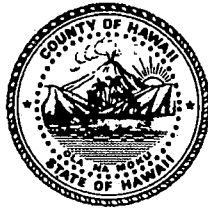


Harry Kim  
Mayor



Joseph K. Kamelamela  
Corporation Counsel

Renee N. C. Schoen  
Assistant Corporation  
Counsel

**COUNTY OF HAWAII**  
**OFFICE OF THE CORPORATION COUNSEL**

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November 3, 2017

Council Member Jen Ruggles  
Hawaii County Council, District 5  
County of Hawaii  
25 Aupuni Street, Suite 1402  
Hilo, Hawaii 96720

Aloha Council Member Ruggles,

**Re: Orchidland Neighbors CRF Grant Follow-up**

Thank you for your August 25, 2017 correspondence to the Honorable Mayor Harry Kim. Unfortunately, I respectfully disagree with your assertion that the law and precedence permits the Orchidland Community Center grant of contingency relief funds.

The critical question is whether the Orchidland Neighbors' request for contingency relief funds ("CRF"), to be used for the planning, design and permitting of the construction of the Orchidland Community Center, on private land, complies with all of the requirements of the Hawaii County Code ("HCC").

**I. SHORT ANSWER**

We opine that the use of CRF monies for the planning, designing and permitting of the construction of the Orchidland Community Center is inconsistent with law and prior precedent. For a non-profit organization to qualify for a grant, it must provide a "service or activity" addressing specific concerns or needs directly to the public. HCC § 2-137. The planning, designing and permitting of a community center is not a "service or activity." In fact, the planning, designing and permitting of the construction of a community center on private property is a capital improvement project on private property. Moreover, the construction of such a capital improvement project does not further any other recognized public purpose under County or State law.

## **II. FACTS AND ANALYSIS**

### **A. Background of the Project**

Orchidland Neighbors is a 501(c)3 organization created and established to improve private property for the construction of a pavilion and community center in the Orchidland Subdivision. See Exhibit "A," attached portions of Orchidland Neighbors' Grant Proposal for the Community Development Block Grant, at 15, 18, Picture of Pavilion and Exterior Views of Community Center (hereinafter referred to as "CDBG grant proposal"). The proposed completed community center, pavilion and surrounding area will be utilized for large gatherings and community meetings, offices, classes, sports events and practices, emergency preparedness, and food basket distribution. *Id.* at 20.

### **B. The CRF Account and Criteria to Qualify for Use of Such Funds**

The Council maintains a CRF fund account in its operating budget. The CRF account was created to pay for unexpected expenses (that is, contingencies) that may occur during the fiscal year. County departments and agencies may receive CRF from the Council via resolution authorizing the appropriation of funds to the County department or agency for a specific purpose. For example, CRF funds may be received by Parks and Recreation for replacing an old scoreboard in a County gym or contributing to the County's Cherry Blossom Festival.

Qualified, private nonprofit organizations exempt from taxation pursuant to 26 USCA Section 501(c)(3) may also receive CRF from the Council, as long as certain criteria is met and the funds are used for a public purpose and/or consistent with an existing County-related program or service. For example, CRF funds may be used for the installation of bus shelters at bus stops where County mass transit buses pick up and drop off riders.

In order to receive such funds, however, a resolution must authorize the appropriation of funds for a specific purpose to an accepting County department and to a qualified Section 501(c)(3) non-profit organization, in accordance to the following criteria:

1. Purpose: provide benefits to the people of the County (HCC § 2-137(2));
2. Provide "service or activity" addressing certain specific concerns or needs (HCC § 2-137(3));
3. Members of governing board serve without compensation and no conflict of interest (HCC § 2-137(4));
4. The non-profit organization has by-laws or policies (HCC § 2-137(5));

5. The non-profit organization has at least one year's experience with the service or activity or can demonstrate sufficient expertise to successfully carry out the service or activity (HCC § 2-137(6)); and
6. Identifying the specific program, project, event, activity, service, equipment, materials, or supplies for which the grant shall be used (HCC § 2-139(a)(2)(A)).

HCC §§ 2-137 and 139(a)(2)(A). Failure of the non-profit organization to satisfy any of the above-stated criteria would be a basis for denying the transfer of CRF monies to the non-profit organization.

