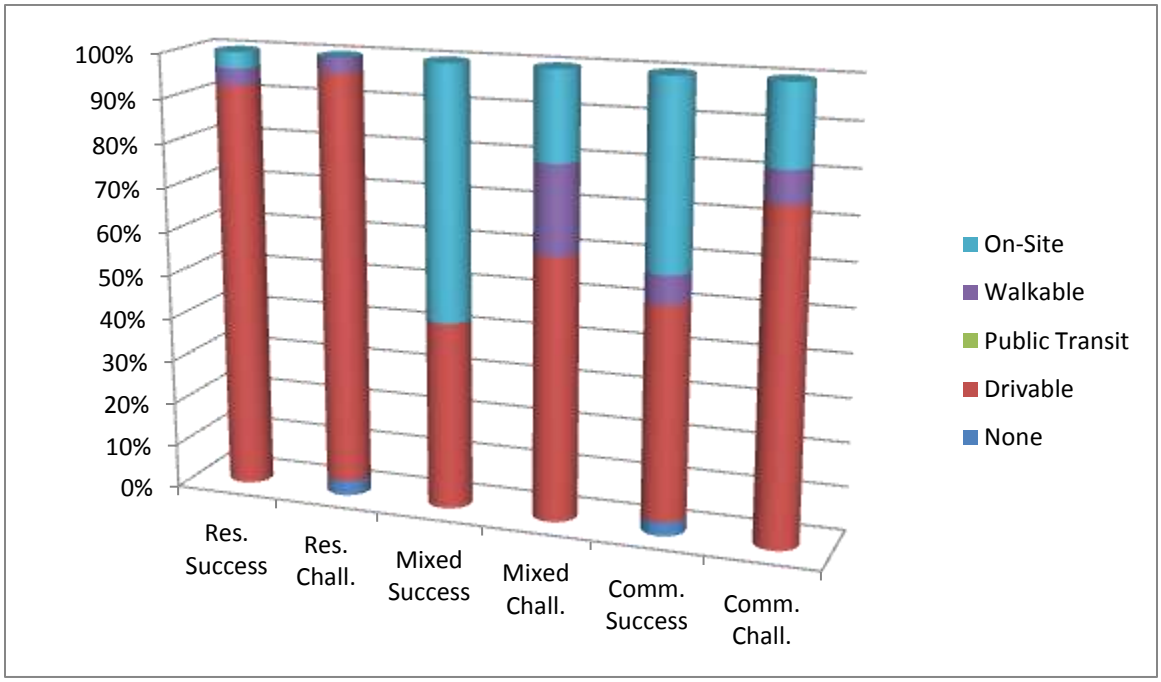


N = 128

The percentages reflect the type of access someone within the development would have to Service Establishments, including banks, insurance offices and dry cleaners (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

HEALTH-RELATED SERVICES (Medical, Mental, Pharmacy) ACCESS

(Percentages)

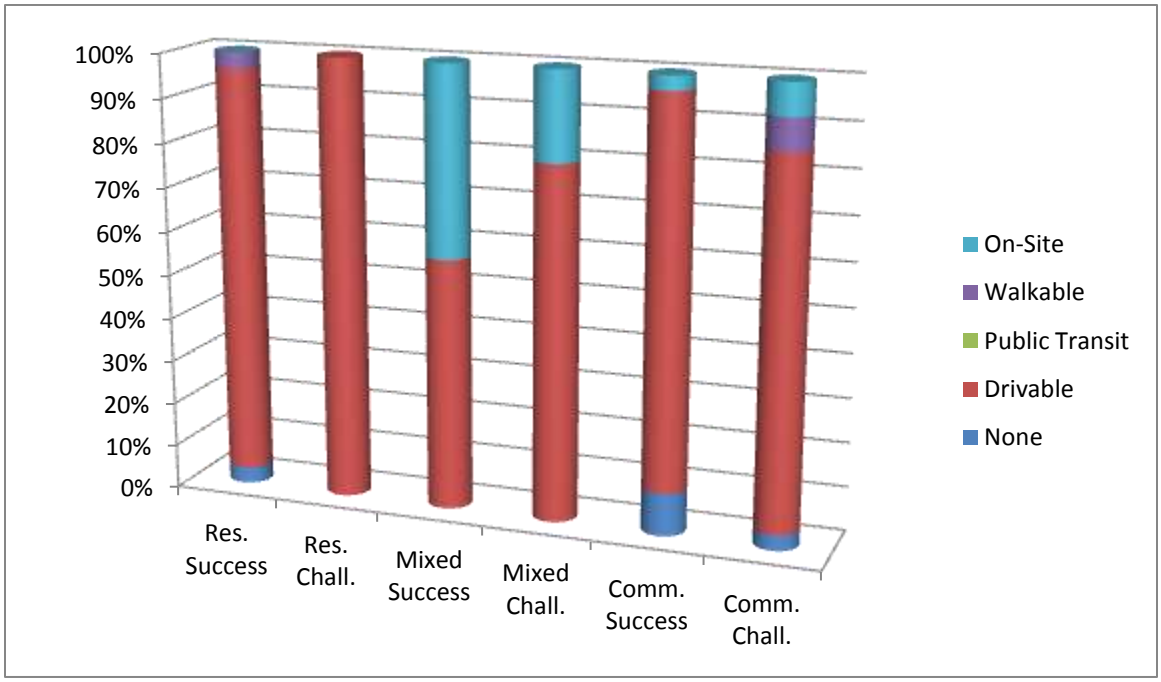


N = 128

The percentages reflect the type of access someone within the development would have to Health-Related Services (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

CHILD-RELATED SERVICES (Daycare, Latchkey, Pre-School) ACCESS

(Percentages)

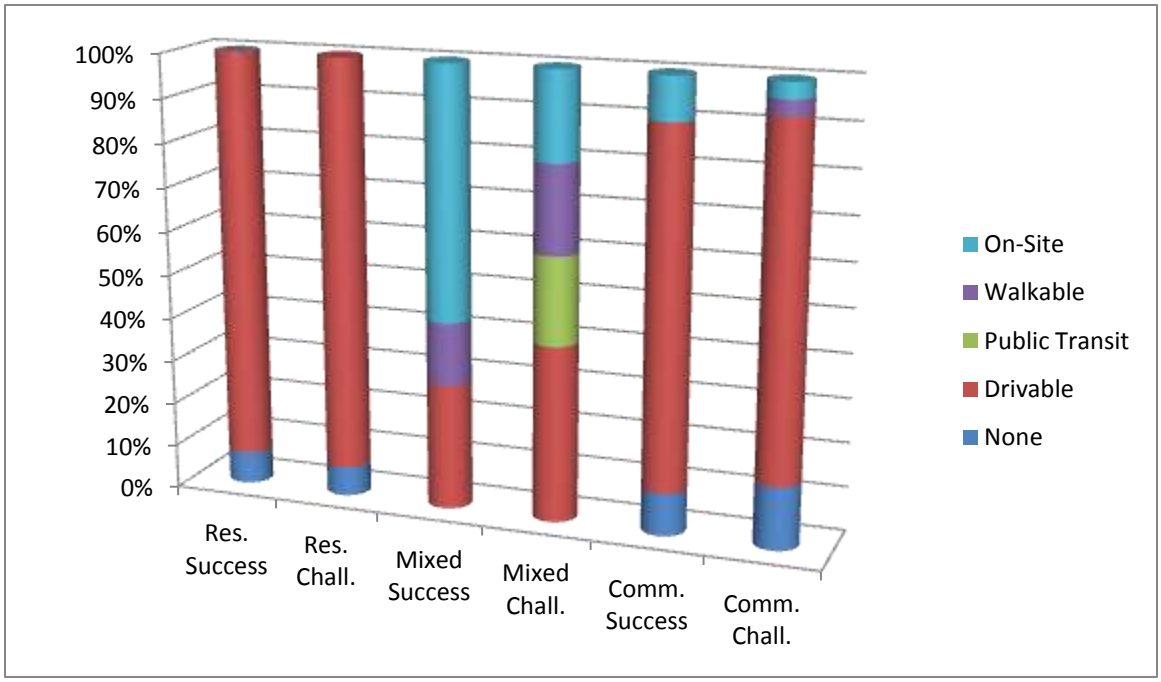


N = 128

The percentages reflect the type of access someone within the development would have to Child-Related Services, including day care, latchkey and preschools (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

TOURIST-RELATED SERVICES (Hotel/Motel) ACCESS

(Percentages)

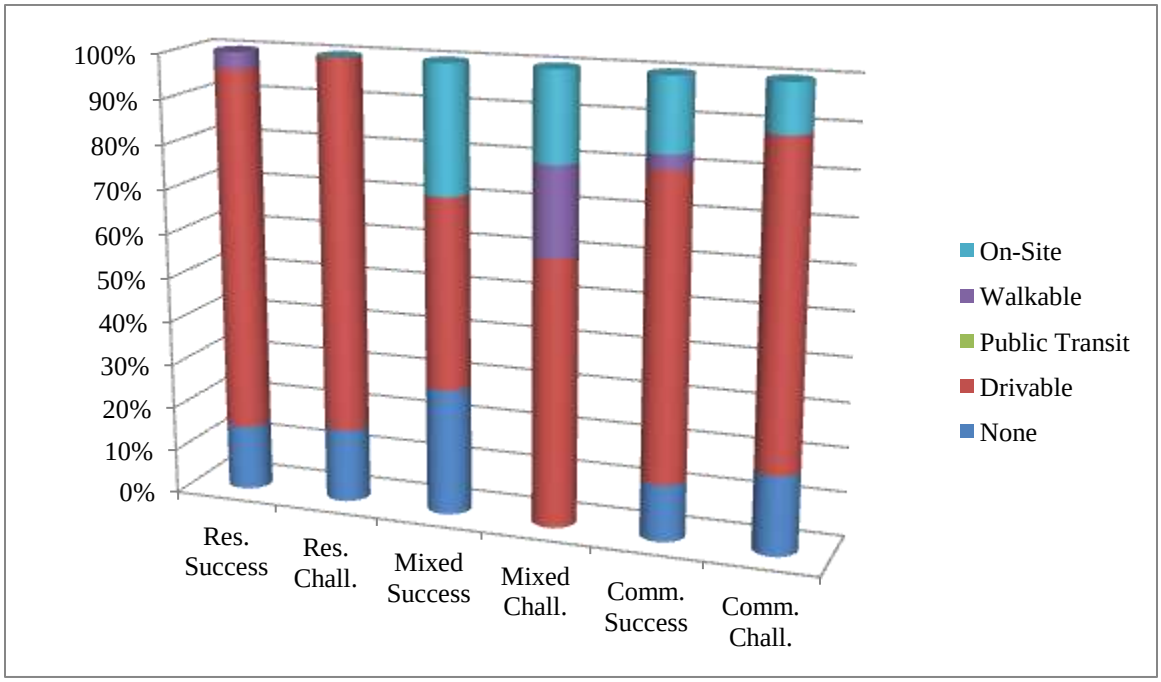


N = 128

The percentages reflect the type of access someone within the development would have to Tourist-Related Services, including hotels and motels (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

ENTERTAINMENT ESTABLISHMENTS (Movies, Bowling Alleys) ACCESS

(Percentages)

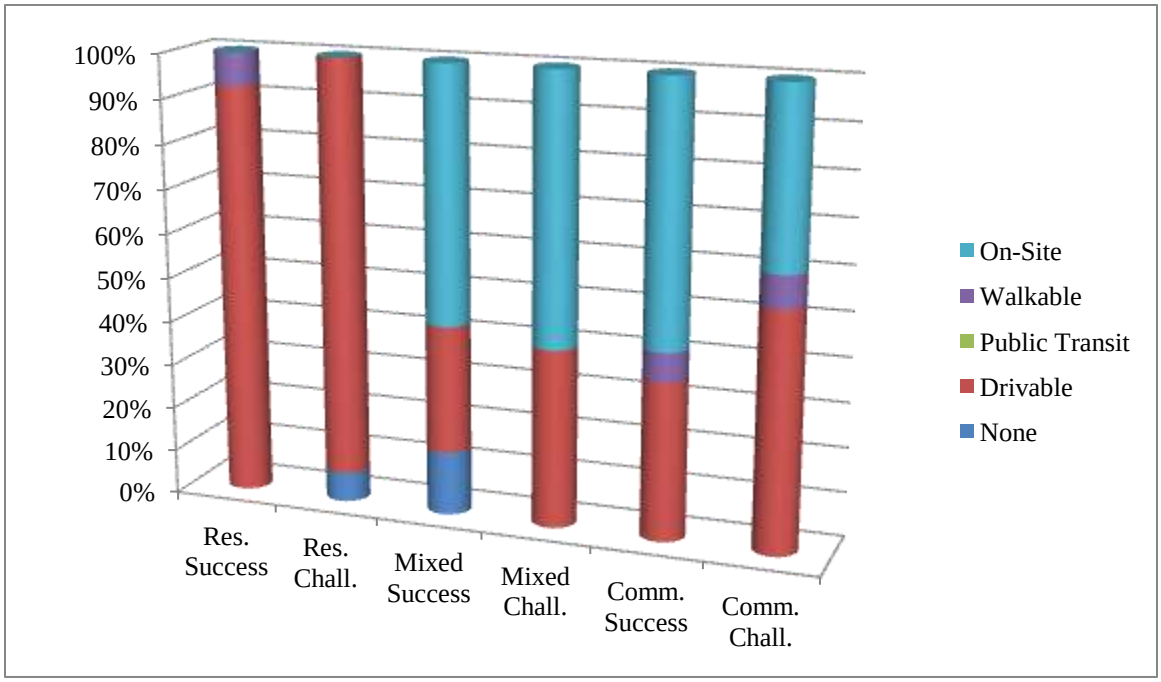


N = 128

The percentages reflect the type of access someone within the development would have to Entertainment Establishments, including movie theaters and bowling alleys (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

FAST FOOD RESTAURANT ACCESS

(Percentages)

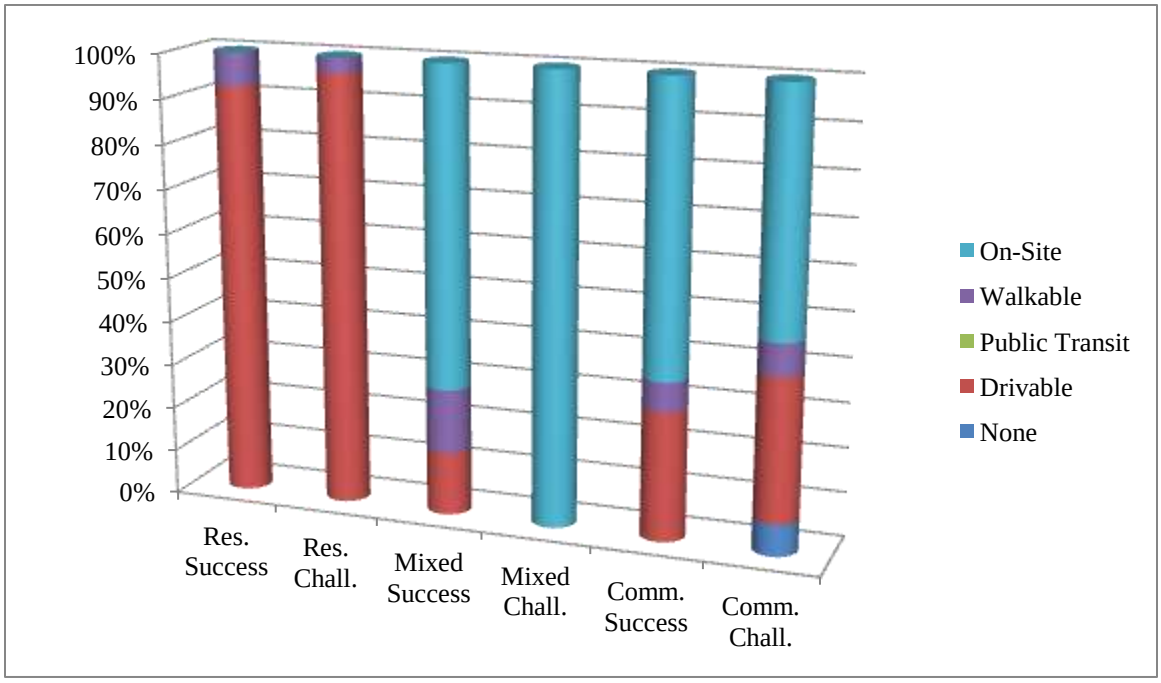


N = 128

The percentages reflect the type of access someone within the development would have to Fast Food Restaurants (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

SIT DOWN RESTAURANT ACCESS

(Percentages)

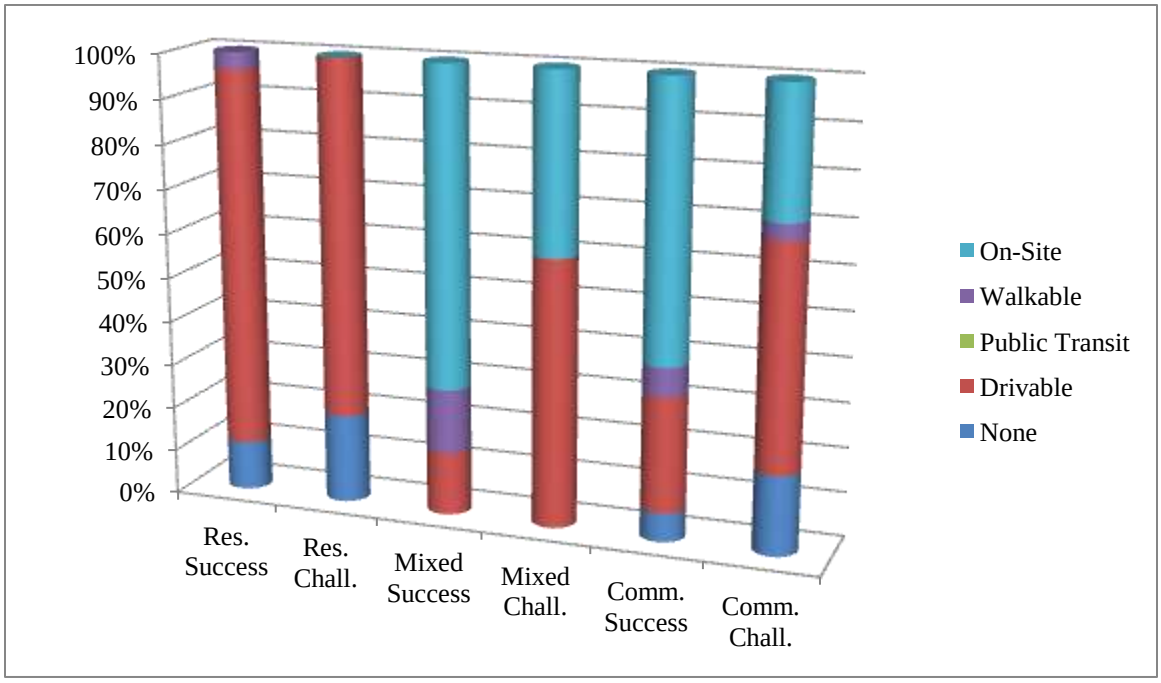


N = 128

The percentages reflect the type of access someone within the development would have to Sit-Down Restaurants (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

COFFEE SHOP ACCESS

(Percentages)

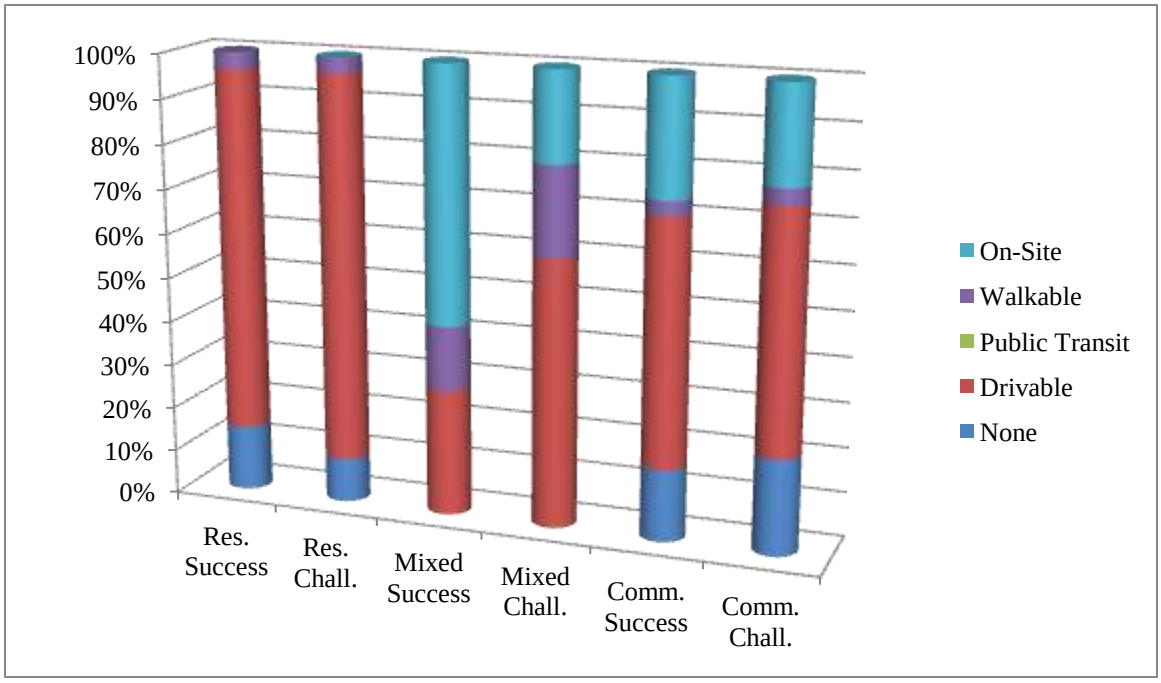


N = 128

The percentages reflect the type of access someone within the development would have to a Coffee Shop (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

BAR (Pub) ACCESS

(Percentages)

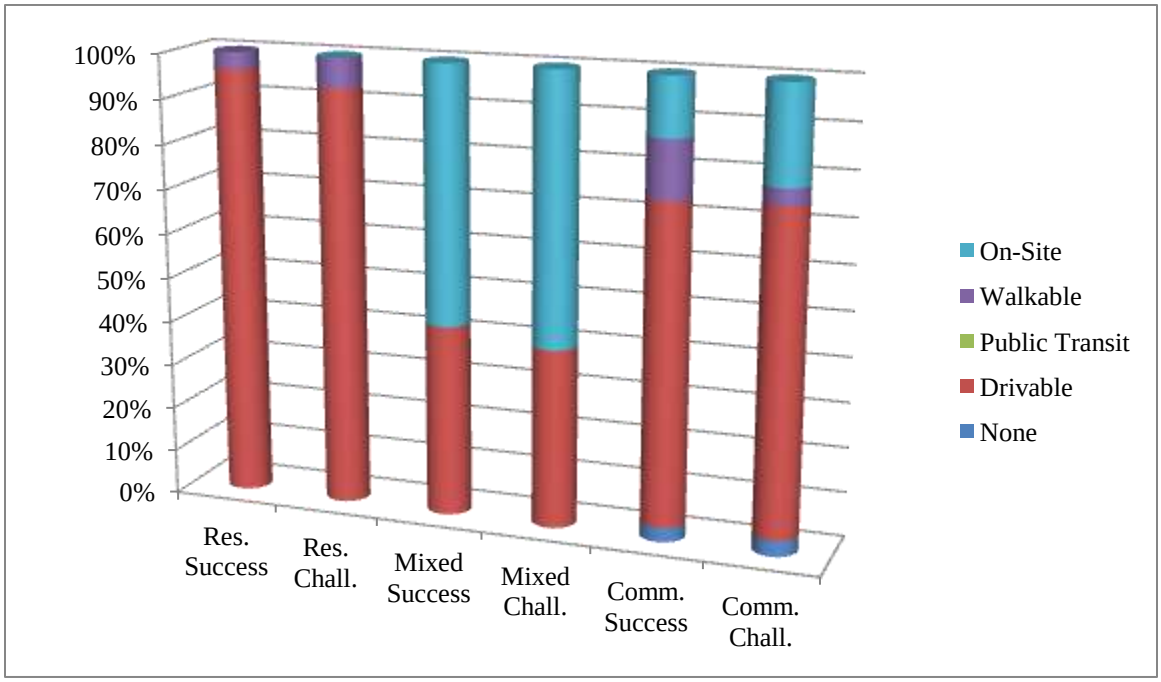


N = 128

The percentages reflect the type of access someone within the development would have to a Bar or Pub (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

CONVENIENCE STORE (Fuel Center) ACCESS

(Percentages)

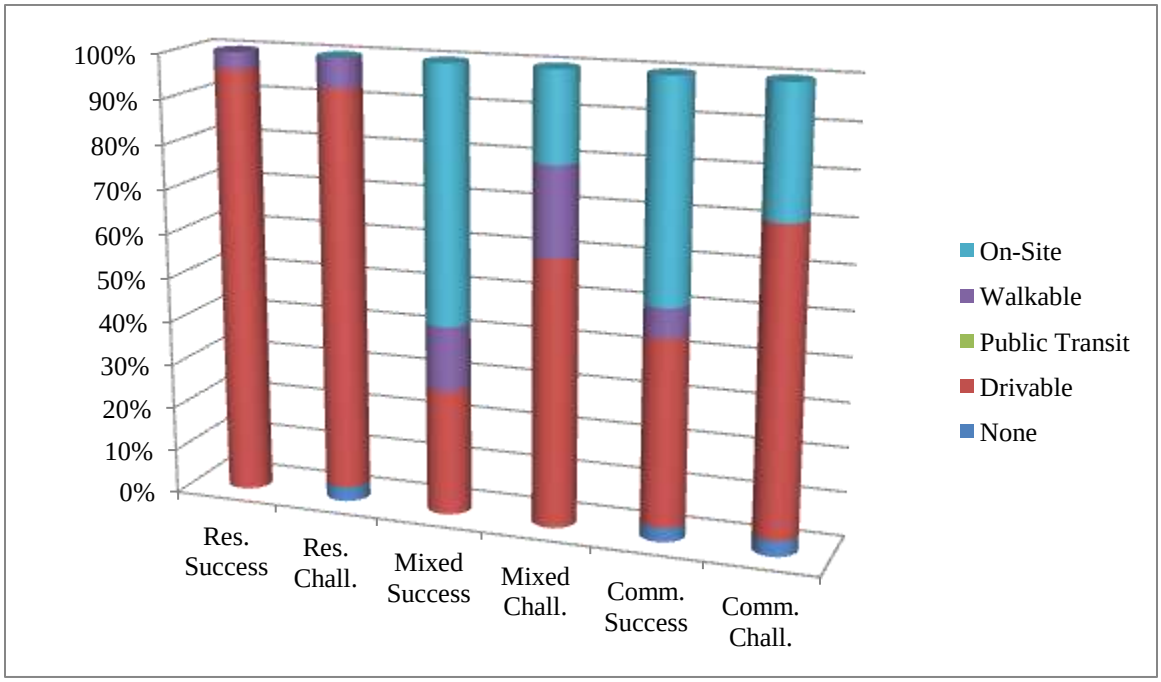


N = 128

The percentages reflect the type of access someone within the development would have to Convenience Store or Fuel Center (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

GROCERY/SPECIALTY SHOP ACCESS

(Percentages)

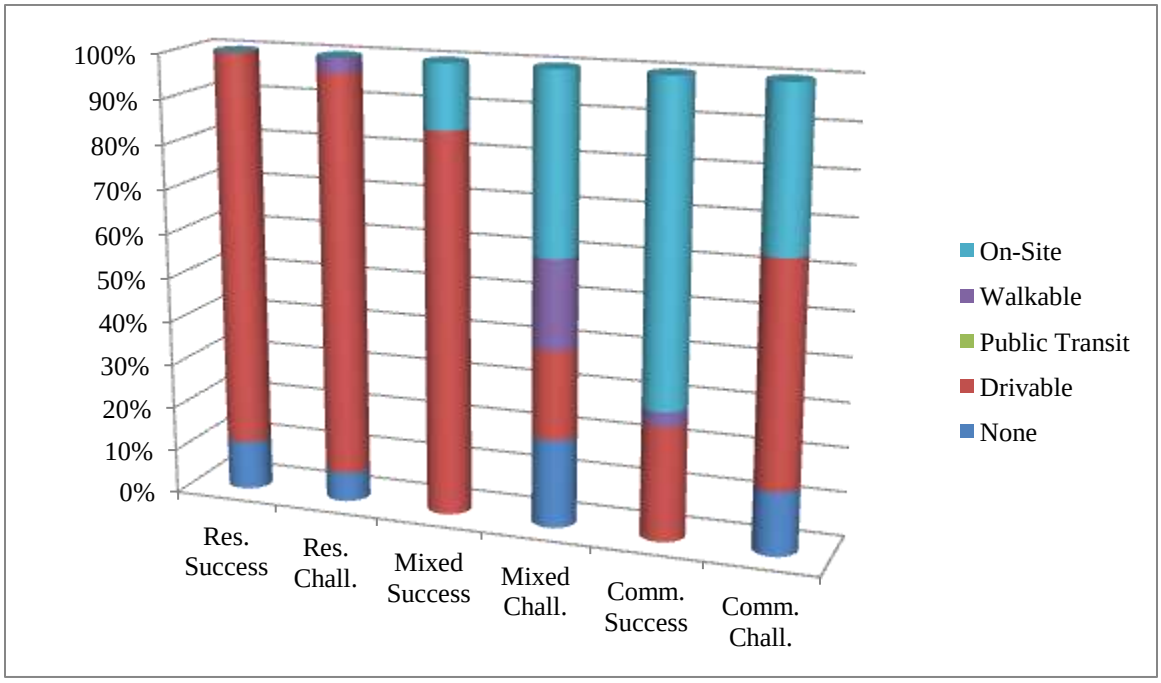


N = 128

The percentages reflect the type of access someone within the development would have to a Grocery or Specialty Shop (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

BIG BOX STORE ACCESS

(Percentages)

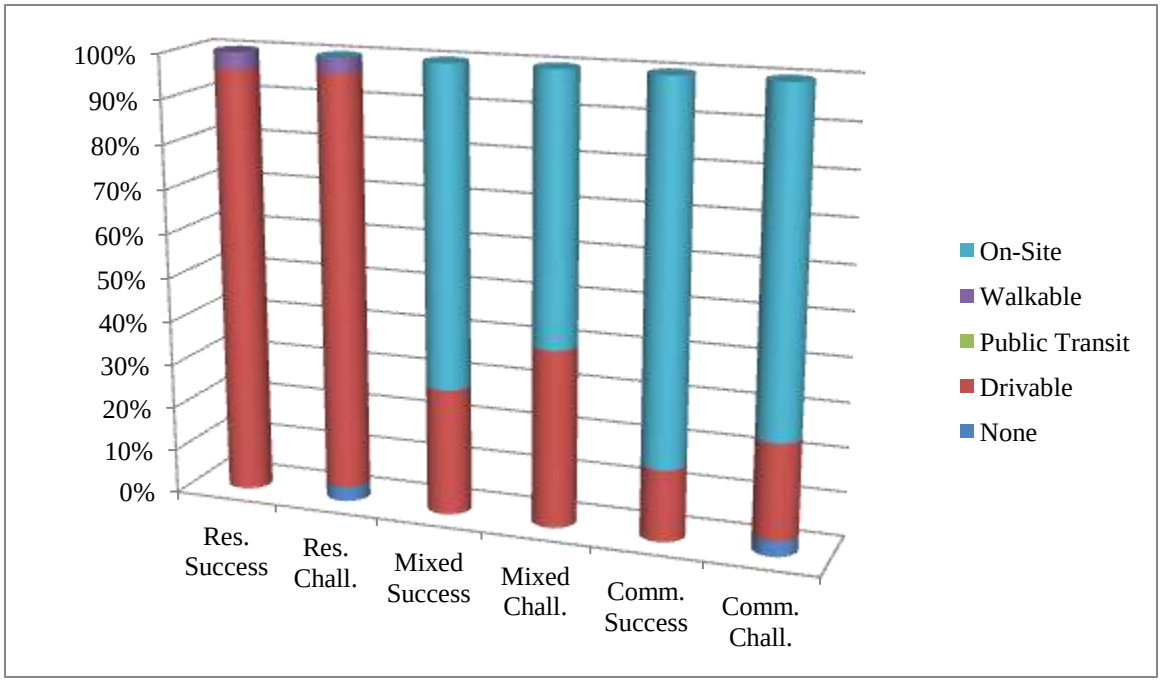


N = 128

The percentages reflect the type of access someone within the development would have to a Big Box Store (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

