

1 **PEND OREILLE COUNTY HEARING EXAMINER**

2
3 **Re:** Application by Todd Behrend for a
4 Conditional Use Permit to construct and
5 operate a cryptocurrency mining facility,
6 located in an R5 zone; and SEPA appeal of
7 DNS, filed by Ed Styskel.

**FINDINGS, CONCLUSIONS,
AND DECISION**

FILE NO. CUP-2021-012

8 **I. SUMMARY OF PROPOSAL AND DECISION**

9 **Proposal:** The Applicant seeks to construct and operate a cryptocurrency mining
10 facility located at 422767 Highway 20 Usk, Washington. An appeal of the
11 Determination of Nonsignificance (DNS) issued for the project was filed by Ed
12 Styskel.

13 **Summary of Decision:** The SEPA appeal is denied. The application for a
14 Conditional Use Permit ("CUP") is approved, with *revised* conditions.

15 **II. FINDINGS OF FACT**

16 **A. General Information:**

17 **Applicant:** Todd Behrend¹
18 422767 SR 20
19 Usk, WA 99180

20 **Property Owner:** Ponderay Real Estate, LLC.
21 200 Spectrum Center Dr., Ste 1450
22 Irvine, CA 92618

23 ¹ Documents in the Department file identify numerous entities as the 'Applicant' for this project. The
24 application itself lists Todd Behrend as the applicant and Ponderay Real Estate, LLC as the property
owner. The clearing and grading permit lists the property owner as Ponderay Data, LLC. This is the
same entity that submitted the document entitled 'Project Description'. Other documents in the file
indicate that Ponderay Industries, LLC., is also involved in the project. At the time the Hearing
Examiner conducted a site visit, the sign in front of the project site was for Merkle Standard. Todd
Behrend is currently listed as Merkle Standard's General Manager for the Ponderay Data Center. For
purposes of this decision, 'Applicant' refers to all entities involved in the construction and/or operation
of the proposed cryptocurrency mining project.

1 **Property Location:** 422767 SR 20, Usk, WA 99180

2 **Legal Description:** 3-59 F4 NE1/4; N1/2NW1/4; SE1/4NW1/4; NW1/4SE1/4 ;
3 LESS ROADS 08-32-44 EASEMENT, parcel number 443208000005, Pend Oreille
4 County, Washington.

5 **Zoning:** The property is zoned R5.

6 **Environmental Review:** A SEPA Environmental Checklist was submitted to
7 Pend Oreille County on March 10, 2022. A Determination of Nonsignificance
8 (DNS) was issued by the Department on April 2, 2022, with an appeal period
9 ending on April 18, 2022. On April 18, 2022, Ed Styskel, the Appellant, filed a
10 timely appeal of the DNS pursuant to WAC 197-11-680.

11 **Site Description:** The subject property consists of 4 parcels of land totaling
12 approximately 309 acres in size. The site has been the location of a working
13 newsprint mill and associated activities since the mid-eighties and was originally
14 approved for operation under a Shoreline Substantial Development Permit 85-4
15 on August 07, 1985, to operate a 440 metric ton newsprint plant, associated
16 utilities, and site improvements. The mill operated in that capacity until its
17 closure due to bankruptcy in 2020. On June 01, 2021, the site was purchased by
18 Ponderay Real Estate LLC.

19 The site is located west of Black Road and the Pend Oreille River, south of the
20 town of Usk, WA, and adjacent to the existing Vaagen Bros. Lumber, Inc.
21 property. The Site is zoned R5, is developed and maintained as an industrial site.
22 The site has an existing access from Highway 20 and Black Rd. The property is
23 primarily flat, with some wooded areas surrounding the developed site. There is a
24 large hill in the middle of the property that sits generally between the developed
portion of the site and the Pend Oreille River. There is power on the site for
lighting, security, and operations. The site lies within Pend Oreille Fire District 4
and is within the Cusick School District boundaries.

Surrounding Conditions: The zoning of the surrounding properties are
designated R5 (areas with zoning districts located along U.S. highways, state
routes, designated arterials, and County Major (07) and Minor (08) collectors),
and NR 20 (Parcels within this zone must have approved road access and
designated as Timber, or Agricultural Lands, or currently in use as a mine).
Surrounding properties to the south and east are designated NR20 undeveloped
and are designated forest land use. Properties to the west are developed and are

1 forest land use designated. Property to the North is designated R5 developed and
2 industrial use.

3 **Project Description:** The Applicant plans to lease land from Ponderay Real
4 Estate, LLC to build and operate a high-density computing facility adjacent to the
5 main entrance of the former Ponderay Newsprint property from State Route 20.
6 This facility will consist of up to 150 prefabricated Modular Data Centers (MDCs).
7 These units are 8'x20'x 9.5' high. The onsite electrical distribution system will be
8 expanded using a fuse block structure consisting of wooden utility poles and
9 crossmembers to support the required electrical components and cabling. This
10 structure will be about 30' tall. Underground cables will be installed to 50
11 transformers, 2500kVA each, measuring about 7'x7'x7' to provide electrical
12 service to the MDCs. Trenching, in already disturbed and modified areas, will be
13 required to install electrical, communication, and water lines. The total amount of
14 material to be excavated and backfilled to support utility installations, in
15 previously disturbed areas is 6,447 cubic yards.

16 More than 30,000 servers will be installed in these MDCs, consuming about
17 100MW of electrical energy. These will be primarily air-cooled, using the fans of
18 the servers to draw in ambient air and exhaust the heat generated by data
19 processing. Evaporative cooling units are built into the MDCs, so a process water
20 supply will be routed to each unit for use during the highest temperatures of the
21 year. A system to direct some of the warmed air to the intake for the coldest
22 periods will be locally designed and installed on site.

23 In addition, an existing 50'x100' building, originally built to house construction
24 offices, will be converted to accommodate high-density computing machinery. This
will require the installation of a new transformer of about the same physical
dimensions as the above, a cooling tower 8.5'x16'x16' high, and a pumping system
about 8' x10'x 5' high. These will be located close to the original Lake Superior
Construction office building near the main entrance. The servers in this facility
will employ liquid cooling, necessitating the cooling tower.

