



Accessibility Compliance Hot Topics

Arizona Department of Housing Forum

August 23, 2018

Tucson, AZ

10:15-11:30 a.m.

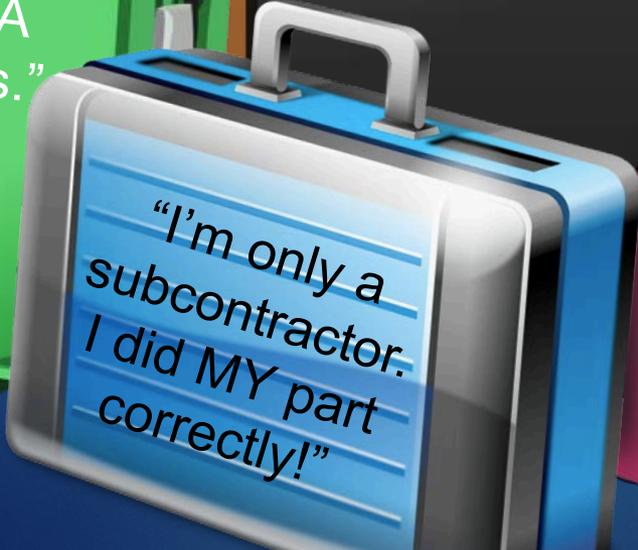
We all have “baggage.”



“I know about all those ADA regulations.”



“I’m only the Site Manger, I didn’t build this property. Me and my maintenance staff have always done it this way”



“I’m only a subcontractor. I did MY part correctly!”



“My plans were drawn by my architect, the HFA approved the plans, the local building inspector issued the CO.”



“I’m an Architect. I drew the plans correctly, and it still was not built right!”



Top 5 Accessibility Myths

WHERE IS YOUR LOW HANGING FRUIT?

Top 5 Accessibility Myths

1. My architect designed it, the funding agency approved it, and the local building inspector reviewed and approved the plans and issued my Certificate of Occupancy, **therefore, I must be ok.**
2. My site is in compliance with the ADA, **therefore, I must be ok.**
3. We have never had a complaint from our tenants about accessibility, **therefore, I must be ok.**
4. We have blue paint, those handicapped signs and ramps all over our property, **therefore, I must be ok.**
5. We have never had a Tester visit our site, **therefore, I must be ok.**

Did you know?

Architects are not typically trained on all three accessibility regulations in architectural school.

They studied ADA, which deals with areas of Public Accommodations.

They are not typically trained on the **Fair Housing Act or Section 504**



MYTH #1

My Architect designed it....



MYTH #1 continued

The funding
agency
approved it....

Did you know?

Most Government Agencies (RD & HUD), State Housing Finance Agencies, Banks, Mortgage Companies do not review Plans for Accessibility accuracy.

That responsibility is **typically** left solely in with the Architect.



Did you know?

Local building inspectors typically don't inspect for violations of the Fair Housing Act (FHA) or Section 504.

A local building code may adopt ANSI or other accessibility requirements but that DOES NOT ensure FHA or Section 504 compliance.

MYTH #1 continued

The local building inspector reviewed and approved the plans and issued my Certificate of Occupancy....



MYTH #2

My site is in compliance with the ADA....

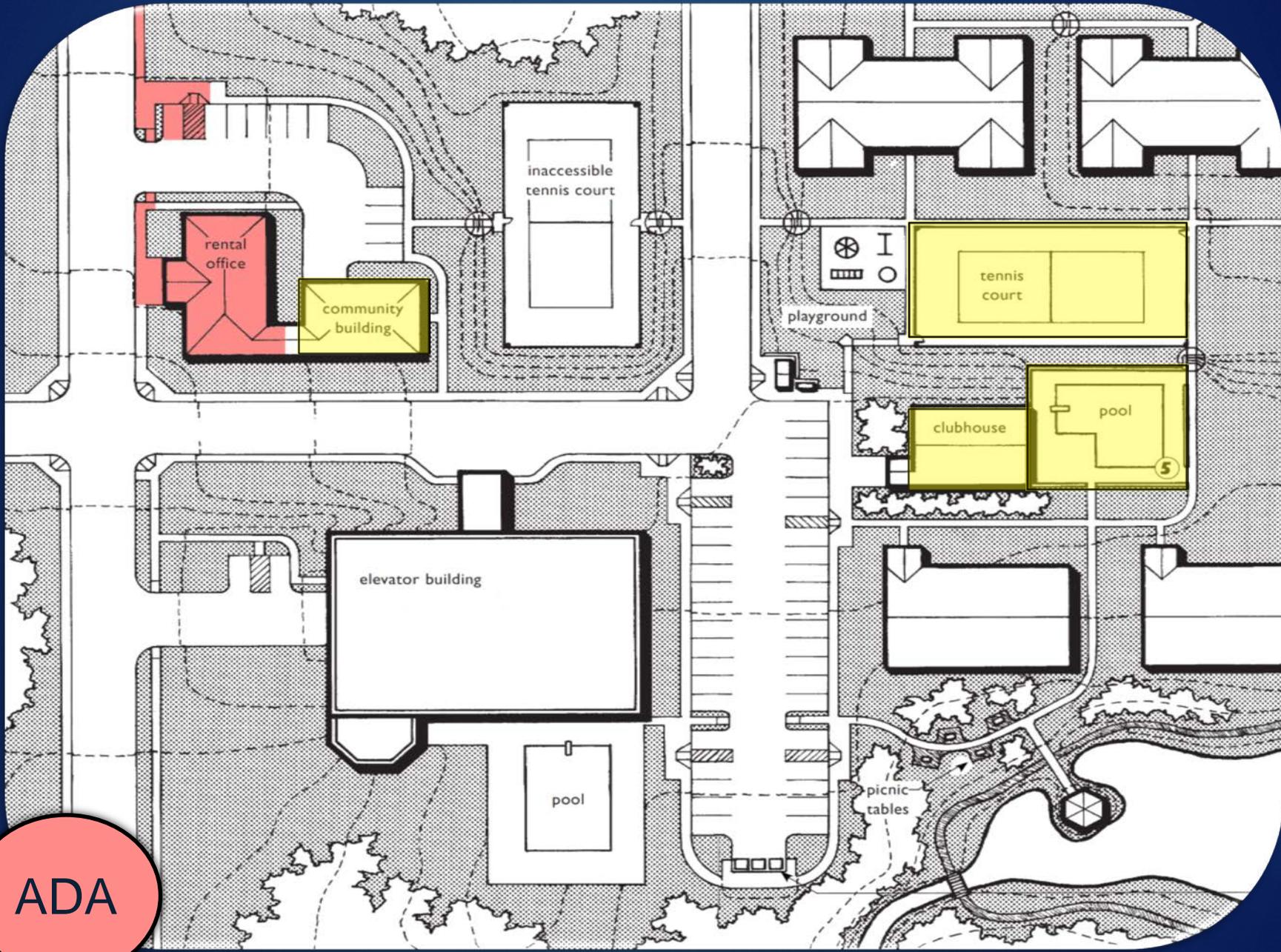
Did you know?