STRIP SHOPPING AREA ACCESS

(Percentages)

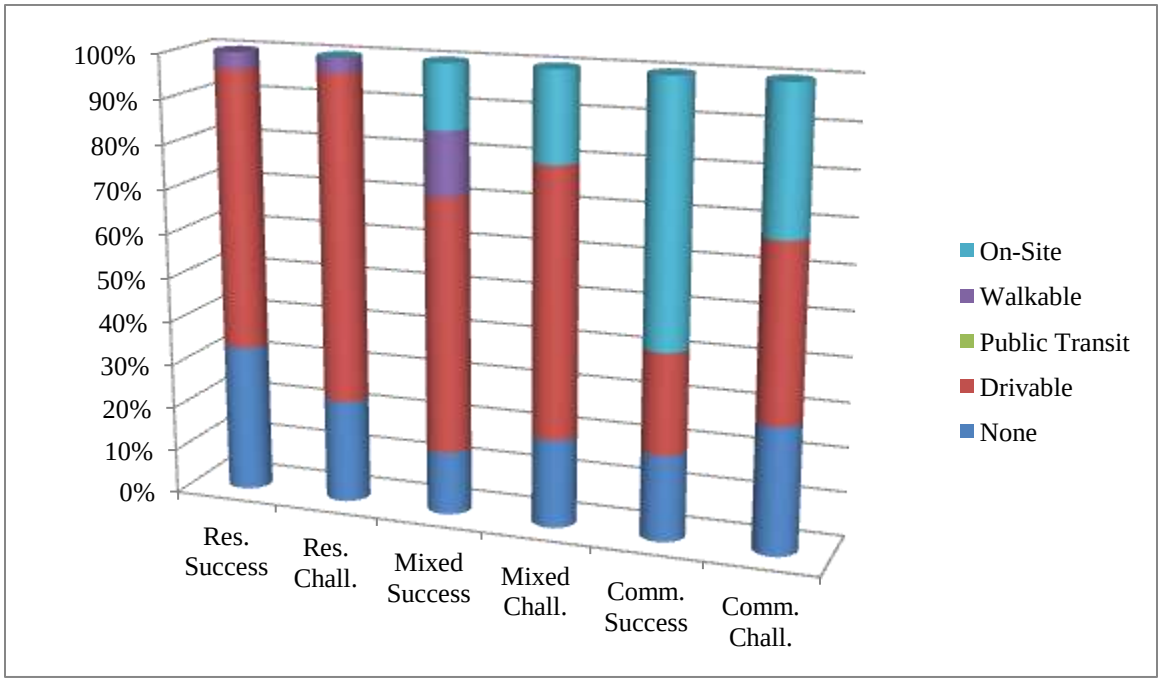


N = 128

The percentages reflect the type of access someone within the development would have to a Strip Shopping Area (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

OPEN AIR MALL/ARCADE/PRODUCE MARKET ACCESS

(Percentages)

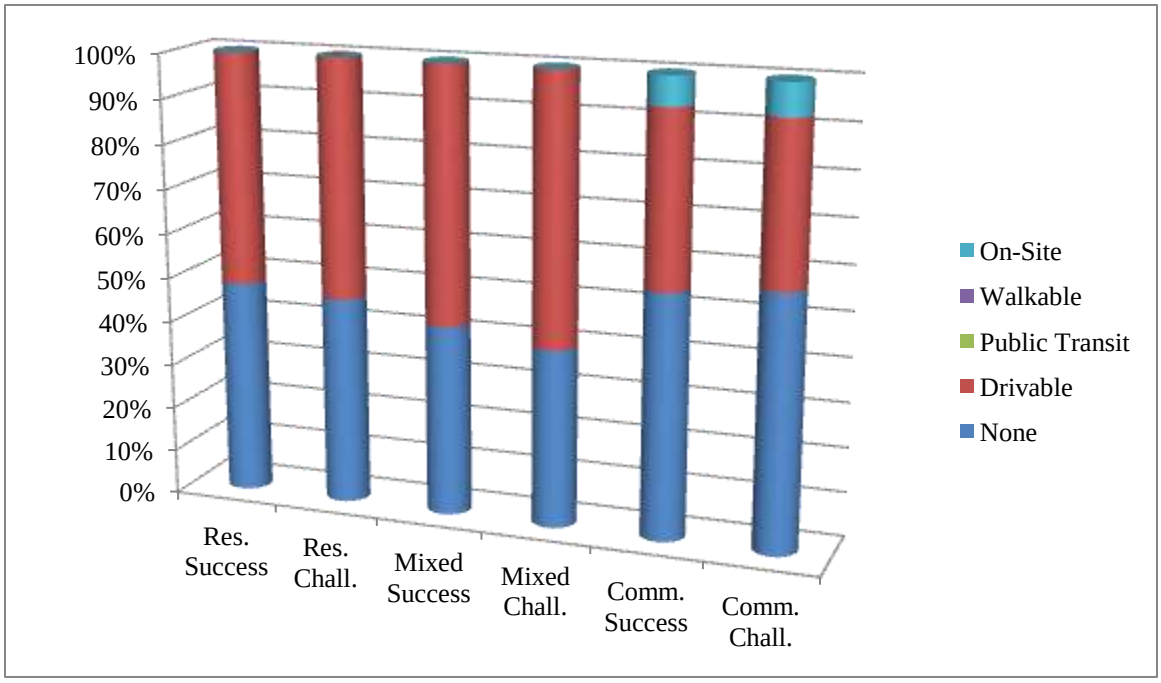


N = 128

The percentages reflect the type of access someone within the development would have to an Open Air Mall, Arcade or Produce Market (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

ENCLOSED MALL ACCESS

(Percentages)

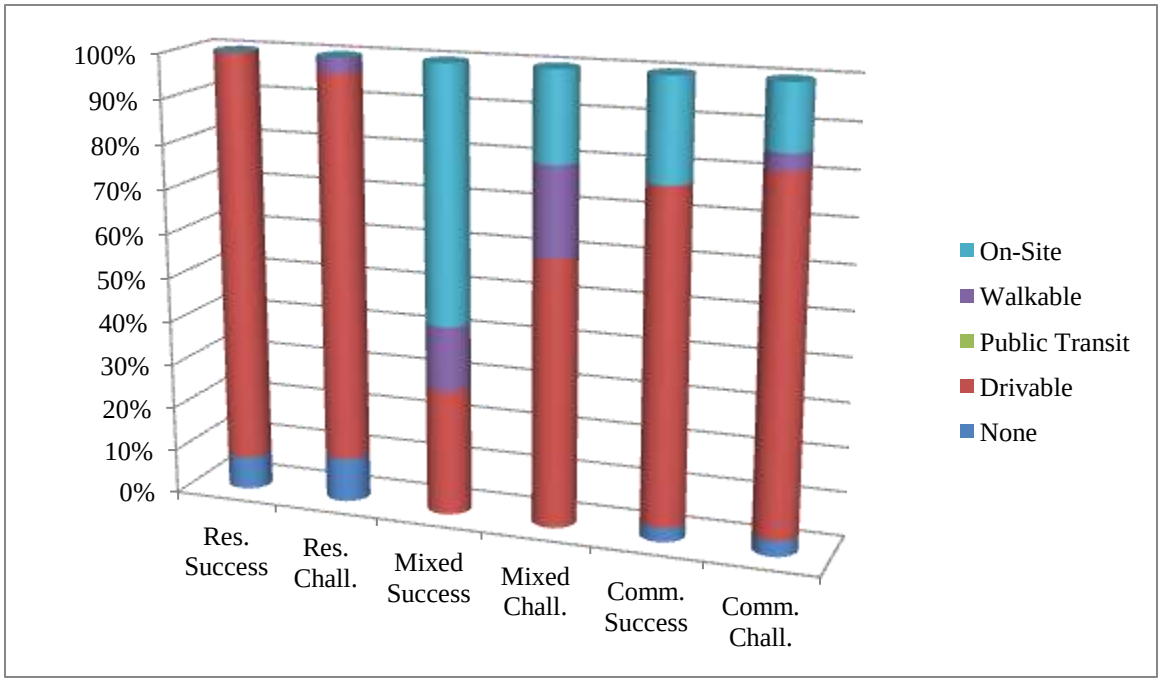


N = 128

The percentages reflect the type of access someone within the development would have to an Enclosed Mall (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

OFFICE CLUSTER ACCESS

(Percentages)

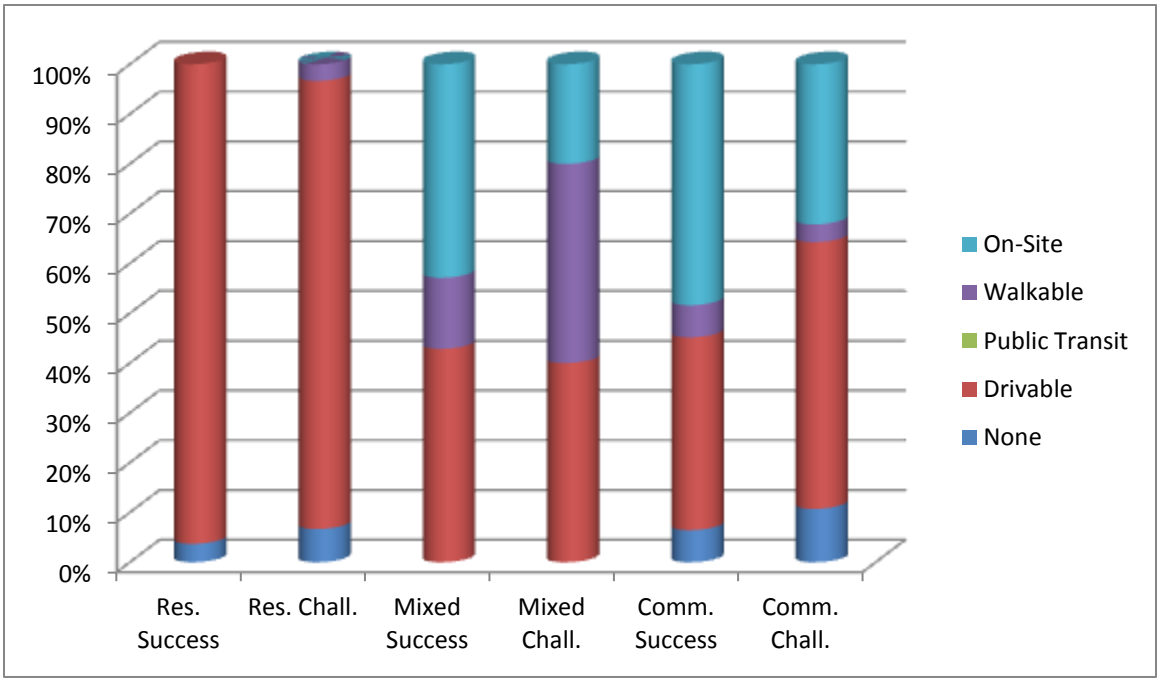


N = 128

The percentages reflect the type of access someone within the development would have to an Office Cluster (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

EMPLOYMENT ACCESS

(Percentages)



N = 128

The percentages reflect the type of access someone within the development would have to Employment opportunities (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

Urban planners of the 1920s attempted to implement Garden City ideals in the United States.[243] They collaborated with interested public officials in drafting model plans for highways, parks, and other public improvements. However, these efforts were thwarted by a lack of municipal authority to launch such improvements.[244] Municipal leaders sought to gain such legislative authority to no avail.[245] There was a cautiousness

[243] Blake McKelvey, *The City in American History*, 90 (George Allen and Unwin, Ltd., London, 1969) and Chang-Moo Lee & Kun-Hyuck Ahn, *Is Kentlands Better than Radburn? The American Garden City and New Urbanist Paradigms*, Journal of the American Planning Association, v. 69, no. 1, 50-51 (Winter 2003).
[244] Blake McKelvey, *The City in American History*, 88-89 (George Allen and Unwin, Ltd., London, 1969).
[245] Blake McKelvey, *The City in American History*, 88-89 (George Allen and Unwin, Ltd., London, 1969).

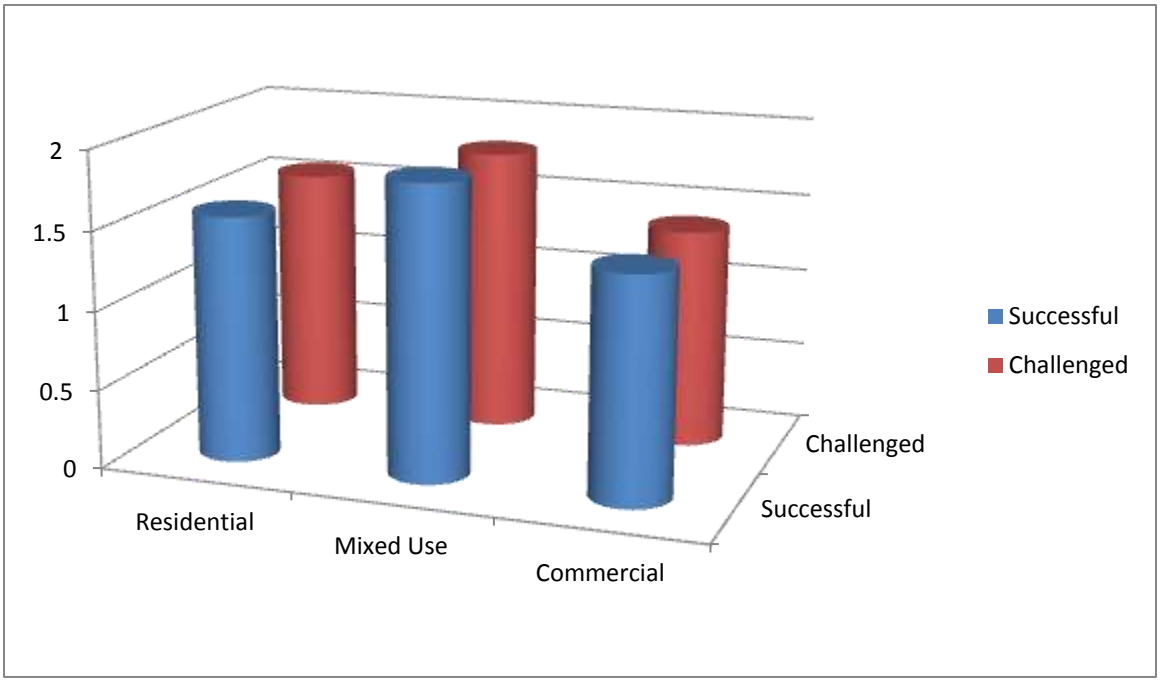
that landowners could claim damages under eminent domain for restriction of the speculative value of their property as a result of these planning activities.[246] Public improvements of this type remained piecemeal and unrelated to any planning philosophy or scheme[247] until the Standard City Planning Enabling Act of 1928 was proposed by the federal government and adopted by the states. As a result, federal, state and local government lawfully entered the field of planning, zoning and development regulation.[248] With the authority to plan highways, parks, and other public improvements in accordance with a model scheme or philosophy came the responsibility of paying for those improvements.

Careful consideration was necessary to ensure that the improvements envisioned to counter outward migration and urban decline and degeneration would not have the opposite effect. It has been theorized that tax burden increases cause residents and businesses to relocate where the tax burden is lower.[249] Bradbury, Downs, and Small report that cities where local per capita taxes are high relative to the rest of the metropolitan area tend to grow more slowly in population.[250]

[246] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 60-61 (University of California Press, Los Angeles, 1969).
[247] Mellier Goodin Scott, *American City Planning Since 1890: A History Commemorating the Fiftieth Anniversary of the American Institute of Planners*, 82-89 (University of California Press, Los Angeles, 1969).
[248] Edward J. Kaiser and David R. Godschalk, *Twentieth century land use planning: a stalwart family tree*, Journal of the American Planning Association, Vol. 61, 365-385 (Summer 1995).
[249] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 79 (The Brookings Institution, Washington, D.C., 1982).
[250] Katharine L. Bradbury, Anthony Downs & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 93 (The Brookings Institution, Washington, D.C., 1982).

PRESENCE OF DISPROPORTIONATE TAXES/ASSESSMENTS

(Means)



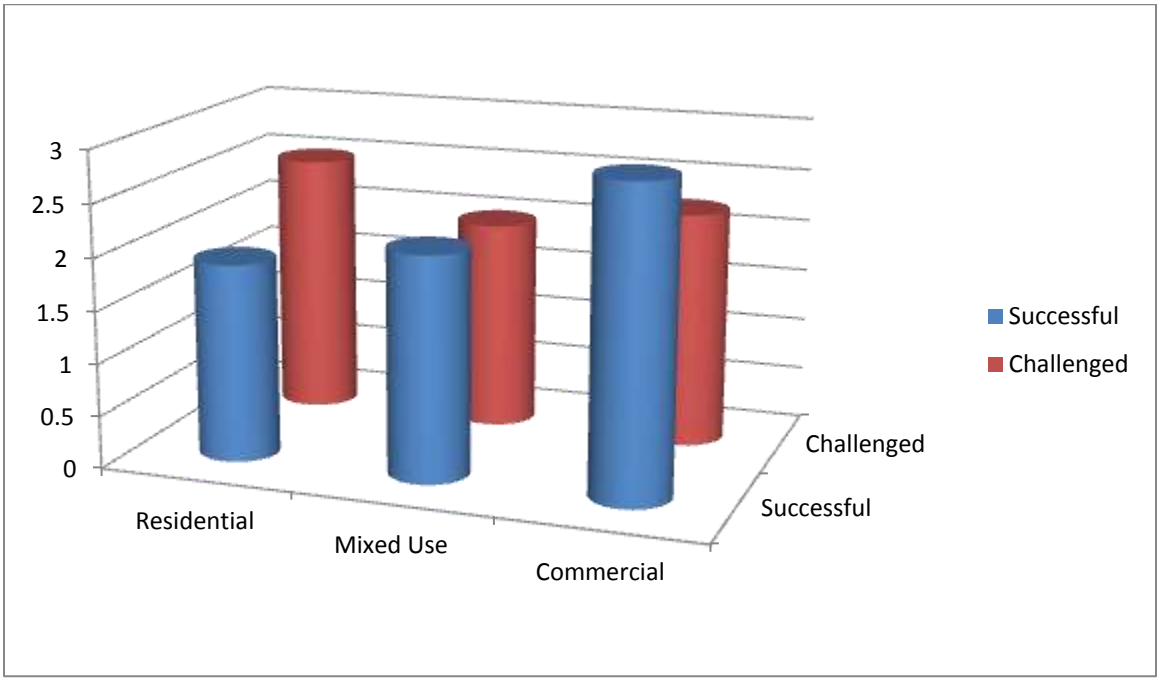
N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Disproportionate Taxes/Assessments in residential developments was 1.56 for successful and 1.57 for challenged developments; in mixed use developments was 1.86 for successful and 1.8 for challenged developments; and in commercial developments was 1.42 for successful and 1.39 for challenged developments.

It has also been asserted that property values perceived as disproportionately high and high utility costs tend to prompt residents and firms to outwardly migrate.[251]

PRESENCE OF DISPROPORTIONATE PROPERTY VALUES

(Means)



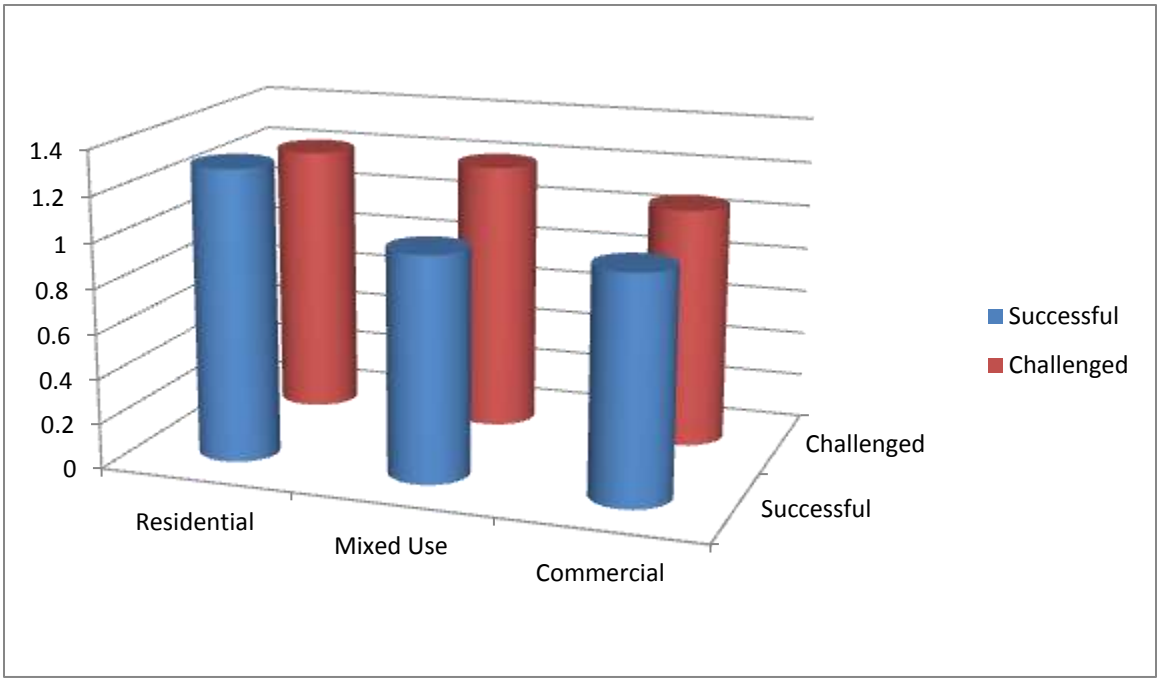
N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Disproportionate Property Values in residential developments was 1.89 for successful and 2.5 for challenged developments; in mixed use developments was 2.14 for successful and 2 for challenged developments; and in commercial developments was 2.94 for successful and 2.25 for challenged developments.

[251] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 79 (The Brookings Institution, Washington, D.C., 1982).

PRESENCE OF DISPROPORTIONATE UTILITY COSTS

(Means)

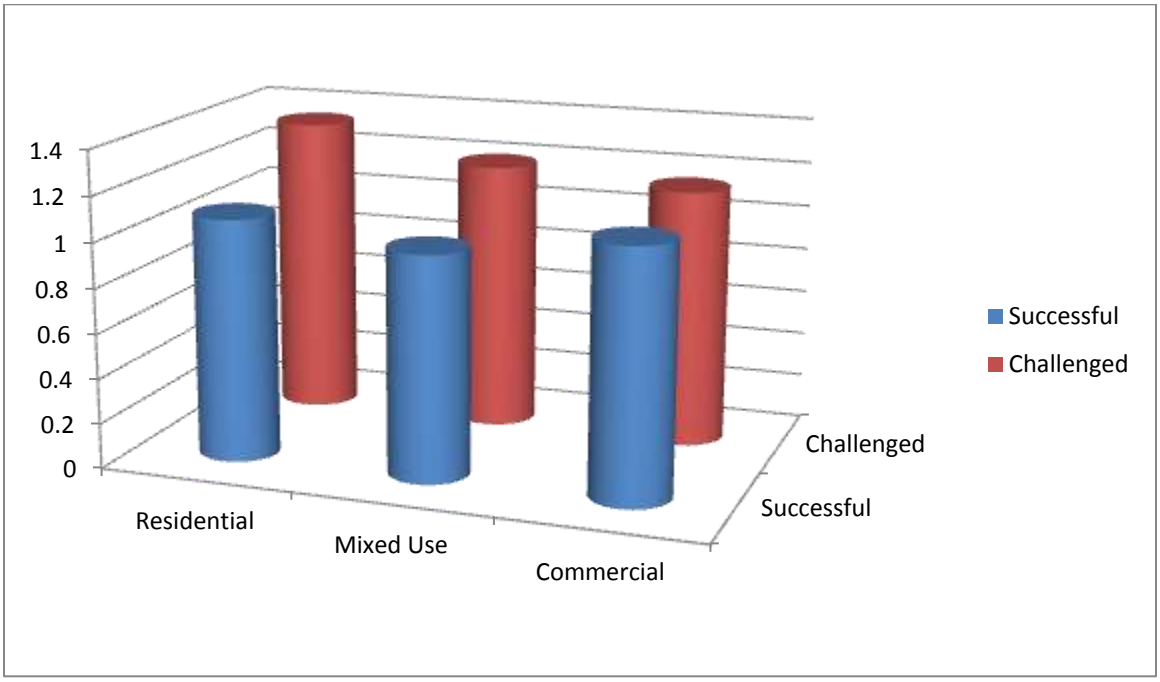


N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Disproportionate Utility Costs in residential developments was 1.3 for successful and 1.21 for challenged developments; in mixed use developments it was not present in successful and was 1.2 for challenged developments; and in commercial developments it was not present in successful and was 1.07 for challenged developments.

PRESENCE OF DISPROPORTIONATE UTILITY SERVICE ACQUISITION COSTS

(Means)



N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Disproportionate Utility Service Acquisition Costs in residential developments was 1.08 for successful and 1.34 for challenged developments; in mixed use developments it was not present in successful and was 1.2 for challenged developments; and in commercial developments was 1.11 for successful and 1.15 for challenged developments.

Throughout the history of the United States, localities and states have implemented policy with the goal of spurring economic growth. Broadly referred to as development incentives, and frequently directed toward stimulating private investment in

real estate, development policy is structured to create a locational advantage for a unit of government (e.g., city, state) in response to unequal distribution of growth factors across the country.[252] It is thought that private investment in blighted areas will not occur without a stimulation provided by government investment in the area.[253] Incentives are now also viewed as a way of offsetting the increasing costs of development. For more than half a century, U.S. government policies have subsidized land and housing costs through tax breaks to landowners; they have paid for new road and utility infrastructure at the edge of metropolitan areas; and they have provided both direct and indirect incentives for industries to locate in suburban areas.[254]

There are a wide variety of incentives utilized throughout the United States. Some are the result of a government expenditure of funds, either by direct payment or through a rebate of taxes/fees that would normally be due on a property. One of the more prominent, locally implemented policies is tax increment financing, or TIFs.[255] TIFs work by capitalizing on future projected increases in property value as collateral for current improvement.

When a geographic area is selected for designation as a TIF district, the property tax collected by local taxing authorities is frozen at the baseline corresponding to the total assessed value of property in the area at the time of TIF designation. As vacant and dilapidated properties are developed and transformed, the market value and associated assessed value of those properties increases, creating an externality that spills over to other properties in the area. This creates an incremental increase in the property tax revenue (sales taxes are also employed) generated within the TIF district. The increment is used to pay off the debt (typically bonds) obtained by the local government to fund investment in the area. When the debt is repaid and the TIF expires, the total property tax

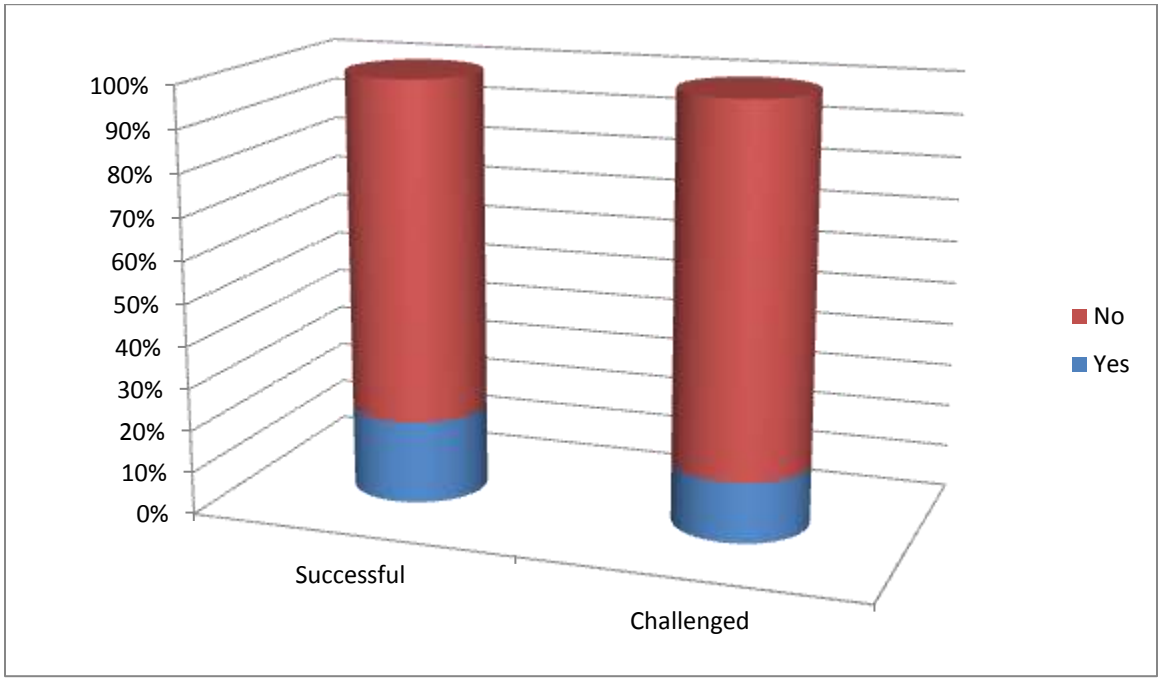
[252] Brent C. Smith, *If You Promise to Build It, Will They Come? The Interaction Between Local Economic Development Policy and the Real Estate Market: Evidence from Tax Increment Finance Districts*, Real Estate Economics, v. 37, no. 2, 209-210 (Summer 2009) (internal citations omitted).
[253] Brent C. Smith, *If You Promise to Build It, Will They Come? The Interaction Between Local Economic Development Policy and the Real Estate Market: Evidence from Tax Increment Finance Districts*, Real Estate Economics, v. 37, no. 2, 209-213 (Summer 2009) (internal citations omitted).
[254] Margaret O'Mara, *Landscapes of Knowledge and High Technology,* Places: Forum of Design for the Public Realm v. 19, no. 1, 48 (Spring 2007).
[255] Brent C. Smith, *If You Promise to Build It, Will They Come? The Interaction Between Local Economic Development Policy and the Real Estate Market: Evidence from Tax Increment Finance Districts*, Real Estate Economics, v. 37, no. 2, 209-210 (Summer 2009) (internal citations omitted).

revenue (baseline and incremental increases) is distributed to all the various taxing entities with an interest in the TIF district.[256]

The following three items provide comparison between developments receiving governmental incentives and those bearing the costs of development by virtue of special assessments, taxes and fees, including dedications to the public and payments in lieu thereof.

