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BOARD OF SUPERVISORS
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Board of Supervisors
County of Stanislaus
1010 10th Street, Suite 6500
Modesto, CA 95354

City Council
City of Modesto
1010 10th Street, Suite 6200
Modesto, CA 95354

SUBJECT: Written Protest of Imposition of Facility Fees/Exactions on Soft-Sided Storage Structure Not Accounted For in Agency Fee Programs and Ignoring Historical Use of Property

Dear Honorable Supervisors and Honorable City Councilmembers:

This office represents the Modesto & Empire Traction Co., a California corporation, and/or its affiliates (together, "M&ET") who is/are the owner(s) and operator(s) of numerous business park and industrial properties in what is commonly known as the Beard Industrial Tract located in the County of Stanislaus and within the sphere of influence of the City of Modesto. Under practice or agreement, no building permit will be issued by the County of Stanislaus in this area until the capital facility fees, public facility fees, developer fees, impact fees, building permit fees, and/or similar exactions (hereafter, "Facility Fees"), are paid by an entity such as M&ET to both the County of Stanislaus and the City of Modesto.

On or about December 23, 2008, M&ET was issued a building permit for the construction of a commodity receiving (via rail) soft-sided storage structure at 300 Codoni Avenue of approximately 182,000 square feet. The new soft-sided structure is being constructed to comply with air quality regulations. Sorensen Construction, Inc. handled the matter for M&ET with government officials. The Codoni Avenue site historically had been used by M&ET as an intermodal rail and trucking facility. Intermodal trains arrived at the site and trucks picked up containers of goods for transportation and delivery. Historic use records indicated that the site regularly had truck traffic of over 500 trip ends per day. We are told approximately 40 employees worked at the site. At the time Stanislaus County (1989) and the City of Modesto (1987) first passed ordinances for imposition of Facility Fees, the historic intermodal use was active at the site. While the original intermodal facility is no longer in operation, an equivalent use of the site has been made in recent years. Various commodities are delivered to the facility by rail where they are transferred to trucks for transportation and delivery. The current and projected truck traffic for the site is much less than the historic use of 500 truck trip ends per day. In addition, the employee count of the current operation is less than the historic use of the site.

As a condition of building permit issuance, the County of Stanislaus imposed a Public Facilities Fee charge of $51,245.23 and the City of Modesto imposed a Capital Facilities Fee charge of $524,160.00 on the structure. M&ET was under increasing pressure from the San Joaquin Valley Air Pollution Control District to control air-borne particulate and to remedy the matter immediately by constructing a soft-sided storage structure. As a result, M&ET and their contractor, Sorensen Construction, paid the fees referenced above in full prior to issuance of the building permit.

This letter constitutes written protest of the imposition of those fees under California Government Code Section 66020 et seq. and other related provisions of the California Government Code, and under California and federal common law, constitutional law and equitable principles. As detailed above, the required payments have been tendered and are under protest.

This letter is submitted to assert and preserve all rights for relief from the disputed fees, as provided by the Constitution and laws of the United States, and of the State of California, including the right to restitution or refund of fees or charges paid under protest or duress as recognized under the common law, constitutional law, and in equity, and by the Mitigation Fee Act [Government Code § § 66000 et seq.].

First, neither the county nor the city acknowledged the historic use of the facility and provided the necessary historic credit for facility fees. Use of the facility for rail-based activity has existed since approximately 1980. Over the years, trains have delivered goods or commodities to the facility that then were transported and delivered to other locations by truck. The historic use of this site must be accounted for by the agencies

and a credit provided to M&ET for Facility Fee impositions and charges based on that historic use. This has not been done. For example, full projected use of the facility and site would lead to significantly fewer truck trips (340 trips at full use in five years, and many less trips today) than the historical use of the site (500 trips.) Such credit must be provided to historical uses such as that on the site.

Second, neither the city nor the county has a fee category for the type of structure upon which the Facility Fees were charged that clearly are not ordinary warehouse/ distribution centers. Without an appropriate fee category, no fee may be imposed or charged. The soft-sided storage structure is not an ordinary warehouse/distribution structure. Rather, it is a semi-permanent tent structure used to minimize air quality impacts of the rail delivery of commodities. It has openings on various sides, and thus it is not a fully enclosed structure. It has none of the ordinary accoutrements of warehouse/distribution space like office space, bathrooms, or other facilities for employees. Neither the county nor city have a fee category for such a structure. Consequently, no fee may be charged.

Third, even if the warehouse/distribution fee category were appropriate to the structure, the impacts and resulting fees are overstated for rail-based storage. For example, warehouse/distribution traffic fee amounts ordinarily are based on truck traffic in and out of the facility. For a rail-based facility, the traffic impacts are significantly overstated, since numerous trips associated with an exclusively truck-based warehouse/distribution facility are made instead by rail. If any fees may be imposed on the facility, a different traffic impact must be developed proportional to the actual impact. The facility cannot be overcharged for non-existent road impacts. Such an analysis would apply to impacts other than traffic that are also overstated in, or misapplied to, the rail-based scenario.

Fourth, imposition of city fees outside of its limits but within the county where the land is in the sphere of influence of the county can only be accomplished through a joint exercise of powers agreement and authority established under the Joint Exercise of Powers Act. We do not believe that the Joint Exercise of Powers Act has been complied with and thus no City Facility Fees may be imposed on land outside of its limits.

In addition to those issues detailed above, the improper imposition of these Facility Fees on the structure violate numerous provisions of statutory, common, and constitutional law. Among the violations evident, without limitation, are the following: no fee may be charged where no appropriate fee category has been established; where there is no appropriate fee category, a purportedly legislatively enacted fee becomes an ad hoc adjudicate fee subject to strict scrutiny and the burden of proof shifted to the government agencies; no fee may be charged without recognition of and credit for the historical use of the project; there is no reasonable relationship between the proposed use of the fee and the type of development upon which the fee is purportedly being

charged; a precedent of not charging Facility Fees has been established by the agencies in 2005 when a building permit was issued for a similar structure of 84,000 square feet without charging fees; there is no reasonable relationship between the claimed need for the public facilities and the type of development upon which the fee is purportedly being charged; there is no reasonable relationship between the Facility Fees and the impacts of the structure; there is no nexus between the Facility Fees and the structure; there is no rough proportionality between the Exactions and the structure; the imposition of the Facility Fees violates the Mitigation Fee Act and related provisions of California law; the improper application of the fee and fee category violates due process and equal protection standards of the federal and state constitutions; the improper application of the fee and fee category constitutes "unconstitutional conditions" being imposed on the building permit; constitutional standards of "nexus" and "rough proportionality" have been violated; and the improper application of the fee and fee category results in the amounts paid constituting a special tax under California law which is void.

As to the special tax claims, this letter is also a written request under Government Code Section 66024(b)(2) for copies of all documents which establish that the increased fees do not exceed the cost of the service, facility, or regulatory activity for which they are imposed.

Thank you for your evaluation of this matter. Please feel free to contact me if you have any questions.

Sincerely,

PETRULAKIS JENSEN & FRIEDRICH, LLP

George A. Petrulakis

cc: Joseph D. Mackil
John Anderson
County Counsel
City Attorney