STATE OF CALIFORNIA

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November 10, 1999

The Honorable Gus S. Kramer
Contra Costa County Assessor
Attn:
834 Court Street
Martinez, CA 94553

RE: **Application of Revenue and Taxation Code Section 51.5 and 80; *Sunrise Retirement Villa v. Dear***

Dear Mr. :

This is in response to your letter of June 30, 1999 and subsequent transmittal of taxpayer' attorney's letter on August 30,1999, requesting our opinion on the proper application of Sections 51.5 (a) and 80 (a)(4) in light of the holding in *Sunrise Retirement Villa v. Dear*, (1997) 58 Cal.App.4th 948. This inquiry is based upon the following factual situation set forth in the letters and attachments:

1. In 1989, Mr. And Mrs. St (hereinafter "S") purchased certain unimproved land in . On September 14, 1990, Mr. and Mrs. S sold the land to Development/ & Associates, Inc. ("K, Inc.") Mr. and Mrs. S carried back a purchase money promissory note securing a deed of trust. All parties believed the property was buildable for purposes of a single family residence. Your office reappraised the property on the change in ownership.

2. On December 8, 1995, the marriage of Mr. and Mrs. S was dissolved. Pursuant to the dissolution decree, the court ordered that the beneficial interests in deed of trust securing the land be divided 41.2% for Mr. S and 58.8% for Mrs. S.

3. Throughout this time, K, Inc. was continuously delinquent in paying property taxes and also defaulted on the note (secured by the 1990 deed of trust). In 1998, Mr. and Mrs. S initiated a non-judicial foreclosure, resulting in a 1998 trustee's deed transferring 58.8% of the land to Ms. S and 41.2% of the land to Mr. S as separate undivided interests. On March 30, 1998, Mr. S transferred his 41.2% to Mrs. S without consideration.

4. Several months after Ms. S's 100% acquisition, it was determined for the first time that the property does not meet current standards for percolation and availability of water. The County Health Services Department (hereinafter "Health Department") issued letters on September 3, 1998 and October 7, 1998, stating that building plans for the parcel were disapproved because of its steep slope (in excess of 20%), inadequate soil depth, septic system problems, and unavailability of water. The taxpayer's attorney states that the Health Department also issued a letter on July 28, 1998, (copy not provided) which indicates that the parcel is "unbuildable."

5. Due to these problems and presumably to the cost of curing them, your office recognized the resultant loss in value, and as of September 30, 1998, reduced the assessed valuation (from $276,866 to $45,000). Mrs. S has not paid the delinquent taxes and penalties owing prior to foreclosure, the total of which currently exceed $38,000.

6. The attorney for Ms. S requested your office to change the base year value of the property back to the time of Mr. and Mrs. S's initial purchase in 1989, arguing that the property was unbuildable at that time, and citing as authority Section 51.5 (a) for correction of nonjudgmental or clerical errors. The attorney cites *Sunrise Retirement Villa*, supra, in support of the right to file an appeal under Section 80(a)(4) in the event that your office denies the request.

In your view, Section 51.5 (a) is restricted to the definition of "nonjudgmental" or "clerical errors" expressly described in that statute and differentiates between errors involving value judgment (subdivision (b)). Since your office exercised value judgment in establishing base year values on the parcel for 1989 and 1990, your authority to make a correction on either of these base year values is limited by Section 51.5(b) to four years. The taxpayer argues that the "unbuildable" condition of the parcel was a "nonjudgmental error," with the result that there is a right to file an appeal under Section 80 (a)(4) if your office declines to correct the 1989 and/or 1990 base year values. As authority, the taxpayer cites the *Sunrise Retirement Villa* case.

The summary answers are as follows:

1. *Sunrise Retirement Villa* did not address the distinctions between a "nonjudgmental" or "clerical" error in Section 51.5 subdivision (a) and an "error involving the exercise of value judgment" in subdivision (b). It only dealt with the former, subdivision, (a).

2. Where the assessor finds that a "nonjudgmental" error occurred, *Sunrise Retirement Villa* did not change the principle that the base year value shall be corrected in the assessment year in which the error was discovered. If it was determined that the error was nonjudgmental, the taxpayer is entitled to a refund or cancellation as provided by law. (Sec. 51.5(d)).