PUBLIC FINANCING AND/OR INCENTIVES

(Frequencies)



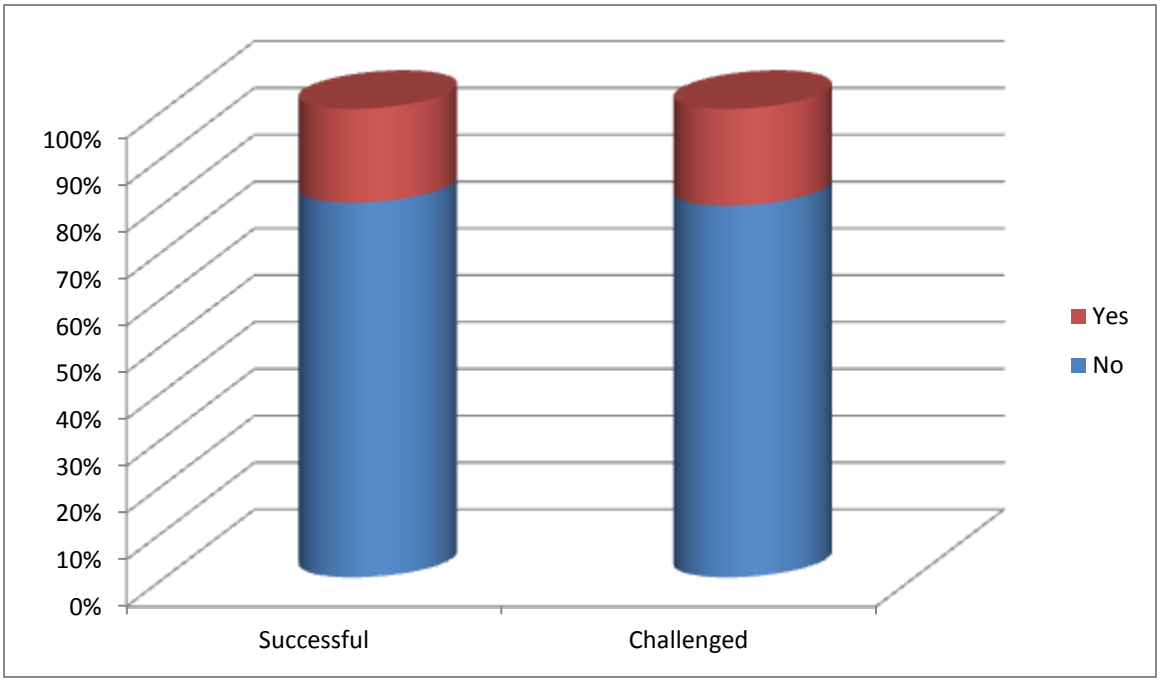
N = 128

There was little variance in regard to Public Financing and/or Incentives between the successful and challenged developments. Eleven (11) of the fifty-six (56) developments identified as successful were subject to Public Financing and/or Incentives. Eight (8) of the fifty-six (56) developments identified as challenged were subject to Public Financing and/or Incentives.

[256] Brent C. Smith, *If You Promise to Build It, Will They Come? The Interaction Between Local Economic Development Policy and the Real Estate Market: Evidence from Tax Increment Finance Districts*, Real Estate Economics, v. 37, no. 2, 212-213 (Summer 2009) (internal citations omitted).

SPECIAL ASSESSMENTS/TAXES/FEES

(Percentages)

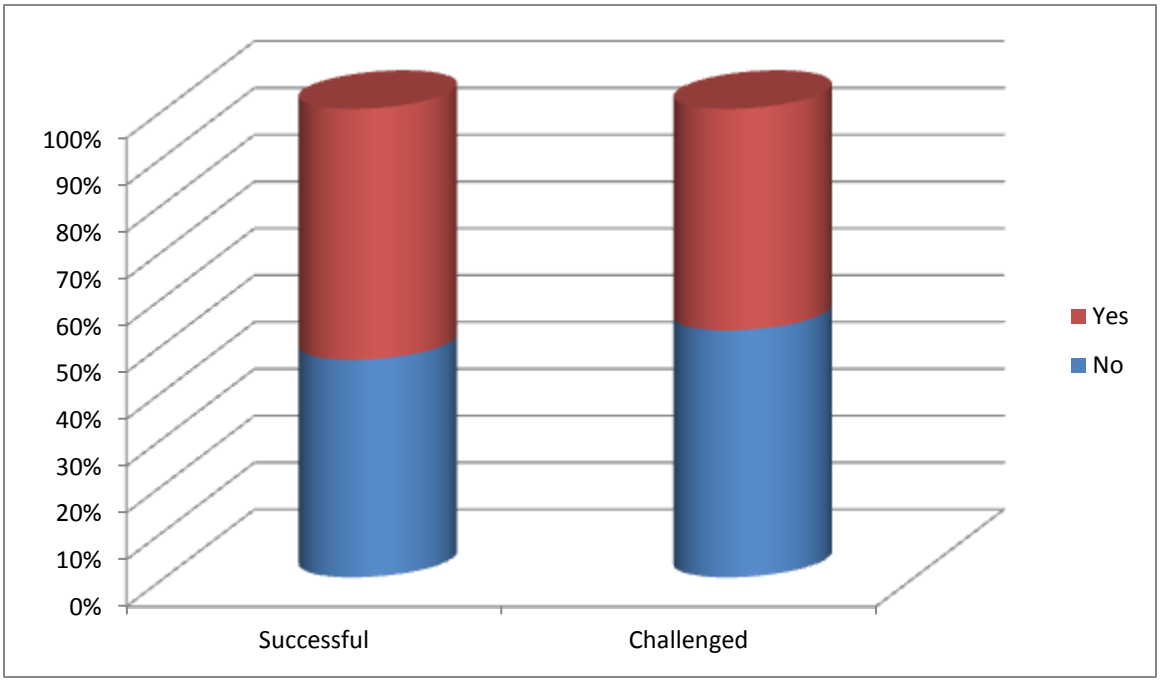


N = 123

Only twelve (12) of the sixty (60) successful developments, or twenty (20) percent, and thirteen (13) of the sixty-three (63) challenged developments, or twenty-one (21) percent reported Special Assessments/Taxes/Fees.

IMPACT FEES/DEDICATIONS/PAYMENTS IN LIEU OF DEDICATIONS

(Percentages)



N = 111

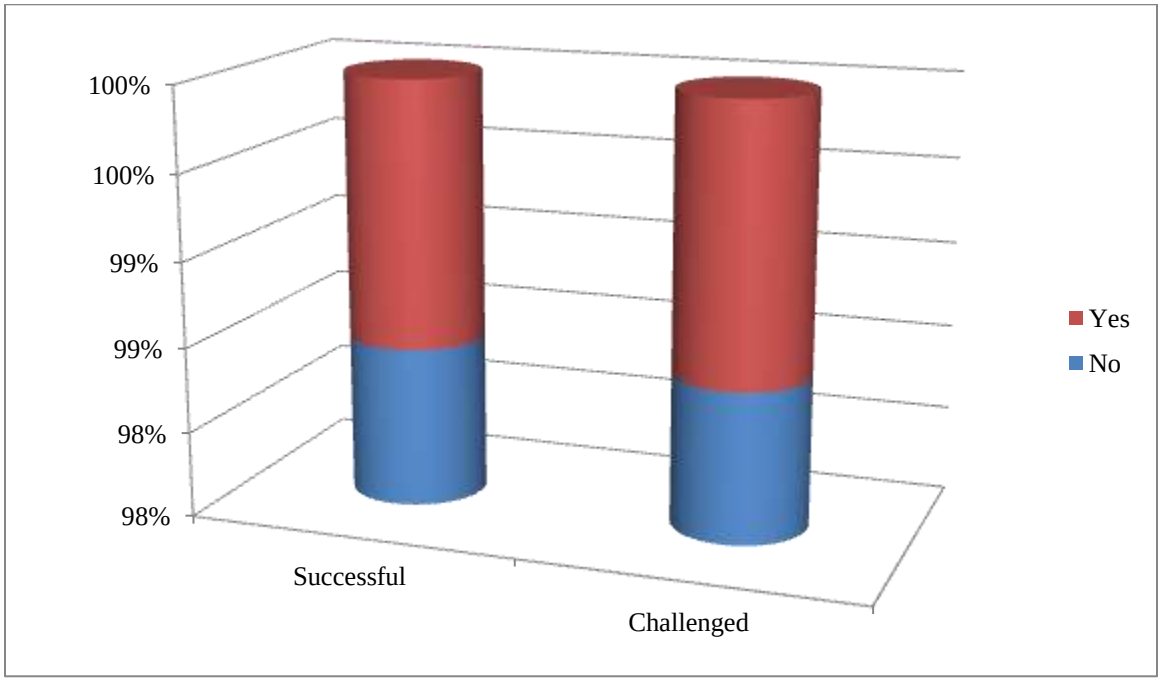
Thirty (30) of the fifty-six (56) successful developments, or fifty-four (54) percent, and twenty-six (26) of the fifty-five (55) challenged developments, or forty-seven (47) percent reported Impact Fees/Dedications/Payments in Lieu of Dedications.

Post World War II, governments in the United States added the priority of assuring affordable housing for an ever-expanding population. Affordable housing is generally defined as costing less than 30 percent of gross family income. It is estimated that even middle-income families are forced to pay more than half of their income for housing. Many people believe that the private market cannot solve the lack of affordable housing on its own. Government has intervened in the form of tax subsidies for building affordable housing, direct rental supplements and rent control measures.[257] However, there is an emerging assumption that the presence of these types of governmental intervention within a development negatively impacts its desirability.

[257] Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation*, 67-68 (American Planning Association Chicago 2003).

AFFORDABLE HOUSING REQUIREMENTS (INCLUDING INCLUSIONARY ZONING)

(Frequencies)

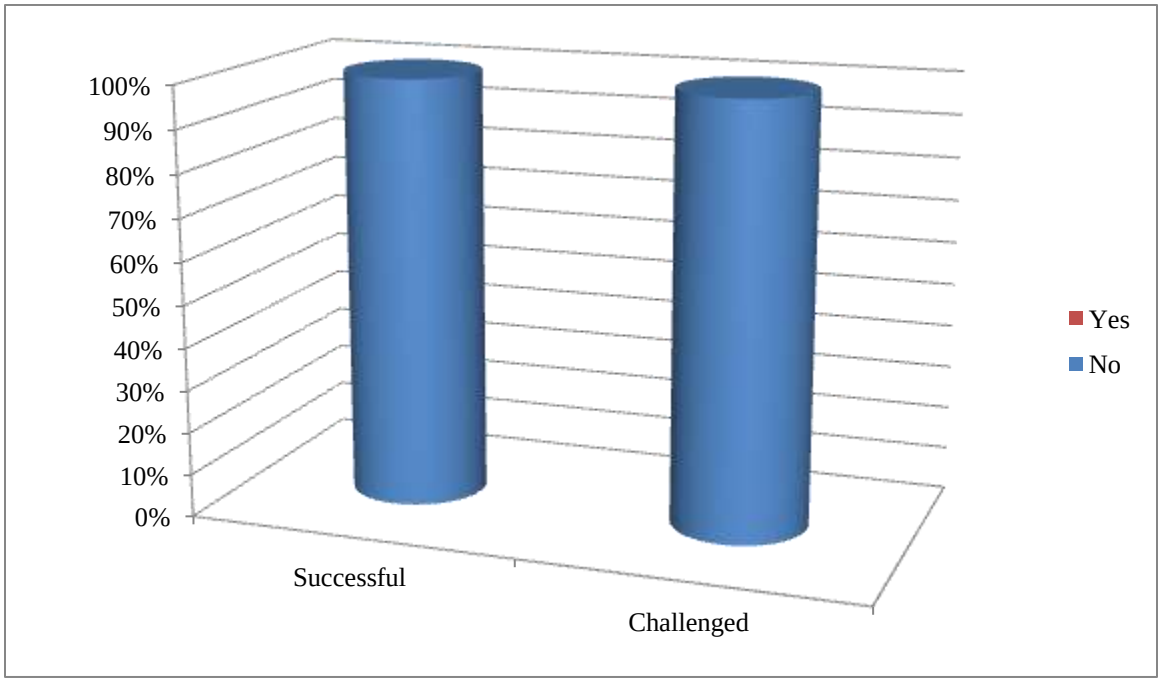


N = 128

Again, there was little variance in regard to Affordable Housing Requirements (Including Inclusionary Zoning) between the successful and challenged developments. One (1) of the sixty-four (64) developments identified as successful was subject to Affordable Housing Requirements (Including Inclusionary Zoning). One (1) of the sixty-two (62) developments identified as challenged was subject to Affordable Housing Requirements (Including Inclusionary Zoning).

RENT/PURCHASE CONTROL REQUIREMENTS

(Frequencies)



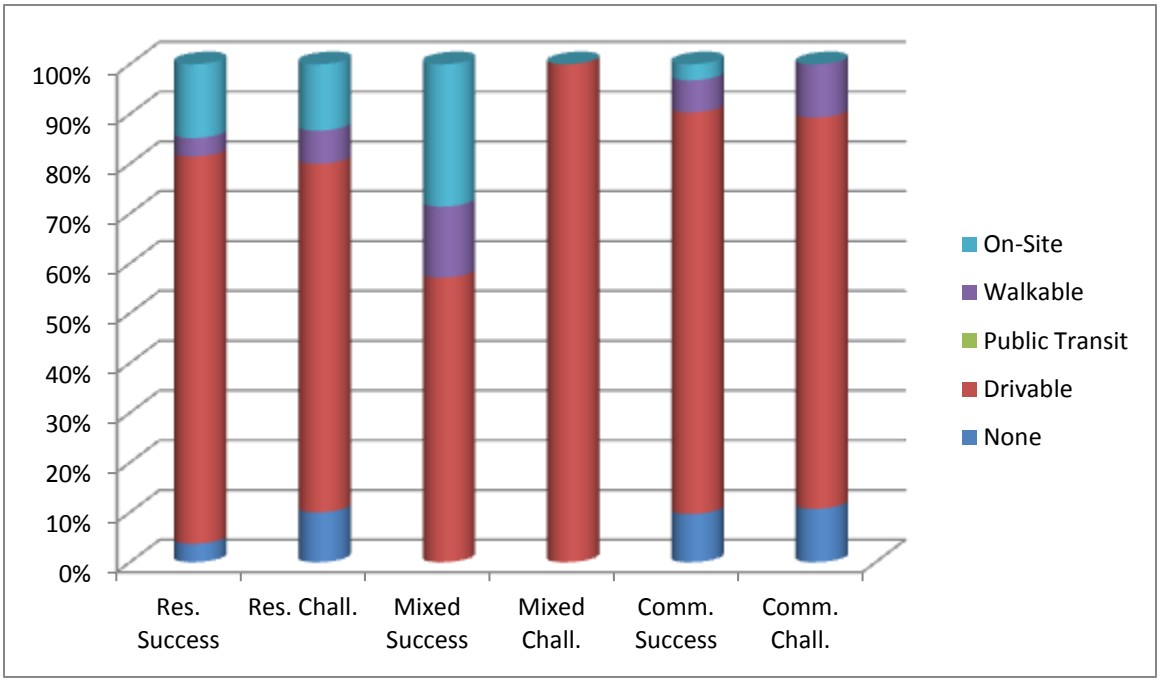
N = 128

No Rent/Purchase Control Requirements were reported in either the successful or challenged developments.

The following three tables reflect developmental access (presence within or proximity thereto) of affordable housing, public housing and shelters, and, for comparison, upscale housing.

AFFORDABLE HOUSING ACCESS

(Percentages)

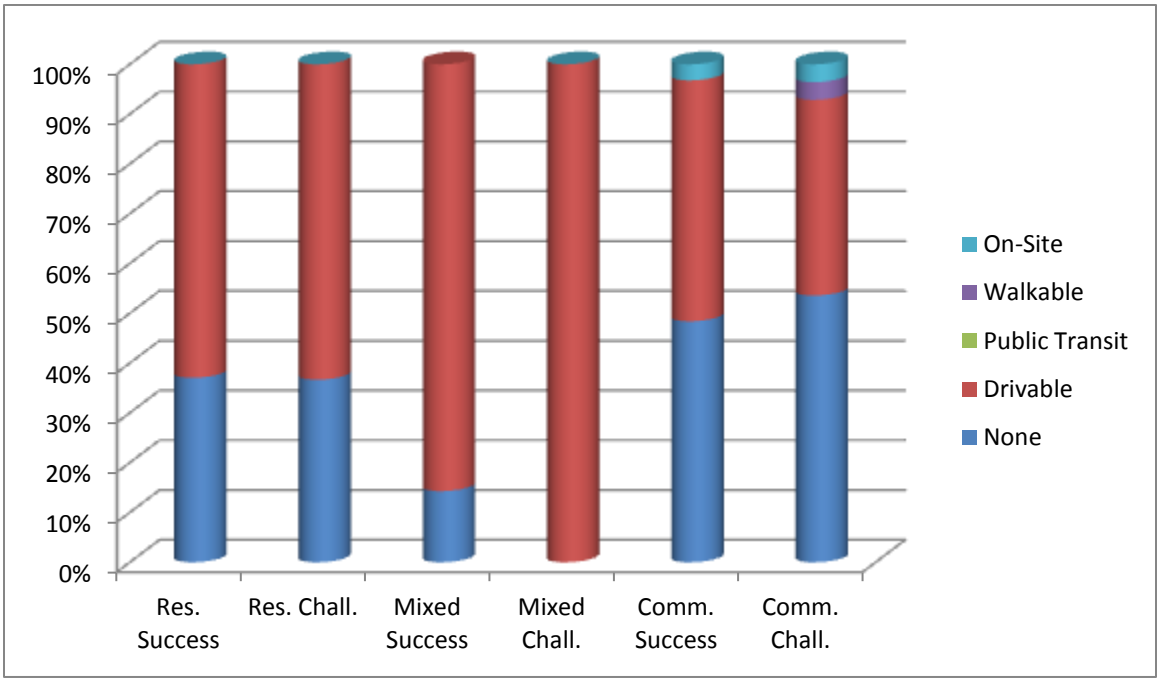


N = 128

The percentages reflect the type of access someone within the development would have to Affordable Housing (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

PUBLIC HOUSING/SHELTER ACCESS

(Percentages)

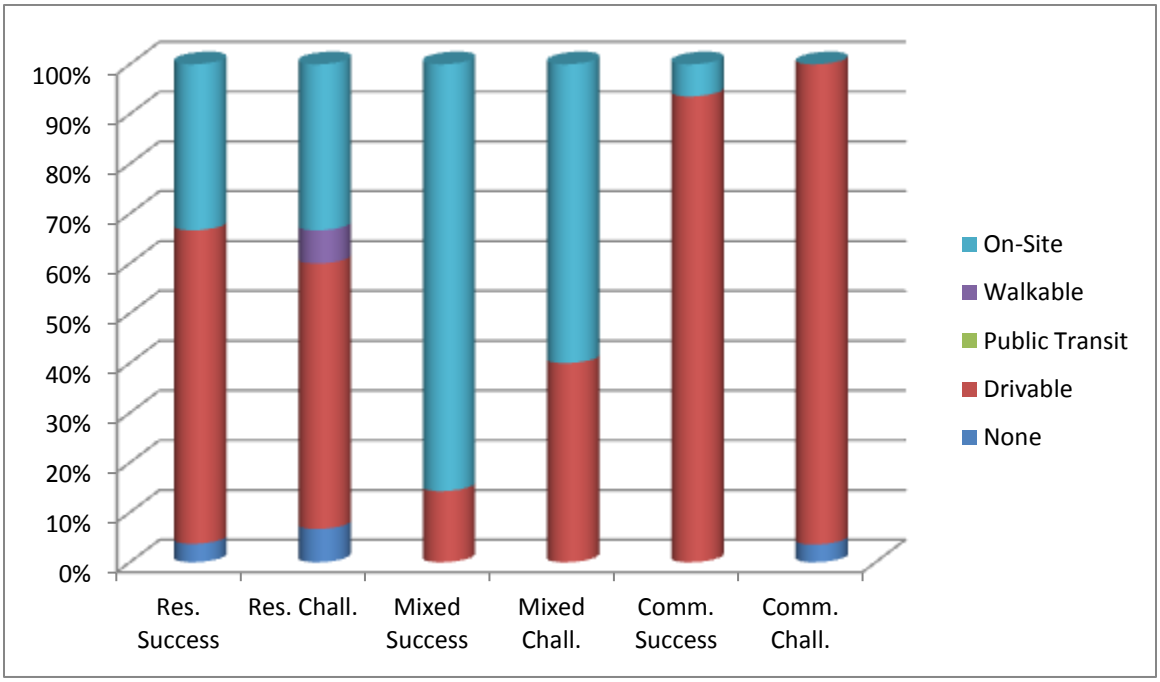


N = 128

The percentages reflect the type of access someone within the development would have to Public Housing/Shelter (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

UPSCALE HOUSING ACCESS

(Percentages)



N = 128

The percentages reflect the type of access someone within the development would have to Upscale Housing (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

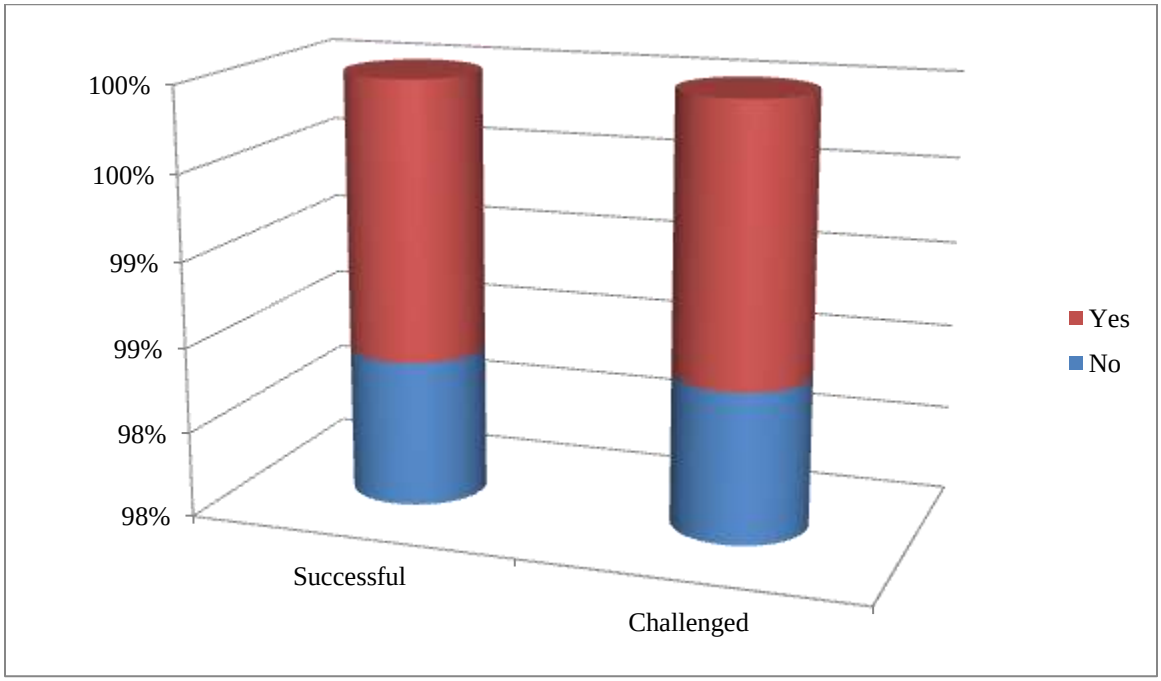
Local governments have continued to grasp for ways to slow outward migration. Efforts have centered on both limiting outward growth and enhancing internal land utilization. Urban growth boundaries have been advocated as a method to shift growth from where it is likely to occur into more centralized and compact areas. An urban growth boundary regulation distinguishes between growth areas, where densities are higher and development is encouraged, and slow growth or conservation areas, where development is discouraged in order to preserve resources.[258] It is thought that urban

[258] *Urban Sprawl: A Comprehensive Reference Guide*, 49 (David C. Soule, ed., Greenwood Press, Westport, Conn., 2006).

growth boundaries are not likely to be effective unless stringent limits on privately-financed competing growth outside of the urban growth boundary are also enacted.[259]

GOVERNMENTAL GROWTH RESTRICTIONS

(Frequencies)



N = 128

There was little variance in regard to Government Growth Restrictions between the successful and challenged developments. One (1) of the sixty-one (61) developments identified as successful was subject to Government Growth Restrictions. One (1) of the sixty-two (62) developments identified as challenged was subject to Government Growth Restrictions.

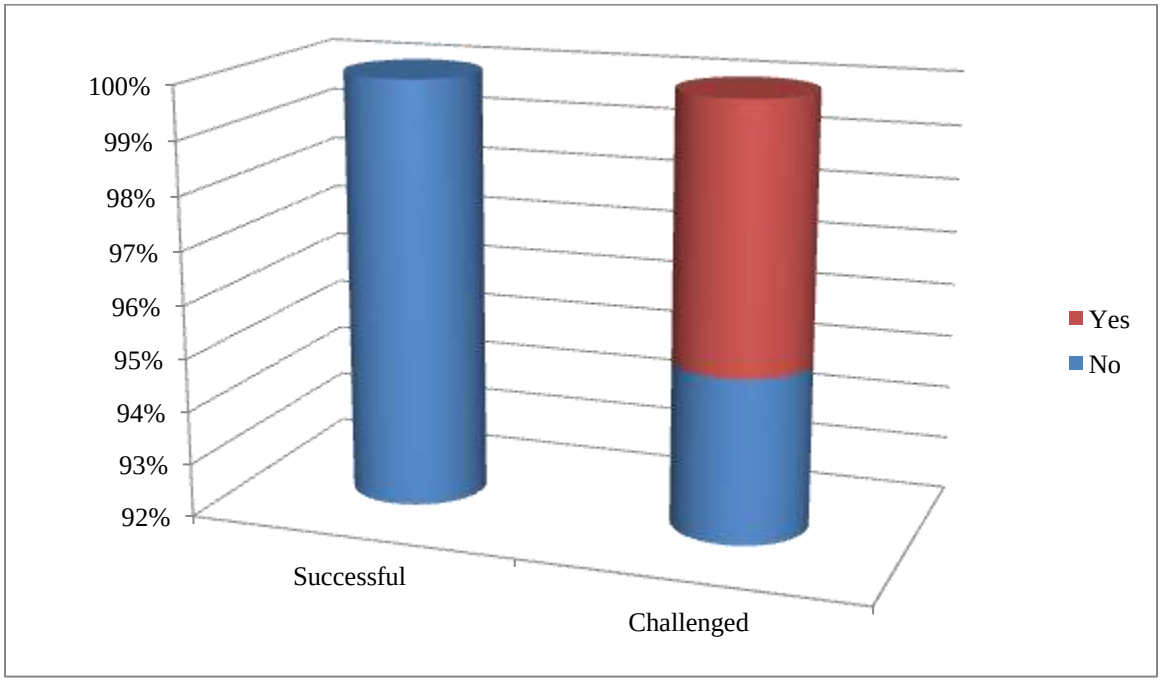
However, any type of zoning which excludes or prohibits uses may become suspect as exclusionary zoning. While there may be legally articulable reasons for a zoning decision, including effect on adjacent property values or utility service burdens

[259] Robert W. Burchell, Anthony Downs, Barbara McCann and Sahan Mukherji, *Sprawl Costs: Economic Impacts of Unchecked Development* 148 (Island Press Washington, D.C. 2005).

for local jurisdictions,[260] the decision may also have the legally questionable effect of excluding certain people, including racial minorities, ethnic groups, or lower-income persons.[261]

REQUIREMENTS SUGGESTING POSSIBLE EXCLUSIONARY INTENTIONS

(Frequencies)



N = 128

There was some variance in regard to Requirements Suggesting Possible Exclusionary Intentions between the successful and challenged developments. None of the sixty-three (63) developments identified as successful were subject to Requirements Suggesting Possible Exclusionary Intentions. Three (3) of the sixty-one (61) developments identified as challenged were subject to Requirements Suggesting Possible Exclusionary Intentions.

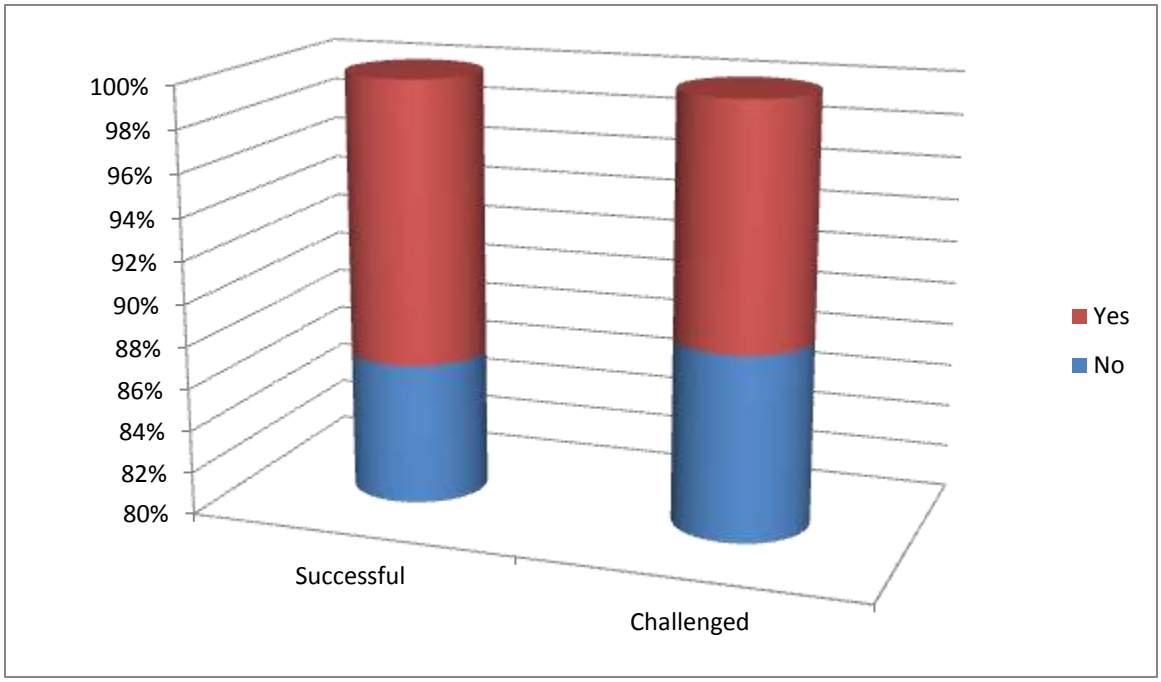
[260] Nico Larco, *Suburbia Shifted: Overlooked Trends and Opportunities in Suburban Multifamily Housing*, Journal of Architectural and Planning Research, v. 27, no. 1, 69-72 (Spring 2010) (internal citations omitted).
[261] Gregory D. Squires, "Urban Sprawl and the Uneven Development of Metropolitan America" in *Urban Sprawl: Causes, Consequences and Policy Responses* 10 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

Cluster development requires a share of a parcel to be permanently protected as open space in exchange for reducing dimensional standards and greater design flexibility.[262] Randall Arendt argues in *Basing Cluster Techniques on Development Densities Appropriate to the Area* that clustered development, or clustering structures close together and combining their surrounding open space into larger open areas, can improve developments.[263] Planners have incorporated clustered development techniques into residential design. Homes in these subdivisions are built on smaller lots and often 30-40 percent of the land is left as an open space easement for all subdivision homeowners to enjoy. In many cases, builders can construct the same number of homes on just half the land, leaving the remainder undeveloped in the form of wetlands, forests, wildlife habitat, and scenic riparian zones.[264] Leonard Gilroy identifies at least three potential benefits: reduced land preparation costs and less infrastructure such as streets and sewers, less homeowner property to maintain and protects environmental resources, and farmland.[265] However, after studying the willingness of potential homebuyers to invest in new residential development in the New England area, Robert Johnston, Stephen Swallow and Dana Marie Bauer claim that homebuyers preferred single, non-fragmented blocks over clustered development.[266]

[262] Jenny Schuetz, *Guarding the Town Walls: Mechanisms and Motives for Restricting Multifamily Housing in Massachusetts*, Real Estate Economics v. 36, no. 3, 555-586 (Fall 2008).
[263] Randall Arendt, *Basing Cluster Techniques on Development Densities Appropriate to the Area*, Journal of the American Planning Association, v. 63, 137-145 (Winter 1997).
[264] Alan K. Reichert & Hsin-Yu Liang, *An Economic Analysis of Real Estate Conservation Subdivision Developments*, The Appraisal Journal, v. 75, no. 3, 236-45 (Summer 2007).
[265] Alan K. Reichert & Hsin-Yu Liang, *An Economic Analysis of Real Estate Conservation Subdivision Developments*, The Appraisal Journal, v. 75, no. 3, 236-45 (Summer 2007) *citing* Leonard Gilroy, "Conservation Design: A Market-Friendly Approach to Local Environmental Protection," (Urban Futures Program, Reason Public Policy Institute, August 6,2006).
[266] Robert J. Johnston, Stephen K. Swallow & Dana Marie Bauer, *Spatial Factors and Stated Preference Values for Public Goods: Considerations for Rural Land Use*, Land Economics, v. 78, no. 4, 489-491 (November 2002).

