

**Understanding the Legal Construct Regulating Government Intervention into City  
Decline and Degeneration in America**

By

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Chairperson Prof. Michael Davis

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Committee Member Prof. George Coggins

---

Committee Member Prof. Sandra Craig McKenzie

---

Committee Member Prof. Julie Cheslik

Date Defended: March 13, 2013

The Dissertation Committee for Bryant Parker  
certifies that this is the approved version of the following dissertation:

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Chairperson Prof. Michael Davis

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## Abstract

An overview of critical academic thought concerning the character and attributes of American urban development establishes that the presence of unsuccessful, or challenged, development is a transcending problem necessitating government regulation in response. Challenged developments were observed frequently materializing in areas exhibiting urban decline and degeneration, including outward migration. It was conjectured that this cycle of outward migration and urban decline and degeneration might be part of an overall development cycle experienced by more than current day cities. History was probed for evidence of commonality.

Cycles of urban decline and degeneration appeared within Mesopotamia, Egypt, the Greek city-states, and the Roman Empire. The form of government, whether a benevolent priest-king, dictator, democratic assembly or republic council appears extraneous. The mere presence of governmental regulation, such as comprehensive planning, zoning, building codes, advanced development techniques or sophisticated legal concepts for the protection of individual rights, did not purport to dissuade or ameliorate these cycles throughout the ages. Historical accounts attributed successful urban concentration to the presence of safety and security, convenience, and quality of life. Conversely, when one or more of these factors were diminished or compromised, cycles of urban decline and degeneration seemed to emerge.

Field research was conducted to ascertain how these historical observations fared in the modern context. Residential and commercial developments differentiated as successful and challenged within the fifty (50) fastest growing counties across the United States between 2000 and 2010 pursuant to the U.S. Census Bureau were surveyed to explore the presence of governmental regulation and procedures as well as factors affecting safety and security, convenience, and quality of life. Consistent with historical observations, only items connected with safety and security, convenience and quality of life emerged from this process.

Based upon this knowledge, local governments may be prompted to intervene at the development stage of residential and commercial developments in an attempt to counter, forestall or at least lessen the impact of the cycle of outward migration and urban decline and degeneration. While this could be attempted *ad hoc*, a more prudent approach might be to re-examine and re-constitute existing zoning, subdivision and development regulations and procedures in light of the differential characteristics between successful verses challenged developments. However, such an undertaking does not happen in a legal "state of nature."

A synthesis of the jurisprudence that defines the limits of and restraints upon current governmental regulation reveals that land use regulation in America centers around the interaction between the authority of a local government to act, pursuant to “police power” authority granted that local government from the state, and whether that government action violates an individual’s Constitutional rights. These Constitutional rights center around the privileges and immunities of citizens, equal protections of the laws and due process clauses of the Fourteenth Amendment and include “regulatory takings” under the theory of inverse condemnation. The United States Supreme Court has undertaken the long and arduous task of defining this interaction. A summation of that current definition is contained in *Arkansas Game and Fish Comm’n v. United States*<sup>1</sup> where the Court expounded 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.<sup>2</sup> This current understanding of the interaction between the exercise of government regulation and takings jurisprudence lays the groundwork for thoughtful and legally permissible implementation and application of zoning, subdivision and developmental regulations and processes aimed at addressing the cycle of outward migration and urban decline and degeneration at the initial development stage as well as subsequently thereto.

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<sup>1</sup> No. 11–597, 568 U. S. \_\_\_\_ (Dec. 5, 2012).

<sup>2</sup> *Arkansas Game and Fish Comm’n v. United States*, No. 11–597, slip op. at 14-15, 568 U. S. \_\_\_\_ (Dec. 5, 2012).

## Table of Contents

I.	Embedded in Modern America is a Cycle of Urban Decline and Degeneration .....	1
II.	Cycles of Outward Migration Interacting with Urban Decline and Degeneration Have Been Present Throughout History .....	15
III.	Test Results .....	37
IV.	Understanding the Constitutional Restraints on Government Action to Solve the Problem .....	149
V.	Conclusion.....	165
	Background Bibliography .....	168
	Development Survey.....	200

## Understanding the Legal Construct Regulating Government Intervention into City Decline and Degeneration in America

### I. Embedded in Modern America is a Cycle of Urban Decline and Degeneration

The one thing that modern cities have in common is decline and degeneration. While easy to observe, there is little understanding whether this is an underlying problem or merely a symptom thereof. Yet this decline and degeneration could impact the stability of America's residential real estate market in unimaginable ways. Without an in-depth vetting there is little hope in providing a meaningful and effective response. This research will attempt to delve into the underlying issues by examining if there is a pattern/cycle that appears to be repeating and probable outcomes of this cycle. This examination will also attempt to delve into the role government and its regulatory process play in fostering this decline and degeneration and may play in an effective response.

In 1963, Peter Marris defined a central city, or urban landscape, to include, "typically, a business district; a railway and bus station; a university; Skid Row; a 'hill,' which, though it may be flat, has remained socially elevated amidst the surrounding decay, an island of gracious town houses for the sophisticated and well-to-do; a museum and a park. Around these features, and extending far beyond them, miles of seedy tenements and row houses peel and flake, amiable or grim in their degenerate old age."<sup>3</sup> He noted that the metropolis, of which the central city is the heart, grows continually, but in the city itself there are sinister portents of decline. Department stores stand empty; buildings are pulled down and turned into parking lots, waiting for better times; offices follow their employees to the suburbs. This decay of the city center is not new, and seems to be a characteristic consequence of its growth.<sup>4</sup> Since then, much of America's central city, or urban, development has continued to decline and degenerate. In the words of William Lucy and David Phillips, "business districts shrank; economic, political, and cultural centers diminished in size and function; once-fashionable residential neighborhoods fell into decline; and deterioration, crime, riots, and despair emerged in poverty ghettos."<sup>5</sup>

While George Wagner has identified a renaissance in some areas of central cities thanks to urban reinvestment and renewal strategies, these efforts have not halted the

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<sup>3</sup> Peter Marris, "A Report on Urban Renewal in the United States" in *The Urban Condition: People and Policy in the Metropolis* 114-115 (Simon and Schuster New York 1963).

<sup>4</sup> Peter Marris, "A Report on Urban Renewal in the United States" in *The Urban Condition: People and Policy in the Metropolis* 114-115 (Simon and Schuster New York 1963).

<sup>5</sup> William H. Lucy & David L. Phillips, *Suburban decline: the next urban crisis*, Issues in Science & Technology, Vol. 17, Issue 1, 55 (Fall 2000).

overall trend towards urban flight.<sup>6</sup> Dawkins and Nelson posit that although some studies point to hidden trends of in-migration from suburban areas to central cities among certain demographic groups, aggregate trends still suggest that outward population migration overshadows this "back to the city" movement.<sup>7</sup> Even though vast amounts of time and money have been expended on numerous urban renewal projects and programs, these basic problems persist in the typical American metropolitan area. "The old urban crisis, characterized by the decline of central cities, still has not been addressed adequately by federal, state, and local policy-makers."<sup>8</sup>

Throughout the United States, individuals are moving away from older deteriorating developments toward newly created developments on the periphery of the central city. The process of massive outward migration from central city development towards new peripheral, or suburban, development began in the wake of World War II.<sup>9</sup>

While residential home values have steadily increased across the United States since World War II,<sup>10</sup> the reality is all new construction deteriorates with age. Decaying central city developments were once brand new construction. The new construction of today is the old building of tomorrow.<sup>11</sup> Currently, office buildings are built with a physical life of about eighty years and an economic life of about sixty years. Homes are built with an expectation that they will have a life of about forty years.<sup>12</sup>

The heart of the problem is the failure of the public and private sectors to understand, recognize, account for and adequately address the natural decline and degeneration of residential development and its central role in the process of urban decline and degeneration. Currently, government mandated appraisal practices continue to artificially inflate residential real estate values. Housing prices do not reflect the reality that residential structures have a finite usable lifespan. When this lifespan is exhausted,

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<sup>6</sup> George R. Wagner, *Gentrification, Reinvestment, and Displacement in Baltimore*, Journal of Urban Affairs, Vol. 17, Issue 1, 81-96 (1995).

<sup>7</sup> Casey J. Dawkins & Arthur C. Nelson, *State Growth Management Programs and Central-City Revitalization*, Journal of the American Planning Association, Vol. 69, Is. 4, 382 (Autumn 2003).

<sup>8</sup> William H. Lucy & David L. Phillips, *Suburban decline: the next urban crisis*, Issues in Science & Technology, Vol. 17, Issue 1, 55 (Fall 2000).

<sup>9</sup> Lyle E. Schaller, *Center City Churches: The New Urban Frontier* 11, (Abingdon Press Nashville 1993) and Gregory D. Squires, "Urban Sprawl and the Uneven Development of Metropolitan America" in *Urban Sprawl: Causes, Consequences and Policy Responses* 1, 8 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

<sup>10</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2007*, Tables 941 and 943, (126<sup>th</sup> Edition, Washington, D.C., 2006).

<sup>11</sup> William T. Bogart, *Don't Call it Sprawl: Metropolitan Structure in the Twenty-First Century* 1 (Cambridge Univ. Press New York 2006).

<sup>12</sup> William T. Bogart, *Don't Call it Sprawl: Metropolitan Structure in the Twenty-First Century* 6 (Cambridge Univ. Press New York 2006).

houses formerly seen as assets are revealed to be great financial liabilities that must either be removed or substantially rebuilt to return the property to use.

Furthermore, the failure of current appraisal and real estate transaction practice to assign value to residential properties based on all their physical attributes, including their structural integrity and useful life, continues to facilitate rampant volatility in real estate markets. In the wake of the 2008 real estate crisis, Anthony Downs explains that the inability to accurately assess the real value of residential real estate forced banks to drastically underestimate the current value of these structures, which led to bank liquidity issues including insolvency as well as prospective reluctance to finance further residential real estate investment.<sup>13</sup>

While possibly not completely understood by individual residential homebuyers, these realities have been identified and are constantly placed in the public conscious by journalists and Hollywood movie producers.<sup>14</sup> Uncertainty in the real value of residential real estate property provides incentive for homeowners to outwardly migrate away from existing developments. This process creates a “hot potato” syndrome where residential properties are passed between individual homebuyers and sellers at artificially inflated values until the final purchaser has made a substantial financial investment into an uninhabitable property. As a 1982 Brookings Institution publication identifies, homes in America pass from purchaser to purchaser and at some point reach a cycle of decline where new growth has moved out beyond them and subsequent purchasers are no longer able to maintain or repair the structures. This results in the “absolute decline” of the neighborhood and the homes within it.<sup>15</sup> Without a reliable appraisal standard, such as the cost approach, homeowner uncertainty concerning the future stability of their residential investment can motivate initial movement away from a residential development. Other homeowners then reluctantly follow suit, likewise fearing declining property values.<sup>16</sup> This migration of homeowners away from existing development towards new peripheral “suburban” growth meant that “as a result, the most deteriorated, or hardest to maintain, urban housing ‘took itself off the market.’ This describes a horrifying reality of burnt-out, abandoned buildings, the vanished life savings of small investors, and distressed older

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<sup>13</sup> Anthony Downs, *Real Estate and the Financial Crisis: How Turmoil in the Capital Markets is Restructuring Real Estate Finance*, 152-153 (Urban Land Institute, Washington, D.C. 2009).

<sup>14</sup> Paul A. Jargowsky, “Sprawl, Concentration of Poverty, & Urban Inequality” in *Urban Sprawl: Causes, Consequences & Policy Responses* 39, 60-61 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

<sup>15</sup> Katherine L. Bradbury, Anthony Downs and Kenneth A. Small, *Urban Decline and the Future of American Cities* 166 (Brookings Institution Washington, D.C. 1982).

<sup>16</sup> Peter Marris, “A Report on Urban Renewal in the United States” in *The Urban Condition: People and Policy in the Metropolis* 113, 114-115 (Leonard J. Duhl, ed., Simon and Schuster New York 1963) and



neighborhoods where the people with little choice about where they can live are increasingly concentrated."<sup>17</sup>

This downward cycle is not limited to owner-occupant housing. "As demand went down for slum buildings, their landlords often sold out to more cynical operators, who created dummy ownership corporations, stopped paying for maintenance and taxes, and collected rent as almost pure profit. When tax foreclosure threatened or the tenants stopped paying rent, the owners walked away from their buildings, and cities were unable to hold them accountable. Cities, the reluctant new owners in foreclosure, were left to rehabilitate the buildings themselves or to demolish them. It was an ugly process, producing results as if whole neighborhoods had been heavily bombed. It created great misery for the tenants caught in the middle; it was a waste of resources."<sup>18</sup>

While decaying residential structures are at the heart of outward migration away from existing central city developments, several other issues emanate from this natural pattern of outward migration accompanying development decline and degeneration. Each of these issues are driven by and/or contribute to urban area decline and degeneration.

Katherine Bradbury, Anthony Downs and Kenneth Small connect declining urban areas with serious fiscal problems, including crumbling infrastructure, declining prosperity, deteriorating public services and rising taxes.<sup>19</sup> Perhaps the most striking aspect of urban decline and degeneration is population loss. They note that large central city population decline began before World War II and became quite extensive after 1950. By the mid-1970s, 63 percent of U.S. cities containing 100,000 or more people were losing population.<sup>20</sup> Casey Dawkins and Arthur Nelson found that this population decline accompanied a similar decline in manufacturing employment within central cities.<sup>21</sup>

Population loss often signals a decline in the central city's tax base. Employers follow the flight of their workers to the suburbs, causing job decentralization and a loss of

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<sup>17</sup> Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation* 66-67 (American Planning Association, Chicago, 2003).

<sup>18</sup> Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation* 121-122 (American Planning Association, Chicago, 2003).

<sup>19</sup> Katherine L. Bradbury, Anthony Downs and Kenneth A. Small, *Urban Decline and the Future of American Cities* 1-2 (Brookings Institution Washington, D.C. 1982).

<sup>20</sup> Katherine L. Bradbury, Anthony Downs and Kenneth A. Small, *Urban Decline and the Future of American Cities* 1 (Brookings Institution Washington, D.C. 1982).

<sup>21</sup> Casey J. Dawkins & Arthur C. Nelson, *State Growth Management Programs and Central-City Revitalization*, *Journal of the American Planning Association*, Vol. 69, Is. 4, 382 (Autumn 2003).

employment opportunities for central city residents.<sup>22</sup> Robert Freilich, Robert Sitkowski and Seth Mennillo explain that as individuals and businesses migrate away from challenged urban and suburban areas for perimeter metropolitan development they leave these cities with little disposable income to service minority, older, poorer, and less-educated residents who require increased social, health, and education benefits with lower income, property, and sales tax revenue availability to meet that challenge. The resultant lack of financial resources in central cities also results in aging, deteriorated, and deficient community facilities and services, which results in a downward spiral of property tax revenue.<sup>23</sup> The resulting higher concentration of poor residents has burdened big-city governments with great needs for services, and low ability to pay for them.<sup>24</sup>

The average new home constructed, pursuant to U.S. Census figures, does not provide adequate tax revenue necessary to support its share of schools and other ongoing government services.<sup>25</sup> Developers are often required to pay for the initial public infrastructure improvements associated with development as a part of the platting process, either directly or by special assessment to each individual lot. However, there is no requirement that maintenance and replacement costs associated with this new public infrastructure be borne by the developer or neighborhood residents, let alone the costs associated with increased municipal service provision responsibilities. If residential property taxes are not enough to support schools and other services, communities are forced to find the money some other way, such as increasing commercial and industrial users or withdrawing or deferring maintenance and services.<sup>26</sup>

This is exacerbated with neighborhood population loss. Government revenues tend to fall at least proportionately unless tax rates are raised. If the local tax system is progressive, then when higher-income households leave, the remaining taxpayers have to pay even greater taxes. Yet the cost of certain local government activities does not decline proportionately with population losses. Area examples include debt service on items that cannot be sold, like highways; operating costs that vary only slightly with usage, like those for the library department; and wage costs of municipal workers whose

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<sup>22</sup> Casey J. Dawkins & Arthur C. Nelson, *State Growth Management Programs and Central-City Revitalization*, *Journal of the American Planning Association*, Vol. 69, Is. 4, 382 (Autumn 2003).

<sup>23</sup> Robert H. Freilich, Robert J. Sitkowski & Seth D. Mennillo, *From Sprawl to Sustainability: Smart Growth, New Urbanism, Green Development, and Renewable Energy* 33 (American Bar Association Chicago 2010).

<sup>24</sup> Katherine L. Bradbury, Anthony Downs and Kenneth A. Small, *Urban Decline and the Future of American Cities* 1-2 (Brookings Institution Washington, D.C. 1982).

<sup>25</sup> Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation*, 108 (American Planning Association Chicago 2003).

<sup>26</sup> Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation*, 108 (American Planning Association Chicago 2003).

organized bargaining strength may prevent proportionate cutbacks. In addition, costly local services such as police and fire protection are concentrated among lower-income households. These opposite effects of population loss on revenues and service needs create a “fiscal squeeze” on local governments that forces them to reduce services, defer necessary maintenance on existing public infrastructure, raise taxes, or seek additional aid from state or federal governments.<sup>27</sup> This is further exacerbated by ongoing operation and maintenance costs associated with utility plant operations. Frequently, where municipal governments are faced with less revenue allocated for continual maintenance of existing public infrastructure despite increasing tax assessments and utility rates to individual homeowners, necessary maintenance within aging residential neighborhoods is deferred and service quality often decreased. At the very least, this combination of increasing financial burdens accompanying decreased service provision engenders resident dissatisfaction and outward migration away from existing development.<sup>28</sup>

The effect of local improvement policies upon urban areas is not confined to newly developed areas. Policies regarding the initiation and financing of local improvements may have a major impact upon long-developed areas. A policy that discourages the modernization of facilities and which places an excessive burden upon individual landowners may accelerate the decline of neighborhoods. It is not uncommon, for example, to find that unpaved streets, broken sidewalks, or unsatisfactory drainage systems are important factors in depreciating land prices, contributing to an accelerating cycle of decline. Similarly, the improvement of streets to arterial standards, at the property owner's expense, may make continued utilization of a parcel of land for existing purposes uneconomic, and it may then be allowed to deteriorate until a change in use becomes feasible.<sup>29</sup> Additionally, the possibility of capturing additional revenue is thwarted when commercial and industrial enterprises follow their workers and consumers to the suburbs or are lured elsewhere by governmental incentives.

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<sup>27</sup> Katherine L. Bradbury, Anthony Downs and Kenneth A. Small, *Urban Decline and the Future of American Cities* 26 (Brookings Institution Washington, D.C. 1982).

<sup>28</sup> Katherine L. Bradbury, Anthony Downs and Kenneth A. Small, *Urban Decline and the Future of American Cities* 1-2 (Brookings Institution Washington, D.C. 1982), Casey J. Dawkins & Arthur C. Nelson, *State Growth Management Programs and Central-City Revitalization*, *Journal of the American Planning Association*, Vol. 69, Is. 4, 382 (Autumn 2003), Andres Duany, Elizabeth Plater-Zyberk & Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* 133 (North Point Press, New York, 2000) and Robert H. Freilich, Robert J. Sitkowski & Seth D. Mennillo, *From Sprawl to Sustainability: Smart Growth, New Urbanism, Green Development, and Renewable Energy* 33 (American Bar Association Chicago 2010).

<sup>29</sup> Glenn W. Fisher, *Special Assessments and Financing Public Improvements in the City of Wichita* 11 (Center for Urban Studies, Wichita State University, Wichita, Kansas, 1974).

Current development patterns pull taxes out from older communities, particularly first-ring suburbs on the unfashionable side of big cities. At the same time, new communities on the rapidly developing fringe of metropolitan areas face big costs to create a complete new infrastructure of schools and utilities. Fiscal needs set up a ruinous competition among communities in the same metropolitan area as each offers incentives to shopping malls, car dealerships, office parks, and other non-residential land uses that produce tax revenue without adding the increased service demands of additional residential housing. New malls and office parks attracted to edges of the metropolitan area pull values from older malls, commercial strips and office buildings.<sup>30</sup> Paul Jargowski further explains that this migration of commercial and industrial enterprises to the suburbs further promotes outward residential migration by creating a spatial mismatch between remaining central city residents and employment opportunities.<sup>31</sup>

American urbanism has thus come to be defined by migration to suburban development. Since the 1950s, American towns and cities have rapidly expanded outward from their central cores into surrounding rural areas. While the nation's population has risen, patterns of land use have shifted and transformed the United States into a largely suburban nation.<sup>32</sup> This phenomenon has been described by many using the term urban sprawl. According to David Resnik, urban sprawl in the United States has its origins in flight to the suburbs to avoid traffic, noise, crime, and other problems while living in homes with more square footage and yard space. As these suburbs developed, cities expanded in geographic area 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."<sup>33</sup>

Many problems have been associated with urban sprawl. Bradshaw Hovey believes that the growth of vast suburban areas, segregated by land use and stratified by race and class, and highly dependent on highways and automobiles, leads to increased air-pollution, diminished farmland and wilderness, disinvestment in central cities, the

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<sup>30</sup> Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation*, 82 (American Planning Association Chicago 2003).

<sup>31</sup> Paul A. Jargowsky, "Sprawl, Concentration of Poverty, & Urban Inequality" in *Urban Sprawl: Causes, Consequences & Policy Responses* 39, 61-63 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

<sup>32</sup> 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).

<sup>33</sup> David B. Resnik, *Urban Sprawl, Smart Growth and Deliberative Democracy*, American Journal of Public Health, Vol. 100, Issue 10, 1853 (October 2010).

atomization of traditional urban areas, and a divided society.<sup>34</sup> Robert Freilich, Robert Sitkowski and Seth Mennillo identify major metropolitan crises engendered by sprawl to include the weakening of existing built-up areas; environmental degradation-poor air and water quality accompanied by loss of wetlands, habitats, scenic vistas, and sensitive lands; global warming stemming from overutilization of oil, gas, and carbon-based energy sources; fiscal insolvency, transportation congestion, infrastructure deficiencies, and taxpayer revolts; agricultural land conversion; and loss of quality of life and sense of place.<sup>35</sup>

According to Gregory Squires, sprawl often leads to inefficient land use practices. Sprawling development requires large infrastructure investments for roads, sewer systems, schools, and other public services. At the same time, infrastructure within central areas goes unused and, in some cases, deteriorates due to inadequate public investment. “Perhaps the most concrete costs associated with sprawl are various environmental problems that are exacerbated by this pattern of development. The outward expansion of metropolitan areas, particularly given the automobile-dependent lifestyle it nurtures, increases air pollution and a range of diseases including asthma, lung cancer, and heart problems. Water quality erodes as development increases pollution that poisons rivers, lakes, and other bodies of water.”<sup>36</sup> According to Resnik, people living 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.<sup>37</sup>

Neil Smith, Paul Caris and Elvin Wyly confirm that urban decline and degeneration has reached older sprawling suburban areas in the outskirts of central cities as well. The old crabgrass frontier is becoming a "crabgrass ghetto" with problems long associated only with central cities: declining prosperity, population loss, rising crime, crumbling infrastructure, rising taxes, and deteriorating public services. In certain metropolitan areas, including Detroit, Atlanta, Cleveland, Seattle, Kansas City, and San Diego, the severity of decline in parts of the suburban ring was found to exceed that of

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<sup>34</sup> Bradshaw Hovey, *Building the City, Structuring Change: Portland's Implicit Utopian Project*, Utopian Studies Vol. 9 No. 1 68-79 (1998).

<sup>35</sup> Robert H. Freilich, Robert J. Sitkowski & Seth D. Mennillo, *From Sprawl to Sustainability: Smart Growth, New Urbanism, Green Development, and Renewable Energy* 22 (American Bar Association Chicago 2010).

<sup>36</sup> Gregory D. Squires, “Urban Sprawl and the Uneven Development of Metropolitan America” in *Urban Sprawl: Causes, Consequences and Policy Responses* 1, 11-12 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

<sup>37</sup> David B. Resnik, *Urban Sprawl, Smart Growth and Deliberative Democracy*, American Journal of Public Health, Vol. 100, Issue 10, 1853 (October 2010).

the respective central city.<sup>38</sup> According to Myron Orfield, contrary to popular belief, socioeconomic instability does not stop neatly at central city borders. As it crosses into older suburban areas, especially into suburbs that were once blue-collar and middle-class neighborhoods, it accelerates and intensifies.<sup>39</sup> He asserts that the difficulties associated with suburban challenged development are even greater. Lacking the central city's central business district and elite neighborhood tax base, social welfare and police infrastructure, and network of organized political activity, suburbs often decline far more rapidly.<sup>40</sup> Jane Jacobs described the need for ever greater amounts of public money, and not simply more money for publicly financed improvement or to stay even, but more money to cope with ever widening retreat and regression. "As needs grow greater, the wherewithal grows less."<sup>41</sup>

Harvard government professor James Wilson has argued that these urban problems involved in the cycle of decline and degeneration may be our "number one" domestic issue.<sup>42</sup> Many causes of urban decline and degeneration have been suggested as the basis for governmental intervention. There's no shortage of explanations of the cause or causes of urban decline and degeneration. Bradbury, Downs and Small compiled a list of 37 theories found in academic literature explaining why individuals move away from center cities to the suburbs and organized them into 6 distinct groups. Accordingly, 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. Every move away from a negative characteristic is also implicitly a move toward a positive one, but we perceive the theories in this category as chiefly emphasizing the negative factors. Tax avoidance theories claim that households or firms move to the suburbs because various characteristics of large cities make local tax burdens (especially on households with high and middle incomes) heavier there than in many surrounding suburbs. Positive attraction theories state that people or business firms are moving from central cities to the suburbs, or from some metropolitan areas to others, in order to obtain desired amenities. The amenities being sought range from lower density to better employment opportunities. Economic evolution

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<sup>38</sup> Neil Smith, Paul Caris and Elvin Wyly, *The "Camden syndrome" and the menace of suburban decline: Residential disinvestments and its discontents in Camden County, New Jersey*, *Urban Affairs Review*, Vol. 36, Is. 4, 497-531, 499-500 (March 2001).

<sup>39</sup> Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 4 (Brookings Institute Press Washington, D.C. 1997).

<sup>40</sup> Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 4 (Brookings Institute Press Washington, D.C. 1997).

<sup>41</sup> Jane Jacobs, *The Death and Life of Great American Cities* 270 (Random House New York 1961).

<sup>42</sup> James Q. Wilson, "Urban Problems in Perspective" in *The Metropolitan Enigma: Inquiries into the Nature and Dimensions of America's "Urban Crisis"* 318 (Chamber of Commerce of the United States Washington, D.C. 1967).

theories postulate that large urban areas, and specific activities within them, undergo definite stages of development. This evolution alters the optimal combination and location of activities in ways unfavorable to maintaining those activities within large cities. Biased policy theories assert that certain government policies influencing the location of public and private investments, households, and economic activities are biased in favor of suburbs and against central cities, or in favor of some areas and against others. Demographic trend theories state that certain population growth trends have impacts adverse to some cities and metropolitan areas.<sup>43</sup> This overview reveals how focused theorists have become on movement to suburbs as an explanation for underlying urban problems.

Professor Wilson teamed with colleague George Kelling to establish an essential nexus between undesirable criminal activity and other cyclical issues involved in urban decline and degeneration. Kelling and Catherine Coles explain that lack of maintenance and litter accumulation around an unoccupied building leads to an atmosphere conducive for minor crimes then more serious crimes coupled with community fear leading to wholesale resident flight and a final downward spiral to blight. They used the analogy of a broken window to describe the relationship between disorder and crime. "If a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. One unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing."<sup>44</sup> Disorderly behavior unregulated and unchecked signals to citizens that the area is unsafe. Responding prudently, and fearful, citizens will stay off the streets, avoid certain areas, and curtail their normal activities and associations. As citizens withdraw physically, they also withdraw from roles of mutual support with fellow citizens on the streets, thereby relinquishing the social controls they formerly helped to maintain within the community, as social atomization sets in. Ultimately the result for such a neighborhood, whose fabric of urban life and social intercourse has been undermined, is increasing vulnerability to an influx of more disorderly behavior and serious crime. To combat this meant developing legally defensible regulations designed to not run afoul of Supreme Court jurisprudence. The result was "broken windows" theory, and when New York City officials implemented its precepts by enacting and enforcing laws designed to restore order to the built environment, crime rates dramatically dropped throughout New York City.<sup>45</sup>

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<sup>43</sup> Katherine L. Bradbury, Anthony Downs and Kenneth A. Small, *Urban Decline and the Future of American Cities* 77-78 (Brookings Institution Washington, D.C. 1982).

<sup>44</sup> George L. Kelling and Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (Touchstone New York 1996).

<sup>45</sup> George L. Kelling and Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* 19-20, 151-153, (Touchstone New York 1996).

Smith, Caris and Wyly believe that movement from the center city to the suburbs, and all intraurban migration for that matter, “is more a symptom than a cause” of the decline and degeneration of development.<sup>46</sup> Paul Jargowsky explains that sprawl is related to but does not cause central city decline. Rather, it involves both the “pull” of desirable suburban characteristics and the “push” of undesirable central city characteristics. Sprawl “clearly does play a role, but it is just as valid to argue that central city decline is what causes sprawl.”<sup>47</sup> Peter Marris argues that expansion at the urban fringe and decay at the city center would still recur even if suburban life held no particular appeal. When the social status of a neighborhood is threatened by the newcomers who impinge on its boundaries, the residents will usually take flight. Once flight begins, the more hesitant follow, fearing for the value of their property and personal safety.<sup>48</sup>

Attempts to isolate a single issue as the sole cause for outward migration and urban decline and degeneration necessarily ignore the interrelation between each problem and the process of urban decline and degeneration. According to Jane Jacobs, “[c]ause and effect become confused precisely because they do link and re-link with one another in such complicated ways.”<sup>49</sup> “Urban decline and distress are mutually reinforcing, as shown by the ‘bunching’ of undesirable conditions and changes in particular places.”<sup>50</sup> Instead, problems associated with urban decline and degeneration should be seen as individual components of a perpetual cycle propelling outward migration away from existing development. Perhaps the strongest advocate for this being cyclical may be blurred causal effect with other phenomena associated with this decline and decay. Identified phenomena seem to be contributing to decline and decay just as decline and decay seems to be contributing to the identified phenomena.

While the problems supporting this cycle of outward migration and urban decline and degeneration are intertwined, individual residential homeowner decisions to abandon existing developments are the driving force perpetuating this cycle. Jacobs isolates the root of urban decline and degeneration as too many people moving out too fast and states

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<sup>46</sup> Neil Smith, Paul Caris and Elvin Wyly, *The “Camden syndrome” and the menace of suburban decline: Residential disinvestments and its discontents in Camden County, New Jersey* *Urban Affairs Review*, Vol. 36, Is. 4, 497-531, 524 (March 2001).

<sup>47</sup> Paul A. Jargowsky, “Sprawl, Concentration of Poverty, & Urban Inequality” in *Urban Sprawl: Causes, Consequences & Policy Responses* 39, 59-60 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

<sup>48</sup> Peter Marris, “A Report on Urban Renewal in the United States” in *The Urban Condition: People and Policy in the Metropolis* 113, 114-115 (Leonard J. Duhl, ed., Simon and Schuster New York 1963).

<sup>49</sup> Jane Jacobs, *The Death and Life of Great American Cities* 270-271 (Random House New York 1961).

<sup>50</sup> Katherine L. Bradbury, Anthony Downs and Kenneth A. Small, *Urban Decline and the Future of American Cities* 64 (Brookings Institution Washington, D.C. 1982).



that for success, this trend must be "broken." She observes the cyclical nature of decline and degeneration, where citizens are the victims as well as the perpetrators of seemingly endless troubles that reinforce each other. "In time, these vicious circles enmesh the whole operations of cities."<sup>51</sup> Smith, Caris and Wyly agree, noting that suburbs and central areas alike face a cycle of decline and degeneration marked by rising crime, crumbling infrastructure, population loss, declining prosperity, deteriorating public services and rising taxes.<sup>52</sup>

It has been often advanced that this cycle of decline and degeneration remains perpetual without government intervention. However, existing methods seem to only address symptoms within the cycle and not the overall cycle itself.

The development of regional governance has been proposed as a strategy for eliminating outward migration. The very existence of independent suburbs is cited as a major contributing factor that must be overcome to prevent sprawl. Perhaps one of the most difficult obstacles is the fragmented political environment of most metropolitan areas. Because a large metropolitan region may consist of several different public entities, without broader regional cooperation, individual local government growth policies may only offer piecemeal results. The competition to attract businesses and taxpayers can be a strong motivating factor for many local governments. A neighboring community may severely weaken another's ability to retain residents by allowing, attracting, and even incentivizing sprawling development.<sup>53</sup> Today, up to 70 percent of the nation lives in metropolitan areas with fragmented political environments.<sup>54</sup> This fragmented land use and tax base competition by developing fringe communities may lead to wasteful, low-density overdevelopment. "The fragmentation of the metropolis, fueled by spending on regional infrastructure, institutionalizes polarization and squanders the value of built assets and natural resources."<sup>55</sup>

Myron Orfield claims that the only real solution to outward migration involves new metropolitan compacts which plan a common future, share benefits and responsibilities, reinvest together in older areas, protect forests and farmland, conquer

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<sup>51</sup> Jane Jacobs, *The Death and Life of Great American Cities* 270-271 (Random House New York 1961).

<sup>52</sup> Neil Smith, Paul Caris and Elvin Wyly, *The "Camden syndrome" and the menace of suburban decline: Residential disinvestments and its discontents in Camden County, New Jersey* *Urban Affairs Review*, Vol. 36, Is. 4, 497-531, 499-500 (March 2001).

<sup>53</sup> 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 63-113, 106 (January 2011).

<sup>54</sup> Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 95, 100 (Brookings Institute Press Washington, D.C. 1997).

<sup>55</sup> Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 95, 100 (Brookings Institute Press Washington, D.C. 1997).

social prejudice, and in general foster sustainable, interdependent regions.<sup>56</sup> However, Orfield acknowledges that while the notion of building a total win-win regional consensus is appealing in theory, in practice sustained regional reform clearly demands the formation of enduring coalitions that can weather intense opposition and controversy. These coalitions have proven difficult to establish and maintain.<sup>57</sup>

A different approach to outward migration is to restructure government programs and regulations to foster more compact forms of growth. Wayne Batchis claims that current zoning laws actually mandate sprawling development by requiring dramatic separation of land use types and open spaces causing vast geographical separation within and between developments.<sup>58</sup> Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck assert that in the years following World War II, massive migration away from dense urban cores to new single-family suburban construction was driven by Federal Housing Administration and Veterans Administration loan programs providing mortgages for over eleven million new homes, typically at costs less per month than paying rent.<sup>59</sup> Duany and Speck propose that local governments alter current growth patterns by replacing current land-use regulations with a form-based code facilitating compact, diverse, walkable and connected communities.<sup>60</sup>

However, Peter Gordon and Harry Richardson are unsure how much zoning and other policies and regulations contribute to America's decentralized urban pattern. They postulate that while it has been argued that zoning has inhibited high-density development and mixed residential and commercial land uses, core preservation strategies have undermined the recycling of obsolete central city land uses, and the absence of market-driven strategies (such as school vouchers and the privatization of infrastructure provision and services) have contributed to the deterioration of the central city, "it remains questionable whether such reforms would have more than a negligible impact on densities and spatial patterns."<sup>61</sup> Additionally, Robert Kirkman observes that some anti-sprawl advocates find themselves in the difficult position of criticizing wildly

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<sup>56</sup> Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 95, 100 (Brookings Institute Press Washington, D.C. 1997).

<sup>57</sup> Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 12 (Brookings Institute Press Washington, D.C. 1997).

<sup>58</sup> Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, Virginia Journal of Social Policy & the Law, Vol. 17 Issue 3, 380 (Spring 2010).

<sup>59</sup> Andres Duany, Elizabeth Plater-Zyberk & Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream*, 7-8 (North Point Press, New York, 2000).

<sup>60</sup> Andres Duany & Jeff Speck with Mike Lydon, *The Smart Growth Manual*, 1.13-1.14, 2.9-2.10 (McGraw-Hill, New York, 2010).

<sup>61</sup> Peter Gordon and Harry W. Richardson, *Are compact cities a desirable planning goal?*, Journal of the American Planning Association v. 63, 95-106 (Winter 1997).

popular building practices and ways of living. "Americans in particular seem to embrace suburban landscapes and dependence on the automobile with something approaching zeal, and many are ready to defend their own choices against any and all criticism."<sup>62</sup>

Most importantly, none of the above identified governmental approaches to regulating against outward migration address the problems of chronically deteriorating housing stock and its interaction with the problems contributing to the cycle of urban decline and degeneration. Furthermore, many advocates think sprawl and the entire growth process are one and the same thing, but, according to Robert Burchell, Anthony Downs, Barbara McCann and Sahan Mukherji, this is not true. While regulating to control sprawl might be perceived to have a positive effect on the urban core, its sufficiency to prevent further urban decline and degeneration in America remains in question. The underlying growth process has several important traits besides those that define sprawl, and many of those other traits would still be in effect even if growth occurred in much more compact forms. These other non-sprawl traits may be more important causes of urban decline and degeneration than any of the traits that define sprawl.<sup>63</sup>

The present discord between current governmental policies and methods of regulation and the cycle of urban decline and degeneration poses two questions for government regulators: what steps should government initiate to subvert this cycle and what legal constraints restrain governmental action. Since current governmental regulatory approaches are not working to disrupt or prevent the progression of this cycle of urban decline and degeneration, additional context for government addressing this cycle is necessary. As George Santayana famously noted, "those who cannot remember the past are condemned to repeat it."<sup>64</sup> Examination will therefore turn to history to determine whether cycles of urban decline and degeneration were present throughout time and, if so, whether and how governments successfully disrupted their effects and which governmental approaches for intervention failed and why. Since this historical examination provided a portion of the basis for field research, the development, administration and results of this field research will be explained. Recommendations for governmental laws, regulations, policies, procedures and practices in response will be proffered. This will be followed by a synthesis of the jurisprudence that defines the limits

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<sup>62</sup> Robert Kirkman, *Did Americans Choose Sprawl?*, Ethics & the Environment, Vol. 15 Issue 1, 124, (Spring 2010).

<sup>63</sup> Robert W. Burchell, Anthony Downs, Barbara McCann and Sahan Mukherji, *Sprawl Costs: Economic Impacts of Unchecked Development* 120 (Island Press Washington, D.C. 2005).

<sup>64</sup> George Santayana, *Life of Reason, Reason in Common Sense* 284 (Charles Scribner's Sons New York 1905).

of and restraints upon current governmental activity in the United States that might impact these recommendations.

## II. Cycles of Outward Migration Interacting with Urban Decline and Degeneration Have Been Present Throughout History

Since 1948, there has been a recognized trend of outward migration from central cities to the suburbs.<sup>65</sup> “Overall, the basic pattern of urban development during the post-World War II years has been one of outward expansion.”<sup>66</sup> This engenders an inquiry whether the presence of unsuccessful or challenged development is merely a manifestation of the current society which consigns priceless antiques first to the attic and valuable collector automobiles first to the barnyard or whether this cycle of outward migration, urban decline and degeneration has been present throughout history.

Two-time Pulitzer Prize-winning author Arthur M. Schlesinger, Jr. observes the strong and enduring foundations for cycles in the physical environment and human nature. He notes a cyclical pattern in organic nature, in the tides, in the seasons, in night and day and in the systole and diastole of the human heart. Automatic corrective reactions take place in the human body when a shift from the stable state is threatened. It has been speculated that a similar “homeostasis” may be at work in the social organism. Schlesinger adopts Adam Smith's premise that the desire of bettering our condition is with us from the womb to the grave and ultimately drives these social and physical cycles.<sup>67</sup>

This latent desire within humanity to better one's position has historically resulted in individuals fleeing troubled existing development for newer, better surroundings. As Edward Gibbon explained “all that is human must retrograde if it does not advance”.<sup>68</sup> Heraclitus concurred, arguing that nothing endures but change.<sup>69</sup> When existing development declined, individuals abandoned it, either rebuilding on site or migrating away towards improved conditions. Even the earliest civilizations of known history

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<sup>65</sup> Lyle E. Schaller, *Center City Churches: The New Urban Frontier* 11, (Abingdon Press Nashville 1993).

<sup>66</sup> Gregory D. Squires, “Urban Sprawl and the Uneven Development of Metropolitan America” in *Urban Sprawl: Causes, Consequences and Policy Responses* 1, 8 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

<sup>67</sup> Arthur M. Schlesinger, Jr., *The Cycles of American History* 27-28, (Houghton Mifflin Boston 1986).

<sup>68</sup> Gibbon, *Decline and Fall of the Roman Empire* at Vol. 1, Chap. 71.

<sup>69</sup> Diogenes Laertius, *Lives and Opinions of Eminent Philosophers*.

endured massive outward migration away from decaying central city development.<sup>70</sup> Kenneth Jackson explains that from the very beginning of urban civilization in Mesopotamia, individuals have been drawn to suburban, or peripheral, residences that offered better quality of life than urban dwellings while maintaining convenient access to the employment and amenities of the city.<sup>71</sup>

Experts agree that the cycle of outward migration and urban decline and degeneration appears throughout history. What begins with a living urban core, or center, usually ends in a Necropolis, or city of the dead; with fire-scorched ruins, shattered buildings, empty workshops and heaps of meaningless refuse.<sup>72</sup> Archaeologists confirm that ancient urban sites all over the ancient world consist of “Tels,” or mounds composed of several layers of crumbled infrastructure. In ancient times, as structures degraded, decomposed or were destroyed, existing building materials were leveled onsite to form a new base for reconstruction.<sup>73</sup> Evidence of this process of decline and rebuilding can be seen today. Modern construction is co-located with Graeco-Roman ruins throughout the cities of Europe.

Given the observed cyclical nature of decline and degeneration marked by urban problems which have been argued to be our "number one" domestic issue, and the power and tractability of cycles, it is appropriate to retrospectively observe these cycles in a number of different historical settings. The legal focus of this dissertation prescribes that while contextual backgrounds will be provided, emphasis will be placed on the reactive exercise of governmental authority and regulation and its impact upon the cycle of outward migration and urban decline and degeneration throughout history.

As early as 1517, Niccolo Machiavelli, in his *Discourses on the First Ten Books of Titus Livius*<sup>74</sup>, identified “circles” (cycles), patterns of urban decline leading to government change throughout recorded history. “And this is the circle in which all the Republics are governed and will eventually be governed; but rarely do they return to the same (original) governments: for almost no Republic can have so long a life as to be able

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<sup>70</sup> Paul A. Jargowsky, “Sprawl, Concentration of Poverty, & Urban Inequality” in *Urban Sprawl: Causes, Consequences & Policy Responses* 39, 59-60 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

<sup>71</sup> Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 12 (Oxford University Press, New York 1985).

<sup>72</sup> Mumford, *The City in History* at 52-53.

<sup>73</sup> Mason Hammond, *The City in the Ancient World* 10 (Harvard University Press, Cambridge, Mass. 1972).

<sup>74</sup> Niccolo Machiavelli, *Discourses on the First Ten Books of Titus Livius*, Book 1, Chapter 2, 1517 (Christian Detmold, Translator Max Lerner, Compiler).

often to pass through these changes and remain on its feet.”<sup>75</sup> Replication of Machiavelli's historical examination of cycles of urban decline will lead to assimilation of his and subsequent efforts to identify, define, understand, address and possibly prevent historical patterns of outward migration and urban decline and degeneration.

Exploration of the cycle of outward migration, urban decline and degeneration and governmental response throughout history is logical legal analysis. It is also substantiated as a valid method of undertaking scientific research and analysis. Research methods author Earl Babbie explains that social science research aims at the observation and understanding of overall patterns of events and correlations. The utility of a social theory or social correlation is enhanced by its "generalizability"<sup>76</sup> over time and location. Accordingly, the goal of historical analysis in social science research is to probe historical occurrences for similarities with the current day. Likewise, retrospective historical research is validated by the principles and methodologies of policy analysis. This type of policy analysis encapsulates the description and interpretation of past policies<sup>77</sup> for understanding, contrast and even application in the current day.

This historical review for patterns of urban decline and degeneration and governmental response commences with the recorded accounts of preindustrial urban centers which crescendos to an apex and is encapsulated within the rise and fall of Rome. Preindustrial urban centers everywhere displayed strikingly similar social and ecological structures in basic form if not in specific cultural context.<sup>78</sup> Leonardo Benevolo posits that urban centers have not always existed and came into being not as a result of natural necessity, but as the result of an historical need, and they will continue only for as long as this need persists.<sup>79</sup> Mason Hammond observes that the emergence of the urban center or community is a natural stage in the development of any human society.<sup>80</sup> Richard Tomlinson suggests that man is by nature destined to live in an urban environment.<sup>81</sup>

Machiavelli explains “as men are not able to make themselves secure except through power, it is necessary to avoid this sterility of country and locate in very fertile places, where because of the fertility of the site, it can grow, can defend itself from

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<sup>75</sup> Niccolo Machiavelli, *Discourses on the First Ten Books of Titus Livius*, Book 1, Chapter 2, 1517 (Christian Detmold, Translator Max Lerner, Compiler).

<sup>76</sup> Earl Babbie, *Survey Research Methods (Second Edition)* 24-25 (Wadsworth Publishing Company, Belmont, California 1990).

<sup>77</sup> Carl V. Patton & David S. Sawicki, *Basic Methods of Policy Analysis and Planning*, 2<sup>nd</sup> Ed., 23 (Prentice-Hall, Englewood Cliffs, New Jersey 1993).

<sup>78</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 5 (The Free Press New York 1960).

<sup>79</sup> Leonardo Benevolo, *The History of the City* 5 (The MIT Press Cambridge, Massachusetts 1980).

<sup>80</sup> Mason Hammond, *The City in the Ancient World* 9 (Harvard University Press, Cambridge, Mass. 1972).

<sup>81</sup> Richard Tomlinson, *From Mycenae to Constantinople: The Evolution of the Ancient City* 1 (Routledge New York 1992).

whoever should assault it, and suppress whoever should oppose its aggrandizement.”<sup>82</sup> According to Gideon Sjoberg, the prerequisites for the emergence of urban centers or communities are: 1) a favorable ecological base, 2) an advanced technology in both the agricultural and non-agricultural spheres and 3) a complex social organization, including a well-developed power structure. All of these conditions had to be fulfilled before an urban center could arise.<sup>83</sup> Philip Hauser concurs, restating and breaking down Sjoberg's prerequisites for emergence into four factors: (1) the size of the total population; (2) the control of natural environment; (3) technological development; and (4) developments in social organization, including power structures.<sup>84</sup> Historically, as well as in the modern world, governmental activities and regulation have unquestionably played a decisive role in the molding and daily function of urban centers. Governmental activities and regulation are entwined with urban growth, proliferation, administration, decline and occasional resurgence. Just as the capacity for growth is dependent in large part upon the existence of viable government, so too, when this is withdrawn urban centers may shrink or even disappear.<sup>85</sup> This appears true as well with the loss of any of the other prerequisites for emergence identified by Sjoberg.<sup>86</sup>

Even with this context and impetus for examining the cycles of urban decline and degeneration well established, a logical mechanism to facilitate this analysis remained elusive. Several questions remain unanswered. While there seems to be much agreement about the prerequisites for the emergence of a city, what has this meant throughout history? Is there a common reason or reasons behind the formation and flourishing of cities from different civilizations under various forms of government in different historical time periods? If these common reasons exist, how have various forms of government administration in distinct civilizations throughout time promoted or otherwise interacted with these reasons supporting urban formation? Similarly, are there common reasons why cities throughout history have succumbed to the cycle of urban decline and degeneration? How have governments attempted to thwart or slow the progression of this natural cycle? Did one type or method of government exceed another in its ability and efforts of response? Have any of these efforts been successful?

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<sup>82</sup> Niccolo Machiavelli, *Discourses on the First Ten Books of Titus Livius*, Book 1, Chapter 1, 1517 (Christian Detmold, Translator Max Lerner, Compiler).

<sup>83</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 27 (The Free Press New York 1960).

<sup>84</sup> Philip M. Hauser, “Urbanization: An Overview”, in *The Study of Urbanization*, 1-6 (Philip M. Hauser & Leo F. Schnore eds., John Wiley & Sons, Inc. New York 1965).

<sup>85</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 17, 73 (The Free Press New York 1960).

<sup>86</sup> Wolf Schneider, *Babylon is Everywhere: The City as Man's Fate* 33-34, 43, 80-81, 88 (Ingeborg Sammet and John Oldenburg trans., Hodder and Stoughton New York 1963).

Defining the first urban centers or communities in large measure depends upon the criteria employed.<sup>87</sup> Throughout history, people have traversed vast distances as a result of trading activities, war or natural disasters, and urban centers have been the prime receptors of these long-distance migrants.<sup>88</sup> Most authorities today agree that urban centers or communities evolved first in the Mesopotamian region or in the areas immediately adjacent to it.<sup>89</sup> Ancient Mesopotamian urban centers provided their inhabitants with material security, prosperity, and efficient government.<sup>90</sup> According to Richard Tomlinson, the movement of societies into urban centers can be attributed to the desire to control greater sources of wealth than those available in more rural settings.<sup>91</sup>

The identified prerequisite of favorable ecology has been credited with facilitating the first urban centers in Mesopotamia as well as in Egypt along the Nile during the time of the pharaohs.<sup>92</sup> A sizable food surplus over and above the reserve needed for sustenance between harvests was required before an urban center could emerge.<sup>93</sup> According to Wolf Schneider, rich crop harvests around 4000 B.C. were a necessary condition for urbanization. Area agriculture production was augmented by the importation of goods. The larger the urban area, the larger the quantities of food that had to be transported over increasingly long distances via boats and land trade caravans. With food stuffs also came quantities of other raw materials such as precious metals, including copper, gold, silver and tin; ivory; wool; silk; and precious stones including diamonds.<sup>94</sup> Urban centers arose at land to water transfer points in the movement of goods or persons and at relay points on overland trade routes.<sup>95</sup>

Proper ecology was important when establishing the location of Greek city-states. Greek urban concentrations were formed based upon the quality of life and convenience afforded by co-location with ports, trade routes and agrarian and mineral-rich ecologies. Exact urban locational decisions were often based upon inhabitant safety and security. Adequate defense was clearly a major issue in the decision of where to place a Greek urban center. The majority of the Greek sites were founded on hilltops or hillsides. However, from the 4<sup>th</sup> century B.C. onwards, the tendency was to found Greek urban centers on south-facing hillsides rather than hilltops. This was probably related to the Greek perception of a "healthy" site. Aristotle recommended a sloping site that faces east

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<sup>87</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 32 (The Free Press New York 1960).

<sup>88</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 84 (The Free Press New York 1960).

<sup>89</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 31 (The Free Press New York 1960).

<sup>90</sup> Hammond, *The City in the Ancient World* at 37-38.

<sup>91</sup> Tomlinson, *From Mycenae to Constantinople* at 2-3.

<sup>92</sup> Schneider, *Babylon is Everywhere* at 35, 48.

<sup>93</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 28-29 (The Free Press New York 1960).

<sup>94</sup> Schneider, *Babylon is Everywhere* at 35, 45, 76-77, 105.

<sup>95</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 85-86 (The Free Press New York 1960).



or one that faces south, because it offered more protection from the weather in winter. Houses on elevated terrain would benefit from good drainage and increased security when under siege. Natural defense was also a focus in the selection of urban center sites during the Roman era, including the city of Rome itself.<sup>96</sup> “The city founded by Romulus lay conveniently on a permanently navigable river, not too far from the sea and was easily fortified. In addition the site was well supplied with springs, and healthy because of the hill-top breezes.”<sup>97</sup>

The identified prerequisite of an advanced technology in both the agricultural and non-agricultural spheres was cited as present in the first urban centers. With improved technology, the food surplus became large enough to support a sizable number of people freed from the production of food. This surplus of food and the existence of raw materials facilitated the emergence and proliferation of crafts by permitting some people to engage in non-agricultural activities.<sup>98</sup> Some of these people devoted themselves to tasks necessitating special skills and training beyond those involved in food production, such as the handicrafts.<sup>99</sup> Mason Hammond asserts the relationship between technology and urban formation was symbiotic, explaining it is likely that urbanization made the Bronze Age possible because they had the necessary surplus of food to maintain metal workers or to trade in exchange for metal and metal objects.<sup>100</sup>

The identified prerequisite of a complex social organization, including well-developed government regulation, was found to be present in even the first urban centers. Lewis Mumford postulates that urban centers are not merely containers, before they have anything to hold, they must attract people and the institutions that carry on life. As such, they were born not merely to increase food but to increase social enjoyment upon a shared vision of a better life which was "more meaningful as well as esthetically enchanting." In an urban center many scattered and unorganized functions are brought together within a limited area, and the components of the community are kept in a state of dynamic tension and interaction. In this regard, to form and survive, an urban center must possess governmental regulation complex enough to address the ever-changing needs and the evolving forms of a growing society.<sup>101</sup>

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<sup>96</sup> Jamie Sewell, *The Formation of Roman Urbanism 338-200 B.C.: Between Contemporary Foreign Influence and Roman Tradition*, 55-56 (Journal of Roman Archaeology Portsmouth, Rhode Island 2010).

<sup>97</sup> O.F. Robinson, *Ancient Rome: City Planning and Administration* 5 (Routledge London 1992).

<sup>98</sup> Hauser, “Urbanization: An Overview” at 1-6.

<sup>99</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 28-29 (The Free Press New York 1960).

<sup>100</sup> Hammond, *The City in the Ancient World* at 30.

<sup>101</sup> Lewis Mumford, *The City in History: Its Origins, Its Transformations, and Its Prospects* 8, 30-31, 82 (Harcourt, Brace and World, Inc. New York 1961).