No new storage areas will be required beyond the construction phase. No new
parking areas will need to be created. The existing site grading was engineered to
manage stormwater, and the site maintains a Stormwater Pollution Prevention
Plan. This includes those asphalt areas on the west side of the project near an
existing drainage ditch that has been in existence for over 30 years. Portions of
the project fall within the buffer zone of this drainage ditch and will have no
additional impact to storm drainage. This project will not affect that system. The

1 existing unloading and storage areas exceed the requirements of the new
2 enterprise.

3 In addition, an existing 50'x100' building originally built to house construction
4 offices will be converted to accommodate high-density computing machinery. This
5 will require the installation of a new transformer of about the same physical
6 dimensions as the above, a cooling tower 8.5'x16'x16' high, and a pumping system
7 about 8' x10'x 5' high. These will be located close to the original Lake Superior
8 Construction office building near the main entrance. The servers in this facility
9 will employ liquid cooling, necessitating the cooling tower.

10 The site is expected to employ about 35 people excluding security, although not all
11 of them will normally be on site simultaneously. Visitors will be very limited, as
12 the site access will be controlled for security and safety. The operation will be
13 continuous, but traffic will largely be limited to employees. During normal
14 operations, less than 30 vehicles per business day on average are expected to
15 travel to the site. Every few years, the equipment will need to be upgraded due to
16 obsolescence and increased traffic will occur briefly during that activity.

17 Due to the limited access, reception for general visitors is not currently
18 anticipated. Outdoor activities will be limited to maintenance of the equipment.
19 No public functions for social or recreational activities will be conducted under
20 normal operations, excluding unique events such as receptions for
21 groundbreaking, commissioning, or other public outreach functions.

22 It is expected that the existing sign at the entrance will be replaced to identify the
23 new enterprise. The new sign is currently envisioned to be of a similar size.

24 **B. Procedural Information:**

Approval Criteria: Pend Oreille County Comprehensive Plan ("CP") Chapter 2.0
– Land Use Element; Pend Oreille County Development Regulations (PODR)
Chapter XX.68 – Conditional Uses; PODR Chapter XX.14 – Processing
Procedures; PODR Chapter XX.26 – Zoning Controls; PODR XX.30 – Development
Standards.

Hearing Date: May 18, 2022

Application Complete: March 10, 2022

Notice of Application: Mailed – March 15, 2022; Published – March 30, 2022

1 **Notice of Hearing:** Mailed – April 27, 2022; Published – April 27, 2022; Posted –
2 April 26, 2022

3 **Site Visit:** May 10, 2022

4 **Testimony:** The following persons were present at the hearing and testified
5 under oath as administered by the Hearing Examiner:

6 Greg Snow
7 Community Development
8 Department
9 418 South Scott Avenue
10 Newport, WA 99156
11 gsnow@pendoreille.org

12 Patrick Mullaney
13 600 University Street, Suite 3600
14 Seattle, WA 98011
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16 Taudd Hume
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SEPA Appeal Exhibits:

Appellant Exhibits -

Exhibit 1: Styskel_Exhibit 1 - SEPA Checklist Ponderay Data Crypto Styskel
Mar. 30 Comments (5 pp.)

Exhibit 2: Styskel_Exhibit 2 - SEPA Checklist DNS Appeal - Ponderay
Cryptomining Facility - Styskel Suppl Comments (11 pp.)

Applicant Exhibits -

Exhibit 1: Ponderay Real Estate_Exhibit 01_Project and Site Description
(5 pp.)

Exhibit 2: Ponderay Real Estate_Exhibit 02_Calispell Diversion Canal HAER (1
page)

Exhibit 3: Ponderay Real Estate_ Exhibit 03_ Noise Study Results (16 pp.)

Exhibit 4: Ponderay Real Estate_ Exhibit 03_ Noise Study Results (5 pp.)

1 Exhibit 5: Ponderay Real Estate_Exhibit 05_Andrew AJ Schmitt - Curriculum
2 Vitae - May 2022 (3 pp.)

3 Exhibit 6: Ponderay Real Estate_ Exhibit 06_Memo 5-5-22_Surface water
4 (6 pp.)

5 Exhibit 7: Ponderay Real Estate_ Exhibit 07_ Merkle_Memo 5-5-22_ Wildlife
6 Assessment (12 pp.)

7 Exhibit 8: Ponderay Real Estate_Exhibit 08_ Mark Pollock Resume (14 pp.)

8 Exhibit 9: Ponderay Real Estate_Exhibit 09_ Erik Nyquist Resume (18 pp.)

9 Exhibit 10: Ponderay Real Estate_Exhibit 10_ Aaron Hoefer Resume (2 pp.)

10 Department Exhibits -

11 Exhibit 1: Pend Oreille County_1_DNS CUP_2021-012 (2 pp.)

12 Exhibit 2: Pend Oreille County_2_SEPA Checklist (30 pp.)

13 **CUP Application Record and Procedure:**

14 The Hearing Examiner conducted a consolidated open public hearing on the
15 applications and appeals on May 12, 2022, beginning at 9:00 a.m. The Hearing
16 Examiner heard the application and appeal pursuant to the interlocal agreement
17 between Pend Oreille County and Spokane County. The hearing was conducted in
18 accordance with Spokane County Code Chapter 1.46 and the Spokane County
19 Hearing Examiner Rules of Procedure, adopted by County Resolution No. 96-
20 0294.to the extent that they do not conflict with the PCDR.

21 The Hearing Examiner takes notice of the Pend Oreille County Comprehensive
22 Plan (“Comprehensive Plan”), the Pend Oreille County Development Code
23 (“Development Code”) other applicable development statutes and regulations, and
24 previous land use decisions for the site and area.

The record includes the documents in Department File No. CUP-2021-012, at the
time of the hearing, the electronic recording of the hearing, the roster of attendees
of the Zoom hearing, and the items taken notice of by the Hearing Examiner.

At the time of the hearing, eighty-seven comment(s) had been received from
the public. The comments were split for and against the project. The vast majority of

1 the opposition comments were related to possible noise disturbances to wildlife and
2 people residing in the area. The Applicant responded to these concerns by submitting
3 professionally conducted noise and wildlife studies, which indicated that mitigation
measures can be implemented to address the noise created by the project.

