

INFRASTRUCTURE IMPROVEMENT AGREEMENT

This Infrastructure Improvement Agreement (the “Agreement”) is executed this ____ day of _____, 2019, by and between the City of Costa Mesa, a California general law city (“City”), on one hand, and EFEKTA Orange, Inc., a Delaware corporation (“EF”), on the other hand. The City and EF are individually referred to herein as a “Party” and collectively referred to herein as “Parties.

RECITALS

- A. EF is the fee owner of that certain real property known as 3150 Bear Street (the “Property”) on which the EF Education First International Language Campus Project (the “Project”) is to be located. The Property is currently developed with one (1) office building consisting of approximately 68,000 square feet of building area. EF desires to renovate the existing three-story (approximately 44-foot tall), 68,000-square-foot building to create approximately 50 classrooms, a student services area, cafeteria, and faculty/staff offices and to develop up to three new residential buildings, along with surface parking areas and recreational facilities and landscaping. The Project includes the addition of 87,000 square feet of new buildings on the Property. In order to develop the Project, EF has sought several discretionary approvals.
- B. EF has requested that the City expedite its approval of the Project as quickly as permissible under the City’s development standards, including any appeals and/or calls for review therefrom. The parties understand that the processing of a development agreement pursuant to the requirements of the state law, including the necessary legislative approvals, would delay the project by a minimum of an additional 90 to 120 days, and accordingly has requested that the Project proceed by other than a development agreement. While EF has requested to expedite the Project, EF desires to nonetheless provide the same or similar type of public benefits that could accrue to the City pursuant to a development agreement. EF also understands and agrees that appeals and/or calls for review of projects from the Planning Commission to the City Council currently may delay the final decision on a project by four to six months, and has requested that the City also expedite any such appeals.
- C. Due to the unique nature of the use and its location, there are potential demands for City infrastructure and services that are unique to this use. The project site is zoned Administrative Professional. The Administrative Professional Zoning District is for office uses and all other properties within this zoning district are office uses. The proposed international language school includes three dormitories to accommodate up to 627 students onsite. While post-secondary schools are permitted within this zone onsite dormitories were not envisioned as part of the projected General Plan buildout for the site nor as part of the infrastructural network that serves this property. While this use is consistent with the General Plan and its environmental impacts were found to be less than significant for CEQA purposes the project still has impacts to the City that must be addressed to ensure that the City’s infrastructure and services can support the project overtime per the goals of the General Plan, including but not limited to transportation and public parks.

- D. The City has found that this project will generate a net fiscal deficit to the City's General Fund per the City's approved Fiscal Impact Model. EF has determined that the project will have a net fiscal benefit to the City's General Fund.
- E. City projects that would compliment the Project include a signalized pedestrian crosswalk connecting the Project entrance to Shiffer Park across Bear Street, improved lighting and other enhancements to Shiffer Park, augmentation of the Bicycle network, sidewalk and parkway improvements, or other projects that enhance the active transportation network or the services of the City that will help improve the quality of the City within the vicinity of the project.
- F. In connection with the decision to grant the Development Approvals, the City caused to be prepared an Initial Study / Mitigated Negative Declaration ("IS/MND"), pursuant to Section 21080(c) of the California Public Resources Code and Section 15063 of the CEQA Guidelines, to analyze any potential adverse environmental impacts of the Project. The IS/MND concluded that there would not be a significant impact in this case because mitigation measures have been incorporated. On November 25, 2019, the Planning Commission of the City certified the IS/MND and approved the Development Approvals.
- G. Despite the findings of the IS/MND that the Project would have a less than significant impact on the environment under CEQA, to ensure that all future users of the Project and the surrounding community will be able to circulate safely and efficiently in the Project vicinity and diminish negative impacts to the City, EF has agreed to commit \$1,800,000 (the "EF Contributions", as defined in Section 2.1 below) to the City to assist in and ensure the implementation of a Crosswalk (as defined in Section 1.1(f) below) and other measures, in the City's discretion, to enhance the active transportation network and other City infrastructure and services within the vicinity of the project site.

AGREEMENT

Based upon the foregoing Recitals, which are incorporated into this Agreement by reference, and for good and valuable consideration, the receipt and sufficiency of which are acknowledged by both Parties, the City and EF agree as follows:

1.0 DEFINITIONS

1.1 Definitions

The following terms when used in this Agreement shall have the meanings set forth below:

(a) The term “Crosswalk” shall mean a crosswalk, associated ADA ramps, and a pedestrian hybrid beacon (also known as a HAWK signal) across Bear Street between the Property and Shiffer Parkas tentatively depicted in Exhibit “A”.