3. The evidence here indicates that value judgment was exercised in 1989 and 1990; therefore, corrections of these base year values were limited to four years under Section 51.5(b), and the taxpayers' times within which to file

appeals were limited to four years under Section 80(a)(3). Neither *Sunrise Retirement Villa* nor Section 80(a)(4) are applicable in this situation.

1. *Sunrise Retirement Villa* did not Change the Definition of a "Nonjudgmental" or "Clerical Error" within the Meaning of Section 51.5.

By express language in subdivision (a), the assessor is required to correct "any error or omission in the determination of a base year value … including the failure to establish that base year value, which does not involve the exercise of an assessor's judgment as to value," *in any assessment year* in which the error or omission is discovered. Subdivision (f) defines "clerical errors" as "only those defects of a mechanical, mathematical, or clerical nature, not involving judgment as to value, where it can be shown from papers in the assessor's office or other evidence that the defect resulted in a base year value that was not intended by the assessor at the time it was determined." Numerous cases have held that this language imposes a duty on assessors to correct base year values whenever "nonjudgmental" determinations of such values, including "clerical errors," are discovered. See *Montgomery Ward & Co. v. County of Santa Clara* (1996) 47 Cal.App.4th 1122, *Sunrise Retirement Villa, Metropolitan Culinary Services, Inc. v. County of Los Angeles* (1998) 61 Cal.App.4th 935 and *Seaworld, Inc. v. County of San Diego* (1994) 27 Cal.App.4th 1390.

a. Distinctions in Section 51.5 between Nonjudgmental Errors and Errors Involving Value Judgment.

Sponsored by the Board of Equalization and drafted primarily by the legal staff, Section 51.5 draws clear distinctions between errors that are nonjudgmental, including clerical errors, that can be corrected at any time, and those involving the exercise of value judgment, that cannot be corrected beyond four years.[1] For example, subdivision (a) describes "errors and omissions" as nonjudgmental errors." Subdivision (c) states that "errors or omissions resulting from the taxpayer's fraud, concealment, misrepresentation, or failure to comply with any provision of law for furnishing information" are not errors or omissions involving the exercise of an assessor's judgment as to value. Subdivision (e) describes the "standard of proof" to be applied by the assessor in establishing the existence of a nonjudgmental or clerical error.[2] And subdivision (f), as noted, specifically defines "clerical errors." Thus, the statute is clearly written in a manner designed to preclude application of the "nonjudgmental error" provisions as a "catch-all," which encompasses every category of problem the assessor wishes to correct.

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[1] Senate Bill 587, Legislative History, SBOE Legislative Analysis, 2/25/87, p.4, summarizes the language regarding nonjudgmental and clerical errors as follows: "Section 2 of the bill adds section 51.5 to the Revenue and Taxation Code. This provision requires the correction of any error or omission in the determination of a base-year value, which does not involve the exercise of an assessor's judgment as to value, in any assessment year in which the error is discovered. Where the error involves the exercise of the assessor's judgment as to value, the correction is limited to four years after July 1 of the assessment year for which the base year value was first established. This four-year limit on correction of errors involving an assessor's value judgment is consistent with the *Dreyer's* decision. Further, it prevents any objection that this provision will permit assessors to constantly second-guess their original judgments as to base-year value. The four-year limit will not apply if the error or omission resulted from the taxpayer's fraud, concealment, misrepresentation, or failure to comply with the various provisions of law requiring the furnishing of information, or from clerical errors."

[2] The clerical error must be proved by a preponderance of evidence where the base year value correction is made *within four years* after July 1 of the assessment year for which the base year value was first established. The clerical error must be proved by clear and convincing evidence where the base year value correction is made *more than four years* after July 1 of the assessment year for which the base year value was first established.

Various categories of problems have been considered as "nonjudgmental errors" by the courts in applying Section 51.5(a). In *Sunrise Retirement Villa*, the Third Appellate District held that an erroneous change in ownership determination constitutes *an error not based on value judgment*; therefore, Section 51.5 (a) applied.[3] The court treated the issue as a question of law and did not provide specific guidance for evaluating the related question of fact, that is, when has value judgment been exercised.

