



City Attorney

March 16, 2015

Sent via Email and U.S. Mail

Citizens' Oversight Projects
Raymond Lutz
771 Jamacha Rd. #148
El Cajon, CA 92019
Email: raylutz@citizenoversight.org

Re: Public Records Act Request received March 3, 2015

Dear Mr. Lutz:

Your request of the above date made pursuant to the California Public Records Act ("CPRA") California Government Code section 6250 et seq., was forwarded to our office for review and response. You requested documents generated by the City of El Cajon that provides a legal finding that a violation of the separation of church and state doctrine does not exist in the matter of Federal funding of certain activities carried on by the East County Transitional Living Center, formerly Set Free Ministry, and the factual basis for the finding.

Attached you will find a copy of the memo generated by the City Attorney's Office in 2005 in response to a request for research made during the February 8, 2005 City Council meetings, also attached. Also included is a copy of the guidelines promulgated by the U.S. Department of Housing and Urban Development that City personnel uses in determining compliance by and equal treatment of faith-based organizations.

There are also some non-exempt public records relating to the issue of religion that are not completely responsive to your request, but in the interest of providing any record that may be considered relevant, we are providing those records as well. However, these records are still being copied and compiled. We estimate we will be able to make those records available to you in the next 2 - 3 days.

If you have any questions, please contact this office at (619) 441-1798. Thank you.

Very truly yours,

Barbara C. Luck
Staff Attorney

cc: Douglas Williford, City Manager
Morgan Foley, City Attorney
Belinda Hawley, City Clerk

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www.cityofelcajon.us

**EXCERPT FROM CITY COUNCIL and
REDEVELOPMENT AGENCY MEETING MINUTES
FEBRUARY 8, 2005**

PUBLIC HEARINGS:

**100 2005-06 CDBG AND HOME ALLOCATIONS; AND REALLOCATION OF PREVIOUS YEAR'S CDBG AND HOME FUNDS
(Report: Director of Redevelopment and Housing)**

RECOMMENDATION: That the City Council

- **Open the Public Hearing and accept and review the testimony**
- **Close the Public Hearing**
- **Allocate funds to projects and programs that will be funded from the FY 2005-06 Community Development Block Grant (CDBG) and HOME grant programs, including reallocation of available funds; and Staff will bring back a funding schedule reflecting the City Council's decisions for final adoption in the One-Year Action Plan at the next and final public hearing on March 8, 2005 at 3:00 p.m.**

DISCUSSION

Director of Redevelopment and Housing Cooksy provides a summary of the Item and reviews Staff's recommendations as shown on Attachment B.

Councilmember Ramos speaks regarding Council's previous action of funding only agencies previously funded.

Mayor Lewis announces the Public Hearing is now Open.

Meredith Hattrup, 11416 Lorena Lana, thanks City Staff for recommending funding of the El Cajon Historical Society improvements and requests additional funding for another project.

Dr. Roger Bailey, 2653 Oceanfront Walk, San Diego, thanks Staff for recommending funding of Meals on Wheels, provides information about the program, and states the agency will continue to serve the community regardless of funding.

Harold Brown, 1527 East Main Street, Chief Operation Officer of Set Free Baptist Fellowship, speaks regarding what his agency does and acknowledges that future funding cuts may be made.

Kristen Johnson, CEO of Soaring Spirit Kids Home Tutoring Service, 796 West Chase, informs Council of what the program does and how it helps local children; requests financial support to continue the program.

**EXCERPT FROM CITY COUNCIL and
REDEVELOPMENT AGENCY MEETING MINUTES
FEBRUARY 8, 2005**

PUBLIC HEARINGS: (100 - Continued)

John Gibson, 1000 Pioneer Way, would appreciate it if the Council would award funding to the Fab 7 program.

Dorothy Smith, 1527 East Main Street #209, speaks regarding the assistance she and her family received from the Set Free Program when her husband lost his job and the family became homeless.

Denise Valence, 1527 East Main Street, Case Manager, Set Free Baptist Fellowship of San Diego, speaks regarding her duties as Case Manager and how the Fellowship will be able to help homeless individuals and families with funding if awarded by the City.

Leane Marchese, 4069 30th Street, San Diego, Director of Elder Help, speaks regarding what the program does, sharing one story of an elderly woman named Evelyn, and how program assisted Evelyn in her daily life.

