

# Keeping it Legal: Survey of Federal Laws Affecting New Urbanist Communities

By Doris Goldstein, Dan Slone and Heather Stevenson

Although real estate development is primarily regulated by state and local law, a number of federal laws impact the creation and marketing of residential real estate. Many of these laws have unexpected consequences when applied to new urbanist communities, which have a mixture of uses and a variety of housing types within a single development. This article surveys some of those federal laws, both as to their general application and to the particular implications for new urbanist communities.

This survey is not intended to provide legal advice. For further information as it applies to your property, please consult an attorney.

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## 1. Fair Housing Act

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**Citation:** Congress enacted the Fair Housing Act as Title VIII of the Civil Rights Act of 1968. The Fair Housing Amendments Act of 1988 significantly expanded its scope. The Housing for Older Persons Act of 1995 (HOPA) makes several changes to the 55 and older exemption.

**Applicability:** The Fair Housing Act covers almost all housing, both private and public. In some circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members. In addition, the familial status provisions don't apply to properties that satisfy the Act's 55 and older housing conditions. The provisions for handicapped accessibility in new construction apply only to certain multifamily dwelling units, as discussed below.

**What It Does:** The Fair Housing Act, as amended in 1988, prohibits housing discrimination on the basis of race, color, religion, sex, disability, familial status, and national origin. Covered activities include financing, zoning practices, new construction design, and advertising. Although the Act is often discussed in the context of landlord and tenant, it applies equally to homeowners' associations and owners.

**How It's Enforced:** Complaints of Fair Housing Act violations may be filed with the U.S. Department of Housing and Urban Development. Additionally, the Department of Justice can file cases involving a pattern or practice of discrimination. The Fair Housing Act may also be enforced through private lawsuits. The law allows a plaintiff to receive both actual and punitive damages, which considerably raises the financial risk of noncompliance.

**How It Affects New Urban Developments:** While the Act has far-reaching implications, this article discusses two that are most important to new urbanist developments: disability-related modifications to buildings, and advertising.

*Accessibility:* In both new and existing buildings, owners or tenants with disabilities must be permitted to make reasonable access-related modifications to their private living space and to common use spaces. Modifications must be done at the expense of the occupant desiring the modification, rather than the landlord or owners' association. There have been some decisions about what is considered a "reasonable" modification; ramps generally are considered to be reasonable.

For new construction, the Act requires that multifamily housing with four or more units be designed and built to allow access for persons with disabilities. These requirements differ from, and are generally less extensive than, those under the Americans with Disabilities Act, discussed below. Requirements under the Fair Housing Act include accessible common use areas, doors that are wide enough for wheelchairs, kitchens and bathrooms that allow a person using a wheelchair to maneuver, and other adaptable features within the units. However, the requirements only apply to ground-floor units, and to upper floor units if the building has an elevator. Unlike the Americans with Disabilities Act, the Fair Housing Act never requires that an elevator be installed in a building. Also unlike the ADA, the standards for new construction do not apply to older buildings undergoing extensive modification.

HUD has issued interpretations concerning application of the Act to townhouse-style dwellings. If four or more units are attached, they are covered by the Act—even if they are separately owned and even if there is a firewall between each unit. However, in a non-elevator building, if each of the units has more than one story internal to the unit ("multistory units" as defined by the Act) then the units would not need to be accessible. To quote from HUD's own comments,

"Using an example of a single structure consisting of five two-story townhouses, the Department stated that such a structure is not a covered multifamily dwelling if the building does not have an elevator, because the entire dwelling unit is not on the ground floor. Thus, the first floor of a two-story townhouse in the example is not a groundfloor unit, because the entire unit is not on the ground floor. In contrast, a structure consisting of five single-story townhouses would be a covered multifamily dwelling."

However, HUD has ruled that in an elevator building, the main floor of multistory units must be accessible to disabled visitors, including a bathroom. The other floors in such a unit do not need to be accessible. This configuration is sometimes seen in larger mixed-use buildings in new urbanist communities. See the Fair Housing Act Design Manual, available online in PDF format, for further information.

The manual also has detailed information about accessible routes from parking areas into the dwelling. Common areas must also meet accessibility standards.

*Advertising:* The Fair Housing Act regulates advertising and prohibits any advertising that would discourage any protected group. While most of the requirements, such as prohibiting racially discriminatory language, are obvious, some are subtle. For new urbanists, whose advertising often focuses on community rather than the features of the house itself, these provisions are noteworthy.