ADA covers only areas of Public Accommodations, and your tenants are not considered “public.”



ADA 2010

Prohibits
Discrimination in
all areas of
Public
Accommodation



ADA



Did you know?

Just because a tenant hasn't complained doesn't mean no one else is looking at your property.

Fair Housing advocacy groups and governmental agencies have made accessibility in affordable housing an enforcement priority.

- ❖ Fair Housing Act
- ❖ Section 504
- ❖ ADA
- ❖ False Claims Act

MYTH #3

We have never had a complaint from our tenants about accessibility....



MYTH #4

We have blue paint, those handicapped signs and ramps all over our property....

Did you know?

This symbol does not automatically imply accessibility for all codes.





Did you know?

Testers may be looking at your property without you even knowing it.

MYTH #5

We've never had a Tester visit our site....

Drive By Testers are looking for your “low hanging fruit”

Low Hanging Fruit Issues:

- ❖ Parking Spaces
- ❖ Access Isles
- ❖ Slopes / Cross Slopes
- ❖ Entrance Issues into Office
- ❖ Accessible Route
- ❖ Curb Ramp
- ❖ Mailboxes
- ❖ Door Knobs



Who's Watching You?



Testers
from
DOJ



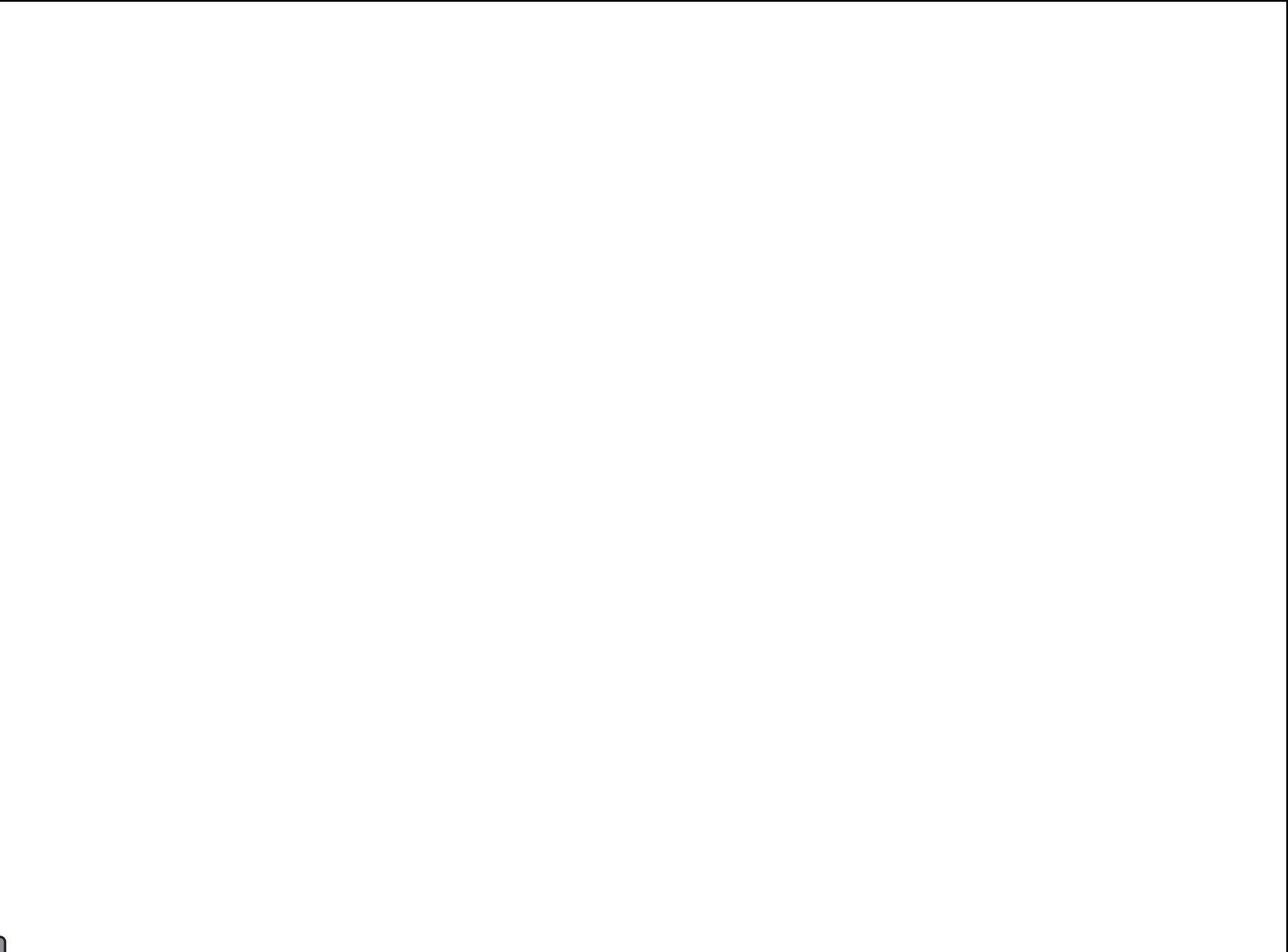
Advocacy
Groups



HUD
Grants
for
Testers



Individuals
with
Disabilities



Aerial View from Google Earth





OFFICE

Google



Who's Watching You?