### C. Analysis

#### 1. Public Purpose.

Article VII, § 4, Hawai'i State Constitution states, in pertinent part, that no appropriation of public money shall be used directly or indirectly, except for a public purpose. In order for a non-profit organization to be qualified in obtaining any grant from the County, it must satisfy the public purpose expressed in the Code pursuant to HCC § 2-137. In addition to the criteria that the funded nonprofit program "yield direct benefits to the public," the non-profit must also meet the following criteria:

The **service or activity** to be provided by the nonprofit organization, and funded by the County, shall address educational concerns, culture and the arts, the needs of the poor, youth, the aged, those with physical or emotional disabilities, victims of crimes, victims of health or social crises, or public health and welfare of the people and the environment, as may be determined by the County.

(Emphasis added), See HCC § 2-137(3).

In this case, the threshold issue is whether the request by Orchidland Neighbors is a "service or activity." A "service" is an act of doing something. See Black's Law Dictionary (Seventh Edition 1999), at 1372 (service). Examples of service include providing labor, skill or advice, or doing something useful for a person for a fee.

An "activity" is an event organized for a specific purpose, See *U.S. v. Griffin*, 585 F.Supp. 1439 (M.D.N.C. 1983) (Parade was "activity" within meaning of state program and activities provision of statute governing federally protected activities, where parade was organized primarily to enable participants to express their public contempt for clandestine racist organization), or a physical act, See *McClure v. Board of Ed. Of City of Visalia*, 176 P. 711, 38 Cal. App. 500 (Cal.App. 3 Dist. 1918) ("activity" meaning a physical or gymnastic exercise, an agile performance).

Given the above-stated definitions for "service or activity," neither the Code nor State law allow public monies to be used for the renovation, construction or capital improvements on private property to construct a pavilion and community center. See Hawai'i Revised Statutes ("HRS") § 37-62 (Definitions of "Capital Expenditures," "Capital Investment Costs," and "Construction costs"). Even if Orchidland Neighbors contend that a specific service or activity will be provided, the fact still remains that its request is not directly related to a "service or activity" to be provided within a fiscal period. In this instance, the preliminary cost estimates for the capital improvements is \$400,000; the capital improvement project will be built and completed in at least three phases (that is, planning, designing and permitting, funding raising, and development and construction); and it is therefore unlikely that the Orchidland Community Center will be completed within a fiscal period. CDBG grant proposal, at 15 and 18. The requested funds are not being used, for example, for the food basket program where the Orchidland Neighbors distributes the food to the needy.

**2. No Precedent of CRF grants used for Construction of a Pavilion or Community Center on Private Land.**

In your August 25, 2017 letter, it was alleged that "there is ample precedence of CRF grants being used for construction of facilities on private land." In support of that allegation, you attached Exhibit D, copies of resolutions regarding specific programs, projects, activities, services, materials or supplies that the grants have been utilized. But none of the identified resolutions provided CRF grants for the construction of a pavilion or community center on private land. In fact, Resolution 113-15, provided CRF monies for the construction of a community association pavilion on Hawaiian Homes Land, which is not private land.

In addition, some of the identified resolutions involved the Department of Environmental Management, Department of Public Works and the Fire Department. Therefore, obtaining CRF monies clearly would benefit the public health and safety. While other resolutions determined the public purpose would be that the County "may furnish all necessary facilities and equipment for the volunteer fire stations." A couple of the resolutions provided were not for capital improvement projects and therefore, are not similar. Lastly, one resolution provided funding to develop a pedestrian-scale lighting plan to improve the overall illumination within the public spaces along Ali'i Drive, which is a County roadway.

**III. CONCLUSION**

For the reasons stated above, we conclude that the use of CRF monies by Orchidland Neighbors for the planning, designing and permitting of the construction of the Orchidland Community Center does not comply with HCC § 2-137(3). The planning, designing and permitting of a community center is not a "service or activity." Furthermore, the planning, designing and permitting of the construction of a community

Council Member Jen Ruggles  
Hawai'i County Council, District 5  
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center on private property is a phase of a capital improvement project upon private property. CRF monies are not used for such a capital improvement project. Under the facts and circumstances of this case, neither the Code nor State law supports the use of public monies by Orchidland Neighbors for a capital improvement project to construct a community center on private land.

Should you have any further concerns or comments, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'JOSEPH K. KAMELAMELA', written over a horizontal line.