If models or drawings of people are used, they must represent different racial groups. While a single ad with a white model would not violate the act, a series of such ads or multiple pictures in a single ad or brochure portraying only white residents would open the developer (and the newspaper that prints it) to a charge of discrimination. As stated in the leading case of *Ragin v. New York Times Co.*, 923 F.2d 995, 1001 (2d Cir. 1991), “Advertising is a make-up-your-own-world in which one builds an image from scratch, selecting those portrayals that will attract targeted consumers and discarding those that will put them off.”

Except for communities that qualify for 55 and over status, advertising must welcome all age groups and family configurations, and models in advertising should illustrate this as well. “Separate but equal” is not good enough, and separate “family” and “adult” sections are prohibited.

**Where To Find More Information:**

Office of Fair Housing and Equal Opportunity  
U.S. Department of Housing and Urban Development  
451 7th Street, S.W. , Room 5242  
Washington, D.C. 20410  
[www.hud.gov/offices/fheo/index.cfm](http://www.hud.gov/offices/fheo/index.cfm)  
(202) 708-2333 (voice)  
(202) 401-1247 (TTY)

For publications, call the Housing and Urban Development Customer Service Center at:  
(800) 767-7468 (voice)  
(800) 877-8339 (TTY)

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## 2. Americans with Disabilities Act

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**Citation:** Congress passed the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. Title III is further implemented by regulations by the Department of Transportation, 49 CFR Parts 27, 37, and the Department of Justice, 28 CFR Part 36.

**Applicability:** To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or

record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.

**What It Does:** The ADA prohibits discrimination on the basis of disability in employment, public accommodations, commercial facilities, transportation, and telecommunications. For the purposes of this article, the most important part of the ADA is Title III of the Act, which requires public accommodations to be accessible. Public accommodations are businesses and nonprofit service providers who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, doctors' offices, transportation services, day care centers, and recreation facilities. It does not include private residences.

Public accommodations must comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment. They also must comply with specific requirements related to architectural standards for new and altered buildings; accessible parking, reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Additionally, public accommodations must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources.

**How It's Enforced:** Complaints of Title III violations may be filed with the Department of Justice. In certain situations, cases may be referred to a mediation program sponsored by the Department. The Department is authorized to bring a lawsuit where there is a pattern or practice of discrimination in violation of Title III, or where an act of discrimination raises an issue of general public importance. Title III may also be enforced through private lawsuits.

**How It Affects New Urban Developments:** Although the ADA does not apply to private residences, it applies to commercial buildings, to recreational facilities, and to most of what new urbanists would consider civic buildings. If residences are rented out for short-term stays, they may be considered public accommodations and subject to the ADA.

Mixed-use buildings with both commercial and residential components may have a mixture of ADA and Fair Housing Act compliance issues, with certain parts of the building subject to ADA, other parts subject to the Fair Housing Act, and some parts subject to both.

**Where To Find More Information:**

U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
Disability Rights Section - NYAV  
Washington, D.C. 20530

www.usdoj.gov/crt/ada/adahom1.htm or ada.gov  
(800) 514-0301 (voice)  
(800) 514-0383 (TTY)

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### 3. Interstate Land Sales Act

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**Citation:** Congress passed the Interstate Land Sales Full Disclosure Act (ILSFDA) in 1968, in response to evidence of rampant fraud in the land sales industry. The ILSFDA is found in at 15 U.S.C. §§ 1700 - 1720 (2003). The ILSFDA regulations are found at 24 C.F.R. Parts 1710 - 1730 (2002).

**Applicability:** To protect consumers, the ILSFDA requires developer registration and disclosures and prohibits unlawful and misleading sales practices in certain land sales. The statute specifically applies to the sale of undeveloped, subdivided land where the developer makes use, either directly or indirectly, of “any means or instruments of transportation or communication in interstate commerce, or of the mails.” 15 U.S.C. § 1703.

**What It Does:** The law is designed to protect purchasers and lessees of property through a variety of mechanisms including registration, disclosure, prohibitions against unlawful and misleading sales practices, consumer protection terms in sales contracts and a cooling-off period to allow a prospective purchaser to revoke a transaction. Unless a developer qualifies to use one of the many exemptions identified in the statute or in the implementing regulations, a developer who is involved in selling or leasing a lot is subject to complex registration and disclosure requirements. Because registration is so burdensome, most developers, and their attorneys, focus attention on finding a suitable exemption from the act.