DENSITY REQUIREMENTS (INCLUDING CLUSTERING)

(Frequencies)



N = 128

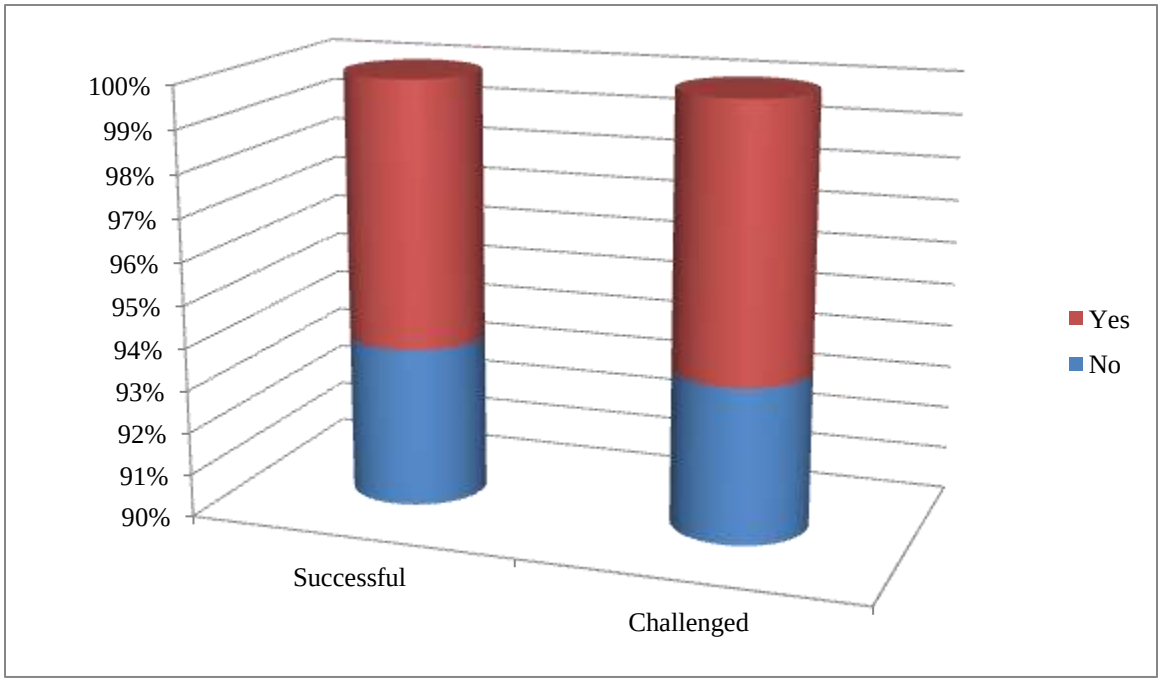
There was little variance in regard to Density Requirements (including clustering) between the successful and challenged developments. Eight (8) of the sixty (60) developments identified as successful were subject to Density Requirements (including clustering). Seven (7) of the sixty-two (62) developments identified as challenged were subject to Density Requirements (including clustering).

It has also been suggested that older property replacement capitalizes on and contributes to rising land prices whose value outpaces older and often under-maintained building stock. Municipal historic preservation legislation is enacted to prohibit owner property replacement within defined historic districts except where rehabilitation or restoration is economically unfeasible.[267]

[267] Rachel Weber, Marc Doussard, Saurav Dev Bhatta, & Daniel McGrath, *Tearing the City Down: Understanding Demolition Activity in Gentrifying Neighborhoods*, Journal of Urban Affairs, v. 28, no. 1, 22-23 (2006).

HISTORICAL PRESERVATION REQUIREMENTS

(Frequencies)



N = 128

There was little variance in regard to Historic Preservation Requirements between the successful and challenged developments. Four (4) of the sixty-four (64) developments identified as successful were subject to Historic Preservation Requirements. Four (4) of the sixty-three (63) developments identified as challenged were subject to Historic Preservation Requirements.

In the early 1960s, the fiscal and legal limits of local government were again realized. Budgetary demands curtailed use of general property taxes to finance the costs associated with a development.[268] The conventional planning process often produced development plans that were little more than summaries of vaguely defined goals, transcriptions of public comment, and broad policy recommendations, generally leaving their implementation to the vagaries of negotiation between market-oriented

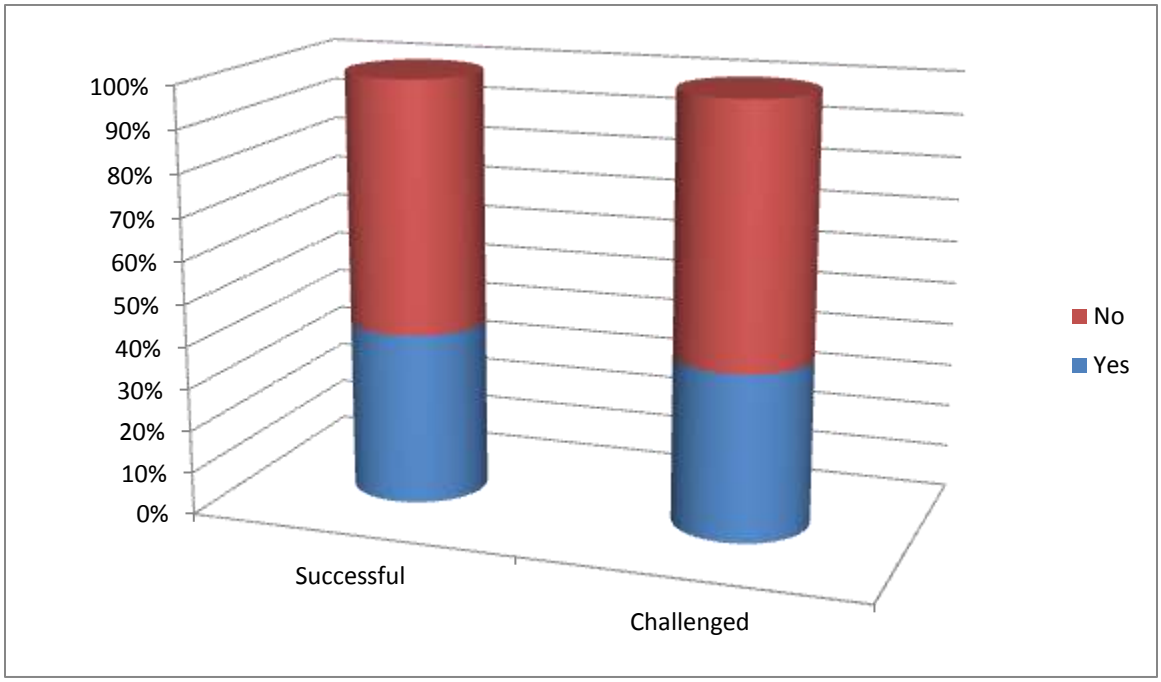
[268] Robert H. Freilich, Robert J. Sitkowski, & Seth D. Mennillo, *From Sprawl to Sustainability: Smart Growth, New Urbanism, Green Development, and Renewable Energy*, 26 (2d ed., Chicago, Ill, American Bar Association, 2010).

entrepreneurs and cash-strapped governmental regulators.[269] Homeowner associations with their restrictive covenants emerged as at least partial solutions. They are typically found in residential developments consisting of several parcels of similar single-family, detached housing and provide members with various goods and services such as street maintenance, snow removal, trash collection and security patrols. In some states, they are given the status of private governments, however their authority is by virtue of binding covenants running with the land.[270] Homeowner associations generally impose strict rules, sometimes in the form of restrictive covenants, controlling the use, maintenance and construction of member properties.[271] With advocacy, the number of homeowner associations has grown exponentially over the last fifty years. Today, in major metropolitan areas, 50 percent of all new housing units are being built and sold as part of a homeowner association.[272] It is asserted that homeowner association homes are expected to have higher values because the stricter enforcement of rules controlling member's behaviors results in fewer possibilities for neighbors to create negative externalities that may harm house values.[273] However, some homeowner association residents have complained that they are paying twice for the same services; once through property tax and again through homeowner association assessments.[274]

[269] David Brain, *Democracy and Urban Design: The Transect as Civic Renewal*, Places, v. 18, no. 1, 18-23, (Spring 2006).
[270] Jeremy R. Groves, *All Together Now? An Empirical Study of the Voting Behaviors of Homeowner Association Members in St. Louis County*, The Review of Policy Research, v. 23, no. 6, 1199-1200 (November 2006).
[271] John M. Coggeshall, *Symbols of Division: Plantations Along South Carolina's Coast*, Home Cultures, v. 5, no. 1, 50-52 (March 2008).
[272] Setha M. Low, *Incorporation and Gated Communities in the Greater Metro-Los Angeles Region as a Model of Privatization of Residential Communities*, Home Cultures, v. 5, no. 1, 95-96 (March 2008) (internal citations omitted).
[273] Jeremy R. Groves, *All Together Now? An Empirical Study of the Voting Behaviors of Homeowner Association Members in St. Louis County*, The Review of Policy Research, v. 23, no. 6, 1201-1202 (November 2006).
[274] Michael Pacione, *Proprietary Residential Communities in the United States*, The Geographical Review, v. 96, no. 4, 554 (October 2006).

HOMEOWNER ASSOCIATIONS

(Frequencies)

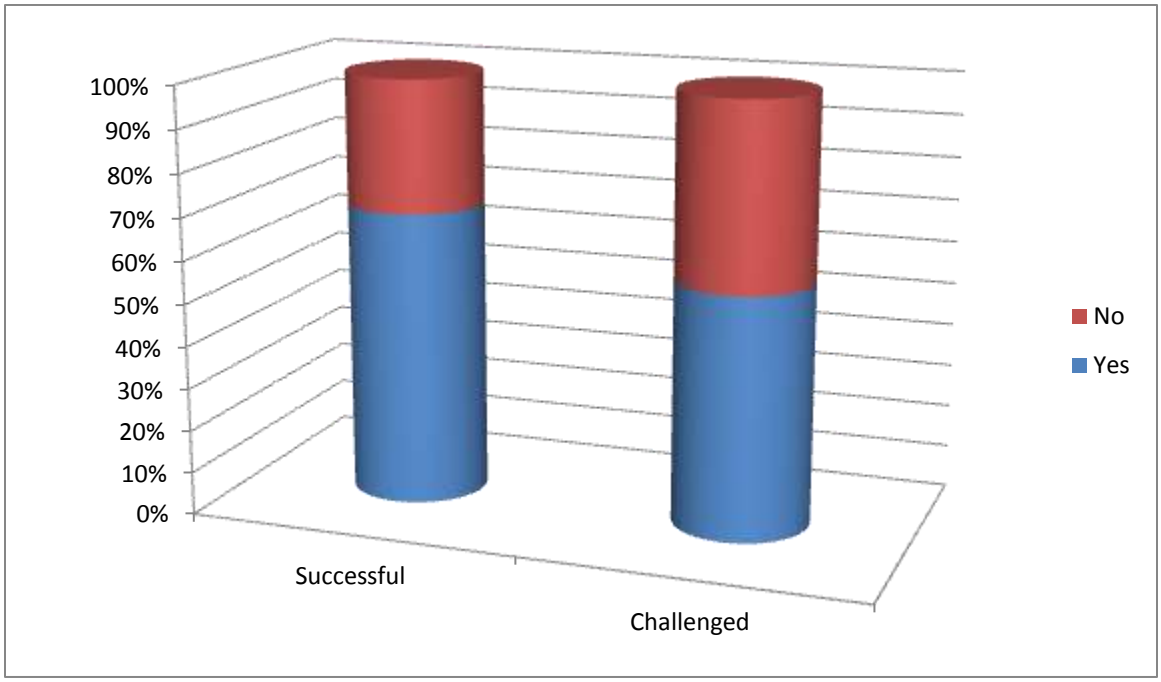


N = 128

There was little variance in regard to Homeowner Associations between the successful and challenged developments. Twenty-six (26) of the sixty-four (64) developments identified as successful were subject to Homeowner Associations. Twenty-four (24) of the sixty-one (61) developments identified as challenged were subject to Homeowner Associations.

RESTRICTIVE COVENANTS

(Frequencies)



N = 128

There was some variance in regard to Restrictive Covenants between the successful and challenged developments. Thirty-eight (38) of the fifty-five (55) developments identified as successful were subject to Restrictive Covenants. Thirty-three (33) of the fifty-eight (58) developments identified as challenged were subject to Restrictive Covenants.

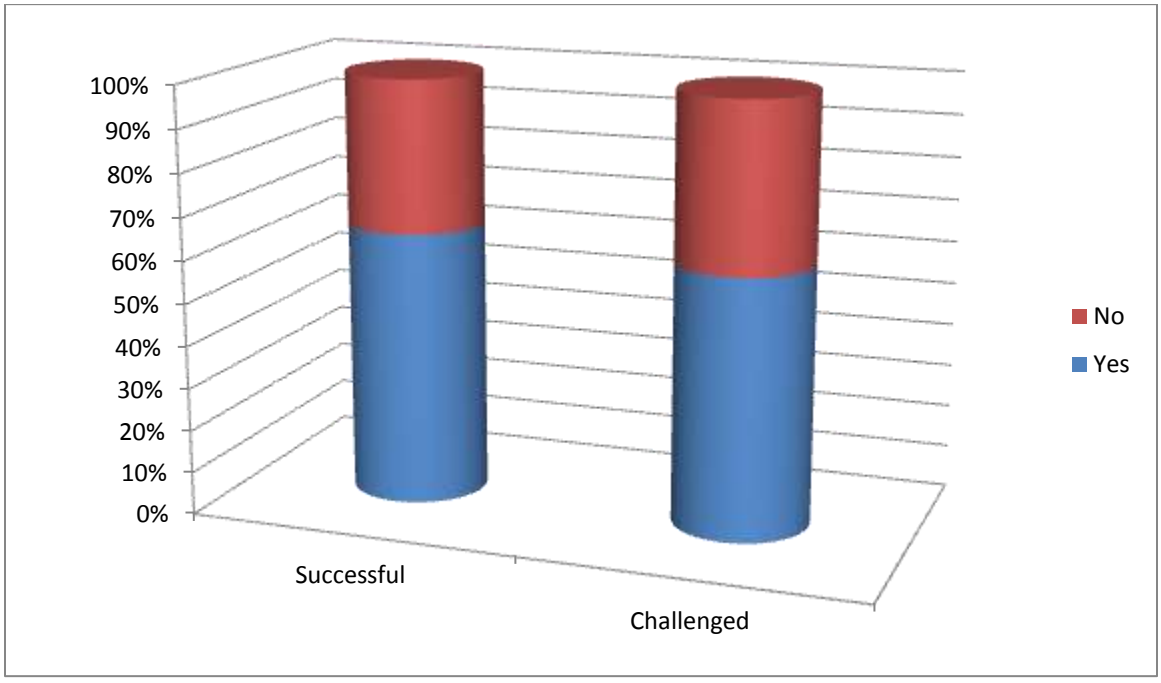
Many urbanists have for decades said that bringing mixed use back to the American city is the key to restoring its vibrancy. They argue that mixed use has the potential to increase social interaction, enrich civic life and bring important benefits in efficiency (by optimizing the use of infrastructure), equity (by providing a variety of housing options and better access to services for different income groups), and sustainability (by reducing the consumption of land and the need for cars). Thus, mixed

use has become a planning mantra and a key tenet of planning movements such as new urbanism.[275]

This has prompted the addition of a planned unit development process to allow a mixture of commercial and residential uses, including multifamily structures.[276] In general, planned unit developments are a combination of modern zoning techniques, namely, the use of general residence districts controlling the level of density by district regulations but without any specification of building types, cluster zoning, the use of rate and sequence of development regulations, and the use of site plan review to regulate the impact of the proposed development on the neighboring area.[277]

PLANNED UNIT DEVELOPMENT

(Frequencies)



N = 128

There was little variance in regard to Planned Unit Developments between the successful and challenged developments. Thirty-eight (38) of the fifty-nine (59) developments

[275] Sonia Hirt, *The Devil is in the Definitions: Contrasting American and German Approaches to Zoning*, Journal of the American Planning Association, v. 73, no. 4, 436 (Autumn 2007) (internal citations omitted).
[276] Jenny Schuetz, *Guarding the Town Walls: Mechanisms and Motives for Restricting Multifamily Housing in Massachusetts*, Real Estate Economics v. 36, no. 3, 555-586 (Fall 2008).
[277] 8 McQuillin Mun. Corp. § 25:101 (3d ed.).

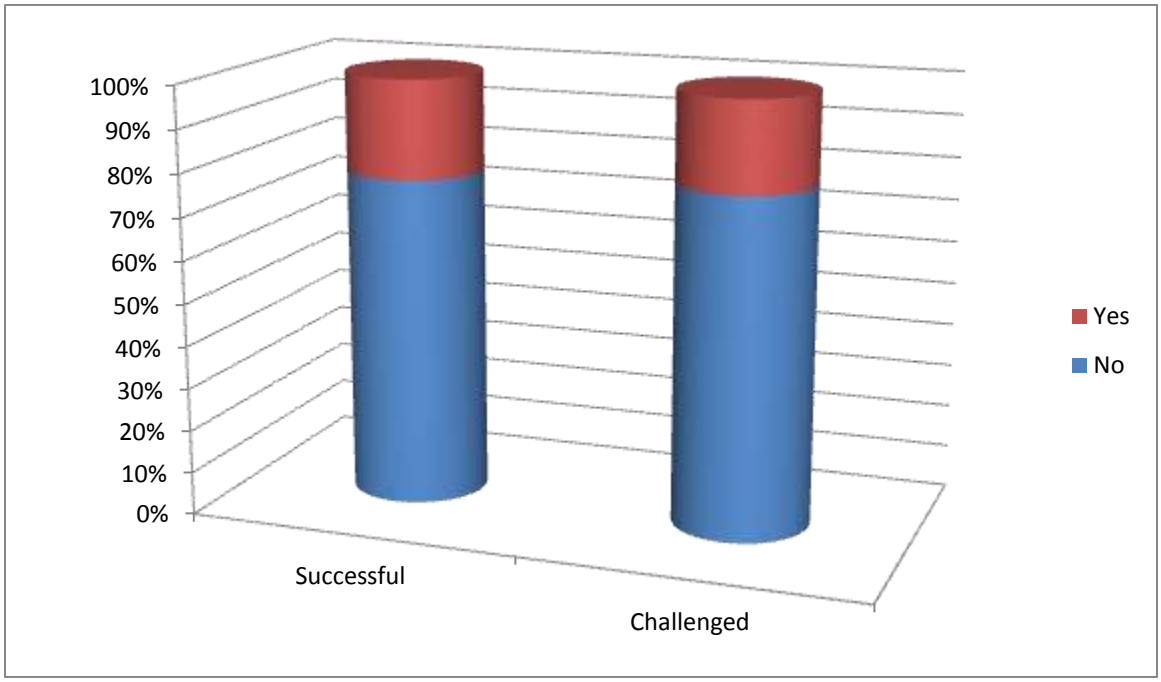
identified as successful were Planned Unit Developments. Thirty-six (36) of the fifty-nine (59) developments identified as challenged were Planned Unit Developments.

The second half of the twentieth century brought a new era of innovation in open space and natural area protection championed by the federal government.[278] It has been argued that the introduction of environmental regulation helps to exacerbate a displacement of politics within the regulatory apparatus. In the context of the public process, sincere and reasonable concern for the environmental impact of development is mixed with specific "not-in-my-backyard" (NIMBY) reactions, narrow self-interest, and a generalized fear of "out-of-control" development and environmental degradation.[279] Urban theorists have advocated for environmental development regulations mandating the preservation of native vegetation, creeks, wetlands, landscape features, and animal life. These regulations are designed to ensure that at least some aspects of new residential development are better integrated with surrounding landscapes. "Particularly egregious" practices, such as the leveling of hills to make way for new subdivisions, may be subject to complete elimination.[280]

[278] *Urban Sprawl: A Comprehensive Reference Guide*, 396 (David C. Soule, Ed., Greenwood Press, Westport, Conn., 2006).
[279] David Brain, *Democracy and Urban Design: The Transect as Civic Renewal*, Places, v. 18, no. 1, 18-23, (Spring 2006).
[280] Rene Davids, *Development, Topography, and Identity: The Dougherty Valley and the New Suburban Metropolis*, Places, v. 20, no. 3, 60 (Cambridge, Mass., Fall 2008).

ENVIRONMENTAL REQUIREMENTS (WETLANDS, ETC.)

(Frequencies)

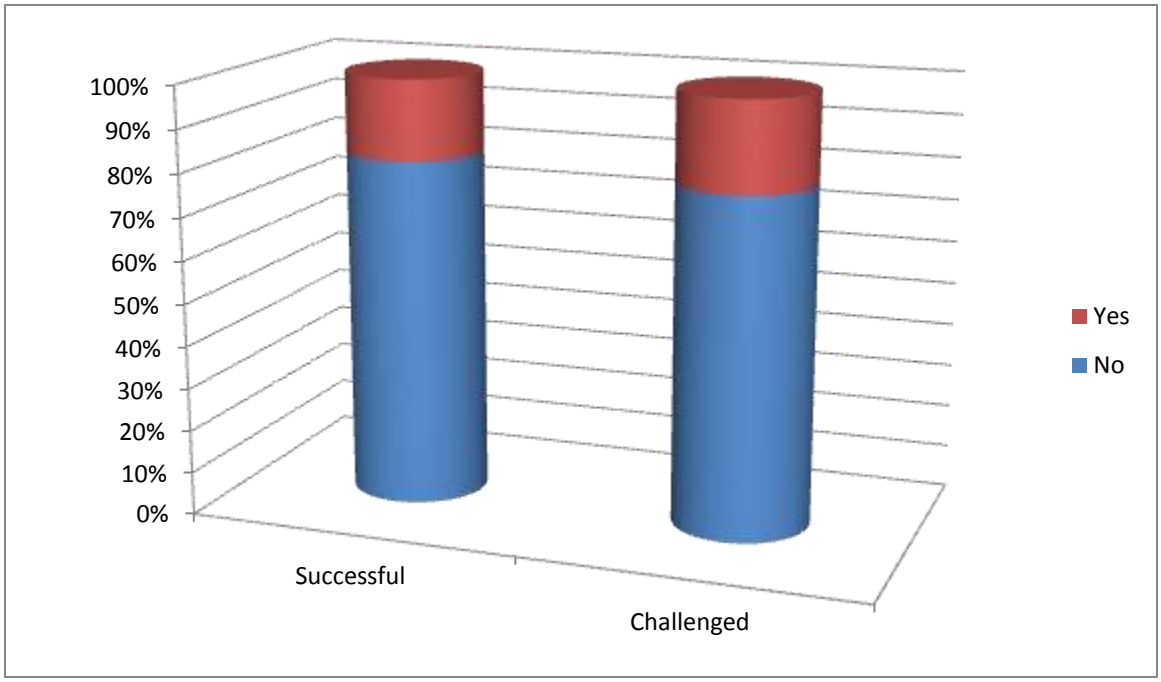


N = 128

There was little variance in regard to Environmental Requirements (wetlands, riparian corridors, upland forests, air quality and greenhouse emissions) between the successful and challenged developments. Fifteen (15) of the sixty-five (65) developments identified as successful were subject to Environmental Requirements (wetlands, riparian corridors, upland forests, air quality and greenhouse emissions). Thirteen (13) of the sixty-two (62) developments identified as challenged were subject to Environmental Requirements (wetlands, riparian corridors, upland forests, air quality and greenhouse emissions).

WATER CONSERVATION REQUIREMENTS

(Frequencies)



N = 128

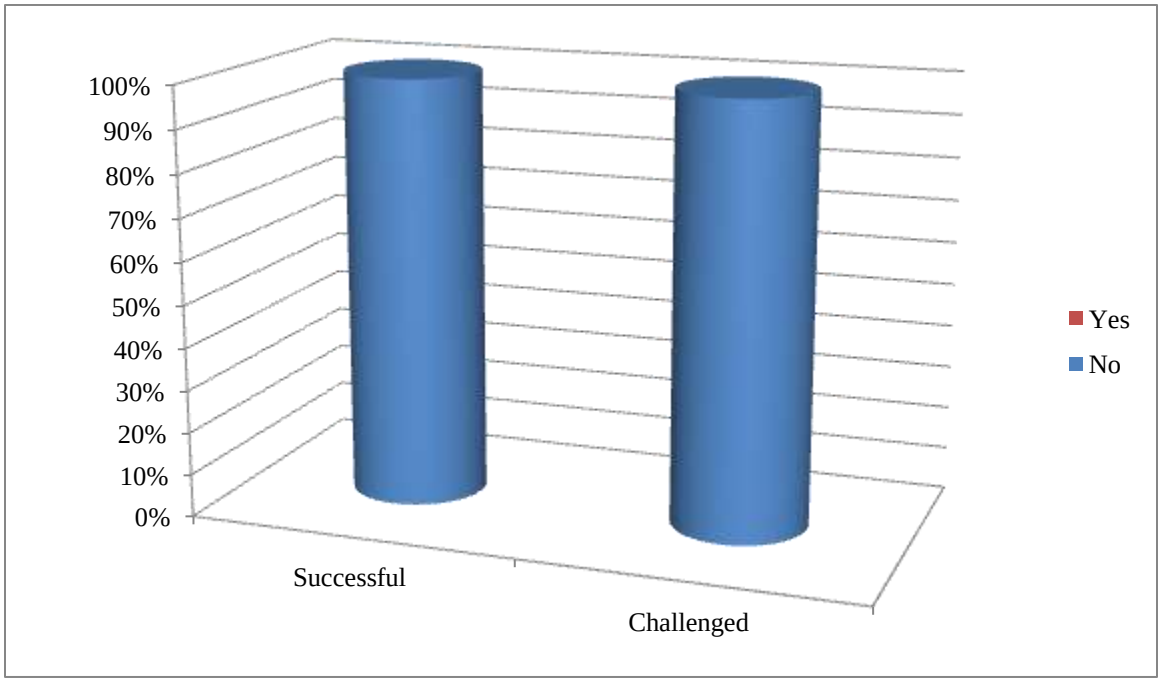
There was little variance in regard to Water Conservation Requirements between the successful and challenged developments. Twelve (12) of the sixty-four (64) developments identified as successful were subject to Water Conservation Requirements. Thirteen (13) of the sixty-two (62) developments identified as challenged were subject to Water Conservation Requirements.

The Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) authorizes the Environmental Protection Agency (EPA) to act quickly against toxic pollutant spills that threaten the environment and human health. The EPA may start response actions to abate any actual or threatened release of hazardous substances. A Superfund exists to pay for mandated cleanups. The EPA can recover its costs from responsible parties to replenish this fund.[281]

[281] 19 McQuillin Mun. Corp. § 53A:3 (3d ed.).

EPA/SUPERFUND REQUIREMENTS

(Frequencies)



N = 128

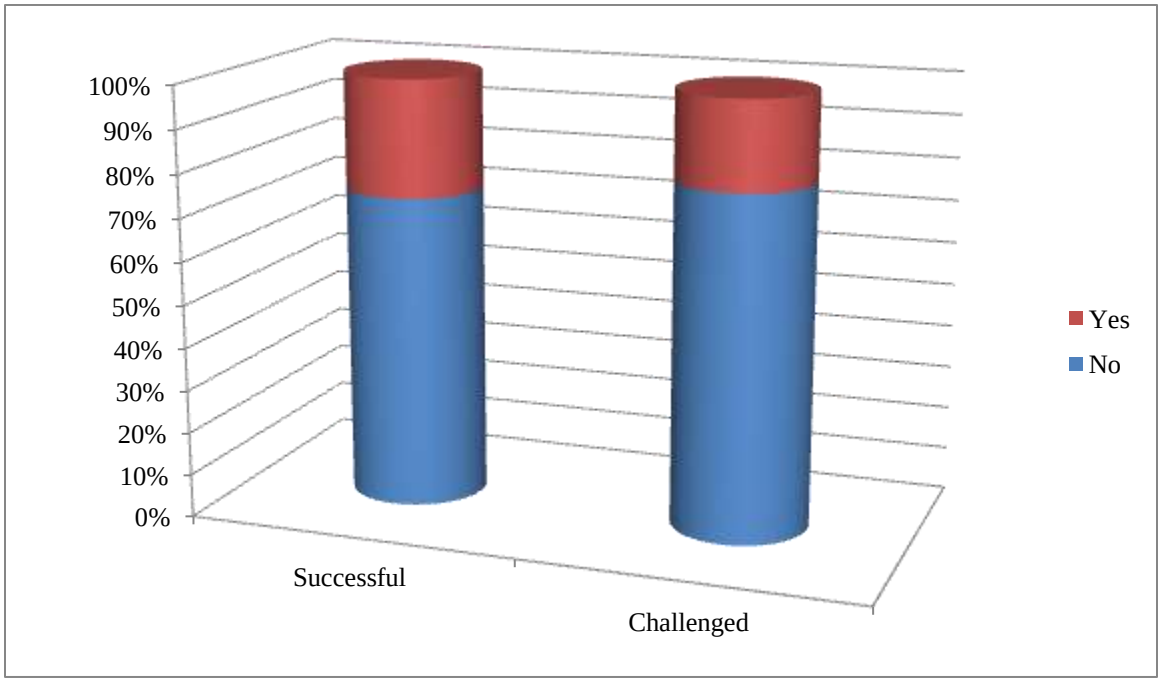
No EPA/Superfund Requirements were reported in either the successful or challenged developments.

To qualify for the sale of federally-subsidized flood insurance a community must adopt and submit to the Administrator as part of its application, flood plain management regulations, satisfying at a minimum the criteria set forth in federal regulation, designed to reduce or avoid future flood, mudslide (i.e., mudflow) or flood-related erosion damages. These regulations must include effective enforcement provisions.[282]

[282] 44 CFR 59.2(b).

FEMA FLOODPLAIN REQUIREMENTS

(Frequencies)

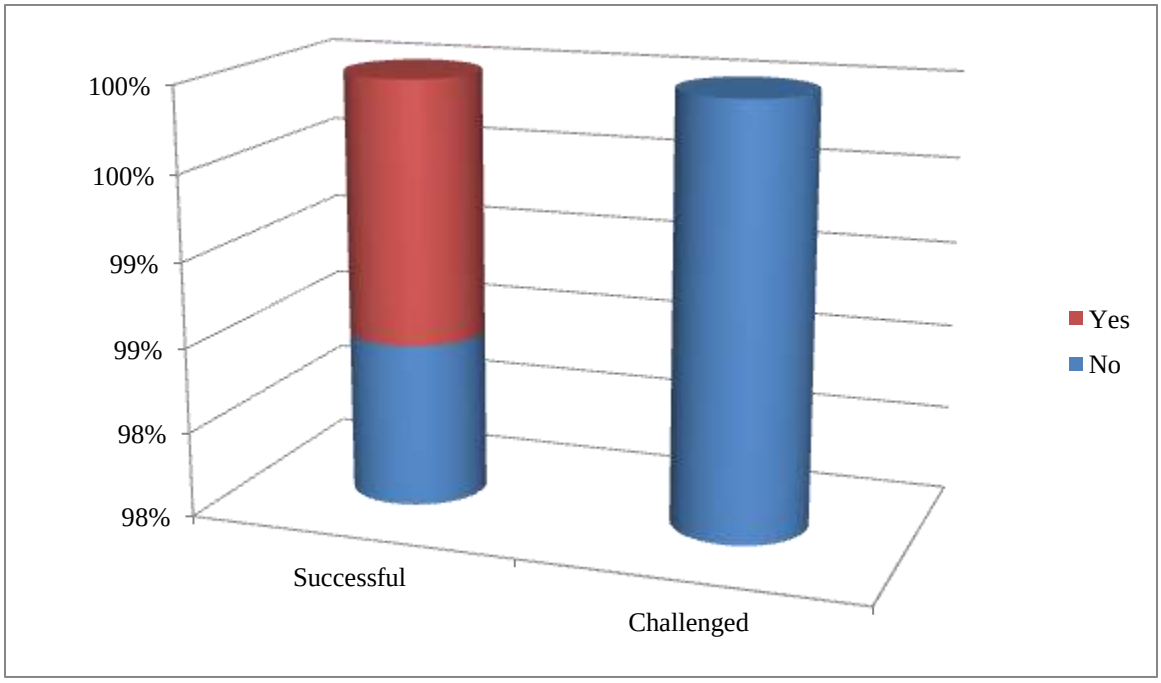


N = 128

Again, there was little variance in regard to FEMA Floodplain Requirements between the successful and challenged developments. Sixteen (16) of the fifty-nine (59) developments identified as successful were subject to FEMA Floodplain Requirements. Twelve (12) of the fifty-nine (59) developments identified as challenged were subject to FEMA Floodplain Requirements.