Google™
maps



Testers
from DOJ



Advocacy
Groups



HUD Grants
for Testers



Individuals
with
Disabilities





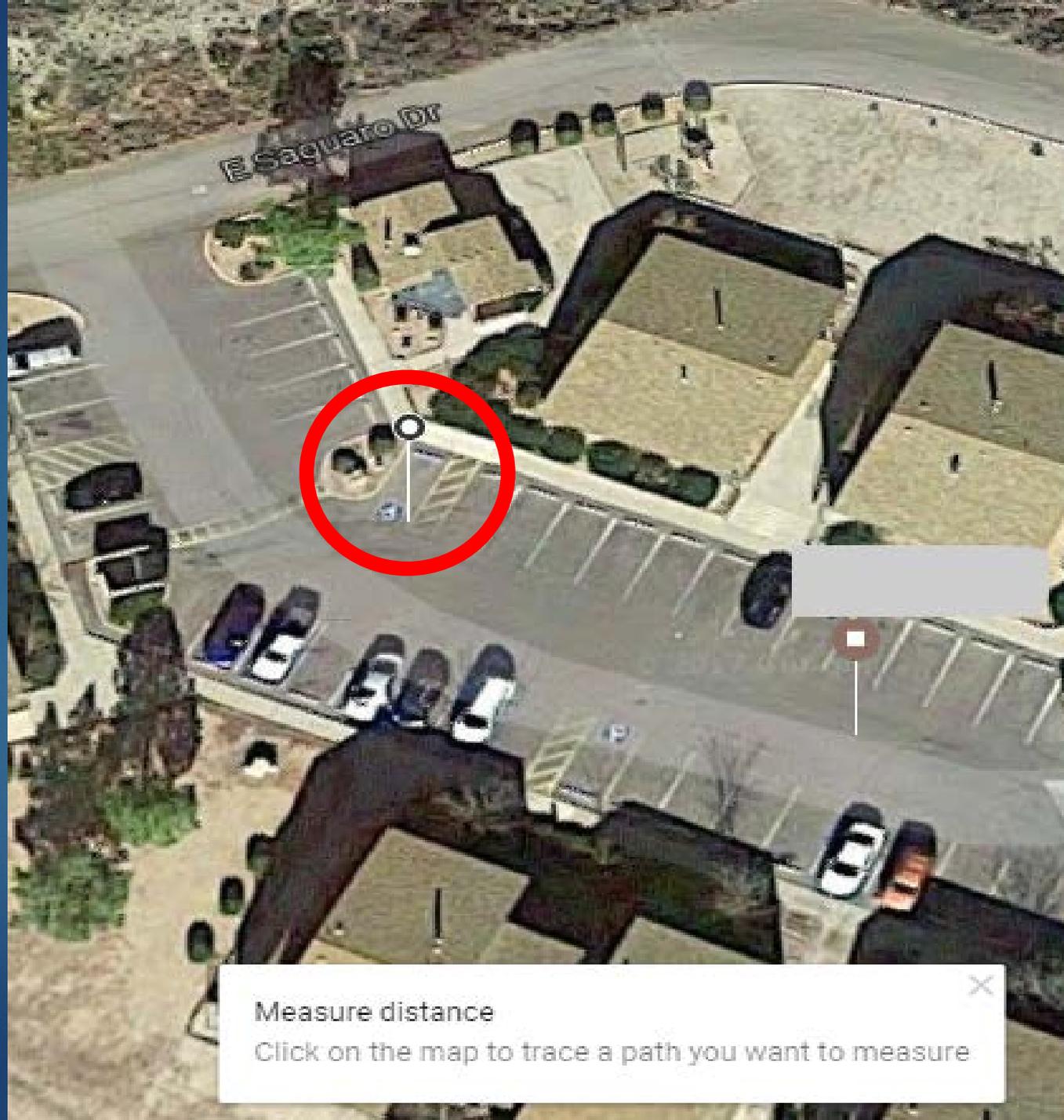
05/19/2017



From
Google Maps



From
Google Maps



Measure distance ✕
Click on the map to trace a path you want to measure

From Google Maps



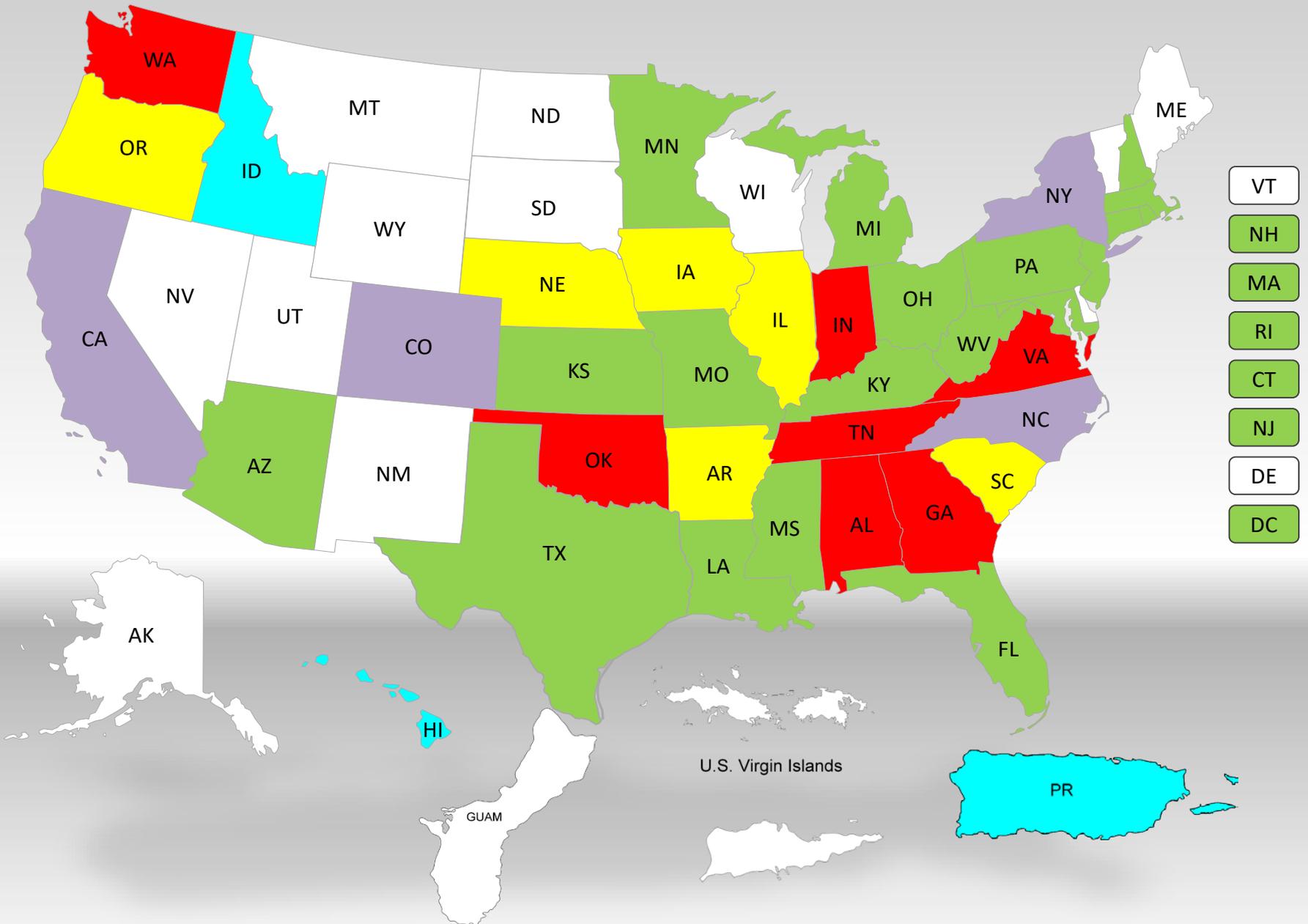
Measure distance

Click on the map to add to your path

Total distance: 5.35 ft (1.63 m)



Recent Settlements Concerning Design & Construction



DOJ
 Fair Housing Agency
 DOJ & Fair Housing Agency
 HUD
 DOJ, Fair Housing & HUD

Very Recent LIHTC Cases

➤ *United States v. Rappuhn*

- Alleged that 71 properties designed and constructed from 1994 to present did not include features compliant with the FHA
- Also alleged violations of Section 504 / UFAS
- Violations:
 - Sloping
 - Clear floor space off by 2-4 inches
 - Abrupt level changes of 1/4" too high
 - Thermostats mounted 2" too high

Recent Cases

- *National Fair Housing Alliance v. Ryan Companies*
 - Alleged that 12 properties designed and constructed from approximately 2005 to present did not include features compliant with the FHA
 - Violations
 - Sloping
 - Clear floor space off by 2-4 inches
 - Abrupt level changes ¼” too high
- **Settled for over \$3.5 million in retrofits, damages and attorneys' fees**

Breaking News: September 1, 2016

LOS ANGELES

- The L.A. City Council agreed to settle litigation brought by three nonprofit disability and fair housing advocacy groups that claimed the city's housing programs were inaccessible to people with disabilities.
- This is the largest agreement of its kind in the country.
- Over the next 10 years, the city will ensure that at least 4,000 of its affordable housing units meet the highly accessible standards required by federal law, and will enforce policies to ensure that those units are inhabited by people who need the specific accessibility features provided.
- The city will spend at least \$200 million during the life of the agreement.

Breaking News: September 1, 2016

LOS ANGELES

- The city must spend an average of \$20 million annually on the program for the next ten (10) years.
- At least 2,655 of the 4,000 units are designed for wheelchair users.
- In addition to the \$200 million, the city will also pay \$4.5 million to the nonprofits that sued the city, plus up to \$1 million in court costs and up to \$20 million in attorneys' fees.
Total of \$225,500,000!

Breaking News: September 1, 2016

LOS ANGELES

“This is the **largest** **settlement** **affordable housing** will send a strong message to cities all over the country that their housing programs must be accessible.”

**All based on Design
and Construction Issues**

The case, brought in the United States District Court, is Independent Living Center of Southern California (ILCSC), et al., v. City of Los Angeles, et al., U.S. District Court, Central District of California, Case No. 2:12-cv-000551-FMO-PJW.