4 III. FINDINGS AND CONCLUSIONS

5 A. SEPA Appeal

6 On March 10, 2022, Todd Behrend submitted a SEPA Environmental
7 Checklist² as part of the Conditional Use Permit (CUP) application for the Ponderay
8 Data Cryptomining Facility on behalf of Ponderay Data, LLC (Applicant). The Pend
9 Oreille County Community Development Department (Department) conducted a
10 review of the checklist³ and issued a Determination of Non-Significance (DNS) for the
11 application on April 1, 2022. The DNS was circulated to numerous state and local
12 agencies for comment, including WDFW⁴, DNR⁵, Ecology⁶, DAHP⁷, the Kalispel
13 Tribe, WSDOT⁸, Tri-County Health Department, Fire District 4, and the Public
14 Utility District.

15 In response, the Department received comments from the Kalispel Tribe and
16 Ecology. Initially, the Department received an email from the Kalispel Tribe
17 detailing eight points which they felt were inadequately addressed in the SEPA
18 checklist⁹. *See*, January 18, 2022, email from Mike Lithgow. The Kalispel Tribe
19 pointed to a few of the answers in the SEPA checklist that needed additional
20 clarification regarding the scope and nature of the proposed project, as well as
21 requesting additional information regarding whether potentially hazardous
22 chemicals were going to be used and how they would be managed to avoid spills or
23 environmental contamination. The email noted that the Kalispel Tribe was not in
24 opposition to the project but felt that additional information was needed. The

19 ² The Department file submitted to the Hearing Examiner indicates that the March 10, 2022, SEPA
20 checklist is a revised version. There is reference in the file to a SEPA checklist that was submitted by
the Applicant on December 10, 2021, this earlier SEPA checklist is not in the record.

21 ³ The Department made handwritten notations throughout the checklist, these included noting the
pendency of the related clearing and grading permit, a notation that future expansion of the CUP
would likely require additional SEPA review, amongst others.

22 ⁴ Washington Department of Fish and Wildlife

⁵ Washington Department of Natural Resources

⁶ Washington Department of Ecology

23 ⁷ Washington Department of Archaeological and Historic Preservation

⁸ Washington State Department of Transportation

24 ⁹ These initial comments from the Kalispel Tribe were in response to the December 2021 SEPA
checklist referenced in FN 1 above.

1 Department forwarded this email to the Applicant for a response. The Applicant
2 submitted a response to the Department, providing clarification on the issues raised
3 by the Kalispel Tribe. The Kalispel Tribe also submitted a second comment regarding
4 the SEPA checklist on March 31, 2022, this comment identified concerns regarding
5 the answers provided on background, surface water, and noise from the project. *See,*
6 March 31, 2022, email from Mike Lithgow.

7 The Department also received comments from Ecology advising of potentially
8 applicable regulations and permits related to possible hazardous waste and water
9 quality issues. *See,* April 14, 2022 letter from Ecology. The comments from Ecology
10 did not suggest that any further actions related to the SEPA review were necessary,
11 nor did Ecology object to the Department's issuance of the DNS or recommend any
12 mitigation measures. The comments from Ecology did not appear to be specific to the
13 proposed project, No other agency comments were received regarding the project.

14 The Department's SEPA review took into consideration the historical use of
15 the proposed site, which has been used as an industrial site as far back as 1987. *See,*
16 *DNS Determination Narrative.* In 1985, Pend Oreille County approved a Shoreline
17 Permit for the site to be used as a newsprint plant. The newsprint plant began
18 operating in the fall of 1987 and ran until a couple of years ago when bankruptcy
19 forced the shutdown of production. Since then, the machinery and site have been
20 maintained in order to allow for newsprint operations to resume production when
21 circumstances permit. Because of the site's historical use, it is already equipped with
22 much of the necessary infrastructure for the proposed cryptocurrency project. The
23 Department noted that the proposed site is located within a wetland buffer, however,
24 the area being utilized for the proposed project is already paved because of the
25 previous development. The Department also indicated that the facility has an
26 existing Stormwater Pollution Prevention Plan in place.

27 On April 18, 2022, the Appellant, Ed Styskel, timely filed an appeal of the
28 Department's DNS. *See, Application for an Appeal of Decision.* The appeal alleges
29 that the Department had insufficient information to make an informed SEPA
30 threshold determination¹⁰. *See, Appellant's Exhibit 2.* In his testimony, Mr. Styskel

31
32 ¹⁰ In response to Mr. Styskel's arguments regarding the environmental impacts of noise from the
33 project, the Applicant presented a professional noise analysis that was conducted at the project site.
34 The Applicant's noise study was conducted well after the threshold determination was issued. The
35 noise study is relevant to the underlying CUP application and would be relevant to the issue of
36 whether the DNS is clearly erroneous. However, the SEPA appeal in this case is limited to whether
37 the Department had sufficient information to adequately consider environmental factors when making
38 the threshold determination. Therefore, the Hearing Examiner finds that because the Applicant's

1 clarified that the purpose of his appeal was to challenge the content of the SEPA
2 checklist as being an insufficient basis upon which to base the threshold
3 determination. *See, Testimony of Ed Styskel.* Mr. Styskel seeks to have the DNS
4 vacated and remanded to the Department for reconsideration and a new threshold
5 determination. *Id.*

6 Mr. Styskel argues that the Department lacked sufficient information to make
7 a threshold determination in numerous areas, including, plants, animals, energy and
8 natural resources, environmental health, aesthetics, and recreation. *See, Appellant's*
9 *Exhibits 1 and 2.* His argument flows from the contention that the SEPA checklist
10 submitted by the Applicant contains misrepresentations and incomplete answers. *Id.*
11 The majority of Mr. Styskel's briefing and testimony focused on pointing out specific
12 aspects that are not addressed in the SEPA checklist or expressly considered by the
13 Department in reaching the threshold DNS. Aspects that the appeal contends were
14 not adequately considered include the potential that invasive plant species could
15 exist on the project site; the possibility that herbicides may be used to treat
16 landscaping at the project; the aesthetic effects of the height and color of the
17 containers used to store computers; and the potential impacts of noise on recreation
18 and tourism in the area. *See, Appellant's Exhibit 1 and 2.*

19 Mr. Styskel's argument places a particular emphasis on the potential impacts
20 of noise created by the proposed cryptocurrency project on the surrounding wildlife
21 and environment, including adverse health effects on people living in the area. *See,*
22 *Appellant's Exhibits 1 and 2; Testimony of Ed Styskel.* He argues that there are
23 hundreds of animal species that live in close proximity to the project site and that
24 these animals would be significantly impacted by the proposed cryptocurrency
project. He specifically pointed to the presence of the American white Pelican which
are present at Calispell Lake from early April to early October. *See, Appellant's*
Exhibits 2. Mr. Styskel asserts that noise disturbance is a documented threat to the
wildlife species and can potentially degrade an otherwise suitable habitat.