**How It's Enforced:** The U.S. Department of Housing and Urban Development enforces the ILSFDA. The agency has the power to enjoin certain sales activities, impose civil penalties on non-compliant developers, and work with the Attorney General to impose criminal sanctions on violators. Private citizens may also bring an action in court for violations of the ILSFDA. Failure to comply with ILSFDA will give the buyer the right to terminate the contract.

**How It Affects New Urban Developments:** There are four main types of exemptions: full exemptions, partial statutory exemptions, partial regulatory exemptions, and extensions of exemptions provided in the original ILSFDA. Because of the intricacies involved in the application of the law to specific fact scenarios, a developer and the developer's lawyer should undertake a detailed analysis of possible relevant exemptions as soon as general plans for the development are available.<sup>1</sup>

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<sup>1</sup> In addition, some states have statutory or regulatory provisions similar to ILSFDA that must be considered. Some states also have rules regulating the receipt of sales or advertising materials. Merely responding to an inquiry from another state can have legal repercussions. A developer and the developer's lawyer should review the regulations of the recipient states to identify any important issues or concerns.

Although there are many exemptions in the statute and the regulations, four of the most commonly used exemptions are described below. A developer should analyze each project in light of all of the exemptions, even those not described here, to determine if some or all of the exemptions of the ILSFDA apply.

*Sale to Builders:* The ILSFDA provides an exemption from the Act for the sale of lots by developers to builders—or, as the Act defines it, sale of lots to people for the purpose of engaging in the business of constructing residential, commercial, or industrial buildings, or for the purpose of resale or lease of the lots to people engaged in this type of building business. This is one of the most commonly used exemptions from the ILSFDA. This exemption does not include the sale of a lot to an individual to have his or her own home built.

*Sale of Lots with an Existing or Proposed Building:* The sale of a lot with a completed building, or where there is a contract obligating the seller to build such a building within two years, is exempt from ILSFDA. Therefore, the developer, or the builder to whom the developer sold a lot under the above exemption, can sell either spec or custom homes and claim an exemption. If the lot is sold with a contract to build, there are specific requirements about the terms of the contract that must be observed to stay within the exemption.

Note that the requirement to build within two years applies to the *seller*, not to the *buyer*. To prevent speculation and create streetscapes, lots within new urbanist communities are sometimes sold with the requirement that the buyer build within a limited time. However, the sale of a lot to a buyer with the requirement that the buyer build within two years does NOT exempt the lot from ILSFDA.

*One Hundred Lot Exemption:* A small subdivision, or a larger in which the majority of lots satisfy one of the two exemptions above, may be exempt. A developer who sells fewer than one hundred lots other than those sold to builders or with a home is exempt from ILSFDA registration. Under a similar exemption, a developer may sell up to 12 lots per year, other than those sold to builders or with homes, and remain exempt. Developments with a common marketing scheme are consolidated for purposes of this exemption, so creating separate subdivisions within a larger community would not help meet the exemption.

*Single-Family Residence Exemption:* The sale of lots in subdivisions that are subject to local codes and standards and within which lots are zoned or limited for single-family residences are exempt from the registration requirements of the ILSFDA. Although this exemption is frequently used for conventional subdivisions, meeting the requirements of this exemption may be more difficult for new urbanist communities. In particular, the subdivision must meet all local standards and codes; the lots themselves must meet applicable minimum standards for development; each lot must be located on a paved street or highway that meets local government standards, and each lot considered for exemption must be zoned single-family residential (or in the absence of a zoning

ordinance, be limited for such use by covenants or restrictions). Note that if the city or county has a zoning ordinance but the lots are not zoned for single-family residential development, then private covenants and restrictions cannot be used to satisfy this requirement.

If this exemption is used, the developer may not offer gifts, trips, dinners or use similar promotional techniques to get prospective purchasers to visit or purchase a lot.

**Where To Find More Information:** Additional information about the ILSFDA is available from the U.S. Department of Housing and Urban Development at:

U.S. Department of Housing and Urban Development  
451 7th Street SW  
Washington, DC 20410  
(202) 708-1112 (voice)  
(202) 708-1455 (TTY)

Additional information is also available on the agency's web site at: <http://www.hud.gov/offices/hsg/sfh/ils/ilshome.cfm>.

For publications, call the Housing and Urban Development Customer Service Center at:  
(800) 767-7468 (voice)  
(800) 877-8339 (TTY)

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#### 4. Income Tax Treatment of Property Owners' Associations

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**Citation:** Section 528 of the Internal Revenue Code of 1986, as amended (the "Code") sets out special tax treatment for homeowners associations.