The factual question was considered in the initial drafts and analyses of SB 587, which contained Section 51.5. The following explanation by the Board's legal staff indicates the intended meaning of nonjudgmental errors that are clerical in nature:

"During the course of its legislative journey, SB 587 received opposition from members of the business community because it was felt that allowing assessors to change base-year value to correct a 'clerical error' would lead to widespread abuse. As a result, the definition of 'clerical error' was added. The opposition was removed because the definition is very narrow in that it applies only where the defect resulted in a base-year value which was not intended by the assessor at the time it was determined. It applies to situations where it can be shown from the records in the assessor's office, or other evidence, that there was an error in addition, multiplication, or there was a simple transposition of numbers which resulted in the entry of a figure which was not intended at the time it was mandated. As can be seen from the very restrictive nature of this definition, the concept of clerical error, as recognized in Section 51.5 of the Revenue and Taxation Code is not intended to be a universal elixir which will cure every base-year value problem." (SB 587 Legislative History, Ochsner Memorandum 2/2/88, attached.)

Other nonjudgmental errors that are not necessarily clerical are discussed in the SB 587 Legislative History, in a 1989 letter to the Mendocino County Assessor (attached), which concludes that subdivision (a) applies to situations where the assessor *did not intend* to exercise value judgment due to a "mistake of fact." Where the assessor failed to establish a base year value on part of a property because he mistakenly thought it was state assessed,[4] it was a nonjudgmental error, (not a clerical error), since a base year value was not established. The letter states on page 2, "While your situation does not, in our opinion, qualify as a clerical error, it is clear that subdivision (a) of Section 51.5 authorizes you to correct the base year value in this situation." [5]

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[3] Regarding the facts court stated, "There is no dispute that an erroneous change in ownership determination constitutes an error not based on value judgment within the meaning of section 51.5(a)."

[4] With respect to the portion of the property that escaped assessment, the base year value was omitted because the assessor's working papers led him to assume for many years that the property was owned by a state-assessed public utility, until a sale of the property disclosed that it was simply leased.

[5] The source of the difference between clerical errors and errors of judgment arose from a case decided long before the enactment of Section 51.5 in *El Tejon Cattle Company v. County of San Diego* (1967) 252 Cal.App.2d 449. The court concluded there that the assessor's error in counting 1,175 more commercial cows than the taxpayer actually had on the lien date was an error in judgment, because the number of cows was a general description of a single assessment which the assessor "intended" on the lien date. The issue was one of overvaluation, not one of clerical error or illegal assessment. Therefore, the court held that the taxpayer must first make application for a reduction of the assessment to the appeals board before seeking relief in superior court.

In *Montgomery Ward & Co. v. County of Santa Clara*, the Sixth Appellate District considered the nature of items within the meaning of nonjudgmental. The court held that where an assessor knew that the property sold and took no action to adjust the base year value, the assessor did not intend to exercise any judgment as to value per Section 51.5(a); therefore, an error of omission occurred.[6] The decision reflects the basic position set forth in the legislative analysis for Senate Bill 587 by treating changes in ownership or new construction omitted or ignored by the assessor as "nonjudgmental," since the assessor lacked intent to value.[7]

Regarding cases where *value judgment must still be exercised*, *Plaza Hollister Limited Partnership v. County of San Benito* (1999), 72 Cal.App.4th 1, held where the issue was whether the assessor [and county board of equalization] had erroneously applied a valuation method in valuing the taxpayer's property, the error was not nonjudgmental. Since, when entering into a stipulated judgment for purposes of settlement, the taxpayer and the board of supervisors failed to establish that the base year value of the property was "calculable as a matter of law based on a fixed mathematical formula," said the court, it was clear that further steps or adjustments were required to arrive at market value. Other cases cited in support of its holding are: the improper valuation method in *Service America Corp. v. County of San Diego* (1993) 15 Cal.App.4th 1232; the failure to discount nominal sales price in *Prudential Ins. Co. of America v. City and County of San Francisco* (1987) 191 Cal.App.3d 1142; and the value not supported by substantial evidence in *Georgia Pacific Corp. v. County of Butte* (1974) 37 Cal.App.3d 978.[8]

b. Facts Here Do Not Establish a Nonjudgmental or Clerical Error in the Assessor's Determination of 1989 and/or 1990 Base Year Values.