Advanced technology that multiplied the agricultural yield freed some persons from primarily agricultural pursuits to devote themselves to planning activities with requisite governmental regulation.<sup>102</sup> This facilitated development of what some believe to be the first urban communities or centers. The Mesopotamian village was supplanted by the Babylonian temple-state, an urban settlement with a wall as its shell and a temple as its core, ruled by a benevolent dictator, or priest-king. The priest-king was an iteration of a village chieftain. They dug canals and constructed grain storehouses for residential welfare and built city walls for residential safety and security<sup>103</sup> The priest-king's will was the only existing law, which included the location and method of construction. As such, he was entitled to receive sacrificial offerings and taxes.<sup>104</sup>

Michael Smith notes that the street layouts in ancient Mesopotamian urban centers are indicative of urban planning, designed and regulated to facilitate residential convenience and quality of life.<sup>105</sup> There was usually a walled city center area with private houses and sometimes a large public bath equipped with a warm-air heating system, steam baths, and a swimming pool,<sup>106</sup> suburbs containing houses and gardens and a separate commercial district which enjoyed some self-government.<sup>107</sup> This was accomplished through implementation of building regulations to facilitate inhabitant's convenience, comfort and quality of life and the incorporation of separation of use akin to modern zoning practices. Land-uses were separated into what were referred to as "sars." One sar was urban with craft activities and workshops in a specific district, public buildings and elite residences in another district and up to half the sar dedicated to open spaces.<sup>108</sup> Another sar was orchards and one sar was identified as "margin lands." According to one source, margin land may in fact have been suburbs, with detached houses and gardens or possibly greenbelts of market gardens.<sup>109</sup>

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<sup>102</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 28-29 (The Free Press New York 1960).

<sup>103</sup> Wolf Schneider, *Babylon is Everywhere: The City as Man's Fate* 33-35, 46-47, 58 (Ingeborg Sammet and John Oldenburg trans., Hodder and Stoughton New York 1963), Hammond, *The City in the Ancient World* at 54, Mumford, *The City in History* at 66 and Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State* 27-28 (Oxford Univ. Press New York 2006).

<sup>104</sup> Wolf Schneider, *Babylon is Everywhere: The City as Man's Fate* 33-35, 46-47, 58 (Ingeborg Sammet and John Oldenburg trans., Hodder and Stoughton New York 1963).

<sup>105</sup> Michael E. Smith, "Form and Meaning in the Earliest Cities: A New Approach to Ancient Urban Planning" in *Journal of Planning History* Vol. 6, No. 1, February 2007 3-47, at 20-21

<sup>106</sup> Schneider, *Babylon is Everywhere* at 55.

<sup>107</sup> Hammond, *City in the Ancient World* at 37-38.

<sup>108</sup> Massimo Vidale, *Aspects of Palace Life at Mohenjo-Daro*, *South Asian Studies*, Vol. 26, Issue 1, p. 59-76, at 61-63 (March 2010) and Schneider, *Babylon is Everywhere* at 45-46.

<sup>109</sup> Mumford, *The City In History* at 75.

Paul Jargowski notes there was suburbanization even in early Mesopotamia.<sup>110</sup> Flowing out from the walled center areas were wide streets designed to accommodate shopping.<sup>111</sup> A community-wide water distribution network of pottery pipes,<sup>112</sup> brick-lined drainage channels in the streets and culverts to carry off rain water were also present.<sup>113</sup> Residential quarters often consisted of row houses with courtyards, bathrooms and inside latrines.<sup>114</sup>

Yet even though the priest-king resided in and ruled over the city with absolute authority, he was not able to prevent its ultimate decline and degeneration. Throughout the various periods of Mesopotamian civilization, urban centers experienced outward migration and decline and degeneration as the priest-kings failed to adequately address or prevent diminutions in the safety and security, convenience or quality of life the urban center offered its citizens. In many cases throughout the various periods of Mesopotamian civilization, local rulers were simply unable to prevent conquering armies from ransacking, damaging or destroying the urban center.<sup>115</sup>

A second but equally important identified reason why Mesopotamian urban centers experienced outward migration and decline and degeneration was their failure to recognize and regulate for or otherwise remediate the natural decay of the built environment. While Mesopotamian priest-kings were able to initially plan for and construct a safe and secure urban center providing convenience and quality of life for its inhabitants via remarkable infrastructure, including paved streets, canals, waterworks projects and drainage systems,<sup>116</sup> they failed to foresee and address via regulation or other governmental activities the cycle of decline and degeneration which ultimately overtook their urban centers resulting in abandonment and extinction.<sup>117</sup>

In Egypt during the Pharaohs, urban centers were creations of the pharaonic system. The basis of government was not localized but rather was part of the kingdom. Initiative in building, in commerce, in industry, and in the arts of civilization stemmed from the Pharaoh or his representatives. Even though comprehensive planning was a condition precedent to Egyptian urban development, written policies with charters of

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<sup>110</sup> Paul A. Jargowsky, "Sprawl, Concentration of Poverty, & Urban Inequality" in *Urban Sprawl: Causes, Consequences & Policy Responses* 39, 59-60 (Gregory D. Squires, Ed., Urban Institute Press Washington, D.C. 2002).

<sup>111</sup> Mumford, *The City in History* at 212.

<sup>112</sup> Schneider, *Babylon is Everywhere* at 55.

<sup>113</sup> Mumford, *The City in History* at 73-75.

<sup>114</sup> Mumford, *The City in History* at 73-75.

<sup>115</sup> Mumford, *The City in History* at 52-54 and Schneider, *Babylon is Everywhere* at 33-34, 88.

<sup>116</sup> Hammond, *City in the Ancient World* at 38 and Schneider, *Babylon is Everywhere* at 69.

<sup>117</sup> Schneider, *Babylon is Everywhere* at 43, 65.

privilege have been discovered eventually giving urban centers some level of self-governance.<sup>118</sup> Urban growth boundaries also appeared, being “hewn into the rocks on both sides of the Nile.”<sup>119</sup>

Just as in ancient Mesopotamia, Egyptian urban centers were planned around a central area.<sup>120</sup> They spread out beyond the central area and might even be called suburban.<sup>121</sup> The Pharaohs sought to balance the quality of life afforded by spacious residences with the convenience of centralized governmental, commercial and religious activities by planning for and installing wide streets that facilitated uncongested transit throughout the city. Similarly, public amenities including fish ponds, meadows, and storehouses were located throughout urban areas to simultaneously support resident quality of life and convenience.<sup>122</sup>

Egyptian urban centers that existed within a stable and safe national government and were otherwise protected by natural barriers against invasion did not construct walls for protection. The Egyptian region had the features of a walled city, with mountains, desert areas, and seas serving as ramparts against invasion. As a result, Egyptian urban centers naturally took a more open form, unwalled and surrounded by a group of villages. However, when the pharaonic protective and unifying national government was weakened or not present, urban centers were vulnerable to outside attack and walls were constructed for protection.<sup>123</sup>

Egyptian urban communities were subject to centralized government with power concentrated in the Pharaoh, who, despite granting a level of local self-governance based upon city charters of privilege, ultimately held absolute authority over the urban community and its inhabitants.<sup>124</sup> Nevertheless, Egyptian urban communities experienced outward migration and decline and degeneration as their government failed to prevent diminutions in the safety and security, convenience or quality of life the urban community offered its citizens. As in Mesopotamia, these diminutions were the result of invading armies ransacking, damaging or destroying urban communities, even though the

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<sup>118</sup> Mumford, *The City in History* at 87.

<sup>119</sup> Schneider, *Babylon is Everywhere* at 51.

<sup>120</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 96-98 (The Free Press New York 1960).

<sup>121</sup> Mumford, *The City in History* at 86.

<sup>122</sup> Schneider, *Babylon is Everywhere* at 48-52.

<sup>123</sup> Mumford, *The City in History* at 81-88 and Schneider, *Babylon is Everywhere* at 48.

<sup>124</sup> Hammond, *City in the Ancient World* at 75-76.

government had constructed walls to prevent such attacks when weakened centralized government made urban communities vulnerable to foreign invaders.<sup>125</sup>

Greek city-states were democracies formed within an urban concentration. In the age of Aristotle, democracy was the most common form of constitution, and in the classical period every Greek city-state embraced popular sovereignty and general citizen participation in government to some extent. Most poleis, or city-states, had the same set of institutions: an assembly, a Council, sometimes a Senate, courts of law and magistrates, either elected or picked by lot. These institutions were tasked with planning and administering the city-state, including legislating and enforcing laws, rules and regulations. Additionally, there was in every polis a network of subdivisions of the citizen body. Like a polis, a civic subdivision had its own capital assembly, in which subdivision laws and decrees could be passed and taxes and liturgies imposed, separate local magistrates and a local court.<sup>126</sup>

Urban centers were often designed with conscious attention to natural advantages, defense and public convenience.<sup>127</sup> When planning a new urban center location, the two primary decisions to be made were where the agora, or marketplace, and the trace of the outside wall would be, even if actual construction of the wall came later.<sup>128</sup> Safety, not beauty, was often the prime consideration.<sup>129</sup> Like previous civilizations, the Greeks planned and constructed walls for the safety and security of the city and its residents. In the Classical Greek period, almost all poleis had walls. Many urban centers had a large open area within the walls, where the population from the countryside could take refuge in case of war.<sup>130</sup>

While early Greek design developed gradually out of an earlier, long-established community in response to terrain, needs, and casual growth, regular grid patterns soon characterized Greek urban centers.<sup>131</sup> A sizeable number of Greek urban centers acquired written city plans with straight streets at right angles to each other.<sup>132</sup>

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<sup>125</sup> Hammond, *City in the Ancient World* at 74-75, Mumford, *The City in History* at 88 and Schneider, *Babylon is Everywhere* at 48.

<sup>126</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State* 113-115, 144 (Oxford Univ. Press New York 2006) and Hammond, *City in the Ancient World* at 188-189 and 193.

<sup>127</sup> Hammond, *City in the Ancient World* at 222.

<sup>128</sup> Sewell, *The Formation of Roman Urbanism* at 24-26.

<sup>129</sup> Schneider, *Babylon is Everywhere* at 102.

<sup>130</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State*, 73 (Oxford University Press New York 2006).

<sup>131</sup> Hammond, *City in the Ancient World* at 222.

<sup>132</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State*, 102 (Oxford University Press New York 2006).

Greek urban centers thrived as they conveniently provided public amenities which enhanced resident quality of life. Within the urban center there might have been a separately walled open space which was mostly but not always kept free of habitation; and large areas were often reserved for the city's marketplace, temples and sports centers,<sup>133</sup> theaters, schools and libraries.<sup>134</sup>

Greek urban centers were planned to maximize convenient navigation and access to desirable amenities and planned civic centers.<sup>135</sup> The Greeks were the first to manifest the planned layout of an urban centre, with a main marketplace, blocks of housing, and even individual plots of land.<sup>136</sup> The economic center was the marketplace, often in the form of a large colonnaded courtyard, which was the place for holding assemblies of the people and often included a covered hall, with shops and administrative offices.<sup>137</sup>

Urban design was tailored to maximize convenient access to the main marketplace. Generally, if one followed any of the streets leading in from the main gates it would necessarily lead to this marketplace. The convergence of the main axes on the central public square was a fundamental characteristic of Greek urban design. The Greeks distinguished between arterial roadways, side streets and even main highways in their urban planning. Streets with greater widths mostly appear to be those which would have seen more traffic.<sup>138</sup> Streets in the urban center were paved.<sup>139</sup>

Residential areas consisted of straight streets and quadratic blocks of houses.<sup>140</sup> Just as in ancient Mesopotamia, Greek planners embraced zoning and the concentration of industrial activities into special districts.<sup>141</sup> Wharves and warehouses, marketplaces and bureaux of customs and police were placed exactly where they could best serve their purpose.<sup>142</sup>

Unlike Mesopotamia and Egypt, the urban centers of the Greek city-state culture did not endure widespread outward migration and decline and degeneration. Greek city-

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<sup>133</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State*, 73 (Oxford University Press New York 2006) and Mumford, *The City in History* at 212.

<sup>134</sup> Schneider, *Babylon is Everywhere* at 111-112.

<sup>135</sup> Hammond, *City in the Ancient World* at 222.

<sup>136</sup> A.M. Snodgrass, "Archaeology and the Study of the Greek City" in *City and Country in the Ancient World* 1, 10 (John Rich and Andrew Wallace-Hadrill, Eds., Routledge New York 1991).

<sup>137</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State*, 104-105 (Oxford University Press New York 2006) and Tomlinson, *From Mycenae to Constantinople* at 22.

<sup>138</sup> Sewell, *The Formation of Roman Urbanism* at 24-26, 33.

<sup>139</sup> Schneider, *Babylon is Everywhere* at 111-112.

<sup>140</sup> Schneider, *Babylon is Everywhere* at 105.

<sup>141</sup> Ian Morris, "The Early Polis as City and State" in *City and Country in the Ancient World* 25-57, 38 (John Rich and Andrew Wallace-Hadrill, eds. Routledge New York 1991).

<sup>142</sup> Schneider, *Babylon is Everywhere* at 105.

states were democracies, with both city-wide government administration and “civic subdivisions” with their own subdivision administration. Greek city government considered the interests of the whole populace and did not favor any class or sector of the population. While aristocratic magistrates held executive and judicial power and oligarchic city councils enacted some legislation and performed administrative duties, both institutions were subservient to the popular assembly. Ultimate sovereignty rested with the people and was expressed via the assembly which exercised final elective and legislative power.<sup>143</sup> Greek urban centers, which were already planned to maximize convenient navigation and access to desirable amenities and planned civic centers, prospered as citizens were given opportunities to decide how their city and neighborhood governments acted to further the safety and security, convenience and quality of life they enjoyed.

Greek urban centers did not generally decline as they transitioned first to Hellenistic and then Roman rule.<sup>144</sup> The Hellenistic monarchs did not alter municipal constitutional forms or the local management of urban affairs and the Romans retained these local governments as dependent political subdivisions.<sup>145</sup> Individual citizens were still able to influence how city and neighborhood government regulated and invested to maintain and increase the safety and security, convenience and quality of life Greek urban centers provided. Greek urban centers were made more sanitary, prosperous and beautiful under Hellenistic and subsequently Roman rule than under the city-state culture. Government and private citizens alike increasingly invested in grand public works projects including theaters, temples, shrines, main marketplace development and fountain houses distributing an improved water supply frequently piped in from the hills outside of the urban center.<sup>146</sup>

The transition away from popular participation in the government of Greek urban centers was gradual, as over time the popular assembly delegated more and more responsibility to the oligarchic councils comprised of well-to-do citizens that could afford to spend time and resources on city affairs. The decline of Greek urban centers along with other cities throughout the Roman Empire accompanied an overall movement away from self-governing municipalities towards a top-down administration of urban centers by

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<sup>143</sup> Hammond, *City in the Ancient World* at 188-189.

<sup>144</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State*, 138 (Oxford University Press New York 2006) and Schneider, *Babylon is Everywhere* at 111.

<sup>145</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State*, 138 (Oxford University Press New York 2006), Mumford, *The City in History* at 196-197 and Hammond, *City in the Ancient World* at 194, 197, 208-209 and 216-217.

<sup>146</sup> Mumford, *The City in History* at 197-200, Hammond, *City in the Ancient World* at 209-210 and Gibbon, *Decline and Fall of the Roman Empire* at 50-54.

Empire officials.<sup>147</sup> Increasingly, municipal investment was dictated first by a group of elite citizens and subsequently by Roman Empire officials.<sup>148</sup> Government efforts to sustain and increase the safety and security, convenience and quality of life enjoyed by individual residents were no longer directed by the very citizens they were designed to serve. These urban investment projects were marked by overbuilding, poor contracting, intense and expensive competition between cities for regional economic development projects awarded by the empirical administration, and the growing disinclination of the wealthy to donate resources for civic projects and bail out overextended municipal governments by paying additional taxes or intervening when unrealistic urban development projects failed.<sup>149</sup>

Roman urban centers included existing urban concentrations which functioned as independent municipalities, subjected to Roman rule by virtue of conquest. The inhabitants of many defeated Greek city-states became Roman citizens and their communities became self-governing.<sup>150</sup> This self-government was derived from and circumscribed by a city charter issued by Caesar. In contrast to the populist Greek city-states, participation in civic affairs and municipal government was limited to well-to-do Romans. Although classified as a republic, municipal councils representing only the aristocracy were responsible for elections and civic administration. Formal participation by the *populus* was rare.<sup>151</sup>

The growth of existing urban centers has been linked to the application of governmental regulation and authority within an area. The growth of estates and urban development in parts of the Roman Empire were fairly sluggish until governmental regulations intervened.<sup>152</sup>

The Romans also planned, designed, located and established new urban centers throughout the Roman Empire. Urban ecology was important for the establishment of a new urban center. From conquered lands, including the Greek city-states, the Romans were aware of the concept of planned urban centers.<sup>153</sup> Several aspects of town planning

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<sup>147</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State*, 138 (Oxford University Press New York 2006) and Hammond, *City in the Ancient World* at 194, 197, 219 and 302-305.

<sup>148</sup> Hammond, *City in the Ancient World* at 219 and 302-303 and Gibbon, *Decline and Fall of the Roman Empire* at 50-57.

<sup>149</sup> Hammond, *City in the Ancient World* at 297 and Gibbon, *Decline and Fall of the Roman Empire* at 55-56.

<sup>150</sup> Jamie Sewell, *The Formation of Roman Urbanism 338-200 B.C.: Between Contemporary Foreign Influence and Roman Tradition*, 9 (Journal of Roman Archaeology Portsmouth, Rhode Island 2010).

<sup>151</sup> Hammond, *City and Country in the Ancient World* at 290-291.

<sup>152</sup> John R. Patterson, "Settlement, city and elite in Samnium and Lycia" in *City and Country in the Ancient World*, 147, 152, 159-160 (John Rich and Andrew Wallace-Hadrill, Eds., Routledge New York 1991).

<sup>153</sup> O.F. Robinson, *Ancient Rome: City Planning and Administration* 5, 14-15 (Routledge London 1992).



represented an extension and continuation of practices seen in the Greek city-states.<sup>154</sup> Streets intersected at right angles, enclosing rectangular or square areas akin to modern city blocks, in which public buildings and residential quarters were erected.<sup>155</sup>

There was strict adherence to the Greek planning rules of the convergence of the main street axes on the central public square and if one followed any of the streets leading in from the gates of the urban center it would necessarily lead to the main marketplace.<sup>156</sup> Adequate defenses were also planned.<sup>157</sup> Local conditions often determined the construction of a fortification.<sup>158</sup> The enhanced safety and security associated with the rise of the Empire's power meant that a significant proportion of cities in the Roman Empire were not walled.<sup>159</sup> Because of the "Roman Peace," urban centers were able to build outside their walls without fear,<sup>160</sup> and the construction of walls was only in reaction to local deterioration of safety and security.<sup>161</sup>

Mixed use structures were the standard form of Roman middle-class and working-class housing. They combined shops and workshops on the ground floor and flats on the floors above, achieving mixed uses in every block. Commonly, streets carried continuous rows of open shops under several floors of tenements. Within each block main staircases generally led to the upper floors independently of the shops. Each floor had a lavatory and chutes for trash disposal. Behind these structures were courtyards which provided a place for water cisterns supplying a communal tap and a large, pleasant space with plenty of air and light.<sup>162</sup>

Improved building techniques enhanced resident quality of life. New materials were used, such as stone, kiln-dried bricks and concrete, allowing multi-story building construction.<sup>163</sup> With the development of concrete construction techniques, buildings were constructed with walls and roofs of solidified concrete. The walls were faced with

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<sup>154</sup> Sewell, *The Formation of Roman Urbanism* at 47.

<sup>155</sup> Arthur Segal and Michael Eisenberg, *Sussita-Hippos of the Decapolis: Town Planning and Architecture of a Roman-Byzantine City*, *Near Eastern Archaeology* Vol. 70, Is. 2, 86-107, 94 (June 2007).

<sup>156</sup> Sewell, *The Formation of Roman Urbanism* at 24-26.

<sup>157</sup> O.F. Robinson, *Ancient Rome: City Planning and Administration* 14-15 (Routledge London 1992).

<sup>158</sup> A.M. Snodgrass, "Archaeology and the Study of the Greek City" in *City and Country in the Ancient World* 1, 9 (John Rich and Andrew Wallace-Hadrill, Eds., Routledge New York 1991).

<sup>159</sup> Penelope J. Goodman, *The Roman City and its Periphery: From Rome to Gaul* 62 (Routledge New York 2007) and Mumford, *The City in History* at 205-206.

<sup>160</sup> John R. Patterson, "Settlement, city and elite in Samnium and Lycia" in *City and Country in the Ancient World*, 147, 159-160 (John Rich and Andrew Wallace-Hadrill, Eds., Routledge New York 1991).

<sup>161</sup> Hammond, *City and Country in the Ancient World* at 310-311.

<sup>162</sup> Hall, *Cities in Civilization* at 627-628.

<sup>163</sup> Robinson, *Ancient Rome: City Planning and Administration* at 34.

baked brick, which in turn were stuccoed or internally concealed behind decorative stone veneers.<sup>164</sup>

Public amenity construction efforts were intended to enhance the provision of residential quality of life. Public amenities included the arrangement of public areas for communal uses, such as docks and forums, designed systems of drainage, public water supplies, thermal establishments, grand latrines, sewage systems, aqueducts and abundant water supply networks and paved streets and squares with sidewalks, curbs and guttering. Roman government fostered business through regulation of business establishments, encouraging a proliferation of bars and hot-food outlets and the dispensing of food tickets for public doles.<sup>165</sup>

It was common for public works construction to be funded by government financing as well as substantial private participation.<sup>166</sup> Where private property was not donated, government compensation for the exercise of eminent domain was present in the Roman Empire. However, municipal governments had to receive their authority to take property by eminent domain from their charter and then only upon payment of just compensation. "A public authority appears then not to have the right to take stone simply by virtue of public office; that would be *ultra vires*." Even though Roman law mandated that fairness be the standard for compensating exercises of eminent domain, government's exercise of this power was unpopular and subject to legal challenge in the courts. "Public works should be done 'without injury to private interests.'" Roman government also recognized a cause of action for inverse condemnation. Loss of convenience, light and prospect was actionable through injunctive relief. Other matters affecting the public amenity, like smoke coming from a cheese smoker or a dung-heap, also fell within the scope of injunctive relief and private parties had an obligation not to harm their

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<sup>164</sup> Tomlinson, *From Mycenae to Constantinople* at 19 and Dominic Perring, "Spatial Organization and Social Change in Roman Towns" in *City and Country in the Ancient World* 273, 284-285 (John Rich and Andrew Wallace-Hadrill, eds., Routledge New York 1991).

<sup>165</sup> Gibbon, *Decline and Fall of the Roman Empire* at 53-54, Goodman, *The Roman City and its Periphery* at 100, Hall, *Cities in Civilization* at 625, Guy P.R. Métraux, *Ancient Housing: "Oikos" and "Domus" in Greece and Rome*, *Journal of the Society of Architectural Historians*, Vol. 58 Issue 3, 392-405, 399 (September 1999), Jennifer Palinkas & James A. Herbst, *A Roman Road Southeast Of The Forum At Corinth: Technology And Urban Development*, *Hesperia*, Vol. 80, Issue 2, 287-336, 290, 311-312 (Apr. 2011), O.F. Robinson, *Ancient Rome: City Planning and Administration* 14-15 (Routledge London 1992), Mumford, *The City in History* at 207-208 and Schneider, *Babylon is Everywhere* at 147.

<sup>166</sup> John R. Patterson, "Settlement, city and elite in Samnium and Lycia" in *City and Country in the Ancient World*, 147, 150-151 (John Rich and Andrew Wallace-Hadrill, Eds., Routledge New York 1991), Robinson, *Ancient Rome: City Planning and Administration* at 58 and Bryan Ward-Perkins, *The Fall of Rome and the End of Civilization*, 3 (Oxford University Press, Oxford, Great Britain, 2006).

neighbors.<sup>167</sup> These principles often provide the cornerstone of many legal doctrines upon which current American jurisprudence is based.<sup>168</sup>

For the Romans, there was an interpenetration of public and private interest, a mixture of legislation and jurisprudence, which controlled their building activities. Regulations were required to fall within the public health, safety and welfare to be valid. However, injunctive relief could be granted to prohibit interference with the cleansing and maintenance of private drains, the restoration of a public sewer to working order or even the laying of a new sewer, because such work pertained to public health and safety.<sup>169</sup>

Building regulations of private dwellings, including control of construction methods, were also found to fall within the scope of the public health, safety and welfare. The Great Fire of Rome in 64 A.D. prompted by-laws and encouraged high-rise apartment buildings as a norm in Rome and elsewhere.<sup>170</sup> One of the Caesars placed a limit of 70 feet on the height of new buildings erected on public streets.<sup>171</sup> Mud brick construction was made illegal in Rome because of their structural weakness.<sup>172</sup> Buildings in Rome were also required to comply with “building lines,” or uniform building setback standards.<sup>173</sup>

Public health, safety and welfare also accommodated Roman zoning regulation, including keeping dangerous or unpleasant industries, such as kilns, outside Roman urban centers. This is often explained in terms of a deliberate policy of excluding industry from the urban center due to practical factors, such as fire and pollution, or ideological factors connected with the sophisticated appearance of the city, now referred to as aesthetic zoning.<sup>174</sup>

Roman urban centers experienced outward migration and decline and degeneration as several factors coincided to substantially reduce the safety and security,

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<sup>167</sup> Robinson, *Ancient Rome: City Planning and Administration* at 26-29, 39-41.

<sup>168</sup> William L. Burdick, *The Principles of Roman Law and their Relation to Modern Law* viii, 9, 32-34 (The Lawbook Exchange, Ltd., Clark, New Jersey 2004).

<sup>169</sup> Robinson, *Ancient Rome: City Planning and Administration* at 39-41.

<sup>170</sup> Guy P.R. Métraux, *Ancient Housing: "Oikos" and "Domus" in Greece and Rome*, *Journal of the Society of Architectural Historians*, Vol. 58 Issue 3, 399 (September 1999).

<sup>171</sup> Robinson, *Ancient Rome: City Planning and Administration* at 35.

<sup>172</sup> Hall, *Cities in Civilization* at 627.

<sup>173</sup> Robinson, *Ancient Rome: City Planning and Administration* at 36.

<sup>174</sup> Penelope J. Goodman, *The Roman City and Its Periphery: From Rome to Gaul*, 50, 106 (Routledge, New York, 2007).

convenience and quality of life provided to city residents.<sup>175</sup> While at the height of imperial expansion expensive public works projects like aqueducts and amphitheaters were paid for using the spoils of war, the “Roman Peace” meant that government could no longer finance its internal needs through territorial expansion. Municipal self-government was replaced with centralized governance that financed these improvements as well as ever-increasing infrastructure maintenance requirements by heavy taxes. Because individual citizens no longer determined which projects were required to prevent diminutions in or promote the safety and security, convenience and quality of life the urban center offered, even grand government infrastructure and public amenity investment strategies were not designed to accurately reflect popular needs and desires and consequently did not prevent or fix the underlying problems that drive outward migration and decline and degeneration. Attempts to offset this decline by adding public amenities only increased the tax burden. By the third century A.D., this reality had led to a self-reinforcing cycle with individuals abandoning the “intolerable conditions” of Roman urban centers altogether, leaving the state with fewer taxpayers to satisfy ever-increasing maintenance costs. This, in turn, resulted in cities providing lower standards of living and prosperity coupled with ever-increasing tax burdens that drove additional urban flight.<sup>176</sup>

Outward flight was also driven by the loss of safety and security at the hands of outside invaders and resident criminals.<sup>177</sup> As in Egypt, the government built walls in formerly open cities to protect essential urban areas and provide refuge for residents of the outskirts and suburbs. Likewise, despite the great public expense dedicated to these projects they proved ineffective at restoring safety and security to Roman urban centers.<sup>178</sup> Loss of safety and security also prevented material wealth, commerce and

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<sup>175</sup> Charles Lloyd, “Greek urbanity and the polis” in *Aspects of Graeco-Roman Urbanism: Essays on the Classical City* 1, 1-7 (Ronald T. Marchese, ed., B.A.R. International Series 188 Oxford, England 1983) and Hammond, *City in the Ancient World* at 302-313.

<sup>176</sup> Sean D. W. Lafferty, *Italy in the Twilight of the Empire: The Decline of Roman Law and Culture under Theoderic the Great (c. 493-526)* Canadian Journal of History, Vol. 45 Issue 3, 458 (Winter 2010), Arjan Zuiderhoek, *Government Centralization in Late Second and Third Century A.D. Asia Minor: A Working Hypothesis*, Classical World, Vol. 103 Issue 1, 47 (Fall 2009), Charles Lloyd, “Greek urbanity and the polis” in *Aspects of Graeco-Roman Urbanism: Essays on the Classical City* 1, 1-7 (Ronald T. Marchese, ed., B.A.R. International Series 188 Oxford, England 1983), Hall, *Cities in Civilization* at 645-646 and Hammond, *City in the Ancient World* at 297-298 and 303-313.

<sup>177</sup> Charles Lloyd, “Greek urbanity and the polis” in *Aspects of Graeco-Roman Urbanism: Essays on the Classical City* 1, 1-7 (Ronald T. Marchese, ed., B.A.R. International Series 188 Oxford, England 1983) and John R. Patterson, “Settlement, city and elite in Samnium and Lycia” in *City and Country in the Ancient World*, 147, 164-165 (John Rich and Andrew Wallace-Hadrill, Eds., Routledge New York 1991).

<sup>178</sup> Gibbon, *Decline and Fall of the Roman Empire* at 489-492 and Hammond, *City and Country in the Ancient World* at 310-311.

trade from entering into and being conducted within urban centers, thereby decreasing the convenience and quality of life marketplaces provided urban center residents.<sup>179</sup>

Even Rome experienced outward migration and decline and degeneration as the convenience, quality of life and safety and security its residents enjoyed diminished. Unlike most of the Empire's cities, Rome was not planned.<sup>180</sup> O.F. Robinson blames Rome's failure to initially foster safety and security, convenience and quality of life on incompetent city administrators that viewed their posts as stepping stones to greater political office.<sup>181</sup>

Rome did possess regulations to support proper building techniques. In the Republic regulations were passed controlling the thickness of walls, building material quality and the height and roofs of buildings. The emperors restricted the height of structures to 70 and subsequently 60 feet.<sup>182</sup> However, these regulations were not enforced, and even though the Romans had the technical knowledge and ability to construct safe and long-lasting buildings, to cut costs most structures were built using substandard materials and techniques.<sup>183</sup> While Robinson blames the lack of enforcement at least in part on the absence of a pre-construction building permitting process<sup>184</sup>, Machiavelli argues that Rome's city officials were simply corrupt. In the beginning, Rome's municipal elected and appointed offices were held by those most qualified to serve the public's best interests. As time went on, however, political savvy and then sheer power replaced competence as the important qualifications for elected and appointed office. Once in office, these officials only regulated and acted in their own self-interest.<sup>185</sup> As the wealthy and powerful in Roman society were typically the owners of these structures,<sup>186</sup> they chose not to regulate their own building practices.

Substandard building materials and construction methods coupled with a lack of maintenance produced buildings that detracted from resident quality of life and safety and

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<sup>179</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 56-57 (The Free Press New York 1960) and Hammond, *City and Country in the Ancient World* at 310-315.

<sup>180</sup> Tomlinson, *From Mycenae to Constantinople* at 147-148, Hall, *Cities in Civilization* at 623 and 632 and Edwin S. Ramage, "Urban Problems in Ancient Rome" in *Aspects of Graeco-Roman Urbanism: Essays on the Classical City* 64, 66 (Ronald T. Marchese, ed., B.A.R. International Series 188 Oxford, England 1983).

<sup>181</sup> Robinson, *Ancient Rome: City Planning and Administration* at 16

<sup>182</sup> Hall, *Cities in Civilization* at 627.

<sup>183</sup> Robinson, *Ancient Rome: City Planning and Administration* at 33 and 41, Edwin S. Ramage, "Urban Problems in Ancient Rome" in *Aspects of Graeco-Roman Urbanism: Essays on the Classical City* 64, 78-79 (Ronald T. Marchese, ed., B.A.R. International Series 188 Oxford, England 1983), Hall, *Cities in Civilization* at 627-629.

<sup>184</sup> Robinson, *Ancient Rome: City Planning and Administration* at 33 and 41.

<sup>185</sup> Niccolo Machiavelli, *Discourses on the First Ten Books of Titus Livius*, Book 1, Chapter 18, 1517 (Christian Detmold, Translator Max Lerner, Compiler).

<sup>186</sup> Schneider, *Babylon is Everywhere* at 139.

security. From the late Republic period onward, most of Rome's citizens lived in terrible slums. Contractors and landowners profited from designing multi-story mixed-use apartment structures that were not properly engineered and lacked adequate ground space to support the height of the structure and building them using cut-rate materials and methods. The result was buildings that were so flimsy they "shook with every gust of wind" and frequently collapsed. Landlords crowded individuals into cramped apartment buildings characterized by poor ventilation, insect infestation and inadequate natural lighting. Buildings which did not collapse on their own accord were frequently destroyed by fire, and the poorly-constructed narrow wood staircases that led to upper-floor apartments made escape in case of catastrophe almost impossible. Poor construction leading to fires and collapse was so rampant it even affected luxury apartment-dwellers. Noise pollution from the street and ground-floor commercial users was a tremendous problem for residents.<sup>187</sup>

The average citizen also suffered from deficient public infrastructure. Unlike many apartment buildings in smaller towns throughout the Empire, most of Rome's tenements did not have running water and sewer facilities on every floor. Residents or contractors had to carry water and sewage by hand to and from each apartment.<sup>188</sup> Open sewers still ran down the middle of streets in many parts of Rome at the height of the Empire<sup>189</sup> even though provincial cities had piped sewage disposal systems similar to those in use today.<sup>190</sup>

Government regulatory attempts at reform were reactions to major crises and did not enjoy long-term success. Following the Great Fire of A.D. 64, Nero mandated that rebuilding efforts be completed pursuant to a comprehensive plan that mandated large open squares to prevent the spread of fires and wide and straight streets. Nero renewed building height restrictions and enacted regulations forbidding party walls and the use of wood as a building material. Building construction using non-combustible bricks and incorporating porticues on the front of new buildings that either assisted with fighting or escaping from fires was mandated, and buildings were also required to contain fire-

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<sup>187</sup> Edwin S. Ramage, "Urban Problems in Ancient Rome" in *Aspects of Graeco-Roman Urbanism: Essays on the Classical City* 64, 68-70 and 78-79 (Ronald T. Marchese, ed., B.A.R. International Series 188 Oxford, England 1983), Hall, *Cities in Civilization* at 627-630, Mumford, *The City in History* at 220-221, Schneider, *Babylon is Everywhere* at 138-141 and Robinson, *Ancient Rome: City Planning and Administration* at 35.

<sup>188</sup> Hall, *Cities in Civilization* at 642 and Mumford, *The City in History* at 216 and 221.

<sup>189</sup> Hall, *Cities in Civilization* at 647.

<sup>190</sup> Jennifer Palinkas & James A. Herbst, "A Roman Road Southeast Of The Forum At Corinth: Technology And Urban Development" *Hesperia*; Apr2011, Vol. 80 Issue 2, 287-336, 290, 313-314.

fighting materials on hand.<sup>191</sup> However, soon after Nero's death, the political climate permitted most of these reforms to be undone in favor of a return to the profitable lesser construction methods of the past.<sup>192</sup> Even with a sophisticated Roman system of government regulation, Roman governmental recognition of the existence of decline and degeneration and governmental regulatory and financial efforts in response, the cycle of decline and degeneration was still experienced.

The cycle of urban decline and degeneration was present within the earliest cities of Mesopotamia. Advancement in technologies such as the wheel and agrarian techniques provided a fertile ecology for urban concentration and city formation based upon quality of life, convenience, and safety and security. A symbiotic relationship was found between city formation and bronze age technological advances, allowing ancient cities to provide goods and conveniences described as rivaling current day cities. The city existed as a temple-city, led by a benevolent dictator, or priest-king, which evolved from the pre-city tribal chieftain position. Governmental regulation intentionally and deliberately acted to foster and sustain the city through planning, zoning, building codes, and the provision of walls for security, marketplaces, open spaces, publicly-provided utilities (streets, water, stormwater drainage and sewer) and other public amenities unique to the city. However, each of these cities entered the cycle of urban decline and degeneration ultimately leading to their extinction when one or more of the factors of convenience, quality of life, and safety and security supporting the original urban concentration were diminished or compromised.

The cycle of urban decline and degeneration was again present within the cities of ancient Egypt. The presence of a strong centralized government and protective physical location made safety and security provision a lesser factor in some of these cities and allowed for the first low-density suburban development. Each major city was designed as a capital city, with comprehensive planning under the strict control of a Pharaoh, as a condition precedent to its development. The Pharaoh planned each city to provide its residents with a quality of life and convenience similar to those found in the cities of ancient Mesopotamia. Interestingly, the Pharaohs, perceived as gods in their own right, as centralized government, implemented a level of local self-governance based upon city

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<sup>191</sup> Brian Sahotsky, *Adventures in Architectural Symbolism: The Use and Misuse of Rebuilding Programs in Ancient Rome*, Places: Forum of Design for the Public Realm, Vol. 21, Issue 1 (Spring 2009), Edwin S. Ramage, "Urban Problems in Ancient Rome" in *Aspects of Graeco-Roman Urbanism: Essays on the Classical City* 64, 74-79 and 83-84 (Ronald T. Marchese, ed., B.A.R. International Series 188 Oxford, England 1983), Hall, *Cities in Civilization* at 627 and Robinson, *Ancient Rome: City Planning and Administration* at 35.

<sup>192</sup> Edwin S. Ramage, "Urban Problems in Ancient Rome" in *Aspects of Graeco-Roman Urbanism: Essays on the Classical City* 64, 74-79 and 83-84 (Ronald T. Marchese, ed., B.A.R. International Series 188 Oxford, England 1983).

charters of privilege. Governmental regulation built upon that seen in Mesopotamia with planned and designed commercial corridors and urban growth boundaries. However, even with strong centralized government, comprehensive planning and a degree of local self-governance, each of these cities entered the cycle of urban decline and degeneration ultimately leading to their extinction when convenience or quality of life were compromised or safety and security lost with the withdrawal of governmental regulation.

The cycle of urban decline and degeneration was also present within the Greek city-states. As in Mesopotamia, the ecology for urban concentration and city formation was based upon quality of life and convenience, with inhabitant safety and security providing the foundation for exact location decisions. Greek city-states were democracies, with both city-wide government regulation and “civic subdivisions” with their own subdivision regulation. The city-states provided residents with a quality of life and convenience similar to those found in the cities of ancient Mesopotamia and Egypt. Governmental regulation built upon that seen in Mesopotamia and Egypt with the introduction of plans for designed urban centers that prescribed the exact locations for various types of structures, a street grid system which distinguished between arterial roadways, side streets and even main highways in their planning and design and the utilization of public health as a justification for urban planning, design and development. Even in a democratic setting, most of the Greek city-states disappeared as slowly and imperceptibly as they emerged. What caused the demise of the Greek city-state culture was the transformation of Rome from a city-state empire into a bureaucratically governed organization,<sup>193</sup> which negatively affected local government administration supporting inhabitant safety and security, quality of life and convenience.

The cycle of outward migration and urban decline and degeneration was again present within Roman cities, with Rome itself in the forefront. As in Mesopotamia and Greece, the ecology for urban concentration and city formation was based upon quality of life and convenience, with urban ecology and inhabitant safety and security providing the foundation for exact location decisions. Roman communities derived their self-government from city charters issued by Caesar.<sup>194</sup> As a republic, the oligarchic municipal councils became wholly responsible for elections and for most municipal regulation.<sup>195</sup>

Many of the Roman cities endeavored to provide residents with a quality of life and convenience similar to that found in the cities of ancient Mesopotamia, Egypt and

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<sup>193</sup> Mogens Herman Hansen, *Polis: An Introduction to the Ancient Greek City-State*, 138 (Oxford University Press New York 2006).

<sup>194</sup> Hammond, *City and Country in the Ancient World* at 290.

<sup>195</sup> Hammond, *City and Country in the Ancient World* at 291.



Greece. The Romans pioneered dynamic professional planning incorporating a “preconception of how they were going to develop in the future;”<sup>196</sup> mixed use development consisting of multi-story structures containing both commercial and residential uses; formal building regulations based upon improved building techniques, including the use of fire-resistant and sustainable building materials such as solidified concrete and baked brick; and the installation of paved streets with sidewalks, curbs and guttering. The Romans also introduced the use of exclusionary zoning for dangerous or unpleasant industries and aesthetic zoning to protect “the sophisticated appearance of the city;”<sup>197</sup> uniform building setback standards; public and private nuisance; restrictive covenants; easements; and individual rights protection embodied in the concepts of government compensation for the exercise of eminent domain, that valid government regulation had to be based upon the public health, safety or welfare and that inverse condemnation exists even when there is only the loss of convenience.<sup>198</sup>

Even with these advanced developments and sophisticated concepts, Roman cities entered the cycle of urban decline and degeneration resulting from the collapse of Roman regulation,<sup>199</sup> the dislocation of trade, the depreciation of the coinage, and inflation,<sup>200</sup> which ultimately compromised one or more of the factors of convenience, quality of life, and safety and security. Ironically, the political and practical atmosphere of the city of Rome allowed its development contrary to many of these advanced developments and sophisticated concepts. Such an atmosphere was identified with its center-core decline, outward migration and suburbanization. Imperial attempts at remediation via amenity influx to the center city, including even the dispensing of food tickets for public doles, did little to stem this outward tide and the city of Rome’s ensuing degeneration.

Historically, the cycle of urban decline and degeneration was found within Mesopotamia, Egypt, the Greek city-states, and the Roman Empire. While dictatorial types of governments were of course more rapid in response and citizen input was key to the overall success of government regulatory responses, this cycle seemed not dissuaded by the form of government. It was not deterred by comprehensive planning, zoning, building regulations, advanced development techniques or sophisticated legal concepts for the protection of individual rights similar to those found today. It could not be stemmed by remediation via amenity influx to the center city. When one or more of the factors of convenience, quality of life, and safety and security supporting the original

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<sup>196</sup> Sewell, *The Formation of Roman Urbanism* at 61-62.

<sup>197</sup> Goodman, *The Roman City and its Periphery* at 50.

<sup>198</sup> Robinson, *Ancient Rome: City Planning and Administration* at 40-41.

<sup>199</sup> Gideon Sjoberg, *The Preindustrial City: Past and Present* 57 (The Free Press New York 1960).

<sup>200</sup> Hammond, *City and Country in the Ancient World* at 310-311.

urban concentration were diminished or compromised, a cycle of urban decline and degeneration followed.

### III. Test Results

While the historians of the accounts examined were often content to document fact in a chronology, the information gleaned therefrom has a broader purpose in the current context. Their accounts documented the existence of the cycle of outward migration and urban decline and degeneration throughout history. The cycle ostensibly appeared and persisted regardless of government form or planning infrastructure, subsidization and regulatory efforts. However, a divergence likely materialized between the cycle of outward migration and urban decline and degeneration and the driving forces supporting urban concentration of convenience, quality of life, and safety and security.

Field research was conducted to ascertain how these historical observations fared in the modern context. Scientifically, synthesizing historical information with empirical research results can provide a viable basis for future action.<sup>201</sup> To assure a broad-based view and focus on areas conducive to growth, the 2010 US Census data was consulted and it revealed a list of the fifty fastest growing counties within the United States from 2000 to 2010. It was soon realized that each of these counties had an assessing/appraising office tasked with understanding the properties within the county at a level that each property could be fairly valued on an ongoing basis for taxation purposes. It was also found that all of these valuations uniformly take place utilizing a document entitled *The Uniform Standards of Professional Appraisal Practice*, which is recognized as the generally accepted standards for professional appraisal practice in North America.<sup>202</sup>

While the assessing/appraising officers could address general trends within their individual counties, it was believed that more insight could be gained by discussing the circumstances of individual developments. The historical observations were often based on specifics rather than generalities. A concept was developed to observe the traits of successful as well as challenged residential, mixed-use and commercial developments throughout the United States. It was started with a list of questions designed to uniformly probe based upon the historical observations. The county assessing/appraising office would be asked to identify a challenged development and a corresponding successful development for discussion. This pairing of developments was believed to account for individual office sensitivities in this regard. Questions were also added in an attempt to confirm this disparity.

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<sup>201</sup> Carl V. Patton & David S. Sawicki, *Basic Methods of Policy Analysis and Planning*, 2<sup>nd</sup> Ed., 22 (Prentice-Hall, Englewood Cliffs, New Jersey 1993).

<sup>202</sup> See The Financial Institution Reform, Recovery and Enforcement Act of 1989 (Pub. L. 101-73).

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.

This concept was discussed with a fellow doctoral researcher who was involved in examining the application of current theories in the development process. 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.

Responses were received concerning 128 distinct developments, 64 identified as successful paired with 64 identified as challenged, throughout the United States. While sections of the questionnaire designed as part of this dissertation research involved issues of governmental regulation, access was also provided to data from the other sections of the questionnaire involving issues concerning the driving forces supporting urban concentration: convenience, quality of life, and safety and security.

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.<sup>203</sup> This is done to ascertain a co-relationship and reflect descriptive characteristics associated with the development<sup>204</sup> 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.<sup>205</sup> Not all questions in the questionnaire were connected by the respondents to every development. When viewing each chart, the *N number* reflects

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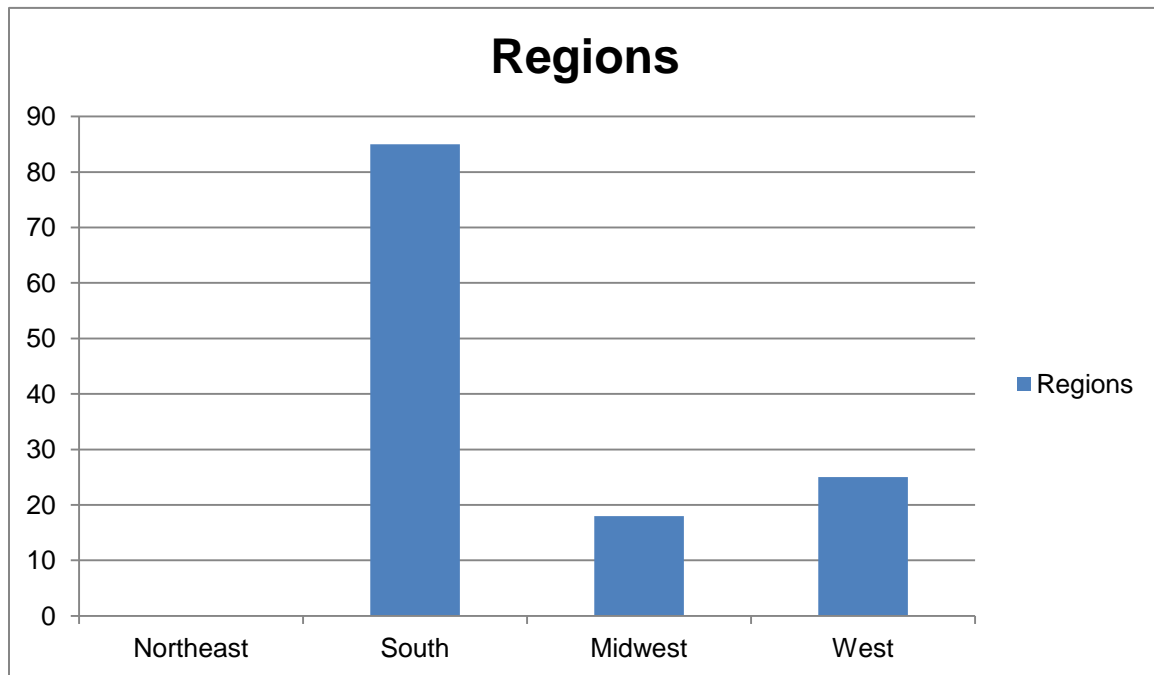
<sup>203</sup> Earl Babbie, *Survey Research Methods (Second Edition)* 367, 374 (Wadsworth Publishing Company, Belmont, California 1990).

<sup>204</sup> Earl Babbie, *Survey Research Methods (Second Edition)* 9, 369-370 (Wadsworth Publishing Company, Belmont, California 1990).

<sup>205</sup> Albert R. Wilson, *Proximity Stigma: Testing the Hypothesis*, *The Appraisal Journal* v. 72, no. 3, 253-62, 254 (Summer 2004).

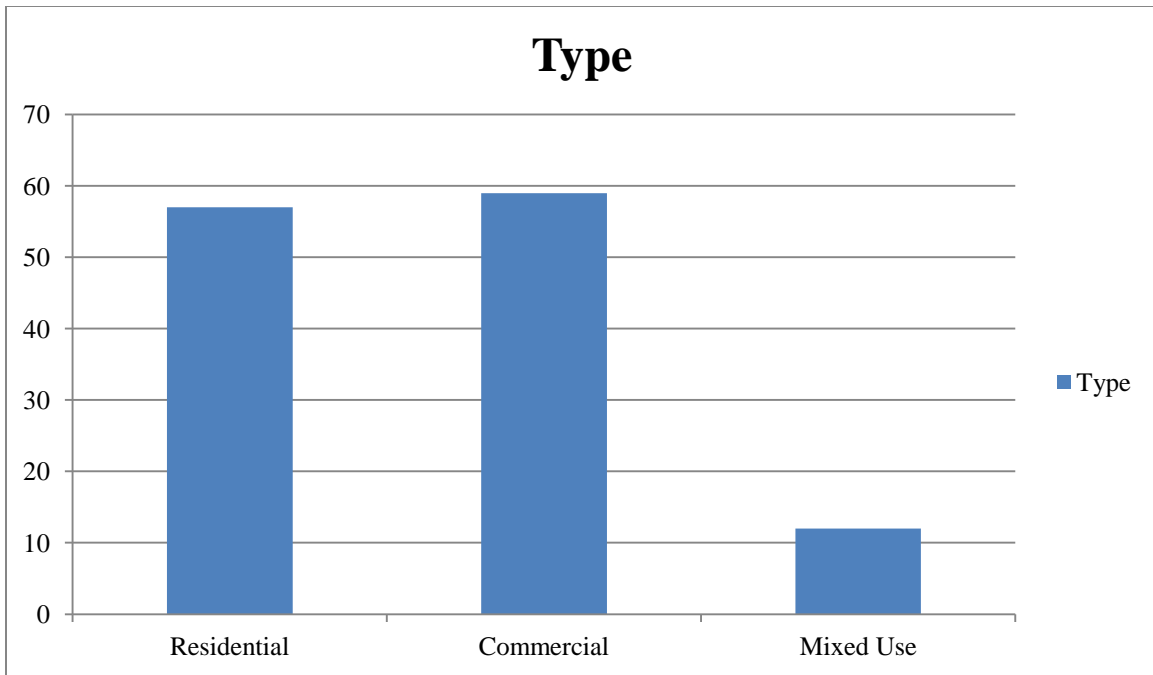
the number of developments out of the 128 possible for which a recordable response was provided by the corresponding assessing/appraising officer.

The following is descriptive background data concerning the researched developments.



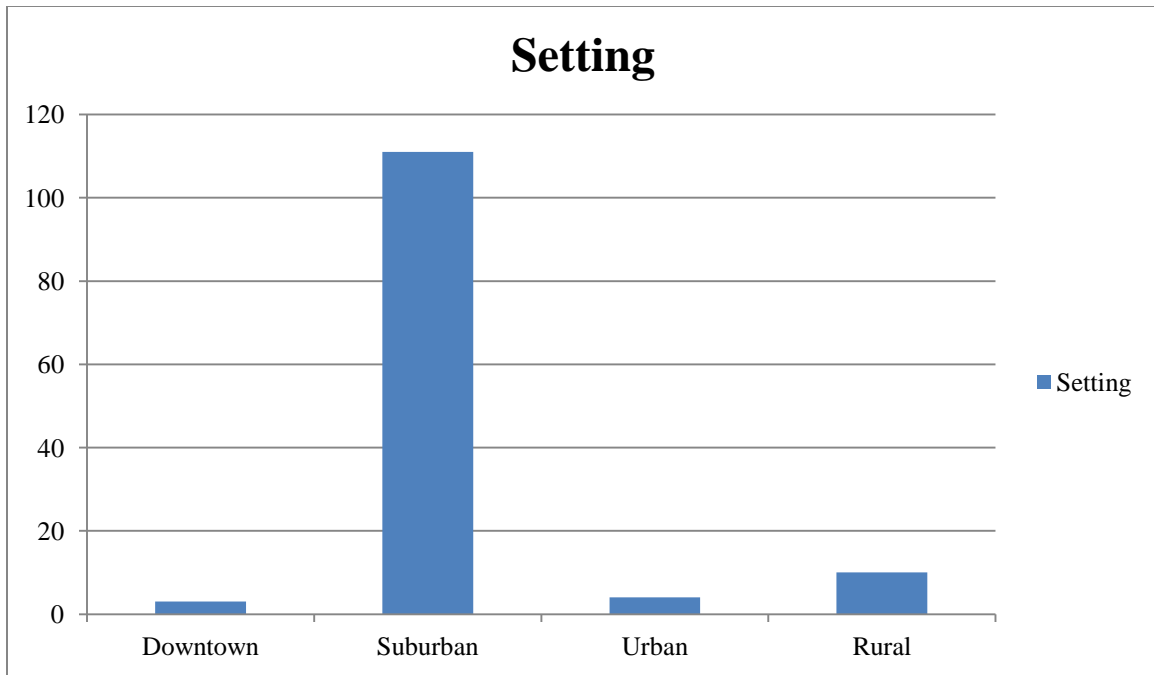
$N = 128$

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 were 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. As a sidelight, the greater Atlanta, Georgia area contained the largest number of these counties, followed by the central and northern parts of Florida and central Texas.



