REQUEST FOR COUNCIL ACTION

CITY COUNCIL MEETING DATE:
NOVEMBER 20, 2018

TITLE:
APPROVE AN AGREEMENT BETWEEN THE CITY AND EASTCOM CORPORATION TO DEFER THE PAYMENT OF THE RESIDENTIAL DEVELOPMENT FEE PURSUANT TO ARTICLE IV, SECTION 35-111 OF THE SANTA ANA MUNICIPAL CODE FOR THE PROPERTY LOCATED AT 888 N. MAIN STREET
{STRATEGIC PLAN NOS. 5, 3}

RECOMMENDED ACTION

Authorize the City Manager, City Attorney, and Clerk of the Council to execute an agreement with Eastcom Corporation (the "Owner") to defer the payment of the Residential Development Fee pursuant to Article IV, Section 35-111 of the Santa Ana Municipal Code (SAMC) subject to non-substantive changes approved by the City Manager and City Attorney for the property located at 888 N. Main Street.

DISCUSSION

Owner Request and Project Background: The City received a request from the Owner of the property located at 888 N. Main Street (the "Property") to defer the collection of the Residential Development Fee (the "RDF") for the residential adaptive reuse project occurring on the Property. The requested deferral is for the collection of the RDF by the City to occur prior to occupancy permit issuance instead of at the time of building permit issuance as stipulated by ordinance. The Owner stated reason for the request is due to a financial hardship as a result of seismic retrofitting cost overrides and the various unanticipated project delays to date. Additionally, the request will also enable the Owner to timely complete the adaptive reuse project and put the new rental residential units into service.

The Owner, since 2016, has been working on an adaptive reuse project to convert the existing outdated 10-story office building on the Property to residential-commercial mixed use, with live/work and commercial space on the ground floor and residential units on the upper floors (the "Project"). The Project will also include a gym, common areas and storage spaces for residents, and a roof deck with residential amenities. A total of 148 residential rental units are being
proposed. The Owner is the process of obtaining building permits to finalize the conversion of the building on the property.

**Salient Issues of the Agreement:** Under the Proposed agreement, the City and the Owner would agree to the following salient issues:

- **Fee Deferral and Amount.** The deferred collection of the RDF in the estimated amount of approximately five hundred two thousand dollars ($502,000).

- **Deferral Period.** The RDF will be deferred until prior to the final inspection or issuance of a certificate of occupancy for Project, or one (1) year from the date of issuance of the building permits for the Project, whichever comes first.

- **Extension.** An extension of the Agreement may only be granted by the City Council.

- **Accrual of Interest.** The amount of fee not paid at the time of building permit issuance shall be subject to accrual of interest at the annual rate of interest that the City normally earns on its investment of pooled funds.

- **Payment Security.** Payment of fee is a personal obligation of the Owner, or any successor secured by the Property, and if left unpaid, shall be collected as a special assessment against the property.

- **Recordation of Agreement and Lien Against Property.** Upon the execution, the Agreement will be recorded in the Official Records of the County of Orange and the Agreement shall contractually bind Owner to pay the RDF and shall constitute a lien against the Property.

**Supporting Facts for Approving the Request:** The intended goal of the collection of City fees at the time of building permit issuance is to ensure that payment of the fees is completed prior to the vesting of development rights by a project proponent. City fees for development projects include customary fees to defray costs for the City to provide development services under the permit, outside agency fees as applicable, and established development impact fees. While deferral of collection of City fees is not a routine practice, the City, in the past, has authorized deferral of certain development impact fees on a broader basis under temporary ordinance during periods of economic downturn. The most recent deferral action was approved by the City Council in 2012 for a twelve-month period. At this time, it is not recommended for the City Council to consider or implement a broad deferral ordinance but rather, reserve the right to consider such requests based on the merits and the extenuating circumstances of a project through an agreement process.

Relating to this request, the Owner is one of the first to initiate a significant adaptive reuse project within the City since the City’s adaptive reuse ordinance became effective in 2014. The Property is located within the Adaptive Reuse Incentive Area and is an Eligible Building, as defined in the Adaptive Reuse Ordinance. The Property is located within the Midtown Specific Plan (SP-3) area and has a General Commercial (GC) land use designation. The intent of the ordinance is to
incentivize and encourage the adaptive reuse of eligible outdated commercial buildings through regulatory reliefs and reducing the high cost of retrofitting of these outdated buildings to meet current design, engineering, environmental, and procedural standards. In addition to the high costs associated with retrofitting, adaptive reuse projects also have a higher degree of unanticipated design and engineering challenges and delays because of the unknown preexisting conditions of the building can only be revealed once the actual work is underway.