In this instance, we have received no documents which would indicate that the 1989 and/or 1990 base year values enrolled were not "intended" by the Assessor, or that the Assessor made a mathematical or clerical error in establishing such values. Rather, the evidence indicates that value judgment was exercised and base year values enrolled when the property was sold to Mr. & Ms. S in 1989, and when they sold it to K, Inc. in 1990. There is no indication that your office had actual or constructive knowledge of the Health Department's determinations, apparently first disclosed in the 1998 letters, and omitted consideration of such facts. It is well established that the assessor cannot be held to knowledge or intent that he attained after the fact as a basis for proving an error or omission in determining a property's base year value. This principle was stated in *Firestone Tire & Rubber Co. v. County of Monterey* (1990) 223 Cal.App.3d 382, which is analogous to the instant case.

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[6] Pursuant to Section 51.5(a), any "*omission* in the determination of a base year value" is a "non-judgmental" error.

[7] An example in SBOE Legislative Analysis, June 22,1987, the 5/13/88 Ochsner memo states, "Insofar as base year value errors not involving the assessor's judgment as to value is concerned, … an assessor discovering unassessed new construction or a change in ownership may be required to go back 15 or 20 years to correct the base year value of the property. Obviously, correction of that base year value cannot result in a change in the assessment entry on the roll for the year in which the error occurred. Rather, after the adjusted base year values for the intervening years have been corrected, and comparisons made with the amounts assessed for those years still open under the statue of limitations, appropriate escape assessments are required to complete the process. "

[8] Two other cases labeled the assessors' actions as *errors involving the assessor's judgment* under Section 51.5(b). In *Seaworld, Inc.*, supra, the court held that where the appeals board found that in using the income approach, the assessor had incorrectly reduced the amount of the improvements by the allocated goodwill of 25 percent rather than 30 percent, (resulting in a reduction in base year value for a 1989 change in ownership), it was a Section 51.5(b) error involving the exercise in the assessor's judgment. Neither party argued that it was merely "clerical." In *Metropolitan Culinary Services, Inc.*, supra, the court determined that where the assessor had "incorrectly computed" the base year value of the taxpayer's food and concession business upon a change in ownership at the Burbank Airport, Section 51.5(b) applied.

Firestone argued that because contamination (hazardous materials) existed on its property before 1980, the assessor should have valued Firestone's property in 1980 as a "polluted" property. Firestone represented that the Department of Health Services would not allow it to sell this property, and that neither it nor anyone else would be allowed to put this property to any other use "… until there has been an environmental clean bill of health issued with respect to the site." (*Firestone,* p.393.) Firestone's evidence was that "…a knowledgeable buyer would have inspected [the property] for contamination, and that the sale price of the property would have been reduced *if* contamination had been found." (*Firestone,* p.395.) "There was no evidence that the contamination had come to light on the 1980 lien date, however." (p. 395.) Citing *De Luz Homes, Inc. v. County of San Diego* (1955) 45 Cal.2d 546, the court held that fair market value means "the market value of property for use in its present condition." (p.391-392.) The salient issue, stated the court, was whether the evidence established that the assessor knew or should have known that the property was contaminated on the valuation date. (p.394.) The court held that the weight of evidence supported the conclusion that as of the 1980 lien date, "a potential purchaser would not have been aware of the contamination, the full extent of which, after its initial discovery in 1981, may not have been revealed until a few months before the April 1984 board hearing, and indeed, until much later still." (*Firestone,* p.395.)