JOSEPH K. KAMELAMELA  
Corporation Counsel

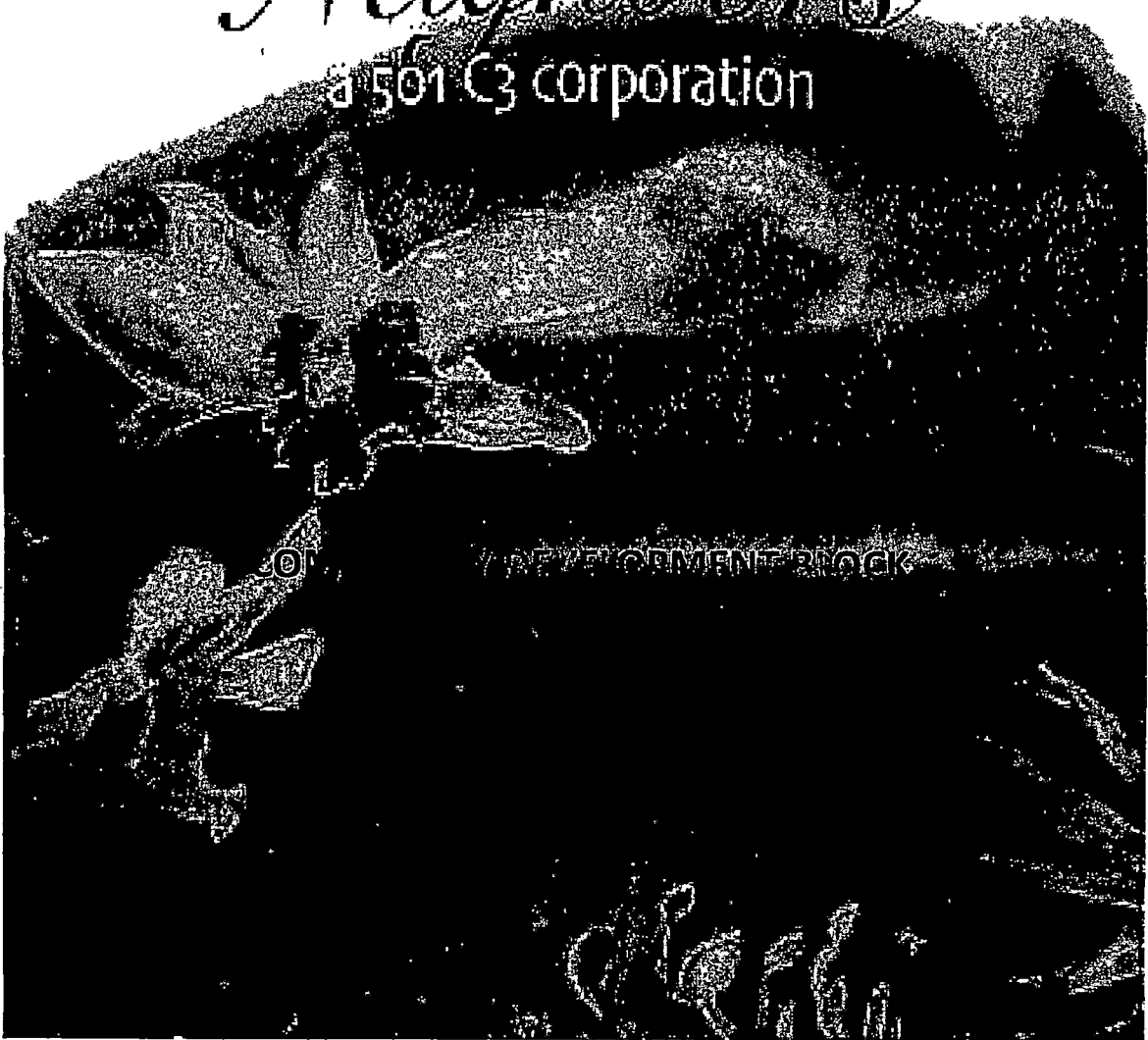
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Attachment: Exhibit "A," Portions of CDBG proposal by Orchidland Neighbors  
c w/attachments: Mayor Harry Kim  
Managing Director Wil Okabe

*Orchidland*

*Neighbors*

a 501 C3 corporation



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**EXHIBIT 9 BUDGET AND FUNDING**

1. Type of funding requested –

Orchidland Neighbors is requesting CDBG funding in the amount of \$400,000.