In support of these assertions, the appeal references numerous scientific
studies and articles regarding the general effects of noise on wildlife and habitat. *See,*
Appellant's Exhibits 1 and 2. Mr. Styskel's representations regarding the type and
prevalence of wildlife in the project area are bolstered by his credentials as a certified
wildlife biologist with 40 plus years of professional experience. *See, Appellant's*

noise study was conducted after the threshold determination was made, it is not relevant to this
appeal.

1 *Exhibit 1 and 2; Testimony of Ed Styskel.* Based upon these credentials, the Hearing
2 Examiner did find Mr. Styskel to be an expert in the field of wildlife biology. Based
3 upon the cited studies and Mr. Styskel's personal knowledge of wildlife in the area he
4 concludes that the Department failed to adequately consider the applicable
5 environmental factors in making their threshold determination. Specifically, with
6 regard to the impacts of noise, Mr. Styskel contends that a comprehensive
7 professional noise analysis is necessary for the Department to meet the burden to
8 adequately consider the environmental impacts as required under SEPA. *See,*
9 *Appellant's Exhibit 1 and 2.*

7 The standard of review for an appeal of a SEPA threshold determination is
8 whether the agency's action is clearly erroneous. *Norway Hill Pres. & Prot. Assn. v.*
9 *King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976); *Sisley v. San Juan*
10 *County, supra; Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wn.
11 App. 787, 795, 309 P.3d 734 (2013). A decision is clearly erroneous if, after reviewing
12 all the evidence, the trier of fact is left with the firm conviction that a mistake has
13 been committed. *Lands Council v. Wash. State Parks & Recreation Comm'n, supra,*
14 795. The decision of the agency issuing the threshold decision is to be given
15 substantial weight. RCW 43.21C.090; *Norway Hill Pres. & Prot. Assn. v. King*
16 *County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976); *Boehm v. City of Vancouver*,
17 111 Wn. App. 711, 716, 47 P.3d 137 (2002).

14 A SEPA threshold determination must be based upon information reasonably
15 sufficient to evaluate the environmental impacts of the proposed action, in this case,
16 the application for a CUP to operate a cryptocurrency mining operation. WAC 197-
17 11-040(4)(c). The content of the environmental review depends on each particular
18 proposal, on the agency's existing planning and decision-making processes, and on
19 the time when alternatives and impacts can be most meaningfully evaluated. WAC
20 197-11-060 (2)(a). An environmental review must begin by review and consideration
21 of an environmental checklist. WAC 197-11-060 (2)(b); WAC 197-11-330 (1)(a). To
22 determine whether an Environmental Impact Statement will be necessary a
23 threshold determination is made by the lead agency for the environmental review. In
24 making a threshold determination, the responsible official shall consider any
mitigation measures required by development regulations, comprehensive plans, or
other existing environmental rules or laws. WAC 197-11-330. A threshold
determination shall not balance whether the beneficial aspects of a proposal
outweigh its adverse impacts, but rather, whether a proposal has any probable
significant adverse environmental impacts under the rules stated in WAC 197-11-
330. A Determination of Non Significance (DNS) may be issued if the lead agency

1 finds that the proposed action will not have a probable significant, adverse
2 environmental impact. RCW 43.21C.031; WAC 197-11-330; WAC 197-11-340. To
3 defeat the appeal in this matter, the record produced by the Department in support
4 of its threshold determination of DNS, relative to the Application for CUP, must
5 demonstrate that environmental factors were considered in a manner sufficient to
6 amount to prima facie compliance with the procedural requirements of SEPA. *Sisley
7 v. San Juan County*, 89 Wn.2d 78, 84 – 85, 569 P.2d 712 (1977).

6 The documentation, testimony, and argument presented by Mr. Styskel
7 provided ample evidence that the proposed cryptocurrency mining operation has the
8 *potential* to cause significant adverse impacts to the surrounding environment. Mr.
9 Styskel's argument fails, however, because he does not demonstrate that the issues
10 he raises are *probable* significant adverse impacts. While he sites to a number of
11 credible scientific studies and articles, there is nothing in the record that
12 demonstrates how the proposed cryptocurrency project it likely to lead to the same
13 outcomes indicated in the articles. Standing alone, none of the articles relied upon
14 demonstrate that the proposed project is likely to lead to the adverse impacts Mr.
15 Styskel attributes to the project. While the Hearing Examiner did find Mr. Styskel to
16 be qualified as an expert in the field of wildlife biology, the record reflects that his
17 knowledge of the relevant wildlife and environment was not gathered in a
18 professional scientific method but was accrued by virtue of being a local resident
19 making lay observations of his surroundings. As such, his observations and
20 conclusions cannot be afforded the same weight as an expert who conducts a formal
21 professional scientific analysis. Accordingly, the Hearing Examiner finds that the
22 Department did not clearly err by not specifically considering the issues raised in the
23 appeal during their SEPA threshold analysis.

17 The appeal further alleged that the SEPA checklist was insufficient and
18 misleading and therefore the Department's SEPA threshold determination process
19 did not amount to prima facie compliance with SEPA review procedure. Mr. Styskel
20 points to a few answers in the SEPA checklist that he contends are deficient,
21 however, his argument ends there and does not account for the other aspects of the
22 Department's SEPA review. Had the Department's threshold determination relied
23 solely and exclusively on the answers provided in the checklist it may well have been
24 insufficient. However, the Department's analysis went beyond simply accepting the
25 SEPA checklist at face value. The Department specifically evaluated the CUP
26 application in light of the historic use of the site as an industrial paper mill. It is
27 clear from the record that this historic use of the site caused a significant amount of
28 noise, and while noise from the proposed use is not identical the Department

1 reasonably relied upon this context in reaching their threshold determination. The
2 Department also sought comment from the agencies with expertise in the areas of
3 concern identified in the appeal. Specifically, the WDFW as the agency with expertise
4 on wildlife according to WAC 197-11-920(5), and Ecology as well as the local health
5 district as the agencies with expertise on noise according to WAC 197-11920(9). Mr.
6 Styskel indicated in his testimony that he believes WDFW did not comment on this
7 project because they are overworked and do not have the time and resources
8 necessary to comment on all of the projects that are submitted to them. This
9 testimony, however, was hearsay from an unknown source and therefore cannot be
10 afforded any weight. Further, as correctly noted by both the Department and the
11 Applicant, the Department is entitled to “assume that the consulted agency has no
12 information related to the potential impact of the proposal as it relates to the
13 consulted agency’s jurisdiction or special expertise” when that agency does not
14 provide any comment. WAC 197-11-545(1). Thus, since WDFW provided no comment
15 and Ecology provided only generic comment, the Department reasonably interpreted
16 this to mean the project did not pose a probable significant adverse impact regarding
17 noise or wildlife.