Breaking News: August 1, 2017

LOS ANGELES



- DOJ filed a new complaint against the City of L.A. and the Redevelopment Agency (CRA/LA) to recover Millions of Federal Grant Dollars. Alleging that together they fraudulently obtained millions of dollars in housing grants from the HUD by **falsely certifying** that the money was being spent in compliance with federal accessibility laws.
- Question: How does one “falsely certify” that the money you borrow from the Government was being spent in compliance with federal accessibility laws?
 - Documents you signed at loan closing
 - “Failure to fulfill their duty to affirmatively further fair housing”

Breaking News: August 1, 2017

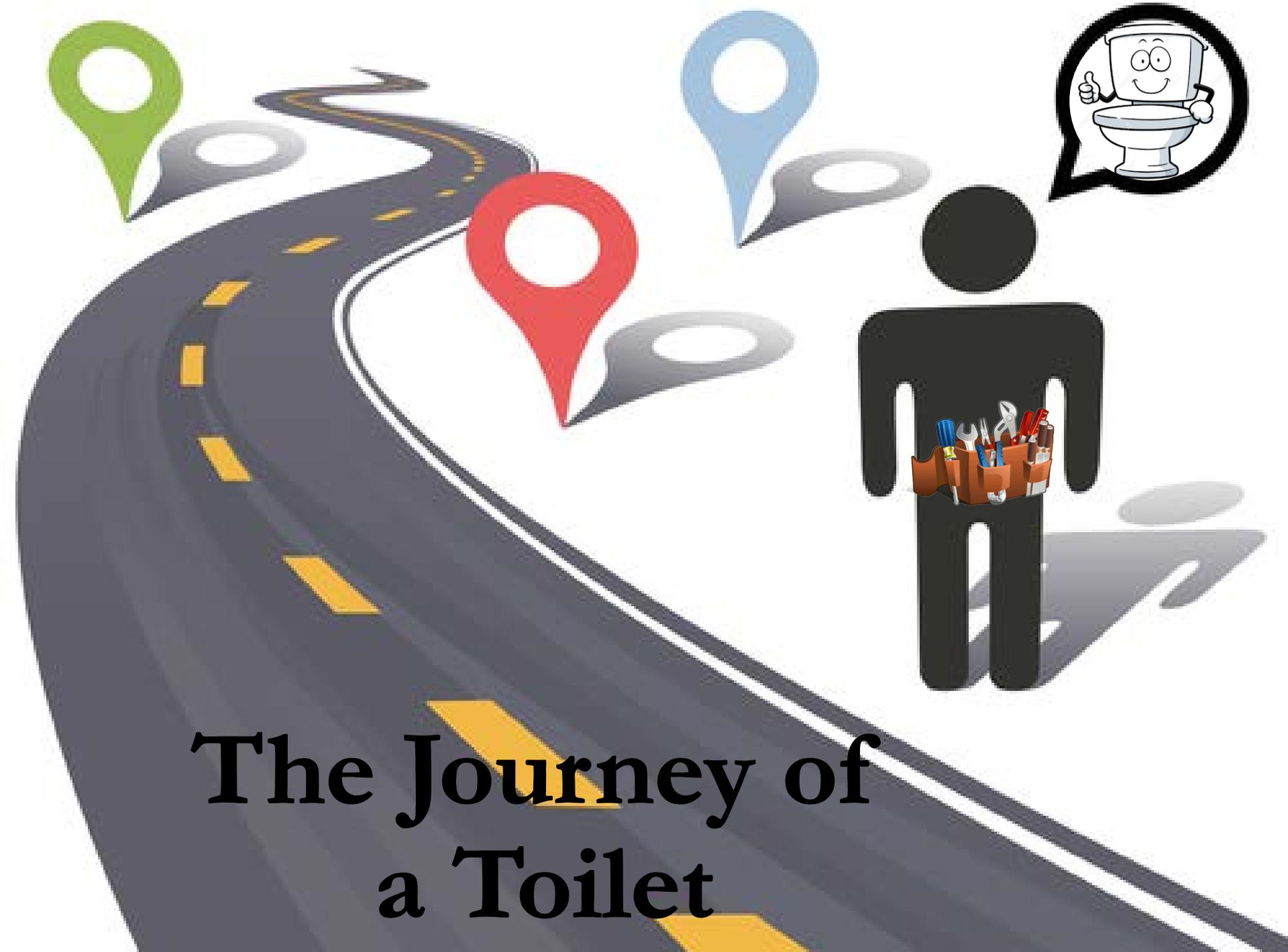
LOS ANGELES

- The complaint is filed on behalf of the United States by a “**whistleblower**” – alleges the city and CRA/LA received federal money by falsely promising to create accessible housing for people with disabilities, instead of creating accessible housing, they used the money to create inaccessible housing that deprived people with disabilities an equal opportunity to find housing of their choice.
- “Despite the federal government investing hundreds of millions of dollars

Breaking News: August 1, 2017

LOS ANGELES

- The lawsuit, *United States ex rel. Ling, et al. v. City of Los Angeles, et al.*, CV11-974-PG, was originally filed in the U.S. District Court by whistleblowers Mei Ling, a resident of L.A. who uses a wheelchair, and the Fair Hsg Council of San Fernando Valley, a nonprofit civil rights advocacy group. The US elected to intervene in the lawsuit and take over the litigation.