The collection of the RDF fee for a new residential development is to fund planned acquisition and development of parks and open space within the City to mitigate the impacts that new developments will have on the demand for parks and open space within the City. While the request will defer the collection of the RDF fee to a later time in the development process, it will not waive or prevent the City from collecting the fee through protections and securities provided to the City under the agreement. Furthermore, fee will be paid prior to the actual impact as no residents will be allow to occupy the building on the Property prior to payment. The deferral will not negatively impact the fiscal benefits to the City as the proposed deferral will accrue customary interest similarly earned under the City’s established investment policies. The deferral will not establish an unintended precedent as this request would promote and demonstrate the ability to economically retrofit and convert an existing outdated 10-story commercial office building on property that is located within the Adaptive Reuse Incentive Area and is an Eligible Building, as defined in the Adaptive Reuse Ordinance.

**STRATEGIC PLAN ALIGNMENT**

Approval of this item supports the City’s efforts to meet Goal No. 5 Community Health, Livability, Engagement and Sustainability, Objective No. 3 (facilitate diverse housing opportunities and support efforts to preserve and improve livability in Santa Ana neighborhoods).

**FISCAL IMPACT**

The total estimated fee to be deferred for the Project is estimated not to exceed $501,888.56 and is as detailed in the table below.

<table>
<thead>
<tr>
<th>Parks Residential Acquisition Fee FY18-19</th>
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<tbody>
<tr>
<td><strong>Type</strong></td>
</tr>
<tr>
<td>Studio</td>
</tr>
<tr>
<td>1Bd</td>
</tr>
<tr>
<td>2Bd</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
</tr>
</tbody>
</table>

The final fee amount to be deferred will be determined at the time of permit issuance. The proposed deferral is for a twelve (12) month period or prior to issuance of the Occupancy Permit, whichever is first.
During the deferral period, interest will accrue for the unpaid amount equal to the rate the City receives on its pooled funds. There is no negative fiscal impact as the deferred amount will be paid to the City with interest. However, it should be noted that the FY18-19 deferred amount may be received in FY19-20. The Parks Residential Acquisition Fee will be deposited into Residential Development District 2 Miscellaneous Receipts account (No. 31213002-57991) and the interest will be deposited into account (No. 31213002-58000).

Minh Thai  
Executive Director  
Planning and Building Agency

APPROVED AS TO FUNDS AND ACCOUNTS:

Kathryn Downs, CPA  
Executive Director  
Finance and Management Services Agency

Exhibit: 1. Agreement
DEVELOPMENT IMPACT FEE DEFERRAL AGREEMENT

between

THE CITY OF SANTA ANA
a charter city and municipal corporation of the State of California

and

[INSERT ENTITY]

[Dated as of ___________________________]
DEVELOPMENT IMPACT FEE DEFERRAL AGREEMENT

1. PARTIES AND EFFECTIVE DATE.

This Development Impact Fee Deferral Agreement ("Agreement") is entered into on this ______ day of __________, 20__, by and between the City of Santa Ana, a charter city and municipal corporation of the State of California ("City"), and [INSERT ENTITY] ("Owner"). City and Owner are sometimes individually referred to herein as "Party" and collectively as "Parties."

2. RECITALS.

2.1 Owner is the owner of that certain real property in the City of Santa Ana, California, which is more particularly described in Exhibit "A" attached hereto and incorporated herein by this reference ("Property"). Owner pursued under the City's Adaptive Reuse Ordinance to convert an outdated XX square foot, XX story office building to XX market-rate residential rental units on the Property. Owner has received City approval and is the process of obtaining the building permits;

2.2 Prior to issuance of any building permits, the City currently requires the payment of various development impact fees for all market-rate residential projects to help address the impacts of new development;

2.3 On November XX, 2018, Owner submitted a written request outlining financial challenges and hardships the project is facing due to the seismic retrofitting requirements for the Property and is requesting for the City Council to allow for the deferral of certain development impact fees for the Property; and,

2.4 City and Owner desire to execute this Agreement to defer certain development impact fees applicable to the Property and either place a lien on the Property or provide an irrevocable letter of credit from the Owner to secure payment of these fees, pursuant to the terms and conditions set forth herein.