No further comments are offered.

MOTION BY Lewis, SECOND BY McClellan, to Close the Public Hearing.

MOTION CARRIES BY UNANIMOUS VOTE.

MOTION BY Lewis, SECOND BY McClellan, to tentatively approve Staff's recommendations under CDBG with the addition of \$50,000 for the Set Free Program, with funding to be taken from Community Policing, and direction to Staff to contact Set Free to assure that the monies are not used for any religious activities.

**MOTION CARRIES BY 4-1 VOTE;
Ramos voting No.**

Mayor Lewis reopened the public hearing to allow **John Gibson** to respond to the Council's questions regarding the requirements of the Set Free Program.

MOTION BY Lewis, SECOND BY Kendrick, to Close the Public Hearing.

MOTION CARRIES BY UNANIMOUS VOTE.

**EXCERPT FROM CITY COUNCIL and
REDEVELOPMENT AGENCY MEETING MINUTES
FEBRUARY 8, 2005**

PUBLIC HEARINGS: (100 - Continued)

Attorney Foley responds to Council's questions regarding the religious aspect of the program and offered to research the issue prior to final approval of award at the March 8, 2005, Council meeting.

Council recessed at 7:52 p.m.; reconvened at 8:02 p.m.

**CITY OF EL CAJON
OFFICE OF THE CITY ATTORNEY**



MEMORANDUM

DATE: March 3, 2005

TO: Mayor Lewis, City Councilmembers McClellan, Kendrick, Hanson-Cox and Ramos

FROM: City Attorney

RE: Legality of Use of Community Development Block Grant Funds for Motel Voucher Program Operated by Set Free Baptist Fellowship of San Diego

QUESTION PRESENTED: Whether the City of El Cajon may legally allocate a portion of its CDBG funds to a nonprofit religious organization.

On February 8, 2005, at the first of two public hearings to consider the appropriation of the City's Community Development Block Grant ("CDBG") funds, the City Council considered a request from Set Free Baptist Fellowship of San Diego ("Set Free") to receive a portion of the City's allocation of CDBG funds. Set Free's request was for \$50,000.00 for motel vouchers to be used by qualified persons and families seeking temporary housing at the Fabulous 7 Motel (the "Motel"). The Motel, the subject of Conditional Use Permit 1956, allowing a transition service center in the C-2 zone, is operated by Set Free as both a motel and transition service center for its programs. The City Council asked the City Attorney to research the issue of whether Set Free may receive a portion of the City's CDBG funds from the U.S. Department of Housing and Development.

SHORT ANSWER: A nonprofit religious corporation, meeting program guidelines, may receive an allocation of the City's CDBG funds provided that it complies with federal regulations and guidelines.

ANALYSIS:

Set Free is a 501(c)(3) nonprofit corporation. The 501(c)(3) designation means that the income received by the corporation is exempt from federal income tax. According to its Articles of Incorporation it is organized as a religious corporation exclusively for the purpose of providing religious services. As such Set Free is considered a “faith-based” organization under Executive Order 13279, which requires federal departments, including the U.S. Department of Housing and Urban Development (“HUD”), to treat all organizations fairly and without regard to religion in federal programs.

Executive Order 13279 was issued by President Bush in order to provide fair treatment to religious (or “faith-based”) organizations, such as Set Free, without violating the United States Constitution.

In compliance with Executive Order 13279 HUD has adopted regulations to remove barriers to the participation of faith-based organizations in certain HUD programs, including CDBG and HOME Investment Partnerships. (The final rule is found at 24 CFR Part 570 (the “Final Rule”).) To implement Executive Order 13279 and the Final Rule HUD issued its Notice CPD 04-10, “Guidelines for Ensuring Equal Treatment of Faith-based Organizations participating in the HOME, CDBG, HOPE 3, HOPWA, Emergency Shelter Grants, Shelter Plus Care, Supporting Housing, and Youthbuild Programs” (the “Guidelines”). The Guidelines provide assistance in interpreting the Final Rule and determining whether the City may award a grant of a portion of its CDBG funds to Set Free without violating the First Amendment to the United States Constitution, which – in addition to the protection of the free exercise of religion – prohibits the establishment of religion by Congress. (These same protections and prohibitions are contained in the California Constitution (Art. I, sec. 4) and are applicable to the City pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution (known as the “due process clause”).)