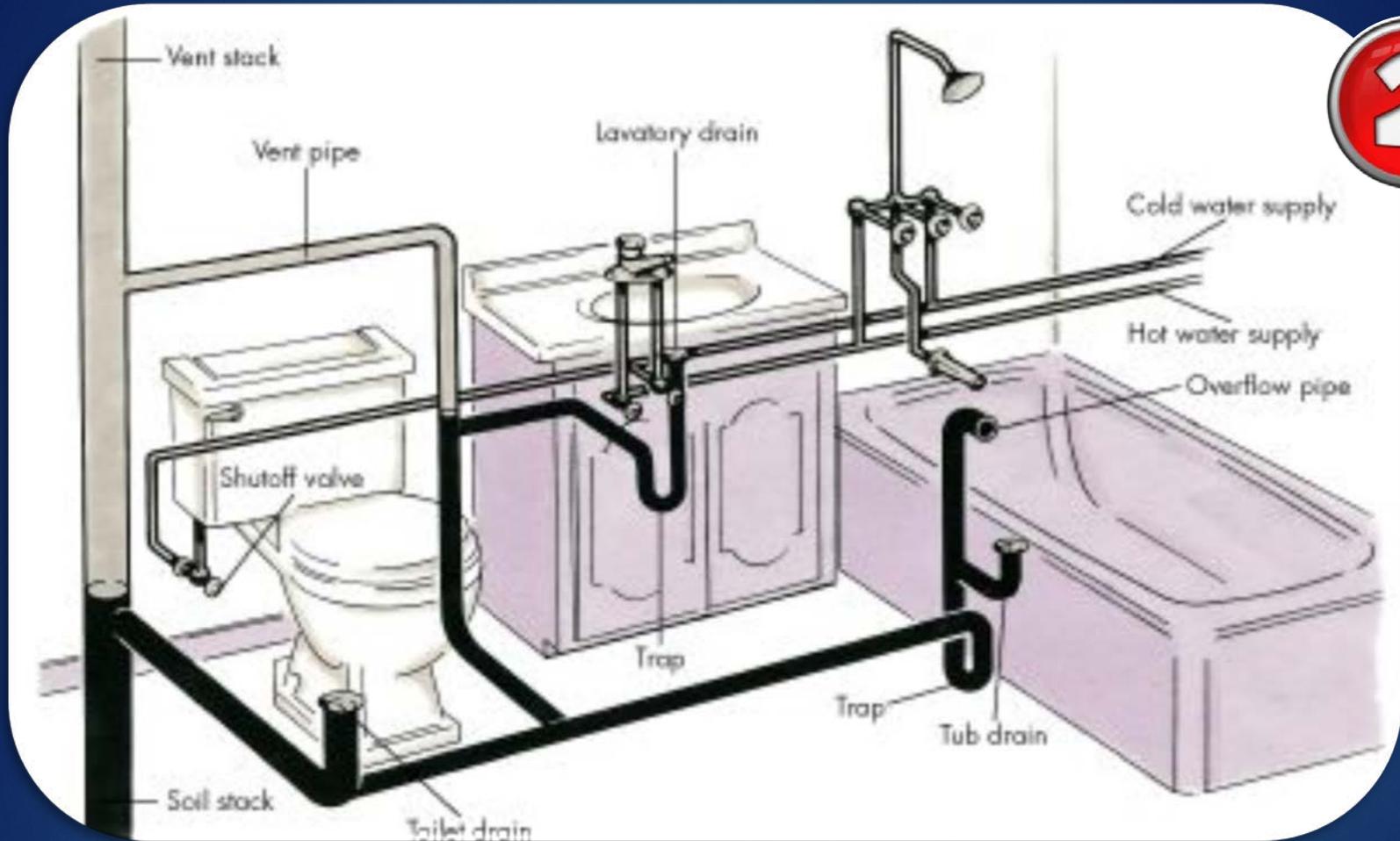
The Journey of a Toilet

How hard is perfect placement to achieve?

Consider who “touches” that toilet’s **final resting place**, even **before** the toilet appears on site



Let's look at the architect's plan for this example bathroom. It is an 8'x8' room framed out as a bathroom.



The project engineer draws a set of civil plans, locating the building and plumbing lines (supply and drains) for the site work.