COASTLINE DEVELOPMENT RESTRICTIONS

(Frequencies)



N = 128

There was little variance in regard to Coastline Development Restrictions between the successful and challenged developments. One (1) of the sixty-five (65) developments identified as successful was subject to Coastline Development Restrictions. None of the sixty-three (63) developments identified as challenged were subject to Coastline Development Restrictions.

Energy-efficient design techniques have been cited as important for new commercial and residential developments.[283] Several standards measuring green development have been introduced over the past few years.[284] The oldest and most prominent certification standard evaluating the energy efficiency of development is the

[283] Nancy M. Wells & Joseph Laquatra, *Why Green Housing and Green Neighborhoods Are Important to the Health and Well-Being of Older Adults [Part of a special issue: Gray and Green: The Intersection of Aging and the Environment]*, Generations (San Francisco, Calif.), v. 33, no. 4, 50-57 (Winter 2009/2010).
[284] Nancy M. Wells & Joseph Laquatra, *Why Green Housing and Green Neighborhoods Are Important to the Health and Well-Being of Older Adults [Part of a special issue: Gray and Green: The Intersection of Aging and the Environment]*, Generations (San Francisco, Calif.), v. 33, no. 4, 51-52 (Winter 2009/2010).

Leadership in Energy and Environmental Design (LEED) Green Building Rating System introduced by the United States Green Building Council (USGBC) in 2000.[285] "LEED is a program through which buildings are certified as meeting sustainability standards. LEED focuses on specific areas of human and environmental health, including sustainable site development, water savings, energy efficiency, materials selection, and indoor environmental quality. LEED is applicable to all buildings."[286]

> LEED has a checklist of prerequisites and credits for six categories, including: siting, energy, materials, indoor air quality, water use, and innovation in design. At the design stage, architects and engineers establish the energy and environmental factors they want to have for a structure. When the building is finished, a representative from the USGBC reviews the documentation (plans, engineers' calculations, etc.) and awards points out of a possible total of 69. The levels are: certified, silver, gold, or platinum (at least 52 points). Basically, each initiative, such as personal lighting control or daylighting in an office area, earns a point. . . .
>
> Seeking to make a business case for projects other than new construction, the council also has a LEED rating system for interiors and for core-and-shell construction, one for existing buildings, a pilot program for Neighborhood Development, and a LEED for Homes. With this broad array of LEED certification, the hope is that a national standard for green buildings of all varieties can be promulgated . . . [287]

Over the past few years, "a number of federal agencies, 22 states, and 75 localities across the nation have instituted policies to require or encourage LEED."[288] A LEED rating system also exists for neighborhood development and focuses on design that reduces risks associated with obesity, heart disease, and hypertension through protection of the natural environment and development of "walkable" communities.[289] In 2007, the U.S. Green Building Council introduced a pilot program incorporating its LEED-Neighborhood Development (ND) criteria. Proposed as a measure of smart-growth goals

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[285] *Id*.
[286] *Id*.
[287] Joe Knisley, *Searching for Gold in Green Buildings*, Electrical Construction and Maintenance, v. 106, no. 12, 22-24 (December 2007).
[288] Joe Knisley, *Searching for Gold in Green Buildings*, Electrical Construction and Maintenance, v. 106, no. 12, 22-24 (December 2007).
[289] Nancy M. Wells & Joseph Laquatra, *Why Green Housing and Green Neighborhoods Are Important to the Health and Well-Being of Older Adults [Part of a special issue: Gray and Green: The Intersection of Aging and the Environment]*, Generations (San Francisco, Calif.), v. 33, no. 4, 51-52 (Winter 2009/2010) (internal citations omitted).

and created with the input of national smart-growth organizations, this rating system is designed to be used as an overlay to current suburban multifamily housing development practices. The LEED-ND criteria promote compact development, a diversity of uses, minimizing walking distances, and increasing access to the surrounding vicinity.[290]

> Another organization is Enterprise Community Partners, which since 2004 has administered the only national program to develop green homes for low-income families. As part of this program, the organization established Green Communities Criteria for design, neighborhood fabric, resource efficiency, environmental health, and maintenance. With input from stakeholders, the National Association of Home Builders (NAHB), the International Code Council (ICC), and the NAHB Research Center developed ICC-700, the National Green Building Standard. It was approved in 2009 as an American national standard and is the only green standard that is consistent with ICC's codes, which are the basis of building codes across the United States (Building Design and Construction, 2009). Green features covered by this standard are similar to those in use by LEED and Enterprise and include a provision for homeowner education on maintenance of green status.[291]

In 2011, new standards were developed and introduced including green building rating systems: site sustainability, water use efficiency, energy efficiency, indoor environmental quality, and the building's impact on the atmosphere, materials and resources.[292] Nancy Wells and Joseph Laquatra report that in green building, the manner in which a building will be disposed of at the end of its life is planned through practices that allow for deconstruction rather than demolition, making possible reuse of building components.[293]

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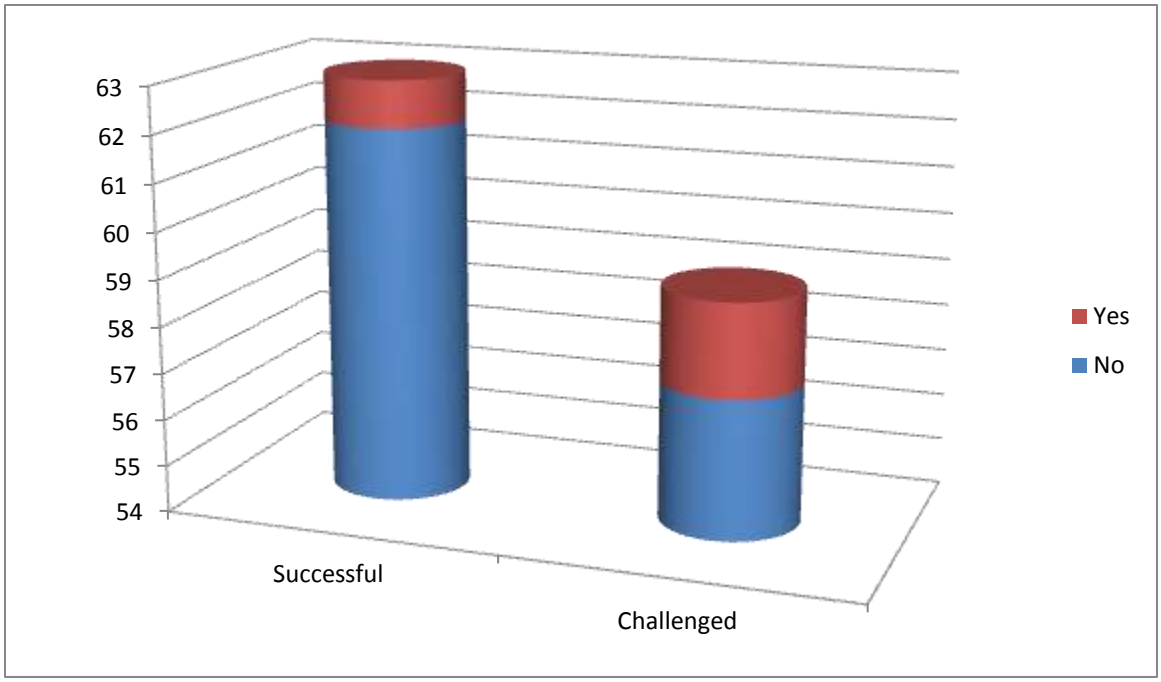
[290] Nico Larco, *Suburbia Shifted: Overlooked Trends and Opportunities in Suburban Multifamily Housing*, Journal of Architectural and Planning Research, v. 27, no. 1, 84 (Spring 2010) (internal citations omitted).
[291] Nancy M. Wells & Joseph Laquatra, *Why Green Housing and Green Neighborhoods Are Important to the Health and Well-Being of Older Adults [Part of a special issue: Gray and Green: The Intersection of Aging and the Environment]*, Generations (San Francisco, Calif.), v. 33, no. 4, 51-52 (Winter 2009/2010) (internal citations omitted).
[292] *New Green Building Standard Available*, ASHRAE Journal, v. 52, no. 1, 6 (January 2010).
[293] Nancy M. Wells & Joseph Laquatra, *Why Green Housing and Green Neighborhoods Are Important to the Health and Well-Being of Older Adults [Part of a special issue: Gray and Green: The Intersection of Aging and the Environment]*, Generations (San Francisco, Calif.), v. 33, no. 4, 50-57 (Winter 2009/2010).

GREEN/LEED/ENERGY EFFICIENT DEVELOPMENT REQUIRMENTS

(Frequencies)

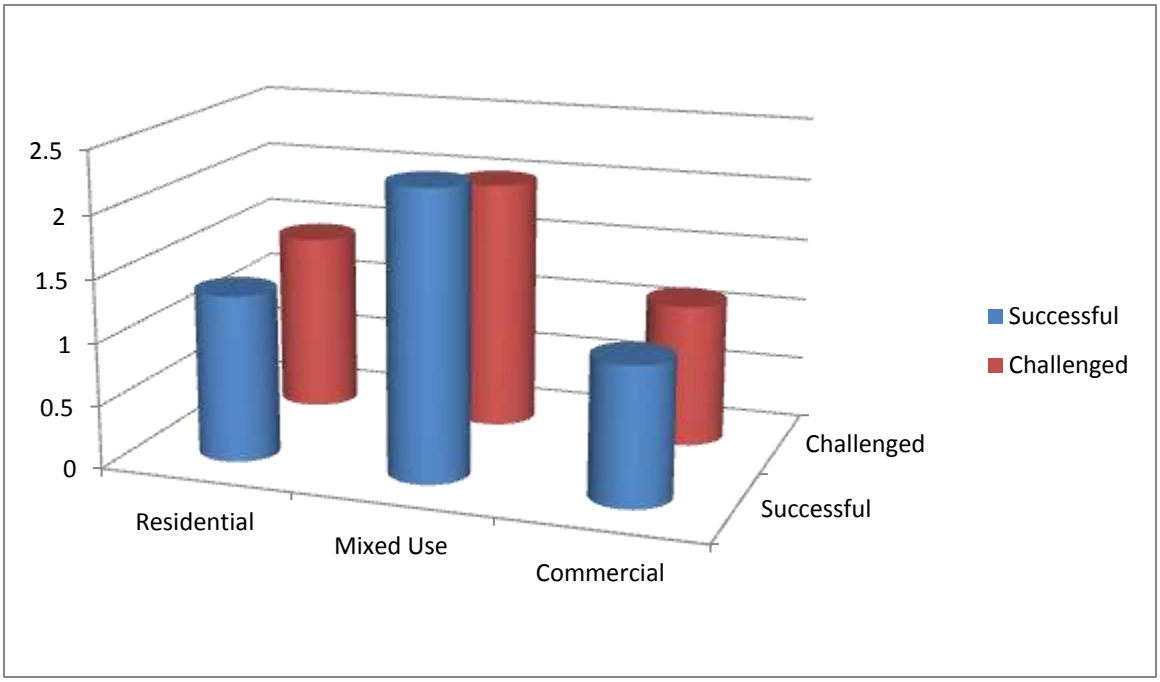


N = 128

There was little variance in regard to Green/LEED/Energy Efficient Development Requirements between the successful and challenged developments. One (1) of the sixty-three (63) developments identified as successful was subject to Green/LEED/Energy Efficient Development Requirements. Two (2) of the fifty-nine (59) developments identified as challenged were subject to Green/LEED/Energy Efficient Development Requirements.

PRESENCE OF GREEN/LEED/ENERGY-EFFICIENT DESIGN

(Means)



N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Green/LEED/Energy-Efficient Design in residential developments was 1.33 for successful and 1.43 for challenged developments; in mixed use developments was 2.29 for successful and 2 for challenged developments; and in commercial developments was 1.1 for successful and 1.14 for challenged developments.

Policies that preserve natural resources for future generations have been advanced as making life on earth sustainable. Sustainability embodies the notion of a development's impact on the environment, public infrastructure and services, and other resources as well as its relationship with people. It includes the use of building materials

from renewable sources, rain storage and recycled water for domestic and landscaping uses and solar and other renewable energy to supplement or replace electricity.[294] Smart growth contains three essential elements: policies to discourage the continued conversion of rural land at the edges of metropolitan regions, ways to make infill development and the restoration of older areas more attractive to investors and consumers and knitting the metropolitan region together with transportation systems that reduce dependency on automobile trips.[295]

Smart Growth initiatives, surfacing in the late 1990s, are directed at countering the continued sprawl of American cities.[296] Smart Growth promotes a more compact urban environment, one that is less auto-dependent, and one that is allegedly more efficient and less sprawl inducing than conventional design.[297] Smart growth principles address two related problems: spatial separation of land use and lack of mobility. Remedies for the problem of spatial separation include mixing land uses and creating diverse environments similar to traditional, older cities. Possible solutions for the lack of mobility include compact development and the promotion of public transit.[298] It is argued that remedying the problems of spatial separation and lack of mobility would combat sprawl by supporting a balanced urban development pattern that creates inclusive housing, supports home-based business, defines the public realm, facilitates pedestrian accessibility, and minimizes the use of the car while supporting public transit.[299]

Dating as far back as the 1930s, the building industry in America has voiced support for a uniform set of zoning standards, identifying traditional local standards as unpredictable, hard to plan for, costlier and less supportive of development.[300] It has been asserted that conventional, proscriptive codes deter smart growth through

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[294] Robert H. Freilich, Robert J. Sitkowski, & Seth D. Mennillo, *From Sprawl to Sustainability: Smart Growth, New Urbanism, Green Development, and Renewable Energy*, 194 (2d ed., Chicago, Ill, American Bar Association, 2010).
[295] Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation* 79, 289 (American Planning Association, Chicago, 2003).
[296] Andres Duany & Emily Talen, *Making the Good Easy: The Smart-Code Alternative*, The Fordham Urban Law Journal, Vol. 29, Issue 4, 1446 (April 2001).
[297] Larry Lawhon, *Planners' Perceptions of their Role in Socially Responsive Neighborhood Design*, Journal of Architectural and Planning Research, v. 20, no. 2, 162 (Summer 2003) (internal citations omitted).
[298] Andres Duany & Emily Talen, *Making the Good Easy: The Smart-Code Alternative*, The Fordham Urban Law Journal, Vol. 29, Issue 4, 1447 (April 2001).
[299] Andres Duany & Emily Talen, *Making the Good Easy: The Smart-Code Alternative*, The Fordham Urban Law Journal, Vol. 29, Issue 4, 1447 (April 2001).
[300] Michael Southworth & Eran Ben-Joseph, *Street Standards and the Shaping of Suburbia*, Journal of the American Planning Association, v. 61, 65-81 (Winter 1995).

regulations concerning density, use, parking, and street design.[301] Smart growth codes permit reductions in lot size, setbacks, and block length, and allow reductions in parking requirements as well as narrower street widths and rights-of-way. In terms of land use, smart growth codes permit accessory buildings to be used as dwellings, dwelling unit types to be mixed, home occupations and live or work units, and housing in commercial zones.[302] Smart growth codes can take a variety of forms. Some areas have adopted cluster zoning to preserve open space while increasing density by reducing minimum lot size requirements. Design-oriented codes have been developed to encourage compact, mixed-use neighborhoods, usually in selected urban zones. Smart growth codes often emphasize bicycle lanes, street connectivity, and sidewalks to facilitate walking and cycling.[303]

Form-based zoning substitutes the traditional differentiation of districts based on use with differentiation based on building form and thus does away with land use separation.[304] One of the most well-known form-based zoning codes is based on an explicit, normative theory, known as the Transect, that links human and natural environments in one conceptually continuous system.[305] "Transect is a geographic cross-section of a region used to reveal a sequence of environments. This range of environments is the basis for organizing the components of the built world: building, lot, land use, street, and all of the other physical elements of the human habitat. The Transect works by allocating elements that make up the human habitat to appropriate geographic locations. The segmentation of the Transect continuum is accomplished by dividing it into six different Transect Zones: Rural Preserve, Rural Reserve, Sub-Urban, General Urban, Urban Center, and Urban Core."[306]

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[301] Andres Duany & Emily Talen, *Making the Good Easy: The Smart-Code Alternative*, The Fordham Urban Law Journal, Vol. 29, Issue 4, 1452 (April 2001) *citing* Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies,* 19 Va. Envtl. L .J. 247, 255, 257 (2000).

[302] Sonia Hirt, *The Devil Is in the Definitions: Contrasting American and German Approaches to Zoning*, Journal of the American Planning Association, v. 73, no. 4, 445-447 (Autumn 2007) (internal citations omitted).

[303] *Id. citing* Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States,* 5 Hastings W. N.J. Env. L. & Pol'y 137, 152-154 (1999).

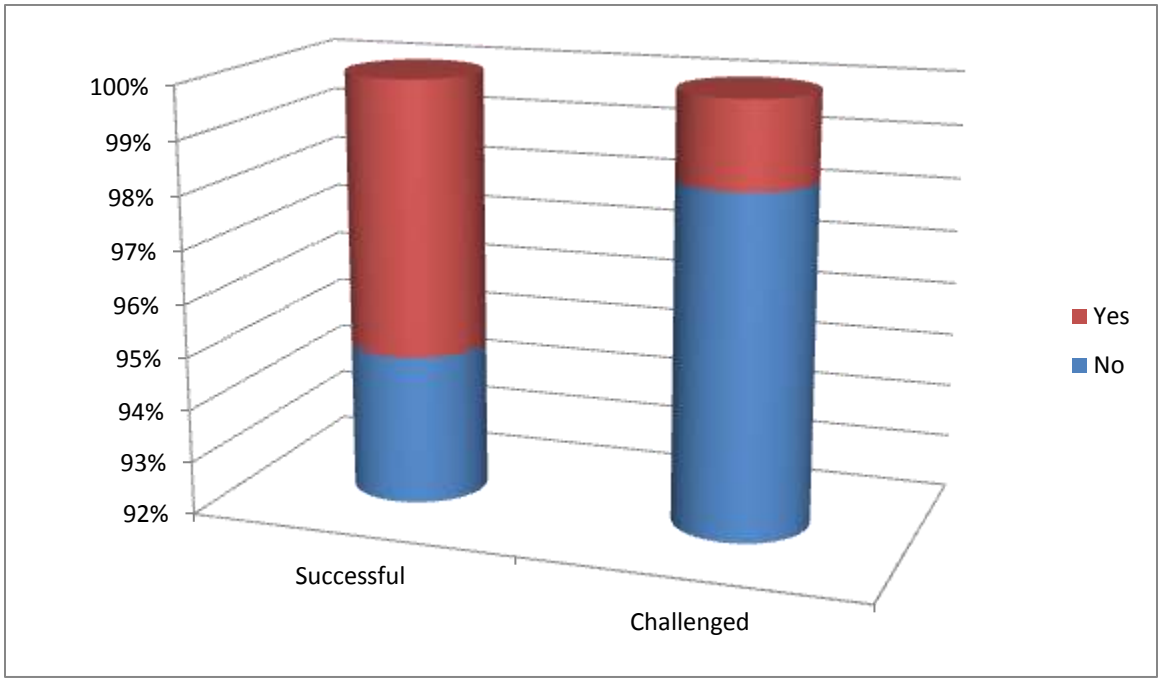
[304] Sonia Hirt, *The Devil Is in the Definitions: Contrasting American and German Approaches to Zoning*, Journal of the American Planning Association v. 73, no. 4, 445-447 (Autumn 2007).

[305] Andres Duany & Emily Talen, *Making the Good Easy: The Smart-Code Alternative*, The Fordham Urban Law Journal, Vol. 29, Issue 4, 1446 (April 2001).

[306] Andres Duany & Emily Talen, *Making the Good Easy: The Smart-Code Alternative*, The Fordham Urban Law Journal, Vol. 29, Issue 4, 1453-1454 (April 2001).

SUSTAINABLE/SMART GROWTH/FORM-BASED CODE REQUIREMENTS

(Frequencies)



N = 128

There was little variance in regard to Sustainable/Smart Growth/Form-Based Code Requirements between the successful and challenged developments. Three (3) of the fifty-eight (58) developments identified as successful were subject to Sustainable/Smart Growth/Form-Based Code Requirements. One (1) of the sixty-two (62) developments identified as challenged was subject to Sustainable/Smart Growth/Form-Based Code Requirements.

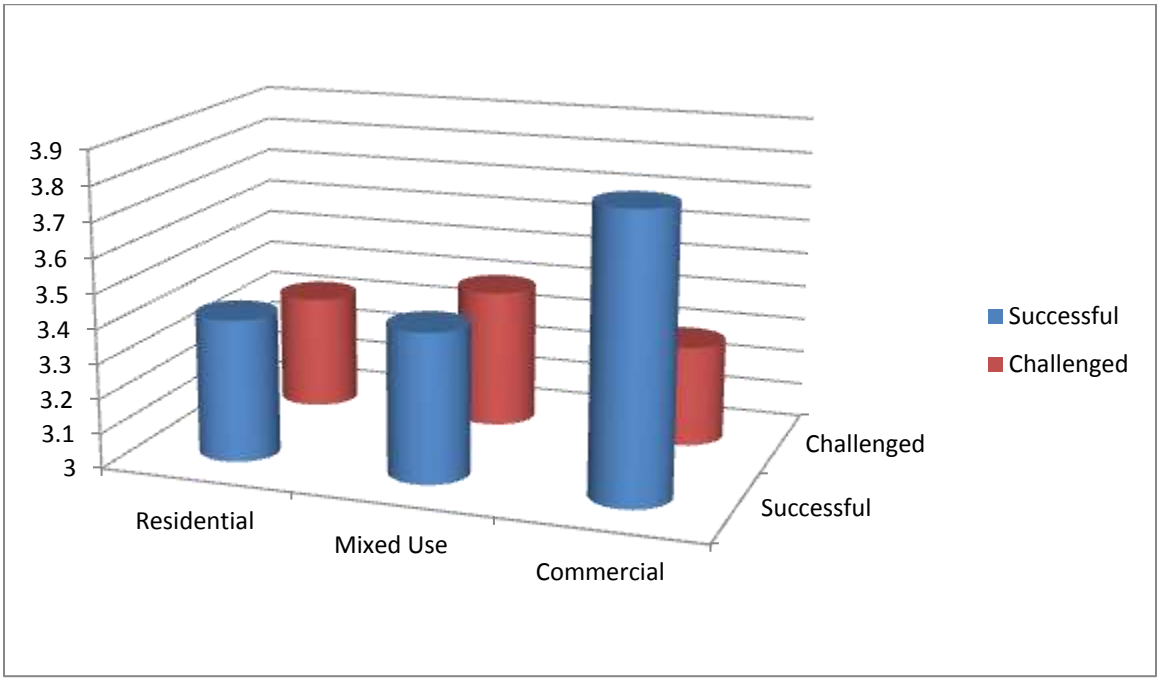
Easy accessibility to adjoining highways has been cited by some mobile professionals[307] as important when considering where to locate. It has been asserted that residents and businesses that rely on automobile/truck usage are attracted to cities and suburbs which have been specifically designed to accommodate automobile and truck

[307] John Tomaney & David Bradley, *The Economic Role of Mobile Professional and Creative Workers and Their Housing and Residential Preferences: Evidence from North East England,* The Town Planning Review, v. 78, no. 4, 524-530 (2007).

travel.[308] Hugh Millward links good paved road access with increased building activity.[309] Anne Vernez Moudon and Paul Mitchell Hess cited the importance of ensuring the ease of accessibility into and within residential developments in the design process.[310] Poor access has been cited as prompting resident relocation away from a neighborhood.[311]

PRESENCE OF STREET GRID ACCESS

(Means)



N = 128

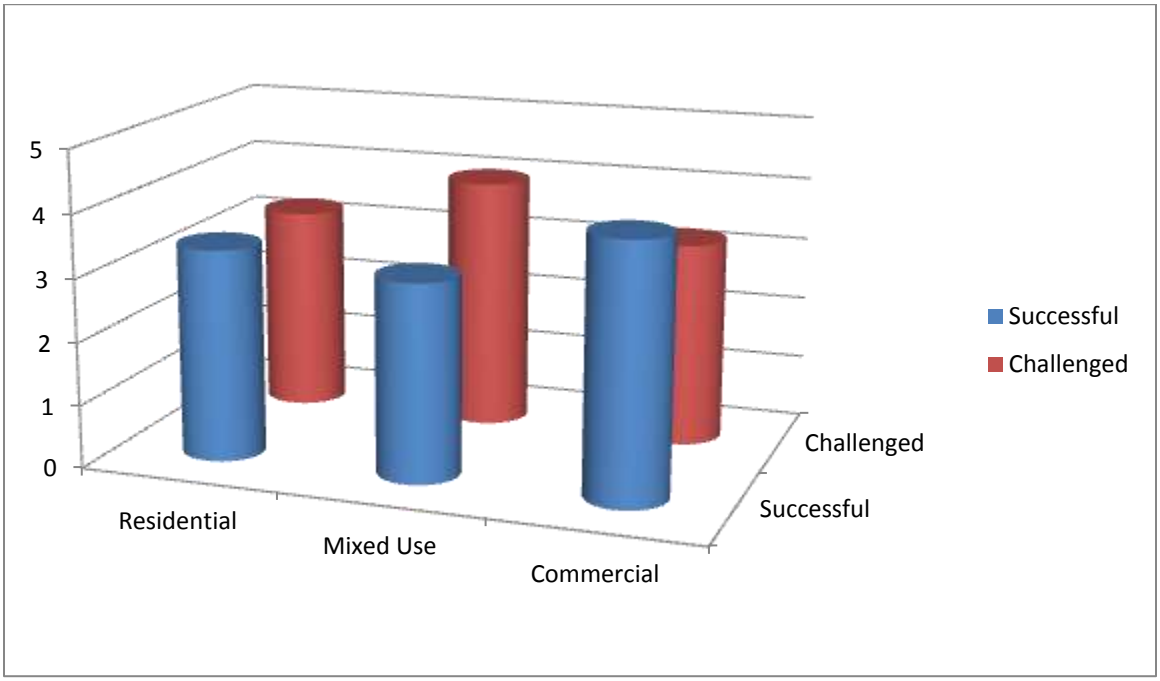
The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the

[308] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 79 (The Brookings Institution, Washington, D.C., 1982).
[309] Hugh Millward , *Peri-Urban Residential Development in the Halifax Region 1960-2000: Magnets, Constraints, and Planning Policies*, The Canadian Geographer, v. 46, no. 1, 42-43 (Spring 2002).
[310] Anne Vernez Moudon & Paul Mitchell Hess, *Suburban Clusters: The Nucleation of Multifamily Housing in Suburban Areas of the Central Puget Sound*, Journal of the American Planning Association, v. 66, no. 3, 243-264 (Summer 2000) (internal citations omitted).
[311] Barrett A. Lee, R.S. Oropesa, & James W. Kanan, *Neighborhood Context and Residential Mobility*, Demography, Vol. 31, No. 2, 250 (May, 1994) (internal citations omitted).

Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Street Grid Access in residential developments was 3.41 for successful and 3.33 for challenged developments; in mixed use developments was 3.43 for successful and 3.4 for challenged developments; and in commercial developments was 3.81 for successful and 3.29 for challenged developments.

PRESENCE OF HIGHWAY ACCESS

(Means)



N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Highway Access in residential developments was 3.37 for successful and 3.27 for challenged developments; in mixed use developments was 3.14 for successful and 4 for challenged developments; and in commercial developments was 4.06 for successful and 3.25 for challenged developments.