The activities to be funded for 2016-2017, shown in the attached budget document, are:

- a. Plot, Planning, Permitting, Design, Environmental Study
- b. Complete Lot Preparation and Infrastructure
- c. Complete Pavilion with restrooms and Small Office
- d. Complete Multipurpose Game Court

2. Detailed Budget included (See attachment K)

Orchidland Community Center Work Breakdown Structure ROUGH ORDER OF MAGNITUDE (ROM) Cost Estimate			
A - Planning, Permits, Fundraising		\$ 50,000	
	AA - Environmental Review		\$ 20,000
	AB - Plot Design		\$ 20,000
	AC - Pavilion Design		
	ACA - BBQ		
	ACB - Restrooms		
	AD - Community Center Design		
	ADA - Commercial Kitchen		
	ADB - Restrooms with showers		
	ADC - 2 Small Offices		
	ADD - 2 Med Conf/Class Rooms		
	ADE - Utility Room		
	ADF - Storage Room		
	ADG - Large Activity Room		
	AE - Multipurpose Court Design		
	AF - Permits		\$ 10,000
B - Develop		\$ 350,000	
	BA - Rip and level both lots		\$ 25,000
	BB - Fill/cover with cinder/soil		\$ 50,000
	BC - Install Fence and Gates		\$ 30,000
	BD - Install Water Catchment		\$ 15,000
	BE - Install Septic System		\$ 15,000
	BF - Install Parking Lot		\$ 13,000
	BG - Install Sidewalks and Curbs		\$ 12,000
	BH - Install Multipurpose Courts		\$ 50,000
	BI - Install Pavilion 1200 SQ FT		\$ 140,000
Total		\$ 400,000	

Figure 2 WBS with ROM Budget

Basket registration and distribution program is currently held at the Town Center under a canopy, competing with traffic in and around the grocery and gas station. Dissemination of information about the current Dengue Fever outbreak and emergency preparedness training has no central distribution point.

During emergencies, such as the recent hurricanes and fires due to lava flow, no storage for emergency supplies, water, tarps or other supplies. Exchange of information is limited since there is no central place for that exchange to take place.

The community association has no office. There is no venue for computer classes or tutoring programs. Educational classes for people whose English speaking and writing skills are limited are held twenty to thirty miles away. County programs which are available in Hilo or in subdivisions surrounding Orchidland cannot be brought in for Orchidland residents.

The facilities available in surrounding subdivisions for graduations, luaus, reunions, weddings and sports events require driving 10 to 30 miles, require payment of fees, and a waitlist is often encountered. Public or private facilities are available in Kona, but entail more expense and a 400 mile drive for these larger events. Even the county building in Pahoa overflows with the community in meetings held by county and state officials.

Phase I for 2016-2017 of this proposal will consist of the following activities:

- A) Plotting, Planning and Permitting of a 2 acre parcel for the Community Center and Recreation Area is scheduled from February to July of 2016.
- B) Prep the lot for the Infrastructure such as the excavation, septic system, water catchment, fencing, parking lot, sidewalks and curbs is scheduled from August to December of 2016.
- C) Installation of the Pavilion with restrooms, a small office and a multi-purpose game court is scheduled from January to May of 2017. By January 2017 we will have finished our planning phase and ready to submit our next CDBG for 2017 for the installation of the Community Center Building.

Completion of these elements will allow the four ongoing programs, Food Basket, CERT, Neighborhood Watch and Emergency Preparedness to be moved on site. It will also allow for a permanent home for other activities that can be held in an outdoor pavilion and a game court.

This project could be built without CDBG funding, but would require another five to 10 years to complete.

The project will be accessible to persons with disabilities and will meet ADA requirements.

#### 1. Phase II 2017-2018

Yes, the project will definitely need CDBG funds in the future. Phase II of the project will require funds for the Community Center Building. (See Attachment N-1)

A plan has been developed to transform the community center into a sustainable project by the third year. Once streams of income are established through rental of

**EXHIBIT 11 OUTCOMES/NUMBER OF BENEFICIARIES**

Estimated outcomes for this activity which will produce the first-ever public facility in Orchidland Subdivision are as follows:

**ONGOING PROGRAMS - 2015**

Food Basket 50 families per month	130 people
Community Meetings	200 people
Offices/Classes	120 people
Sports Practice	150 people
Emergency Preparedness	120 people
Estimated Total Users per Month	720
Yearly Total	8,640