The Guidelines and the Final Rule make it clear that faith-based organizations, such as Set Free, are eligible for HUD funding on an equal footing with any other organization, and that such organizations retain their “independence,” regardless of the acceptance of HUD funding. This does not mean, however, that a faith-based organization may discriminate in hiring or promotional opportunities for those programs receiving federal funds. Therefore the organization, if it operates programs funded in whole or in part with HUD funds, may not require that those employees or applicants for employment working in the HUD-funded program be of any particular religion, or not be of a religion at all.

In addition to the “non-discrimination” provision pertinent provisions of the Guidelines are as follows:

- Organizations may not use direct HUD funds to support inherently religious activities such as worship, religious instruction, or proselytization.

- Faith-based organizations, like all organizations implementing HUD-funded programs, must serve all eligible beneficiaries without regard to religion.
- Faith-based organizations, like other organizations, may receive HUD funds to acquire, construct, or rehabilitate buildings and other real property as long as the funds only pay the costs attributable to HUD activities.
- The Final Rule applies to any local funds commingled with HUD funds.

Set Free's application for CDBG funds for motel vouchers at the Motel included a description of its operations. Staff was concerned with the proposal from Set Free, as it included details of Set Free's religious activities at the Motel. Clearly the activities at the Motel, operated by Set Free, can be interpreted as "inherently religious activities, in violation of the Final Rule and the Guidelines.

Accordingly a meeting was set with Set Free's representatives and staff to discuss the proposed project to be funded with the City's CDBG funds. Attending the meeting were myself, David Cooksy, Director of Redevelopment and Housing, Jim Yerdon, Senior Management Analyst in Redevelopment and Housing, Harold Brown, Pastor with Set Free, and John Gibson, of The Hamann Companies, owner of the Motel. At that meeting we sought clarification of the proposal of Set Free, explained eligibility of funding under the Final Rule and the Guidelines, and received information to assist in our analysis of eligibility.

Mr. Brown subsequently presented a revised proposal for consideration of the Set Free application, clarifying the program sought to be funded. This clarification provides a commitment to operate the program in accordance with federal regulations, which would include the Final Rule and the Guidelines.

If the City Council approves the requested funding City staff will work with Set Free to establish reasonable methods of ensuring compliance with the Final Rule and the Guidelines, in the event that special procedures are necessary. Based on the clarification from Mr. Brown it is likely that increased monitoring of the program will be necessary in order to achieve a successful and compliant program, in light of the circumstances.

Based on the foregoing, and assuming ongoing compliance with the Final Rule and the Guidelines, I am of the opinion that allocation of \$50,000.00 of the City's CDBG funds to Set Free will not violate the United States Constitution.

Morgan L. Foley
City Attorney

MLF:kjr

U.S. Department of Housing and Urban Development

Special Attention of:

NOTICE: CPD 04-10

All CPD Office Directors
All CPD Field Office Directors
All CPD Formula Grantees
All HOPWA, Supportive Housing, Shelter Plus Care,
and Youthbuild Grantees

Issued September 29, 2004
Expires September 29, 2005

SUBJECT: Guidelines for Ensuring Equal Treatment of Faith-based Organizations participating in the HOME, CDBG, HOPE 3, HOPWA, Emergency Shelter Grants, Shelter Plus Care, Supportive Housing, and Youthbuild Programs

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I. Purpose:

The purpose of this Notice is to provide guidance to HOME, CDBG, HOPE 3, HOPWA, Emergency Shelter Grants, Supportive Housing, Shelter Plus Care, and Youthbuild grantees covered by the September 30, 2003 final rule on ensuring equal treatment of Faith-Based organizations in CPD programs. This Notice will provide guidance to CPD field staff and grantees on their responsibilities, answer some questions raised, and provide direction on how HUD will administer its responsibilities under this regulation.

II. Background:

On December 12, 2002, Executive Order 13279 was issued, requiring federal departments to treat all organizations fairly and without regard to religion in federal programs. It is HUD policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for federal funding. Accordingly, organizations that are faith-based are eligible, on the same basis as any other organization, to participate in HUD's programs and activities. Neither the federal government nor a state or local government receiving funds under a HUD program or activity shall discriminate against an organization on the basis of the organization's religious character or affiliation. HUD supports the participation of faith-based organizations in its programs.