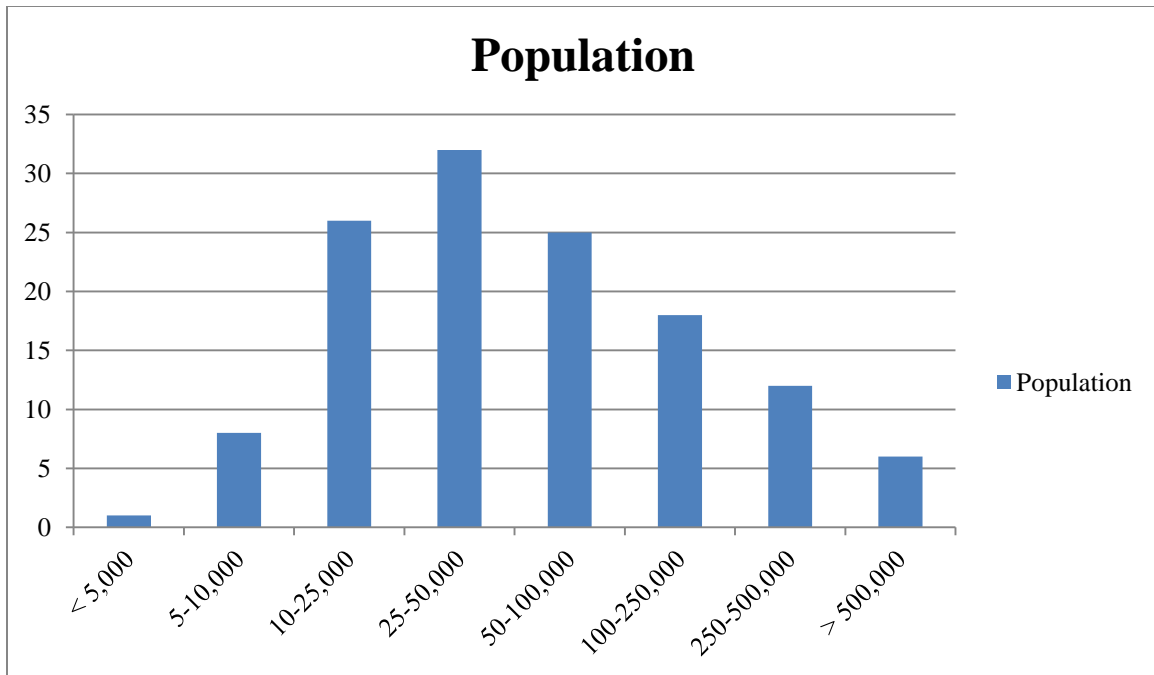
$N = 128$

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

No constraint was placed upon the assessing/appraising officers concerning the setting/location of the identified developments. However, a 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.



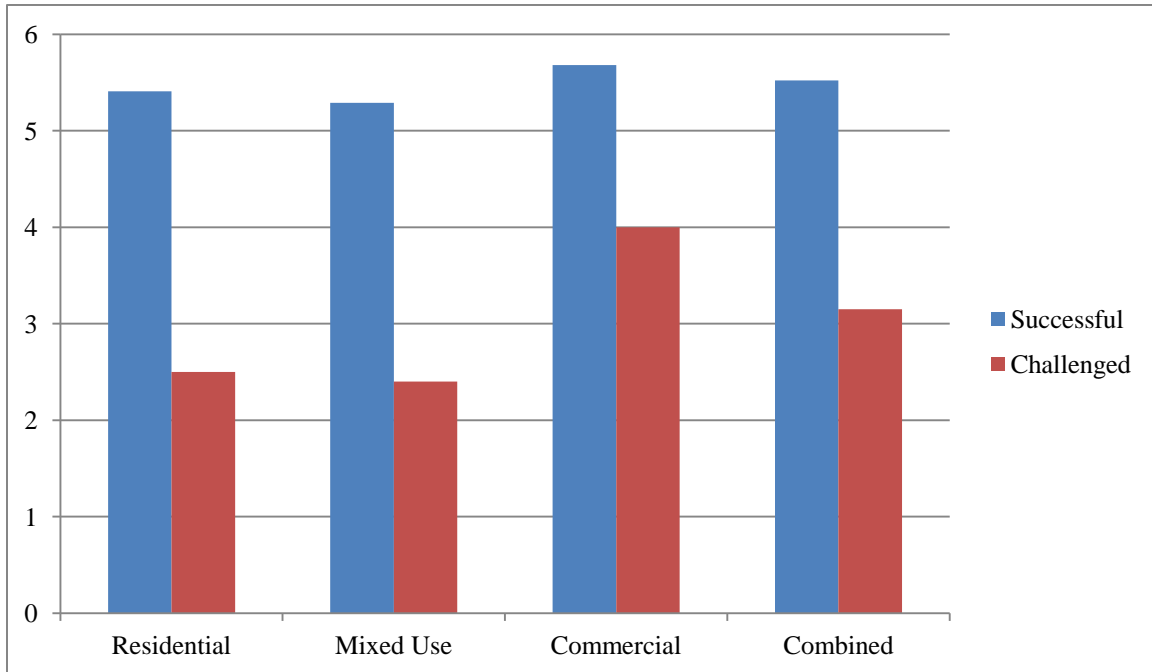
$N = 128$

Again, no constraint was placed upon the assessing/appraising officers concerning the population of the location of identified developments. However, a 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).

The following three questions were designed 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)



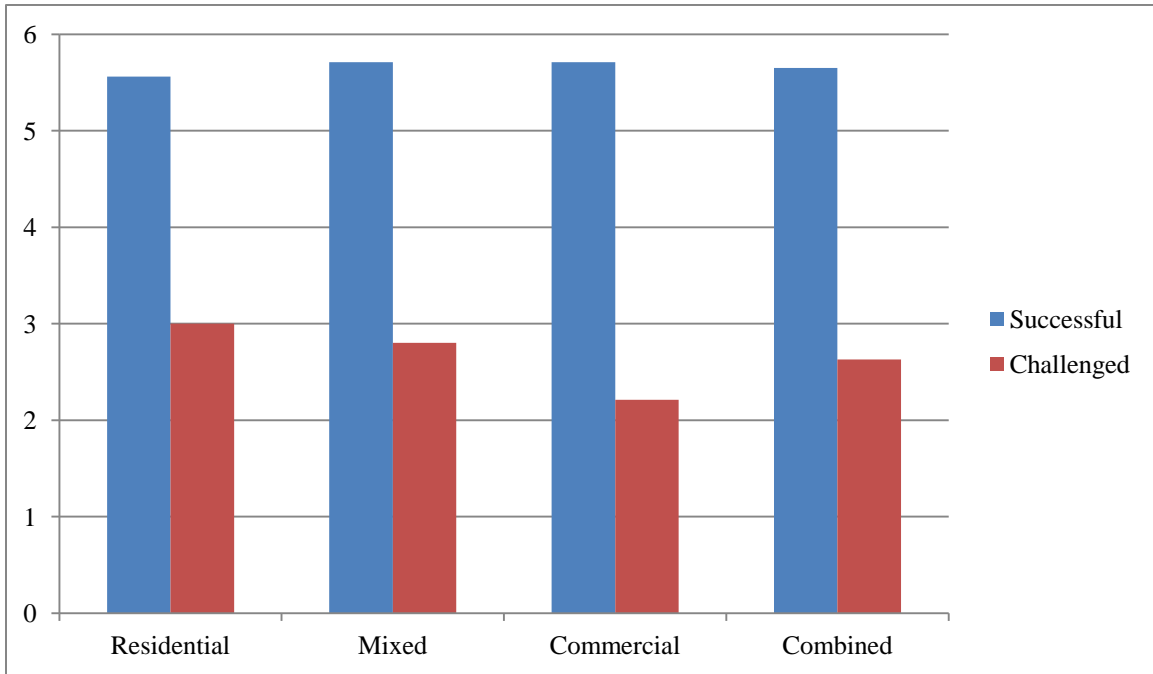
$N = 127$

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)

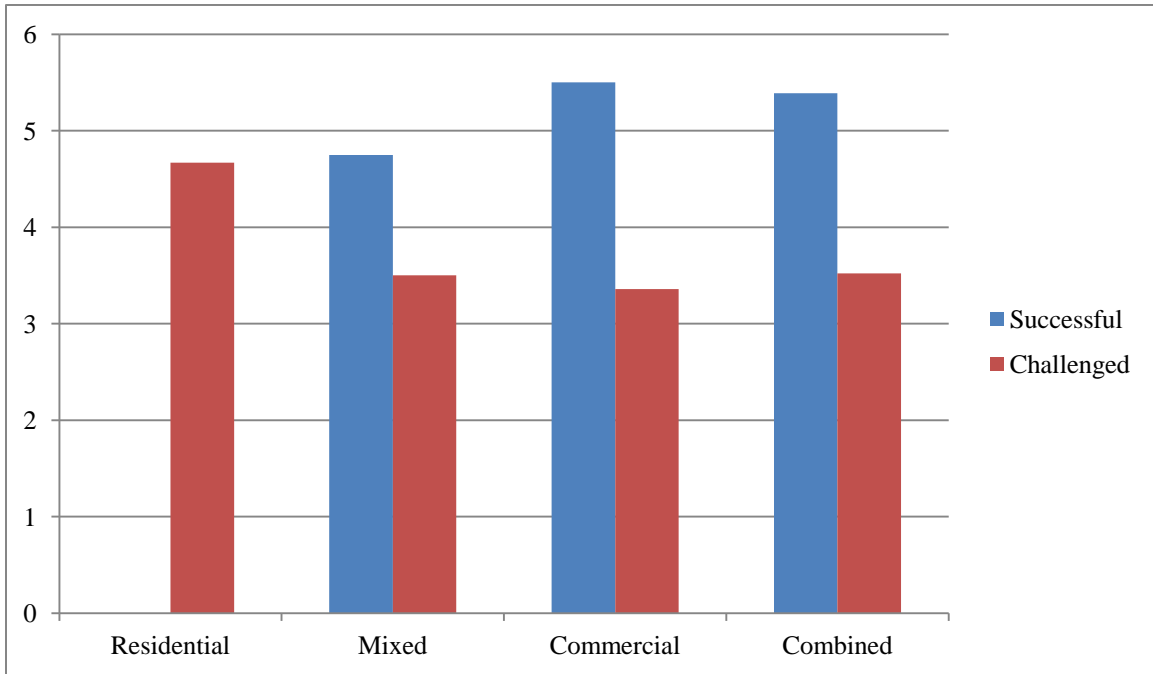


$N = 128$

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 were 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.

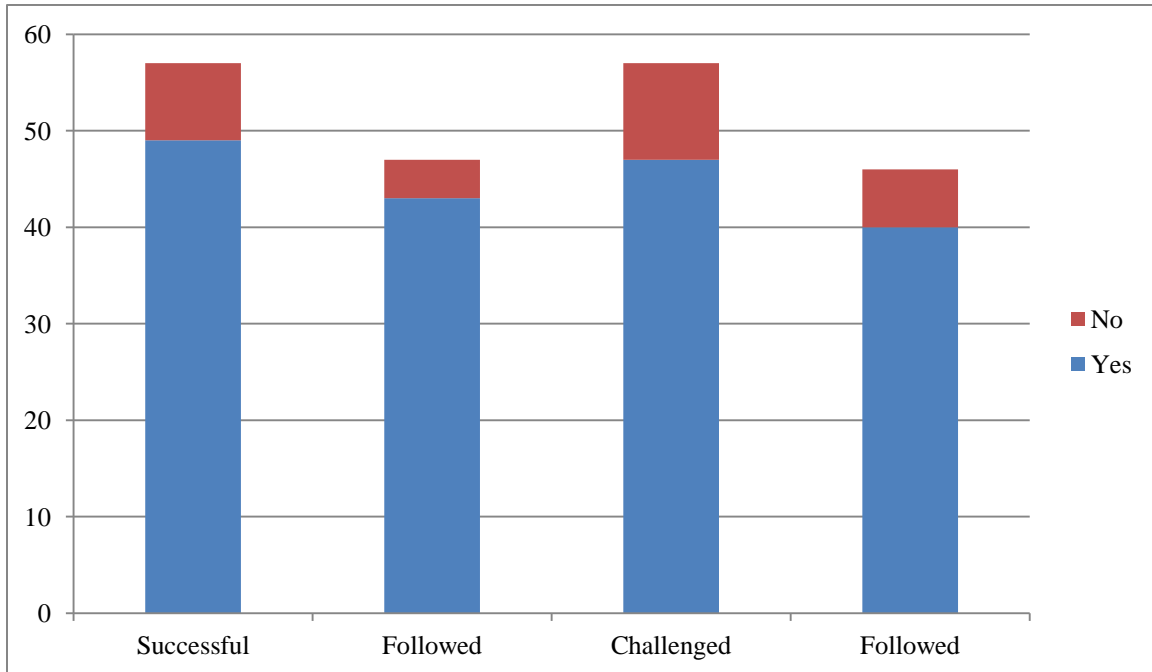
The historical observations reflected the existence of the cycle of urban decline and degeneration regardless of the type of government or extent of its development-related practices, comprehension of the problems or counteractions. All of the historical eras revealed some level of planning. It is therefore logical to commence this current-day examination of government involvement with Preexisting Comprehensive Planning of the development site. The Comprehensive or Master plan usually takes the form of a series of inter-related policy statements, with some maps showing areas of generally preferred uses. Comprehensive plans address such topics as land use, housing, transportation, economy, culture, utilities, services, parks and neighborhoods.<sup>206</sup>

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<sup>206</sup> Bernie Jones, *Neighborhood Planning: A Guide for Citizens and Planners* 3 (American Planning Association, Chicago, Ill, 1990).

## PREEXISTING COMPREHENSIVE PLANNING

(Frequencies)



$N = 128$

As reflected in the foregoing chart, there was little variance in this regard between the successful and challenged developments. Forty-nine (49) of the fifty-seven (57) developments identified as successful were subject to preexisting comprehensive planning. Of those, forty-three (43) followed that comprehensive planning. Forty-seven (47) of the fifty-seven (57) developments identified as challenged were subject to preexisting comprehensive planning. Of those, forty (40) followed that comprehensive planning.

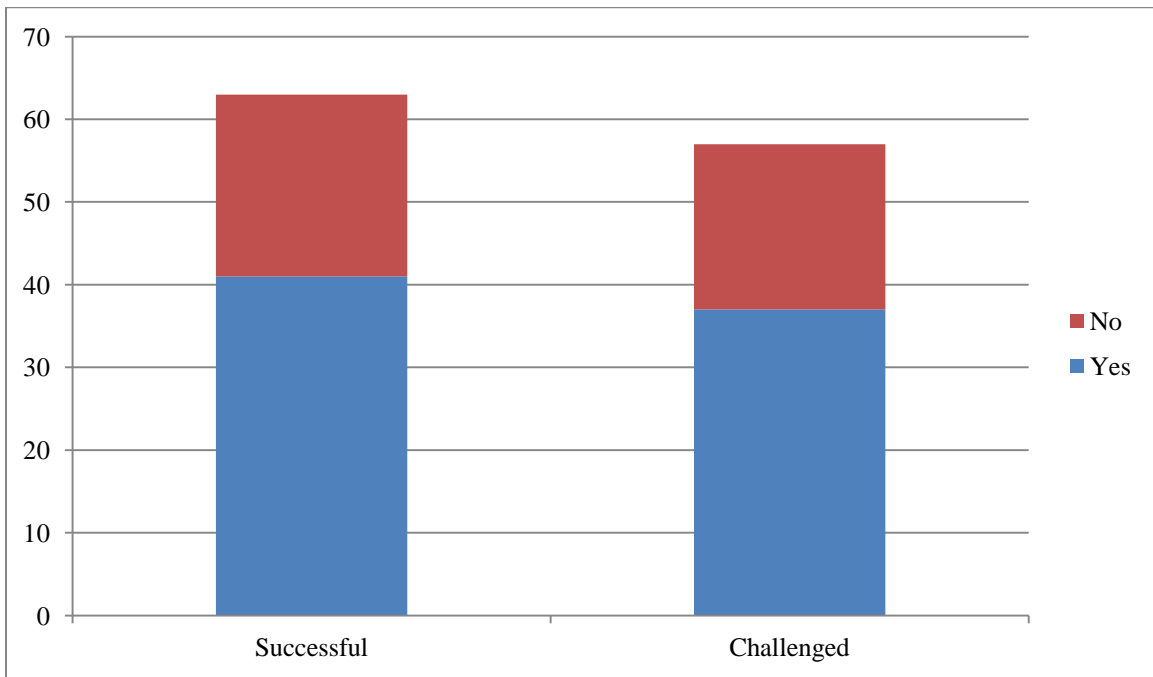
While the Mesopotamians identified a desire to combine compatible uses and separate dissimilar ones, more advanced zoning philosophies were exhibited by the Romans.

Zoning authority empowers local governments to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentages of lot that may be occupied, the size of yards, courts and other open spaces, the density of

population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.<sup>207</sup>

## ZONING/REZONING

(Frequencies)



$N = 128$

Again, there was little variance in regard to zoning/rezoning between the successful and challenged developments. Forty-one (41) of the sixty-three (63) developments identified as successful were subject to zoning/rezoning. Thirty-seven (37) of the fifty-seven (57) developments identified as challenged were subject to zoning/rezoning.

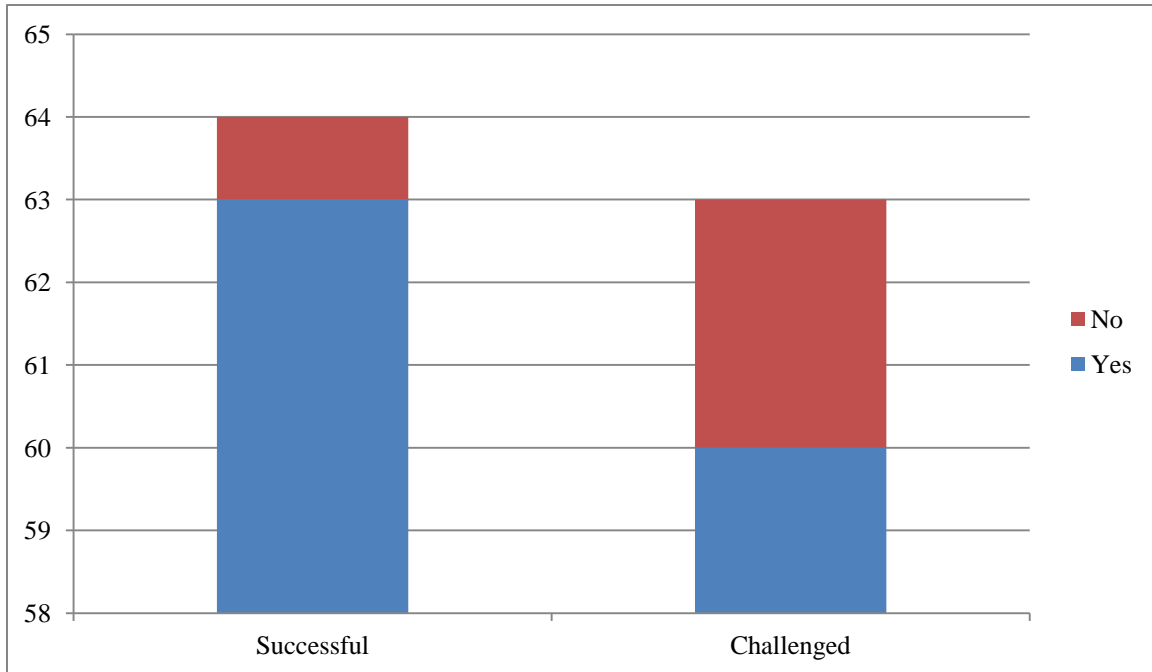
The Greeks were the first to reduce planning to the written page in the form of plats. Platting is part of the subdivision process and entails the division of land into lots, blocks, streets and alleys by drawings and statements on paper.<sup>208</sup>

<sup>207</sup> *A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations*, Recommended by the United States Department of Commerce Section 1 (1926).

<sup>208</sup> 11A McQuillin Mun. Corp. § 33:25 (3d ed.).

## PLATTING/REPLATTING

(Frequencies)



$N = 128$

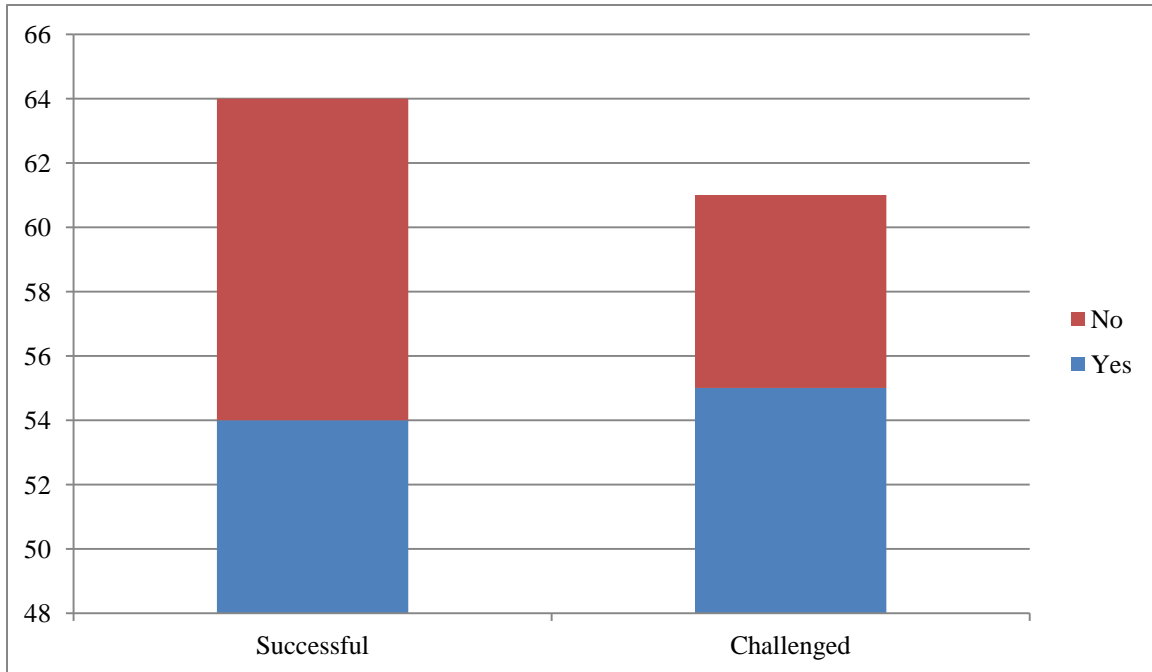
While at first glance the scale of the foregoing chart appears to provide some variety, there was in fact little variance in regard to platting/replatting between the successful and challenged developments. Sixty-three (63) of the sixty-four (64) developments identified as successful were subject to platting/replatting. Sixty (60) of the sixty-three (63) developments identified as challenged were subject to platting/replatting.

The Romans pondered how developments were accessed and adequately serviced by roadways and utilities. This provides the bedrock foundation for today's subdivision regulations and review. Current subdivision regulations and review examines the impact that the subdivision of land will have on adjacent areas and existing facilities, such as streets, schools, parks, water and sewers. This is done by addressing how the new lots being created through subdivision will be adequately serviced and who is to pay for service extensions and new facilities in that regard.<sup>209</sup>

<sup>209</sup> 8 McQuillin Mun. Corp. § 25:130 (3d ed.).

## SUBDIVISION REVIEW

(Frequencies)



$N = 128$

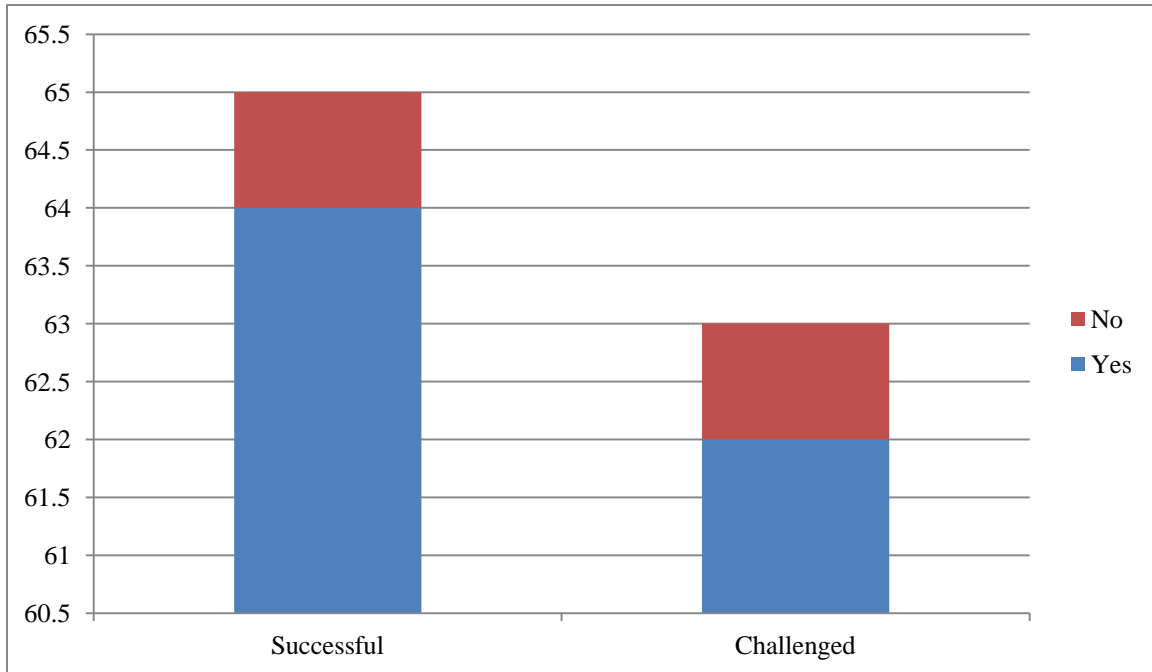
There was little variance in regard to subdivision review between the successful and challenged developments. Fifty-four (54) of the sixty-four (64) developments identified as successful were subject to subdivision review. Fifty-three (53) of the sixty-one (61) developments identified as challenged were subject to subdivision review.

Prior to construction on an individual site, it is frequently required that an application for a building permit be accompanied by detailed plans and specifications, and maps or plats of the site, to be approved by designated officials if sufficiently detailed in content to enable the officials to ascertain whether the contemplated construction will comply with pertinent regulations and laws. A municipality may require that all plans and specifications be prepared by a registered architect or engineer, and may prohibit under penalty substantial deviations from the plans and specifications.<sup>210</sup>

<sup>210</sup> 9A McQuillin Mun. Corp. § 26:227 (3d ed.).

## SITE PLAN REVIEW

(Frequencies)



$N = 128$

Again, there was little variance in regard to site plan review between the successful and challenged developments. Sixty-four (64) of the sixty-five (65) developments identified as successful were subject to site plan review. Sixty-two (62) of the sixty-three (63) developments identified as challenged were subject to site plan review.

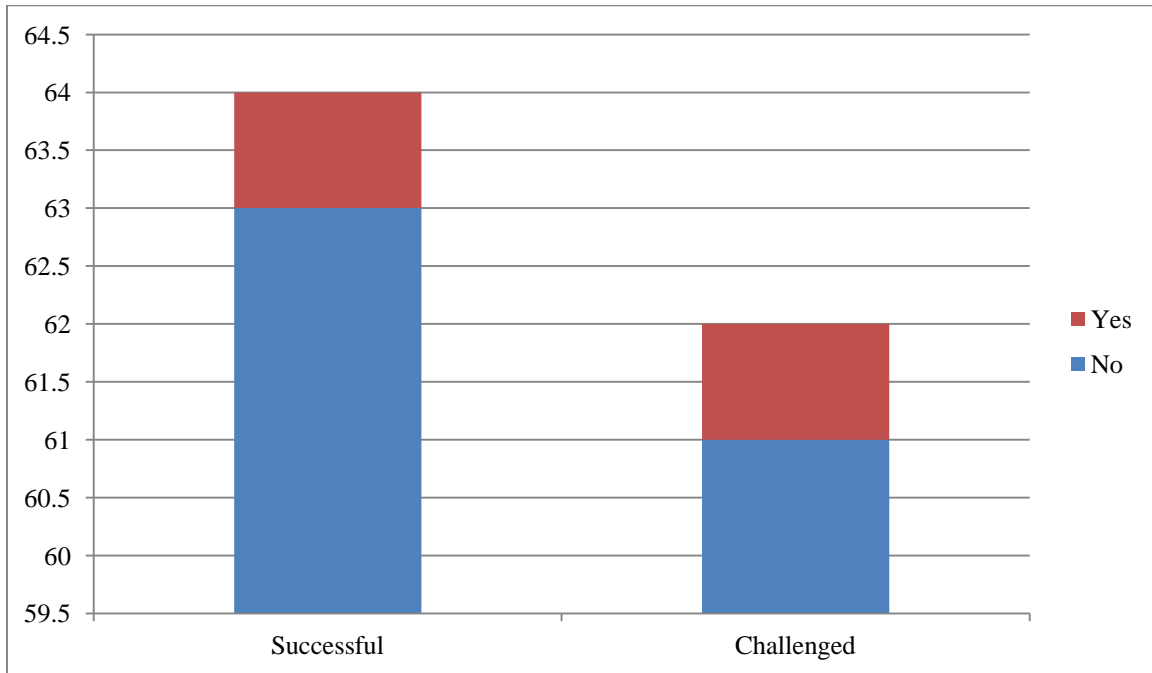
The site plan review process often includes compliance with governmental requirements, such as affordable or inclusionary housing. The defining feature of inclusionary housing is often a citywide or countywide mandatory requirement or voluntary objective that assigns a percentage of housing units in all new residential developments with more than a specified minimum of units, to be sold or rented to lower- or moderate-income households at affordable rates.<sup>211</sup>

<sup>211</sup> Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: the Experience of Two Decades*, *Journal of the American Planning Association* v. 64, no. 2, 150-169 (Spring 1998).



## AFFORDABLE HOUSING REQUIREMENTS (INCLUDING INCLUSIONARY ZONING)

(Frequencies)



$N = 128$

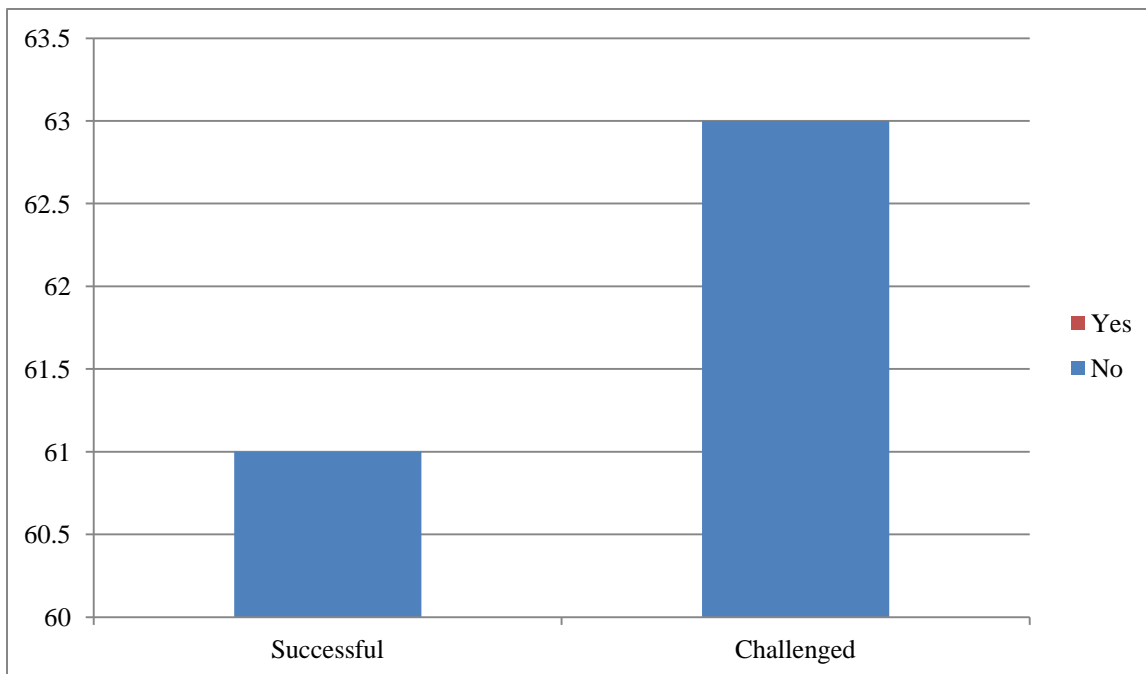
Again, there was little variance in regard to Affordable Housing Requirements (Including Inclusionary Zoning) between the successful and challenged developments. One (1) of the sixty-four (64) developments identified as successful was subject to Affordable Housing Requirements (Including Inclusionary 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 setting ceilings and otherwise controlling rents were once sustained under the police power, as temporary expedients only, to meet housing emergencies, including those due to disastrous effects of war. However, the constitutionality of a rent/purchase control measure no longer is dependent on the existence of a serious public emergency consisting of a critical shortage of rental housing or the existence of exorbitant rents, but has been justified under the exercise of a municipality's police power if reasonably related to a legitimate government purpose.<sup>212</sup>

<sup>212</sup> 7A McQuillin Mun. Corp. § 24:565 (3d ed.).

## RENT/PURCHASE CONTROL REQUIREMENTS

(Frequencies)



*N* = 128

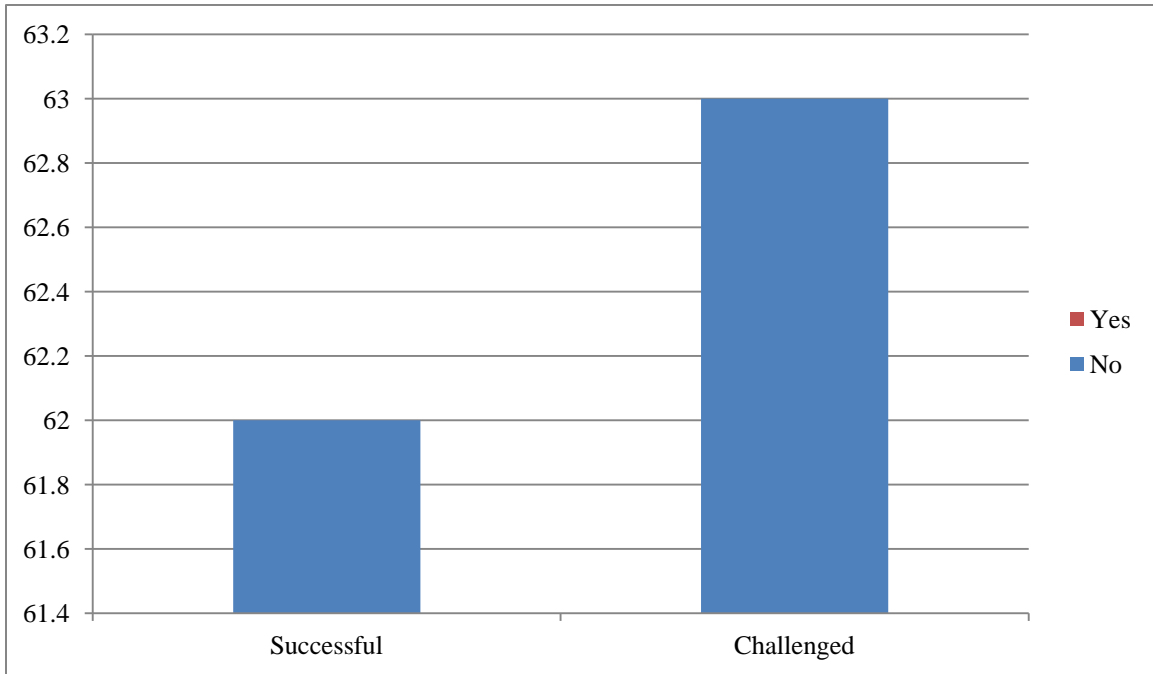
No Rent/Purchase Control Requirements were reported in either the successful or challenged developments.

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.<sup>213</sup>

<sup>213</sup> 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.

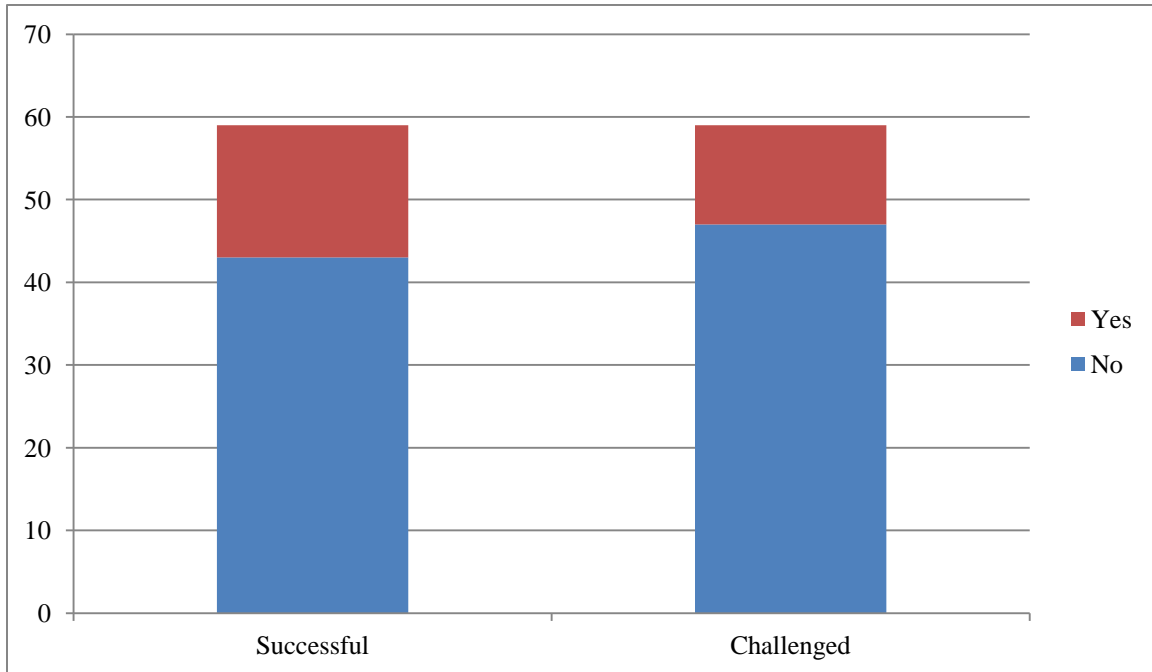
To qualify for the sale of federally-subsidized flood insurance a community must adopt and submit to the Administrator as part of its application, flood plain management regulations, satisfying at a minimum the criteria set forth in federal regulation, designed to reduce or avoid future flood, mudslide (i.e., mudflow) or flood-related erosion damages. These regulations must include effective enforcement provisions.<sup>214</sup>

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<sup>214</sup> 44 CFR 59.2(b).

## FEMA FLOODPLAIN REQUIREMENTS

(Frequencies)



$N = 128$

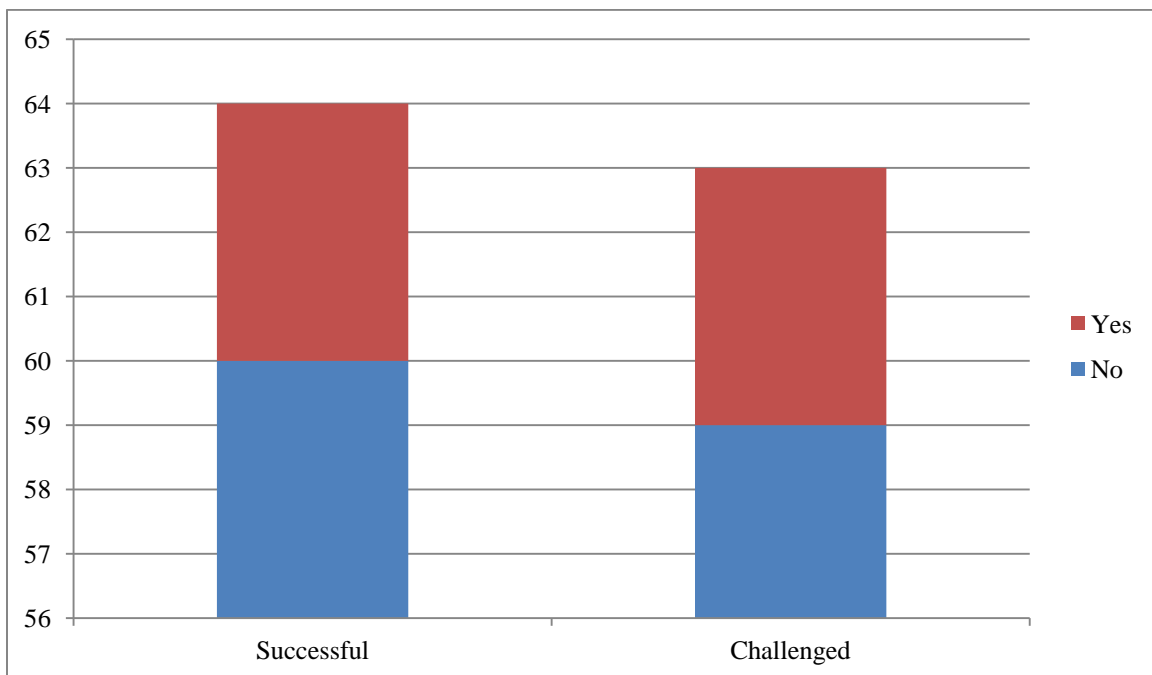
Again, there was little variance in regard to FEMA Floodplain Requirements between the successful and challenged developments. Sixteen (16) of the fifty-nine (59) developments identified as successful were subject to FEMA Floodplain Requirements. Twelve (12) of the fifty-nine (59) developments identified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

Preservation of the historic interest of a neighborhood may be the object of legislation restricting all exterior construction and alteration of buildings to a style in conformance with the neighborhood's traditional architecture. The police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of historically significant structures. While historic preservation legislation, particularly historic district ordinances, may work an economic hardship on owners of property located within the boundaries of the historic district, the wisdom of such legislation is deemed to be "fairly debatable" and the courts will not substitute their judgment for that of the law makers. The administration of

historic district ordinances may be delegated to a historic district commission but adequate architectural guidelines and design standards must be established to limit the commission's exercise of discretionary authority. Except where rehabilitation or restoration is economically unfeasible, municipal historic preservation legislation may prohibit property owners from demolishing buildings located within historic districts. However a municipality's authority may be limited in what it may require for restoration of historic areas.<sup>215</sup>

## 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.

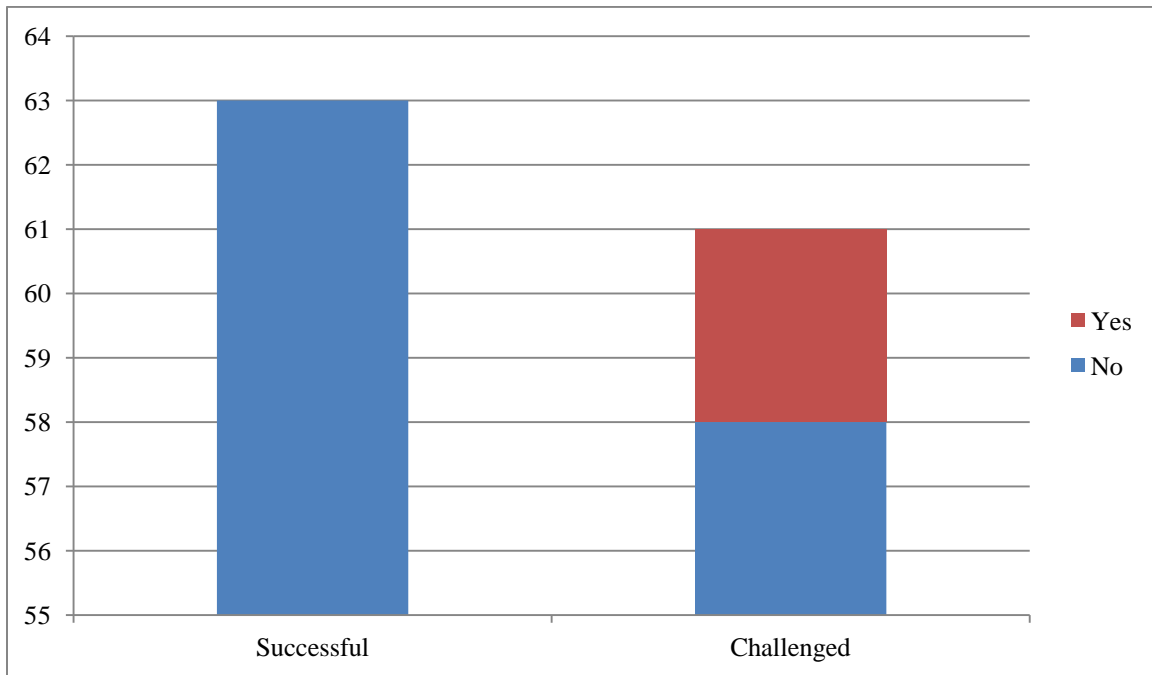
Requirements suggesting possible exclusionary intentions operate to generally exclude certain people, whether racial minorities or ethnic groups, or lower-income

<sup>215</sup> 8 McQuillin Mun. Corp. § 25:34 (3d ed.).

persons from residential areas. Frequently, they interfere with the availability of housing in areas where housing is needed. Zoning regulations and practices which are otherwise valid are unconstitutional where they have the effect of closing new housing and land markets to racial minorities and low-income groups.<sup>216</sup>

### 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.

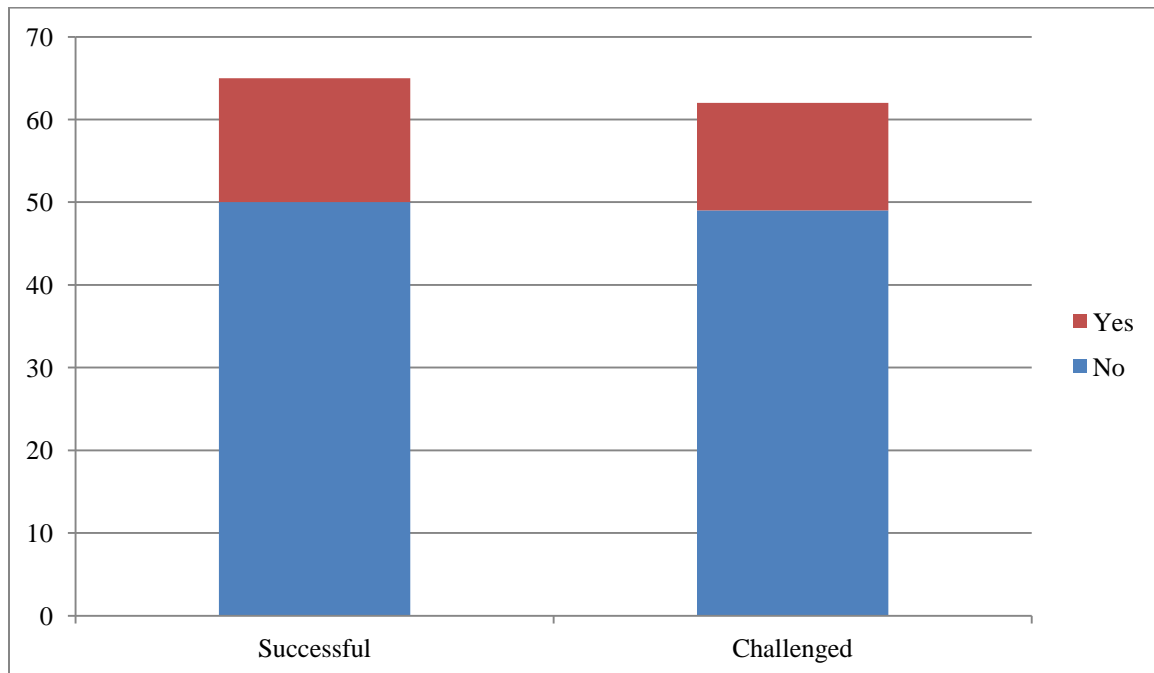
Environmental protection and conservation are legitimate purposes for zoning. Although states generally leave zoning matters to local authorities, environmental zoning often involves substantial interplay between state and local regulations. State laws often require local bodies to implement environmental protections schemes through local land use ordinances and procedures. For example, state law may require a municipality to

<sup>216</sup> 8 McQuillin Mun. Corp. § 25:146 (3d ed.).

assess the environmental impact of new construction or of zoning changes. State law may also mandate that local governments preserve open space and protect natural and scenic resources. Local laws may also be preempted by federal laws.<sup>217</sup>

### ENVIRONMENTAL REQUIREMENTS (WETLANDS, ETC.)

(Frequencies)



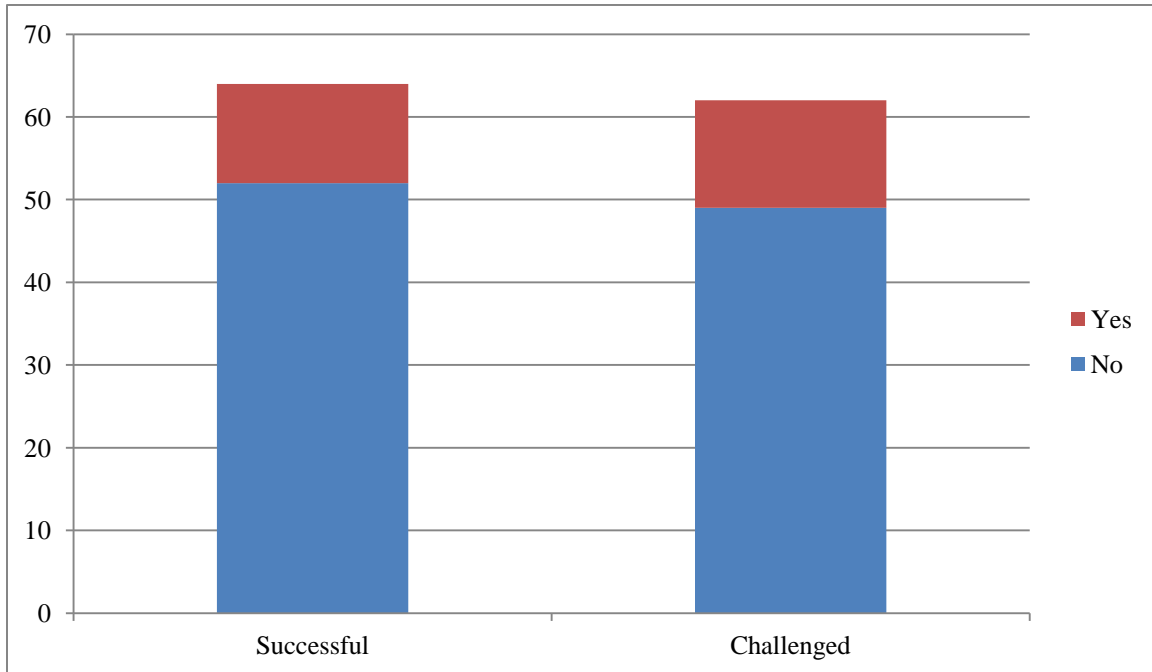
*N* = 128

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).

<sup>217</sup> 8 McQuillin Mun. Corp. § 25:24 (3d ed.).

## 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.

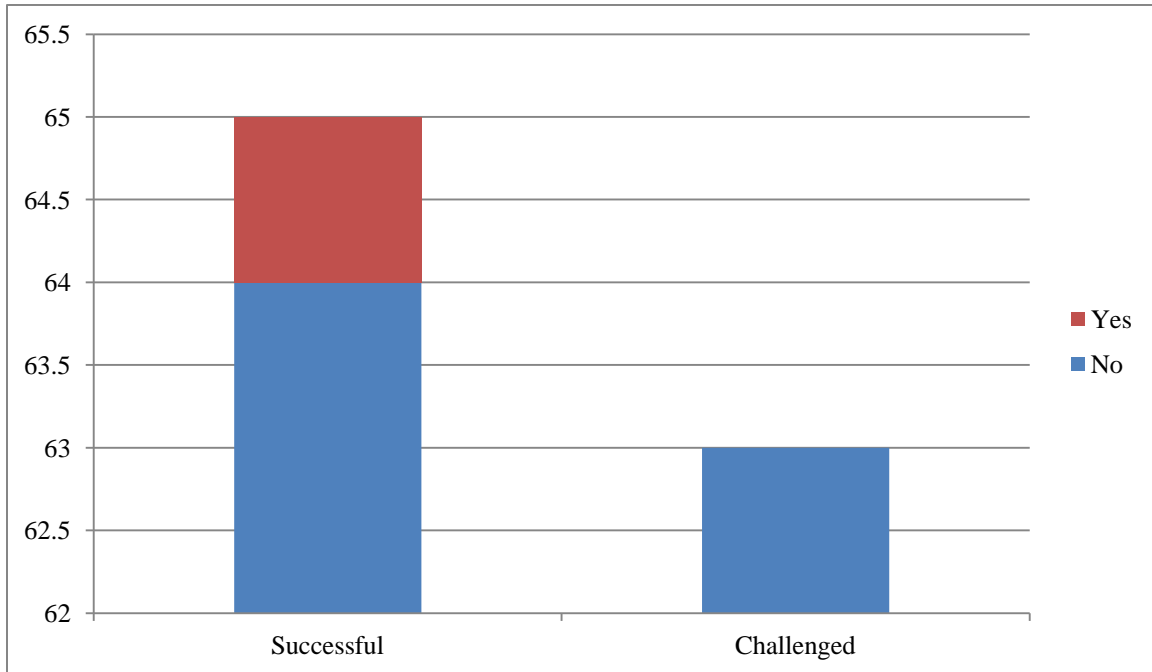
Zoning of areas along the ocean, on lake shores and along streams has in some cases been sustained but in others invalidated.<sup>218</sup>

<sup>218</sup> 8 McQuillin Mun. Corp. § 25:91 (3d ed.).