Participants in a 2003 survey responded that the ability to "age-in-place" and live independently in a residential development while growing older was important to them.[312] Various factors will together increase the likelihood that older people will age in place, even though retirement offers the opportunity to finally break the ties between where one works and lives. Older homeowners have traditionally shown a reluctance to change residences and locations.[313] When the first wave of baby boomers turns 65, between 2010 and 2020, the 65-to-74 age group is expected to increase by almost 49 percent.[314] It is asserted that at least a portion of these residents will choose to relocate into different single family homes in traditional residential neighborhoods. In most instances, the outward appearance of these dwellings will usually not be distinguishable from nearby residences. But the insides of these buildings may increasingly offer a contrasting view. They will be more likely to include design and technological adaptations demanded by an elder population seeking strategies to make their accommodations both safer and more compatible with their physical frailties.[315] It is theorized that older adults will also choose to relocate near other older adults to participate in age-specific support networks that supplement exchanges with kin and friends in the community.[316] Seniors are also predicted to relocate into master-planned senior-oriented residential developments designed to support resident convenience and quality of life.[317] Seniors are demanding more services, amenities, and programs along with greater customization to fit personal tastes.[318]

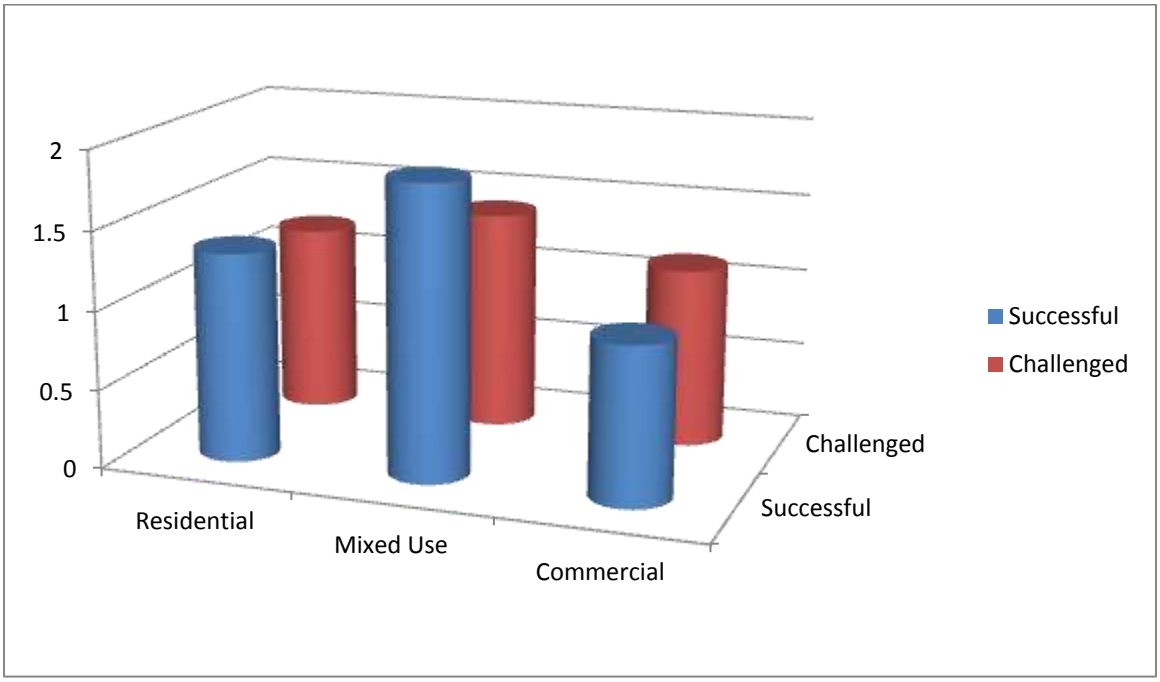
Integration of supportive medical services and facilities near developments housing seniors is also cited as important to aging residents.[319] Some communities have

[312] Susan Handy, James F. Sallis, Deanne Weber, Ed Maibach, & Marla Hollander, *Is Support for Traditionally Designed Communities Growing? Evidence From Two National Surveys*, Journal of the American Planning Association, v. 74, no. 2, 214-220 (Spring 2008).
[313] Stephen M. Golant, *Deciding Where to Live: The Emerging Residential Settlement Patterns of Retired Americans*, Generations, v. 26, no. 2, 67-68 (San Francisco, Cali., Summer 2002).
[314] Stephen M. Golant, *Deciding Where to Live: The Emerging Residential Settlement Patterns of Retired Americans*, Generations, v. 26, no. 2, 67 (San Francisco, Cali., Summer 2002).
[315] Stephen M. Golant, *Deciding Where to Live: The Emerging Residential Settlement Patterns of Retired Americans*, Generations, v. 26, no. 2, 67, 70 (San Francisco, Cali., Summer 2002).
[316] Geoffrey C. Smith, *Geographic Separation and Patterns of Social Interaction Between Residents of Senior Citizen Apartment Buildings and Their Adult Children*, The Canadian Geographer, v. 42, no. 2, 145-158 (Summer 1998).
[317] Stephen M. Golant, *Deciding Where to Live: The Emerging Residential Settlement Patterns of Retired Americans*, Generations, v. 26, no. 2, 70 (San Francisco, Cali., Summer 2002).
[318] Stephen M. Golant, *Deciding Where to Live: The Emerging Residential Settlement Patterns of Retired Americans*, Generations, v. 26, no. 2, 70 (San Francisco, Cali., Summer 2002).
[319] Stephen M. Golant, *Deciding Where to Live: The Emerging Residential Settlement Patterns of Retired Americans*, Generations, v. 26, no. 2, 71 (San Francisco, Cali., Summer 2002) (internal citations omitted).

responded by offering more supportive housing facilities, such as congregate housing, at locations usually near, but not on, the site of the active-adult community.[320]

PRESENCE OF SENIOR-ORIENTED RECREATION AND/OR SOCIAL ACTIVITIES

(Means)



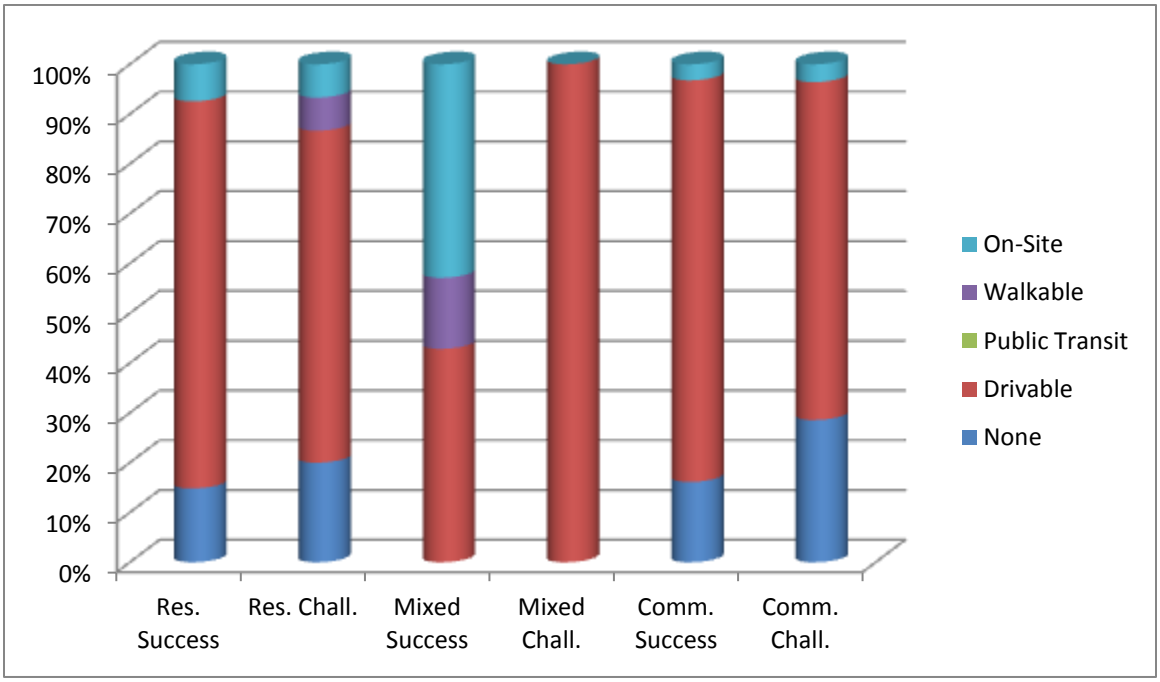
N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Senior-Oriented Recreation and/or Social Activities in residential developments was 1.33 for successful and 1.2 for challenged developments; in mixed use developments was 1.86 for successful and 1.4 for challenged developments; and in commercial developments it was not present in successful and was 1.14 for challenged developments.

[320] Stephen M. Golant, *Deciding Where to Live: The Emerging Residential Settlement Patterns of Retired Americans*, Generations, v. 26, no. 2, 71 (San Francisco, Cali., Summer 2002) (internal citations omitted).

SENIOR-ORIENTED RECREATION/SOCIAL ACTIVITIES ACCESS

(Percentages)

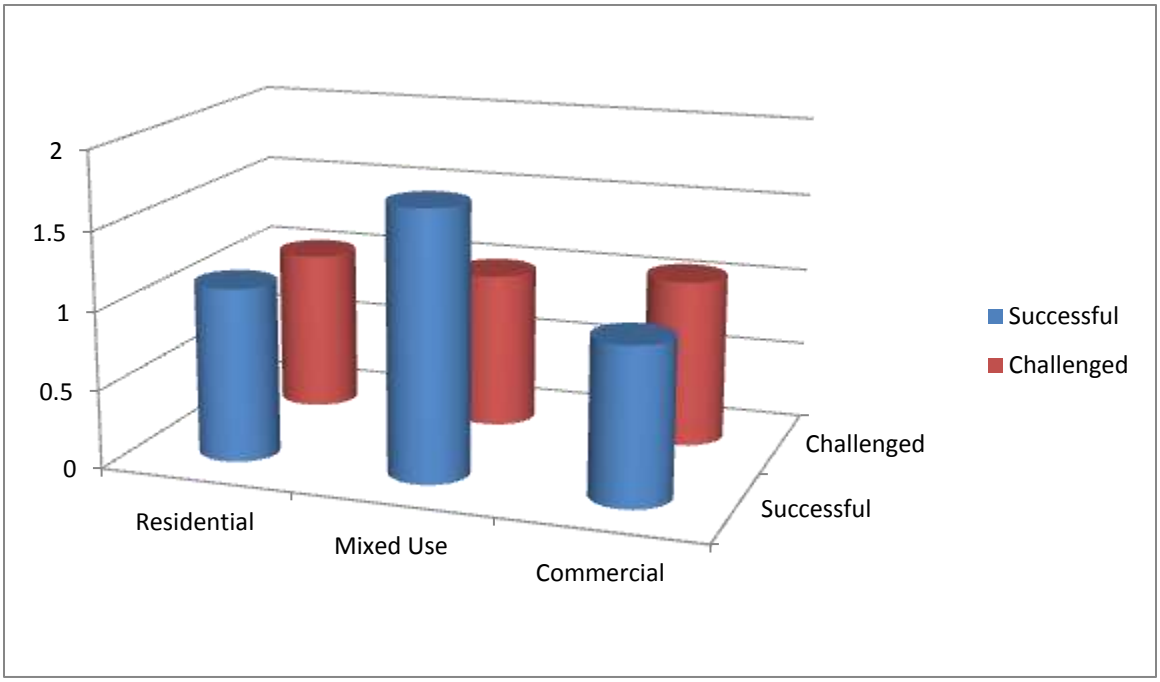


N = 128

The percentages reflect the type of access someone within the development would have to Senior-Oriented Recreation/Social Activities (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

PRESENCE OF ASSISTED LIVING RESIDENTIAL FACILITIES

(Means)

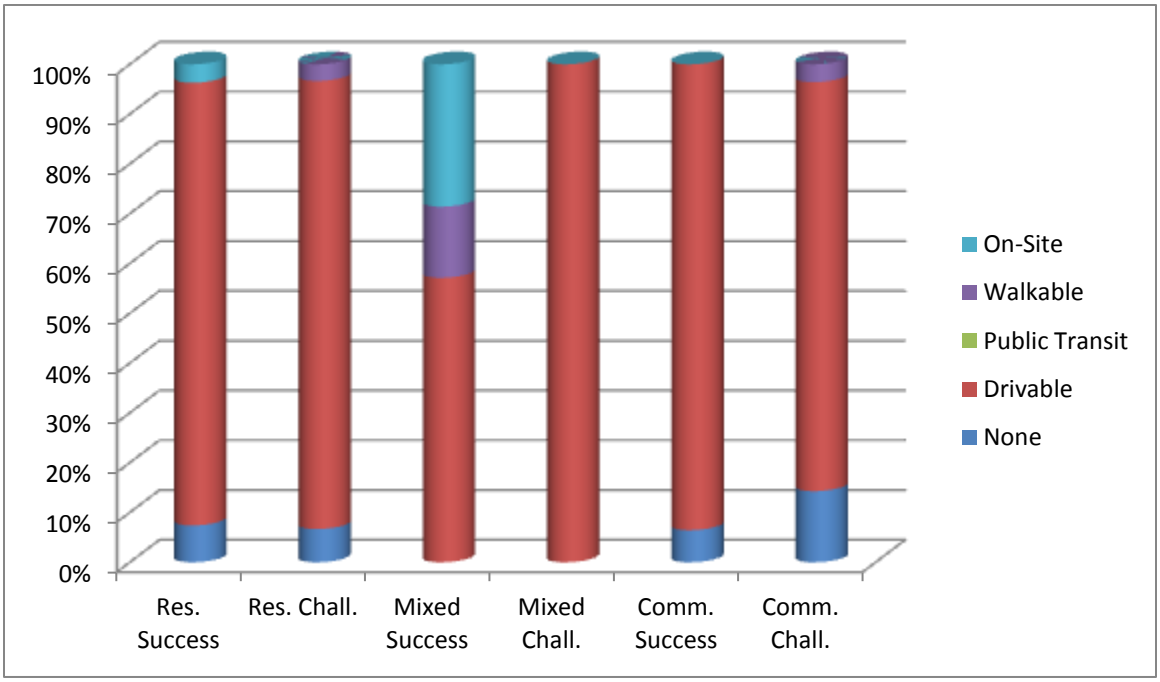


N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Assisted Living Residential Facilities in residential developments was 1.11 for successful and 1.03 for challenged developments; in mixed use developments was 1.71 for successful and it was not present in challenged developments; and in commercial developments it was not present in successful and was 1.07 for challenged developments.

ASSISTED LIVING RESIDENTIAL FACILITIES ACCESS

(Percentages)

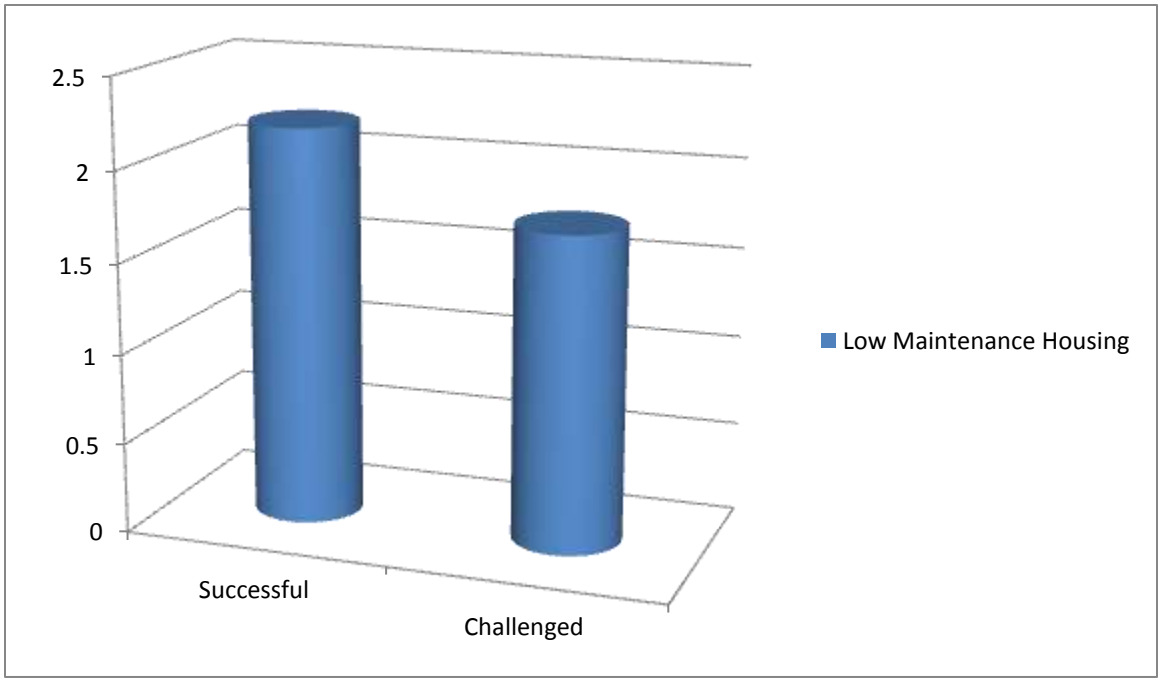


N = 128

The percentages reflect the type of access someone within the development would have to Assisted Living Residential Facilities (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

PRESENCE OF LOW MAINTENANCE HOUSING

(Means)

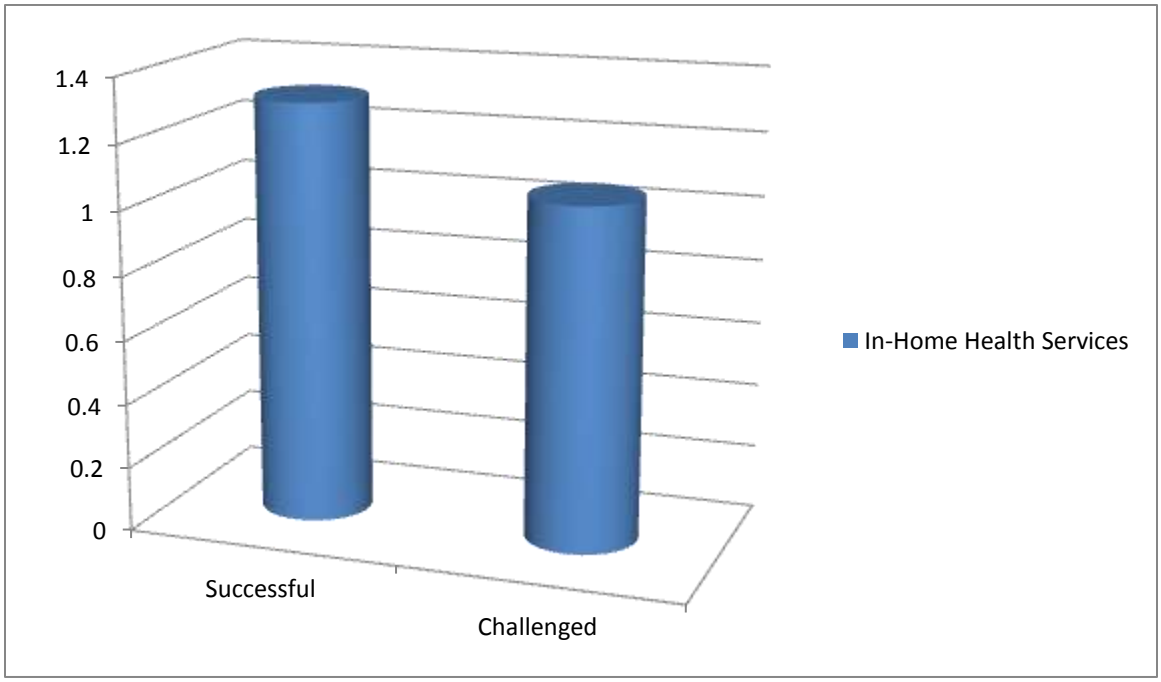


N = 69

Low Maintenance Housing numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present receives a one (1), Minimally Present receives a two (2), Moderately Present receives a three (3), Substantially Present receives a (4) and Extremely Present receives a five (5). As reflected in the foregoing chart, Low Maintenance Housing numbers reflected a mean score in the moderately present range of 2.2 for the successful developments, while reflecting a minimally present mean score of 1.74 for the challenged developments.

PRESENCE OF IN-HOME HEALTH SERVICES

(Means)

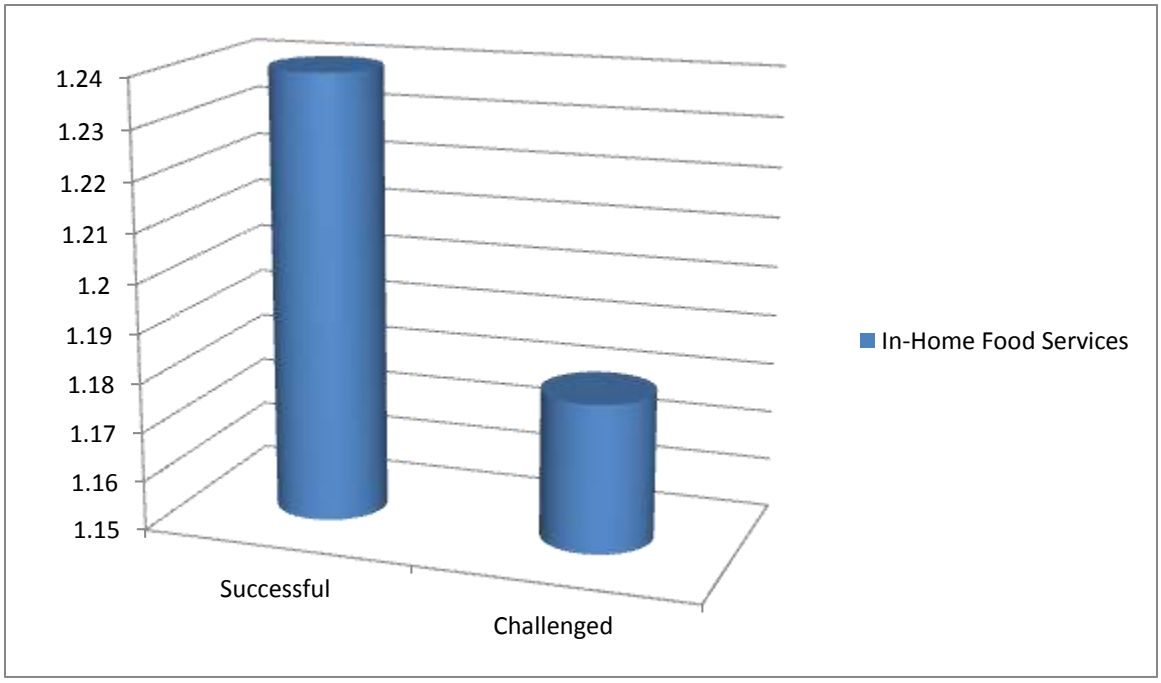


N = 69

In-Home Health Services numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present receives a one (1), Minimally Present receives a two (2), Moderately Present receives a three (3), Substantially Present receives a (4) and Extremely Present receives a five (5). As reflected in the foregoing chart, In-Home Health Services numbers reflected a mean score in the minimally present range of 1.31 for the successful developments, while reflecting a minimally present mean score of 1.06 for the challenged developments.

PRESENCE OF IN-HOME FOOD SERVICES

(Means)



N = 69

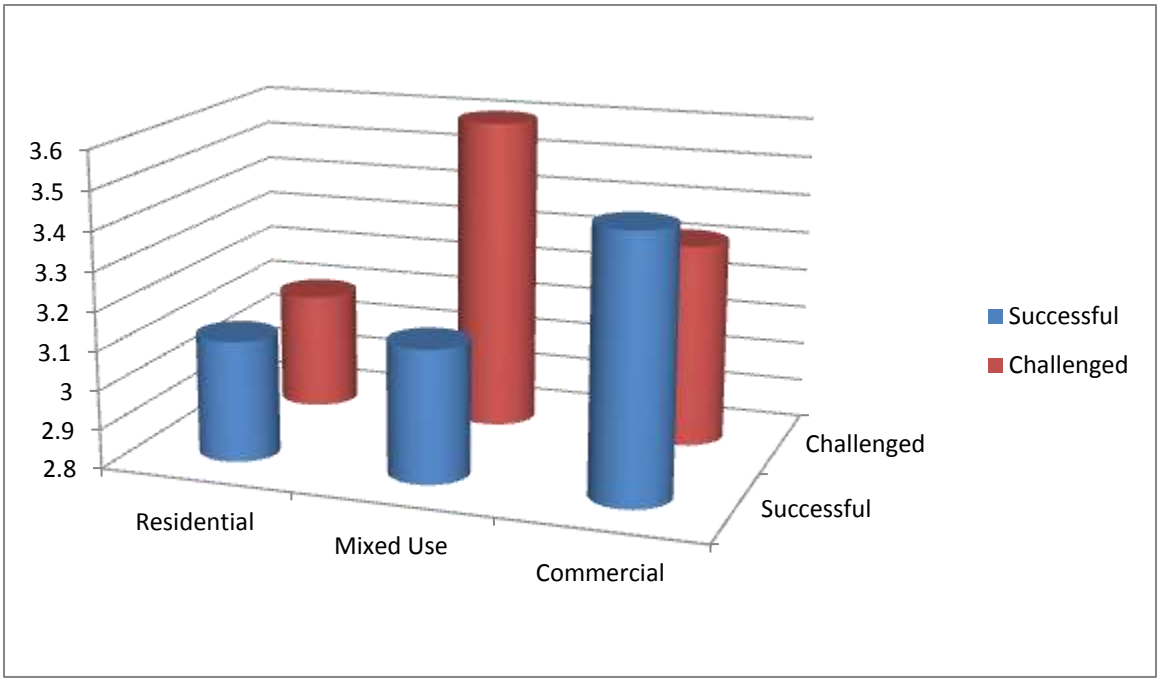
In-Home Food Services numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present receives a one (1), Minimally Present receives a two (2), Moderately Present receives a three (3), Substantially Present receives a (4) and Extremely Present receives a five (5). As reflected in the foregoing chart, In-Home Food Services numbers reflected a mean score in the minimally present range of 1.24 for the successful developments, while reflecting a minimally present mean score of 1.18 for the challenged developments.

Public access to technology seems to be emerging as a developmental amenity.[321]

[321] Martha Fuentes-Bautista & Nobuya Inagaki, *Reconfiguring Public Internet Access in Austin, TX: Wi-Fi's Promise and Broadband Divides*, Government Information Quarterly, v. 23, no. 3/4, 419 (2006).

PRESENCE OF TECHNOLOGY ACCESS

(Means)



N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Technology Access in residential developments was 3.11 for successful and 3.1 for challenged developments; in mixed use developments was 3.14 for successful and 3.6 for challenged developments; and in commercial developments was 3.47 for successful and 3.32 for challenged developments.

"New Urbanism" focuses on amending the current shape of sprawling automobile-oriented suburban development by replacing the disconnected street system utilizing cul-de-sacs and hierarchical roads with the gridiron street system popular in traditional American suburban development of the early 1900s.[322] Andres Duany, Elizabeth Plater-Zyberk, and Jeff Speck claim in their book *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* that redesigning streets and roads for pedestrian viability is the first step toward making neighborhoods more livable.[323] Promoting traditional neighborhood developments (TNDs), New Urbanism draws on the grid patterned traditional neighborhood of the past, a walking environment incorporating narrow streets, reduced front yards, a variety of housing types, and opportunities for social interaction in walking to nearby schools and commercial or recreational uses.[324] Andres Duany and Emily Talen, in *Making the Good Easy: The Smart-Code Alternative*, explain that since World War II, conventional urban growth has proceeded without the development of diverse neighborhood units.[325] They argue that traditional neighborhood developments should ideally form the basis of a subdivision.[326]

Among the changes to contemporary suburbs advocated by the New Urbanists are increased opportunities for pedestrian movement, the creation of town centers and houses with porches rather than garages facing the street, the replacement of suburban cul-de-sacs with a gridded town plan and streets directly connected to one another, more parks of various sizes, community gardens and open-space conservation areas with greenbelts that define and connect neighborhoods and districts.[327] While many of these attributes may be individually discussed, they collectively provide an understanding of the traditional neighborhood development philosophy.

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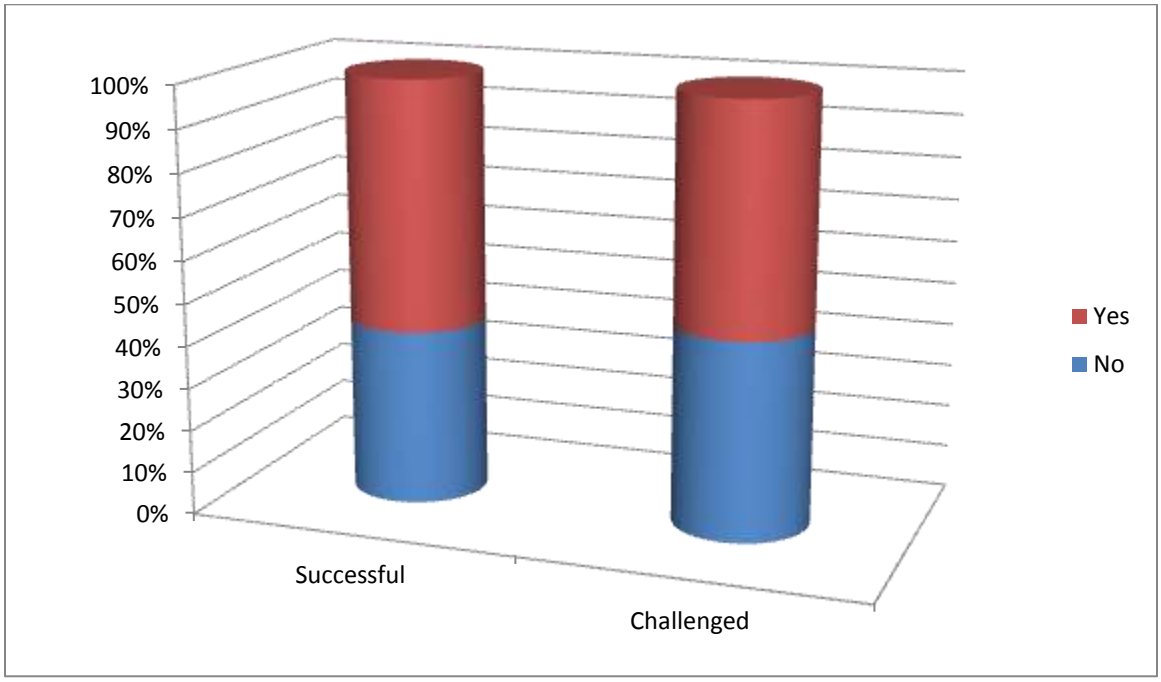
[322] Chang-Moo Lee & Kun-Hyuck Ahn, *Is Kentlands Better than Radburn? The American Garden City and New Urbanist Paradigms*, Journal of the American Planning Association, v. 69, no. 1, 50-51 (Winter 2003).
[323] Andres Duany, Elizabeth Plater-Zyberk, & Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream*, 85 (North Point Press, New York, 2000).
[324] Larry Lawhon, *Planners' Perceptions of their Role in Socially Responsive Neighborhood Design*, Journal of Architectural and Planning Research, v. 20, no. 2, 155-156 (Summer 2003) (internal citations omitted).
[325] Andres Duany & Emily Talen, *Making the Good Easy: The Smart-Code Alternative*, The Fordham Urban Law Journal, Vol. 29, Issue 4, 1447 (April 2001).
[326] Andres Duany & Emily Talen, *Making the Good Easy: The Smart-Code Alternative*, The Fordham Urban Law Journal, Vol. 29, Issue 4, 1447 (April 2001).
[327] Rene Davids, *Development, Topography, and Identity: The Dougherty Valley and the New Suburban Metropolis*, Places, v. 20, no. 3, 63 (Cambridge, Mass., Fall 2008).

LOCAL DEVELOPMENT/BUILDING DESIGN STANDARDS (TRADITIONAL NEIGHBORHOOD DESIGN)

(Frequencies)



N = 128

There was little variance in regard to Local Development/Building Design Standards (Traditional Neighborhood Design) between the successful and challenged developments. Thirty-seven (37) of the sixty-three (63) developments identified as successful were subject to Local Development/Building Design Standards (Traditional Neighborhood Design). Thirty-two (32) of the sixty (60) developments identified as challenged were subject to Local Development/Building Design Standards (Traditional Neighborhood Design).

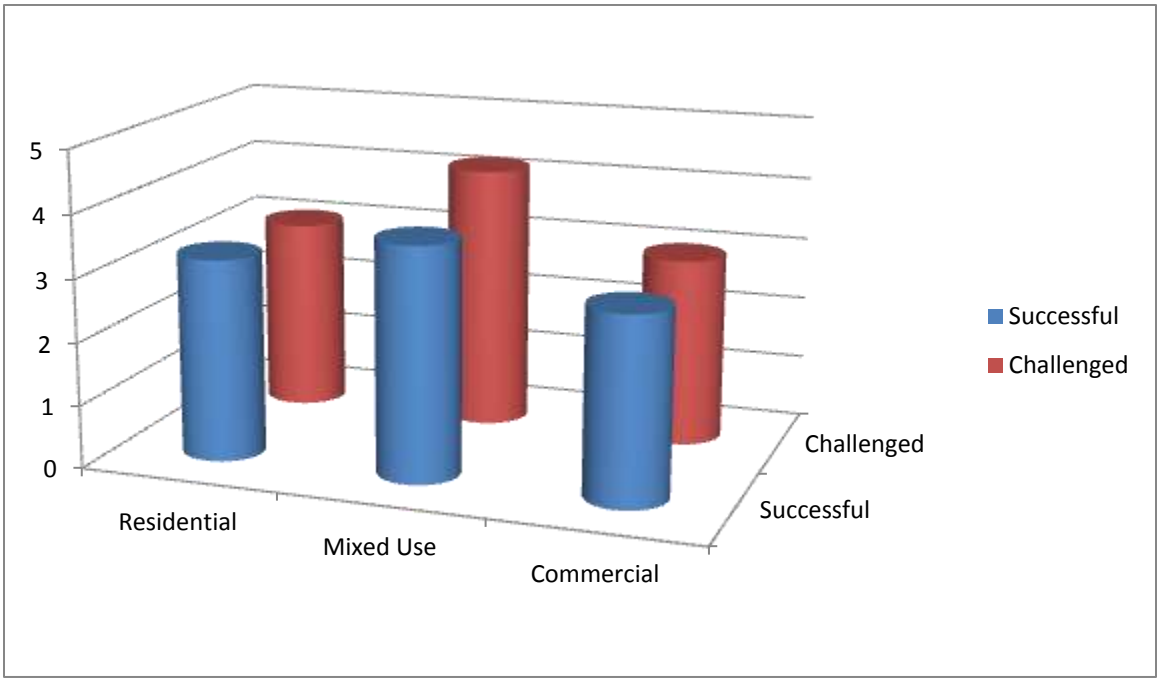
Walkability has long been a concern of American urban planners. Concern for pedestrians was shown in America's first modern Garden City, Radburn, New Jersey. There, planners integrated a system of walking trails with neighborhood interior parks to facilitate safe pedestrian movement free from vehicular traffic throughout the

development.[328] Prominent new urbanist planners Andres Duany, Elizabeth Plater-Zyberk, and Jeff Speck claim in their book *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* that "redesigning streets and roads for pedestrian viability is a first step toward making our neighborhoods more livable"[329] Xinyu Cao, Susan Handy, and Patricia Mokhtarian explain that planners and public health officials alike have been promoting policies that improve the quality of the built environment for pedestrians: mixed land uses, interconnected street networks, sidewalks and other facilities.[330] "Walkability" of a neighborhood measures whether community design encourages or inhibits walking. For example, lack of a sidewalk can make walking unsafe, and a disconnected street network can discourage walking. Conversely, having retail stores close to where people live and providing connected streets increases the likelihood that a person will incorporate walking into daily routines.[331]

[328] Chang-Moo Lee & Kun-Hyuck Ahn, *Is Kentlands Better than Radburn? The American Garden City and New Urbanist Paradigms*, Journal of the American Planning Association, v. 69, no. 1, 52 (Winter 2003).
[329] Andres Duany, Elizabeth Plater-Zyberk, & Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream*, 85 (North Point Press, New York, 2000).
[330] Xinyu Cao, Susan L. Handy, & Patricia L. Mokhtarian, *The Influences of the Built Environment and Residential Self-Selection on Pedestrian Behavior: Evidence from Austin, Texas*, Transportation, v. 33, no. 1, 1-2 (January 2006).
[331] Julian D. Marshall, Michael Brauer, Lawrence D. Frank, *Healthy Neighborhoods: Walkability and Air Pollution*, Environmental Health Perspectives, v. 117, no. 11, 1752 (November 2009) (internal citations omitted).