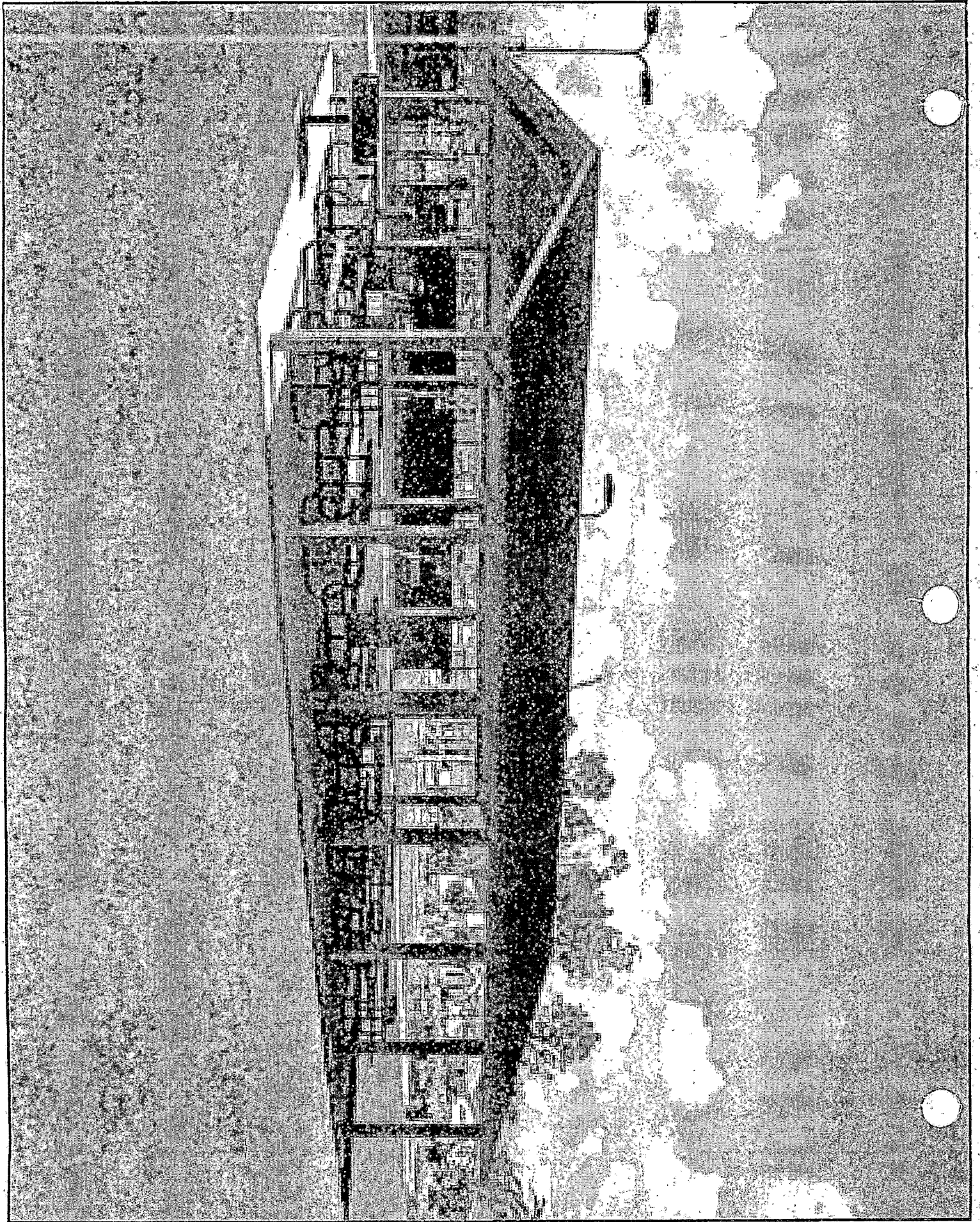
**NEW PROGRAMS AND ACTIVITIES - 2016**

Large gatherings and community meetings	250 people
Classes and offices	125 people
Sports events and practices	125 people

Estimated Total Users per Month 500 Yearly Total 6,000

Additional activities which have been requested and may be available:

- Elderly Activities and Classes
- Health Services and Information
- Exercise for All Ages
- Indoor/Covered Sports
- Election Activities
- English as Second Language Classes
- GED Classes
- Soccer Ball Field



# ON Lot Development