3. TERMS.

3.1 Deferral of Development Impact Fees.

3.1.1 Deferral of Development Impact Fee. City and Owner agree that the development impact fees ("Subject Fee(s)") and amount as shown in Exhibit "B", for Property will be deferred until prior to the final inspection or issuance of a certificate of occupancy for any new residential units on the Property, or one (1) year from the date of issuance of the building permits for the Property, whichever comes first ("Deferral Period"). City and Owner acknowledge and agree that the City Council may, in its sole and absolute discretion and during a regular, regular adjourned, or special meeting of the City Council, extend the deadline for payment of the Subject Fees to any period greater than twelve (12) months without obtaining the approval of Owner or an amendment or modification of this Agreement. Any extension granted by the City Council pursuant to this Section 3.1.1 shall automatically be deemed to be part of the Deferral Period for purposes of this Agreement.
3.1.2  **Payment of Subject Fee.** Owner, or its successor in interest to the Property or any portion thereof, shall be liable for the payment of the Subject Fees pursuant to this Agreement. The Subject Fees for a residential building constructed on the Property shall be due and payable at the termination of the Deferral Period. No certificate of occupancy shall be issued for the building, any portion, or any residential units thereof on the Property unless and until all Subject Fees have been paid in full. Notwithstanding any other provision to the contrary, any deferred development impact fees not paid at the time of building permit issuance shall be subject to interest on unpaid fees at the annual rate of interest that the City earns on its investment of pooled funds, which shall accrue from the date of issuance of the initial building permit until the deferred development impact fees and all accrued interest is paid.

3.1.3  **Subject Fee Amount.** Except as may otherwise be provided for by a statutory development agreement for the Property, as approved by the City, the amount of the Subject Fee for each residential unit to be developed on the Property shall be determined according to the rate of the Subject Fee adopted by the City and in effect on the date when the building permit for the residential building is issued by the City. Upon issuance of each building permit, the City shall complete and attach the form set forth in Exhibit "B" to this Agreement to reflect the amount of the Subject Fee applicable at the time of issuance of that building permit and attach a copy of the building permit, which shall collectively thereafter be incorporated as part of this Agreement.

3.1.4  **Obligation for Payment of Subject Fee.** Owner hereby acknowledges and agrees that Owner's obligation to pay the Subject Fees shall continue and remain an obligation of Owner, as well as (jointly and severally) any successors in interest of Owner, including, without limitation, any successor in interest to the Property or any portion of the Property. Without limiting the nature of the foregoing, any Subject Fees that remain unpaid following the time that they are required to be paid may be collected by the City as a personal obligation of the Owner, or any successor of Owner, as a special assessment against the property (collected at the same time and in the same manner as ad valorem property taxes), or by any combination of the foregoing.

3.2  **Covenant of Owner.** Owner covenants that he, she or it is eligible to enter into this Agreement and has fulfilled the requirements for approval of deferral of the Subject Fees. Should Owner and/or the Property be deemed at any time prior or subsequent to execution of this Agreement to be ineligible for a deferral of Subject Fee regardless of whether Owner intentionally or unintentionally misrepresented to the City that Owner was eligible for a deferral of Subject Fee, City may terminate this Agreement and require all Subject Fees to be immediately paid in full.

3.3  **Recordation of Agreement.** Upon the execution of this Agreement, the City shall cause this Agreement to be recorded in the Official Records of the County of Orange, California. All costs assessed by the County of Orange for recordation of this Agreement shall be paid by the Owner.

3.4  **Lien against Property.** From and after its execution, this Agreement shall contractually bind Owner to pay all Subject Fees as provided in this Agreement, and shall constitute a lien against the Property in an amount equal to the total Subject Fees, pursuant to
Government Code section 66007(c)(2). Upon payment to City of the total amount of the Subject Fees for the Property, City shall, at the request of the Owner, execute and record in the Official Records of the County of Orange, California, a release of the lien from the Property in substantially the form of Exhibit “C” which is attached hereto and incorporated herein by this reference. At the request of the Owner, the City shall deliver a copy of the executed and recorded release of the lien to Owner.