The taxpayer here asserts that the parcel should have been valued as an "unbuildable," i.e., "unmarketable" property. Yet, Ms. S admits that up until 1998, when the building plans for a septic system and water were submitted, everyone thought the property was buildable. She and her former husband bought it under that assumption; they sold it to K, Inc. in 1990 based on that assumption; they foreclosed on it in early 1998 based on that assumption; and apparently, Ms. S agreed to receive the gift of her ex-husband's 41.2% interest (March 30, 1998) under that assumption. Presumably, your office reassessed the property for each of these transfers, based on the same assumption. Neither Mr. S. nor Ms. S, nor K, Inc. filed an application for reduced assessment (base year value or Prop 8) during these years for the purpose of protesting the value or asserting that an error in the determination of base year value had occurred. Nor is there documentation indicating that the Health Department notified your office that there were restrictions on the property making it "unbuildable." Neither is there any evidence of fraud or misrepresentation.[9] Thus, the weight of evidence supports the conclusion that as of the 1989 and 1990 lien dates, both potential and actual purchasers would not have been aware of any possible "unbuildable" condition of the property, or of any land and/or building restrictions, the full which were not revealed until a few months after building plans were submitted in 1998.

Moreover, the evidence does not clearly establish that the parcel is in fact, "unbuildable." Both the September 3, 1998 and October 7, 1998 letters from the Health Department to Ms. S indicate that no specific site plans (design or location) for a septic system were ever submitted to the county during the prior years (1985-1990), which would have resulted in the county's approval or disapproval to construct a sewage disposal system on the parcel. The letters suggest that although the plans submitted in 1998 were rejected, approval may yet be possible pending further soils analysis and design changes. For example, the October 7 letter states that it appears "…steep slopes and inadequate soil depths precludes the approval of a standard septic system on your property. Therefore, an alternative engineered septic system can be pursued, and this division is willing to work with you and your engineer on such a system." (Emphasis added.) An

[9] In applying subdivisions (a) and (c), see Saunders letter, 1/10/97, attached, advising that if the assessor finds that property was overassessed due to "taxpayer fraud," this is not an error involving the exercise in the assessor's judgment, and the erroneous base year value should be corrected provided that the appropriate refund and/or cancellation procedures are followed.

alternative engineered septic system means that "further soil evaluation is necessary." It seems that more information is required before a final determination can be made to substantiate that the property was or is "unbuildable."[10]

2. If it was Determined that a Nonjudgmental Error Occurred in 1989 and/or 1990, *Sunrise Retirement Villa* did not change the principle that base year value shall be corrected in the year in which the error was discovered.

If, based on further evidence, it was determined that a nonjudgmental error was made in the 1989 and/or 1990 base year values, your office could make a correction and the taxpayer would be entitled to cancellation of taxes back to the year the error was discovered. In this regard, the decision in *Sunrise Retirement Villa* is consistent with other courts in holding that where a nonjudgmental error in Section 51.5 (a) occurred (no change in ownership in 1986), the assessor must make the correction in any the assessment year in which the error was discovered (in 1994). [11]

As discussed above, there is no evidence in this instance that a nonjudgmental or clerical error occurred, i.e., that your office had knowledge of any Health Department determinations concerning the property in 1989 and/or 1990. And even if the September 3 and October 7 Health Department letters could be construed as a determination that the parcel was "unbuildable" (and unmarketable), that was not determined until 1998. In order for Section 51.5(a) to apply to the 1989 and 1990 changes in ownership, and for your office to correct either/or both base year values, the facts must establish, even under the holding in *Sunrise*, that a nonjudgmental or clerical error occurred in 1989 and in 1990. Only under these circumstances would Section 51.5(d) apply, authorizing a reduction in the base year value, and allowing Ms. S to seek "appropriate refunds and cancellations of tax (relief from the delinquent taxes not paid by the former owner).[12]

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[10] In determining market value of property for use in its present condition, the importance of obtaining and evaluating the pertinent facts at all relevant times cannot be overemphasized. In *County of San Diego v. Assessment Appeals Board No. 2 of San Diego County* (1983) 148 Cal.App.3d 548, the Fourth Appellate District held on a similar fact pattern that the board erred in determining that the properties with defective and/or inoperative septic systems were "totally unmarketable on the lien date." The court stated that the board disregarded competent evidence presented at the hearing regarding "costs to cure" the problem and comparable sales of other properties, and produced findings (that the improvements had zero value) which were unsubstantiated.