## 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.

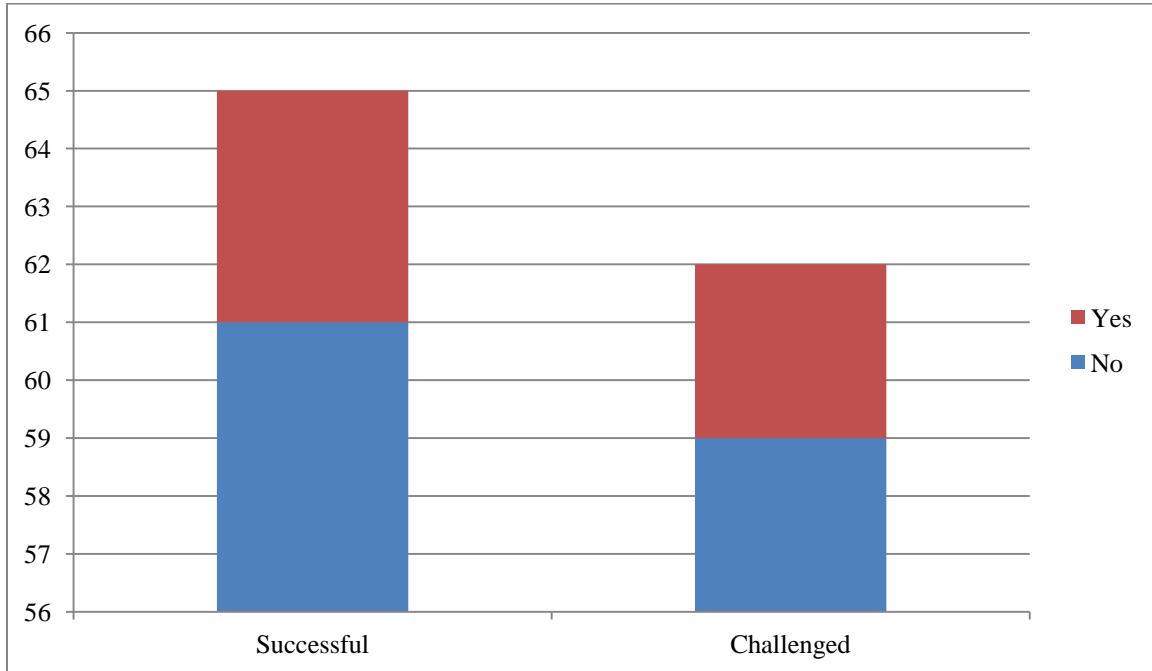
Building height limitations were not unknown to the Roman law.<sup>219</sup> Aviation safety requires a minimum clear space, or buffer, between operating aircraft and other objects. The Federal Aviation Administration (FAA) has determined that when these other objects are structures such as buildings, the buffer may be achieved by limiting aircraft operations, by limiting the location and height of these objects, or by a combination of these factors. Section 511 of the Federal Airport and Airway Improvement Act of 1982, states that as a condition precedent to approval of an airport development project, the U.S. Secretary of Transportation shall receive satisfactory written assurances that the aerial approaches to airports will be adequately cleared and

<sup>219</sup> 8 McQuillin Mun. Corp. § 25:3 (3d ed.).

protected by removing and preventing the establishment airport hazards, including height hazards. Zoning height ordinances are drafted to conform with the FAA prescribed height restrictions for the involved airport.<sup>220</sup>

### FAA HEIGHT RESTRICTIONS

(Frequencies)



$N = 128$

There was little variance in regard to FAA Height Restrictions between the successful and challenged developments. Four (4) of the sixty-five (65) developments identified as successful were subject to FAA Height Restrictions. Three (3) of the sixty-two (62) developments identified as challenged were subject to FAA Height Restrictions.

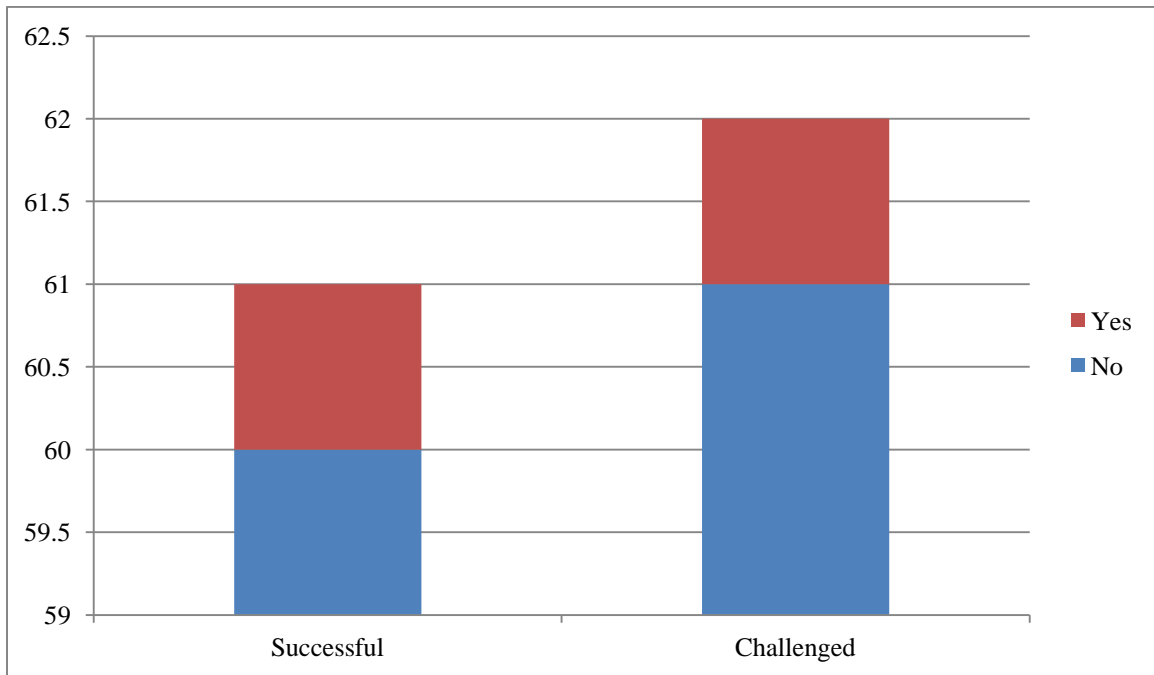
A basic purpose of zoning should be the solution of problems of the present and, so far as they can reasonably be anticipated, of the future. In planning for its future, a city may adopt comprehensive plans designed to avoid the problems that accompany contemporary trends in population growth by establishing a yearly growth rate for housing development which has the effect of limiting the influx of new residents.

<sup>220</sup> U.S. Dept. of Transportation Advisory Circular No. 150/5190-4A (12/14/1987).

Moreover, the stemming of urban encroachment on open spaces, particularly where premature and unnecessary, is a valid governmental objective which a municipality may advance through plans that restrict residential density. Growth controls must, however, be reasonable and nondiscriminatory.<sup>221</sup>

### GOVERNMENTAL GROWTH RESTRICTIONS

(Frequencies)



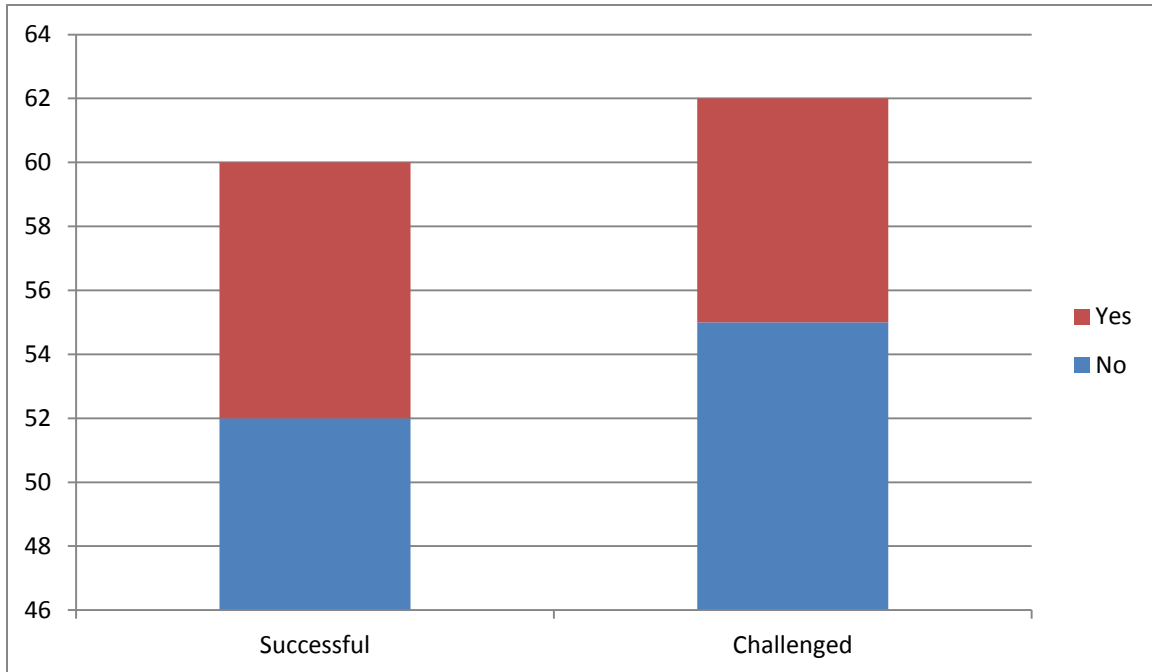
*N* = 128

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.

<sup>221</sup> 8 McQuillin Mun. Corp. § 25:30 (3d ed.).

## DENSITY REQUIREMENTS (INCLUDING CLUSTERING)

(Frequencies)



$N = 128$

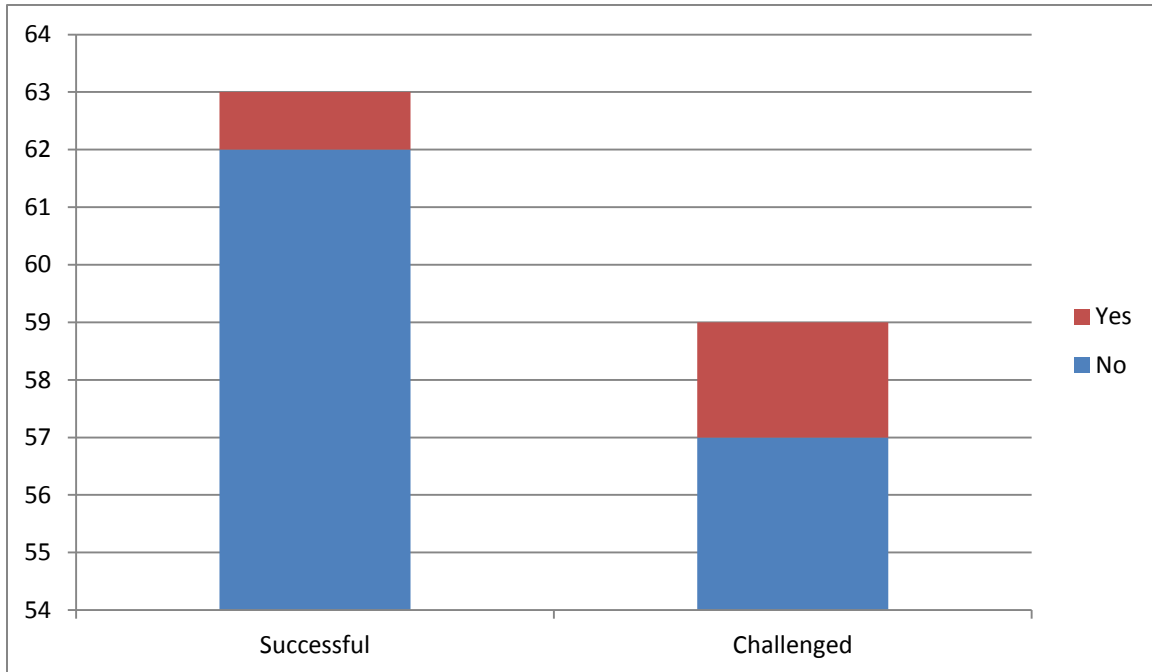
There was little variance in regard to Density Requirements (including clustering) between the successful and challenged developments. Eight (8) of the sixty (60) developments identified as successful were subject to Density Requirements (including clustering). Seven (7) of the sixty-two (62) developments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

The major force involved in raising the operating efficiency of buildings is the United States Green Building Council (USGBC). It developed building performance standards resulting in the Leadership in Energy and Environmental Design (LEED) Green Building Rating System, a checklist of prerequisites and credits for six categories, including siting, energy, materials, indoor air quality, water use, and innovation in design.<sup>222</sup>

<sup>222</sup> Joe Knisley, *Searching for Gold in Green Buildings*, Electrical Construction and Maintenance v. 106, no. 12, 22-24 (December 2007).

## 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.

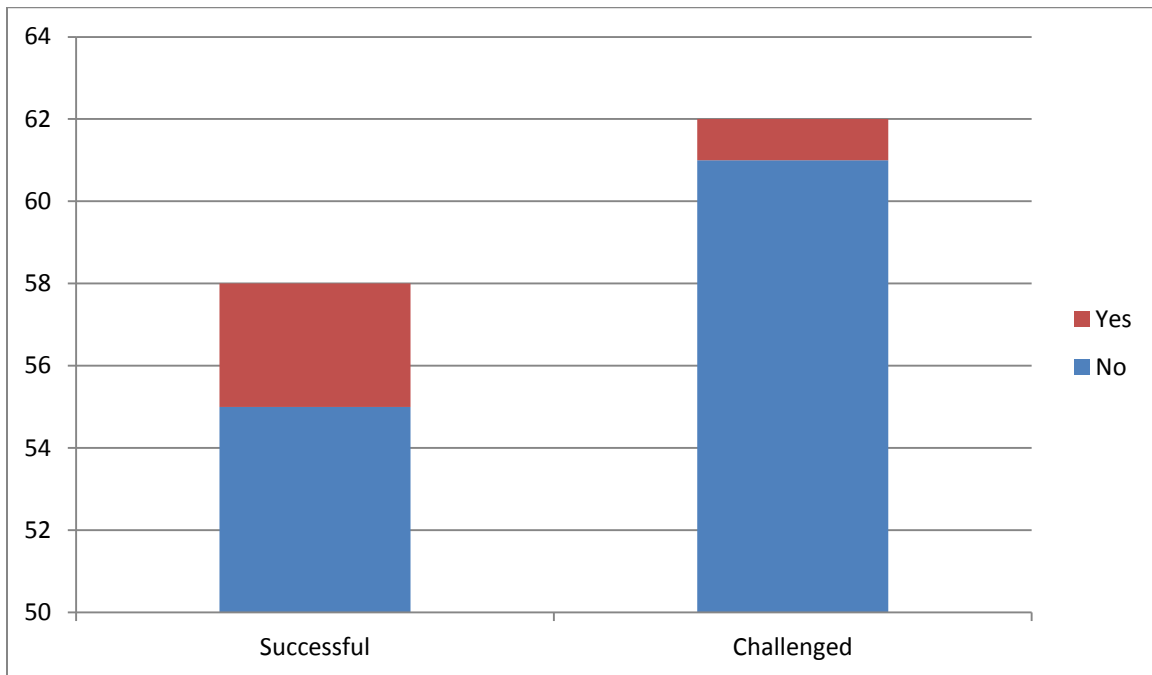
Policies that preserve natural resources for future generations are said to make life on earth sustainable. Smart growth contains three essential elements: policies to discourage the continued conversion of rural land at the edges of metropolitan regions, ways to make infill development and the restoration of older areas more attractive to investors and consumers and knitting the metropolitan region together with transportation systems that reduce dependency on automobile trips.<sup>223</sup> Form-based zoning substitutes

<sup>223</sup> Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation* 79, 289 (American Planning Association, Chicago, 2003).

the traditional differentiation of districts based on use with differentiation based on building form and thus does away with land use separation.<sup>224</sup>

### 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.

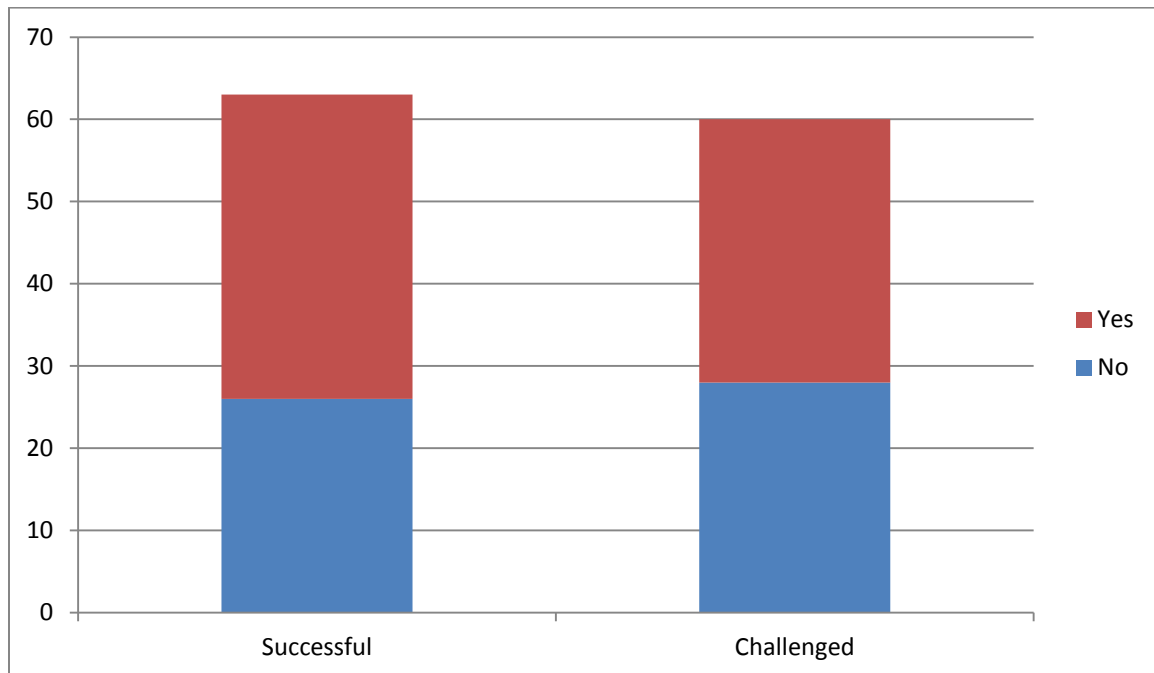
Traditional neighborhood design (TND) requirements are sometimes available as an alternative to the planned unit development process of conventional zoning. TND rules for development approval are spelled out in advance. Like a subdivision ordinance,

<sup>224</sup> 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).

TND rules specify street layout and width, block size and open space requirements. Like zoning, they specify the location for different building sizes and mixes of activities.<sup>225</sup>

### **LOCAL DEVELOPMENT/BUILDING DESIGN STANDARDS (TRADITIONAL NEIGHBORHOOD DESIGN)**

(Frequencies)



$N = 128$

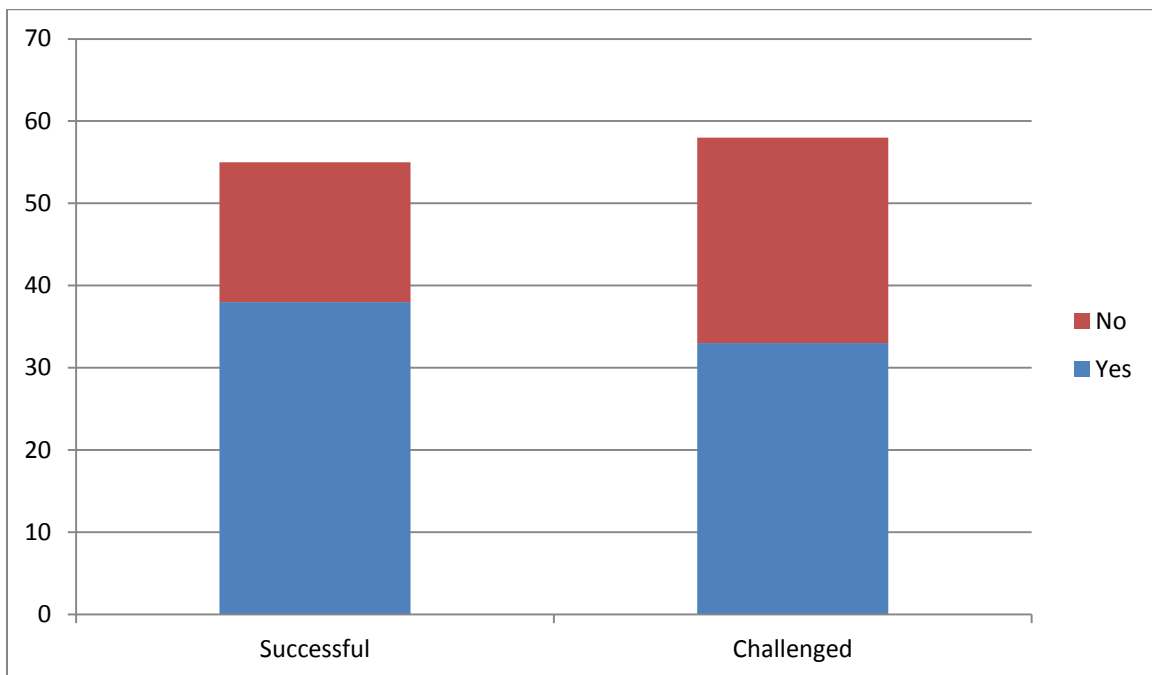
There was little variance in regard to Local Development/Building Design Standards (Traditional Neighborhood Design) between the successful and challenged developments. Thirty-seven (37) of the sixty-three (63) developments identified as successful were subject to Local Development/Building Design Standards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

<sup>225</sup> Jonathan Barnett, *Redesigning Cities: Principles, Practice, Implementation* 259 (American Planning Association, Chicago, 2003).

Covenants and deeds can make restrictions as to the use of property conveyed in addition to the restrictions imposed by zoning ordinances. Restrictions under contracts or deeds have private ends in view, and although they may in some instances be directed to secure the public welfare or the good of a residential or other property development, they are, nevertheless, privately conceived, controlled and directed.<sup>226</sup>

## 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.

Homeowner associations are generally found in single-family residential developments. They often provide members with various goods and services, such as

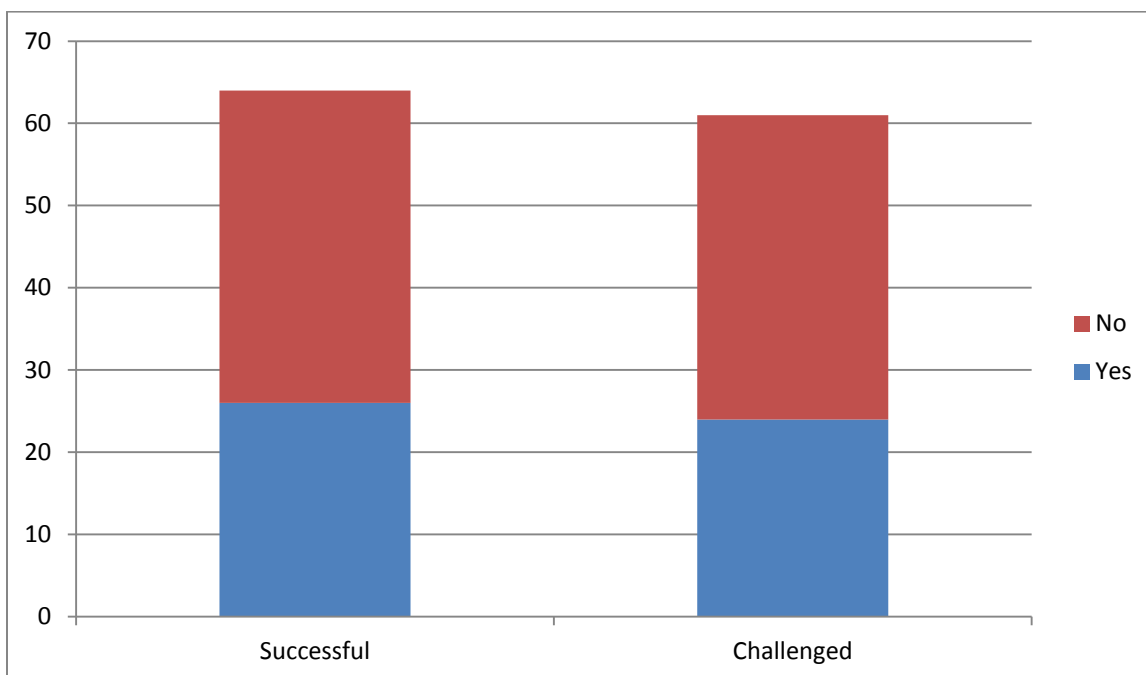
<sup>226</sup> 8 McQuillin Mun. Corp. § 25:10 (3d ed.).



street maintenance, snow removal, trash collection, and security patrols,<sup>227</sup> while imposing rules, sometimes in the form of restrictive covenants, controlling the use, maintenance and construction of member properties.<sup>228</sup>

### HOMEOWNERS' ASSOCIATIONS

(Frequencies)



$N = 128$

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

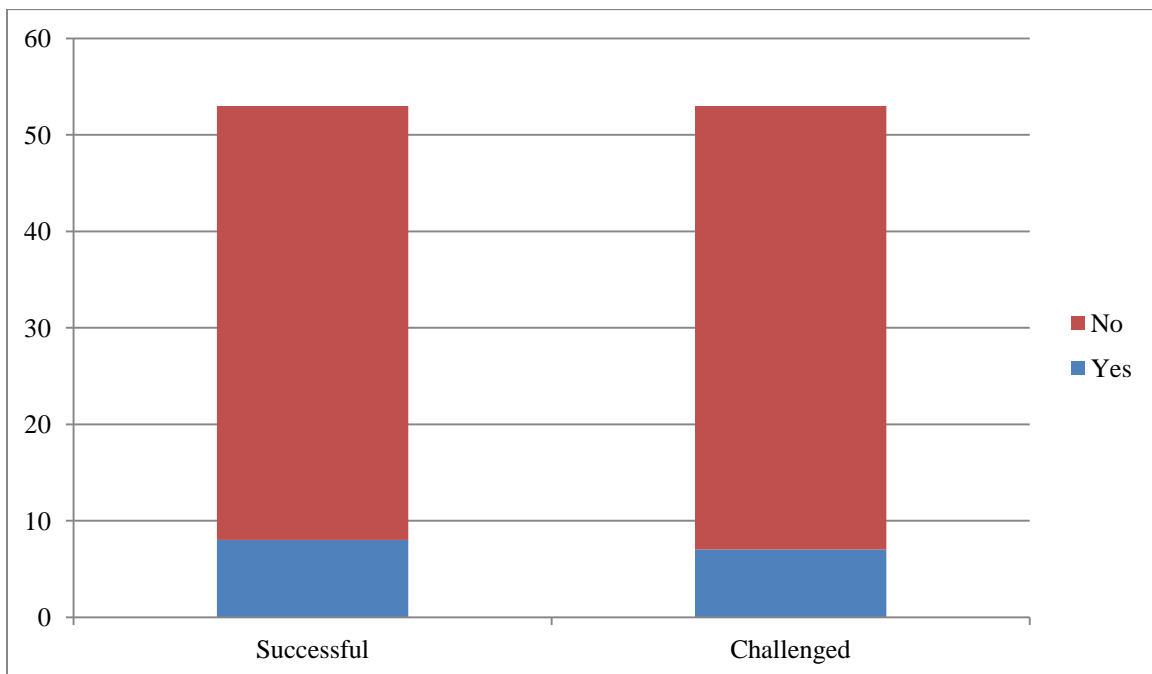
<sup>227</sup> Jeremy R. Groves, *All Together Now? An Empirical Study of the Voting Behaviors of Homeowner Association Members in St. Louis County*, *The Review of Policy Research* v. 23, no. 6, 1199-1200 (November 2006).

<sup>228</sup> John M. Coggeshall, *Symbols of Division: Plantations Along South Carolina's Coast*, *Home Cultures* v. 5, no. 1, 50-52 (March 2008).

What the Romans accomplished by private easement enforced by interdict is now often accomplished by Conditional Use Permits or Special Use Permits. A conditional use permit allows a property owner to put his or her property to a use that a zoning ordinance expressly permits when certain conditions have been met.<sup>229</sup> A special use permit in some states differs from a conditional use in that it involves governmental and public uses. But like a conditional use permit, it is issued for a use which a zoning ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the zoning ordinance exist.<sup>230</sup>

### CONDITIONAL USE PERMIT/SPECIAL USE PERMIT

(Frequencies)



$N = 128$

There was little variance in regard to Conditional Use Permits or Special Use Permits utilization between the successful and challenged developments. Eight (8) of the fifty-three (53) developments identified as successful utilized Conditional Use Permits or Special Use Permits. Seven (7) of the fifty-three (53) developments identified as challenged utilized Conditional Use Permits or Special Use Permits.

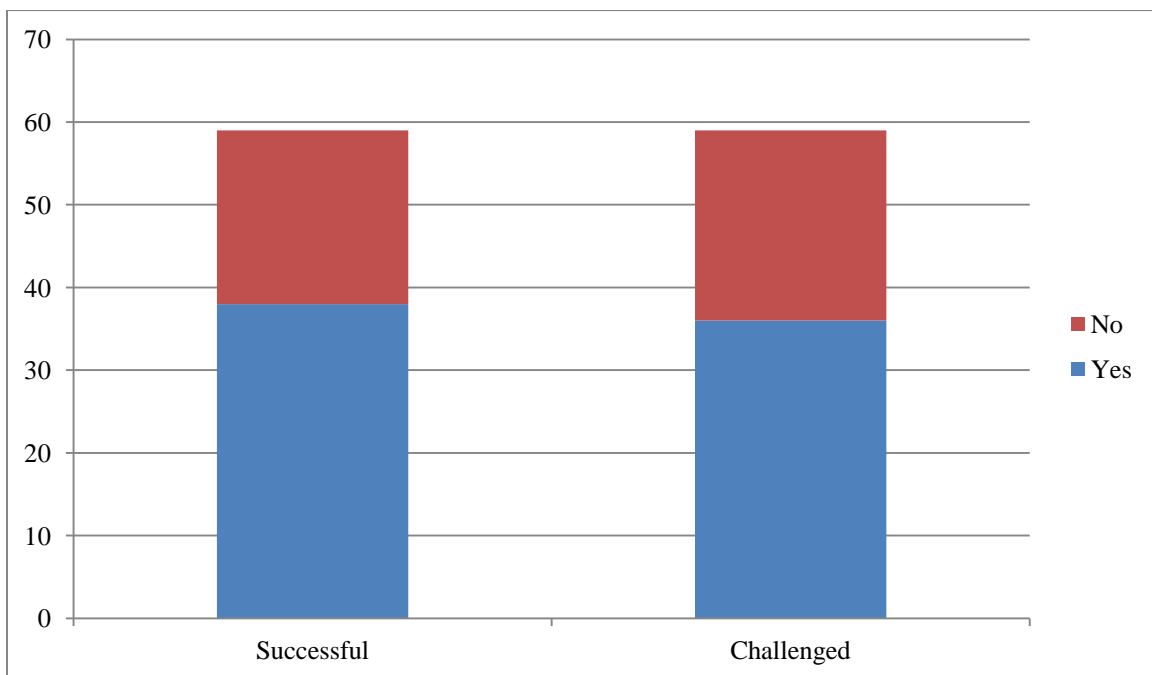
<sup>229</sup> 8 McQuillin Mun. Corp. § 25:81 (3d ed.).

<sup>230</sup> 8 McQuillin Mun. Corp. § 25:179.16 (3d ed.).

A planned unit development involves the development of land as a unit where it is desirable to apply more flexible regulations than those pertaining to other zoning classifications. The planned unit development scheme supports the zoning objectives of the community by permitting the development of large areas as a unit. In some cases planned unit developments may include residential and nonresidential commercial and industrial development within the same zoning district. 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.<sup>231</sup>

### 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

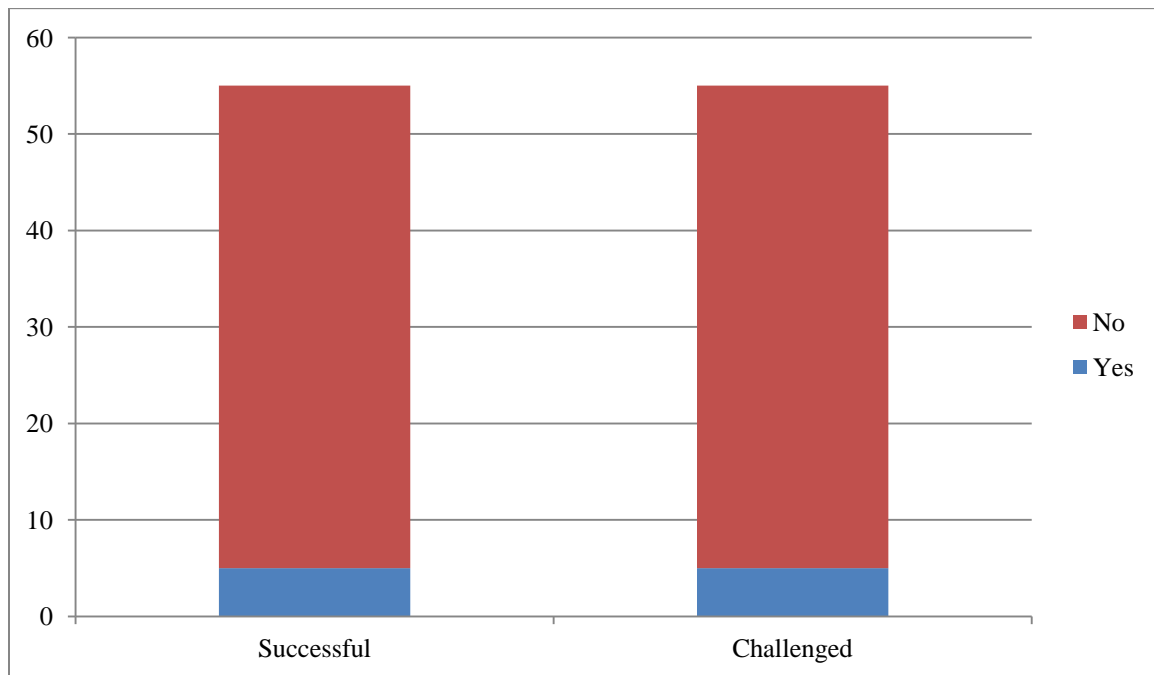
<sup>231</sup> 8 McQuillin Mun. Corp. § 25:101 (3d ed.).

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

Authorized variance was a common occurrence in Rome, as granted by municipal authority. There are two generally recognized types of variances, “use variances” and “area variances.” A “use variance” allows a landowner to engage in a use of the land that the zoning ordinance prohibits. An “area variance” involves a use permitted by the zoning ordinance but grants the landowner an exception from strict compliance with physical standards, such as setbacks, frontage requirements, height limitations and lot size restrictions.<sup>232</sup>

## VARIANCE

(Frequencies)



$N = 128$

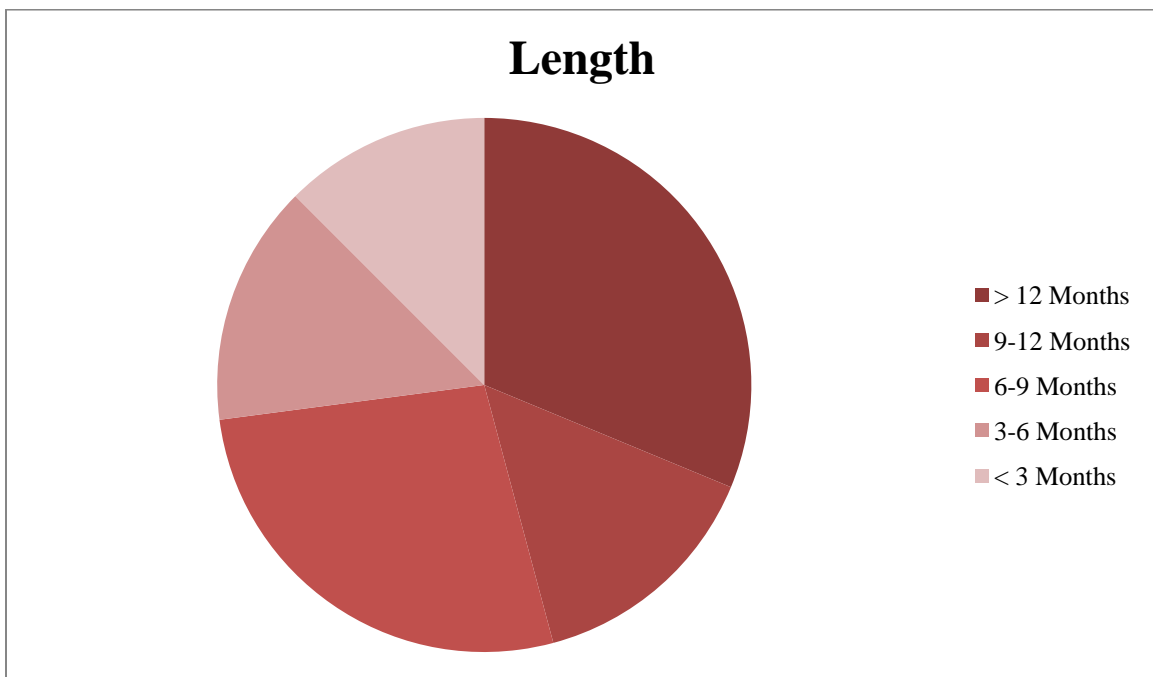
There was no variance in regard to variance utilization between the successful and challenged developments. A variance was utilized in five (5) of the fifty-five (55) developments identified as successful. A variance was utilized in five (5) of the fifty-five (55) developments identified as challenged.

<sup>232</sup> 8 McQuillin Mun. Corp. § 25:179.30 (3d ed.).

In addition to the processes themselves, it has been postulated that accompanying procedural “[d]elays increase holding costs, . . . can make scheduling deliveries and work by subcontractors extremely difficult . . . [and] can increase uncertainty and risk.”<sup>233</sup>

### PROCESS LENGTH FOR SUCCESSFUL DEVELOPMENTS

(Frequencies)

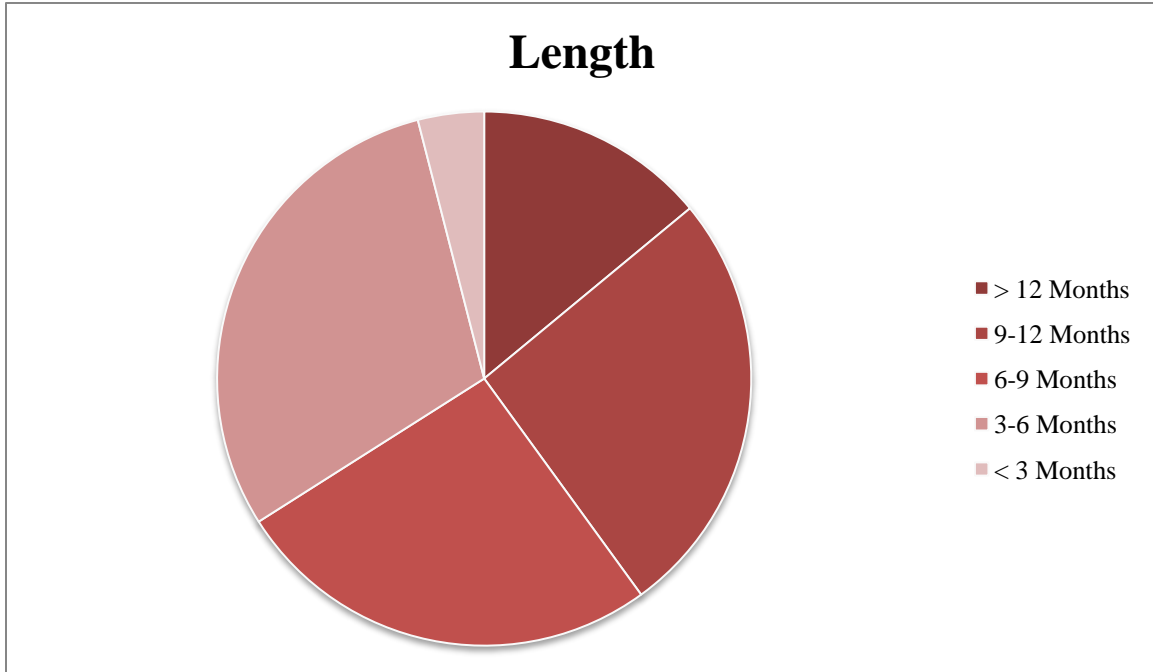


$N = 48$

<sup>233</sup> Raymond J. Burby, David Salvesen, & Michael Creed, *Encouraging Residential Rehabilitation with Building Codes: New Jersey's Experience*, *Journal of the American Planning Association* v. 72, no. 2, 184 (Spring 2006).

## PROCESS LENGTH FOR CHALLENGED DEVELOPMENTS

(Frequencies)



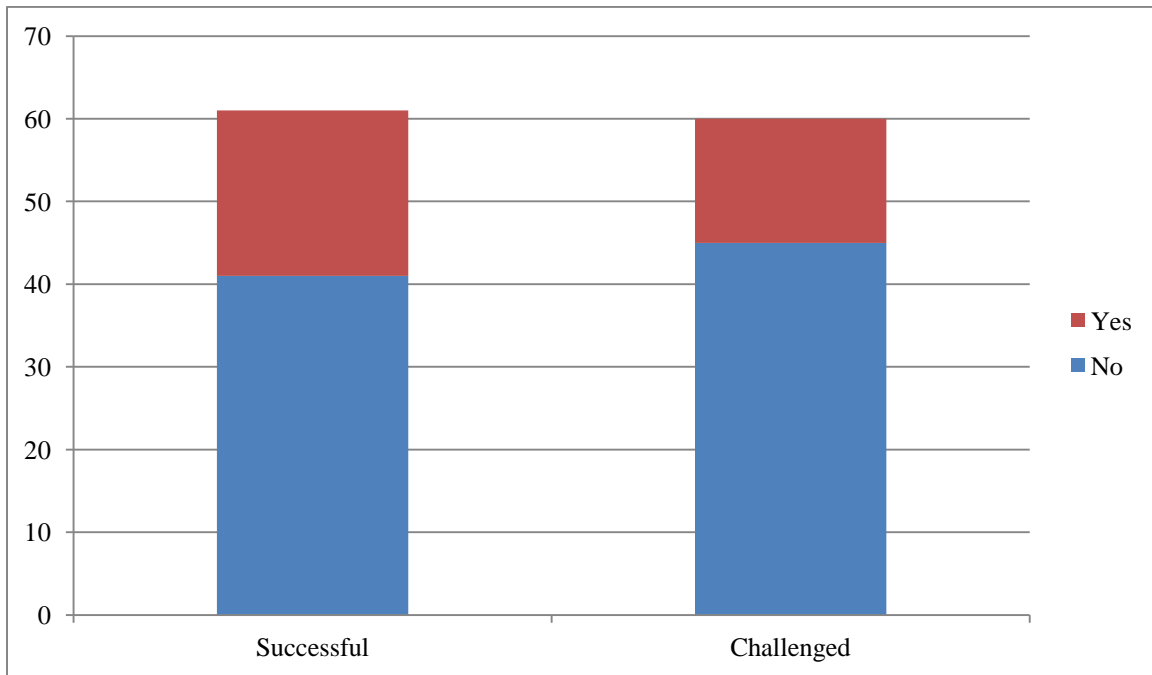
$N = 50$

In comparing the lengths of construction delay due to government process, the composite chart for challenged developments actually reflects less overall delay time than the chart for successful developments. For the successful developments, six (6) reported delays of less than three (3) months, seven (7) reported delays of three to six (3-6) months, thirteen (13) reported delays of six to nine (6-9) months, seven (7) reported delays of nine to twelve (9-12) months and fifteen (15) reported delays of greater than twelve (12) months. For the challenged developments, two (2) reported delays of less than three (3) months, fifteen (15) reported delays of three to six (3-6) months, thirteen (13) reported delays of six to nine (6-9) months, thirteen (13) reported delays of nine to twelve (9-12) months and seven (7) reported delays of greater than twelve (12) months.

Impediments to the site have been identified as major challenges to the development process. “The extent and duration of the decline in marketability and value of property relate to both the real and perceived risks associated with owning, financing, or using the property.”<sup>234</sup>

### DRAINAGE ISSUES

(Frequencies)



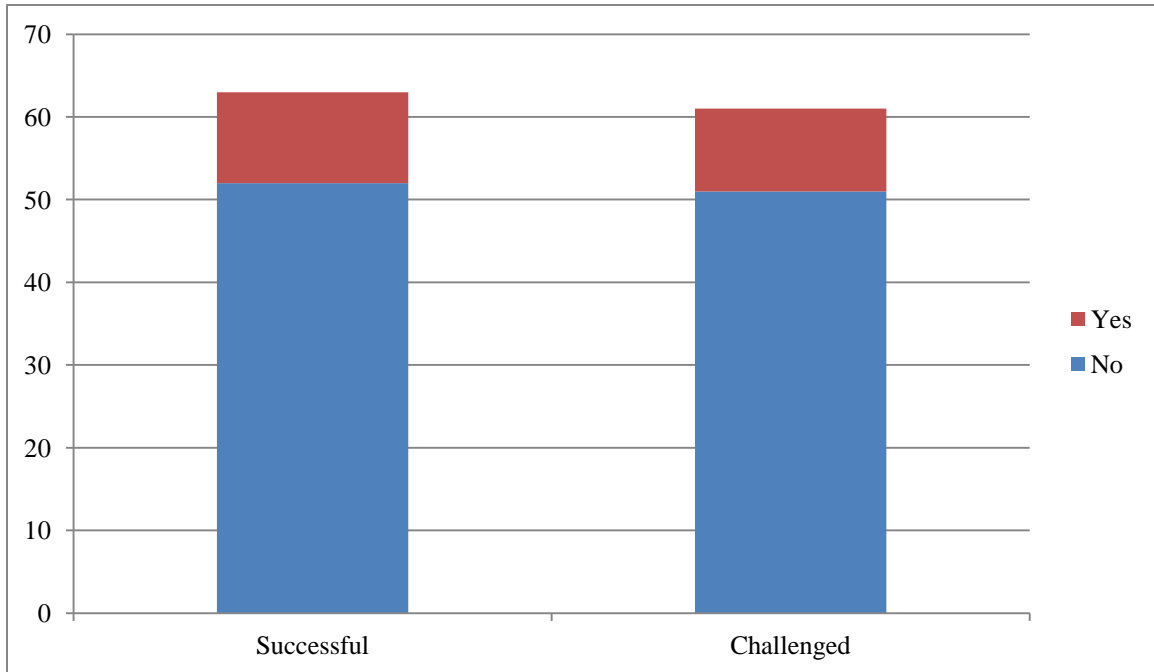
$N = 128$

There was little variance in regard to drainage issues between the successful and challenged developments. Twenty (20) of the sixty-one (61) developments identified as successful were subject to drainage issues. Only fifteen (15) of the sixty (60) developments identified as challenged were subject to drainage issues.

<sup>234</sup> Alan Reichert, *The Persistence of Contamination Effects: A Superfund Site Revisited [Uniontown, Ohio]*, *The Appraisal Journal* v. 67, no. 2, 126-35 (April 1999).

## ENVIRONMENTAL ISSUES

(Frequencies)



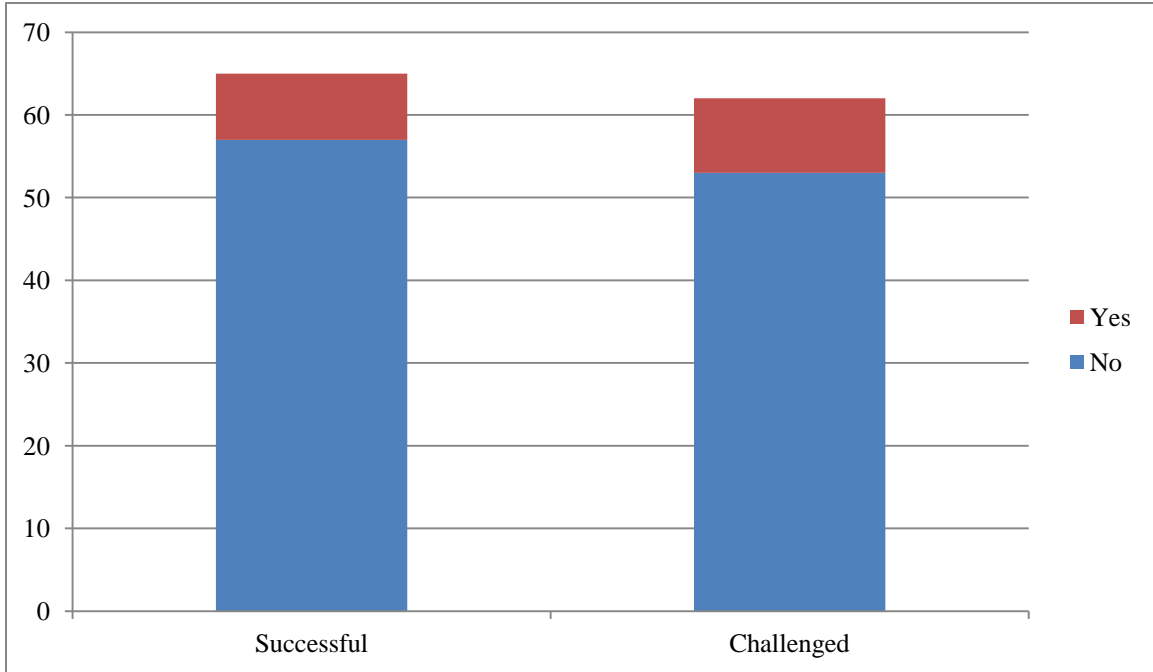
$N = 128$

There was little variance in regard to environmental issues between the successful and challenged developments. Eleven (11) of the sixty-three (63) developments identified as successful were subject to environmental issues. Ten (10) of the sixty-one (61) developments identified as challenged were subject to environmental issues.



## SITE BUILD ABILITY ISSUES

(Frequencies)

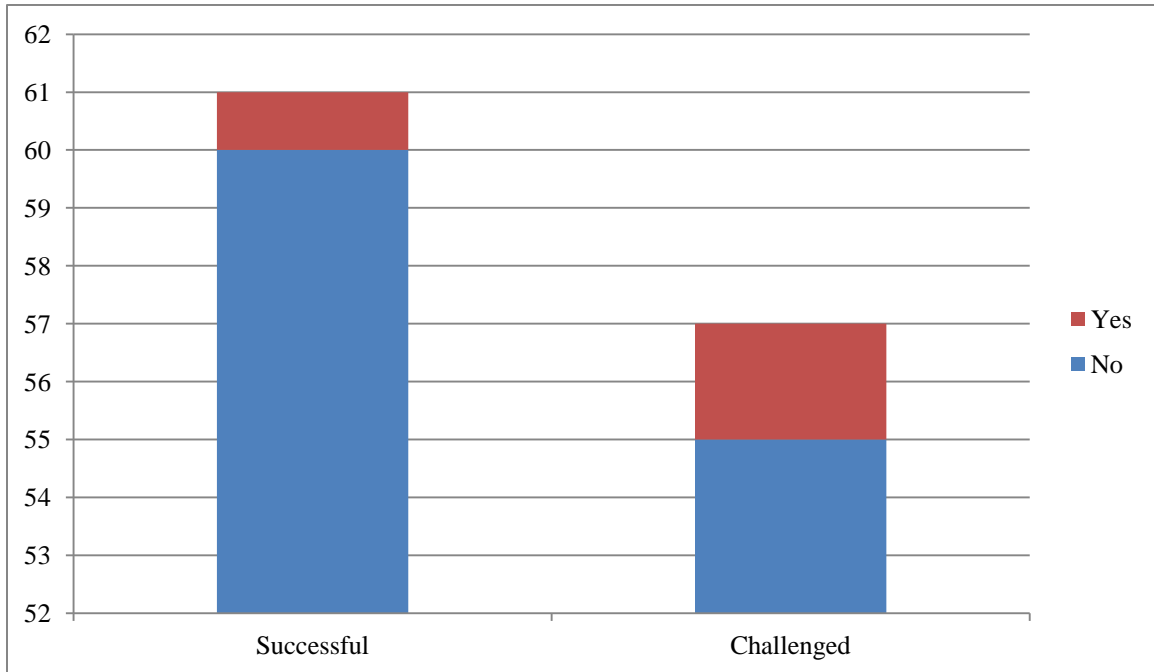


$N = 128$

There was little variance in regard to site build ability issues between the successful and challenged developments. Eight (8) of the sixty-five (65) developments identified as successful were subject to site build ability issues. Nine (9) of the sixty-two (62) developments identified as challenged were subject to site build ability issues.