PRESENCE OF WALKABILITY

(Means)

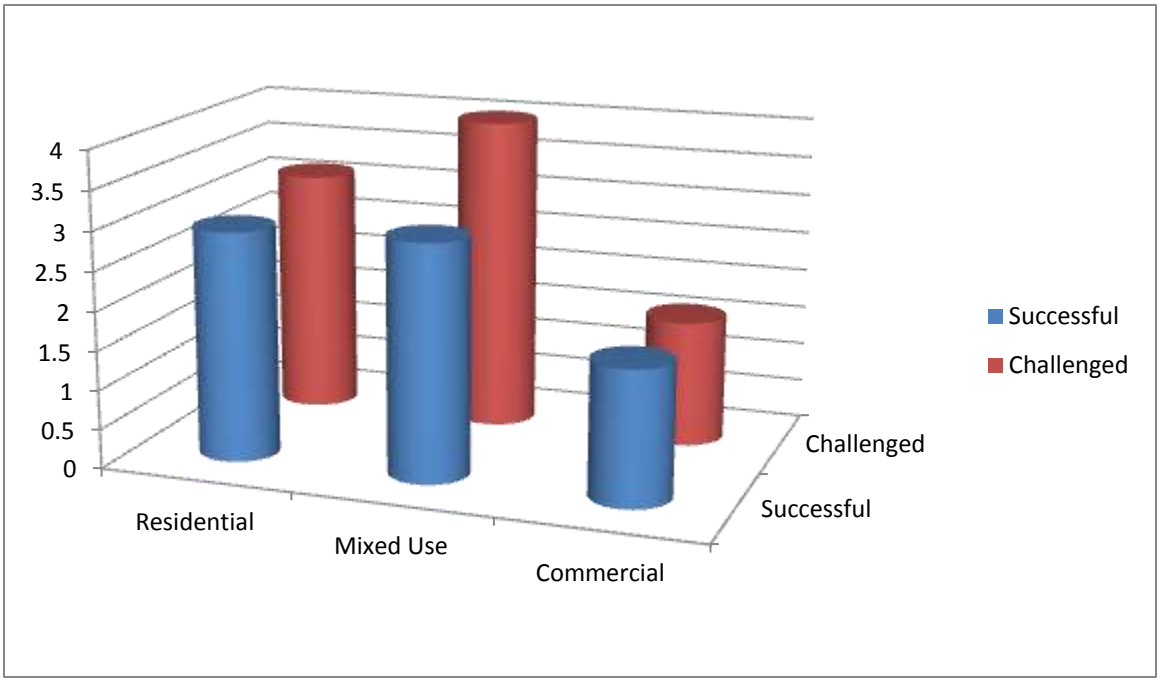


N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Walkability in residential developments was 3.22 for successful and 3.07 for challenged developments; in mixed use developments was 3.71 for successful and 4.2 for challenged developments; and in commercial developments was 2.97 for successful and 3 for challenged developments.

PRESENCE OF BICYCLE FRIENDLY

(Means)

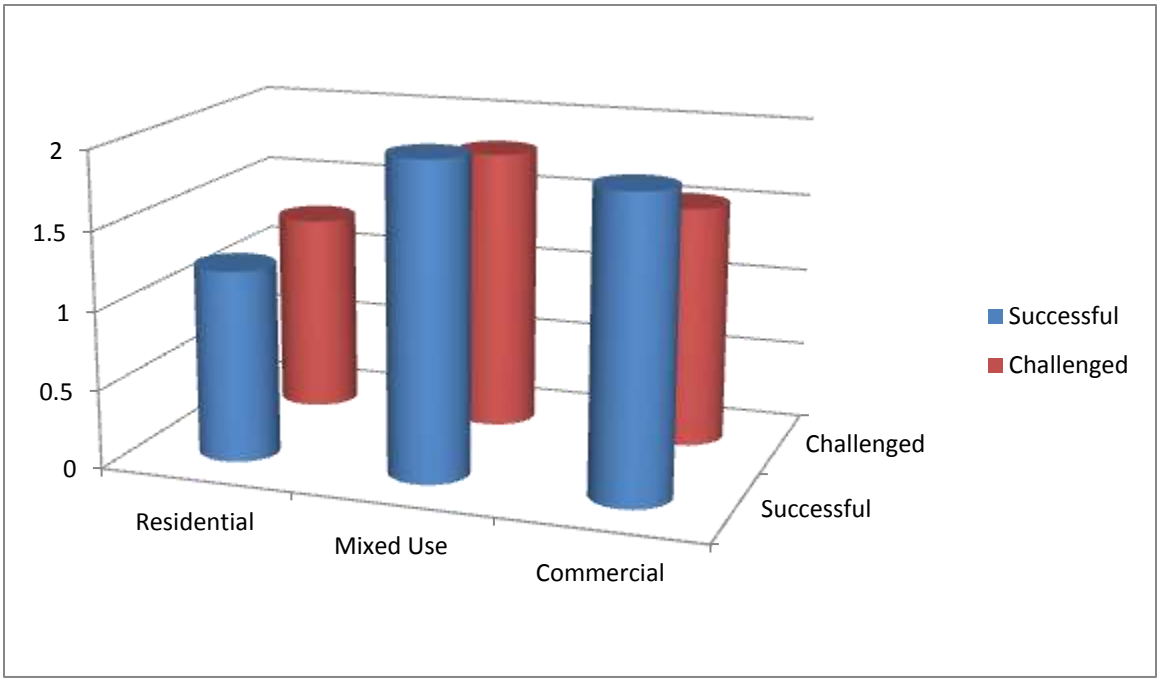


N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Bicycle Friendliness in residential developments was 2.93 for successful and 3.13 for challenged developments; in mixed use developments was 3 for successful and 4 for challenged developments; and in commercial developments was 1.71 for successful and 1.61 for challenged developments.

PRESENCE OF PUBLIC TRANSIT ACCESS

(Means)



N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Public Transit Access in residential developments was 1.22 for successful and 1.27 for challenged developments; in mixed use developments was 2 for successful and 1.8 for challenged developments; and in commercial developments was 1.9 for successful and 1.54 for challenged developments.

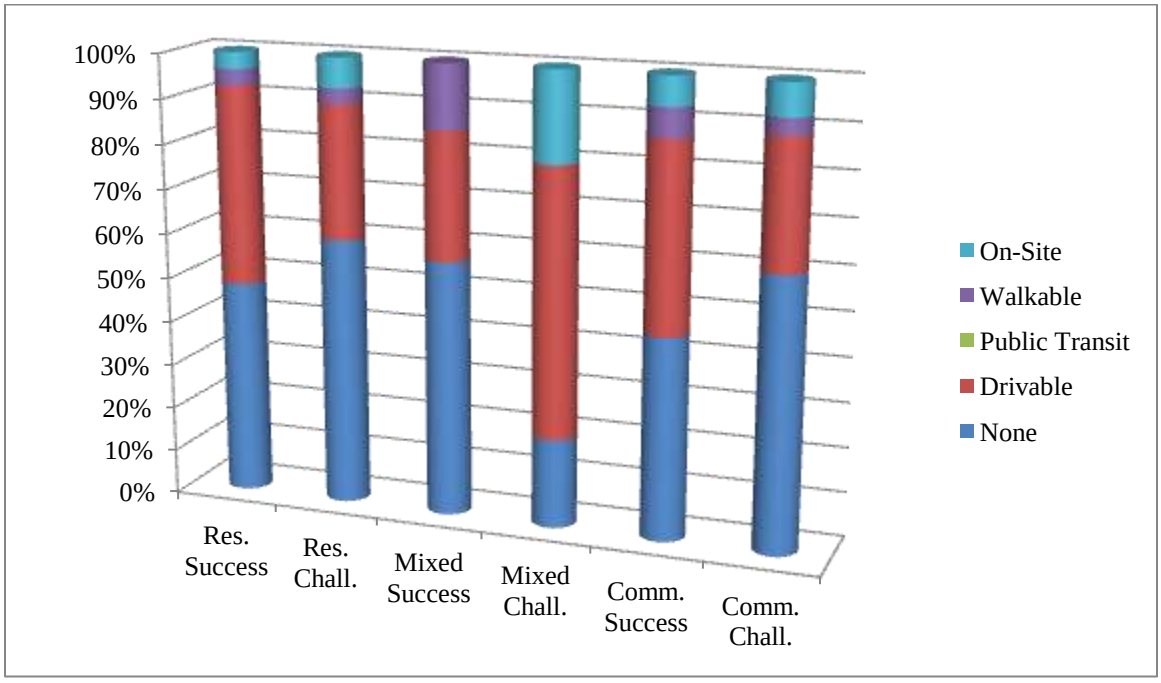
Disamenity avoidance theories assert that people or business firms are moving away from central cities to suburbs, or from certain metropolitan areas to others, to avoid negative characteristics such as crime and high energy costs.[332] While access to

[332] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 78 (The Brookings Institution, Washington, D.C., 1982).

transportation links, such as highway interchanges, airport hubs, train stations, and boat landings, is a positive factor, being too close to transportation uses that are far away from access links can have a negative effect on property values due to the nuisance and potential problems of accidents. This is particularly true for railroads that crisscross the country carrying freight and have very few access points.[333] Proximity to disamenities, such as railroads, highways, power lines, telecom towers, traffic conditions and adjacent negative land uses,[334] including environmental contamination,[335] have been associated with lower area property values.

DISAMENITIES (Railroad, Highways, Lines, Transformers, Towers)
ACCESS

(Percentages)



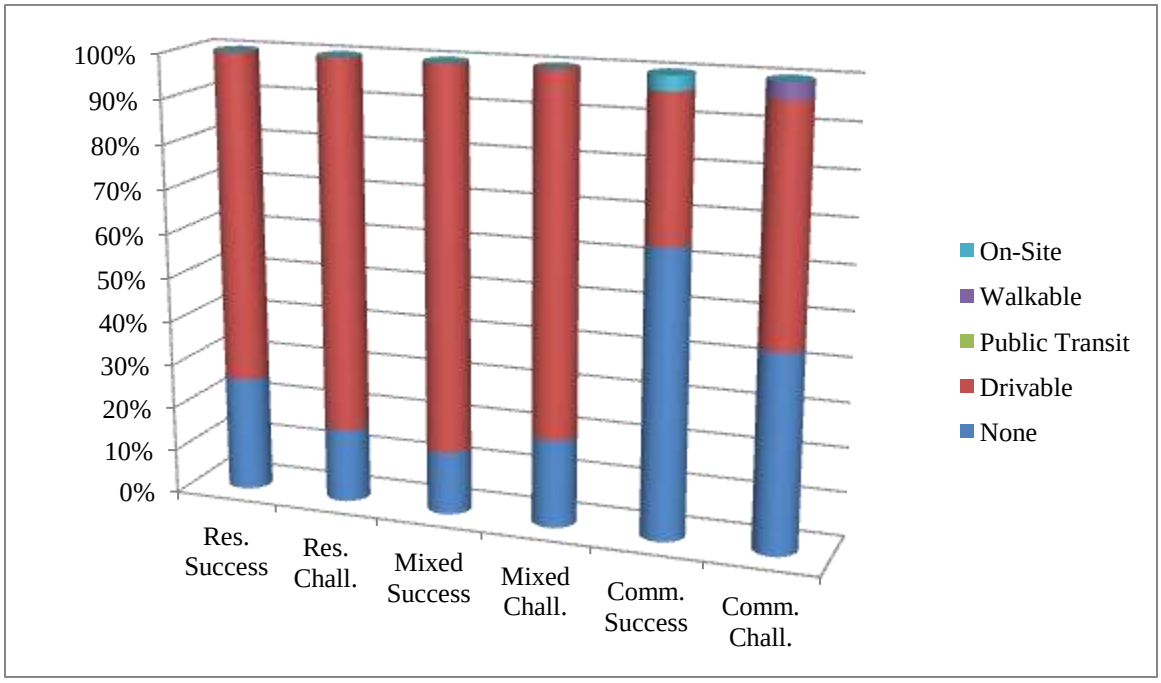
N = 128

[333] Robert A. Simons & Abdellaziz El Jaouhari, *The Effect of Freight Railroad Tracks and Train Activity on Residential Property Values*, The Appraisal Journal, v. 72, no. 3, 223 (Summer 2004).
[334] Stephen A. Samaha & Wagner A. Kamakura, *Assessing the Market Value of Real Estate Property with a Geographically Weighted Stochastic Frontier Model*, Real Estate Economics, vol. 36, no. 4, 719 (Winter 2008).
[335] Thomas O. Jackson, *When Good Things Happen to Bad Properties*, The Appraisal Journal, v. 77, no. 2, 112 (Spring 2009).

The percentages reflect the type of access someone within the development would have to Disamenities, including railroads, highways, power lines, transformers and towers (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

CORRECTIONAL FACILITY (Detention, Halfway House, Parole) ACCESS

(Percentages)

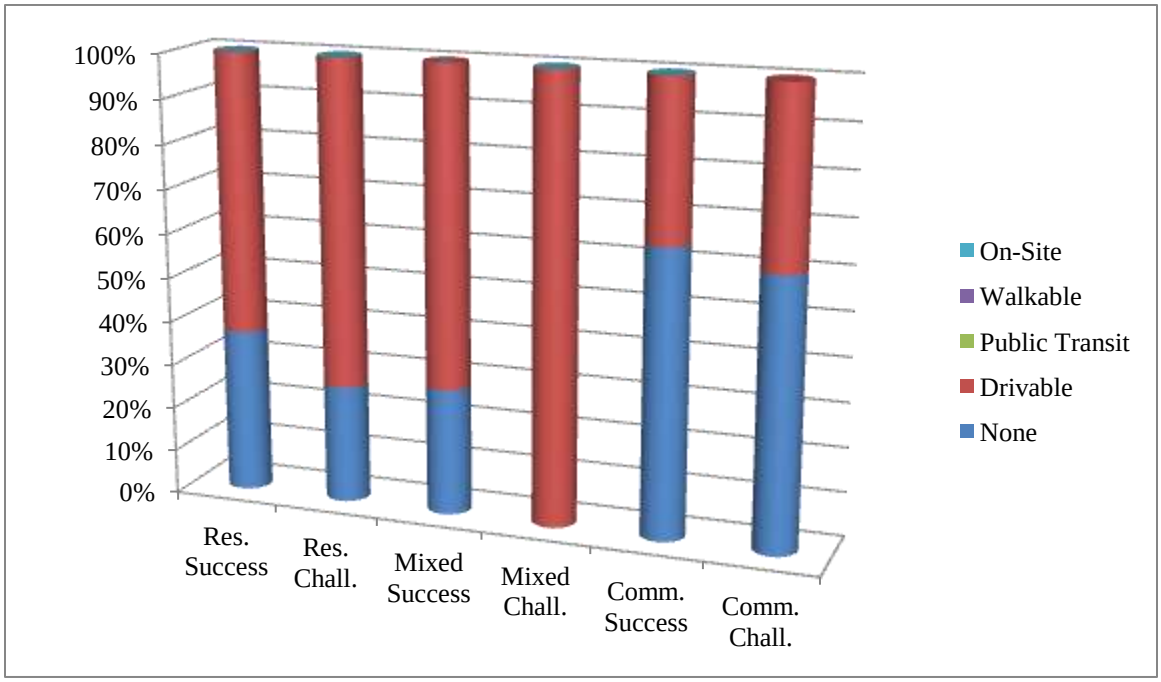


N = 128

The percentages reflect the type of access someone within the development would have to a Correctional Facility, including a detention facility, halfway house or parole office (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

LANDFILL/QUARRY/MINE/ROCK CRUSHER ACCESS

(Percentages)

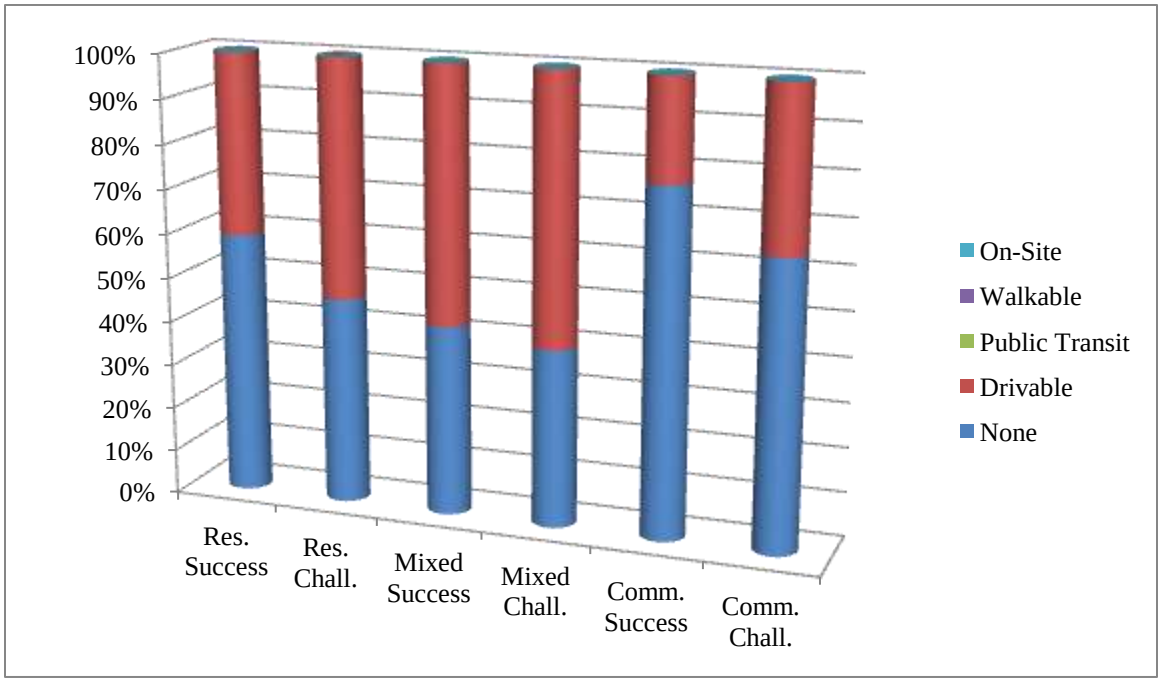


N = 128

The percentages reflect the type of access someone within the development would have to a Landfill, Quarry, Mine or Rock Crusher (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

REFINERY/SEWAGE TREATMENT/SLAUGHTERHOUSE ACCESS

(Percentages)

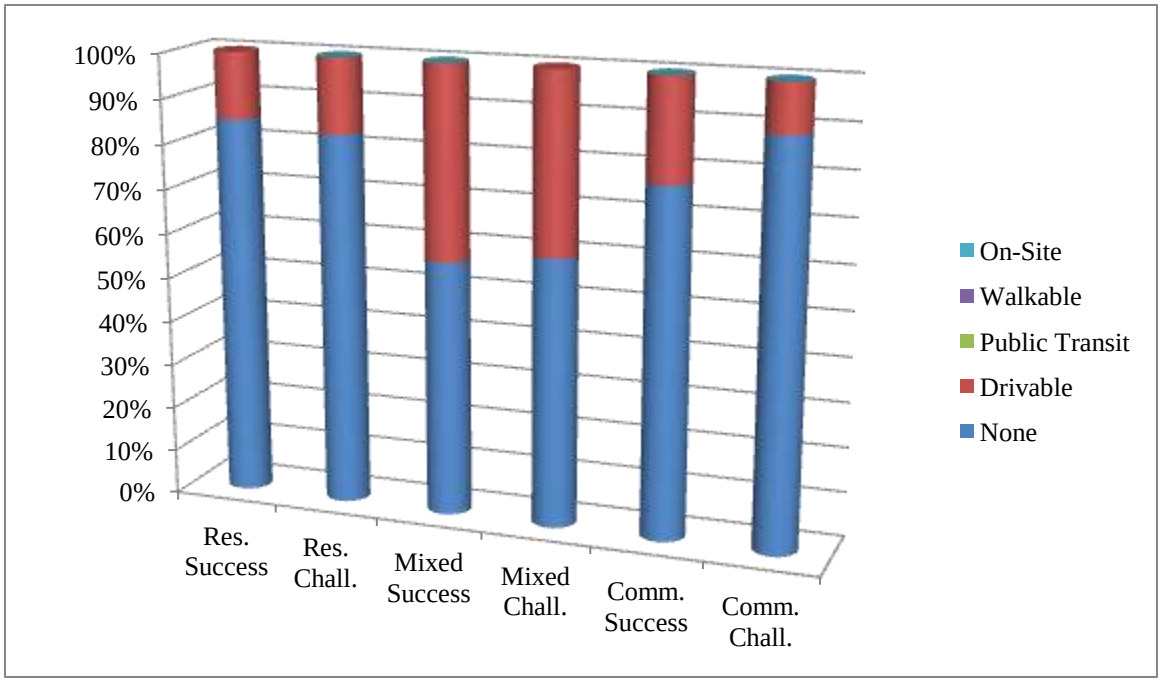


N = 128

The percentages reflect the type of access someone within the development would have to a Refinery, Sewage Treatment Plant or Slaughterhouse (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

SMOKESTACK INDUSTRY ACCESS

(Percentages)

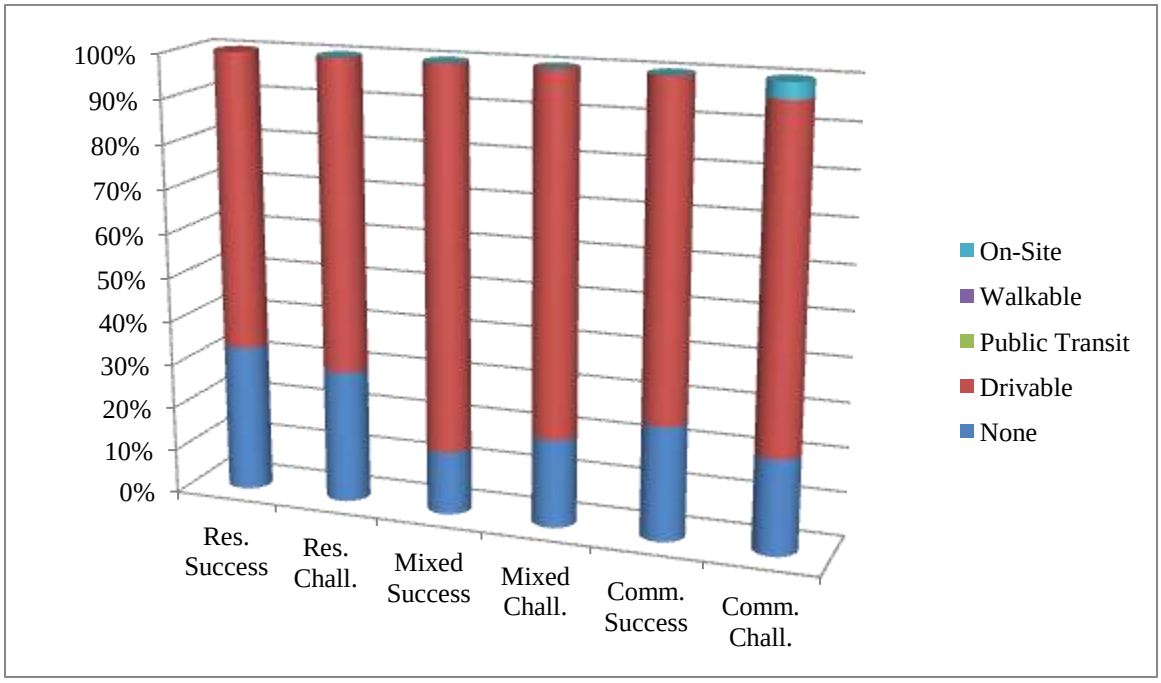


N = 128

The percentages reflect the type of access someone within the development would have to a Smokestack Industry (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

LIGHT MANUFACTURING/WAREHOUSING ACCESS

(Percentages)



N = 128

The percentages reflect the type of access someone within the development would have to Light Manufacturing or Warehousing (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

Participants in a 2003 survey responded that a low crime rate in a residential development was important to them.[336] "Neighborhoods can be desirable because they foster a sense of safety from crime and disorder."[337] Insecurity instills a desire for a home to be a fortress, even to include walls, gates, and guards when practicable.[338] Elena

[336] Susan Handy, James F. Sallis, Deanne Weber, Ed Maibach, & Marla Hollander, *Is Support for Traditionally Designed Communities Growing? Evidence From Two National Surveys*, Journal of the American Planning Association, v. 74, no. 2, 214-217 (Spring 2008).
[337] John R. Hipp, *Specifying the Determinants of Neighborhood Satisfaction: A Robust Assessment in 24 Metropolitan Areas*, Social Forces, v. 88, no. 1, 395-396 (September 2009).
[338] John M. Coggeshall, *Symbols of Division: Plantations Along South Carolina's Coast*, Home Cultures, v. 5, no. 1, 50-52 (March 2008) *citing* Edward Blakely & Mary Gail Snyder, *Fortress America: Gated Communities in the United States*, 18 (Brookings Institution Press, Washington, D.C., 1999) and Setha

Irwin, Hazel Morrow-Jones and Brian Roe cite neighborhood safety as important to homebuyers.[339] Escaping crime may provide motivation for residential relocation away from an area.[340]

Commencing in the 1980s, social scientists and criminal justice researchers began exposing linkages between the urban environment, fear and urban decline.[341] The broken windows phenomenon emphasizes that the physical environment is an important factor in the occurrence of crime. A would-be offender needs a suitable victim or target, and must encounter it in circumstances that permit a crime to be carried out without interruption. Recognition of these fundamental observations has led to the recent development of perspectives such as routine activities theory, which looks beyond the attributes of residents of high-crime areas to consider those social and environmental factors that make such areas conducive to crime. Routine activities theory portrays crime as the convergence of the following three elements: motivated offenders, potential victims or targets, and unguarded access. Thus, features of the urban environment that contribute to the convergence of these factors by increasing the concentration of offenders and victims, or reducing guardianship, will result in increased crime rates. Such factors may include characteristics of neighborhoods, such as the age composition of residents or the proportion of rental housing. They may include physical structures in the environment such as bars, schools, or shopping malls that serve as crime attractors or generators.[342]

Low, *The Edge and the Center: Gated Communities and the Discourse of Urban Fear*, American Anthropologist, 103: 45-58 (2001).

[339] Elena G. Irwin, Hazel A. Morrow-Jones, & Brian Roe, *The Effects of Farmland, Farmland Preservation, and Other Neighborhood Amenities on Housing Values and Residential Growth*, Land Economics, v. 80, no. 1, 55-56 (February 2004).

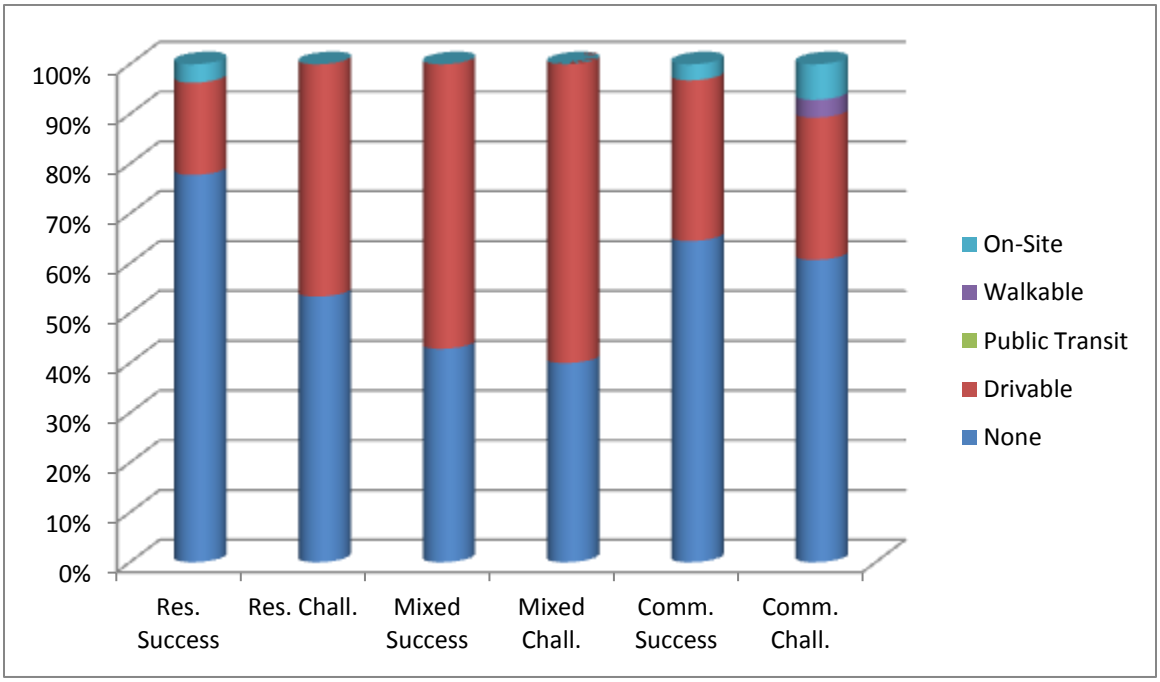
[340] Barrett A. Lee, R.S. Oropesa, & James W. Kanan, *Neighborhood Context and Residential Mobility*, Demography, Vol. 31, No. 2, 250 (May, 1994).

[341] George L. Kelling & Katharine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in our Communities*, 22-27 (Touchtone, New York, 1996).

[342] Teresa C. LaGrange, *The Impact of Neighborhoods, Schools, and Malls on the Spatial Distribution of Property Damage*, Journal of Research in Crime and Delinquency, vol. 36, no. 4, 393-394, (November 1999) (internal citations omitted).