3.5 **Covenants Run With Land.** Notwithstanding Section 3.6, each and all of the promises, covenants and conditions of this Agreement and all liens against the Property subject to this Agreement shall, as provided in Government Code section 66007, run with the Property and shall be binding upon all parties having or acquiring any right, title or interest in or to the Property or any portion thereof.

3.6 **Sale of Property.** Pursuant to Government Code section 66007(c)(3), Owner shall notify City in writing within two (2) business days of the opening of any escrow for the sale or transfer of all or any portion of the Property. Owner additionally covenants and agrees to provide a written copy of the escrow instructions to City stating that the Subject Fees shall be paid from the sale proceeds of the Property held in escrow prior to disbursement of the sale proceeds to the new owner of the Property.

3.7 **Invalidity of Lien.** The invalidity or unenforceability of any lien provided for under this Agreement shall not affect the contractual obligation of Owner to pay any and all Subject Fees for the Property, nor shall the sale, lease or any encumbrance of the Property release the Owner of this contractual obligation.

3.8 **Rights Not Granted Under Agreement.** This Agreement is not, and shall not be construed to be, an approval or a granting of any right or entitlement (vested or otherwise) by City concerning any development on the Property, or any other project, development or other construction by Owner within the City. This Agreement does not, and shall not be construed to, exempt Owner from paying any fees for any entitlements, permits, licenses or other approvals that may be required by the City or other public entity with jurisdiction over the Property at the time required by the City or other public entity with jurisdiction over the Property, or any other project development or other construction by Owner. This Agreement does not, and shall not be construed to, exempt Owner from any requirement to obtain permits or other discretionary or non-discretionary approvals as may be necessary for the development, maintenance or operation of the development on the Property or any other project, development or other construction by Owner within the City. This Agreement does not, and shall not be construed to, exempt Owner or the Property from the application or exercise of the City’s or any of its related agencies’ power of eminent domain or its police powers, including, but not limited to, the regulation of land uses, and the taking of any actions necessary to protect the health, safety and welfare.

3.9 **Cumulative Remedies.** The rights or remedies of the City, as provided in this Agreement, or pursuant to any applicable laws, rules or regulations, may be pursued singly, successively, together or otherwise against the Property, Owner or its transferees, at the sole discretion of the City. The City’s failure to exercise any such right or remedy shall in no event be construed as a waiver or release of such rights or remedies, or of the right to exercise them at any later time.
3.10 **Indemnification.** Owner agrees to indemnify, defend and hold harmless the City, its elected officials, officers, agents and employees from and against all claims, demands, costs, damages, liabilities and obligations of any kind or nature arising out of the deferral provided by the Development Impact Fee Deferral Ordinance to Owner, this Agreement, or both, including without limitation, all costs of collection, including actual attorneys' and expert witness fees.

3.11 **Successors and Assigns.** Owner may not assign this Agreement, in whole or in part, without the prior written consent of the City, which may be given, withheld or conditioned in the City's sole and absolute discretion. Any attempt to assign this Agreement without the City's prior written consent shall be null and void. This Agreement shall be binding on any and all permitted successors and assigns of Owner.

3.12 **Governing Laws.** This Agreement shall be governed by the laws of the State of California, without regard to the conflict of laws principles. The Superior Courts of the State of California in the County of Orange, California, shall have exclusive jurisdiction of any litigation between the City and Owner arising out of this Agreement. Owner hereby expressly waives the provisions of any federal or state law providing for a change of venue to any other state court or to federal district court, due to any reason whatsoever, including, without implied limitation, the fact that the City is a party to this Agreement, due to any diversity of citizenship between the City and Owner, or due to the fact that a federal question may be involved. Without limiting the generality of the foregoing, Owner expressly waives, to the maximum legal extent, the benefit of California Code of Civil Procedure Section 394 and all other state and federal statutes and judicial decisions of similar effect.