III. General Guidance:

The new rule revises HUD regulations to remove barriers to the participation of faith-based organizations in the programs listed above. In doing so, the preamble to the regulation stresses that all program participants should compete on equal footing and be subject to the same requirements. In implementing this regulation, HUD and grantees in the formula programs—HOME, CDBG, ESG, and HOPWA, should be conscious that requirements for documentation, reporting, monitoring, and use should be applied to all entities across the board. If a formula grant recipient has procedures in place, these procedures should be applied to all subrecipients without regard to their religious or secular status. Equality of treatment should be the guiding principle in implementing the regulations.

As with any regulatory change, the new rule requires clarification on several fronts in order to ensure a uniform and accurate implementation in the affected programs. The purpose of this notice is to provide guidance on certain aspects of the September 30, 2003 final rule. The guidance contained in this notice applies to all eight of the CPD programs covered by the September 30, 2003 final rule. HUD may issue additional guidance, as it determines necessary, and as it receives questions and requests for clarification on the new regulatory requirements.

IV. Applicability:

On September 30, 2003 (68 FR 56396), HUD issued a final rule requiring equal treatment of faith-based organizations for eight HUD programs administered by its Office of Community Planning and Development (CPD). In addition, HUD published a final rule on July 9, 2004 (69 FR 41712) requiring, among other things, that states under the CDBG program to provide equal treatment of faith-based organizations. Copies of the rules are attached as Appendix A or can be accessed online at <http://www.hud.gov/initiatives/fbci/finalrule.pdf> and <http://www.hud.gov/offices/fbci/finalfr070904.pdf>. These programs are:

1. HOME Investment Partnerships (24 CFR part 92);
2. Community Development Block Grants (CDBG) for Entitlements, States and HUD-Administered Small Cities and Insular Areas (24 CFR part 570). Including Economic Development Initiative (EDI), Brownfields (BEDI), and Section 108 Loan Guarantees
3. Hope for Homeownership of Single Family Homes (HOPE 3) (24 CFR part 572)
4. Housing Opportunities for Persons With AIDS (HOPWA) (24 CFR part 574);
5. Emergency Shelter Grants (ESG) (24 CFR part 576);
6. Shelter Plus Care (24 CFR part 582);
7. Supportive Housing (24 CFR part 583); and
8. Youthbuild (24 CFR part 585).

The amendments made by the September 30, 2003 final rule provide policy on the following:

- *Faith-based organizations are eligible for HUD funding on an equal footing with any other organization.*

Organizations competing for HUD funding, including faith-based organizations, should be assessed on their merits and how well they perform eligible activities, not on their religious or secular character.

- *Faith-based organizations retain their independence.*

The rule provides that a faith-based organization that receives HUD funds will retain its independence from federal, state, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct HUD funds to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a religious organization retains its authority over internal governance, may constitute its board on a religious basis, may display religious symbols and icons, and retains its Title VII exemption, which permits it to hire only employees that share its religious beliefs without incurring liability under the Civil Rights Act.

A faith-based organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1(a)), is not forfeited when the organization receives HUD funding. However, a faith-based organization, like any other entity participating in a HUD funded program, must comply with all the statutory requirements of that program. Both the CDBG and HOME programs contain statutory provisions imposing nondiscrimination requirements on all grantees and their recipients, subrecipients, subgrantees, and contractors. Section 109 of the Housing and Community Development Act of 1974 as implemented at 24 CFR Part 6 and 24 CFR Part 570.602 and Section 282 of the HOME

Investment Partnership Act as implemented at 24 CFR 92.350 provide that “no person in the United States shall on the grounds of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.” In light of prior court decisions regarding similarly broad language, one interpretation of this provision is that it means that any entity being assisted with CDBG or HOME funds may not treat employees or job applicants differently on a religious basis. Religious organizations that believe that this substantially burdens their religious freedom may be entitled to additional protection under the Religious Freedom Restoration Act (42 U.S.C. 4000bb-3, 4000bb-2(1)), which applies to all federal law and its implementation. Grantees should also be aware that the provisions of Section 109 and Section 282 may pose questions of conformance with Title VII of the Civil Rights Act of 1964 and future court rulings could define more specifically the application of these laws to faith-based organizations.