18 Giving substantial weight to the Department’s threshold determination, the
19 Hearing Examiner finds that the Department’s threshold determination was based
20 upon information reasonably sufficient to evaluate the environmental impacts of the
21 proposed cryptocurrency mining project and the record reflects that the
22 environmental factors were considered in a manner which amounted to prima facie
23 compliance with the procedural requirements of SEPA. Therefore, the DNS should be
24 upheld.

25 **B. Conditional Use Permit Application**

26 To be approved, the application for Conditional Use Permit must comply with
27 the criteria set forth in the Development Code and demonstrate consistency with the
28 Comprehensive Plan. The Hearing Examiner has reviewed the CUP application file
29 and evidence of record regarding the application and makes the following findings
30 and conclusions:

31 **Consistency with Comprehensive Plan:**

32 Sections of the Comprehensive Plan that are salient to the application before
33 the Hearing Examiner include:

34 2.3 Land Use Goals, Goal #4 – Encourage urban type development to be
concentrated in urban growth areas where existing facilities either have

1 adequate capacity or where appropriate levels of service can be reasonably
2 provided.

3 2.4 Land Use Policies, Policy #1 – Pend Oreille County shall require that
4 necessary public facilities (i.e., streets, water, sewer, and power) be in place, or
5 be put in place, to serve new development. Project Sponsors shall provide all
6 required on-site facilities, and provide, or make a fair contribution to the
7 provision of, off-site facilities significantly impacted by their activities.

8 The subject property is located on and has close access to State Highway 2 and
9 is in an area characterized by urban and commercial development. The proposed
10 expansion is the natural growth of an existing business, which is encouraged by the
11 Comprehensive Plan. The proposed conditional use is expected to use the electric
12 service, water service, and sewer facilities currently available and/or existing at the
13 site. The proposed use is anticipated to have minimal impact on traffic onto and from
14 the site.

15 2.4.2 Rural Land Use Policy #8 – Pend Oreille County should permit small-
16 scale commercial uses including, but not limited to; neighborhood stores, cafes,
17 taverns, and resorts in rural areas on non-designated Natural Resource Lands,
18 provided that:

- 19 a. Performance standards that address noise, light and glare, solid waste
20 handling, odors, traffic and similar sources of conflict are established that
21 avoid, minimize, landscape buffers or mitigate potential nuisances that
22 could affect other properties; and
- 23 b. Standards are established that require adequate off-road parking and
24 safe access to public roads, with the number of points of access to arterial
roads being minimized.

The proposed use is located on property that is zoned as R5 and is not
designated Natural Resource Land. The proposed use can be conditioned so that it
will be consistent with the above policy. Pend Oreille County Development
Regulations address the requirements of this proposed use.

The Hearing Examiner agrees with the Department's assessment that the
proposed conditional use can be conditioned to be made consistent with the goals and
policies of the Pend Oreille County Comprehensive Plan. Therefore, the Hearing
Examiner finds the proposed CUP is generally consistent with the goals and policies
of the applicable chapters of the Comprehensive Plan.

1 **Consistency with Pend Oreille County Development Regulations:**

2 The proposed expansion is an allowed use in the R5 zone upon approval of a
3 Conditional Use Permit. PCDR xx.26.040; Table of Permitted Uses, Adopted
4 December 22, 2015. A Conditional Use Permit may be approved upon compliance
5 with the requirements of Chapter xx.68 of the PCDR. The Hearing Examiner finds
6 that the proposed use can be and as conditioned will be compatible with neighboring
7 uses in the area in which the application is sought. PCDR xx.68.010.

8 Sections of the Pend Oreille County Development Regulations that are salient
9 to the application before the Hearing Examiner include:

10 **Zoning Controls**

11 xx.26.050 Development Standards.

12 B. Setbacks and Buffering.

13 1. All uses that may be permitted may only be approved based on a finding that
14 adequate provisions have been made for setbacks and buffering from
15 neighboring properties.

16 c. Impacts to neighboring properties shall be avoided, minimized and
17 mitigated including noise, light and glare, solid waste handling, odors,
18 traffic, operating hours, signs and similar sources of conflict.

19 As conditioned herein, the Hearing Examiner finds that the proposed CUP is
20 consistent with applicable PODR Zoning Controls.

21 **Development Standards**

22 xx.30.010 Off-Premise Sign Regulations.

23 A. Purpose: The purpose of this section is to protect the general health, safety
24 and welfare of County residents and the traveling public as well as their
general aesthetic views within the County while allowing for advertising by
having standards for the type, size, number, illumination of and location of
off-premise signs. Off-premise signs shall be compatible with the surrounding
uses, sensitive to the surrounding natural area and shall retain the rural
character of the community. Approval shall not be unreasonably withheld.

 B. Applicability: The off-premise sign regulations shall apply to any person, firm,
corporation or business wanting to construct or erect an off-premise sign

1 within the unincorporated portion of Pend Oreille County. Safety signs are
2 excluded.