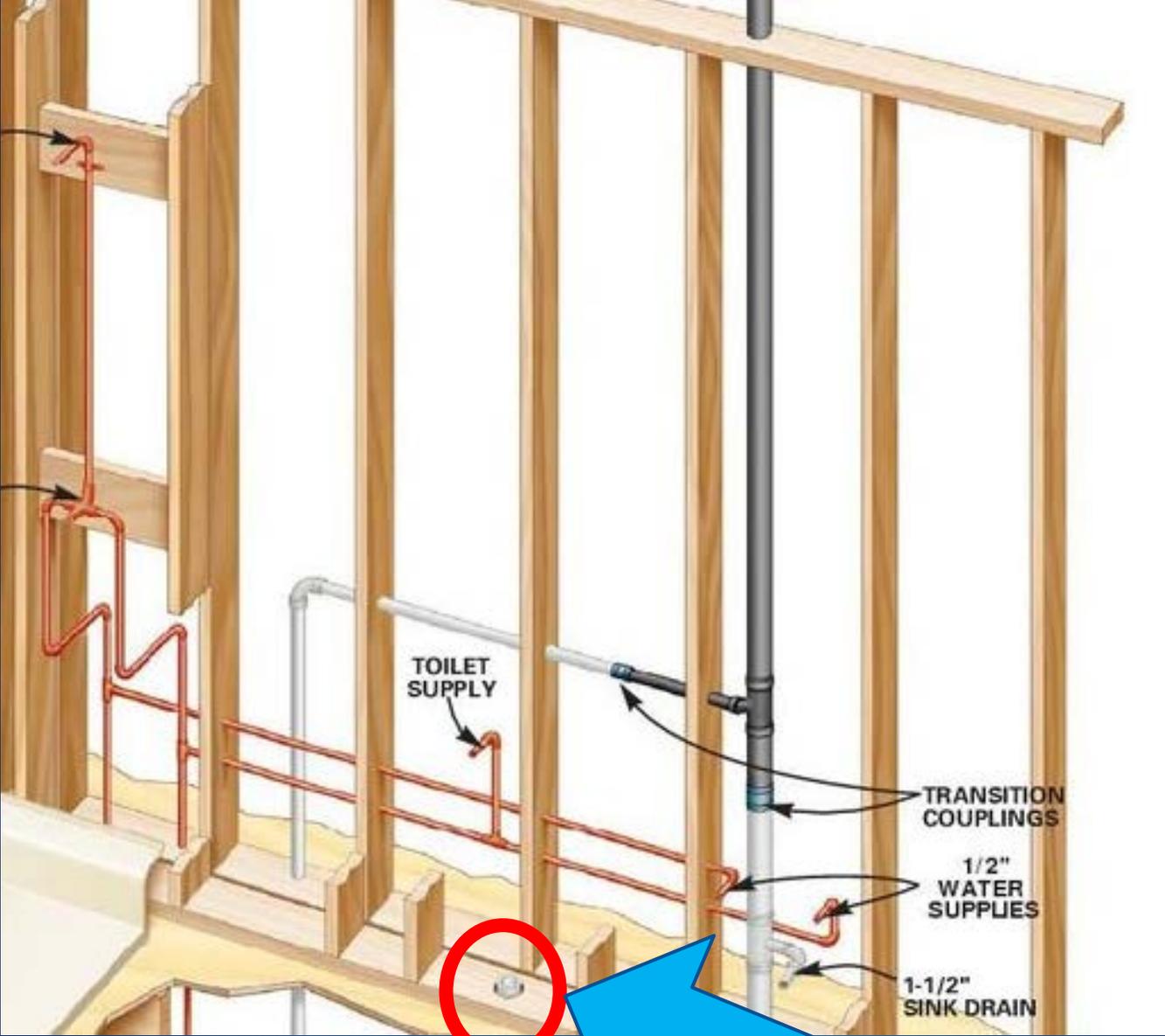
4





The plumber comes in, and starts rough plumbing, to locate where drain lines will be placed under the slab for all the plumbing. Before pouring the floor slab, openings are framed out in the concrete for the toilet drains.









When the vanity is installed by the finish carpenters, the cabinet guys measure from the door wall out, to locate it. **(Which is not the same as measuring from the toilet wall.)** So, it's "almost" right when they leave.



10

Final Inspection day arrives.



TEN different teams of people have all had a part in locating this toilet. If any **ONE** of them is over a $\frac{1}{4}$ " off in their work, the toilet is "out of compliance."

What are
you
aiming at?

Functioning
or Correct



Remember:

**This symbol
does not
automatically
imply
accessibility
for all codes.**





Voltaire once said: *“Perfect is the enemy of good.”*

When was the last time you looked at a typical board of lumber or piece of sheetrock?

Multifamily properties are built over a period of time in many weather conditions. Defects are not only possible, but probable. Yet we expect lumber to be straight and sheetrock to be perfect. At least, that’s how we set it up.

Think about it. An architect draws up a perfect set of plans on his computer. ALL of the measurements are to the minimum, so there is **NO MARGIN FOR ERROR.**





Education and Proper Oversight are the Solution

- The majority of architects aren't trained on Section 504 & Fair Housing Accessibility regulations.
- Contractors, job superintendents and subcontractors don't understand there is a chain reaction that follows even a small change from the plans whether they are aware of it or not.



“Perfect is the Enemy of Good”

By Mark E. English, E&A Team, Inc., and Scott P. Moore, Baird Holm L.L.P.



François-Marie Arouet, whose pen name was Voltaire, was a French writer, historian, and philosopher in the 1700s. Voltaire, known

For complete article, see the back of book.

...the state of the nation's
...of multi-family housing that does not meet federal
accessibility requirements and why we continue to see multimillion dollar
settlements of accessibility lawsuits.



Three Major Actions

in the last several months that are going to potentially change the way you view Accessibility

- 1. USDA/RD Management Control Review (MCR) for Multi-Family Housing Section 515 Rural Rental Housing May 11, 2018 (ref Transition Plans**
- 2. NCSHA introducing 46 new Recommended Best Practices** (voted on December 2017)
- 3. The Department of Justice “Accessibility Initiative”** (announced October 2017)



Major Action # 1

USDA Rural Development:

Fiscal Year 2015 Management Control Review (MCR) for Multi-Family Housing Section 515 Rural Rental Housing and Section 514/516 Off-Farm Labor Housing Loan Servicing

Dated: May 11, 2018

Reserve Account Usage for Borrowers (page 1)

“The CNA includes a replacement schedule that anticipates the useful life of each item, and estimates when they will need to be replaced and the cost. Once the CNA is approved, borrowers are expected to only use reserve account funds in accordance with the schedule set forth in the CNA”.

MFH Project Accessibility

“The results of the Project Accessibility portion of the MCR revealed that most properties reviewed on-site had some degree of non-compliance with nationally recognized physical accessibility standards, including recently renovated properties.



In some cases, there was no Self Evaluation/Transition Plan in place for the property to address Accessibility concerns in the future.

Full Agency guidance on Physical Accessibility is set forth in **Appendix 5 of HB-2-3560**, “Civil Rights Laws’ Accessibility Requirements that Apply to the Multi-Family Housing Program” (MCR, dated May 11, 2018, Page 1)

*“The Civil Rights laws covering accessibility have different implementation responsibilities but all provide. For the protection and nondiscrimination of individuals with disabilities. **Borrowers who fail to meet these requirements will make themselves vulnerable to damages and can be required to retrofit their facilities at their expenses.**” (HB-2-3560, Appendix 5, Page 1)*

Compliance Standard:

- ❖ Uniform Federal Accessibility Standards (UFAS)
- ❖ Fair Housing Act / Accessibility Guidelines
- ❖ American with Disabilities Act (ADA)

(MCR, dated May 11, 2018, Page 1-2)



Transition Plans

At a minimum, transition plans are required to:

1. Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to disabled person;
2. Describe in detail the methods that would be used to make the facilities accessible;
3. Specify the schedule for taking the steps necessary to achieve full program accessibility and if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period
4. Identify the person responsible for implementation of the plan

(HB-2-3560 Appendix 5, Page 5)

Self-Evaluation & Transition Plan, MCR dated May 11, 2018, Page 5

“Undue Financial Burden” – **generally, USDA will approve budgets necessary to accomplish a Transition Plan”**

HB-2-3560 Appendix 5, Page 14

Item 21. “Realistically, all structural changes should be accomplished within a three-year time frame unless funding is an issue. When changes are not made within the time frame of the transition plan, **the borrower should prepare a new or revised 3 year transition plan that documents what has been done, what will be completed, and times frames for completion.**”



**NCSHA Board
of Directors
*Recommended
Best Practices***

(Approved December 2017)

Major Action # 2

NCSHA Board of Directors published its “Recommended Practices in Housing Credit Administration” in December and 4 out of 46 of those practices directly relate to Accessibility.