(b) The term “Designated Improvements” shall mean infrastructure and service improvements which enhance livability within the vicinity of the project. These include, but are not limited to, the Crosswalk and other projects such as enhanced lighting in Shiffer Park, augmentation of the bicycle and pedestrian network, enhancements to Shiffer Park, parkway improvements, or any other projects that enhance the active transportation network, other City infrastructure, and services of the City that improve quality and livability of the City within the vicinity of the project.

(c) The term “Effective Date” shall mean the date this Agreement is fully executed.

(d) The term “Party” shall refer singularly to the City or to EF and collectively to the City and EF.

1.2 Exhibits

The following documents are attached to, and by this reference made a part of, this Agreement:

Exhibit “A” – Map of Property, with tentative location of the Crosswalk.

Exhibit “B” – TBD

Exhibit “C” – TBD

2.0 AGREEMENT AND ASSURANCES

2.1 Agreement and Assurances on the Part of EF

As consideration for the City agreeing to EF’s request to expedite the Project as set forth herein, to construct and/or implement the Crosswalk, to consider making the other Designated Improvements, and/or entering into this Agreement, EF shall make the payments described

below to the City that total One Million Eight Hundred Thousand Dollars (\$1,800,000.00) (“EF Contributions”).

2.1.1 Crosswalk Contribution

Prior to the issuance of the first building permit for the construction or reconstructions any building on the Property authorized by approval of the Project, EF shall make a payment to the City of Three Hundred Thousand Dollars (\$300,000.00) to fund the cost of Designated Improvements. The City may deposit these funds into a separately maintained account dedicated to installation of the Designated Improvements.

2.1.2 Additional Contributions

Following the issuance of the first Certificate of Occupancy for a Project building, EF shall provide to the City the following payments:

(a) A payment of One Hundred Thousand Dollars (\$100,000.00) (the “First Annual Payment”) within thirty (30) days; and

(b) For the following fourteen (14) years after the First Annual Payment, on each successive yearly anniversary, an additional payment of One Hundred Thousand Dollars (\$100,000.00) (“Additional Annual Payments”).

The First Annual Payment and the Additional Annual Payments shall total One Million Five Hundred Thousand Dollars (\$1,500,000.00). The City may also deposit these funds into a separately maintained fund dedicated to the Designated Improvements.

2.1.3 Failure to Make Contributions

Should EF fail to make the Crosswalk Contribution or any Additional Contribution, EF agrees that such failure shall constitute valid grounds for the City to revoke and/or rescind any and all permits or other approvals issued to the Project, in addition to any other remedy the City may have at law and/or under this Agreement.

2.1.4 Security for Obligations

[TBD].

2.2 Agreement and Assurances on the Part of the City

2.1.1 Expedited Approval of the Project

In consideration of the foregoing, the City agrees that approval of the Project shall not require the processing of a development agreement and that it will expedite any public hearings for any appeals and/or calls for review of the Project, such that any City Council hearing on an appeal and/or call for review shall take place within three months of the filing of an appeal

and/or call for review, unless a longer period of time is requested by EF and/or is required by law.

2.1.2 Implementation of the Designated Improvements

The City shall be solely responsible for implementing the Crosswalk, and shall be solely responsible for, but not obligated to, implement any other Designated Improvement of its choosing contemplated herein. City's responsibilities for implementing a Designated Improvement shall include, without limitation, preparation of any necessary plans, securing all necessary approvals (i.e., environmental clearance, sign-off from other local agencies including the Costa Mesa Sanitary District, Mesa Water District, etc.), and construction of such improvements. In no event shall EF be responsible for implementing any Designated Improvements, nor shall EF's financial obligation to the City for said improvements exceed the EF Contributions defined in Section 2.1 above. City agrees to indemnify and defend EF along with its parents, subsidiaries, affiliates, directors, officers, agents, employees, contractors and insurers from and against any third party claim, action, judgment, or proceeding that arises from the design, construction, or maintenance of the Crosswalk. The City's indemnity shall survive the expiration or termination of this Agreement.

3.0 GENERAL PROVISIONS

3.1 Duration of Agreement

This Agreement shall commence on the Effective Date and continue thereafter until the date on which the final payment described in Section 2.1.2(b) above is delivered to the City.

3.2 Binding Effect of Agreement

This Agreement shall be binding on the parties' heirs, successors and assigns.

3.3 Defaults and Remedies

Failure by the City or EF to perform any term or provision of this Agreement for a period of thirty (30) days from the receipt of written notice thereof from the other shall constitute a default under this Agreement, subject to extensions of time by mutual consent in writing. Said notice shall specify in detail the nature of the alleged default and the manner in which said default may be satisfactorily cured. If the nature of the alleged default is such that it cannot reasonably be cured within such thirty (30) day period, the commencement of the cure within such time period and the diligent prosecution to completion of the cure shall be deemed a cure within such period. Subject to the foregoing, after notice and expiration of the thirty (30) day period without cure, the notifying Party, at its option, shall have all rights and remedies provided by law, including injunctive relief.