HIGH CRIME RATE ACCESS

(Percentages)

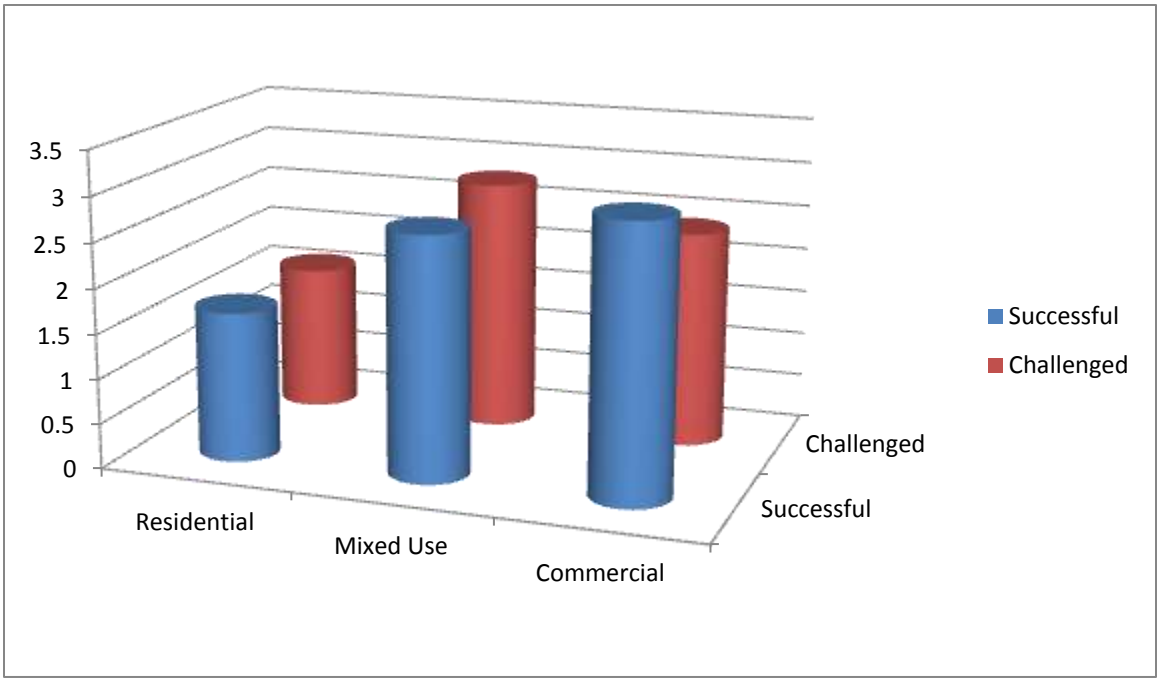


N = 128

The percentages reflect the type of access someone within the development would have to High Crime Rates (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

PRESENCE OF SECURITY (Patrols, Lighting, Electronic Surveillance)

(Means)

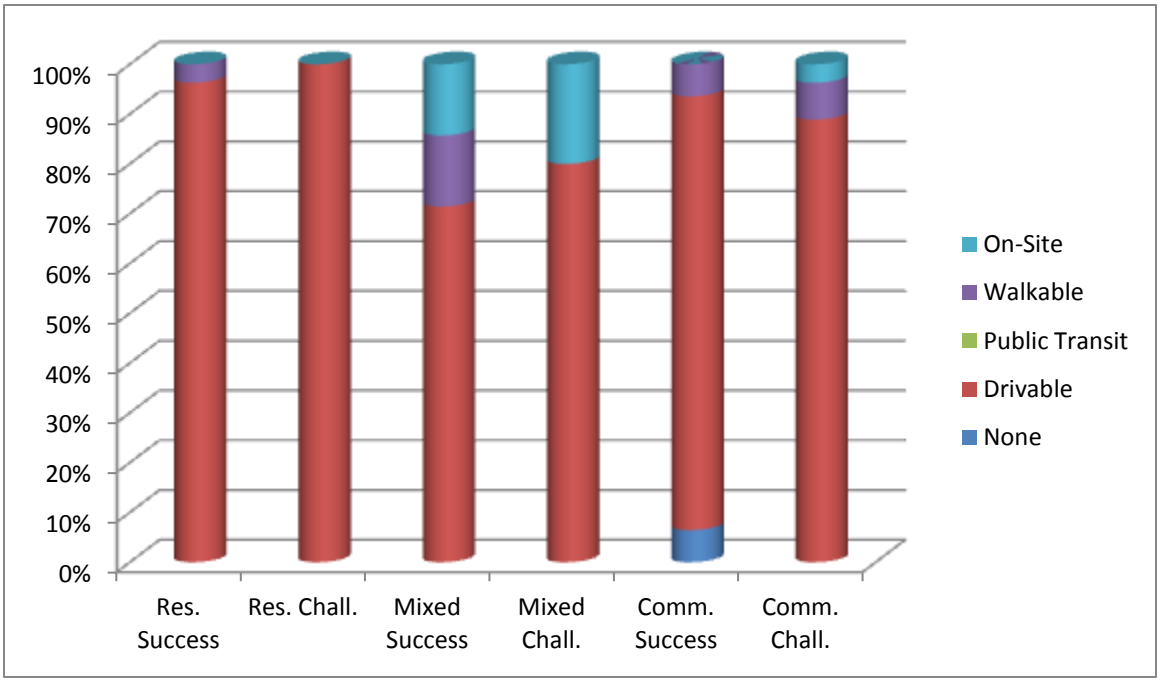


N = 128

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). The average for the Presence of Security (Patrols, Lighting, Electronic Surveillance) in residential developments was 1.67 for successful and 1.63 for challenged developments; in mixed use developments was 2.71 for successful and 2.8 for challenged developments; and in commercial developments was 3.03 for successful and 2.41 for challenged developments.

PUBLIC SAFETY (Police, Fire, Ambulance) ACCESS

(Percentages)

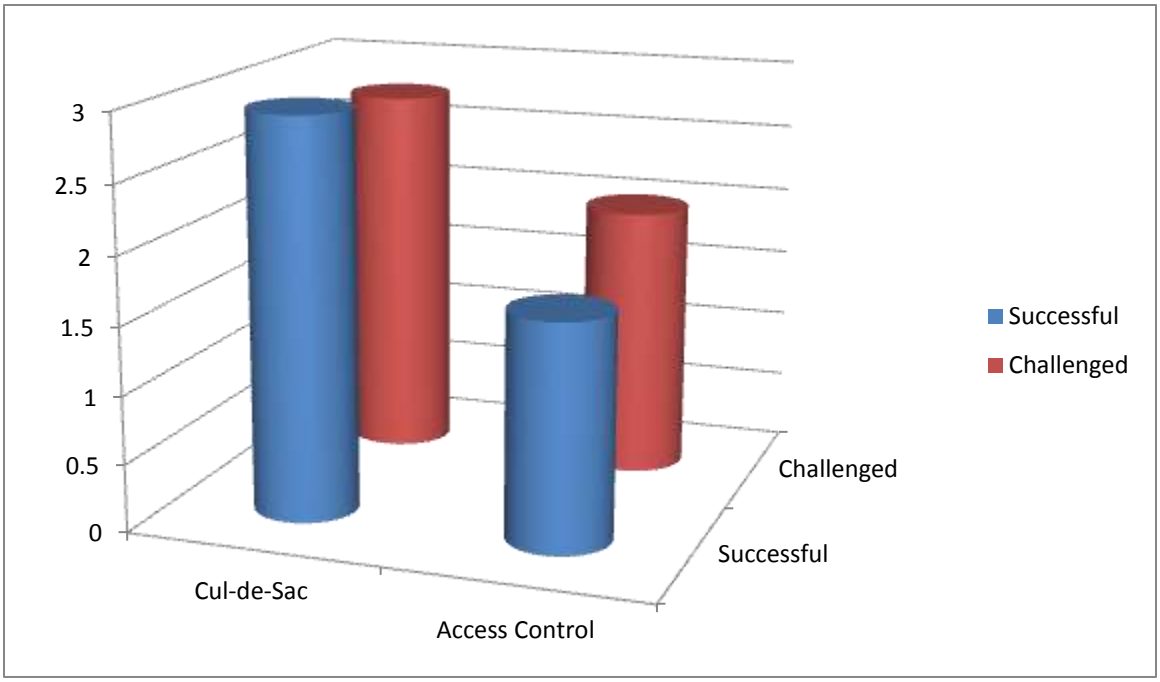


N = 128

The percentages reflect the type of access someone within the development would have to Public Safety (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

CUL-DE-SACS AND ACCESS CONTROL WITHIN THE DEVELOPMENT

(Means)



N = 69

The numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present within the Development receives a one (1), Minimally Present within the Development receives a two (2), Moderately Present within the Development receives a three (3), Substantially Present within the Development receives a four (4) and Extremely Present within the Development receives a five (5). "There are increasing demands that cities provide a safer, more secure living environment."[343] This includes Cul-de-Sacs and Access Control. The average for Cul-de-Sacs was 2.94 for successful and 2.76 for challenged developments and Access Control was 1.66 for successful and 2.0 for challenged developments.

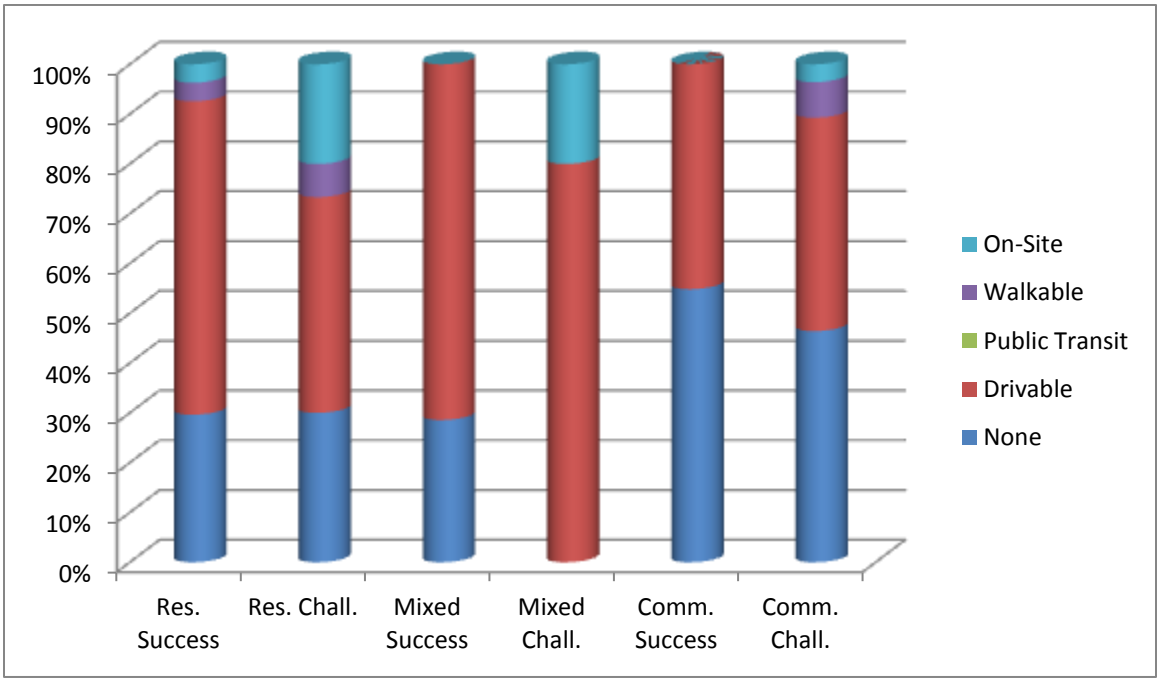
[343] John R. Minnery & Bill Lim, Measuring Crime Prevention Through Environmental Design, Journal of Architectural and Planning Research, v. 22, no. 4, 331 (Winter 2005).

Community deterioration and blight has been identified as a reason prompting people to leave a residential area.[344] Those perceiving more physical disorder were considerably less satisfied with the neighborhood, and perceiving more crime showed an accelerating negative effect on satisfaction.[345] It has been asserted once decline begins, investors are afraid to put more funds into facilities in declining areas because they believe no one will purchase their properties when they want to sell.[346] Describing this problem in the context of public housing, Thomas McNulty and Steven Holloway cite the potential for a vicious downward spiral of neglect emerges when the disordered environment of a poorly maintained public housing project is left unchecked. Indeed, many projects continue to suffer from meager funding, inadequate maintenance, decaying structures, and associated high levels of disorder. Visible signs of disorder (e.g., abandoned apartments, litter, graffiti, vandalism) undermine social cohesion and promote further economic decay and more serious crime. This may substantially affect the social organization of surrounding areas by driving away businesses, reducing the value of local housing, and promoting residential instability.[347]

[344] Barrett A. Lee, R.S. Oropesa, & James W. Kanan, *Neighborhood Context and Residential Mobility*, Demography, Vol. 31, No. 2, 252 (May, 1994) (internal citations omitted).
[345] John R. Hipp, *Specifying the Determinants of Neighborhood Satisfaction: A Robust Assessment in 24 Metropolitan Areas*, Social Forces, v. 88, no. 1, 395-396 (September 2009).
[346] Katharine L. Bradbury, Anthony Downs, & Kenneth A. Small, *Urban Decline and the Future of American Cities*, 79 (The Brookings Institution, Washington, D.C., 1982).
[347] Thomas L. McNulty & Steven R. Holloway, Race, Crime, and Public Housing in Atlanta: Testing a Conditional Effect Hypothesis, Social Forces, v. 79, no. 2, 307-314 (December 2000) (internal citations omitted).

DISTRESSED NEIGHBORHOOD/BLIGHT ACCESS

(Percentages)

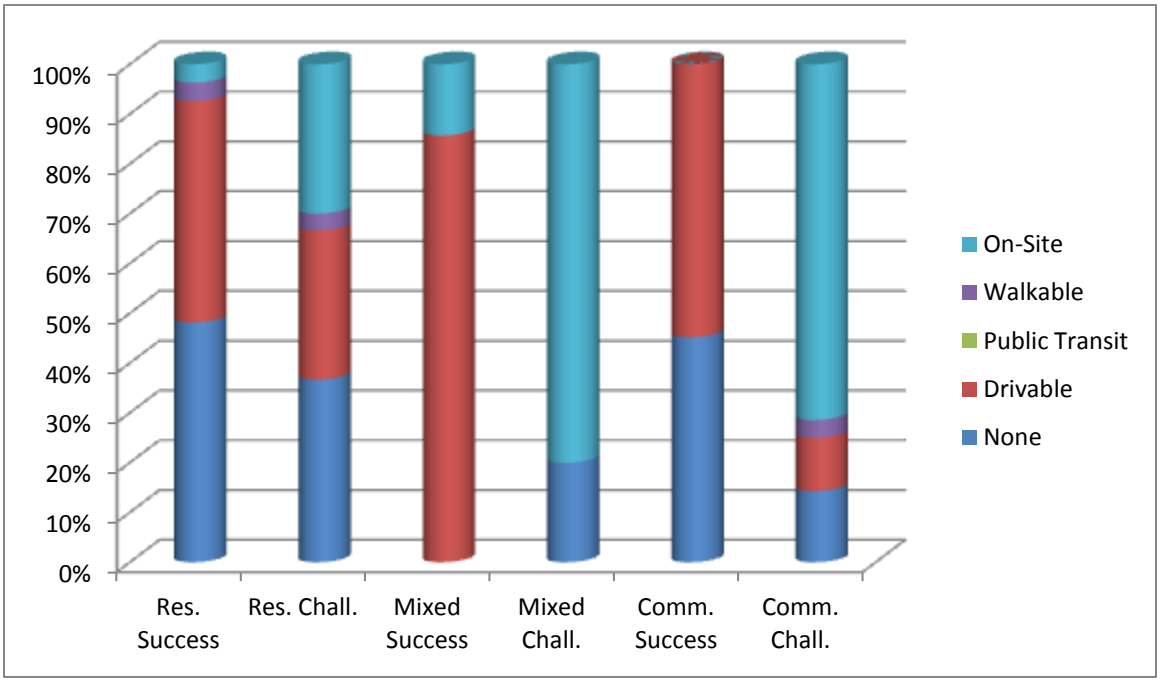


N = 128

The percentages reflect the type of access someone within the development would have to a Distressed Neighborhood/Blight (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

HIGH VACANCY RATE ACCESS

(Percentages)



N = 128

The percentages reflect the type of access someone within the development would have to High Vacancy Rates (None, Drivable, Public Transit, Walkable, or On-Site). The successful and challenged results are presented for residential, mixed use and commercial developments to provide visual inter- as well as intra-comparisons.

The foregoing discussion of the philosophies and factor approaches encountered during the academic literature review, along with the data tables reflecting their relationship to developments identified as successful and challenged within the marketplace, remains academic without public and private sector action to adopt and adapt the knowledge gained therein both practically and legally.

Practically, Robert Owens, in his article *Subdivision Development: Bridging Theory and Practice*, reported that several research interviews with developers revealed that a topic emphasized by all the developers contacted involved the unusually high risks that go with land development. According to the developers, these risks are many and varied and virtually impossible to fully anticipate and include meeting governmental and

utility regulations.[348] While developers seek a more predictable future protected from the whims of local officials and their constituents, public-sector planners seek a mechanism for accommodating the competing interests of local residents, developers, and environmentalists, as well as the demands of state and federal authorities.[349] Understanding the relationship of individual philosophies and factor approaches to successful and challenged development provides justification for action.

Legally, lack of objectively verified planning standards is particularly problematic in light of the U.S. Supreme Court's standard for valid exercise of the police power set forth in *Euclid*: that any regulation enacted be not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[350] "State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable."[351]

The U.S. Supreme Court, in *Penn Cent. Transp. Co. v. City of New York*, explained that land use regulations are valid exercises of the police power as long as they are "reasonably related to the implementation of a policy expected to produce a widespread public benefit and applicable to all similarly situated property."[352] However, in "determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government" as regulatory takings exceeding the scope of government's police powers, "the Court's decisions have identified the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations as relevant considerations."[353]

These legal precedents support revision of current land use regulatory practices in light of the above marketplace research. Government regulation can be drafted to mandate and/or promote the presence of development philosophies and factor approaches associated with developments identified as successful within the marketplace. A code based upon development standards objectively verified as associated with successful

[348] Robert W. Owens, *Subdivision Development: Bridging Theory and Practice*, The Appraisal Journal, v. 66, no. 3, 274-281 (July 1998).
[349] Richard Hogan, *The Failure of Planning: Permitting Sprawl in San Diego Suburbs, 1970-1999*, xxi (The Ohio State University Press, Columbus, Ohio, 2003).
[350] *Village of Euclid, Ohio*, 272 U.S. at 394-395 (internal citations omitted).
[351] *Gorieb v. Fox*, 274 U.S. 603, 608, 47 S.Ct. 675, 677 (1927).
[352] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 2664 at Footnote 30 (1978).
[353] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2659 (1978).

developments would therefore not be arbitrary and unreasonable as having no substantial relation to the general welfare. Such code provisions could be designed to be applicable to all similarly situated property and to produce the widespread public benefit of promoting development success and preventing the negative community-wide effects of development failure. Regulation designed to promote development success based upon development philosophies and factor approaches associated with developments identified as successful within the marketplace should not be found to effect a regulatory taking exceeding government's police powers for there can be no developer economic interest supported by "distinct investment-backed expectations" in development failure. Even discretionary permit conditions designed to promote development success based upon development philosophies and factor approaches associated with developments identified as successful within the marketplace should be found to embody the "essential nexus" required between the "legitimate state interest" of promoting development success and preventing development failure. They should be found to be related both in nature and extent to the impact of the proposed development because such conditions are objectively based and legislatively intended to relate to the success of the specific development in question.

CONCLUSION

American urbanism has come to be defined by migration from deteriorating urban development to new suburban development resulting in population decline within America's urban cores, or central cities. Population decline sets in motion certain self-reinforcing forces, or issues, likely to perpetuate it. These include the withdrawal of high- and middle-income households, a decline in the central city's tax base accompanied by rising local taxes and deteriorating public services, a dwindling consumer base to support utility infrastructure maintenance and improvement, and a rise in criminal activity. Federal, state and local governments have been involved in a variety of "urban renewal" strategies via studies, regulations, tax incentives and even investments of public funds, largely to no avail. During this time, what were once thought to be only urban issues have now also outwardly migrated to the suburbs.

While some may assert that the birthplace of modern U.S. Supreme Court jurisprudence defining governmental authority to regulate land use is *Euclid*, the U.S. Supreme Court outlines in this same case that the true origin of this power is the power of sovereignty, the power to govern men and things within the limits of government's dominion, except in so far as it has been restricted by the Constitution of the United States. The Court explains that the nature and extent of these powers evolve as

government is confronted with new issues requiring intervention. The evolution of government's regulatory powers and how these powers have been guided and constrained is defined by the application of Constitutional principles, statutes and ordinances. From Colonial times until the Civil War, state and local government regulation existed apart from U.S. Constitutional restraint. However, with the passage of the Fourteenth Amendment, the United States Supreme Court was charged to ensure state and local legislation complied with guaranteed rights under the U.S. Constitution. The Court in *Mugler* defined regulatory authority as the "police powers." Therein, state and local governments possess the authority to determine what measures are necessary to protect the public health, safety and welfare. The Court held that valid police power regulation does not violate individual liberty or property rights. Instead of defining this power's reach, the Court chose in this and subsequent case law only to retroactively invalidate regulation bearing no substantial relation to these powers. These powers were broadly interpreted and government operated with only the threat of regulatory invalidation until *First English,* where the Court determined government may have to compensate where regulation extends beyond these powers. The Court ruled in *Penn. Central* with recent confirmation in *Ark. Game and Fish Comm'n* that regulation effects a taking where it interferes with "distinct investment-backed expectations." Since there can be no investment-backed expectation in failure, government regulation designed to promote success should not run afoul of this constraint.

Academically proffered philosophies and factor approaches involving residential and commercial developments can be objectively examined for co-relationship with developments identified as successful or challenged within the marketplace. A code based upon development philosophies and factor approaches objectively verified as associated with successful developments would therefore not be arbitrary and unreasonable as having no substantial relation to the general welfare. Such code provisions could be designed to be applicable to all similarly situated property and to produce the widespread public benefit of promoting development success and preventing the negative community-wide effects of development failure. Such a code should not be found to exceed government’s regulatory police powers, for there can be no developer economic interest supported by “distinct investment-backed expectations” in development failure.

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DEVELOPMENT SURVEY

Name _____

Description _____

Address _____

Case _____ Region NE S MW W Type RES COM MIX Setting DT SUB URB RUL

Population <5 5-10 10-25 25-50 50-100 100-250 250-500 >500 Success Yes No

Compared To Type In County (Far B/Below/Slightly B/Average/Slightly A/Above/Far A)

Completion Rate	FB	B	SB	AVG	SA	A	FA
Occupancy Rate	FB	B	SB	AVG	SA	A	FA
SQ FT Rental Rate	FB	B	SB	AVG	SA	A	FA

Government Regulation/Process

Was the development tract covered by a preexisting comprehensive plan? Yes No DK

Did the development deviate from the plan? Yes No DK

If yes, what was the envisioned land-use? SFR MFR MIX LCOM HCOM IND OPN RUL

Was there a delay because of the deviation? Yes No DK

If yes, length? < 3 months 3-6 months 6-9 months 9-12 months > 12 months

To be developed, the tract was subject to:

Zoning/Rezoning? Yes No DK

Platting/Replatting? Yes No DK

Subdivision Review? Yes No DK

Conditional/Special Use Permit? Yes No DK

Planned Unit Development Process? Yes No DK

Variance? Yes No DK

Site Plan Review? Yes No DK

Total process length? < 3 months 3-6 months 6-9 months 9-12 months > 12 months

To be developed, the tract was subject to:

Drainage Issues?	Yes	No	DK
Environmental Issues?	Yes	No	DK
Site Build Ability Issues?	Yes	No	DK
Property Title Issues?	Yes	No	DK
Development Code Compliance Issues?	Yes	No	DK
LEED Certification Issues?	Yes	No	DK
Extension of Utilities to the development tract?	Yes	No	DK

Total Delay? < 3 months 3-6 months 6-9 months 9-12 months > 12 months

Was a development/infrastructure guarantee (Cash, Surety, LOC) required?	Yes	No	DK
Was the development assisted by public financing and/or incentives?	Yes	No	DK

If yes, amount/type _____.

The development tract is subject to:

Affordable Housing Requirements (including inclusionary zoning)?	Yes	No	DK
Rent/Purchase Control Requirements?	Yes	No	DK
EPA Superfund Requirements?	Yes	No	DK
FEMA Floodplain Requirements?	Yes	No	DK
Historic Preservation Requirements?	Yes	No	DK
Requirements Suggesting Possible Exclusionary Intentions?	Yes	No	DK
Environmental Requirements (wetlands, riparian corridors, upland forests, air quality, greenhouse emissions)?	Yes	No	DK
Water Conservation Requirements?	Yes	No	DK
Coastline Development Restrictions?	Yes	No	DK
FAA Height Restrictions?	Yes	No	DK
Governmental Growth Restrictions?	Yes	No	DK
Density Requirements (including clustering)?	Yes	No	DK
Green/LEED/Energy-Efficient Development Requirements?	Yes	No	DK

Sustainable/Smart Growth/Form-Based Code Requirements?	Yes	No	DK
Local Development/Building Design Standards (i.e. TND)?	Yes	No	DK
Restrictive Covenants?	Yes	No	DK
Homeowner's Association?	Yes	No	DK

If yes, monthly amount is _____.

Special Assessments/Taxes/Fees?	Yes	No	DK

If yes, monthly amount is _____.

Impact Fees/Dedications/Payments in Lieu of Dedications?	Yes	No	DK

If yes, amount/type _____.

Presence In The Development (Not/Minimal/Moderate/Substantial/Extreme)

Residential Development

Apartments	Not	Min	Mod	Subtn	Extrm
Condominiums (owner inside walls)	Not	Min	Mod	Subtn	Extrm
Townhomes/Row Houses	Not	Min	Mod	Subtn	Extrm
Quad-plexes and Tri-plexes	Not	Min	Mod	Subtn	Extrm
Duplexes (twin homes)	Not	Min	Mod	Subtn	Extrm
Patio/Garden Homes	Not	Min	Mod	Subtn	Extrm
Single-Family Housing < 1200 square feet	Not	Min	Mod	Subtn	Extrm
Single-Family Housing 1200-1800 square feet	Not	Min	Mod	Subtn	Extrm
Single-Family Housing > 1800 square feet	Not	Min	Mod	Subtn	Extrm
Manufactured Housing	Not	Min	Mod	Subtn	Extrm
Owner-Occupied Housing	Not	Min	Mod	Subtn	Extrm
Low-Maintenance Housing	Not	Min	Mod	Subtn	Extrm
Access Control (entry gates, berms, walls, fence)	Not	Min	Mod	Subtn	Extrm
Cul-de-sacs	Not	Min	Mod	Subtn	Extrm
Commercial	Not	Min	Mod	Subtn	Extrm

In-home health-related services	Not	Min	Mod	Subtn	Extrm
In-home food services (meals on wheels)	Not	Min	Mod	Subtn	Extrm
Commercial Development					
Free-Standing Building(s)	Not	Min	Mod	Subtn	Extrm
Big Box Store(s)	Not	Min	Mod	Subtn	Extrm
Strip Shopping Area	Not	Min	Mod	Subtn	Extrm
Open Air Mall/Arcade/Produce Market	Not	Min	Mod	Subtn	Extrm
Enclosed Mall	Not	Min	Mod	Subtn	Extrm
Office Cluster	Not	Min	Mod	Subtn	Extrm
Tenant Ownership	Not	Min	Mod	Subtn	Extrm
National Chain	Not	Min	Mod	Subtn	Extrm
Residential	Not	Min	Mod	Subtn	Extrm
Warehouse	Not	Min	Mod	Subtn	Extrm
Industrial	Not	Min	Mod	Subtn	Extrm
All Development					
Streetscaping (sidewalks, trees, boulevards, plazas)	Not	Min	Mod	Subtn	Extrm
Security (patrols, lighting, electronic surveillance)	Not	Min	Mod	Subtn	Extrm
Entry and Common Area Landscape/Monuments/Art	Not	Min	Mod	Subtn	Extrm
Open Space (greenbelt, tree canopy, dunes, bluffs)	Not	Min	Mod	Subtn	Extrm
Water Features (wetlands, streams, pond, canal)	Not	Min	Mod	Subtn	Extrm
Public Transit Access	Not	Min	Mod	Subtn	Extrm
Street Grid Access	Not	Min	Mod	Subtn	Extrm
Highway Access	Not	Min	Mod	Subtn	Extrm
Walkable	Not	Min	Mod	Subtn	Extrm
Bicycle Friendly	Not	Min	Mod	Subtn	Extrm
Parking	Not	Min	Mod	Subtn	Extrm

Technology Access	Not	Min	Mod	Subtn	Extrm
Green/LEED/Energy-Efficient Design	Not	Min	Mod	Subtn	Extrm
Disproportionate Property Values	Not	Min	Mod	Subtn	Extrm
Disproportionate Utility Costs	Not	Min	Mod	Subtn	Extrm
Disproportionate Utility Acquisition Costs	Not	Min	Mod	Subtn	Extrm
Disproportionate Taxes/Assessments	Not	Min	Mod	Subtn	Extrm
Senior-Related					
Senior-oriented recreational and/or social activities	Not	Min	Mod	Subtn	Extrm
Assisted living residential facilities	Not	Min	Mod	Subtn	Extrm

Proximity To The Development **(**None/Drivable Only/Public Transit/Walkable/On-site)

Commercial Amenities, Social Amenities, Leisure Amenities, Support Services, Community Conditions, Lifestyle Amenities

Fast Food Restaurant	None	Drive	Public	Walk	On-Site
Sit-Down Restaurant	None	Drive	Public	Walk	On-Site
Coffee Shop	None	Drive	Public	Walk	On-Site
Bars	None	Drive	Public	Walk	On-Site
Entertainment Establishments (movies, bowling)	None	Drive	Public	Walk	On-Site
Service Establishments (banking, insurance, cleaning)	None	Drive	Public	Walk	On-Site
Health-Related Services (medical, mental, pharmacy)	None	Drive	Public	Walk	On-Site
Child-Related Services (day care, latch key, pre-school)	None	Drive	Public	Walk	On-Site
Tourist-Related Services (hotel/motel)	None	Drive	Public	Walk	On-Site
Upscale Housing	None	Drive	Public	Walk	On-Site
Affordable Housing	None	Drive	Public	Walk	On-Site
Public Housing/Shelter	None	Drive	Public	Walk	On-Site
Distressed Neighborhood/Blight	None	Drive	Public	Walk	On-Site
High Crime Rate	None	Drive	Public	Walk	On-Site
High Vacancy Rate	None	Drive	Public	Walk	On-Site

Correctional Facility (detention, halfway house, parole)	None	Drive	Public	Walk	On-Site
Landfill/Quarry/Mine/Rock Crusher	None	Drive	Public	Walk	On-Site
Refinery/Sewage Treatment/Slaughterhouse	None	Drive	Public	Walk	On-Site
Smokestack Industry	None	Drive	Public	Walk	On-Site
Light Manufacturing/Warehousing	None	Drive	Public	Walk	On-Site
Religious Establishment (Church, etc.)	None	Drive	Public	Walk	On-Site
Post Office	None	Drive	Public	Walk	On-Site
Convenience Store (fuel center)	None	Drive	Public	Walk	On-Site
Grocery/Specialty Shop	None	Drive	Public	Walk	On-Site
Big Box Store	None	Drive	Public	Walk	On-Site
Strip Shopping Area	None	Drive	Public	Walk	On-Site
Open Air Mall/Arcade/Produce Market	None	Drive	Public	Walk	On-Site
Enclosed Mall	None	Drive	Public	Walk	On-Site
Office Cluster	None	Drive	Public	Walk	On-Site
Public School	None	Drive	Public	Walk	On-Site
Private School	None	Drive	Public	Walk	On-Site
Vocational School	None	Drive	Public	Walk	On-Site
College/University	None	Drive	Public	Walk	On-Site
Natural Amenity (lake, ocean, beach, forest, mountain)	None	Drive	Public	Walk	On-Site
Large Park (trails, playground, picnic area)	None	Drive	Public	Walk	On-Site
Small Neighborhood/Urban/Pocket Park	None	Drive	Public	Walk	On-Site
Cemetery	None	Drive	Public	Walk	On-Site
Recreation/Activity/Aquatic/Fitness Center	None	Drive	Public	Walk	On-Site
Country Club/Resort	None	Drive	Public	Walk	On-Site
Tennis/Basketball Courts	None	Drive	Public	Walk	On-Site
Golf Course	None	Drive	Public	Walk	On-Site

Athletic Fields	None	Drive	Public	Walk	On-Site
Amusement Park/Aquarium/Zoo	None	Drive	Public	Walk	On-Site
Convention Center/Arena/Sports Stadium	None	Drive	Public	Walk	On-Site
Bookstore	None	Drive	Public	Walk	On-Site
Library	None	Drive	Public	Walk	On-Site
Cultural Center (museum, theater, concert hall)	None	Drive	Public	Walk	On-Site
Historic Site	None	Drive	Public	Walk	On-Site
City Center	None	Drive	Public	Walk	On-Site
Public Safety (police, fire, ambulance)	None	Drive	Public	Walk	On-Site
Airport	None	Drive	Public	Walk	On-Site
Parking	None	Drive	Public	Walk	On-Site
Disamenities (railroad, highways, power lines, transformers, telecom towers)	None	Drive	Public	Walk	On-Site
Employment	None	Drive	Public	Walk	On-Site
Senior-oriented recreational and/or social activities	None	Drive	Public	Walk	On-Site
Assisted living residential facilities	None	Drive	Public	Walk	On-Site

Other factors that effected the development (How?) _____

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_____

_____

_____