NCSHA Board of Directors *Recommended Best Practices* (Approved December 2017)

- **Item 23.** Capital Needs Assessment (Necessary improvements to physical accessibility)
- **Item 28.** Construction Monitoring (Evaluate compliance with Fair Housing and Accessibility rules)
- **Item 34.** Training (Fair Housing and Accessibility Rules)
- **Item 41.** Encouraging Fair Housing Compliance



NCSHA BOARD OF DIRECTORS RECOMMENDED BEST PRACTICES (APPROVED DECEMBER 2017)

➤ **Item 23. Capital Needs Assessment** (Necessary improvements to physical accessibility)

Over the last 10 years of our firm doing CNAs/PNAs and more recently RAD inspections and working with Syndicators, Lending Institutions, and Federal Agencies, there is one common denominator I continually see -- it is what I refer to as “Accessibility Lite” Assessments.

CNA inspectors who worked off of someone else’s Accessibility Check List and had no training or independent knowledge about when state Accessibility Codes, ADA, Section 504, or Fair Housing regulations applied. Or if there was a conflict which one takes precedents.

This results in a delayed closing and more often than not, what we refer to as “value engineer” takes place on the site since the true Accessibility numbers were not taken into consideration when the final numbers were submitted – meaning that some of the major accessibility issues are addressed, but others are not due to financial restraints.



NCSHA BOARD OF DIRECTORS RECOMMENDED BEST PRACTICES

(APPROVED DECEMBER 2017)

- **Item 28.** Construction Monitoring (evaluate compliance with Fair Housing and accessibility rules)



Plan and Specification Review

Require that each new and rehab construction project have an **Accessibility Plan Review** by an **Accessibility Specialist** based on the project's funding source and the date of occupancy, if it is a rehab.



This review should include an analysis for all:

1. **Site**
2. **Architectural**
3. **Engineering drawings**
4. **Specifications**, reviewing them for compliance with applicable **accessibility regulations and standards.**

Once the corrections have been incorporated into the plans and specs by the architect, then the REVISED plans should be given back to the Accessibility Specialist for a subsequent review. This should continue until all plans and specs are cleared of all accessibility deficiencies.



Accessibility Construction Inspections

- BEFORE construction begins, require a Pre-Con Meeting (either in person or by Video Conference Call) with ALL Team Members

- **At least three site visits:**

1st Visit - Framing / Plumbing / Electrical Rough-In

2nd Visit - Full Site inspection (mid-construction)

3rd Visit - A Pre-Final (before sub-contractors move off site)





NCSHA BOARD OF DIRECTORS RECOMMENDED BEST PRACTICES

(APPROVED DECEMBER 2017)

- **Item 34.** Training (Fair Housing and Accessibility Rules)



Accessibility Training Seminars

- A **required** training for the Development Team to attend an Accessibility Seminar (approx. 5 hours)
 1. Architect
 2. Developer/Owner
 3. Contractor
 4. Job Superintendent
 5. Representatives from **all** Trades that affect Accessibility:
 - ✓ **Grading**
 - ✓ **Concrete**
 - ✓ **Framing**
 - ✓ **Electrical**
 - ✓ **Plumbing**
 - ✓ **Sheetrock**
 - ✓ **Cabinetry**
- Make attendance for all those trades working on the project a **mandatory** requirement in the contract for service. This will help ensure that all of the trades have an understanding of all federal, and possibly, state accessibility requirements.





NCSHA Board of Directors *Recommended Best Practices* (Approved December 2017)

- **Item 41.** Encouraging Fair Housing Compliance
 - Housing Credit property owners are required to certify annually to the state agency any findings of discrimination under the Fair Housing Act, including both disparate treatment and disparate impact of protected classes



FACT: It is not reasonable to think that a review of a property from 3, 5, 10, or 15 years ago identifies all the Accessibility deficiencies that exist **today.**

FACT: Contractors, subcontractors, maintenance persons, and the majority of government and State HFA employees never had the benefit of receiving any in-depth Accessibility training.

FACT: Due to their lack of Accessibility training, sometimes they suggest a “correction” of an issue, and not only give you bad information, but sometimes their solutions create new accessibility issues in the process.

FACT: You must acknowledge changes that have happened over time: ground shifts and moves, freezes / thaws, repairs / replacements occur. All of these can create new Accessibility issues.

To ignore these facts and still think your property will be “Accessibility Compliant” after all of this time is unrealistic.



Lets look at the wording of Item 41 again.....

- **Item 41.** Encouraging Fair Housing Compliance
- Housing Credit property owners are required to certify annually to the state agency any findings of discrimination under the Fair Housing Act, including both disparate treatment and disparate impact of protected classes

Major Action # 3

Accessibility Initiative



Department of Justice *Accessibility Initiative*

- **What might be considered Proactive**
 - Having your plans & specs reviewed by an Accessibility Consultant on new & rehab properties
 - Accessibility Construction Inspections by an Accessibility Consultant
 - Train your Development Team on Fair Housing, Section 504 and ADA Accessibility that will include:
 - The Architect, Contractor, Job Superintendent, plus a representative of **all the trades** that are going to walk on the site.
 - Having your existing portfolio reviewed by an Accessibility Consultant who would in turn prepare a Accessibility Transition Plan



There is an Apartment Tsunami coming...

- Currently, almost 39 million people live in apartments
- In order to keep up with demand for apartments, the industry will need to build **4.6 million apartments by the year 2030** – that’s an average of at least 325,000 new apartments being built every year until the year 2030
- Yet, on average, just 244,000 apartments were delivered from 2012 through 2016.
- This is not the time to fall back into the “**same old, same old**” way of doing business
- As you move forward, be part of the next Success Story by being Be **Pro-Active** NOT **Re-Active**



Mark English

(888) 504-7483, ext. 113

Mark@EandATeam.com