3.4 Force Majeure

Performance by any Party of its obligations hereunder shall be excused during any period of "Permitted Delay," which Permitted Delay shall mean and include delay caused by an event beyond the reasonable control of the Party claiming the delay (and despite the good faith efforts of such Party) that prevents the Party from fulfilling the obligations for which it seeks excuse including without limitation all of the following to the extent that they prevent the Party claiming delay from fulfilling the obligation from which it seeks to be excused: acts of God; civil commotion; riots; strikes; picketing or other labor disputes; shortages of materials or supplies; damage to work in progress by reason of fire, flood, earthquake or other casualties; failure, delay or inability of the other Party to act; terrorism, and litigation brought by a third party attacking the validity of this Agreement.

3.5 Notices

3.5.1 Notice

As used in this Agreement, "notice" includes, but is not limited to, the communication of notice, request, demand, approval, statement, report, acceptance, consent, waiver, appointment or other communication required or permitted hereunder.

3.5.2 Form of Notice

All notices to be given under this Agreement shall be in writing, signed by a signatory hereto (or an officer, agent or attorney of such party) giving such notice, and shall be deemed effective (i) upon receipt if hand delivered or sent by overnight courier service; or (ii) upon delivery or the date of refusal if sent by the United States mail, postage prepaid, certified mail, return receipt requested, in either case addressed as follows:

If to the City: City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92628-1200
Attn: Lori Ann Farrel Harrison, City Manager

With copy to: City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92628-1200
Attn: Kimberly Hall Barlow, City Attorney

If to EF: EFEKTA Orange, Inc.
Two Education Circle
Cambridge, MA 02141
Attn: Ms. Shawna Marino

With copy to: Park & Velayos, LLP
801 South Figueroa Street, Suite 450
Los Angeles, CA 90017
Attn: Francis Y. Park, Esq.

3.6 Severability

If any term, provision, covenant, or condition set forth in this Agreement is held by the final judgment of a court of competent jurisdiction to be invalid, void, and unenforceable, the remaining provisions, covenants, and conditions shall continue in full force and effect to the extent that the basic intent of the Parties as expressed herein can be accomplished. In addition, in such event the Parties shall cooperate in good faith in an effort to amend or modify this Agreement in a manner such that the purpose of the invalidated or voided provision, covenant, and condition can be accomplished to the maximum extent legally permissible; provided, however, that in no event shall either Party be required to agree to an amendment or modification of this Agreement that materially adversely impacts its rights or materially increases its obligations or risks as set forth herein.

3.7 Time of Essence

Time is of the essence in the performance of each provision of this Agreement as to which there is a time element.

3.8 Parties in Interest

This Agreement and all of its terms, conditions, and provisions are entered into only for the benefit of the Parties executing this Agreement (and their respective successors in interest), and not for the benefit of any other individual or entity. No other person shall have any right of action based upon any provision of this Agreement.

3.9 Section Headings

All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

3.10 Rules of Construction

As used herein, the singular of any word includes the plural and the masculine gender includes the feminine.

3.11 Applicable Law

This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California; venue shall be in the superior court of the County of Orange. This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the parties hereto, and the rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in interpreting this Agreement, all parties having been represented by counsel in the negotiation and preparations hereof.

3.12 Project as a Private Undertaking

It is understood and agreed by and between the Parties that the development of the Project is a private development, that neither Party is acting as the agent of the other in any respect hereunder, and that each Party is an independent contracting entity with respect to the terms and conditions contained in this Agreement. No partnership, joint venture, or other association of any kind is formed by this Agreement. The only relationship between the City and EF is that of a government entity regulating the development of private property and the owner of such property.

3.14 Amendments and Waivers

No modification or amendment of this Agreement or any of the provisions hereof shall be effective for any purpose unless set forth in a writing signed by the duly authorized representatives of both Parties. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought. No waiver of any right or remedy in respect to any occurrence or event shall be deemed a waiver of any right or remedy in respect to any other or subsequent occurrence or event.

3.15 Entire Agreement

This Agreement (including the Exhibits hereto) constitutes the entire understanding and agreement of the Parties and supersedes all previous negotiations, discussions and agreement between the Parties with respect to all or part of the subject matter hereof. No parol evidence shall be permitted to contradict or vary the terms of this Agreement.

3.16 Future Litigation Expenses

In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

3.17 Authority to Execute

The persons executing this Agreement warrant and represent that they have the authority to execute this Agreement and represent that they have the authority to bind the Parties for which they are signing to the performance of the obligations hereunder.

IN WITNESS WHEREOF, each of the Parties has executed this Agreement on the date first above written.

CITY OF COSTA MESA

By: _____
Katrina Foley, Mayor

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
City Attorney

EFEKTA Orange, INC.

By: _____
Its: Director _____

EXHIBIT "A"
CROSSWALK

DRAFT