3.13 **Notices.** All notices required to be delivered under this Agreement or applicable law shall be delivered by personal delivery, express mail or by United States mail, certified, postage prepaid. Notices personally delivered or delivered by express mail shall be deemed received upon receipt. Notices delivered by certified mail shall be deemed received the earlier of three (3) days following deposit of such notice with the United States Postal Service or actual receipt. Notices shall be sent as follows:

To City: City of Santa Ana  
c/o Clerk of the Council  
20 Civic Center Plaza  
P.O. Box 1988  
Santa Ana, CA 92702-1988

With copy to: Executive Director of PBA  
City of Santa Ana  
20 Civic Center Plaza  
P.O. Box 1988  
Santa Ana, California 92702

and City Attorney  
City of Santa Ana
3.14 **Attorneys’ Fees and Costs.** Should the City or Owner bring any action or proceeding against the other, and if such action or proceeding is related to the interpretation or enforcement of this Agreement or in any way relates to or arises due to the existence of this Agreement, then the prevailing party in that action or proceeding shall be entitled to recover from the non-prevailing party, in addition to all other relief to which the prevailing party may be entitled, its actual litigation costs and attorneys' and expert witness fees. The "prevailing party" shall be as determined by the court in accordance with the provisions of California Code of Civil Procedure Section 1032. Recoverable litigation costs and attorneys' fees include those incurred by the prevailing party in the enforcement of any judgment or other judicial order, and during the defense of any appeal taken from such underlying judgment or other judicial order.

3.15 **Entire Agreement.** This Agreement constitutes the entire agreement of City and Owner and supersedes all previous agreements, oral or written, on the subject matter of this Agreement.

3.16 **Modification.** This Agreement may be amended or modified only by an agreement in writing signed by each of the parties hereto.

3.17 **Headings.** Section headings contained in this Agreement are for convenience only, and shall not impact the construction or interpretation of any provision.

3.18 **Severability.** If any provision or clause of this Agreement or any application of it to any person, firm, organization, partnership or corporation is held invalid, such invalidity shall not affect any other provision of this Agreement, and the Agreement shall be construed as if such provisions or clauses did not exist.

3.19 **Time Is of the Essence.** Time is of the essence in this Agreement.

3.20 **No Third Party Beneficiaries.** This Agreement and the performance of the City’s and Owner’s obligations hereunder are for the sole and exclusive benefit of the City and Owner. No person or entity who or which is not a signatory to this Agreement shall be deemed to be benefited or intended to be benefited by any provision hereof, and no such person or entity shall acquire any rights or causes of action against either the City or Owner hereunder as a result of the City’s or Owner’s performance or nonperformance of their respective obligations under this Agreement.
IN WITNESS WHEREOF, the parties hereto have executed this Agreement the date and year first above written.

ATTEST:

MARCIAL D. HUIZAR  
Clerk of the Council

CITY OF SANTA ANA

RAUL GODINEZ II  
City Manager

APPROVED AS TO FORM:  
SONIA R. CARVALHO  
City Attorney

By:  
SONIA R. CARVALHO  
City Attorney

RECOMMENDED FOR APPROVAL:

MINH THAI  
Executive Director – PBA
EXHIBIT "A" TO
DEVELOPMENT IMPACT FEE DEFERRAL AGREEMENT

Legal Description of Property
EXHIBIT “B” TO
DEVELOPMENT IMPACT FEE DEFERRAL AGREEMENT

Subject Fee for Building Permit No. __________

The following development impact fee imposed upon the Property or portion thereof by the City of Santa Ana upon issuance of City of Santa Ana Building Permit No. ________ shall be deferred pursuant to the terms and conditions of this Agreement:

(1) Residential Development Fee in the amount of $______.
EXHIBIT “C” TO
DEVELOPMENT IMPACT FEE DEFERRAL AGREEMENT

Form Release of Lien

[Attached behind this cover page]
RELEASE OF LIEN FOR PAYMENT OF DEVELOPMENT IMPACT FEES

The City of Santa Ana, a charter city and municipal corporation of the State of California, does hereby release that certain real property, as further described in Exhibit 1 attached to this Release, from the lien for payment of certain development impact fee as created by the Development Impact Fee Deferral Agreement entered into on ____________, by and between the City of Santa Ana and [Redacted], which was recorded on ____________, as Document Serial No. ______________________, Official Records of the County of Orange, California ("Agreement").

This release pertains only to the property described above and does not extend to any other property(ies). This release of lien is executed and recorded pursuant to the provisions of California Government Code section 66007.

Dated: ________________.

CITY OF SANTA ANA

By: ____________________________
   City Manager

Attest:

__________________________
   City Clerk
STATE OF CALIFORNIA
COUNTY OF ______________________

On ___________ before me, ______________________ (here insert name and title of the officer), personally appeared ________________, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under penalty of perjury under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature ____________________________________