3 C. Design Criteria: All off premise signs larger than 3 square feet shall require a
4 sign permit before installation and must be designed, constructed, and
5 maintained in accordance with County Building Codes, all applicable
6 ordinances, and the following standards:

- 7 1. Off premise signs may not be located on private property without the
8 written approval of the property owner.
- 9 2. No off-premise sign may be located on County property or in the rights-of-
10 way owned by the County.
- 11 3. No off premise sign may be located any closer than 660 feet (or line of site
12 from approach to access road) to any dwelling unit, except the dwelling
13 unit(s) owned by the owner of the site on which the sign is located. This
14 distance may be reduced if all of the property owners within 660' of the
15 proposed off premise sign provide an affidavit that they are knowledgeable
16 about the proposed site and design of the sign and have no objections.
- 17 4. No off-premise sign shall interfere with public safety.
- 18 5. No off-premise sign shall be larger than 32 square feet;
- 19 6. No off-premise sign shall be taller than 15 feet in height as measured from
20 the surface of the roadway adjacent to the sign.
- 21 7. Utility Poles and trees shall not be used to display signs.
- 22 8. All illuminated signs must meet the standards set forth in Ch. 30.020
23 (Outdoor Lighting Standards) of the Pend Oreille County Development
24 Regulations.
- 25 9. Signs within jurisdictional shoreline areas shall comply with the Shoreline
26 Regulations, Chapter XX.34 of the Pend Oreille County Development
27 Regulations

28 xx.30.020 Outdoor Lighting Standards.

- 29 A. The purpose of this section is to provide standards for outdoor lighting to help
30 ensure compatibility with neighboring uses, preserve our dark skies, and
31 provide a more pleasant and comfortable nighttime environment while
32 preserving the ability to install effective security lighting.
- 33 B. The following outdoor lighting standards shall apply in all zones:

- 1 1. Lighting fixtures must be a full cut-off design that is shielded, hooded and
2 oriented towards the ground so that direct rays of lighting source(s) are not
3 visible past the property boundaries and do not shine into the night sky;
- 4 2. The use of motion sensing devices is encouraged;
- 5 3. No lighting shall blink, flash or be of unusually high intensity or
6 brightness; and
- 7 4. New or replacement lighting of County or private roads shall be shielded
8 and downward pointing.

9 C. The following lighting is exempt from the requirements of this Chapter:

- 10 1. Lighting fixtures installed on residential structures with incandescent
11 lamps, or equivalent. This exemption does not apply to fixtures that light
12 parking areas, driveways, sports areas or outbuildings;
- 13 2. Seasonal decorative lighting fixtures;
- 14 3. Lighting fixtures used temporarily for emergency purposes;
- 15 4. Public athletic fields, fairgrounds, and approved temporary special events
16 lighting;
- 17 5. Approved navigation, aviation, and traffic safety lighting; and
- 18 6. Construction lighting.

19 xx.30.030 Clearing, Grading, and Stormwater Management

20 A. The purpose of this section is to provide standards to govern clearing and
21 grading activities in order to protect private property, water quality,
22 environmentally sensitive areas, shorelines, and priority habitat areas. No
23 provision of this section is intended to impede commercial, forestry, or
24 agricultural activities.

B. The following clearing and grading standards shall apply to development
activities in all zones and shall be processed as a Class 1 permit:

1. All clearing and grading activities shall be conducted so as to minimize
potential adverse effects on off-site property, surface water quality, critical
areas, and shorelines.
2. Stormwater runoff from new developments shall not adversely affect off-site
property, surface water quality and quantity, and/or critical areas.

1 Provisions shall be made to control the release of surface water runoff from
2 the development both during and following construction.

- 3 3. Clearing and grading, including drainage and erosion control measures,
4 shall conform to the requirements of the Washington State Department of
5 Ecology Stormwater Management Manual for Eastern Washington as
6 adopted by Pend Oreille County, or alternative measures that meet or exceed
7 these standards as determined by the County.
- 8 4. All development shall ensure that soil erosion and sedimentation of
9 drainage-ways will be controlled to prevent damage to adjoining property
10 and downstream drainage channels and receiving waters.
- 11 5. Surface drainage shall not be directed to or discharged onto county roads or
12 ditches within county rights-of-way unless approved by the County Public
13 Works Director or his/her designee.
- 14 6. Drainage controls may be required to regulate velocities of runoff water and
15 to control pollutants, erosion, and sedimentation if the County determines
16 that it is probable that damage could occur downstream to property or water
17 quality of receiving water bodies. Such controls may include landscaping or
18 re-establishing native vegetation, ponds, catch basins, bio-filters, and other
19 control structures or systems.
- 20 7. If required by the County, a drainage analysis shall be prepared. A drainage
21 report, prepared under the direction of and sealed by a professional engineer,
22 shall be submitted by the Applicant for review as part of the permit
23 application. The drainage report shall clearly define the measures proposed
24 to control stormwater runoff so as to avoid offsite, downstream impacts to
adjacent property and receiving water bodies. The County Engineer shall
have the authority to approve or reject the adequacy of drainage reports and
stormwater control measures, which decision is final and not subject to
administrative appeal.
8. The County may condition any approval of a development permit so as to
require clearing, grading and drainage controls to meet the requirements of
this Section.

C. The Following Clearing and grading activities are exempt from this section:

1. Any landfill or excavation of 500 cubic yards or less throughout the total
lifetime of the fill or excavation; and any fill or excavation classified as a class
I, II, or III forest practice under RCW 76.09.050 or regulations there under.

- 1 2. Any clearing of vegetation that is less than 50% of the area of a lot which is
2 2 acres or less in size.
- 3 3. Any clearing of vegetation that is less than 1 acre on lots larger than 2 acres
4 in size.

5 The Applicant proposes to alter the existing sign at the location to reflect the
6 new operations. The Applicant has a current clearing and grading permit, allowing
7 for a total volume of 6,447 cubic yards (cut and fill). The Applicant has indicated that
8 stormwater runoff from the project can be contained on site.

9 The proposed development on the subject property is subject to the
10 requirements of xx.30.020 and xx.30.030 of the Pend Oreille County Development
11 Regulations. During the construction and operation of the proposed facility on the
12 subject property, the applicant is required to comply with these and all other
13 statutes, regulations, codes, and rules that are applicable to the grading,
14 construction, and operation of the proposed use on the property. All applicable
15 permits, county, state, and/or federal, for such activity must be obtained prior to any
16 activity to develop the property as described in the application for the Conditional
17 Use Permit. The record reflects that the project as proposed and conditioned herein
18 will comply with the applicable PODR Development Standards.

19 **Conditional Uses**

20 xx.68.010 Purpose. The purpose of the Chapter is to establish the conditions under
21 which certain uses and structures may be permitted. Proposed conditional uses may
22 be permitted if the use is compatible with or can be conditioned to be compatible with
23 neighboring use in the area in which the application is sought.