**Applicability:** The section defines three types of organizations that can qualify as a homeowners association: a condominium management association, a residential real estate management association, and a timeshare association. Each of these types of organizations must satisfy five tests as further described in the section.

**What It Does:** Although homeowners associations are typically organized under state law as nonprofit corporations, they do not qualify for tax-exempt treatment under §501(c)(3) of the Code. Therefore, absent an exemption, they would be subject to income taxation.

For qualified homeowners associations that elect treatment under Section 528, members' assessments (known as "exempt function income") are not taxed. Any remaining income, including interest on investments, is taxed at a flat 30% rate. The election must be made on an annual basis, and in some cases it may be to the association's advantage not to make the election.

**How it affects New Urban developments:** To qualify under Section 528, substantially all (85% or more) of the units, lots, or buildings must be used by individuals for residences. A mixed-use property association or condominium association may not qualify. This factor may contribute to the developer's decision to create separate associations for residential and commercial properties.

According to the accompanying regulations, in the case of a condominium management association, substantially all of the units will be considered as used by individuals for residences if at least 85 percent of the total square footage of all units within the project is used by individuals for residential purposes. There is no guidance on what the phrase "within the project" means for purposes of the substantially residential test.

In the case of a residential real estate management association, the regulations state that substantially all of the lots or buildings (including unimproved lots) will be considered as used by individuals as residences if at least 85 percent of the lots are zoned for residential purposes. Lots shall be treated as zoned for residential purposes even if under such zoning lots may be used as parking spaces, swimming pools, tennis courts, schools, fire stations, libraries, churches, and other similar purposes auxiliary to residential use. Commercial shopping areas (and their auxiliary parking areas), however, are not lots zoned for residential purposes.

Special care must be taken in second-home communities, particularly those with rental programs. If for more than half the days in a year a building or unit is occupied by a person or series of persons, each of whom occupies the unit or building for less than 30 days, then that unit or building would not qualify as residential property and would be excluded from the units needed to satisfy the 85% test.

**Where To Find More Information:**

Internal Revenue Service: <http://www.irs.gov/>

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## 5. Energy Efficiency Standards

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**Citation:** In 1992, the U.S. Environmental Protection Agency implemented a voluntary ENERGY STAR program to identify and promote energy-efficient products. The program was designed to help reduce greenhouse gas emissions. EPA has since partnered with the Department of Energy for certain categories of energy-efficient products.

Various independent organizations and state and local government programs also promote energy efficient construction through voluntary programs. One example of such a program is the EarthCraft House™ Certification Process in Atlanta, Georgia, a program developed by the Greater Atlanta Home Builders Association and Southface Energy Institute in 1999. This program promotes the construction of affordable homes designed to reduce energy and water costs and to protect the environment.

**Applicability:** The ENERGY STAR label covers not only appliances, office equipment, lighting, home electronics, and other consumer goods, but also new residential, commercial, and industrial buildings.

**What It Does:** The ENERGY STAR program provides the information necessary for companies and individuals to choose energy-efficient products and construction designs. For residential homes, energy efficiency can include (but is not limited to) the use of ENERGY STAR major appliances, energy efficient insulation and windows, and air and vapor barriers. To earn the ENERGY STAR label, a new home must be at least 30% more energy-efficient in heating, cooling, and water heating than a comparable home built to specified 1993 standards, and at least 15% more efficient than the state energy code requirements.

The EarthCraft House™ Certification Process provides builders with a set of guidelines for building energy efficient homes and allows the certification as an EarthCraft House™ of those homes that meet the strict guidelines of the program.

**How It affects New Urban Developments:** Although the use of energy efficient designs and products is not unique to new urban developments, the vision for many such developments includes a focus on environmentally sensitive project design. ENERGY STAR products and programs and other energy-efficiency promoting programs help communities meet the goals of these project designs.

Not only can the use of energy-efficient materials and products help developers achieve environmentally sensitive project designs, there can be significant financial incentives for home buyers to buy energy efficient homes. For example, ENERGY STAR financing partners are required to provide certain incentives to buyers of ENERGY STAR homes such as discounted interest rates, waiving of certain fees, etc. Utilities may also provide incentives for the use of ENERGY STAR labeled products.

**Where To Find More Information:**

ENERGY STAR Program: <http://www.energystar.gov>

EarthCraft House™: [http://www.southface.org/home/ech/earthcraft\\_home.htm](http://www.southface.org/home/ech/earthcraft_home.htm)

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