Since the provisions of Section 109 or Section 282 apply to activities funded through CDBG or HOME programs, faith-based organizations administering CDBG or HOME funded activities should be aware that the nondiscrimination provisions normally apply to employees administering the activities but clearly not to employees not involved in the activity. To the extent that a faith-based organization uses an indirect cost method to allocate CDBG or HOME expenses across the organization, they should be aware that doing so may trigger nondiscrimination provisions of Section 109 or 282 for the whole organization. The statutory and regulatory coverage is the “program or activity (funded in whole or in part)” (see 24 CFR § 6.3).

- *Organizations may not use direct HUD funds to support inherently religious activities such as worship, religious instruction, or proselytization.*

In the context of the regulation, “direct HUD funds” means that the state or local government, grantee, or an intermediate organization with similar duties as a governmental entity under a particular HUD program selects an organization and purchases needed services straight from the organization (e.g., via a contract or cooperative agreement). “Direct funds,” then, applies as a term both to HUD funds received by an organization as a competitive grant award and to HUD funds received through a governmental entity such as an entitlement community, participating jurisdiction, etc. In contrast, “indirect funding” means that the choice of service provider is determined by a beneficiary, who pays for the cost of that service through a voucher, certificate, or other similar means of payment.

An organization that is awarded direct HUD funds may still engage in inherently religious activities providing they are voluntary for participants in HUD-funded activities and occur separately in time or location from the HUD-funded activities. For example, a Bible study that is conducted by a faith-based organization operating a HUD-funded “soup kitchen” must be separate in time or

location from the meal service and must be voluntary for any recipients of the meal service. Prayers offered before meals are acceptable so long as they are voluntary and understood to be voluntary by those receiving meal services.

When a grantee's or subgrantee's HUD funded program provides a voucher, certificate or similar means of payment to a program beneficiary and permits the beneficiary to choose from among a range of service providers, such a program is typically a form of "indirect" aid. If the beneficiary then chooses a faith-based provider, the faith-based service provider is exempt from the prohibition against incorporating inherently religious activities into their provision of HUD funded services.

- *Faith-based organizations, like all organizations implementing HUD-funded programs, must serve all eligible beneficiaries without regard to religion.*

An organization receiving HUD funds may not restrict HUD-funded services or housing to people of a particular religion or religious denomination. For example, a church-run community center improved with HUD funds may not restrict use of the center to members of the church. Likewise, organizations may not require a particular religious belief or activity as a condition of receiving benefits or participating in activities provided with HUD funds. Both the CDBG and the HOME program statutes and regulations prohibit any person from being denied the benefits of, or being subjected to discrimination, on the basis of religion under any activity funded in whole or in part with CDBG or HOME funds. This prohibition would also prevent, for example, an organization from marketing or advertising housing, facilities or services exclusively to members of a particular faith. In addition, participating jurisdictions (PJs) should note that the affirmative marketing requirements of 24 CFR 92.351 apply to HOME-assisted housing containing five or more assisted units, including the requirement for outreach to persons in the market area that are "least likely to apply."

- *Faith-based organizations, like other organizations, may receive HUD funds to acquire, construct, or rehabilitate buildings and other real property as long as the funds only pay the costs attributable to HUD activities.*

Faith-based organizations are no longer required to form a separate, secular organization to receive HUD funds for real property as they were under HUD's former regulations. However, an organization that engages in inherently religious activities must allocate its costs so that HUD funds are used only for eligible HUD activities. (Further guidance on cost allocation is provided below.) Additionally, HUD funds may not be used to acquire or improve sanctuaries, chapels, or any other room that faith-based entities receiving HUD funds use as their principal places of worship.

- *The statutory provisions defining eligible program applicants remain the same and are not affected by this rule change.*

Grantees are reminded that statutory and regulatory provisions that define eligible applicants still apply. For example, to be certified as a community housing development organization (CHDO) by a participating jurisdiction (PJ), faith-based organizations must meet the same requirements as any other entity as described in 24 CFR 92.2. This includes the requirement that the faith-based organization be a Section 501(c)(3) or 501(c)(4) organization. A faith-based organization that is not organized as a 501(c)(3) or 501(c)(4) organization would not qualify as a CHDO. However, it may create a separate 501(c)(3) or 501(c)(4) organization that would be eligible to qualify as a CHDO. Similarly, in the CDBG Entitlement program, community based development organizations (CBDOs) must meet certain qualification requirements described in 24 CFR 570.204(c). The regulation states that a CBDO must be organized under state or local law to engage in community development activities, or under Section 301(d) of the Small Business Investment Act of 1958, or under Sections 501, 502, or 503 of the Small Business Investment Act of 1958.