[11] When the assessor, six years after the fact, refused to correct the base year value of taxpayer's 1986 change in ownership, the appeals board denied the base year value appeal, and the taxpayer filed a writ of mandate asking the court to direct the assessor to correct its base year value as a *nonjudgmental* error, or to compel the appeals board to set the matter for hearing, the trial court so directed the assessor, finding that no change in ownership had occurred in 1986, that the error was "nonjudgmental," and that the assessor was not entitled to disregard the court's determination on these facts. The court of appeal deviated from the statutes and other cases when it directed the appeals board to hear the matter, stating that the taxpayer's appeal right also goes back to "the year in which the error or omission was discovered."

[12] Since the taxes on the 1990 base year value are unpaid, cancellation would be appropriate, however, a refund for 1989 would be outside of the statute of limitations in Sections 5096-5097. Whether a refund or cancellation is sought however, the proper statutory procedures governing the remedy must be followed. *Sea World, Inc.*, supra. (If the taxpayer is seeking a cancellation of the delinquent taxes, section 4986 et seq. applies.)

3. <u>The Evidence Indicates that Value Judgment was Exercised in 1989 and 1990; Corrections are Limited to Four Years under Section 51.5(b) and the Taxpayer's Appeal Period is Limited to Four Years under Section 80(a)(3).</u>

Where the facts involve a situation in which the assessor initially exercised judgment in setting base year values as here, the error falls within Section 51.5 (b) and the taxpayer has four years from that date to request a correction or to file an appeal under Section 80(a)(3). (*Metropolitan Culinary Services*, p.941.[13]) Your office exercised judgment in establishing the 1989 and 1990 base year values, and through 1993 and/or 1994, Mr. S, Ms. S and K, Inc. had the opportunity to present evidence of an error to your office and/or to file an appeal contesting these values. As established in the *Firestone* case, it seems clear in this case also that no evidence of the possible "unbuildable" condition of the parcel existed on the 1989 or 1990 lien dates. The weight of the evidence (similar to *Firestone*) is that a potential purchaser would not have been aware of any such condition on these dates. Thus, the base year values enrolled in 1989 and 1990 were based on the information known about the property at those times.

The decision in *Sunrise Retirement Villa* does not address this situation. Nor does it suggest that any mistake or error in the assessor's value judgment is not subject to the four-year time limitation for corrections under Section 51.5(b), or the four-year time limit for the taxpayer filing an appeal under Section 80(a)(3). No case has held contrary to the principle in both sections that when an error is related to value judgment, the assessor is precluded from making corrections beyond four years, and the taxpayer is precluded from filing an appeal beyond four years (after the July 1 of the assessment year for which the base year value was first established). Thus, neither *Sunrise Retirement Villa* nor Section 80(a)(4) are applicable in this situation.

Nevertheless, it appears that Ms. S was entitled to receive the requested reduction in property value for 1998. In 1998, she apparently filed an application for reduction of assessment and obtained relief from your office. And presumably the same occurred in 1999. If not, the one-year correction period set forth in subdivision (b) of section 4831 would be applicable. As explained in Letter to Assessors No. 95/54, <u>Roll Corrections</u>, this statutory subdivision gives counties the authority to reduce assessed values, via roll corrections, within one year after the assessment roll is completed and delivered to the auditor. This authority to reduce assessed values after delivery to the auditor is, however, limited to those situations where the assessor failed to properly reflect a decline in the taxable value of the real property pursuant to Section 51(a)(2).

As you are aware, Section 51(a) provides that the taxable value of real property is the lesser of the adjusted base year value and full cash value of the property each year, and is among the statutes pertaining to declines in value. Assessments based upon declines in value (Revenue and Taxation Code §§ 51, 110, 1601 et seq., and 4831) are distinct from those pertaining to base year values and corrections thereof (Revenue and Taxation Code §§ 110.1, 51.5 and 80). Among other things, the base year value statutes include time limitations peculiar to themselves. As there is no statute for declines in value comparable to that of Section 51.5(a) for corrections of base year values, declines in value must be pursued on a year-by-year basis, consistent with the statutory scheme.

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[13] The court held that it was an error involving the exercise in value judgment, even though the county had stipulated that the change in Metropolitan's base year value was based on the County's own clerical error.

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Very truly yours,

/s/ Kristine Cazadd

Kristine Cazadd
Senior Tax Counsel

Attachments: Legislative History, SB 587 Bill Analysis and documents;
Saunders Letter 1/10/97

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precdent/baycor/99/05kec.doc

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