24 xx.68.020 Applicability. Conditional use permits shall be processed as Class 2
25 Permits.

26 A. In considering conditional use permits, the County shall have the discretionary
27 authority to determine and recommend whether a conditional use permit should
28 be granted, and grant conditional use permits with safeguards and limitations
29 as are appropriate under this Title. The County may deny those applications
30 that it finds not in harmony with the purpose and intent of adopted plans,
31 policies and this Title. Each application is declared to be, and shall be considered
32 as a separate and unique case.

33 B. Conditions and safeguards may be prescribed which are in conformity with
34 adopted plans and policies and this Title which are considered necessary to
35 protect the best interest of the immediate neighborhood, surrounding area or

1 the County as a whole. These conditions and safeguards may include but are not
2 limited to the following:

- 3 1. Increasing the required lot size, setback or yard dimensions;
- 4 2. Limit the height of buildings or structures;
- 5 3. Control the number and location of vehicular access points;
- 6 4. Require the dedication of additional rights-of-way for future public street
7 improvements;
- 8 5. Require the designation of public use easements or drainage easements and
9 the recording of same;
- 10 6. Increase the number of required off-street parking and/or loading spaces;
- 11 7. Limit the size, shape, location and lighting of signs;
- 12 8. Require view-obscuring fencing, landscaping, diking, or other facilities to
13 protect adjacent or nearby properties;
- 14 9. Designation of sites and/or size of open space or recreational areas;
- 15 10. Site reclamation upon discontinuance of use and/or expiration or revocation of
16 the special exception permit;
- 17 11. Limit the period of time that the Conditional Use Permit is allowed;
- 18 12. Require annual inspections be made to insure compliance with the permit and
19 may require that the inspections be paid for by the owners of the conditional use
20 facility;
- 21 13. Require that upon change in ownership of the subject property, the new owner
22 may need to apply for and obtain a new Conditional Use Permit prior to commencing
23 commercial operations; and
- 24 14. Require the proponent obtain a liability insurance policy that directly relates
to impacts of the proposed use.

C. Conditions of Approval. At a minimum, all conditional uses must comply with
all County Codes and ordinances, the goals and policies of the Comprehensive
Plan as well as the following conditions, and any additional conditions that may
be imposed as a condition of approval by the County:

1. The Project Sponsor shall maintain on file at the County
Community Development Department an up-to-date Property
Management Plan, approved by the County, that identifies the
property owner and agents authorized to act on the property owners

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behalf, includes emergency contact information, and that identifies how the Project Sponsor will enforce compliance with the terms and conditions of approval.

2. An up-to-date copy shall also be provided by the Project Sponsor to all property owners within 300' of the boundaries of the property on which the vacation rental is proposed and all adjacent parcels under the ownership or control of the Project Sponsor.

3. The Project Sponsor shall maintain on file at the County Community Development Department, an up-to-date Site Plan, approved by the County, that identifies the location of required off-street parking, refuse and recycling facilities, emergency shut-offs, on-site amenities, structures, water, sewer, and power.

a. The Project Sponsor shall also provide documentation, subject to County review and approval, of adequate water and sanitary sewer service.

3. The Project Sponsor shall maintain on file at the County Community Development Department, an up-to-date certificate of occupancy documenting that the facility complies with the provisions in the International Building Code and International Fire Code for the occupancy type for which the use is classified.

a. It is important to note that converting an existing structure from one use to another use may result in requiring changes to the structure to meet the requirements of the new use.

4. The Project Sponsor shall provide such financial guarantees or deposits as may be required by the County to ensure full compliance with the conditions of approval. The County may utilize such deposits to offset the costs associated with responding to complaints for non-compliance.

5. The Project Sponsor shall be responsible for the collection and payment of all required taxes, fees, and charges and shall provide the County with annual documentation of full compliance.

D. All physical conditions required by the County shall be completed prior to reviewing authorization to occupy the use as defined in the application.

E. The failure to comply with the terms and conditions of approval may result in the suspension or revocation of a Conditional Use permit and/or civil or criminal penalties.

1 xx.68.030 Time Limitations. The project shall commence within five years of the date
2 of preliminary project approval. An Applicant who files a written request to the
3 Board of County Commissioners at least thirty days before the expiration of this five-
4 year period may be granted one one-year extension upon a showing that the
5 Applicant has attempted in good faith to commence the project within the five-year
6 period. The project shall be completed within five years of commencement unless
7 other approvals are granted by the County.

8 There was evidence presented at the hearing that the noise created by the
9 proposed cryptocurrency project could make the project incompatible with the
10 surrounding land uses in the area. It is unlikely that the daytime noise coming from
11 the site will differ significantly from the type of noise that was produced by the paper
12 mill that historically operated at the site. However, under the proposed CUP, the
13 cryptocurrency facility would operate around the clock. This would be a significant
14 deviation from any noise that was created by prior uses of the property. In response
15 to the noise concerns, the Applicant submitted a noise study that was conducted at
16 the project site. The results of the study indicated that the noise from the project,
17 which is emitted towards residential properties in the area, could be mitigated down
18 to 50 dBA during nighttime hours. Concerns were also raised regarding the disposal
19 of E-waste from the project. In response, the Applicant expressed a commitment to
20 follow any pertinent regulations regarding the disposal of E-waste and follow the best
21 management practices in this area. Based upon the record in this case, the Hearing
22 Examiner finds that the proposed CUP project can be conditioned to be compatible
23 with neighboring use in the area in which the application is sought.

24 IV. DECISION

A. SEPA Appeal

Based on the findings and conclusions above, it is the decision of the Hearing
Examiner that the Department's SEPA threshold DNS was based upon information
reasonably sufficient to evaluate the environmental impacts of the proposed
cryptocurrency mining project and the record reflects that the environmental factors
were considered in a manner which amounted to prima facie compliance with the
procedural requirements of SEPA. Therefore, the appeal of the SEPA threshold
determination is denied.

B. CUP Application

Based on the findings and conclusions above, it is the decision of the Hearing Examiner
to approve the proposed CUP subject to the following *revised* conditions.

1 This approval does not waive the applicant's obligation to comply with all other
2 requirements of other public agencies with jurisdiction over land development.