- *The final rule applies to state or local funds if a state or local government chooses to commingle its own funds with the HUD funds covered by the rule.*

V. Effective Date for Grant Agreements:

The new rule is applicable to all future grant agreements, and grant agreements executed with organizations following the effective date of the final rule (October 30, 2003) must be consistent with the new regulatory provisions. Organizations with previously executed grant agreements may request that the grantor agency amend those agreements to reflect the new regulatory provisions, in accordance with the same procedures applicable to amendments.

For formula grantees, including states under the CDBG, HOME, ESG and HOPWA programs, the final rule applies to all funds committed, including amendments, after the effective date of the final rule, October 30, 2003. Grantees under the CDBG, HOME, ESG and HOPWA programs should review their guidance, procedures, contracts, agreements, and documents for recipients, subrecipients, subgrantees, and contractors to be sure that all documents and agreements are in compliance with the new regulations. In order to ensure equal treatment, grantees should revise guidance where necessary to remove barriers to the participation of faith-based organizations.

For grantees of competitively awarded programs, the final rule applies to any subgrants or contracts advertised, competed, or awarded after October 30, 2003, including any continuing transactions or amendments with subgrantees or contractors.

VI. Cost Allocation:

Each grantee, particularly the formula program grantees, should establish a policy for determining cost allocation between eligible and ineligible activities for all capital improvement projects that is consistent with the applicable program rules. The policy should be applied to all recipients and subrecipients in an equal, impartial manner. The policy should include record-keeping requirements, fair market value, reporting requirements, and any procedures for terminating participation in the program.

- The new rule introduced a significant change to the use of HUD funds for the acquisition and improvement of physical property by eliminating the requirement that faith-based grantees and subrecipients establish a separate, secular nonprofit organization to receive funding for the acquisition, construction, reconstruction, or rehabilitation of buildings. Faith-based organizations may now receive HUD funding for structures in which both eligible activities and inherently religious activities occur so long as the costs are allocated according to the extent of the eligible activities.
- Funds awarded for social services activities may be allocated according to space or time. Allocating funds by space is relevant in circumstances in which individual rooms or other discreet areas within a larger structure are used solely for ineligible activities (i.e., inherently religious activities). Allocating funds by time is relevant when individual rooms or structures are used for both eligible and ineligible activities.
- When allocating funds according to time, the proportion of total cost borne by HUD funding shall be no greater than the proportion of time the space is used for eligible activities. For example, the total cost to rehabilitate two rooms is \$10,000 and the rooms are used for eligible activities 50% of the time (total hours used per week is 40, and 20 hours each week is for eligible activities). In this example, no more than \$5,000 of HUD funds may be used for the proposed rehabilitation.
- When allocating funds according to space, whether for acquisition, rehabilitation, or social service activities, important measures such as square footage and numbers of rooms should be used in the calculation. The cost of space used for eligible activities should be subtracted from the total cost. Improvements that benefit the entire building, such as a boiler or roof repairs, should be allocated accordingly.

Special Considerations:

The CDBG program represents a special case on the topic of allocating funds on any basis other than religious use. The CDBG Entitlement regulation at 24 CFR 570.200(b) is the only HUD regulation that speaks to allocating costs of eligible public facilities, and it limits cost allocation to considerations of space, but not time. For this reason, HUD will consider waivers to permit cost allocation by time with CDBG Entitlement funds.

HOME program funds may only be used to assist affordable housing. The HOME program does not fund social services or space used by social service programs. Therefore, a cost allocation method based on time is not applicable to the HOME program. The HOME regulations at 24 CFR 92 .205(d) address the issue of cost allocation in multi-unit housing projects with both eligible and ineligible units or space. Additional guidance is provided in Notice CPD 98-02 “Allocating Costs and Identifying HOME-Assisted Units in Multi-Unit Projects” (March 18, 1998). HOME-assisted common space must be reserved for the general use of the residents on a non-discriminatory basis. The HOME rule does not define how residents may use this space. If residents wish to use the common space for activities of a religious nature, this is permissible as long as this is not the only use of the common space, preference is not provided for religious uses, participation is voluntary, and participation is limited to residents and their guests. In addition, just as equipment and artifacts used for any activity organized in common spaces must be removed after the activity has terminated, any religious, artifacts, or equipment placed in the common area for religious activity must be removed at the conclusion of the activity.