## PROPERTY TITLE ISSUES

(Frequencies)

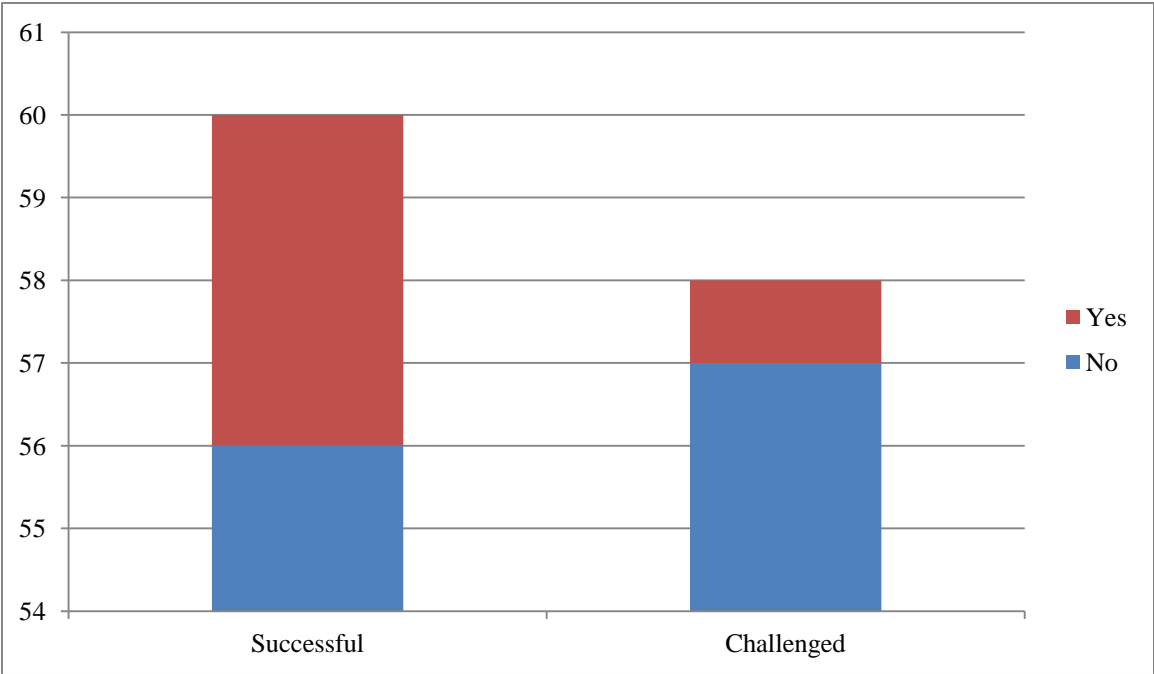


$N = 128$

There was little variance in regard to property title issues between the successful and challenged developments. One (1) of the sixty-one (61) developments identified as successful was subject to property title issues. Two (2) of the fifty-seven (57) developments identified as challenged were subject to property title issues.

# DEVELOPMENT CODE COMPLIANCE ISSUES

(Frequencies)

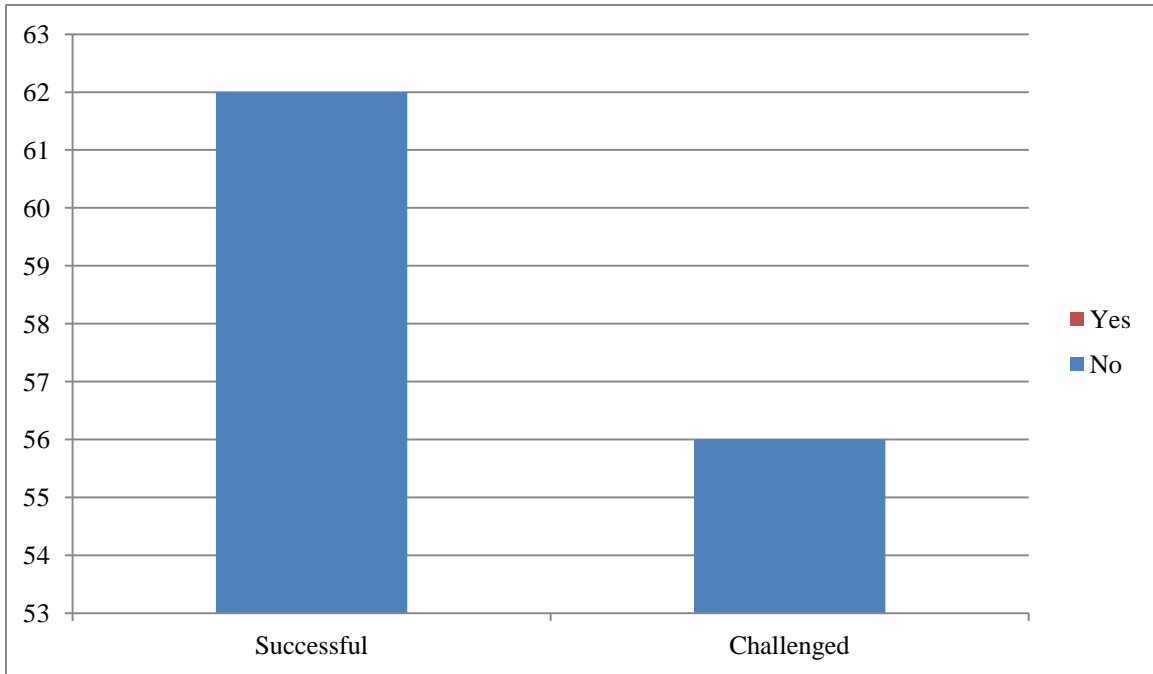


*N* = 128

There was little variance in regard to development code compliance issues between the successful and challenged developments. Four (4) of the sixty (60) developments identified as successful were subject to development code compliance issues. One (1) of the fifty-eight (58) developments identified as challenged was subject to development code compliance issues.

## LEED CERTIFICATION ISSUES

(Frequencies)

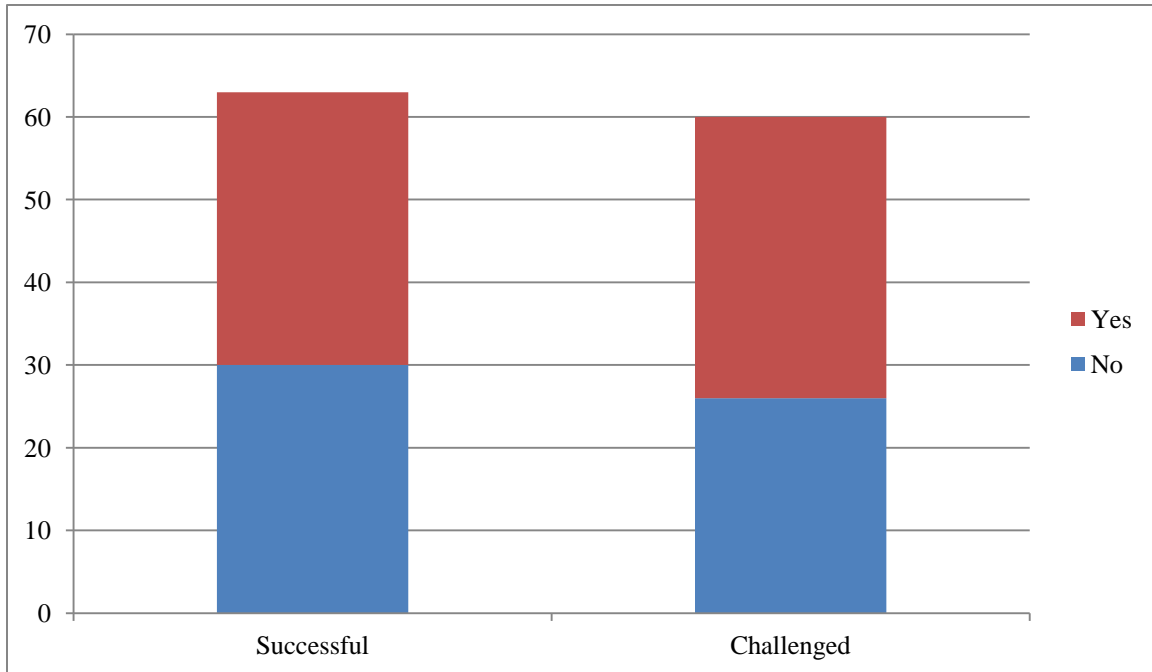


$N = 128$

No LEED Certification issues were reported in either the successful or challenged developments.

## EXTENSION OF UTILITIES TO TRACT

(Frequencies)

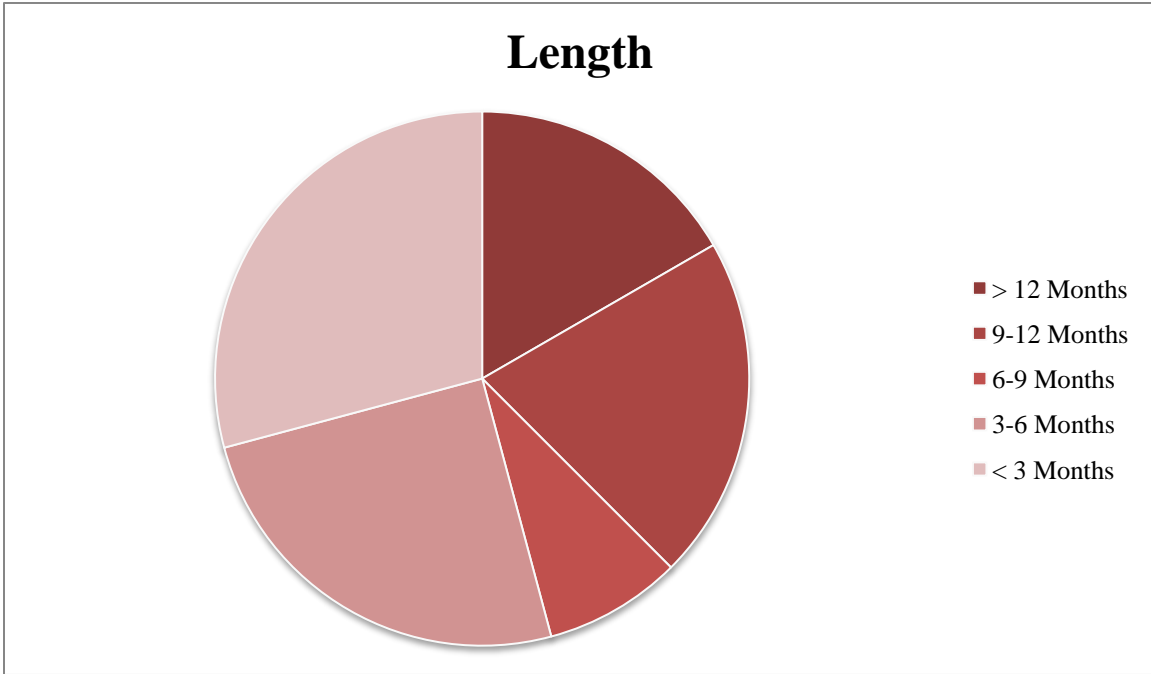


$N = 128$

There was little variance in regard to the need for extension of utilities to successful and challenged developments. Thirty-three (33) of the sixty-three (63) developments identified as successful were subject to the need for extension of utilities. Thirty-four (34) of the sixty (60) developments identified as challenged were subject to the need for extension of utilities.

# TOTAL ISSUE DELAY FOR SUCCESSFUL DEVELOPMENTS

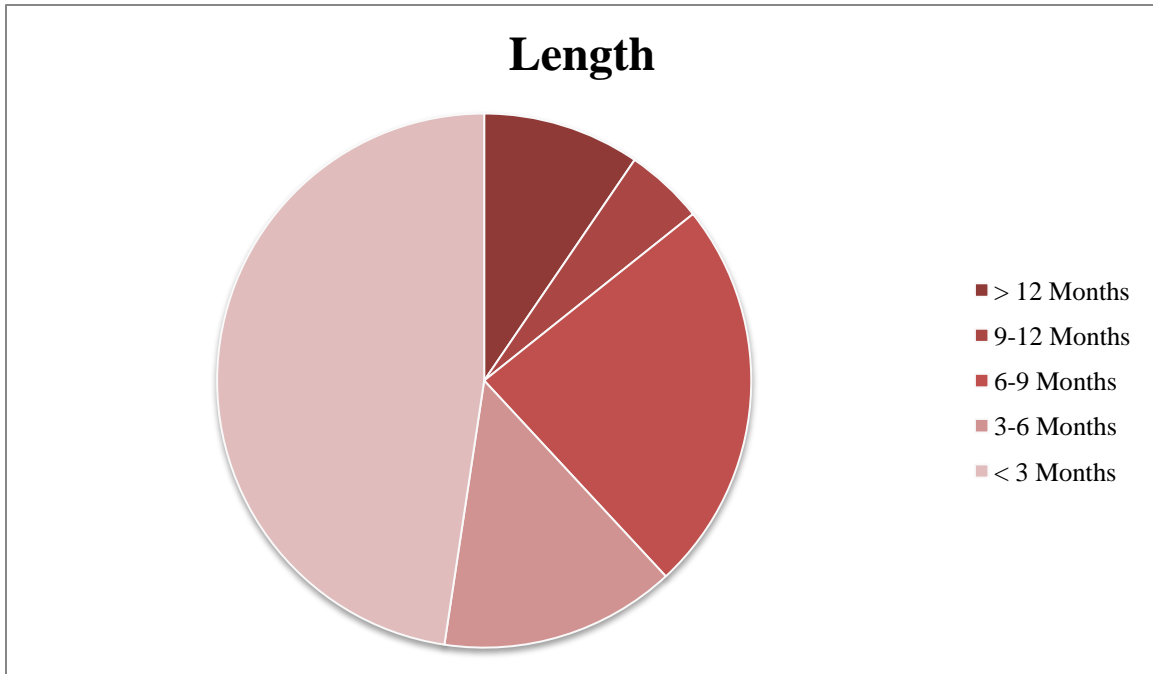
(Frequencies)



*N* = 24

## TOTAL ISSUE DELAY FOR CHALLENGED DEVELOPMENTS

(Frequencies)



$N = 21$

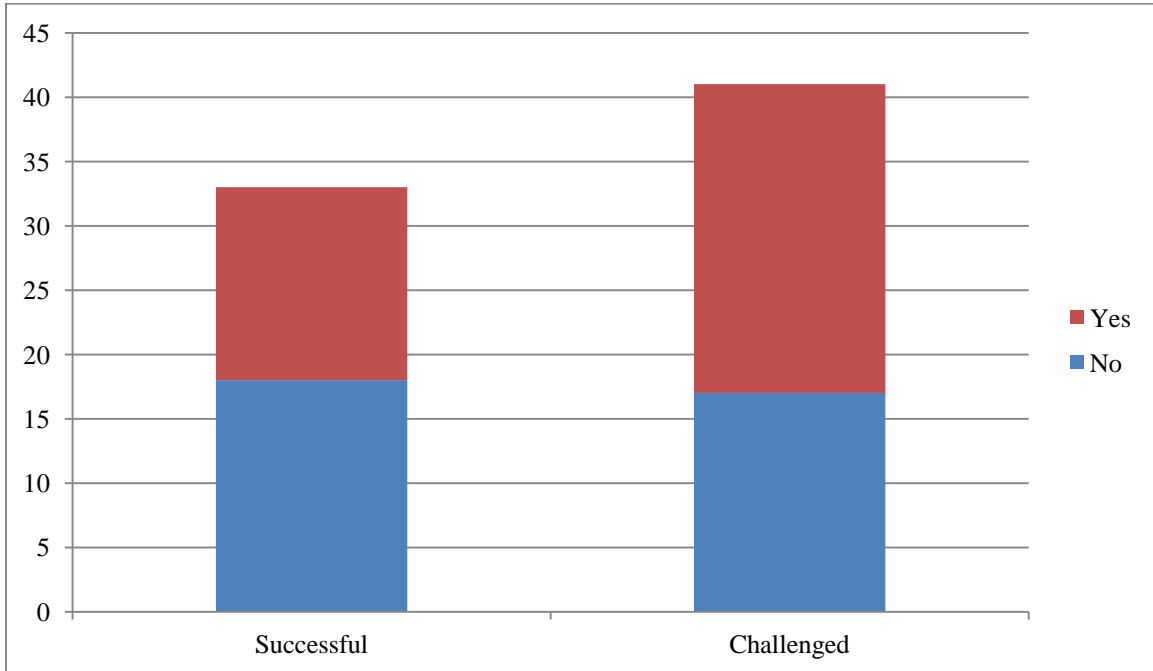
In comparing the lengths of construction delay due to impediments to the site, the composite chart for challenged developments actually reflects less overall delay time than the chart for successful developments. For the successful developments, seven (7) reported delays of less than three (3) months, six (6) reported delays of three to six (3-6) months, two (2) reported delays of six to nine (6-9) months, five (5) reported delays of nine to twelve (9-12) months and four (4) reported delays of greater than twelve (12) months. For the challenged developments, ten (10) reported delays of less than three (3) months, three (3) reported delays of three to six (3-6) months, five (5) reported delays of six to nine (6-9) months, one (1) reported delays of nine to twelve (9-12) months and two (2) reported delays of greater than twelve (12) months.

“Providing water supply, wastewater disposal, garbage collection, and other services to new developments can be expensive, and existing residents are understandably reluctant to increase their own tax burden to underwrite the infrastructure

needs of their new neighbors.”<sup>235</sup> In that regard, some local governments have taken a hard line approach by demanding infrastructure guarantees while other local governments have countered with public financing and incentives.

### DEVELOPMENT/INFRASTRUCTURE GUARANTEE REQUIREMENT

(Frequencies)



$N = 128$

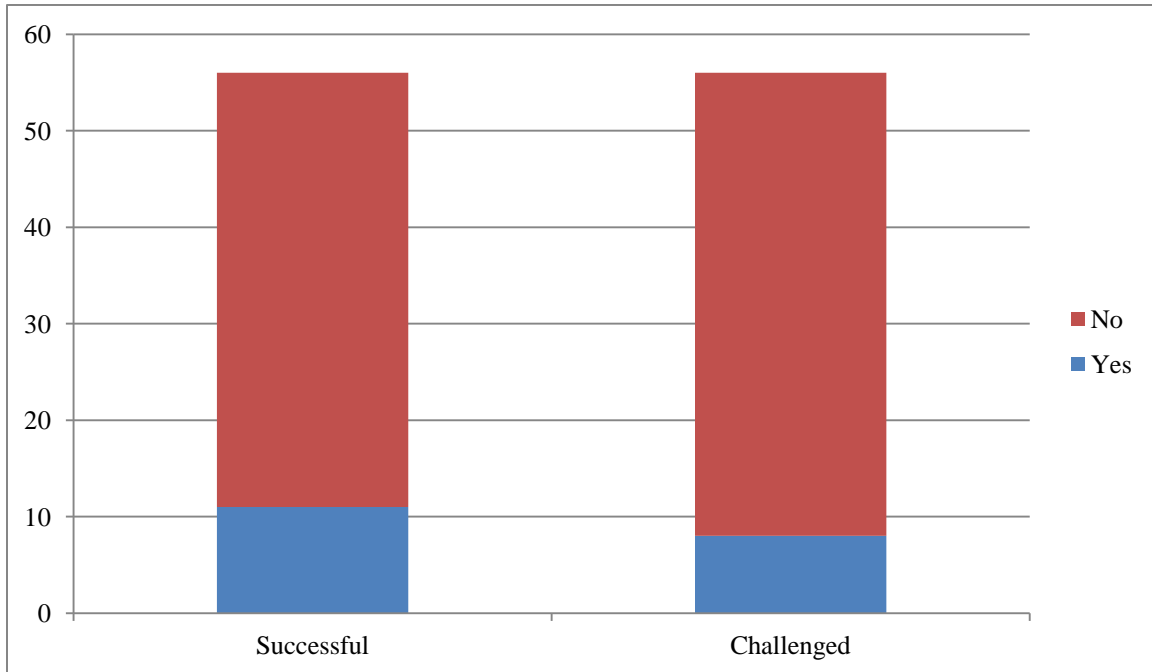
There was some variance in regard to Development/Infrastructure Guarantee Requirements between the successful and challenged developments. Fifteen (15) of the thirty-three (33) developments identified as successful were subject to Development/Infrastructure Guarantee Requirements. Twenty-four (24) of the forty-one (41) developments identified as challenged were subject to Development/ Infrastructure Guarantee Requirements.

<sup>235</sup> Valerie P. Going, Jason M. Gorrie & Michael P. Smith, *Reuse to Grow*, Water Environment & Technology v. 18, no. 2, 36-38 (February 2006).



## 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.

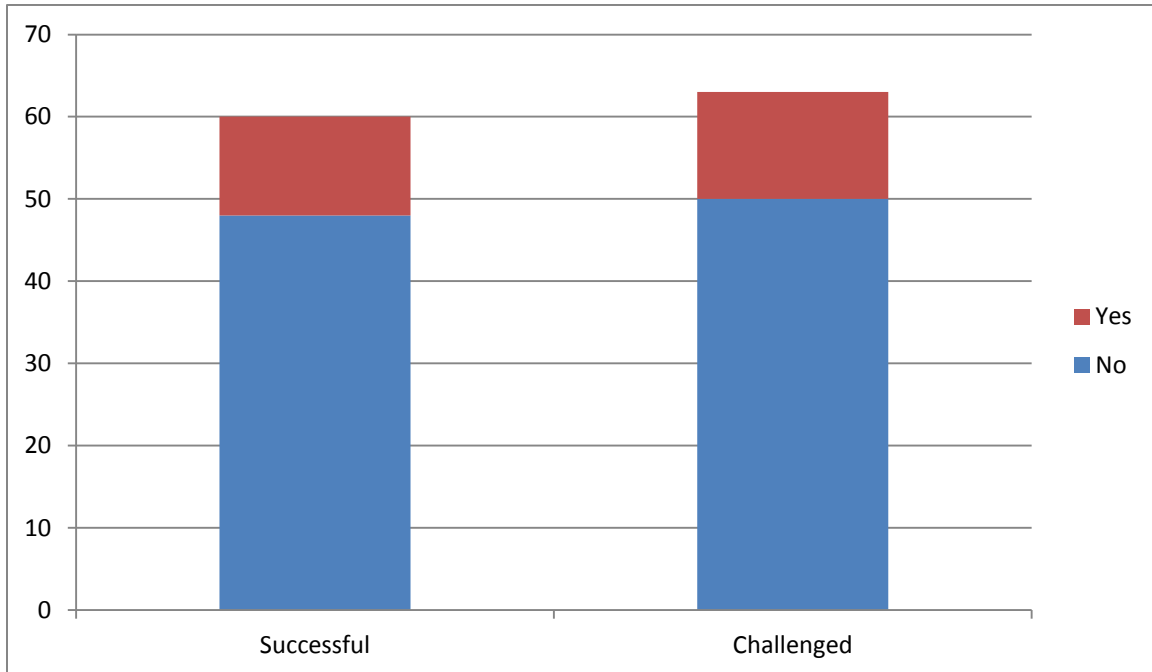
A special benefit district is established to finance infrastructure that provides "special benefits" to a small group of people or property rather than general benefits to an entire city, community or region. A special benefit district implements an infrastructure financing arrangement so that those who benefit from a facility pay for it.<sup>236</sup>

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<sup>236</sup> Thomas P. Snyder & Michael A. Stegman, *Paying for Growth: Using Development Fees to Finance Infrastructure* 63 (Urban Land Institute, Washington, D.C. 1987).

## SPECIAL ASSESSMENTS/TAXES/FEEES

(Frequencies)



$N = 128$

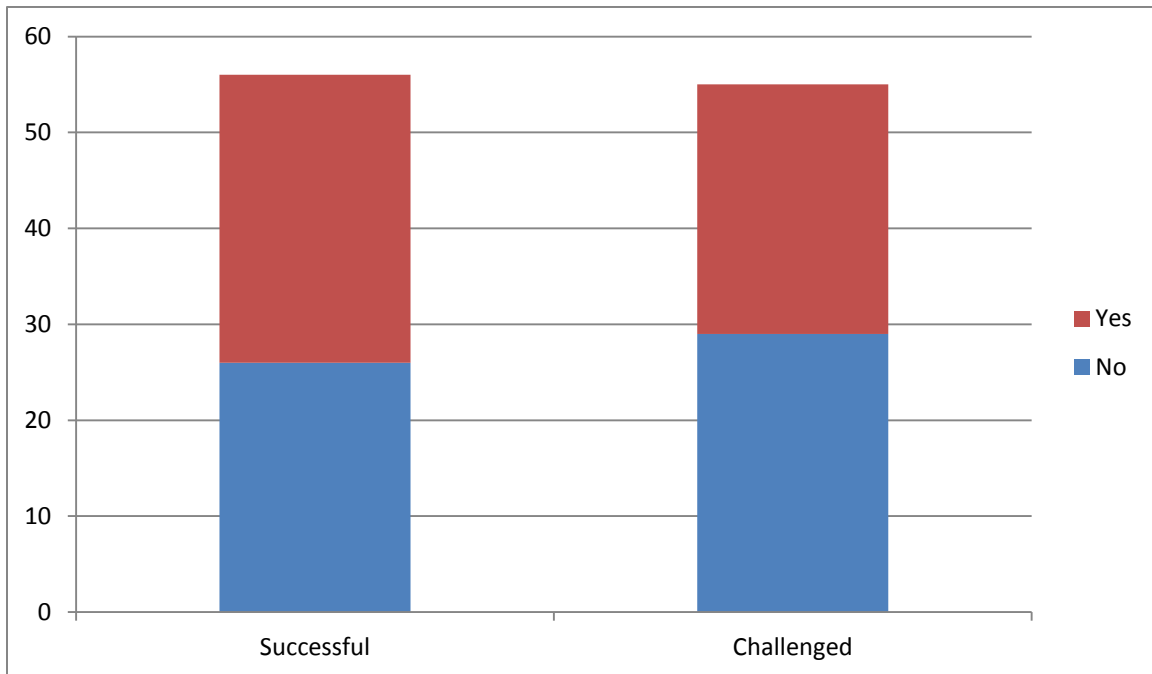
There was little variance in regard to Special Assessments/Taxes/Fees between the successful and challenged developments. Twelve (12) of the sixty (60) developments identified as successful were subject to Special Assessments/Taxes/Fees. Thirteen (13) of the sixty-three (63) developments identified as challenged were subject to Special Assessments/Taxes/Fees.

Exactions and development fees are the most common methods for financing the public infrastructure which is necessary for the development and usually externally (off-site) located. Dedications and exactions consist of land and facilities built by developers and dedicated to the city, while development fees, such as impact fees and payments in lieu of, consist of charges imposed on new developments as regulations or taxes.<sup>237</sup>

<sup>237</sup> Thomas P. Snyder & Michael A. Stegman, *Paying for Growth: Using Development Fees to Finance Infrastructure* 73 (Urban Land Institute, Washington, D.C. 1987).

## IMPACT FEES /DEDICATIONS/PAYMENTS IN LIEU OF DEDICATIONS

(Frequencies)



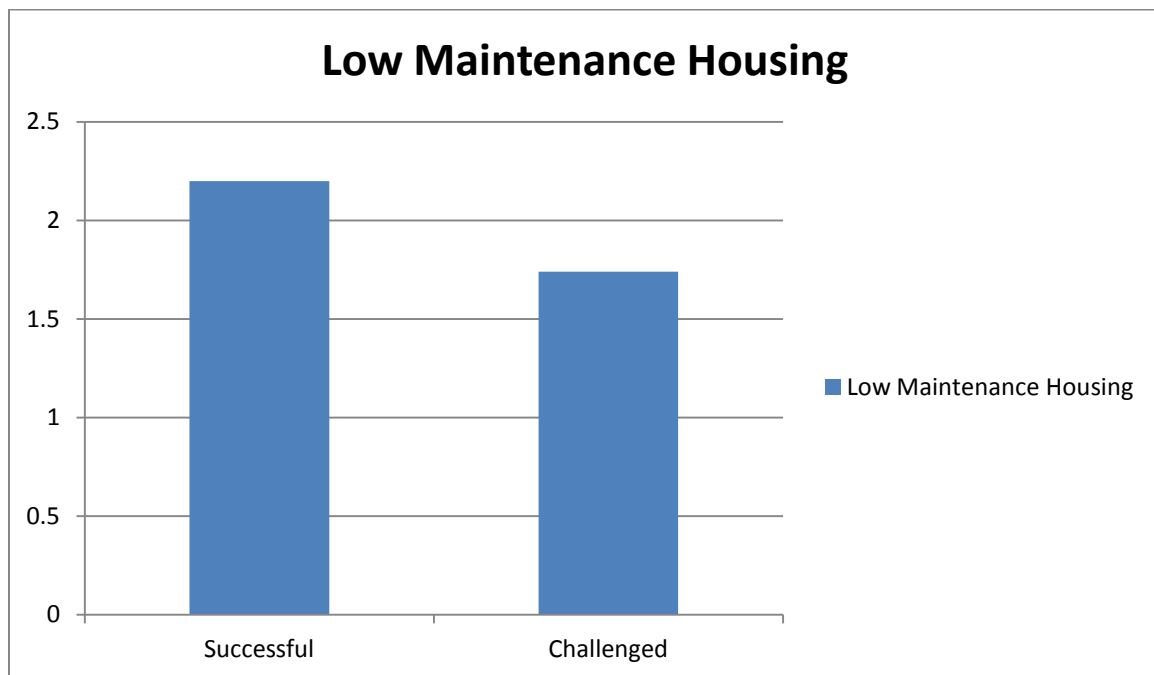
$N = 128$

There was little variance in regard to Impact Fees /Dedications/Payments In Lieu Of Dedications between the successful and challenged developments. Thirty (30) of the fifty-six (56) developments identified as successful were subject to Impact Fees /Dedications/Payments In Lieu Of Dedications. Twenty-six (26) of the fifty-five (55) developments identified as challenged were subject to Impact Fees /Dedications/Payments In Lieu Of Dedications.

With a lack of variance generally found in the governmental development-related practices in relation to successful and challenged developments, attention is now turned to the historically identified driving forces of Convenience, Quality of Life and Safety/Security.

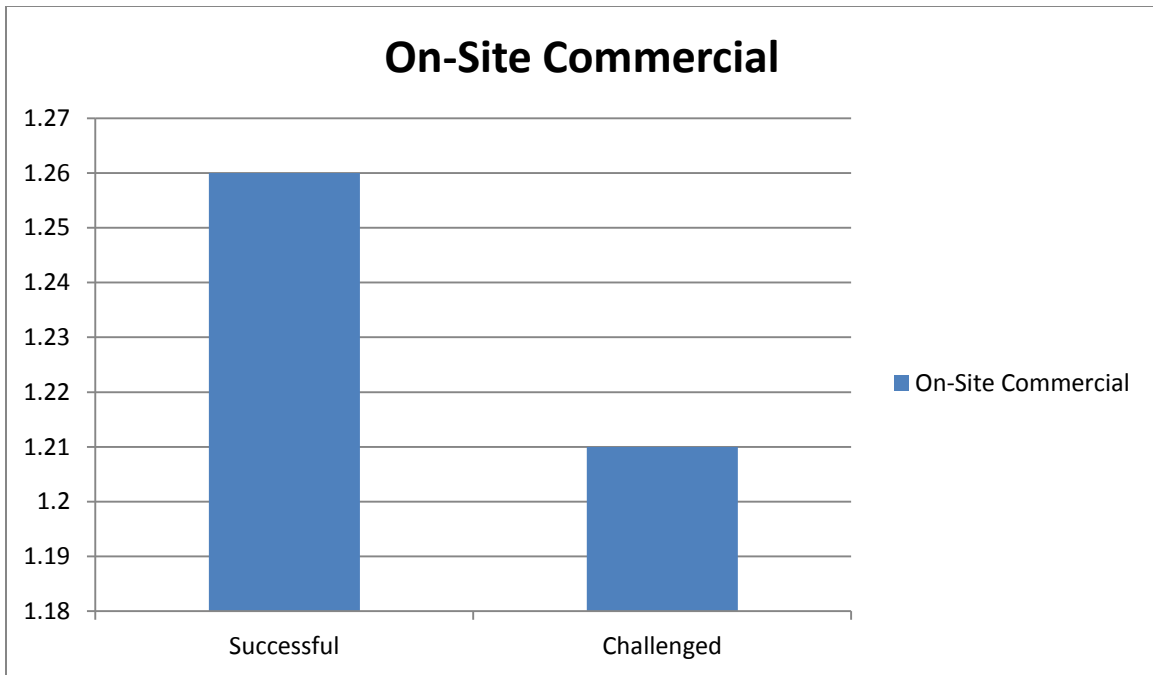
## CONVENIENCE

Convenience is represented by a number of somewhat disparate items and their connection with the development. Some items are specific to residential development: Low Maintenance Housing; On-Site Commercial Development; In-Home Health Services; and In-Home Food Services. Some items are both commercially and residentially applicable: Public Transit Access; Street Grid Access; Highway Access; and On-Site Parking.



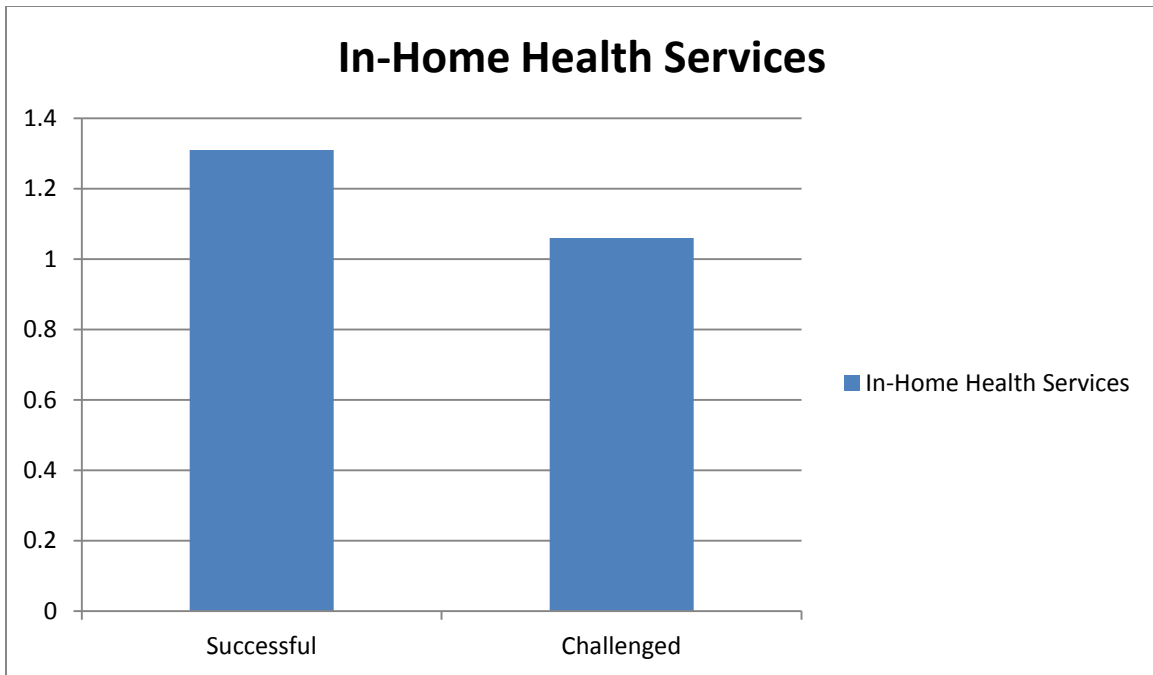
*N* = 69

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.



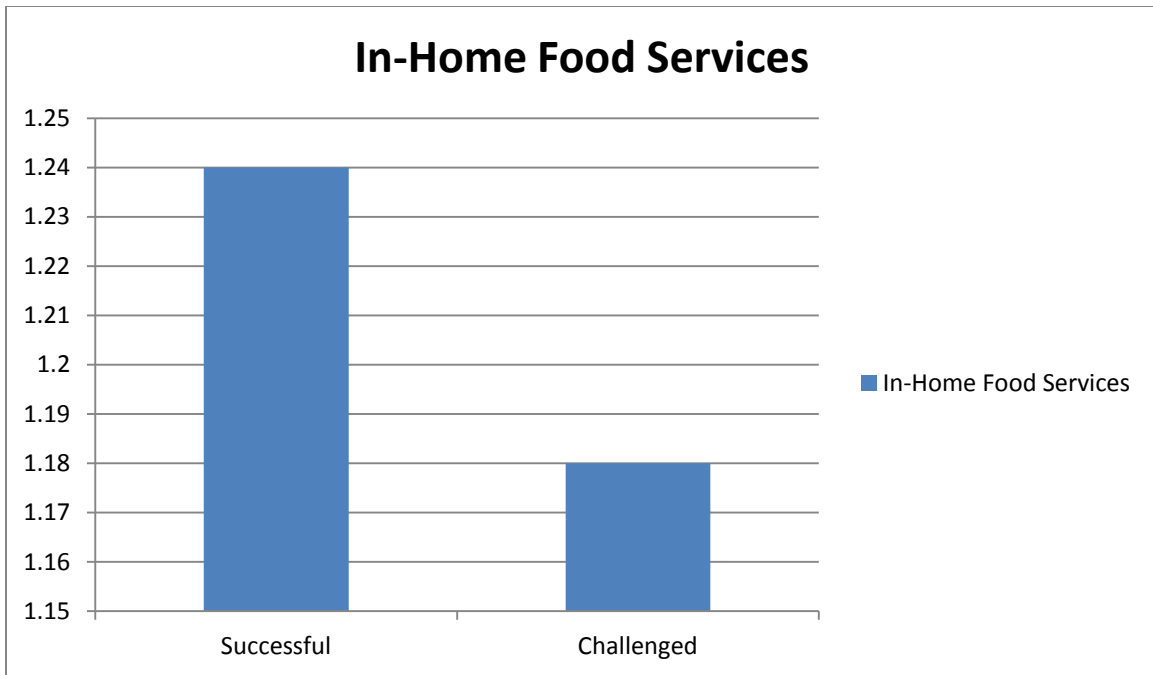
*N = 69*

On-Site Commercial 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, On-Site Commercial numbers reflected a mean score in the minimally present range of 1.26 for the successful developments, while reflecting a minimally present mean score of 1.21 for the challenged developments.



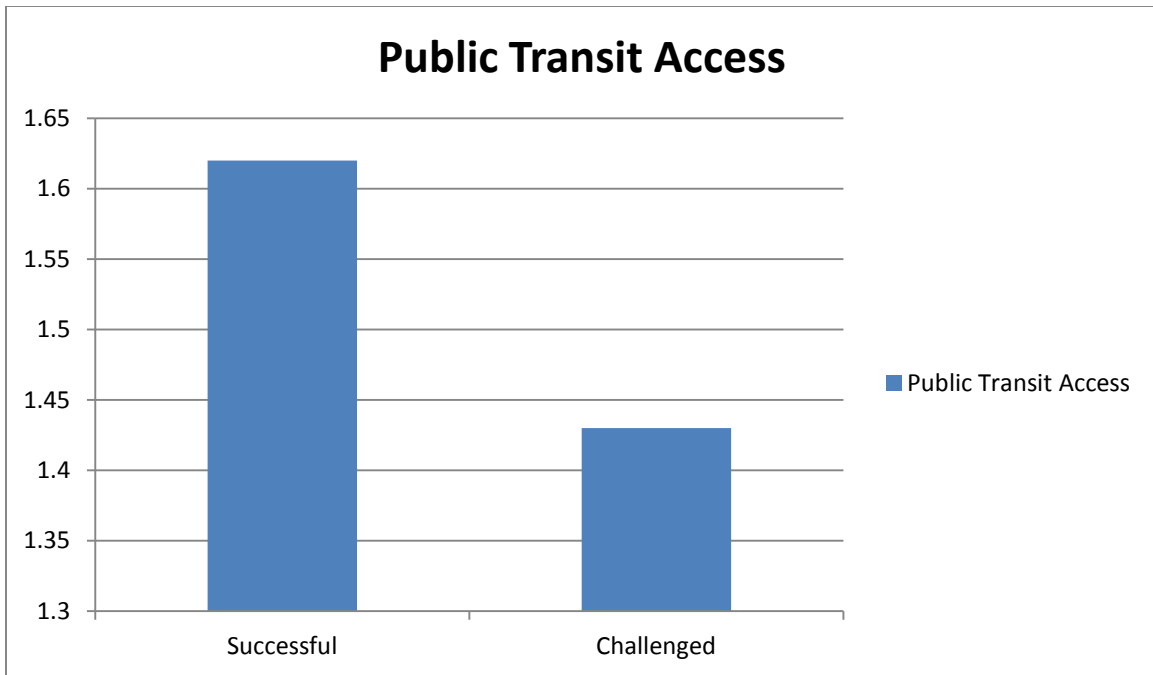
*N* = 69

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.



*N* = 69

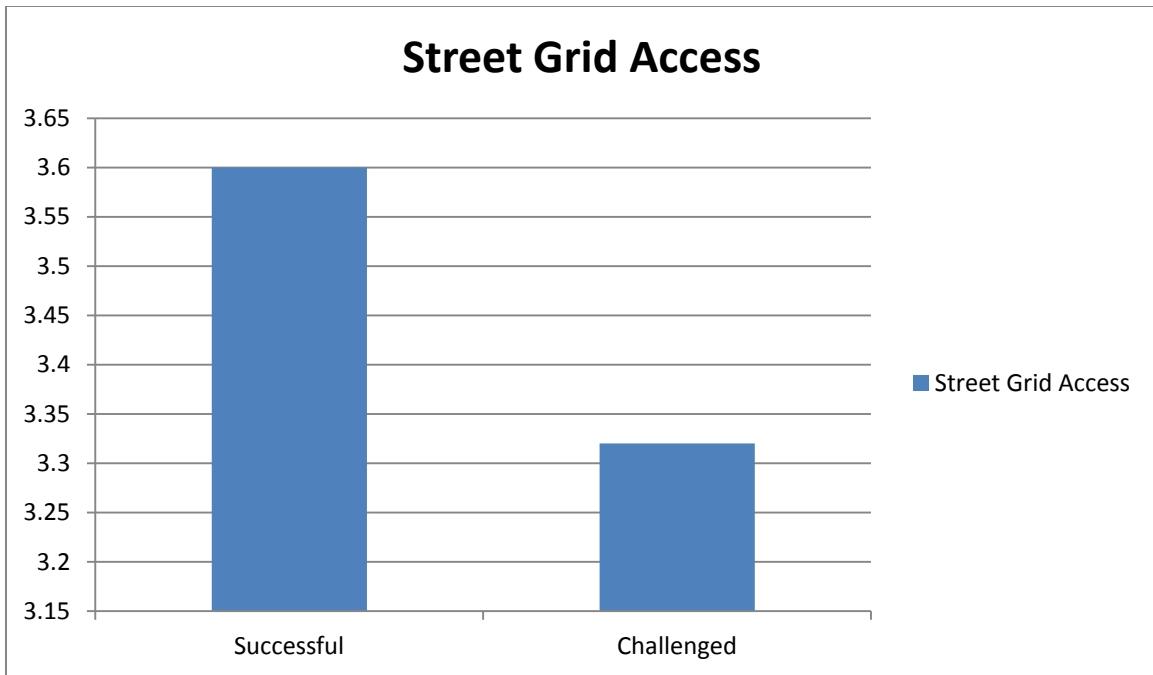
In-Home Food Services numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present receives a one (1), Minimally Present receives a two (2), Moderately Present receives a three (3), Substantially Present receives a (4) and Extremely Present 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.



*N* = 128

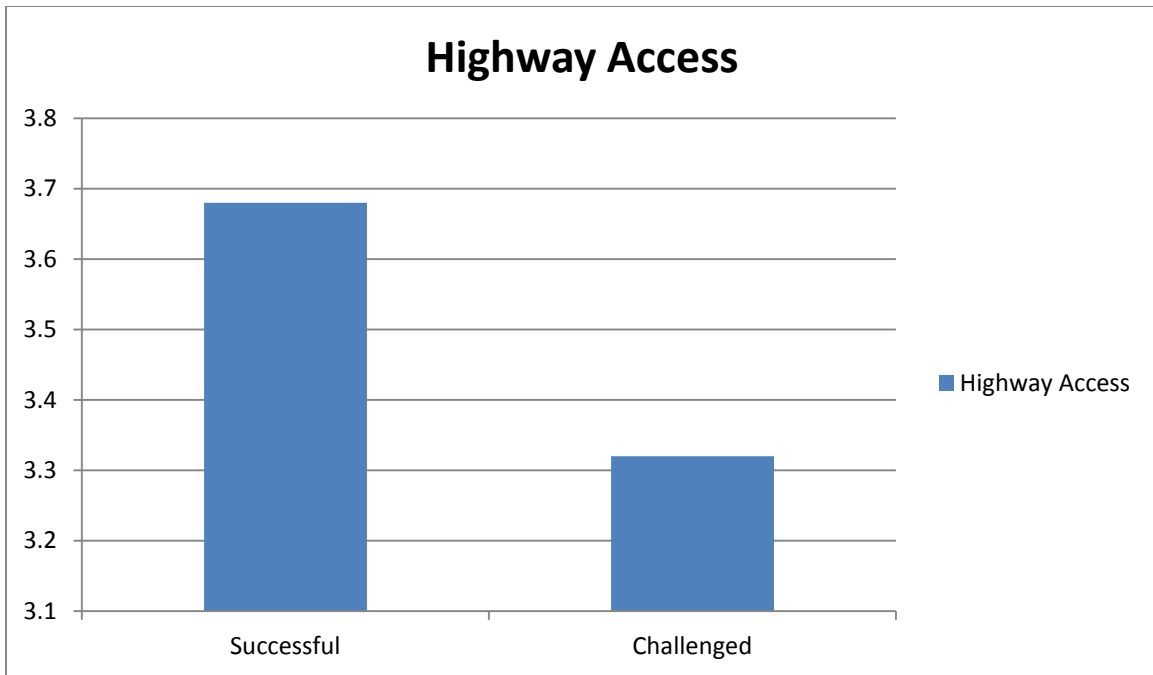
Public Transit Access numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present receives a one (1), Minimally Present receives a two (2), Moderately Present receives a three (3), Substantially Present receives a (4) and Extremely Present receives a five (5). As reflected in the foregoing chart, Public Transit Access numbers reflected a mean score in the minimally present range of 1.62 for the successful developments, while reflecting a minimally present mean score of 1.43 for the challenged developments.





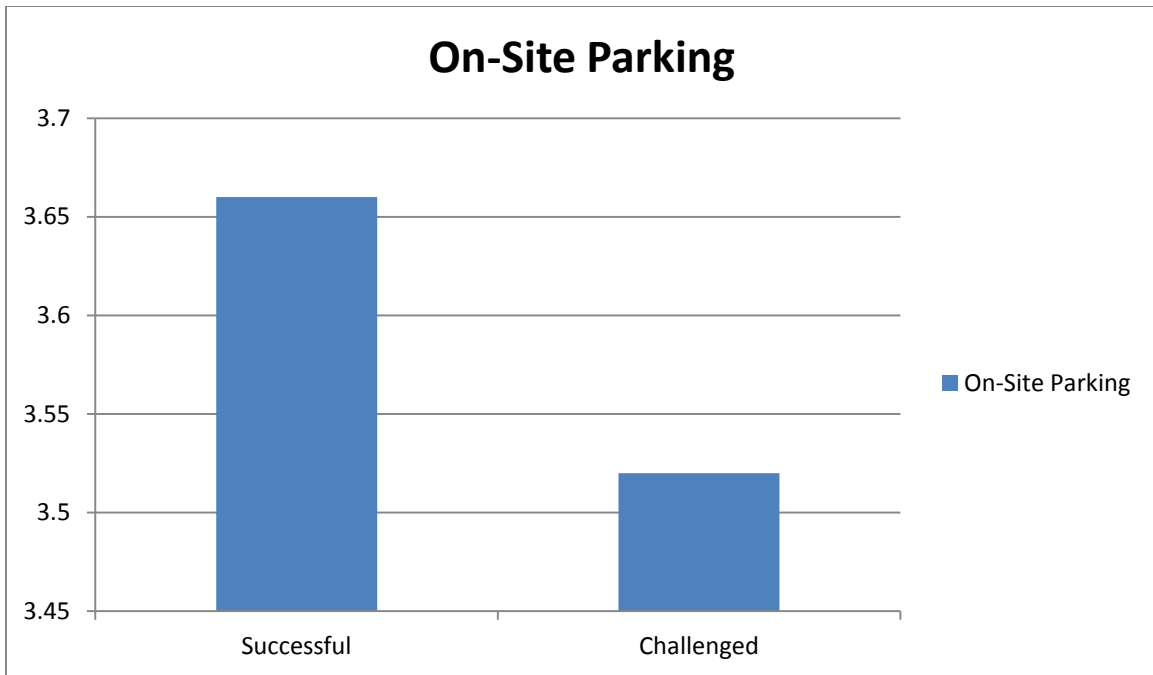
*N* = 128

Street Grid Access 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, Street Grid Access numbers reflected a mean score in the substantially present range of 3.6 for the successful developments, while reflecting a substantially present mean score of 3.32 for the challenged developments.



*N* = 128

Highway Access 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, Highway Access numbers reflected a mean score in the substantially present range of 3.68 for the successful developments, while only reflecting a substantially present mean score of 3.32 for the challenged developments.

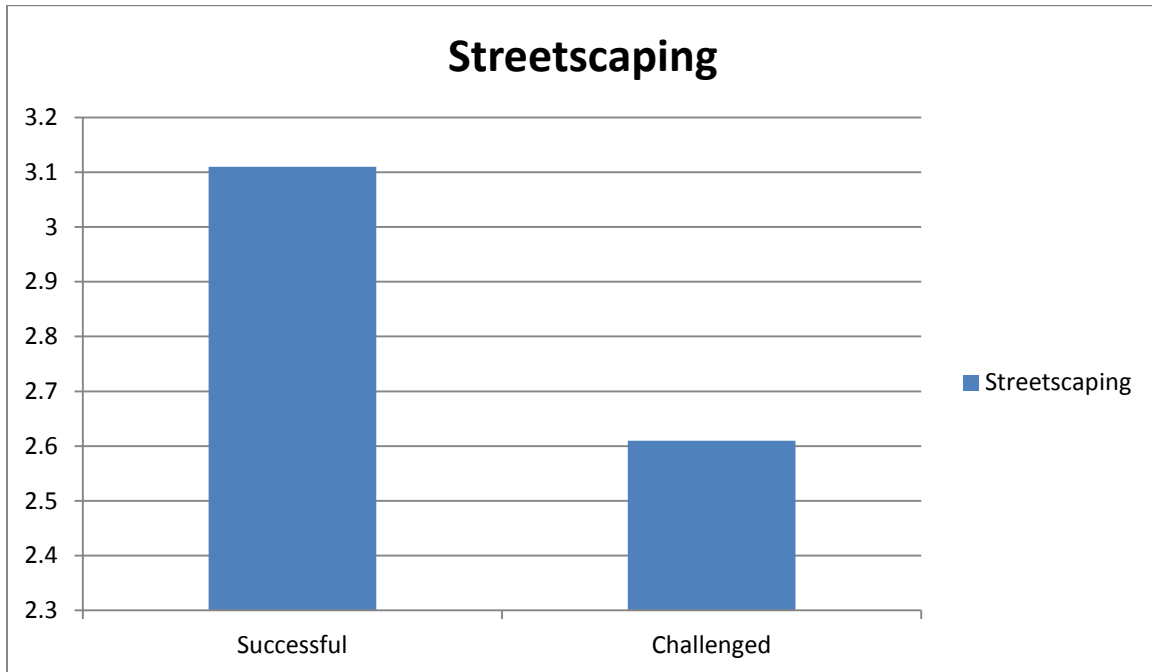


$N = 128$

On-Site Parking 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, On-Site Parking numbers reflected a mean score in the substantially present range of 3.66 for the successful developments, while only reflecting a substantially present mean score of 3.52 for the challenged developments.

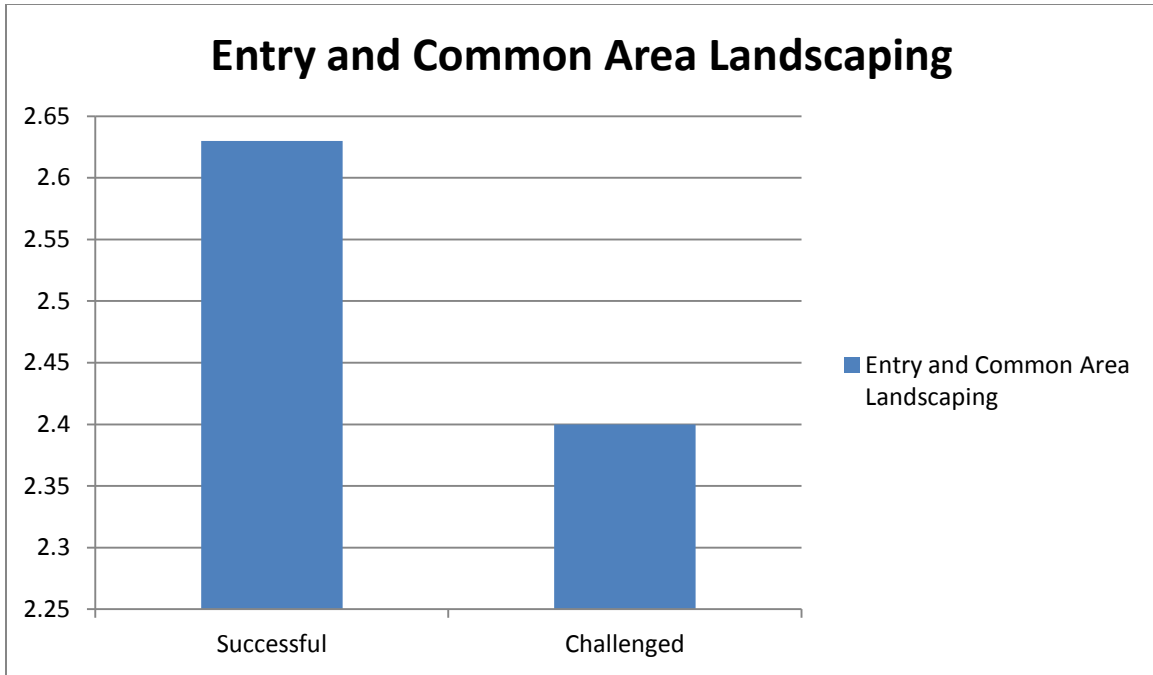
## QUALITY OF LIFE

Quality of Life is represented by a number of amenity items and their connection with the development. The following tables reveal whether an amenity is actually within the development or, if not, its proximity to the development. While presence within a development may be important with some types of amenities, proximity to other types of amenities may be adequate to impact a development and its inhabitants.