3 Minor revisions should be made to the conditions of approval to ensure proper
4 formatting, clarity, and consistency with the findings and conclusions above.

4 **C. Conditions of Approval:**

- 5 1. *All conditions imposed by the Hearing Examiner shall be binding on the*
6 *"Applicants," which term shall include the owner, owners, or developers of the*
7 *property, heirs, assigns and successors.*
- 8 2. *The proposal shall comply with provisions of the applicable zone and shall comply*
9 *with all other applicable chapters of the PCDR as amended.*
- 10 3. *The applicant shall develop the subject property in substantial conformance to the*
11 *site plan of record, dated 10/19/2021.*
- 12 4. *The Department shall prepare and record, with the Pend Oreille County Auditor, a*
13 *Title Notice noting that the property in question is subject to special conditions*
14 *imposed as a result of an approved land use action. The Title Notice shall serve as*
15 *public notice of the conditions of approval affecting the property in question. The*
16 *Title Notice should be recorded within the same time frame as allowed for an*
17 *appeal and shall only be released, in full or part, by the Community Development*
18 *Department. The Title Notice shall generally provide the following:*
19 *"The parcel legally described as [insert legal description] is the subject of a land*
20 *use action by a Pend Oreille County Hearing Examiner on [insert date],*
21 *imposing a variety of special development conditions. File CUP-19-001 is*
22 *available for inspection and copying in the Community Development*
23 *Department."*
- 24 5. Operations must be consistent and conducted within the parameters stated in the application, supporting documents and all fire codes, building codes, downward lighting, any other agency requirements/criteria and other applicable permit processes.
6. *The Applicant shall ensure that noise emitted from the proposed project does not intrude into any property where human beings reside and sleep at a level higher than 60 dBA between the hours of 7:00 a.m. and 10:00 p.m., and higher than 50 dBA between the hours of 10:00 p.m. and 7:00 a.m.*
7. *If at any time in the future, expansion of the project is proposed, (expansion of parking area, additional buildings etc.) then a Site Analysis will be required, a*

1 *SEPA may be required in addition an amended CUP will be required to reflect any*
2 *expansion of the current proposal.*

- 3 8. Any new signage must comply with Pend Oreille County Code.
- 4 9. The approach to the site must be maintained/constructed/repaired to the
5 satisfaction of the Pend Oreille County Public Works and/or WSDOT standard for
6 this use.
- 7 10. Any fluids, hazardous chemicals, batteries or other waste potentially generated in
8 the operation of the business must be disposed of to the satisfaction of the
9 Washington State Department of Ecology and Pend Oreille County Solid Waste.
- 10 11. *Disposal of any E-Waste shall comply with all federal, state, and local regulations,*
11 *and shall conform to all best practices and/or guidance from the Washington State*
12 *Department of Ecology.*
- 13 12. *The applicant shall ensure that all hazardous materials, including but not limited*
14 *to gasoline, motor oil, hydraulic oil, cleaning solutions, and any other materials*
15 *that are defined in Washington State or Federal regulations or statutes as*
16 *hazardous materials, are not allowed to penetrate the surface of the subject site.*
17 *The applicant shall ensure compliance with all applicable hazardous materials*
18 *regulations and/or statutes whether local, state or federal.*
- 19 13. Any onsite lighting must conform to chapter xx.30.020 Outdoor Lighting
20 Standards.
- 21 14. All applicable building land use, site evaluation and/or critical area ordinance
22 permits must be obtained in the proper sequence before development activities
23 may commence.
- 24 15. Any applicable permits must be obtained from the Washington State Department
of Fish and Wildlife, Washington State Department of Natural Resources,
Washington State Department of Ecology, United States Army Corp of Engineers,
and/or Washington State Department of Archaeology and Historic Preservation.
16. If soil disturbing activities exceed one acre, a Construction Stormwater General
Permit must be obtained.
17. Any amount of process wastewaters, including blowdown from cooling water
systems and waste streams originating from the treatment of source water supply
to these cooling water systems must obtain a waste discharge permit from Ecology
prior to discharge, as provided under Chapter 90.48 RCW, Chapter 173-216 WAC,
Chapter 173-220 WAC, Chapter 173-200 WAC and Chapter 173-201A WAC.

- 1 18. The Applicant shall be responsible for ensuring that the proposed use(s) are
2 within the limitations of its water rights. If the proposal's actions are different
3 than the existing water right (source, purpose, the place of use, or period of use),
4 then it is subject to approval from the Department of Ecology pursuant to Sections
5 90.03.380 RCW and 90.44.100 RCW.
- 6 19. Sound deadening technology is required if decibel levels off the property exceed
7 the 75-decibel level as stated in the application.
- 8 20. The approach to the site must be maintained/constructed/repared to the
9 satisfaction of the Washington State Department of Transportation standard for
10 this use.

11 DATED this 27th day of May, 2022

12 PEND OREILLE COUNTY HEARING
13 EXAMINER

14 

15 Christopher A. Anderson, WSBA #45361

16 **NOTICE OF FINAL DECISION AND NOTICE OF RIGHT TO APPEAL**

17 The decision of the Hearing Examiner on an application for a Conditional Use
18 Permit is final and conclusive unless within twenty-one (21) calendar days from the
19 issuance of the Examiner's decision, a party with standing files a land use petition in
20 Superior Court pursuant to Chapter 36.70C of the Revised Code of Washington
21 (RCW).

22 Pursuant to RCW Chapter 36.70C, the date of issuance of the Hearing
23 Examiner's decision is three (3) days after it is mailed, counting to the next business
24 day when the last day for mailing falls on a weekend or holiday.

On May 31, 2022, a copy of this decision will be mailed by first class mail to
the Applicants, and by e-mail to other parties of record. The date of issuance of the
Hearing Examiner decision is June 3, 2022.

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THE LAST DAY FOR APPEAL OF THIS DECISION TO SUPERIOR COURT BY LAND USE PETITION IS JUNE 24, 2022.

The complete record in this matter, including this decision, is on file during the appeal period with the Pend Oreille County Community Development Department, 418 South Scott Avenue, Newport, WA 99156, (509) 447-4821. The file may be inspected Monday through Friday of each week, except holidays, between the hours of 8:00 a.m. and 4:30 p.m. Copies of the documents in the record will be made available at the cost set by Pend Oreille County.

Pursuant to RCW 36.70B.130, affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.