- The new rule clarifies that religious congregations may not receive HUD funds for improvements to sanctuaries, chapels, or any other room that the congregation uses as its principal place of worship, even if the room is used for eligible activities during non-worship times. Organizations that lease space to a religious congregation to use as its principal place of worship, however, may receive HUD funds for improvements to the structure, provided (1) the space is leased at fair market rent, and (2) the funds are allocated by time according to the eligible activities for which the space is used.
- The following provide examples of the application of the new rules regarding capital expenditures:

Example 1 (ineligibility of a room used as a principal place of worship). A one-room church applies for CDBG funds to make several necessary repairs. On Sunday morning, the church serves as a place for congregational worship. During weekdays, the church is used to operate a “soup kitchen” for homeless individuals. Accordingly, except for the few hours on Sunday morning when the church holds worship services, the one-room church is used for the purpose of providing meals to homeless individuals—a purpose that is eligible for HUD assistance. However, the one-room church is ineligible for CDBG-funded improvements because it is the congregation’s principal place of worship.

Example 2 (eligibility of rooms located within a building that includes the principal place of worship). A synagogue with several rooms applies for CDBG funds to do necessary rehabilitation only to its “soup kitchen,” which is operated from two rooms located within the synagogue basement. The congregation does not use these rooms as its principal place of worship; they are used exclusively for the “soup kitchen.” Accordingly, the rehabilitation of the two rooms is eligible for CDBG assistance.

Example 3 (eligibility of structure formerly used as a principal place of worship). A mosque purchases an abandoned church and applies for HUD funding to renovate it and use it as an elderly daycare center. The planned renovation will retain the existing exterior facade of the former church, including the stained-glass windows. The mosque will not conduct inherently religious activities within the new daycare center. Although the proposed rehabilitation involves a building formerly used as a church, the entire renovation is eligible for HUD funding because the building will be used solely for eligible HUD activities.

Example 4 (cost allocation based on space). A church applies for HUD funding to construct a homeless shelter, which will contain several rooms for use as a shelter as well as a one-room chapel to be used for weekly religious services and nightly prayer meetings. With the exception of the chapel, the homeless shelter will be used exclusively for eligible HUD-funded activities; no inherently religious activities, such as worship or religious instruction, will be conducted outside of the chapel. Homeless individuals staying at the shelter will be offered the opportunity to participate in the religious services, but attendance will be voluntary. HUD may assist the construction on an allocated basis by excluding the costs of the chapel.

Example 5 (cost allocation based on time). A church applies for CDBG funding to make repairs to a gymnasium within a larger building complex that also contains its sanctuary and offices. The gymnasium is in use 40 hours a week. For four hours each weekday (20 hours per week), the gymnasium is used to operate a nonreligious recreation center for at-risk youth, a program that is otherwise eligible for HUD assistance. For the remainder of time during which the gymnasium is in use (20 hours per week), the congregation uses the gymnasium for a variety of activities, including religious programs that are ineligible for HUD assistance. While the gym is a discrete space in the complex, because it is used for both eligible and ineligible activities, the costs must be allocated based on time, should the church secure a waiver to the CDBG space cost allocation requirements (see note 4 above).

VII. Disposition of Property:

Under the new rule disposition by a faith-based organization of real property after the term of the grant, or any change in the use of the real property during the term of the grant, is subject to the government-wide regulations governing real property disposition. These general regulations are found at 24 CFR part 84 (for institutions of higher education, hospitals, and other nonprofit organizations) and 24 CFR part 85 (for state, local, and federally recognized Indian tribal governments). Pursuant to § 84.37, real property, equipment, intangible property, and debt instruments that are acquired or improved with federal funds must be held in trust by the faith-based organization as trustees for the beneficiaries of the project or program under which the property was acquired or improved. The faith-based organization will record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with federal funds and that use and disposition conditions apply to the property.