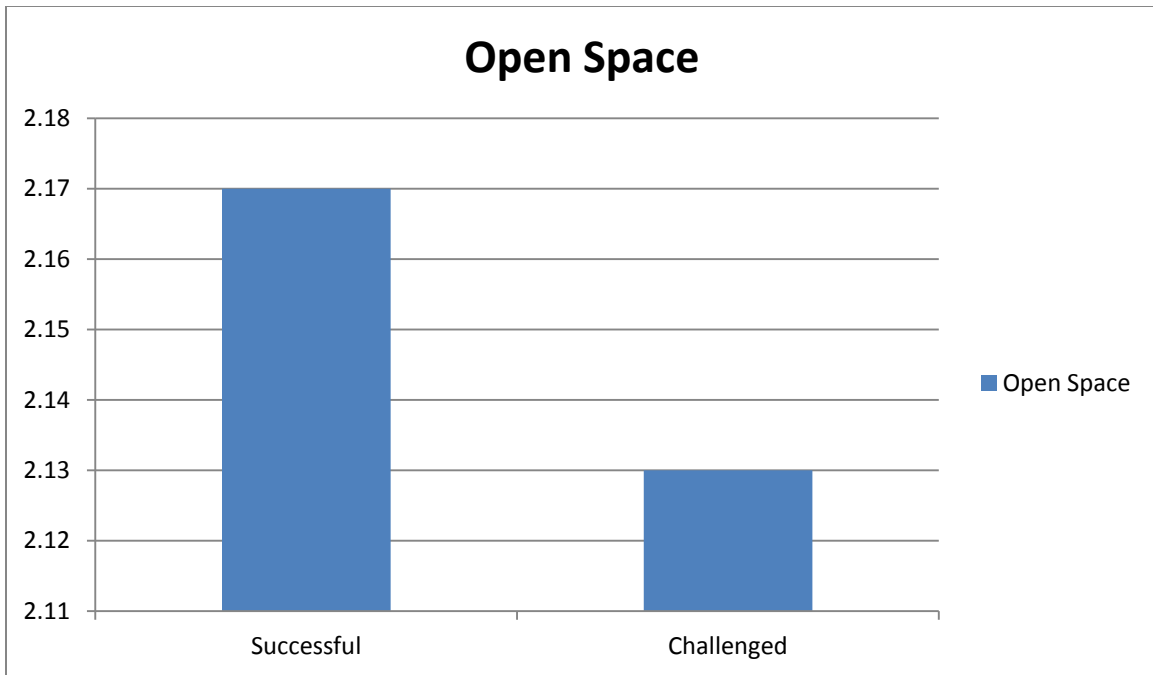
*N* = 128

Streetscaping 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, Streetscaping numbers reflected a mean score in the substantially present range of 3.11 for the successful developments, while reflecting a moderately present mean score of 2.61 for the challenged developments.



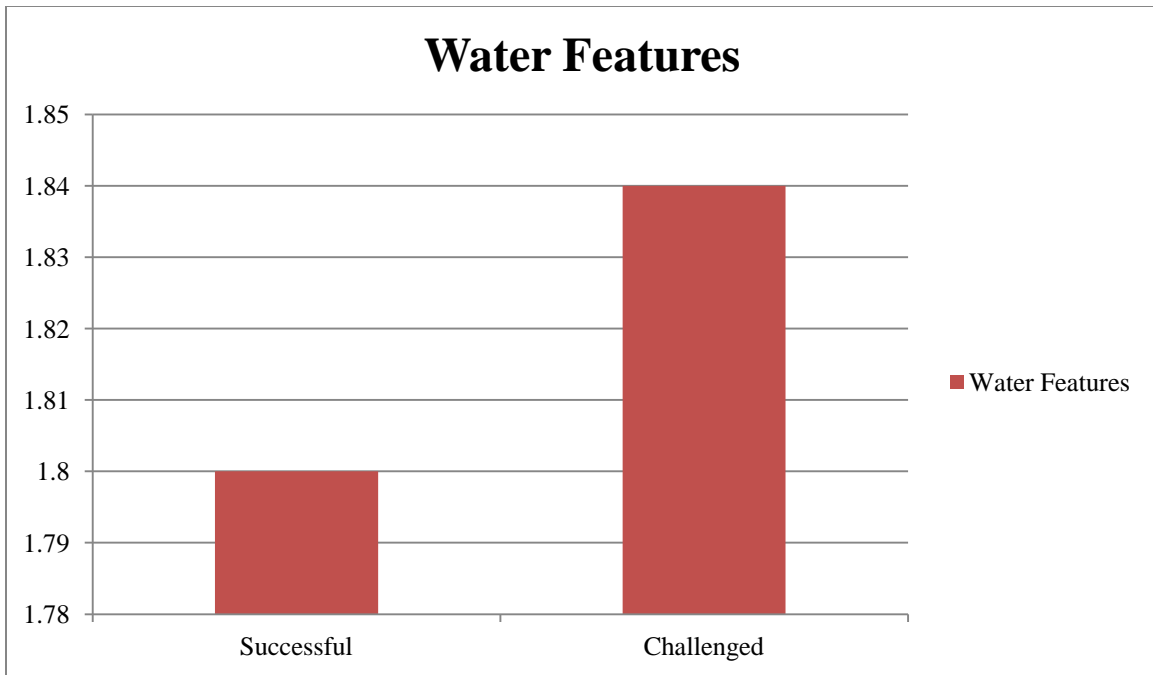
*N = 128*

Entry and Common Area Landscaping 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, Entry and Common Area Landscaping numbers reflected a mean score in the moderately present range of 2.63 for the successful developments, while reflecting a moderately present mean score of 2.4 for the challenged developments.



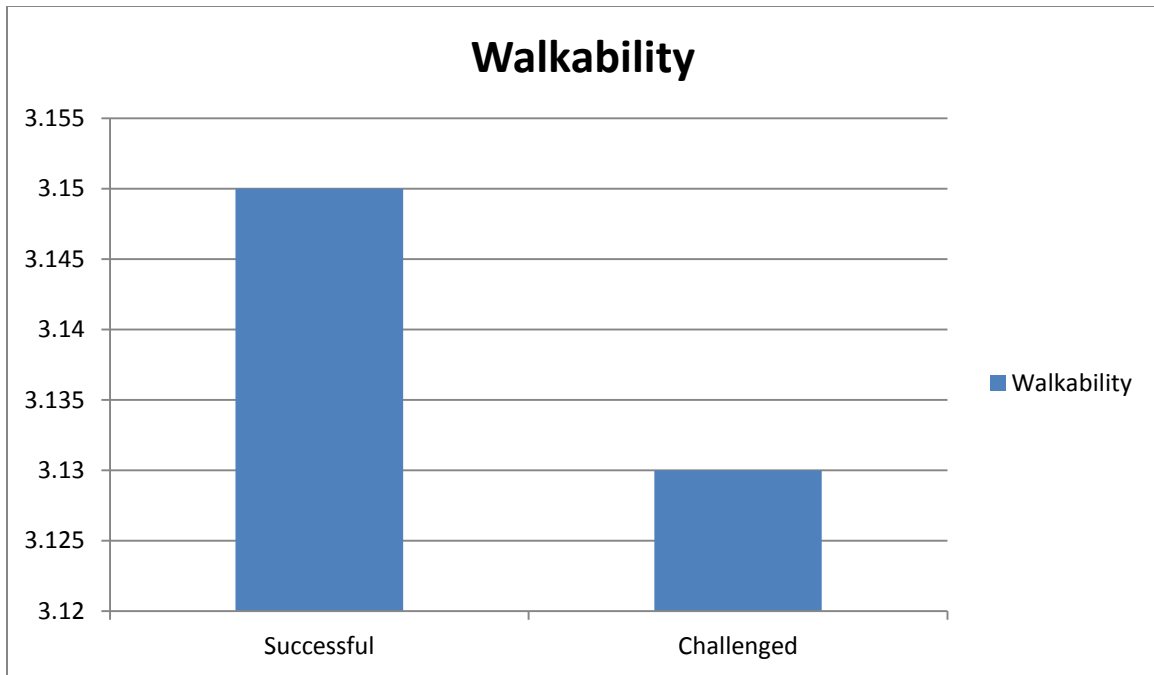
*N* = 128

Open Space 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, Open Space numbers reflected a mean score in the moderately present range of 2.17 for the successful developments, while reflecting a moderately present mean score of 2.13 for the challenged developments.



*N = 128*

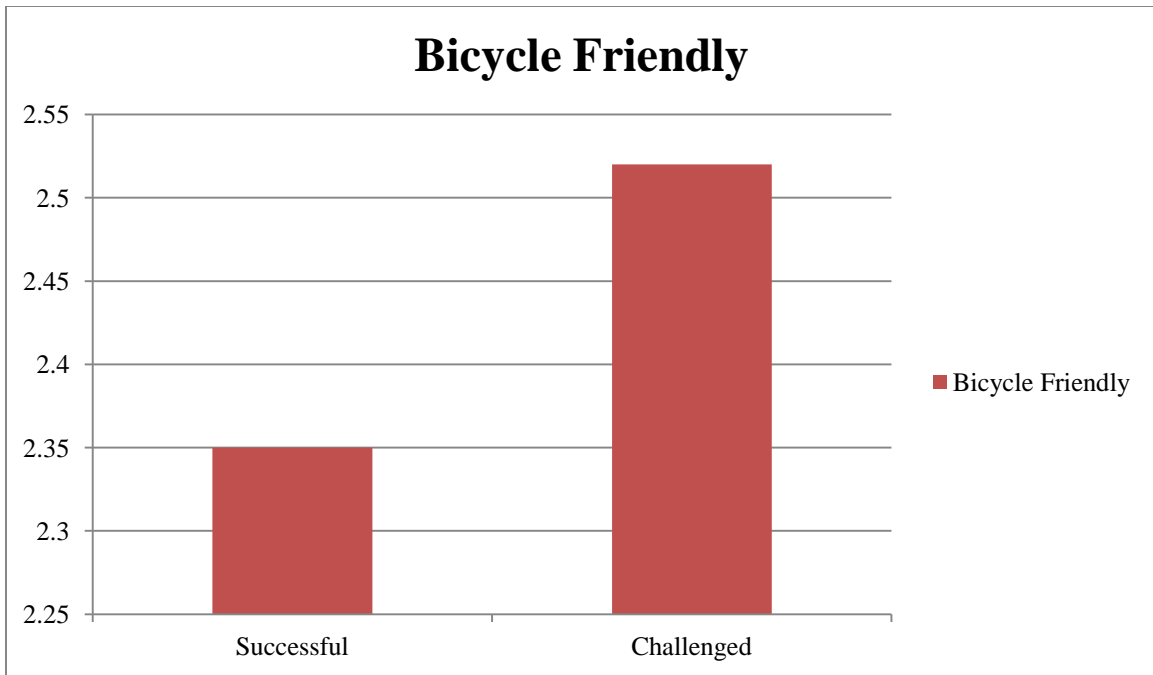
Water Features numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present receives a one (1), Minimally Present receives a two (2), Moderately Present receives a three (3), Substantially Present receives a (4) and Extremely Present receives a five (5). As reflected in the foregoing chart, Water Features numbers reflected a mean score in the minimally present range of 1.8 for the successful developments, while reflecting a minimally present mean score of 1.84 for the challenged developments.



*N = 128*

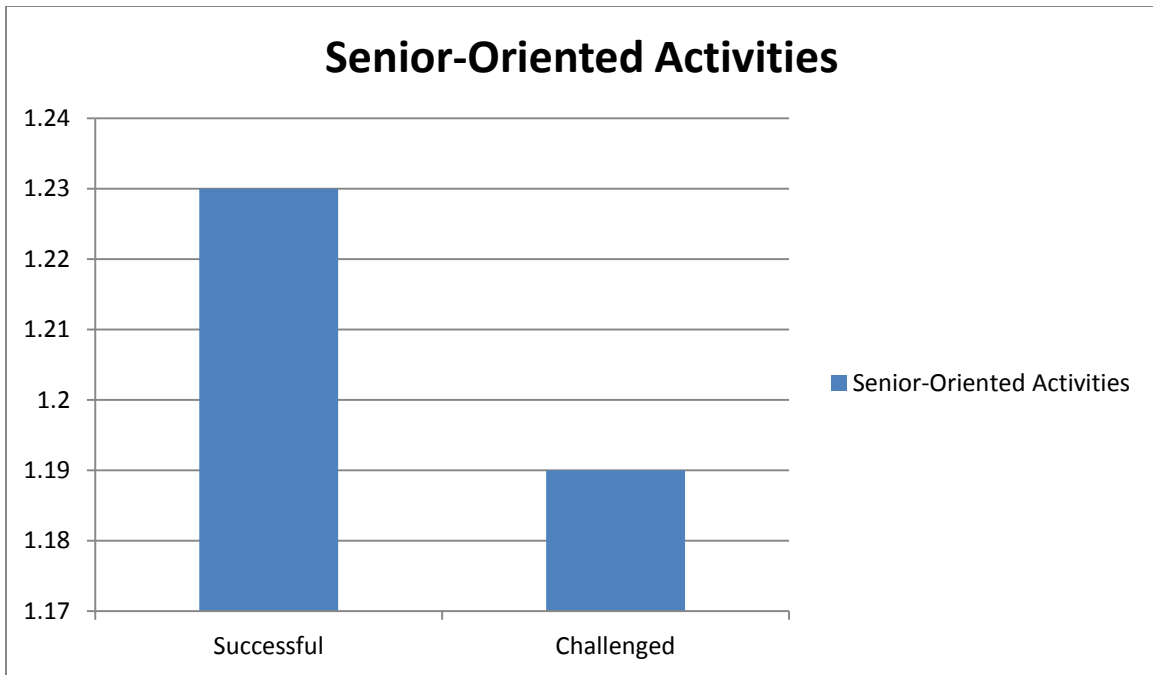
Walkability numbers are based upon a mean (average) of the scores given to the answers received based upon a scale in which Not Present receives a one (1), Minimally Present receives a two (2), Moderately Present receives a three (3), Substantially Present receives a (4) and Extremely Present receives a five (5). As reflected in the foregoing chart, Walkability numbers reflected a mean score in the substantially present range of 3.15 for the successful developments, while reflecting a substantially present mean score of 3.13 for the challenged developments.





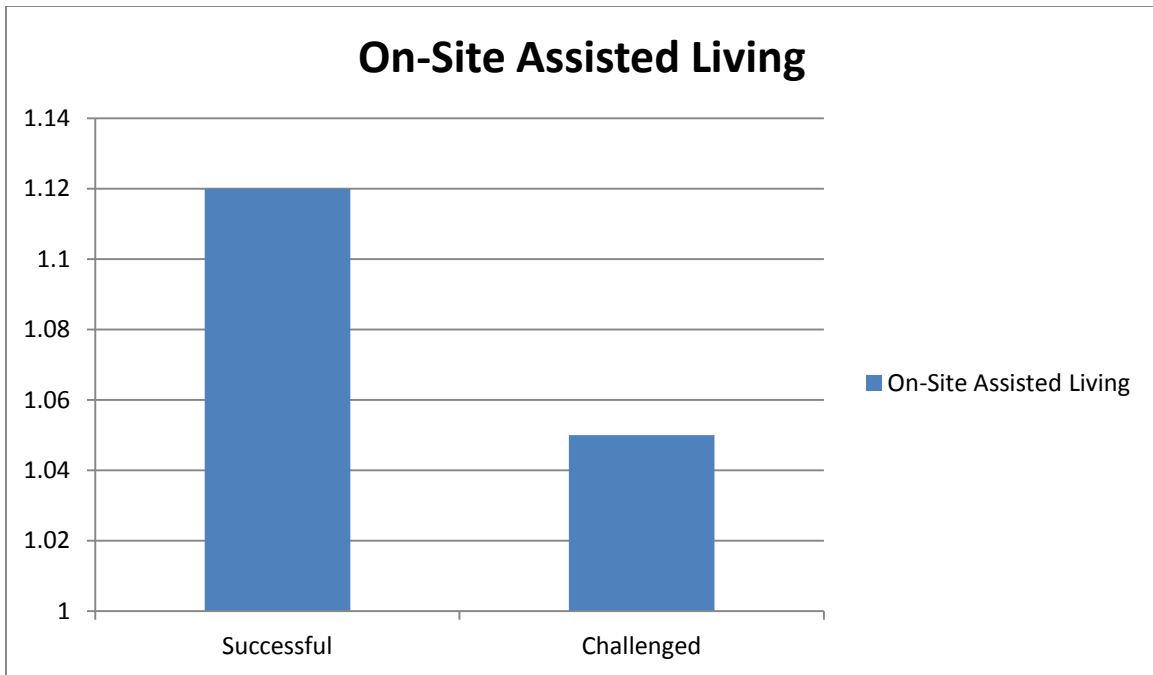
*N* = 128

Bicycle Friendly 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, Bicycle Friendly numbers reflected a mean score in the moderately present range of 2.35 for the successful developments, while reflecting a moderately present mean score of 2.52 for the challenged developments.



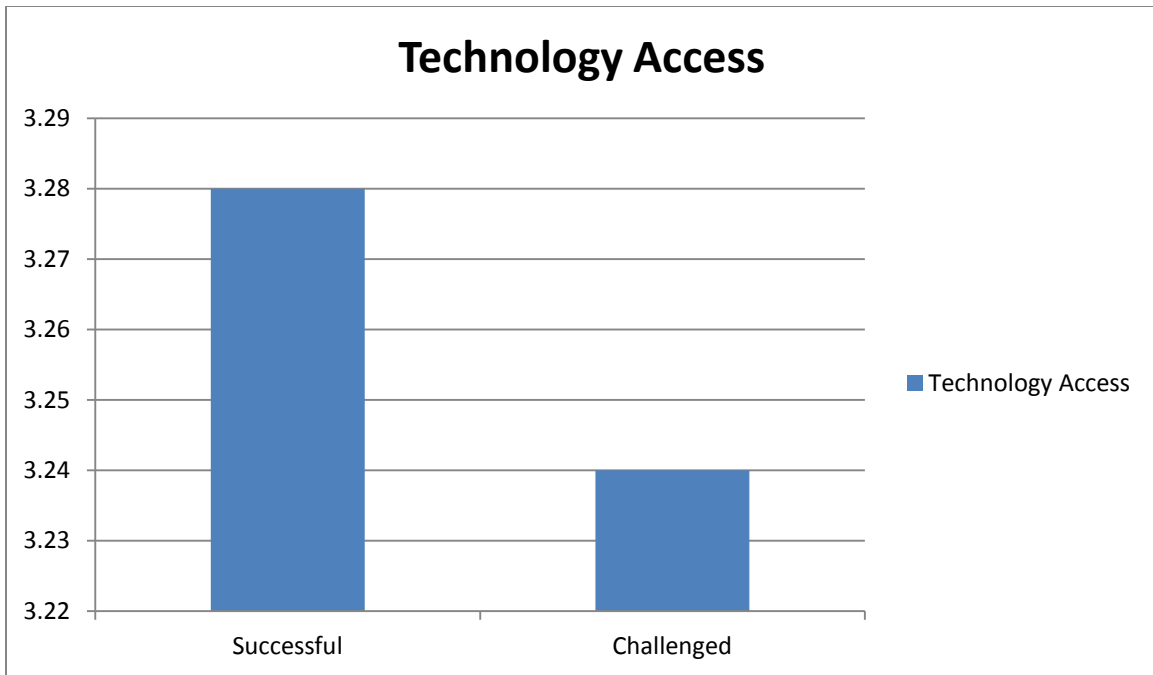
*N* = 128

Senior-Oriented Activities 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, Senior-Oriented Activities numbers reflected a mean score in the minimally present range of 1.23 for the successful developments, while reflecting a minimally present mean score of 1.19 for the challenged developments.



*N* = 128

On-Site Assisted Living 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, On-Site Assisted Living numbers reflected a mean score in the minimally present range of 1.12 for the successful developments, while reflecting a minimally present mean score of 1.05 for the challenged developments.



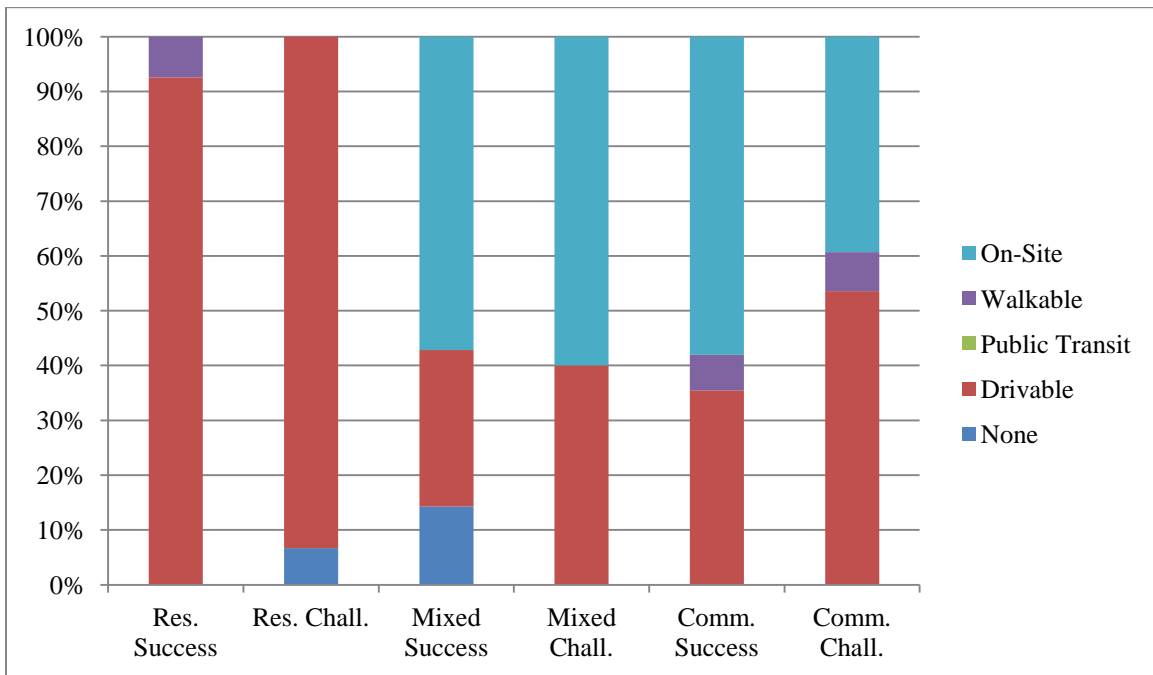
*N = 128*

Technology Access 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, Technology Access numbers reflected a mean score in the substantially present range of 3.28 for the successful developments, while reflecting a substantially present mean score of 3.24 for the challenged developments.

In the following tables, the percentages reflect the type of amenity (or disamenity) access afforded someone within the development. None is at the bottom of the scale, followed by Drivable, Public Transit, Walkable, and On-Site access. Results are visually reported for successful and challenged residential, mixed use and commercial developments.

### FAST FOOD RESTAURANT ACCESS

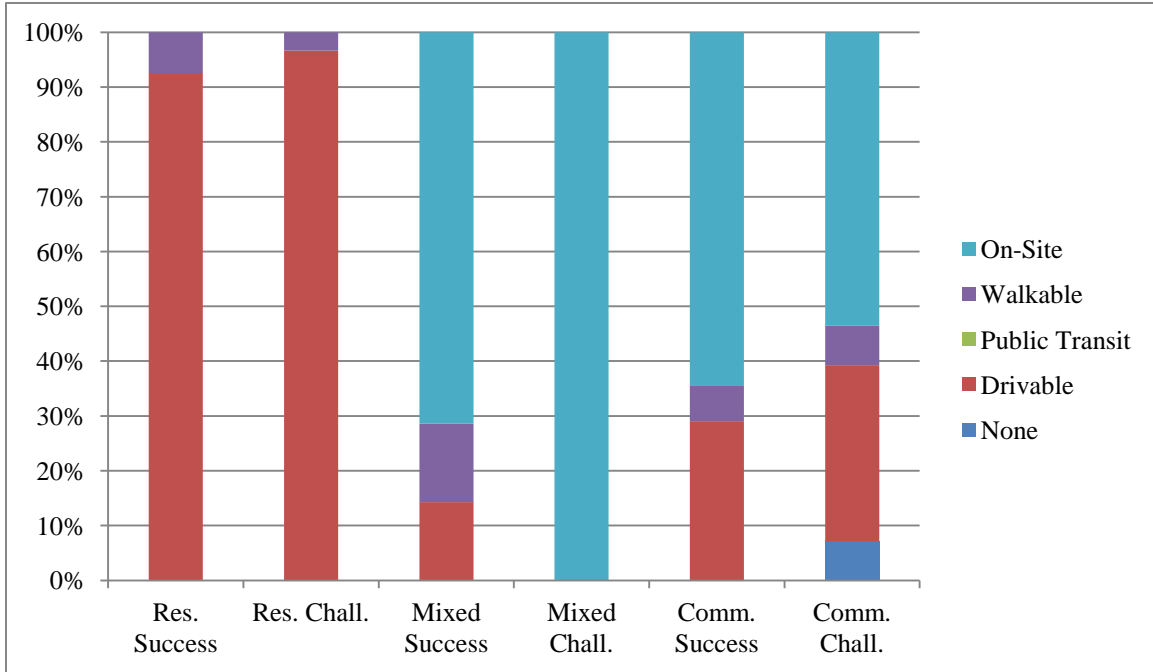
(Percentages)



*N* = 128

## SIT DOWN RESTAURANT ACCESS

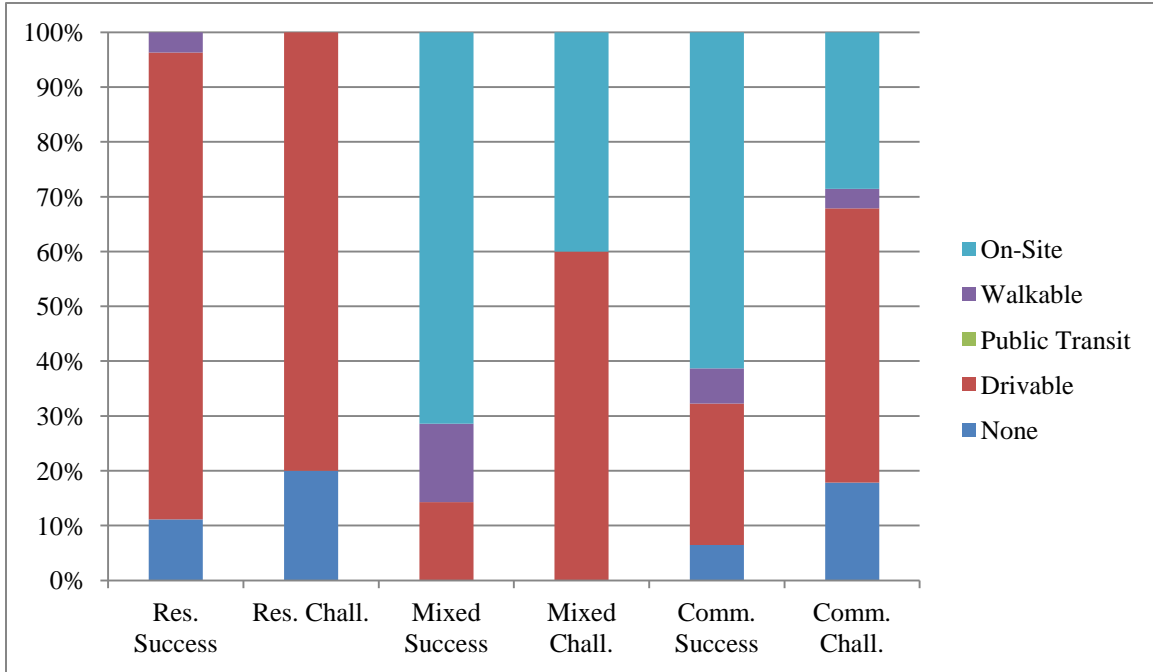
(Percentages)



$N = 128$

## COFFEE SHOP ACCESS

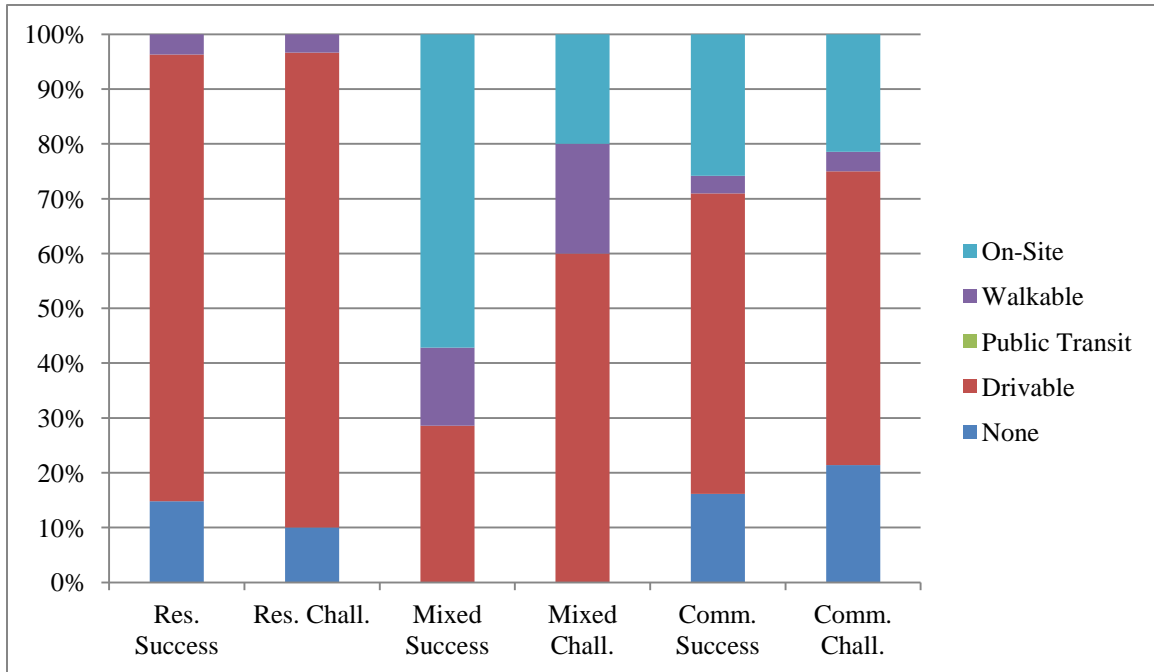
(Percentages)



$N = 128$

## BAR (Pub) ACCESS

(Percentages)

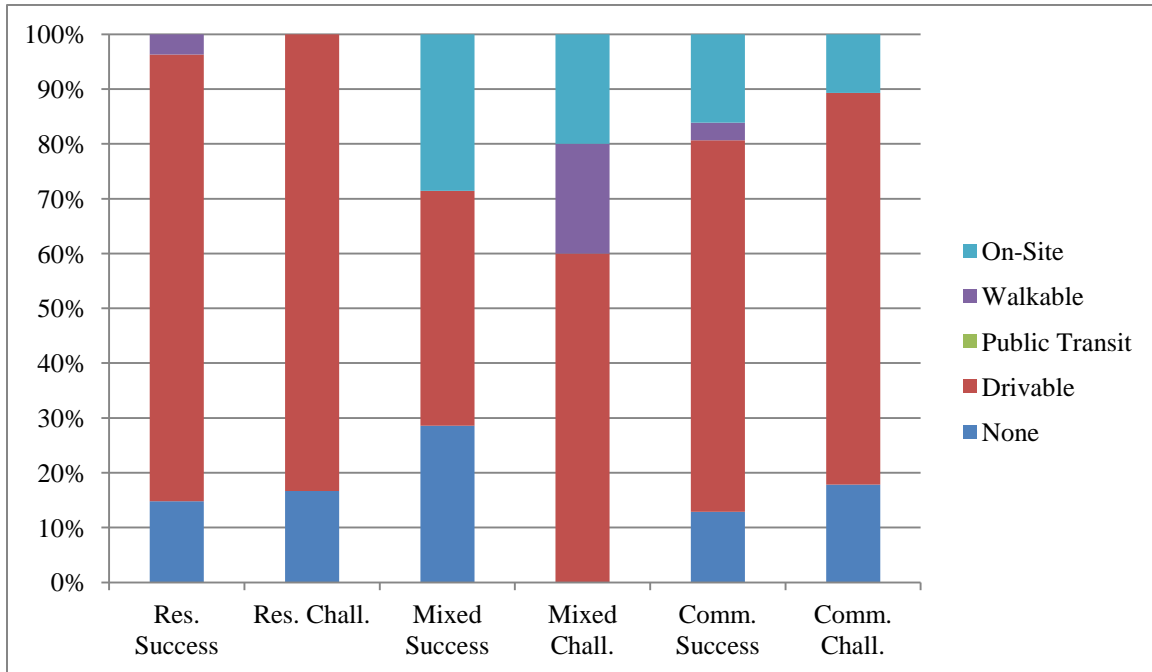


$N = 128$



## ENTERTAINMENT ESTABLISHMENTS (Movies, Bowling Alleys) ACCESS

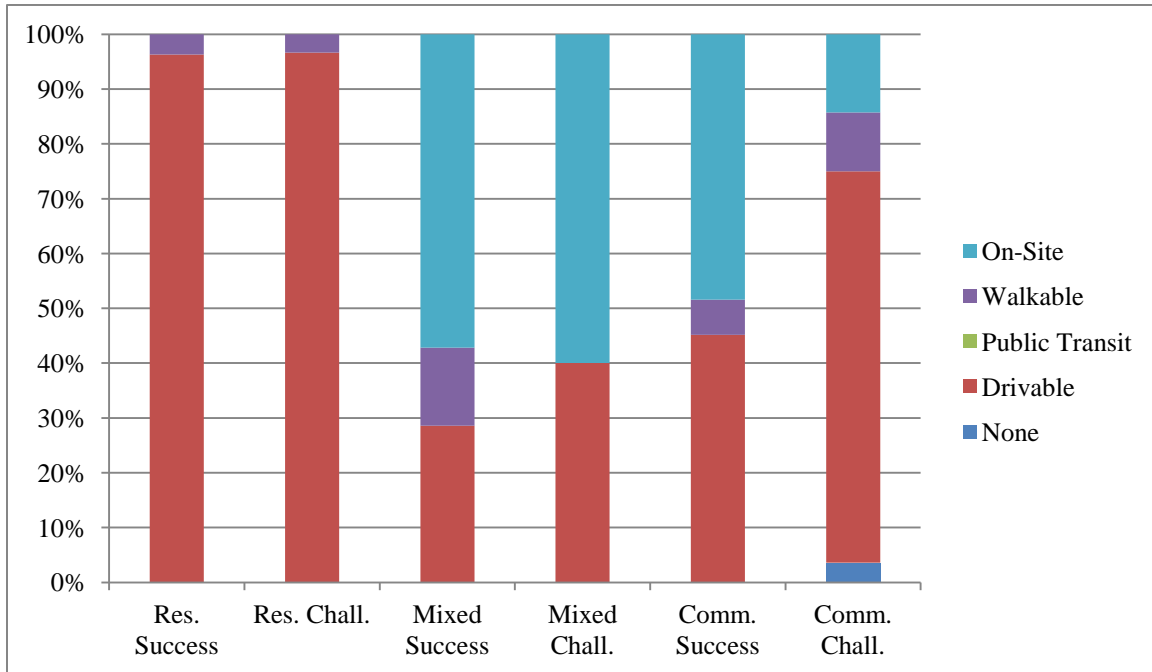
(Percentages)



$N = 128$

## SERVICE ESTABLISHMENTS (Banking, Insurance, Cleaning) ACCESS

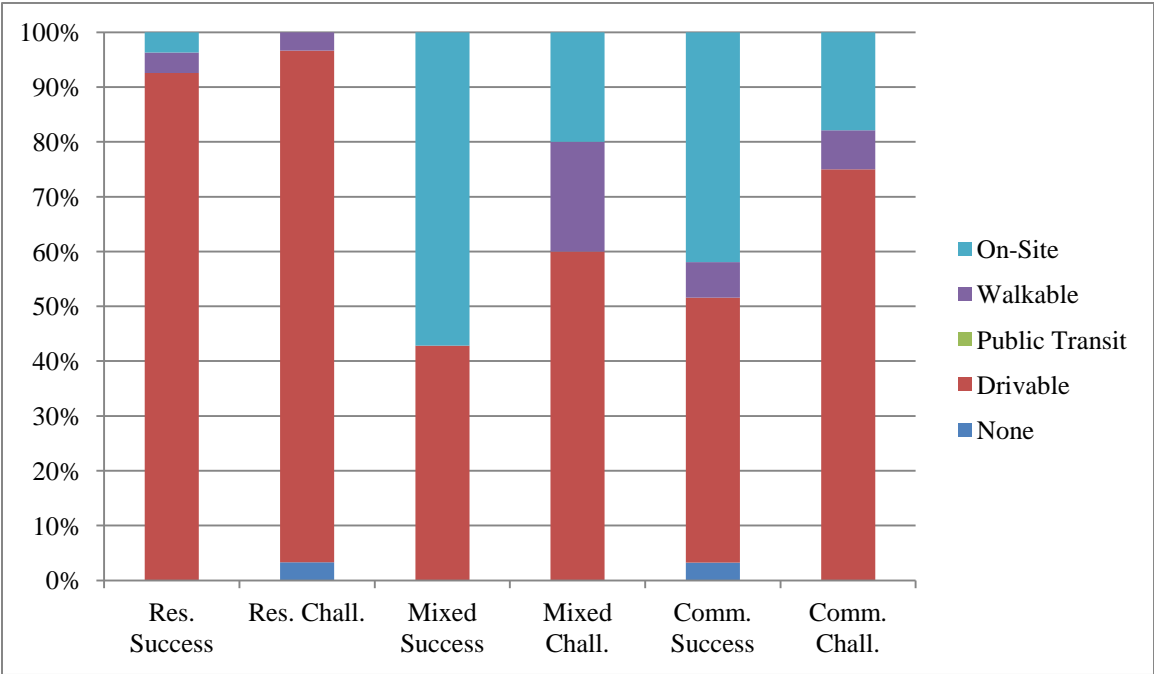
(Percentages)



$N = 128$

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

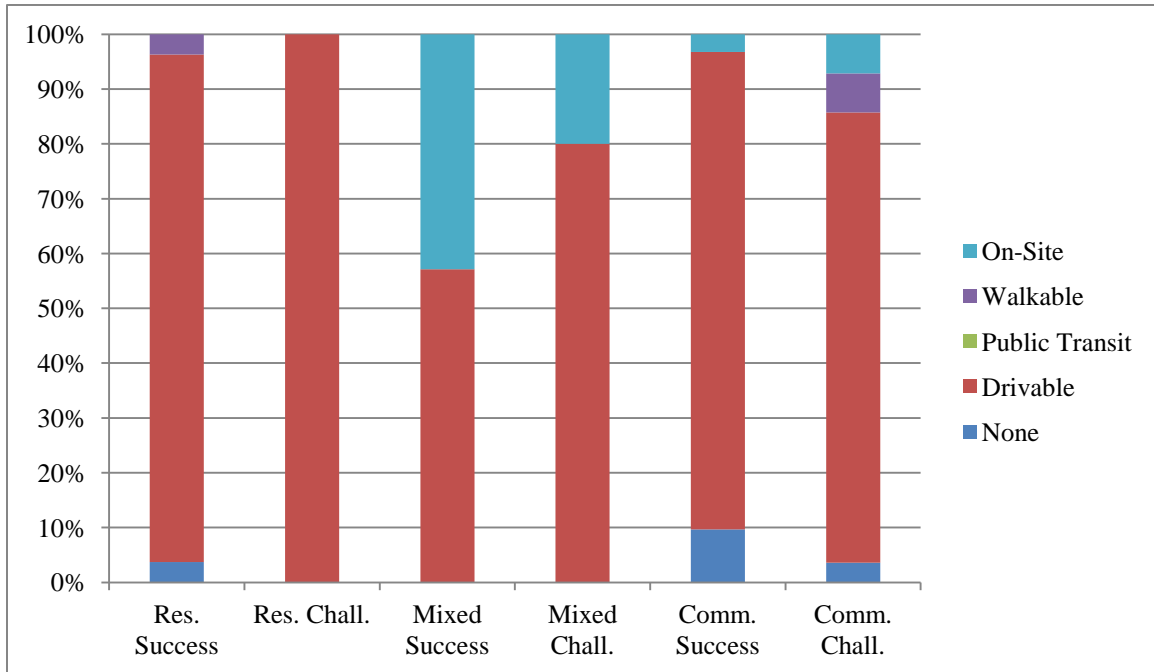
(Percentages)



*N* = 128

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

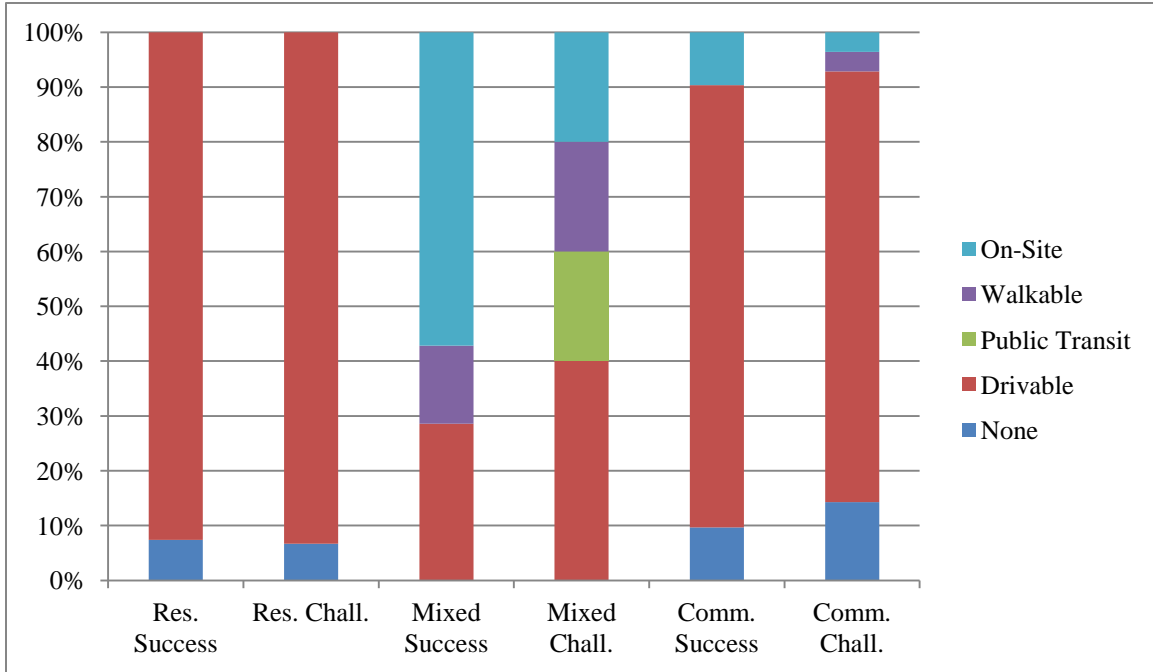
(Percentages)



*N* = 128

## TOURIST-RELATED SERVICES (Hotel/Motel) ACCESS

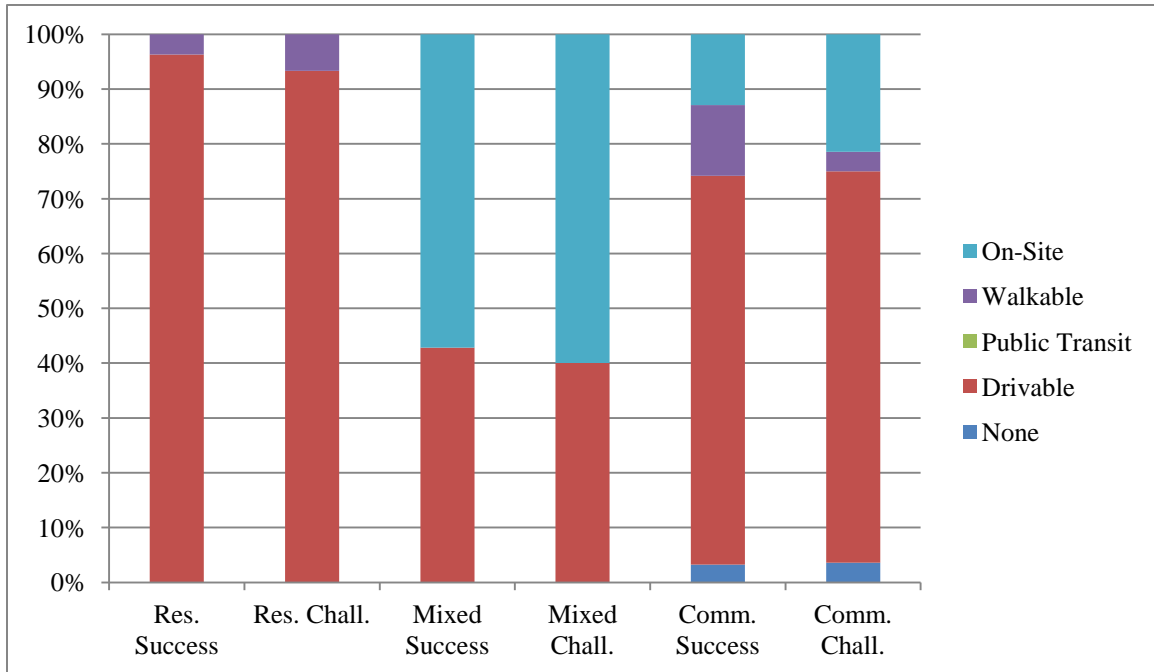
(Percentages)



$N = 128$

## CONVENIENCE STORE (Fuel Center) ACCESS

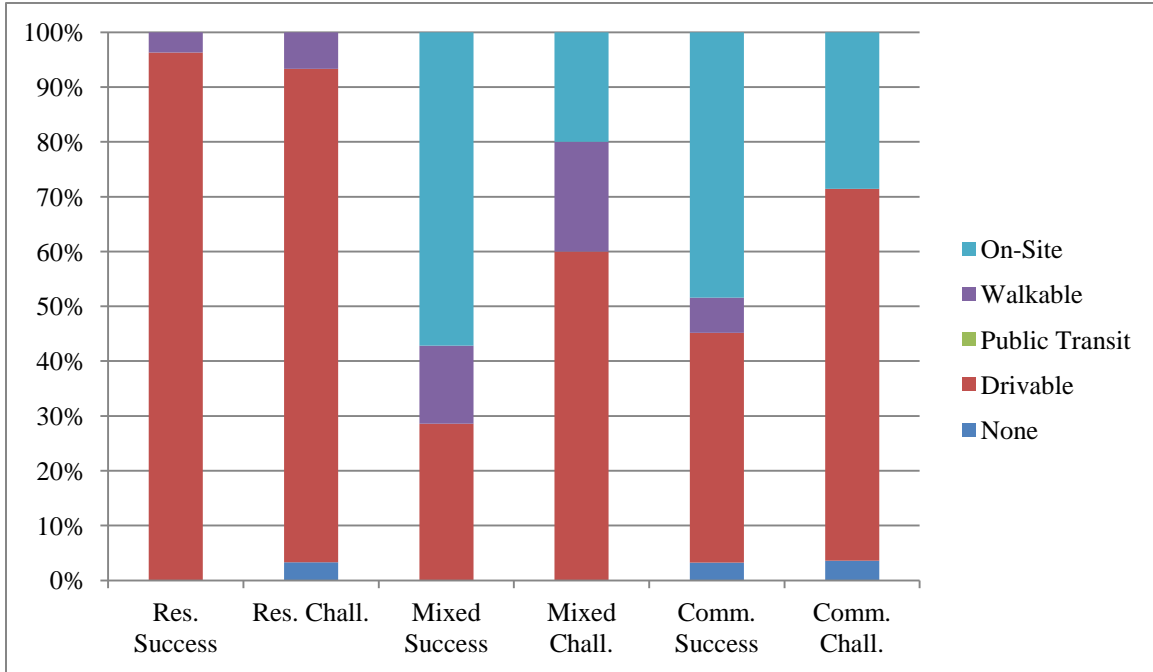
(Percentages)



$N = 128$

## GROCERY/SPECIALTY SHOP ACCESS

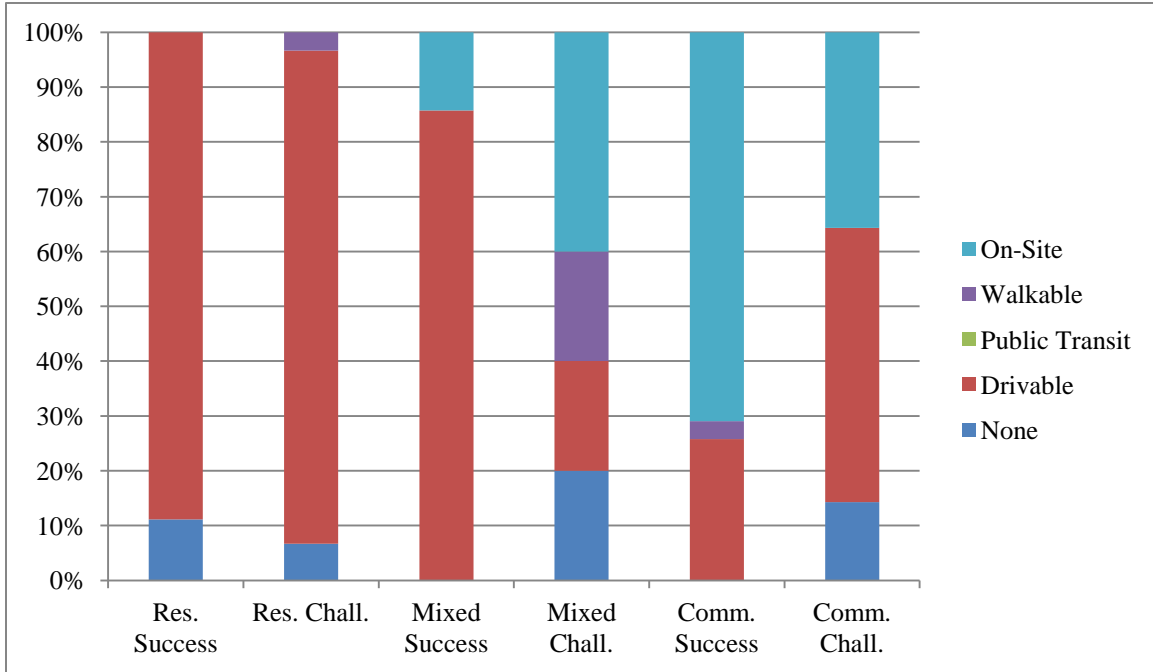
(Percentages)



$N = 128$

# BIG BOX STORE ACCESS

(Percentages)

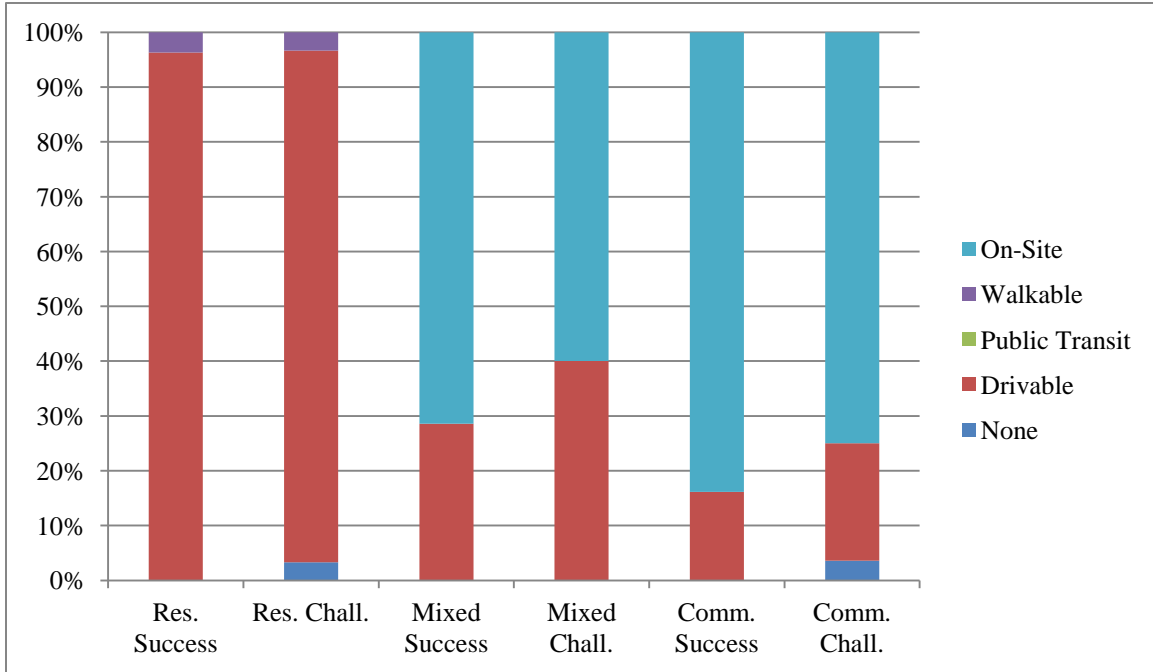


*N* = 128



## STRIP SHOPPING AREA ACCESS

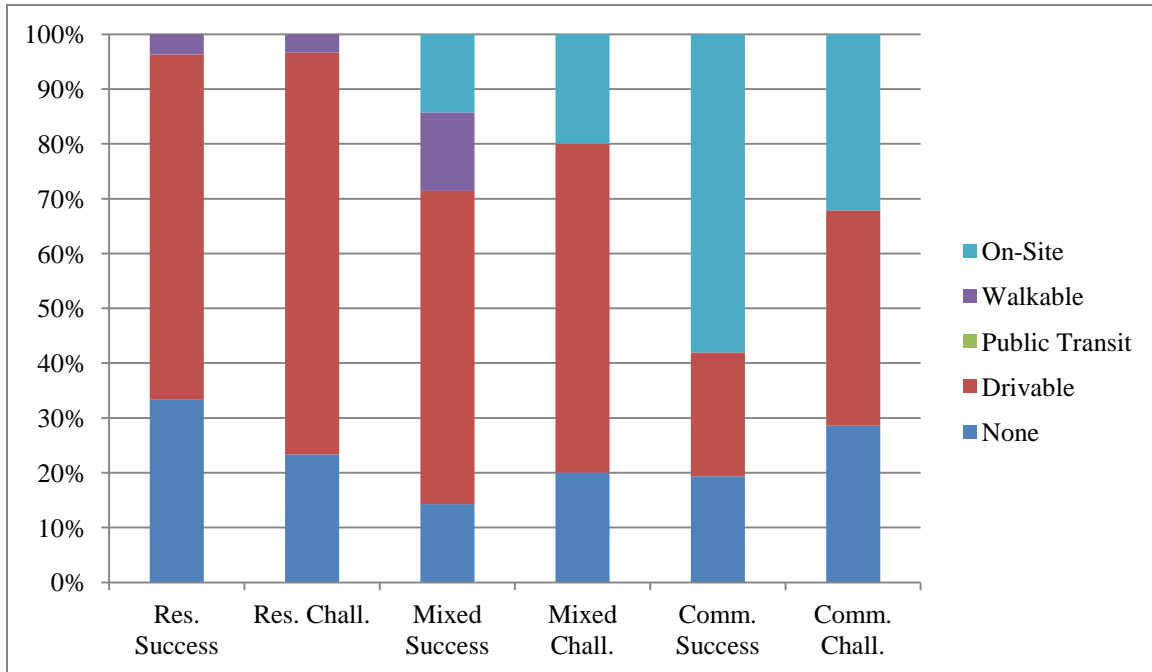
(Percentages)



$N = 128$

## OPEN AIR MALL/ARCADE/PRODUCE MARKET ACCESS

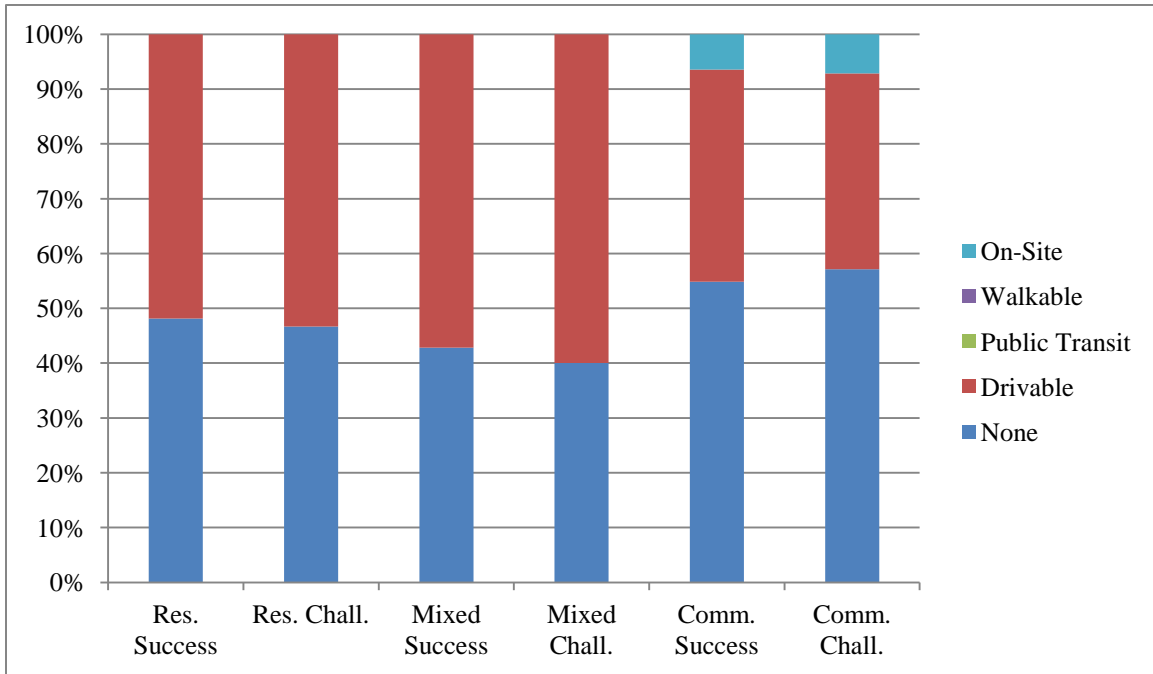
(Percentages)



*N* = 128

## ENCLOSED MALL ACCESS

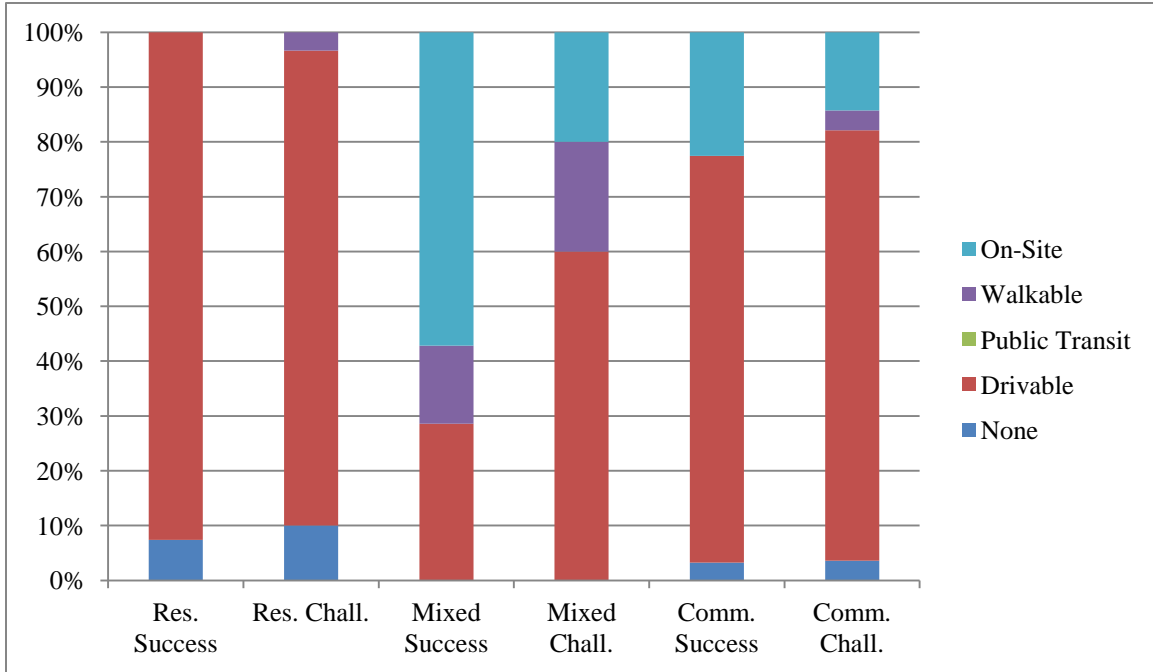
(Percentages)



$N = 128$

## OFFICE CLUSTER ACCESS

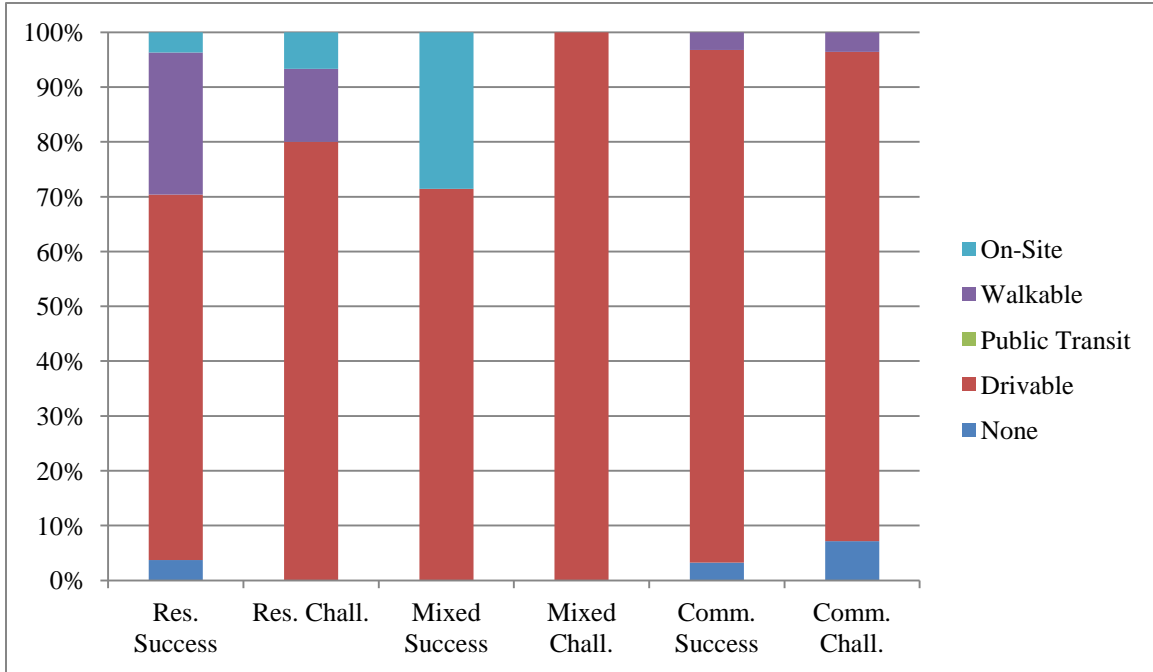
(Percentages)



$N = 128$

## PUBLIC SCHOOL ACCESS

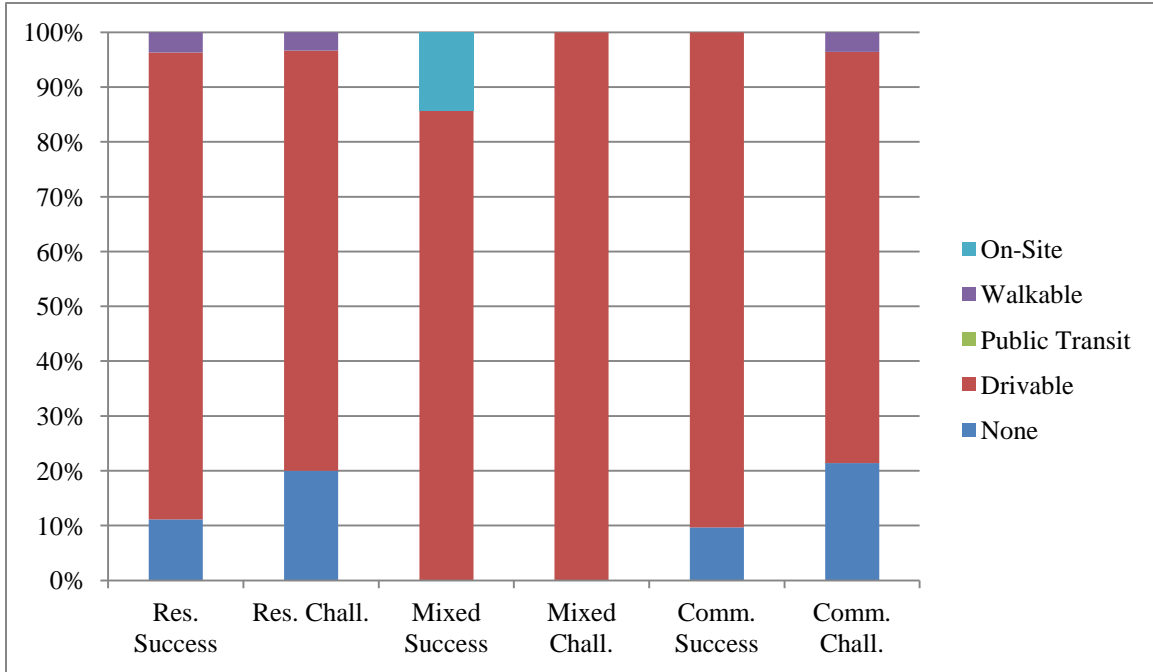
(Percentages)



*N* = 128

# PRIVATE SCHOOL ACCESS

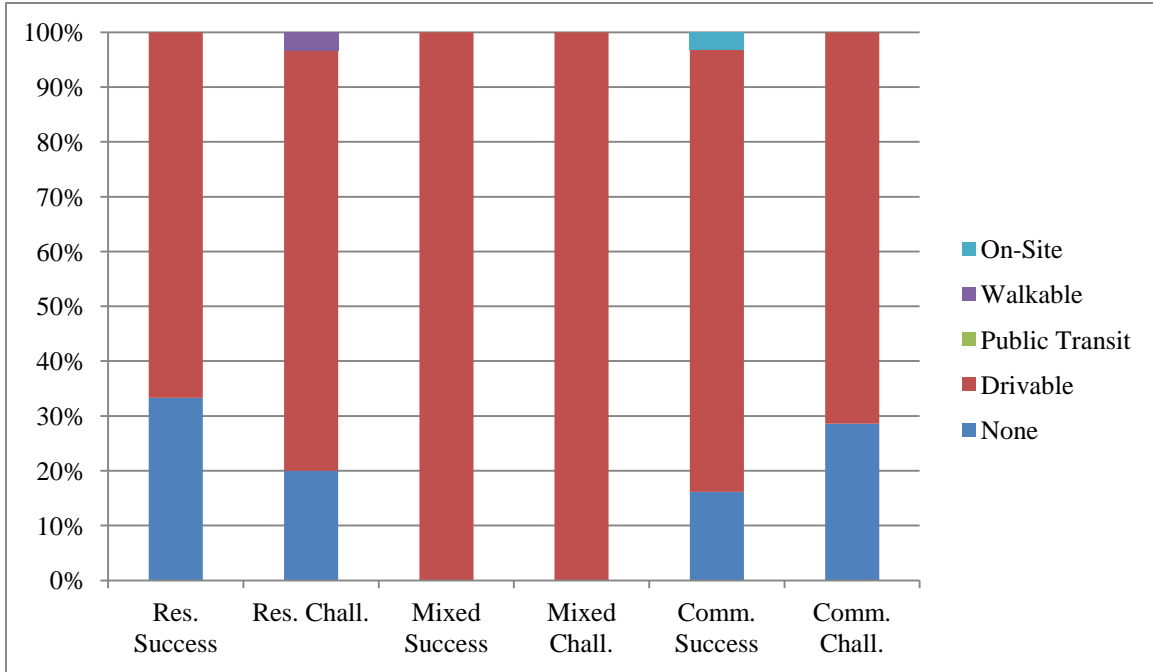
(Percentages)



*N* = 128

## VOCATIONAL SCHOOL ACCESS

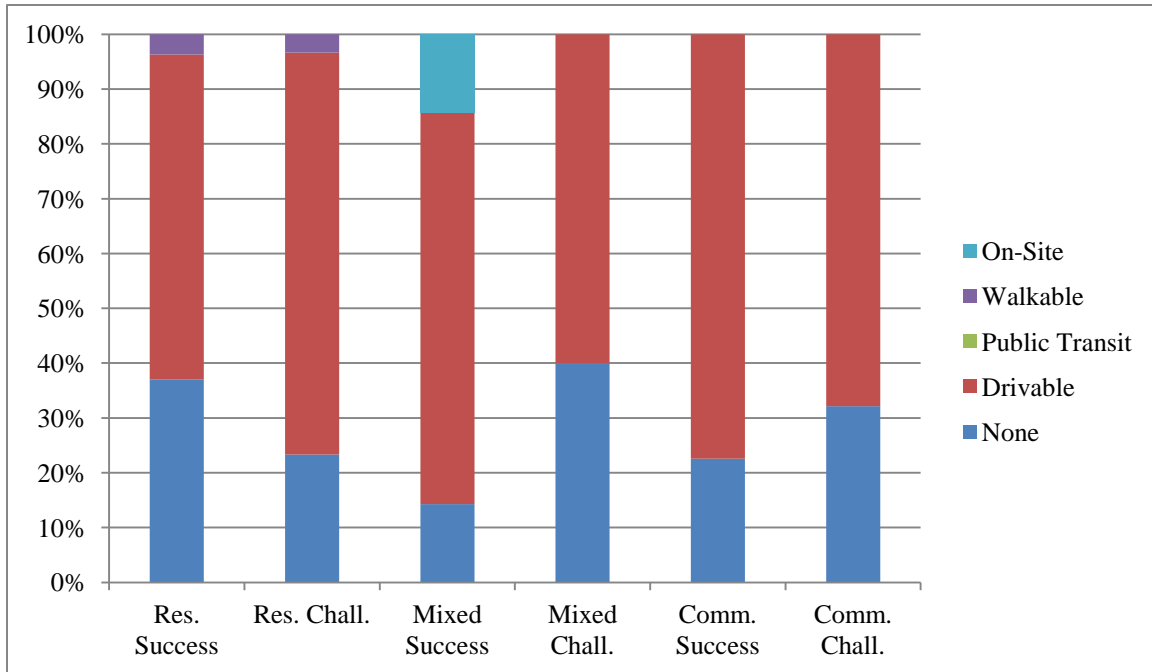
(Percentages)



*N* = 128

## COLLEGE/UNIVERSITY ACCESS

(Percentages)

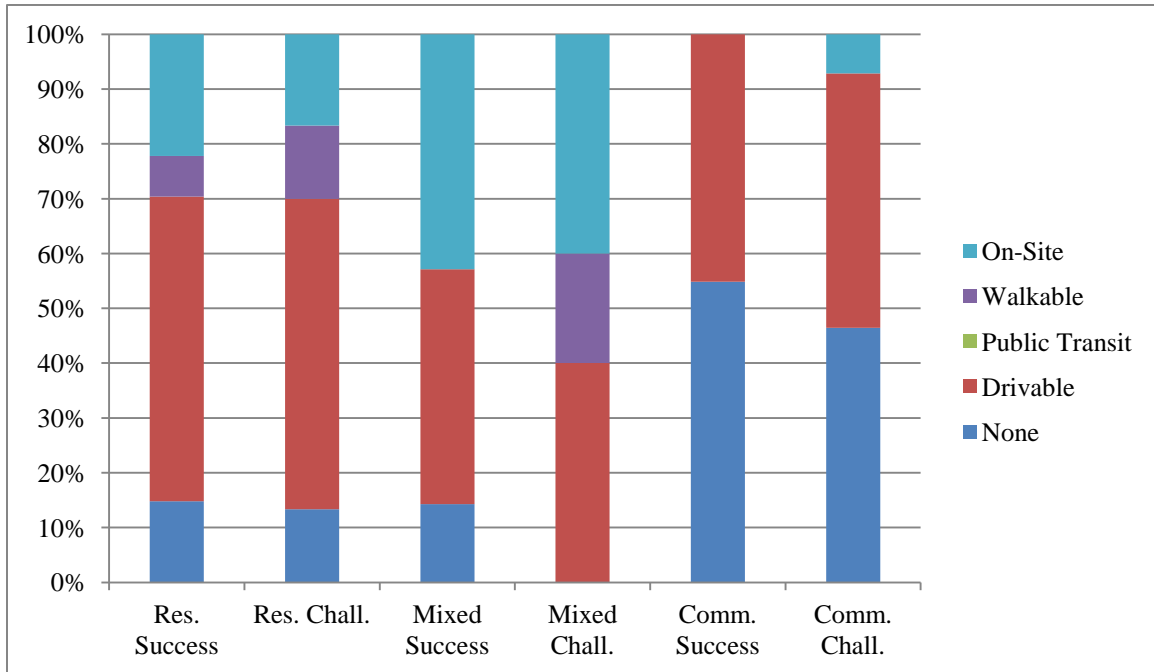


$N = 128$



## NATURAL AMENITY (Lake, Ocean, Beach, Forest, Mountain) ACCESS

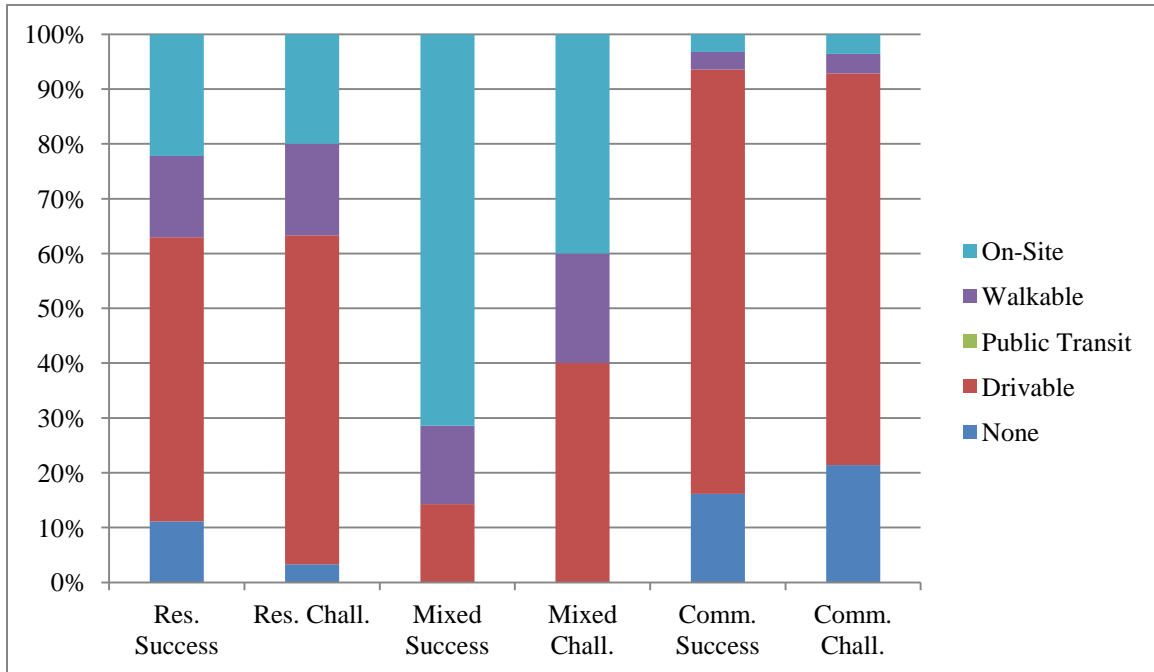
(Percentages)



$N = 128$

## LARGE PARK (Trails, Playground, Picnic Area) ACCESS

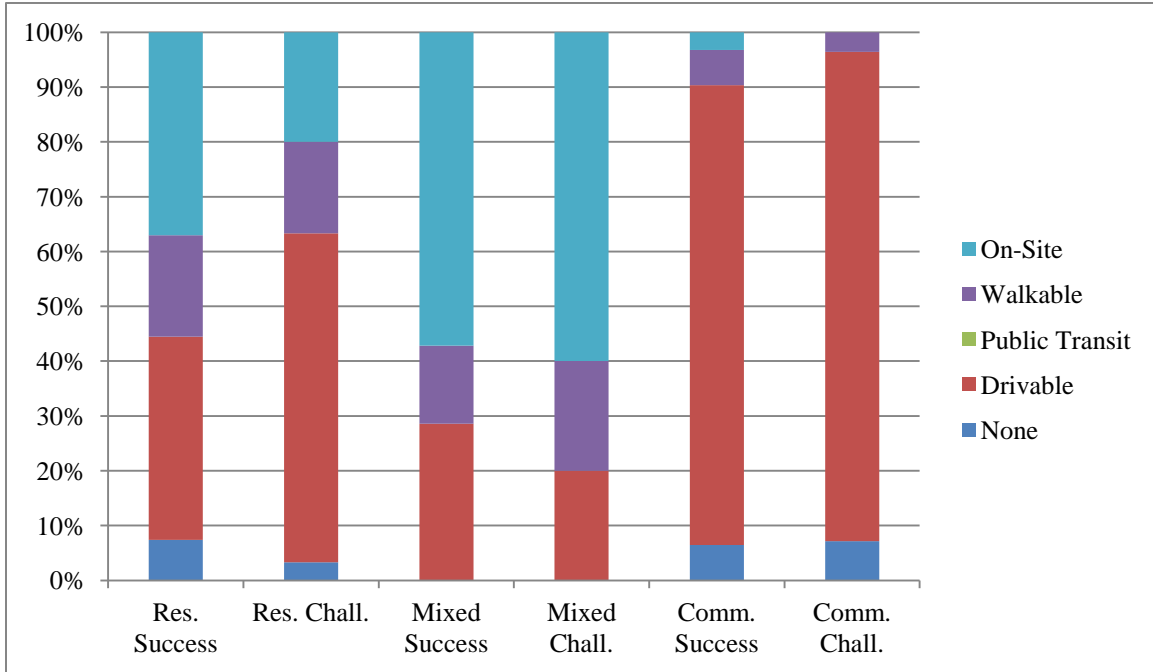
(Percentages)



*N* = 128

## SMALL NEIGHBORHOOD/URBAN/POCKET PARK ACCESS

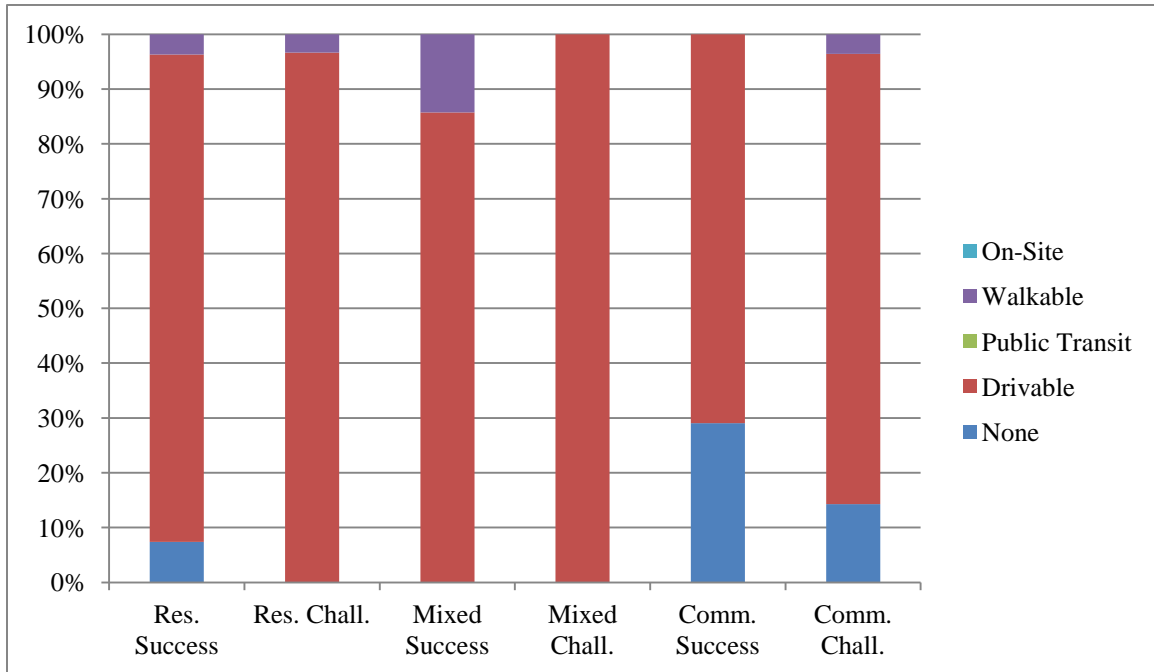
(Percentages)



*N* = 128

## CEMETARY ACCESS

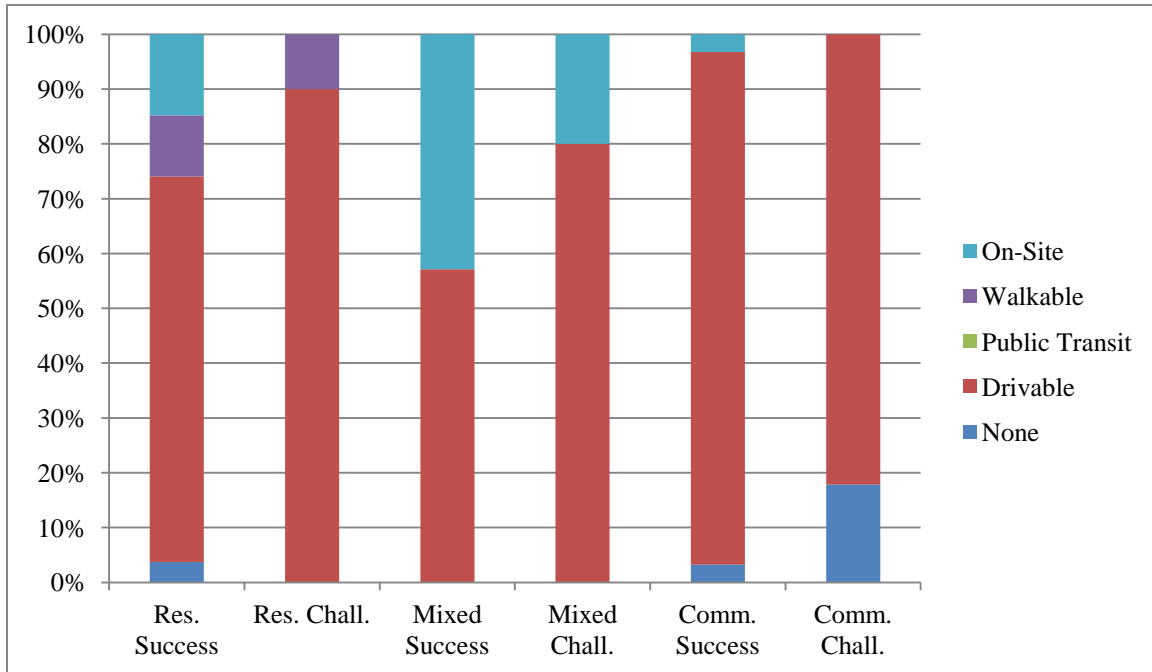
(Percentages)



$N = 128$

## RECREATION/ACTIVITY/AQUATIC/FITNESS CENTER ACCESS

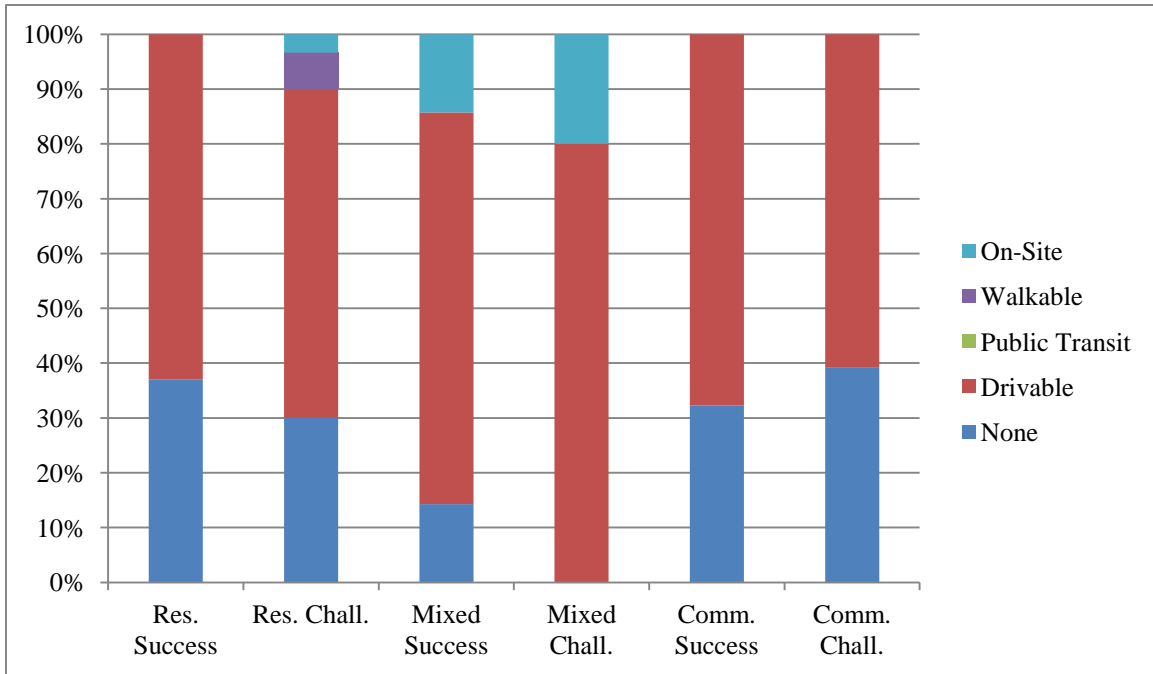
(Percentages)



*N* = 128

## COUNTRY CLUB/RESORT ACCESS

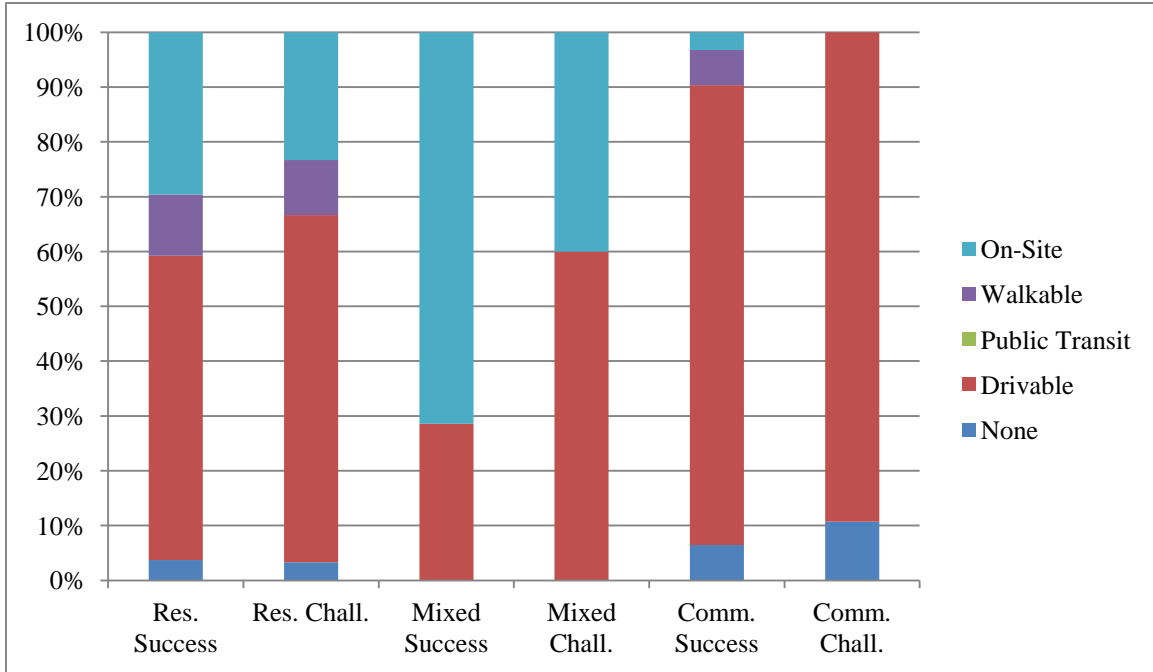
(Percentages)



*N* = 128

# TENNIS/BASKETBALL COURTS ACCESS

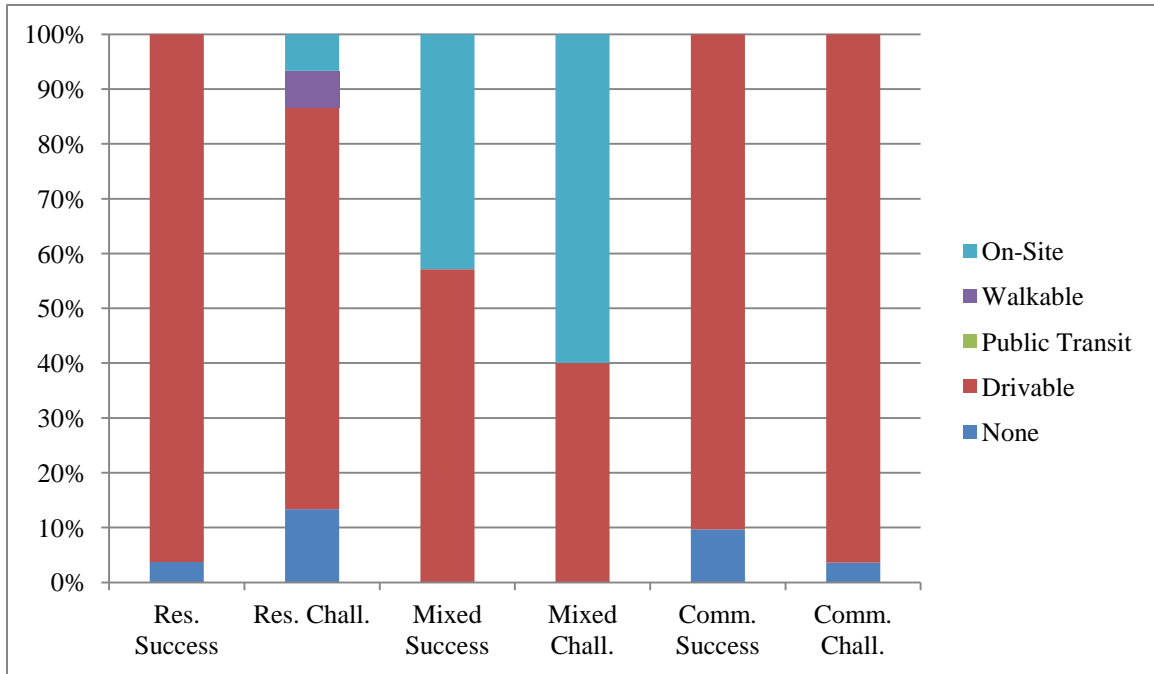
(Percentages)



*N* = 128

## GOLF COURSE ACCESS

(Percentages)

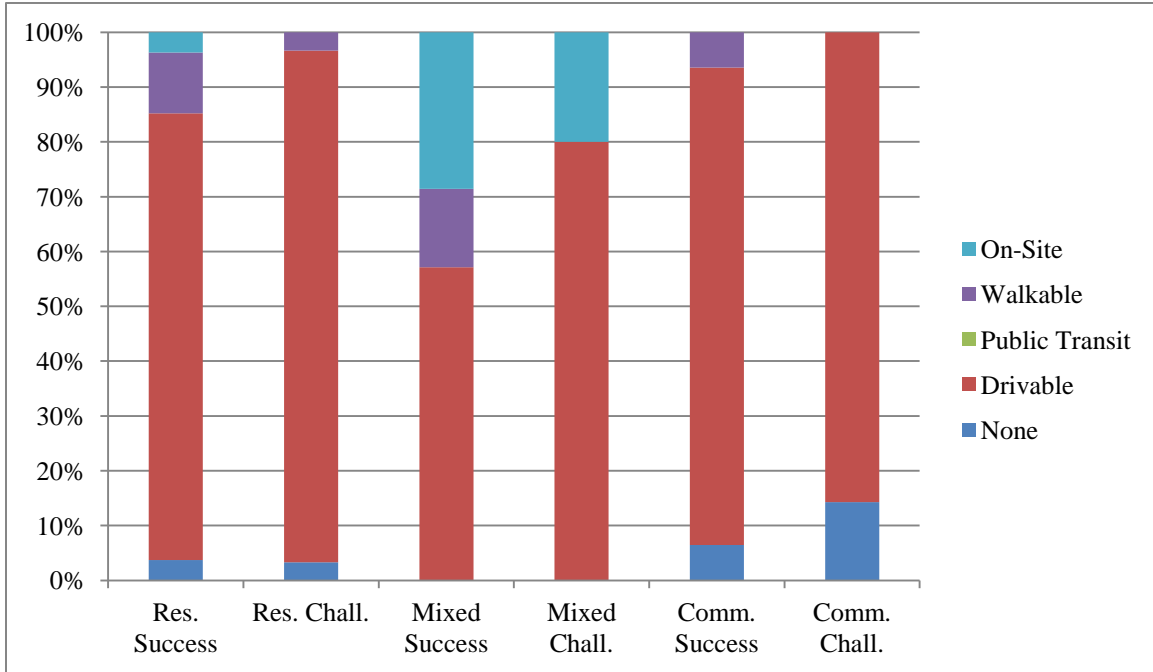


$N = 128$



# ATHLETIC FIELDS ACCESS

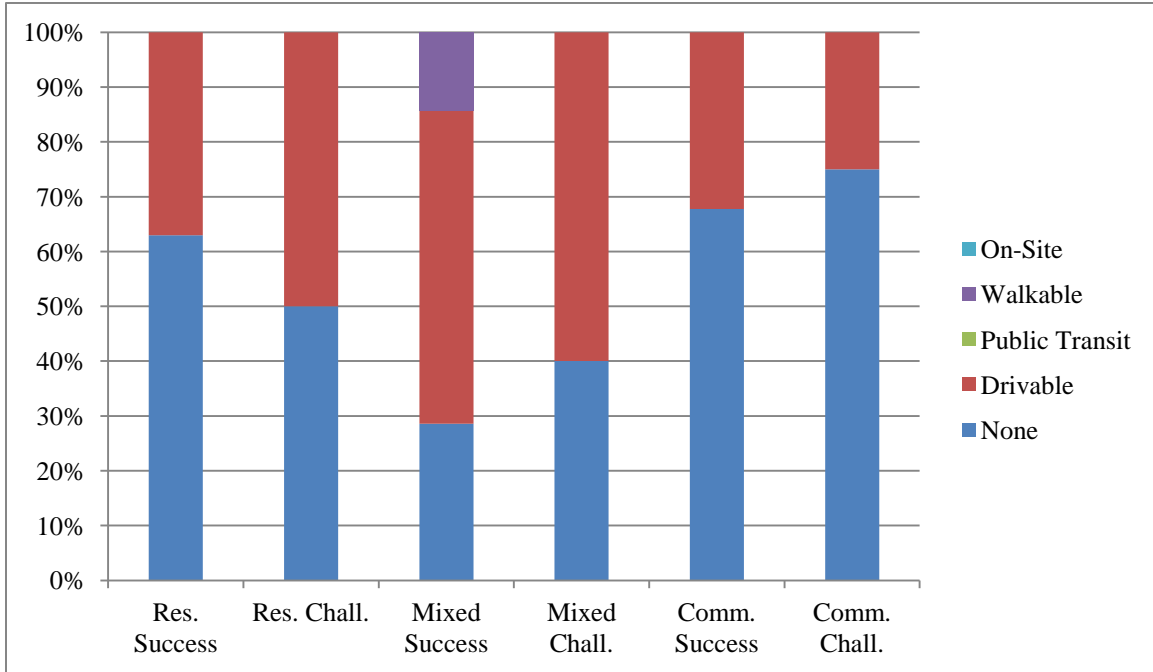
(Percentages)



*N* = 128

## AMUSEMENT PARK/AQUARIUM/ZOO ACCESS

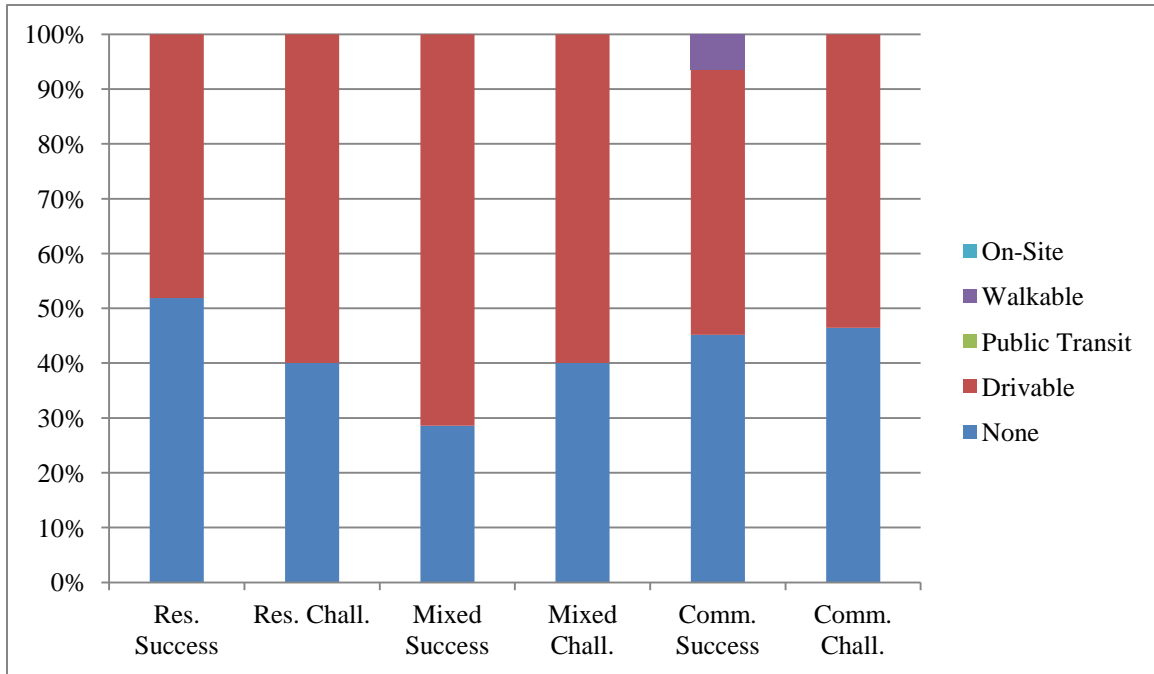
(Percentages)



$N = 128$

## CONVENTION CENTER/ARENA/SPORTS STADIUM ACCESS

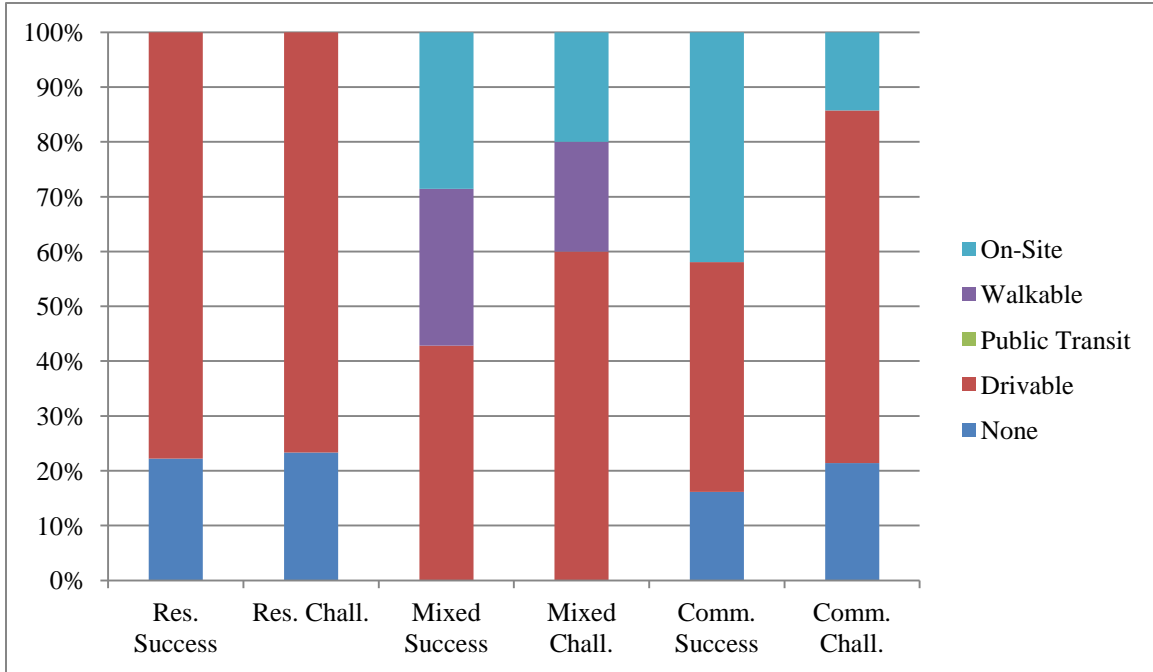
(Percentages)



$N = 128$

# BOOKSTORE ACCESS

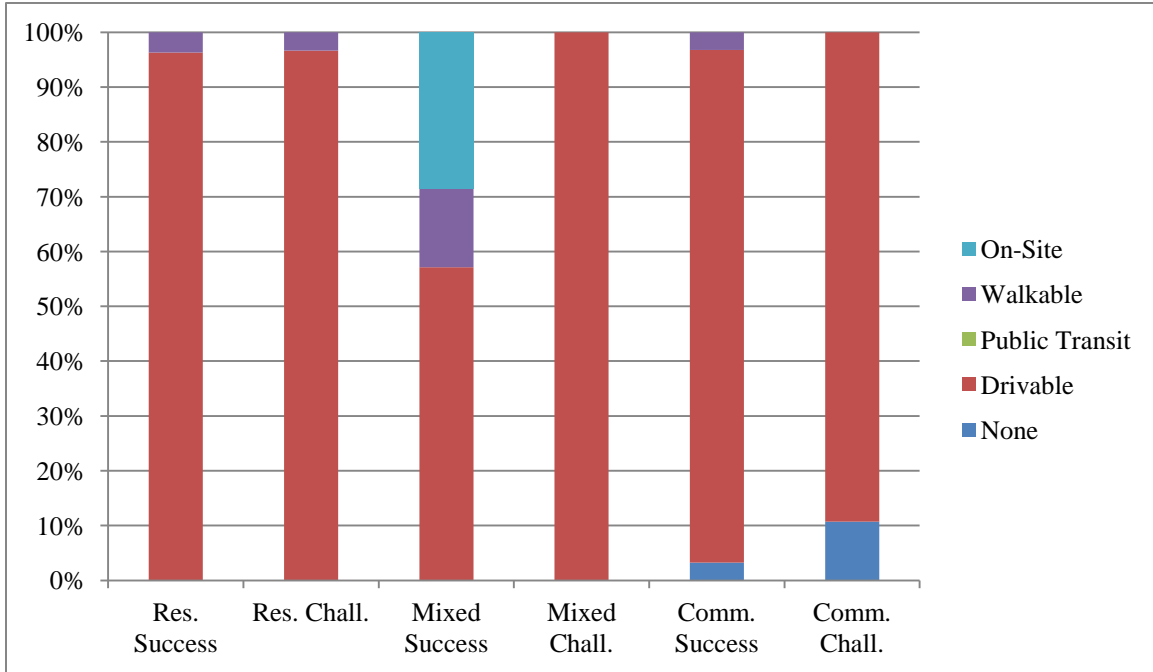
(Percentages)



*N* = 128

# LIBRARY ACCESS

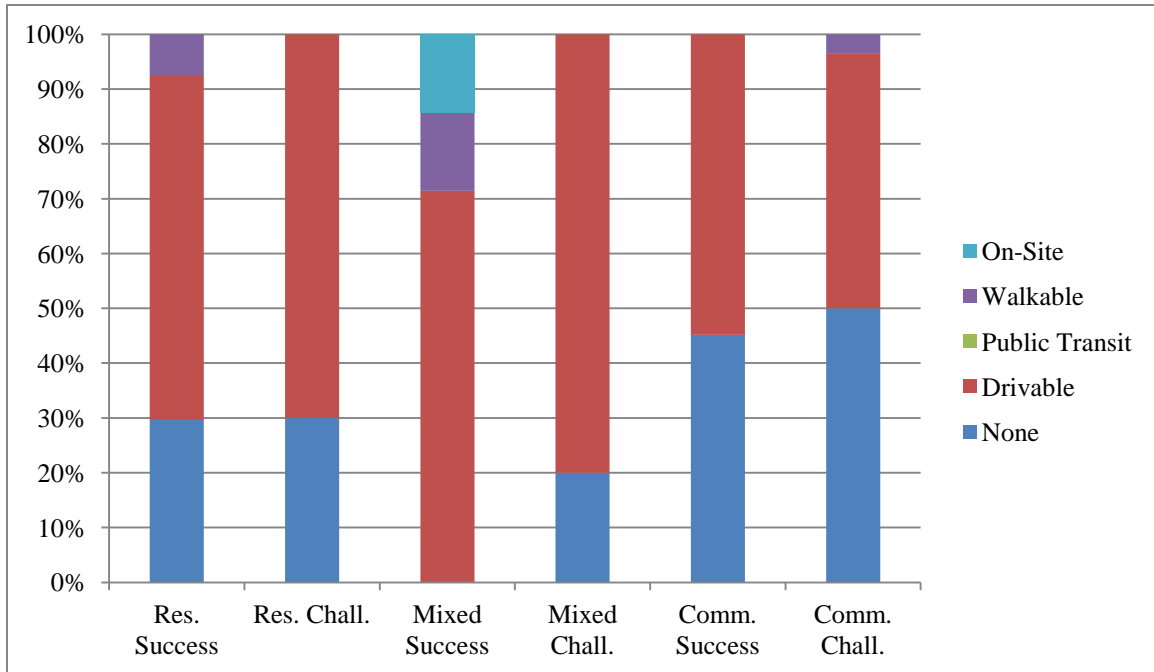
(Percentages)



*N* = 128

## CULTURAL CENTER (Museum, Theater, Concert Hall) ACCESS

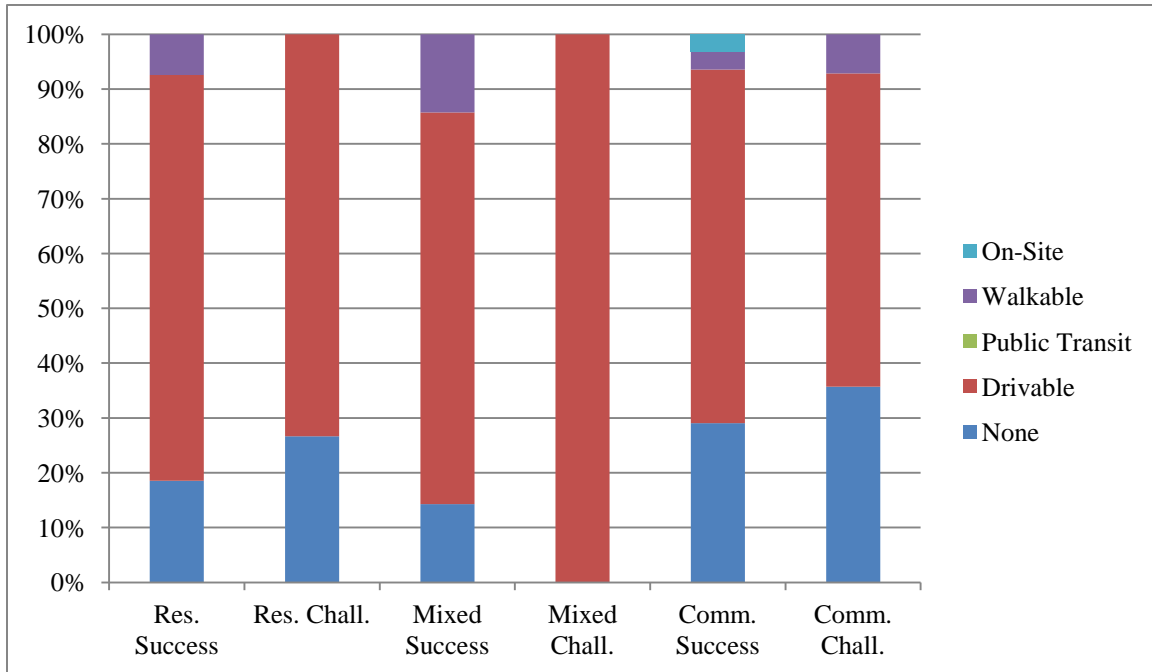
(Percentages)



$N = 128$

## HISTORIC SITE ACCESS

(Percentages)

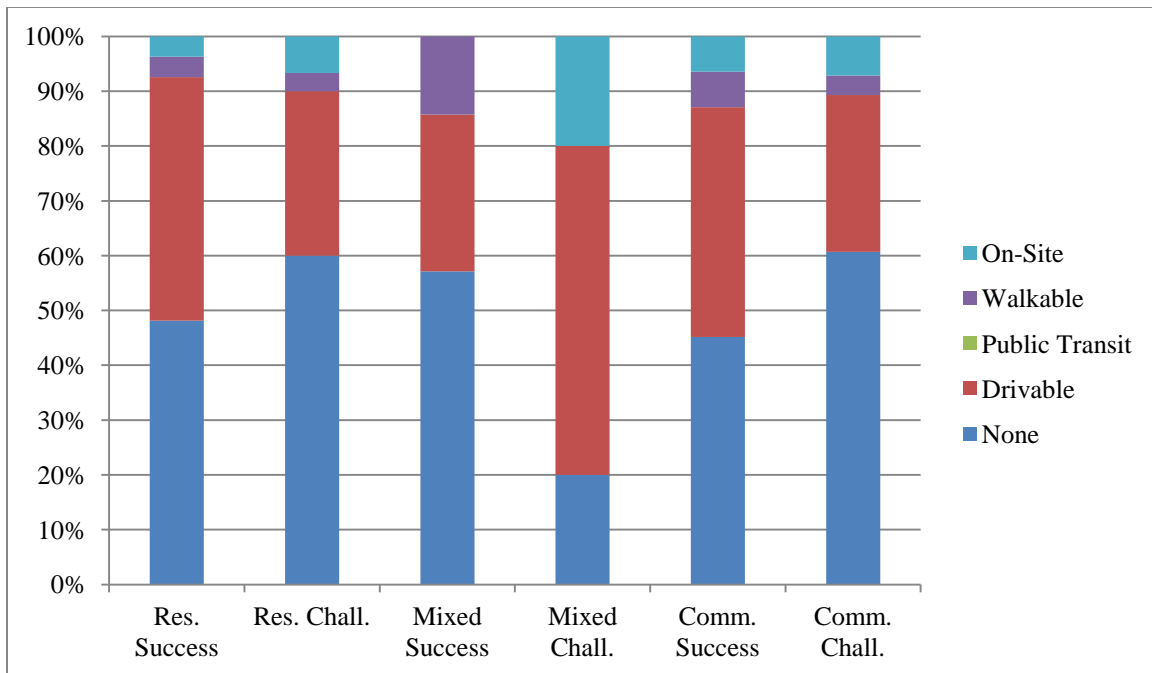


*N* = 128

Proximity to disamenities may outweigh the potential amenities.<sup>238</sup>

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

(Percentages)



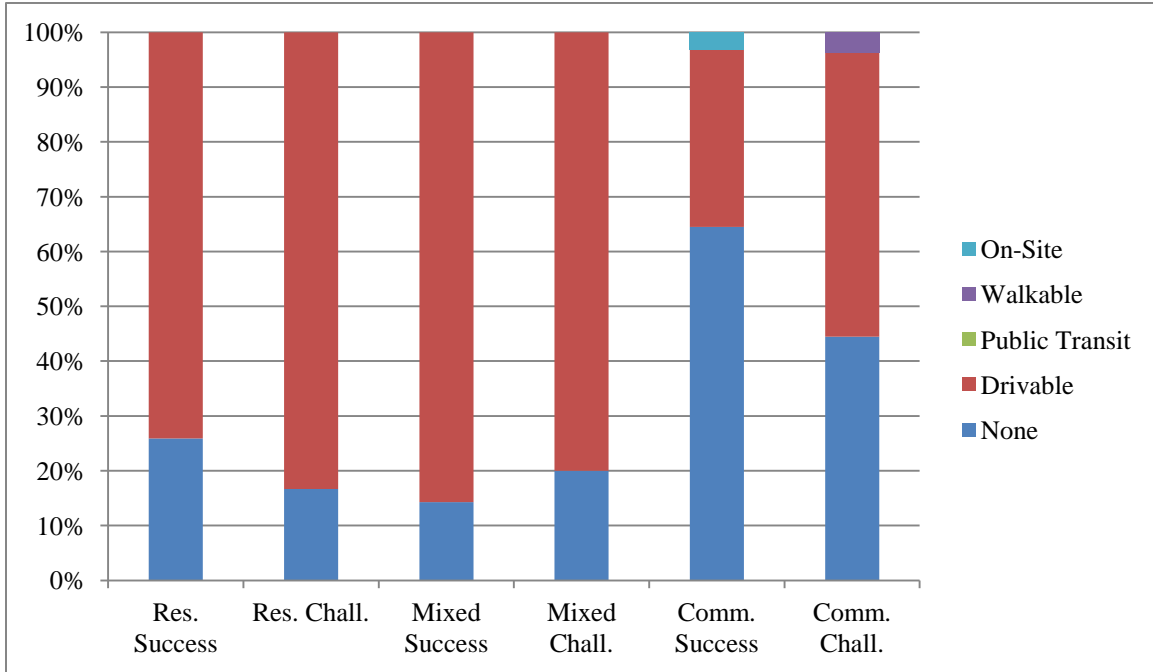
$N = 128$

<sup>238</sup> 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, 37 (2006).