With regards to the acquisition and disposition of real property, parts 84 and 85 generally require that, except as otherwise provided in federal statute, the faith-based organization must use the real property for the originally authorized purpose as long as needed for that purpose. The faith-based organization may not dispose of, or encumber, its title or other interest in the property. When the real property is no longer needed for the originally authorized purpose, the faith-based organization must request disposition instructions from HUD or the grantee. HUD or the grantee may authorize the faith-based organization to sell or retain title to the real property, but only after compensating HUD for the federal assistance. Alternatively, HUD or the grantee may require the faith-based organization to transfer title to HUD, the grantee, or an eligible third-party, and compensate the faith-based organization for its attributable percentage of the current fair market value of the property. Faith-based organizations should refer to 24 CFR parts 84 and 85 for more specific requirements regarding the disposition of property (see § 84.32 and § 85.31).

Special Considerations:

The regulatory requirement subjecting property disposition to Parts 84 and 85 applies when some part of the assisted property has been used by the recipient for inherently religious activities (such as worship or religious instruction) or when the owner of the property is a religious or faith-based organization.

While many of the covered CPD programs have statutory or regulatory provisions governing change of use and disposition of assisted properties, these provisions are not necessarily sufficient to satisfy constitutional safeguards required by the Supreme Court when a faith based organization receives HUD assistance. Therefore, the September 30, 2003 regulations make the provisions of Parts 84 and 85 governing property disposition and change of use applicable to these programs along with the program-specific provisions. Note that while § 84.32 only relates to disposition of property, § 84.37 permits HUD to apply use and disposition requirements to properties acquired or improved with Federal funds. In practice, this means that at the time of a change in use or disposition of HUD-improved property, HUD will apply the analysis of § 84.32 in permitting the disposition or change of use of the improved property. Conveyance of homeownership units to private families does not pose a risk of violation of the separation of church and state, so there are no additional requirements imposed for conveyance homeownership properties by faith-based organizations to eligible homebuyers.

ESG: While section 415(c) of the McKinney Vento Homeless Assistance Act requires the grantee to certify that the assisted property will be used for at least 10 years in the case of major rehabilitation assistance or 3 years for other rehabilitation assistance, when a faith-based organization holds title to property acquired or improved with ESG funds, Part 84.32 applies as well.

SHP: Section 423(b) of the McKinney Vento Homeless Assistance Act requires that property acquired, constructed, or rehabilitated with grant funds will be used for supportive housing for at least 20 years (unless HUD permits the conversion of the property to another use benefiting low-income persons). If the property is used for less than 20 years, the statute requires repayment of up to 100 percent of the original assistance provided. When a faith-based organization holds title to property acquired or improved with SHP funds, the amount to be repaid to the program account will be the greater of either the statutorily-derived amount or the amount determined under 84.32.

Youthbuild: Part 84.32 governs the change of use or disposition of properties acquired or improved with Youthbuild funds.

HOPWA: Section 858(b) of the AIDS Housing Opportunity Act requires that certain HOPWA-assisted property will be used for AIDS short-term supportive housing for at least 10 years if acquired or substantially rehabilitated with HOPWA funds or at least three years if leased, renovated, converted, or repaired with HOPWA funds (unless HUD permits the conversion of the property to another use benefiting low-income persons). When a faith-based organization holds title to property acquired or improved with HOPWA funds, disposition and change of use is governed by 84.32.

HOME: The affordability period for rental housing required by section 215(a)(1)(E) and implemented at 24 CFR 92.252 is not necessarily sufficient to satisfy the constitutional safeguards required by the Supreme Court. Therefore, when a faith-based organization holds title to property acquired or improved with HOME funds, it is subject to the requirements of 84.32 after the affordability period.

CDBG: Properties owned by faith-based organizations are subject to the requirements of 84.32, not the general CDBG subrecipient property disposition requirements of 24 CFR 570.503(b)(7) or 570.489(j).

VIII. Monitoring Faith-Based Organizations' Activities:

- Like any recipient of HUD funds, faith-based organizations are responsible for complying with HUD regulations. Therefore, they must carefully account for the use of those funds and ensure that funds are used only for eligible activities. They should be monitored with no more or no less scrutiny than any other HUD-funded organization to ensure compliance with program requirements.
- HUD funded grantees should make faith-based organizations aware of the conditions pertaining to the use of HUD funds through the same common and regular procedures used to advise all recipients, subrecipients, subgrantees and contractors of funding availability and program requirements.