## CORRECTIONAL FACILITY (Detention, Halfway House, Parole) ACCESS

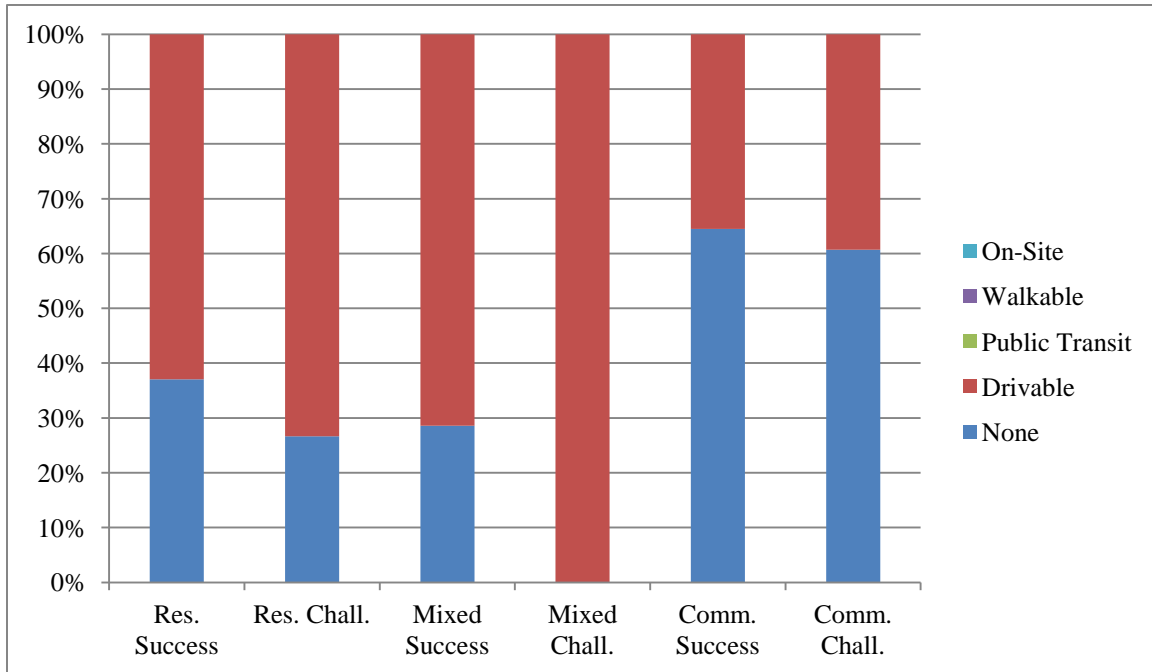
(Percentages)



$N = 128$

## LANDFILL/QUARRY/MINE/ROCK CRUSHER ACCESS

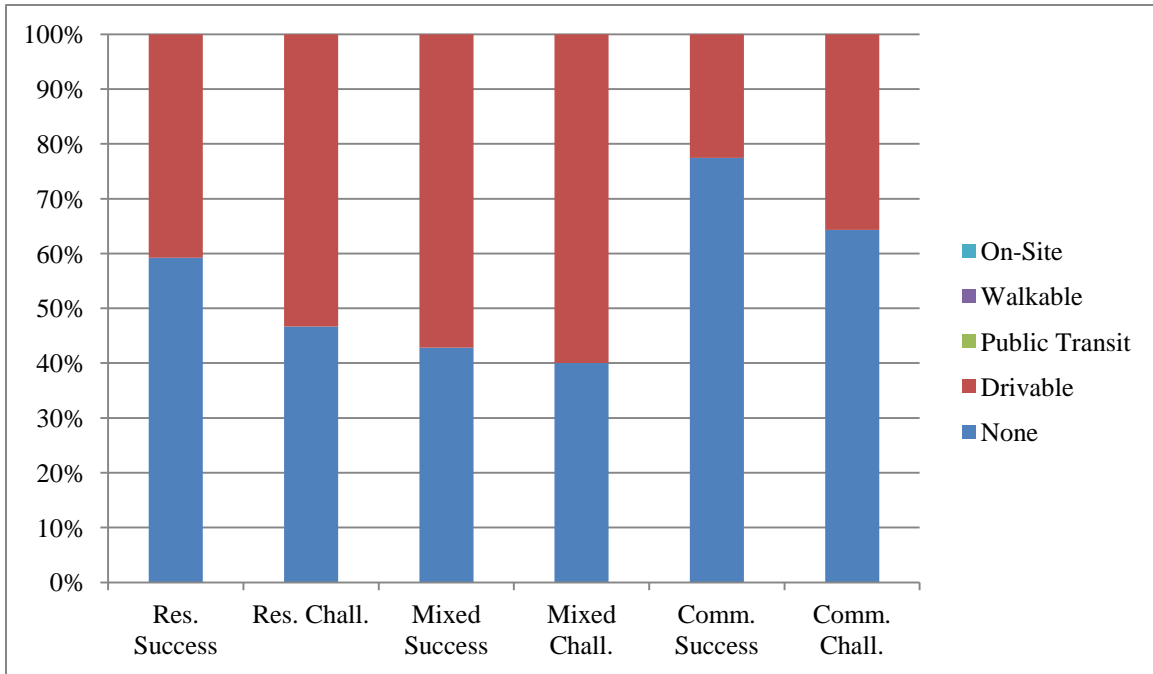
(Percentages)



$N = 128$

## REFINERY/SEWAGE TREATMENT/SLAUGHTERHOUSE ACCESS

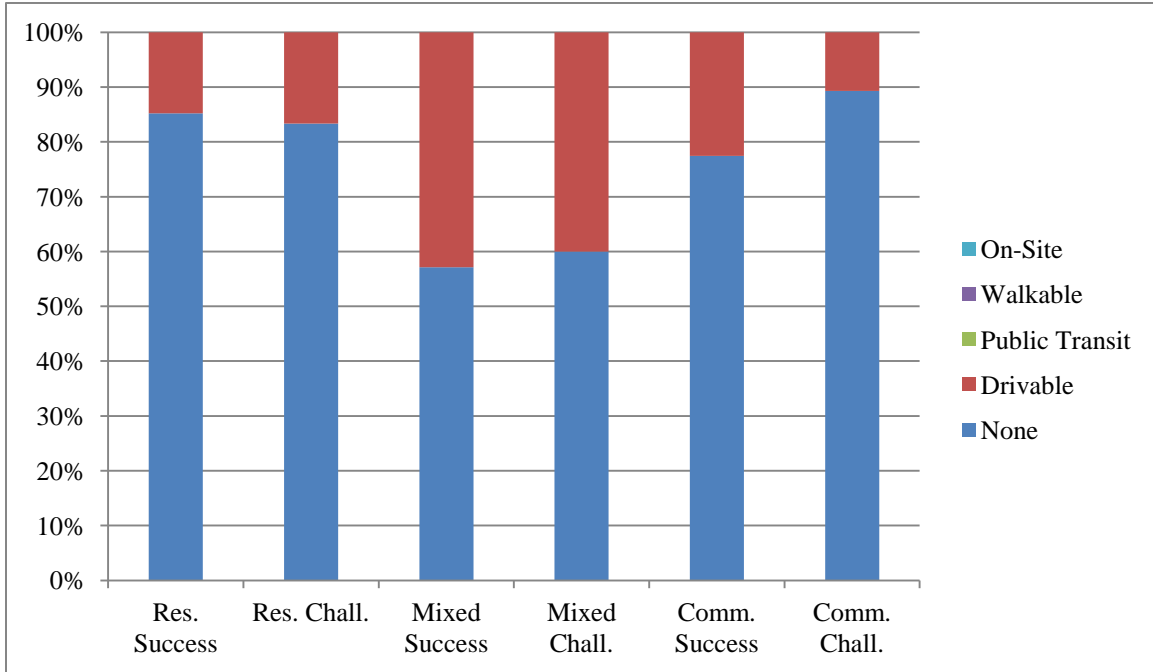
(Percentages)



$N = 128$

## SMOKESTACK INDUSTRY ACCESS

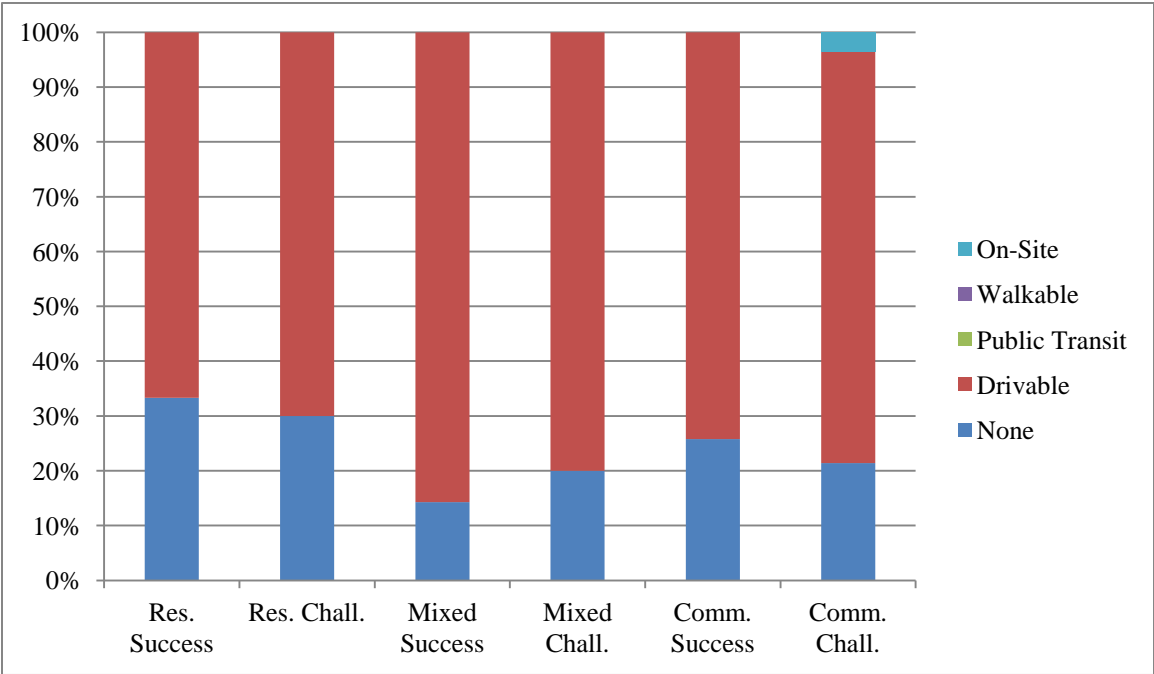
(Percentages)



$N = 128$

# LIGHT MANUFACTURING/WAREHOUSING ACCESS

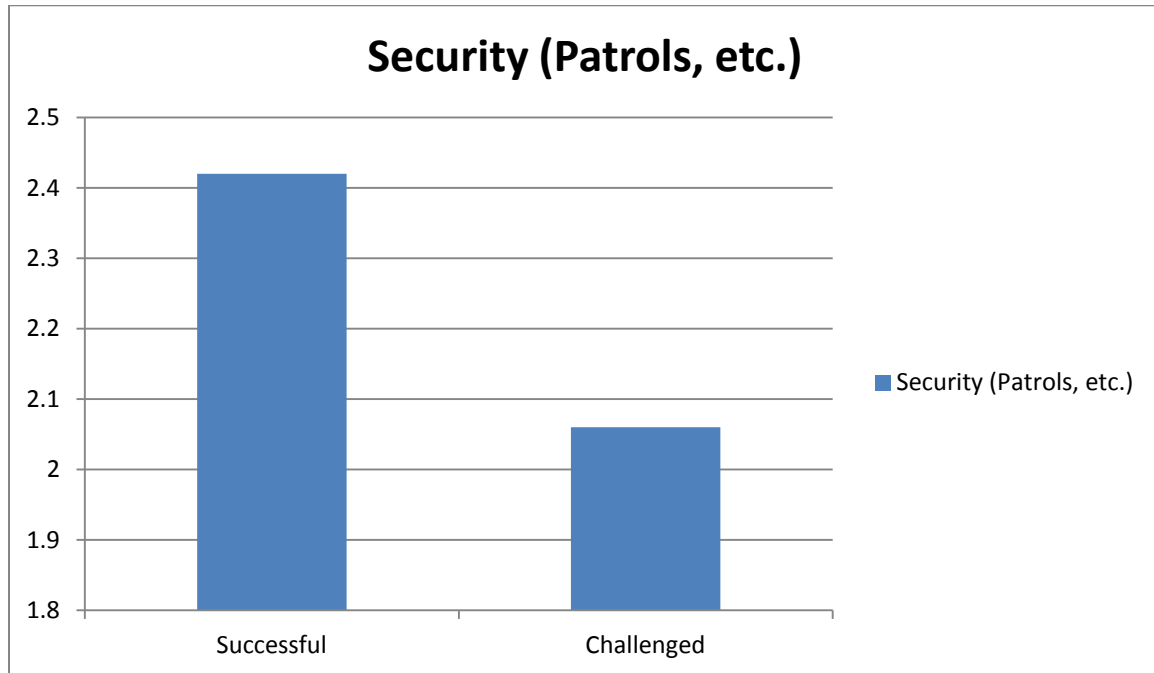
(Percentages)



N = 128

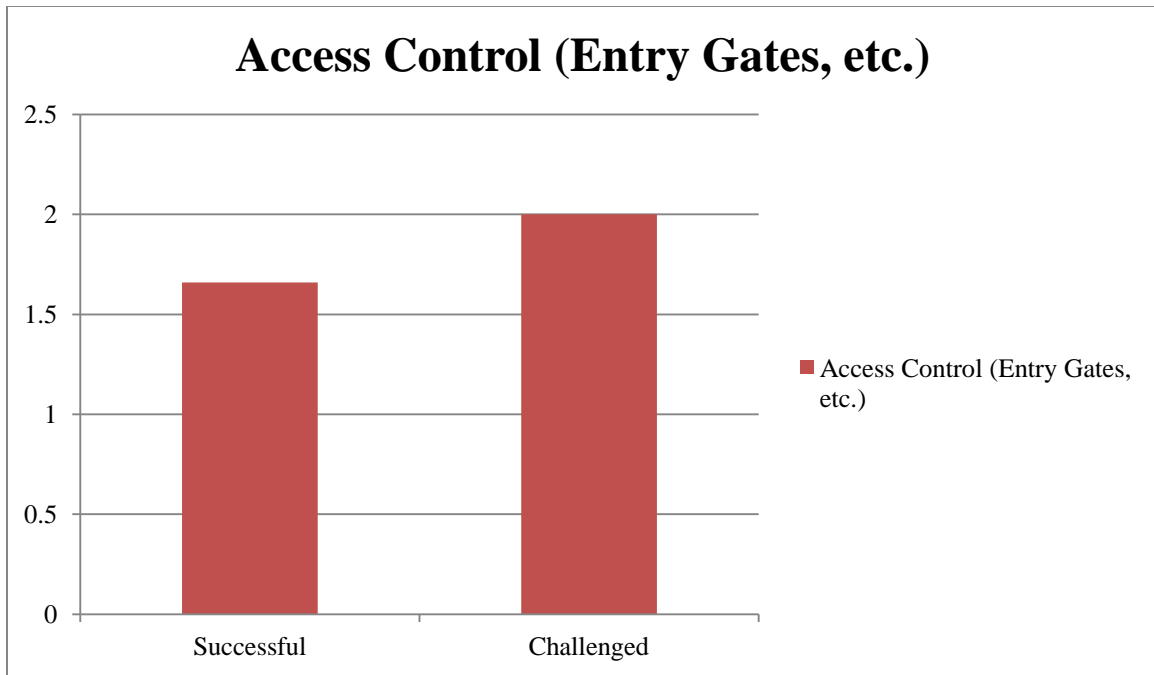
## SAFETY/SECURITY

Safety/Security is represented by Security (patrols, lighting, electronic surveillance) and Access Control (entry gates, berms, walls, fence).



$N = 128$

Security (patrols, lighting, electronic surveillance) 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, Security (patrols, lighting, electronic surveillance) numbers reflected a mean score in the moderately present range of 2.42 for the successful developments, while reflecting a moderately present mean score of 2.06 for the challenged developments.



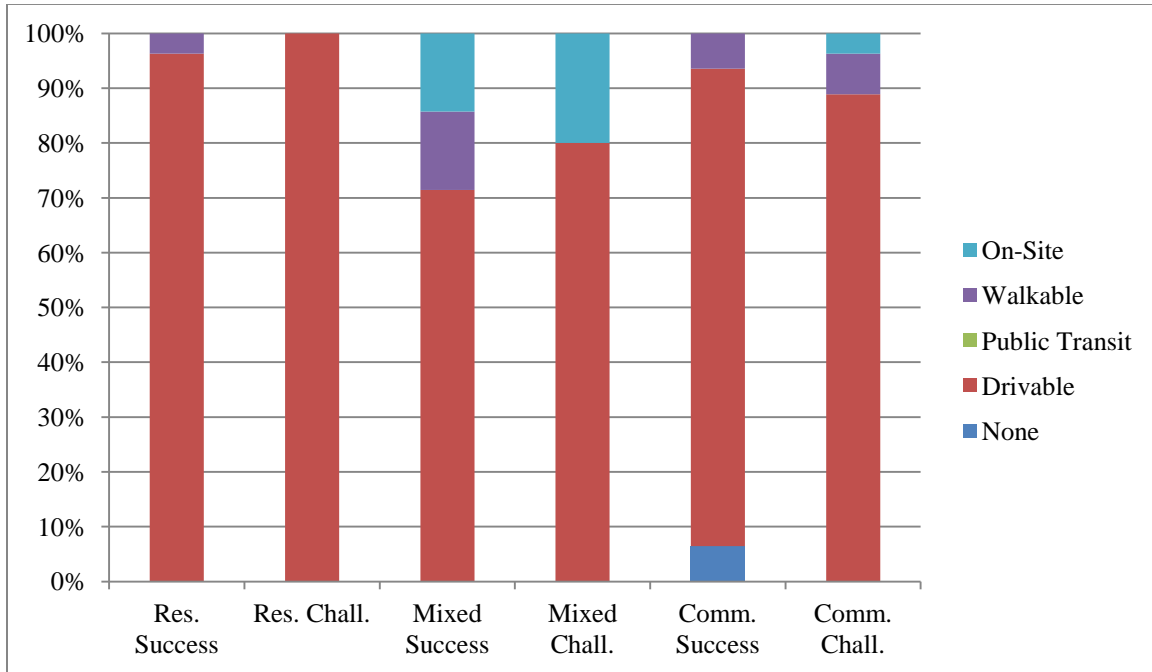
*N* = 128

Access Control (entry gates, berms, walls, fence) 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, Access Control (entry gates, berms, walls, fence) numbers reflected a mean score in the minimally present range of 1.66 for the successful developments, while reflecting a moderately present mean score of 2 for the challenged developments.

## PUBLIC SAFETY (Police, Fire, Ambulance) ACCESS

(Percentages)

N = 128



The percentages reflect the type of access afforded someone within the development. None is at the bottom of the scale, followed by Drivable, Public Transit, Walkable, and On-Site access. Results are visually reported for successful and challenged residential, mixed use and commercial developments.

While many survey items demonstrated little variance between successful and challenged development results, consistent with the historical observations, there was a strong overall connection between successful developments and several modes of government regulation. Interestingly enough, the successful developments were on average subject to a more lengthy development process than challenged developments. Furthermore, successful developments were more likely to be subject to a preexisting comprehensive plan and were less likely to have deviated from that plan than their challenged counterparts.

Also consistent with the historical observations was the differentiation between successful and challenged developments concerning the range of items comprising



convenience, quality of life and safety/security. The survey results continue to reflect a strong overall connection between the developments identified as successful and the range of items comprising convenience, quality of life and safety/security. Many of these items emerged as proper foci of governmental regulation. While some items were prevalent in or proximate to both successful and challenged developments, many exhibited an increased overall presence in or proximity to successful developments when compared to challenged developments. Few items were more prevalent in or proximate to challenged than successful developments. These variations could provide the foundation for future government regulation, with special emphasis being placed on those characteristics which exhibited the biggest divergence between successful and challenged developments.

With this knowledge of the differential characteristics between successful verses challenged developments, local governments may be prompted to intervene at the development stage of residential and commercial developments in an attempt to counter, forestall or at least lessen the impact of the cycle of outward migration and urban decline and degeneration. This could be attempted *ad hoc* by virtue of contract zoning which has come into vogue with developers and governmental jurisdictions attempting to escape perceived inadequacies of current standard zoning, subdivision and development regulatory schemes.

Contract zoning involves a hopefully enforceable promise on the part of the owners or zoning authority to rezone property. Some courts have upheld a unilateral contract which obligates the owner if and when the municipality chooses to act. Other courts, however, have not enforced such contracts on the ground that the owner's obligation provides improper motivation for the zoning authorities to act. Courts generally disfavor contracts in which a zoning authority promises to rezone property in a particular manner because such a contract attempts to bargain away the governmental authority to regulate and unlawfully bind a subsequent governing body's exercise of governmental authority. Another reason to disfavor such contracts is that a promise to rezone may evade state statutory and due process related procedures designed to insure a fair hearing for all concerned parties.<sup>239</sup> A more prudent approach might be to re-examine and re-constitute existing zoning, subdivision and development regulations and procedures in light of the differential characteristics between successful verses challenged developments. However, such an undertaking does not happen in a legal "state of nature." Therefore, Constitutional restraints on this path should be first understood.

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<sup>239</sup> 8 McQuillin Mun. Corp. § 25:104 (3d ed.).

#### IV. Understanding the Constitutional Restraints on Government Action to Solve the Problem

Initially, neither the United States or state governments possessed any latent or inherent powers. All power was held by the people and the federal government was only empowered to act pursuant to the grants of authority from the people contained in the U.S. Constitution. State governments only exercised citizen grants of power by virtue of their respective state constitutions. Early courts specifically acknowledged that some powers were retained by the citizenry as a whole and government was powerless to interfere in those areas. While the federal government's powers are necessarily limited to those specifically granted it by the U.S. Constitution, its exercise of those powers preempts state power entirely or at least to the extent that state decrees are inconsistent with federal actions. The federal Constitution may be used by the citizens of the United States to restrict the exercise of state powers, if in conflict. This delegation of powers by the people to the federal and state governments was confirmed in the ratification of the Tenth Amendment to the U.S. Constitution.

In *Martin v. Hunters Lessee*,<sup>240</sup> the United States Supreme Court artfully explained that

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of the policy or principle. On the other hand, it is perfectly clear that the

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<sup>240</sup> 14 U.S. 304, 4 L.Ed. 97, 1 Wheat. 304 (1816).

sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in the Tenth Amendment of the Constitution, which declares, that "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."<sup>241</sup>

With these premises established, the Court was then free to turn its attention to their practical applications. The text of the U.S. Constitution provided no general mechanism for federal oversight of state governmental actions. The federal court began by limiting its oversight to state actions directly contrary to the few restrictions specifically expressed in the text of the Federal Constitution. In *Fletcher v. Peck*,<sup>242</sup> the U.S. Supreme Court invalidated as unconstitutional a law passed by the Georgia Legislature in an attempt to repeal a prior massive land grant by the state which was allegedly tainted by corruption. The Court based its decision upon language found in Article I, Section 10 of the U.S. Constitution which states "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."<sup>243</sup> The *Martin v. Hunters Lessee* Court noted its appellate jurisdiction over states and their courts on federal issues. "It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. The language of the constitution is also imperative upon the states as to the performance of many duties."<sup>244</sup>

This jurisdiction was soon expanded to include protection of the powers implied within the federal government's exercise of its powers granted by the U.S. Constitution. In *McCulloch v. Maryland*,<sup>245</sup> the U.S. Supreme Court held that "the government of the

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<sup>241</sup> *Martin v. Hunters Lessee*, 14 U.S. 304, 324-325, 4 L.Ed. 97, 1 Wheat. 304 (1816).

<sup>242</sup> 10 U.S. 87, 3 L.Ed. 162 (1810).

<sup>243</sup> *Fletcher v. Peck*, 10 U.S. 87, 138, 3 L.Ed. 162 (1810).

<sup>244</sup> *Martin v. Hunters Lessee*, 14 U.S. at 343.

<sup>245</sup> 17 U.S. 316 (1819).

United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding.’ The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.”<sup>246</sup>

However, in 1833 when confronted with a claim that municipal action rendered a privately owned wharf unusable causing the owner to seek redress under the Fifth Amendment to the U.S. Constitution, the U.S. Supreme Court in *Barron v. Baltimore*<sup>247</sup> limited Fifth Amendment protections to actions of the federal government. "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes. If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest."<sup>248</sup> Prior to the adoption of the Fourteenth Amendment in 1868, state enactments raised no question under the Constitution of the United States. Such legislation was left to the discretion of the respective states, subject to no other limitations than those imposed by their own constitutions, or by the general principles supposed to limit all legislative power.<sup>249</sup>

The privileges and immunities of citizens, equal protections of the laws and due process clauses of the Fourteenth Amendment were examined by the U.S. Supreme Court

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<sup>246</sup> *McCulloch v. Maryland*, 17 U.S. 316, 406, 436 (1819).

<sup>247</sup> 32 U.S. 243 (1833).

<sup>248</sup> *Barron v. Baltimore*, 32 U.S. 243, 247-248 (1833).

<sup>249</sup> *Mugler v. Kansas*, 123 U.S. 623, 659, 8 S.Ct. 273 (1887).

in the context of local government action. The Court in *Munn v. People of State of Illinois*<sup>250</sup> noted that down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. "The Amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation."<sup>251</sup>

The United States Supreme Court in *Davidson v. City of New Orleans*<sup>252</sup> noted that the concept of due process is inherent.

The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866.

The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal government, it is found in the fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offence; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the constitutions of the several States, and in one shape or another have been the subject of judicial construction.

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<sup>250</sup> 94 U.S. 113 (1876).

<sup>251</sup> *Munn v. People of State of Illinois*, 94 U.S. 113, 124-126 (1876).

<sup>252</sup> 96 U.S. 97 (1877).

It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law,' remains today without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States.

It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.<sup>253</sup>

The *Davidson* Court concluded that the inherency of due process makes its scope and application ripe for judicial definition. "There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law. But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and

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<sup>253</sup> *Davidson v. City of New Orleans*, 96 U.S. 97, 101-102 (1877).

exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."<sup>254</sup>

The United States Supreme Court provided the foundational justification for subsequent substantive due process claims in *Barbier v. Connolly*.<sup>255</sup> It held that a San Francisco ordinance requiring certificates from a municipal health officer and board of fire wardens for public laundry operations constituted a lawful execution of municipal police powers and was not a violation of any substantial right of the individual. The Court held that the Fourteenth Amendment's declaration that no state "shall 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 the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.<sup>256</sup>

The *Barbier* Court also acknowledged that neither the Fourteenth Amendment or any other amendment was designed to interfere with the power of the state, sometimes termed its police power, 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 wealth and prosperity. Special burdens are often necessary for general benefits. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public

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<sup>254</sup> *Davidson v. City of New Orleans*, 96 U.S. 97, 104 (1877).

<sup>255</sup> 113 U.S. 27, 5 S.Ct. 357 (1884).

<sup>256</sup> *Barbier v. Connolly*, 113 U.S. 27, 31-32, 5 S.Ct. 357, 359-360 (1884).

purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.<sup>257</sup>

In a second challenge of San Francisco's regulation of public laundries, the United States Supreme Court in *Soon Hing v. Crowley*<sup>258</sup> explained that "the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body."<sup>259</sup>

In the third case scrutinizing San Francisco's regulation of public laundries, the United States Supreme Court in *Yick Wo v. Hopkins*<sup>260</sup> faced "admitted" discrimination<sup>261</sup> rather than police power justification. The Court embraced the application of constitutional protections against government regulatory activities in its holding that a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies, discriminating against some and favoring others, is prohibited.<sup>262</sup>

This led to the seminal United States Supreme Court case of *Mugler v. Kansas*,<sup>263</sup> which examined the provisions of the Fourteenth Amendment in addressing the validity of a state law declaring all structures for the manufacture of intoxicating liquors to be a common nuisance and commanding closure and government possession. "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

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<sup>257</sup> *Id.*

<sup>258</sup> 113 U.S. 703, 5 S.Ct. 730 (1885).

<sup>259</sup> *Soon Hing v. Crowley*, 113 U.S. 703, 710-711, 5 S.Ct. 730, 734 (1885).

<sup>260</sup> 118 U.S. 356, 6 S.Ct. 1064 (1886).

<sup>261</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 1073 (1886).

<sup>262</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 366-367, 6 S.Ct. 1064, 1069-1070 (1886).

<sup>263</sup> 123 U.S. 623, 8 S.Ct. 273 (1887).



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."<sup>264</sup>

The United States Supreme Court in *Lawton v. Steele*<sup>265</sup> then addressed and advanced the concept of substantive due process stating that "to justify the state in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."<sup>266</sup>

Recognizing the difficulty in defining with exactness the phrase "due process of law," the Court in *Holden v. Hardy*<sup>267</sup> held that it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.<sup>268</sup> However, the Court in *Chicago & A.R. Co. v. Tranbarger*<sup>269</sup> noted that "the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment."<sup>270</sup>

However, the Court in *Pennsylvania Coal Co. v. Mahon*<sup>271</sup> held the general rule "is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>272</sup> The Court noted that government hardly could go on if to some extent values incident to property could not be diminished without paying for

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<sup>264</sup> *Mugler v. Kansas*, 123 U.S. 623, 668-669, 8 S.Ct. 273 (1887).

<sup>265</sup> 152 U.S. 133, 14 S.Ct. 499 (1894).

<sup>266</sup> *Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499, 501 (1894).

<sup>267</sup> 169 U.S. 366, 18 S.Ct. 383 (1898).

<sup>268</sup> *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 390-391 (1898).

<sup>269</sup> 238 U.S. 67, 35 S.Ct. 678 (1915).

<sup>270</sup> *Chicago & A.R. Co. v. Tranbarger*, 238 U.S. 67, 78, 35 S.Ct. 678, 682 (1915).

<sup>271</sup> 260 U.S. 393, 43 S.Ct. 158 (1922).

<sup>272</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922).

every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.<sup>273</sup>

The *Pennsylvania Coal* Court found that the protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.<sup>274</sup>

The United States Supreme Court was then prepared to turn its attention on zoning regulation in light of the foregoing decisions. In *Village of Euclid, Ohio v. Ambler Realty Co.*,<sup>275</sup> it held that before a zoning regulation ordinance can be declared unconstitutional, there must be a showing that its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," based upon the acknowledgement that

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.

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<sup>273</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159 (1922).

<sup>274</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922).

<sup>275</sup> 272 U.S. 365, 47 S.Ct. 114 (1926).

In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application 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.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. Thus the question 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. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.<sup>276</sup>

The United States Supreme Court then addressed the concept of a regulatory taking. *Miller v. Schoene*<sup>277</sup> concerned a governmental regulation destroying infected trees as the only way to prevent the spread of a deadly tree disease. Where the choice is unavoidable, the Court refused to say that this type of exercise of police power, controlled by considerations of social policy which are not unreasonable, involved any denial of due process.<sup>278</sup> That same year, the Court in *Nectow v. City of Cambridge*<sup>279</sup> refused to sustain the application of a zoning ordinance which zoned a parcel residential yet there was a finding that while the parcel was usable under a different zoning classification, "no practical use can be made of the land in question for residential purposes."<sup>280</sup> The Court found this zoning ordinance application exceeded the Fourteenth Amendment's substantive due process limitations upon state and local government regulatory authority. The governmental power to interfere by zoning regulations with the

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<sup>276</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387-388, 47 S.Ct. 114, 118 (1926).

<sup>277</sup> 276 U.S. 272, 48 S.Ct. 246 (1928).

<sup>278</sup> *Miller v. Schoene*, 276 U.S. 272, 280, 48 S.Ct. 246, 248 (1928).

<sup>279</sup> 277 U.S. 183, 48 S.Ct. 447 (1928).

<sup>280</sup> *Nectow v. City of Cambridge*, 277 U.S. 183, 187, 48 S.Ct. 447, 448 (1928).

general rights of the land owner by restricting the character of his use, is not unlimited and such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Without that, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.<sup>281</sup>

As Michael Davis and Robert Glicksman explain, the requirement of substantive due process is meant to ensure that the government acts for a proper purpose, i.e., to enhance the aggregate social welfare. The prohibition on taking private property without just compensation serves a different function; it prevents the government from imposing on particular property owners a disproportionate share of the burdens caused by government actions taken to promote the public good. These distinct functions reflect the Court's historic focus in substantive due process cases on issues of authority and in taking cases on questions of impact.<sup>282</sup>

The Court in *Goldblatt v. Town of Hempstead, N. Y.*<sup>285</sup> explained that there is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, it is by no means conclusive.<sup>286</sup> The Court in *Moore v. City of East Cleveland, Ohio*<sup>287</sup> noted that

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely

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<sup>281</sup> *Nectow v. City of Cambridge*, 277 U.S. 183, 188-189, 48 S.Ct. 447, 448 (1928).

<sup>282</sup> Michael J. Davis & Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses*, 68 Or. L. Rev. 393, 443-444 (1989).

<sup>285</sup> 369 U.S. 590, 82 S.Ct. 987 (1962).

<sup>286</sup> *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594, 82 S.Ct. 987, 990 (1962).

<sup>287</sup> 431 U.S. 494, 97 S.Ct. 1932 (1977).

to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.<sup>288</sup>

The Court in *Penn Cent. Transp. Co. v. City of New York*,<sup>289</sup> noted that it has recognized a wide variety of contexts in which government may execute laws or programs that adversely affect recognized economic values. Takings challenges have been dismissed on the grounds that while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute “property” for Fifth Amendment purposes.<sup>290</sup>

The *Penn Central* Court identified several factors that have particular significance for determining whether a restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>291</sup>

However, as noted in *Andrus v. Allard*,<sup>292</sup> the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full

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<sup>288</sup> *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 501-502, 97 S.Ct. 1932, 1936-1937 (1977).

<sup>289</sup> 438 U.S. 104, 98 S.Ct. 2646 (1978).

<sup>290</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-125, 98 S.Ct. 2646, 2659 (1978).

<sup>291</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 (1978).

<sup>292</sup> 444 U.S. 51, 100 S.Ct. 318 (1979).

“bundle” of property rights, the destruction of one “strand” of the bundle is not a taking, because the aggregate must be viewed in its entirety. Loss of future profits, unaccompanied by any physical property restriction, provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.<sup>293</sup>

The Court in *Kaiser Aetna v. United States*<sup>294</sup> further noted that while not a taking per se, the “right to exclude” is so universally held to be a fundamental element of the property right that it falls within this category of interests that the Government cannot take without compensation. Even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.<sup>295</sup> The Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*<sup>296</sup> explained that property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. A mere unilateral expectation or abstract need is not a property interest entitled to protection.<sup>297</sup> The Court in *Loretto v. Teleprompter Manhattan CATV*<sup>298</sup> concluded that a permanent occupation of physical property authorized by government is a taking without regard to the public interests that it may serve. However, temporary government limitations on property are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.<sup>299</sup>

The Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*<sup>300</sup> found that the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation.<sup>301</sup> The test for regulatory takings requires comparison of the value that has been taken from the property with the value that remains in the property. Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has

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<sup>293</sup> *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 327 (1979).

<sup>294</sup> 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

<sup>295</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979).

<sup>296</sup> 449 U.S. 155, 101 S.Ct. 446 (1980).

<sup>297</sup> *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 451 (1980).

<sup>298</sup> 458 U.S. 419, 102 S.Ct. 3164 (1982).

<sup>299</sup> *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426, 435-436, 102 S.Ct. 3164, 3171, 3176 (1982).

<sup>300</sup> 480 U.S. 470, 107 S.Ct. 1232 (1987).

<sup>301</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492, 107 S.Ct. 1232, 1246 (1987).

effected a taking, the focus is on the character of the action and the nature of the interference with rights in the parcel as a whole.<sup>302</sup> The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.<sup>303</sup> There is an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation.<sup>304</sup>

The Court in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*<sup>305</sup> reviewed a temporary building moratorium placed upon property damaged by flooding worsened because of upstream forest fire damage. The Court elucidated that the Fifth Amendment as applied by the Fourteenth Amendment makes it clear that it is not designed to limit governmental interference with property rights per se, but rather to secure compensation in the event otherwise proper interference amounts to a taking. Thus, government action that works a taking of property rights implicates the “constitutional obligation to pay just compensation.”<sup>306</sup> Temporary takings which deny a landowner all use of his property are no different than permanent takings, for which the Constitution clearly requires compensation. The Just Compensation Clause of the Fifth Amendment requires that government pay the landowner for the value of the use of the land during this period of temporary taking.<sup>307</sup>

The Court in *Nollan v. California Coastal Com'n*,<sup>308</sup> dealt with whether requiring the uncompensated conveyance of an easement as a condition of a land-use permit constitutes the taking of a property interest.<sup>309</sup> It has been long recognized that land-use regulation does not effect a taking if it “substantially advances legitimate state interests” and does not “deny an owner economically viable use of his land”<sup>310</sup> A permit condition that serves the same legitimate police power purpose as a refusal to issue the permit

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<sup>302</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498, 107 S.Ct. 1232, 1247 (1987).

<sup>303</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492, 107 S.Ct. 1232, 1245 (1987).

<sup>304</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494, 107 S.Ct. 1232, 1246 (1987).

<sup>305</sup> 482 U.S. 304, 107 S.Ct. 2378 (1987).

<sup>306</sup> *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.* 482 U.S. 304, 315, 107 S.Ct. 2378, 2385-2386 (1987).

<sup>307</sup> *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.* 482 U.S. 304, 318-319, 107 S.Ct. 2378, 2388 (1987).

<sup>308</sup> 483 U.S. 825, 107 S.Ct. 3141 (1987).

<sup>309</sup> *Nollan v. California Coastal Com'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145 (1987).

<sup>310</sup> *Nollan v. California Coastal Com'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147 (1987).

should not be found to be a taking if the refusal to issue the permit would not constitute a taking.<sup>311</sup> In short, 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.”<sup>312</sup> A “permanent physical occupation” has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.<sup>313</sup>

This was followed by *Dolan v. City of Tigard*,<sup>314</sup> where the Court instructed that under the well-settled doctrine of “unconstitutional conditions,” 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. In this regard, 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.<sup>315</sup> 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 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.<sup>316</sup> In *City of Monterey v. Del Monte Dunes*,<sup>317</sup> 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.<sup>318</sup>

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<sup>311</sup> *Nollan v. California Coastal Com'n*, 483 U.S. 825, 836, 107 S.Ct. 3141, 3148 (1987).

<sup>312</sup> *Nollan v. California Coastal Com'n*, 483 U.S. 825, 837, 107 S.Ct. 3141, 3149 (1987).

<sup>313</sup> *Nollan v. California Coastal Com'n*, 483 U.S. 825, 832, 107 S.Ct. 3141, 3146 (1987).

<sup>314</sup> 512 U.S. 374, 114 S.Ct. 2309 (1994).

<sup>315</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385-386, 114 S.Ct. 2309, 2317 (1994).

<sup>316</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 388-392, 114 S.Ct. 2309, 2318-2320 (1994).

<sup>317</sup> 526 U.S. 687, 119 S.Ct. 1624 (1999).

<sup>318</sup> *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-703, 119 S.Ct. 1624, 1635 (1999).



The Supreme Court, in *Village of Willowbrook v. Olech*,<sup>319</sup> acknowledged the broad application of the equal protection clause of the Fourteenth Amendment. "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that 'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"<sup>320</sup>

Thereafter, in *Lingle v. Chevron U.S.A. Inc.*,<sup>321</sup> the United States Supreme Court struck the death knell for burgeoning substantive due process theories in takings jurisprudence. The Court explained that the "substantially advances" language has been read to announce a stand-alone regulatory takings test that is wholly independent of any other test. The Court noted that although a number of takings precedents recited the "substantially advances" formula, its validity as a freestanding takings test has never been considered. This formula prescribes an inquiry in the nature of due process, not a takings test, and has no proper place in takings jurisprudence.<sup>322</sup>

The Court in *Arkansas Game and Fish Comm'n v. United States*<sup>323</sup> expounded 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.<sup>324</sup>

While the United States Supreme Court will most certainly continue to provide definition to the Fourteenth Amendment and its interaction with state and local government exercise of police powers, this language from *Arkansas Game and Fish Comm'n v. United States* does an admirable job of providing a capstone for our current

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<sup>319</sup> 528 U.S. 562, 120 S.Ct. 1073 (2000).

<sup>320</sup> *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 1074-1075 (2000).

<sup>321</sup> 544 U.S. 528, 125 S.Ct. 2074 (2005).

<sup>322</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, 125 S.Ct. 2074, 2082-2083 (2005).

<sup>323</sup> No. 11-597, 568 U. S. \_\_\_\_ (Dec. 5, 2012).

<sup>324</sup> *Arkansas Game and Fish Comm'n v. United States*, No. 11-597, slip op. at 14-15, 568 U. S. \_\_\_\_ (Dec. 5, 2012).

understanding. Although Joseph Sax once posited that “the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results. The principle upon which the cases can be rationalized is yet to be discovered by the bench: what commentators have called the ‘crazy-quilt pattern of Supreme Court doctrine’ has effectively been acknowledged by the Court itself, which has developed the habit of introducing its uniformly unsatisfactory opinions in this area with the understatement that ‘no rigid rules’ or ‘set formula’ are available to determine where regulation ends and taking begins.”<sup>325</sup> Ensuing clarity provided by the Supreme Court works to erode that position's persuasiveness today. Current understanding of the interaction between the exercise of government regulation and takings jurisprudence lays the groundwork for thoughtful and legally permissible implementation and application of zoning, subdivision and developmental regulations and processes aimed at addressing the cycle of outward migration and urban decline and degeneration at the initial development stage as well as subsequently thereto.

## V. Conclusion

An overview of critical academic thought concerning the character and attributes of American urban development establishes that the presence of unsuccessful, or challenged, development is a transcending problem necessitating government regulation in response. Challenged developments were observed frequently materializing in areas exhibiting urban decline and degeneration, including outward migration. It was conjectured that this cycle of outward migration and urban decline and degeneration might be part of an overall development cycle experienced by more than current day cities. History was probed for evidence of commonality.

Cycles of urban decline and degeneration appeared within Mesopotamia, Egypt, the Greek city-states, and the Roman Empire. The form of government, whether a benevolent priest-king, dictator, democratic assembly or republic council appears extraneous. The mere presence of governmental regulation, such as comprehensive planning, zoning, building codes, advanced development techniques or sophisticated legal concepts for the protection of individual rights, did not purport to dissuade or ameliorate these cycles throughout the ages. Historical accounts attributed successful urban concentration to the presence of safety and security, convenience, and quality of life. Conversely, when one or more of these factors were diminished or compromised, cycles of urban decline and degeneration seemed to emerge.

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<sup>325</sup> Joseph L. Sax, *Takings And The Police Power*, 74 Yale L. J. 36, 37 (November 1964).

Field research was conducted to ascertain how these historical observations fared in the modern context. Residential and commercial developments differentiated as successful and challenged within the fifty (50) fastest growing counties across the United States between 2000 and 2010 pursuant to the U.S. Census Bureau were surveyed to explore the presence of governmental regulation and procedures as well as factors affecting safety and security, convenience, and quality of life. Consistent with historical observations, only items connected with safety and security, convenience and quality of life emerged from this process.

Based upon this knowledge, local governments may be prompted to intervene at the development stage of residential and commercial developments in an attempt to counter, forestall or at least lessen the impact of the cycle of outward migration and urban decline and degeneration. While this could be attempted *ad hoc*, a more prudent approach might be to re-examine and re-constitute existing zoning, subdivision and development regulations and procedures in light of the differential characteristics between successful verses challenged developments. However, such an undertaking does not happen in a legal "state of nature."

A synthesis of the jurisprudence that defines the limits of and restraints upon current governmental regulation reveals that land use regulation in America centers around the interaction between the authority of a local government to act, pursuant to "police power" authority granted that local government from the state, and whether that government action violates an individual's Constitutional rights. These Constitutional rights center around the privileges and immunities of citizens, equal protections of the laws and due process clauses of the Fourteenth Amendment and include "regulatory takings" under the theory of inverse condemnation. The United States Supreme Court has undertaken the long and arduous task of defining this interaction. A summation of that current definition is contained in *Arkansas Game and Fish Comm'n v. United States*<sup>326</sup> where the Court expounded 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.<sup>327</sup> This

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<sup>326</sup> No. 11-597, 568 U. S. \_\_\_\_ (Dec. 5, 2012).

<sup>327</sup> *Arkansas Game and Fish Comm'n v. United States*, No. 11-597, slip op. at 14-15, 568 U. S. \_\_\_\_ (Dec. 5, 2012).

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**Development Survey**

Name \_\_\_\_\_

Description \_\_\_\_\_

Address \_\_\_\_\_

Case \_\_\_ Region NE SE MW SW 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

**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

Plans 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
Exclusionary Zoning Requirements (i.e. large lot/building)?	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
<b>All Development</b>					
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
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**Senior-Related**

Senior-oriented recreational and/or social activities	Not	Min	Mod	Subtn	Extrm
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Assisted living residential facilities	Not	Min	Mod	Subtn	Extrm
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**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
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Sit-Down Restaurant	None	Drive	Public	Walk	On-Site
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Coffee Shop	None	Drive	Public	Walk	On-Site
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Bars	None	Drive	Public	Walk	On-Site
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Entertainment Establishments (movies, bowling)	None	Drive	Public	Walk	On-Site
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Service Establishments (banking, insurance, cleaning)	None	Drive	Public	Walk	On-Site
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Health-Related Services (medical, mental, pharmacy)	None	Drive	Public	Walk	On-Site
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Child-Related Services (day care, latch key, pre-school)	None	Drive	Public	Walk	On-Site
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Tourist-Related Services (hotel/motel)	None	Drive	Public	Walk	On-Site
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Upscale Housing	None	Drive	Public	Walk	On-Site
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Affordable Housing	None	Drive	Public	Walk	On-Site
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Public Housing/Shelter	None	Drive	Public	Walk	On-Site
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Distressed Neighborhood/Blight	None	Drive	Public	Walk	On-Site
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High Crime Rate	None	Drive	Public	Walk	On-Site
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High Vacancy Rate	None	Drive	Public	Walk	On-Site
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Correctional Facility (detention, halfway house, parole)	None	Drive	Public	Walk	On-Site
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Landfill/Quarry/Mine/Rock Crusher	None	Drive	Public	Walk	On-Site
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Refinery/Sewage Treatment/Slaughterhouse	None	Drive	Public	Walk	On-Site
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Smokestack Industry	None	Drive	Public	Walk	On-Site
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Light Manufacturing/Warehousing	None	Drive	Public	Walk	On-Site
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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