

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant(s): Yvonne Swanberg and Tim Judkins
P.O. Box 1127
Friday Harbor, WA 98250

File No.: PCUP00-10-0006

Parcel No: 363341001

Location: 3136 Roche Harbor Road
San Juan Island, WA

Summary of Proposal: A conditional use permit application to prepare food and
remove 99CU003 restriction

Land Use Designation: Rural Farm Forest

Public Hearing: Held August 5, 2010

Application Policies and Regulations: SJCC 18.80.100(D) CUP Criteria

Decision: The proposal is approved.

S.J.C. COMMUNITY

AUG 23 2010

DEVELOPMENT & PLANNING

1 Pacific Northwest. There has been a significant rise in the interest of food in
2 relationship to wine. The wine industry has evolved to accommodate that interest in
3 food and wine pairing. It is common practice to actively associate wine with food,
4 and to demonstrate this, Mr. Query provided two magazines that discuss wine
5 industry marketing with respect to food. The food service associated with wine
6 events at the site has been very casual in the past, including barbecues, potlucks, and
7 catered events. According to Mr. Query, the lack of on-site preparation facilities
8 compromises the quality and safety of the food.

9 Mr. Query stated that the focus would always be primarily on the wine. Mr. Query
10 envisioned food being served as appetizers or in more formal winemaker dinners.
11 Yvonne Swanberg spoke about the anticipated kitchen equipment that would be
12 installed. She stated that a commercial kitchen would be installed according to code,
13 including refrigeration (not a giant walk-in cooler), gas range, warming oven,
14 dishwasher, and sinks. She reminded the Examiner that the permit is restricted to ten
15 events a year, which severely limits the frequency of events and prevents the use from
16 being considered a restaurant. Food will not be readily available for purchase; it will
17 only be prepared on-site for wine related events.

18 Terra Tamai testified regarding food safety. She is an experienced, professional
19 executive chef and caterer. Ms. Tamai testified that it is archaic for a winery not to
20 have a commercial kitchen. She has to be really careful when preparing food offsite
21 so that it is safe for customers to consume.

22 Bob Query then addressed the land division restriction. Mr. Query stated that he
23 researched the surrounding properties and discovered that none of the parcels are
24 taxed as agricultural, but rather, are all taxed as residential. A llama and camel graze
25 on a property to the south, but there are no other agricultural uses in the area.

Mr. Query acknowledged the intent of the restriction was to limit impacts of the
winery. The proposal, page 7 (site plan), shows that the winery consists of vineyards
and operations for processing, bottling, and storing wine. It is approximately 12 acres
in size. Mr. Query stated that if the intent is to buffer surrounding properties, his
clients were not asking to make the winery any bigger. It is not generating cash flows
to justify using the entire 33 acres. Rather, removing the restriction creates more
options for marketing the property because the large amount of vacant land not
suitable for growing grapes is not a selling feature, and has in fact, been detrimental.
Mr. Query stated that the parcel could have 2 houses without any other subdivision
or change in the conditional use permit. Because two houses could be built without a
change in the permit, Mr. Query did not consider removal of the restriction to be
problematic.

Tim Judkins, owner of San Juan Winery, testified that the area that the owners desire
to subdivide into a second lot primarily consists of rock outcroppings and a hill that
are not suitable for a winery. Thus, the subdivision would not increase or intensify

1 the winery use or, in his opinion, degrade the buffer for surrounding properties.
2 According to Mr. Judkins, the property has little agricultural potential at all. Mr.
3 Judkins stated the original intent of the restriction was to prevent separate ownership
4 of the vineyard, processing operation, and retail operation.

5 Yvonne Swanberg, another owner of San Juan Winery, testified that the change was
6 necessary to make the winery economically viable. She stated that the argument of
7 staff, that residences around the winery relied on the restriction when purchasing, was
8 not logical because the restriction only applies while the property is used as a
9 vineyard, which may cease at any time. Ms. Swanberg also described the difficulty
10 of not being able to prepare food onsite. In the past, she has prepared chili for harvest
11 pickers at her home and transported it to the vineyards for service.

12 Mr. Query also testified the change of circumstances since 1996 that would justify
13 removal of prohibition on land division would be the importance of wine in our
14 culture and the importance of marketing, given the economic circumstances of today.
15 Nothing physical about the land has changed.

16 Bill Giesy testified that the reduction in size of the winery property from 32 acres to
17 12 acres increases buffering of neighbors. Mr. Giesy also echoed Ms. Swanberg's
18 testimony that if the winery were to cease operations, the property could then be
19 subdivided. He also stated that under the current situation, there could be two
20 residences built without an additional land use permit not be subject to subdivision
21 ordinance. Consequently, Mr. Giesy also felt the concern about neighbor reliance is
22 not really valid.

23 Stan Reitan testified that he realizes the difficulty of running a winery. It is very
24 challenging; owners put a lot of money into the winery and don't get a lot out. Mr.
25 Reitan stated it was imperative to do something to make the winery a viable business
and that the community should do everything it can to support Ms. Swanberg and Mr.
Judkins.

Diane Giesy testified that there were three applicants originally, but that Ms.
Swanberg's husband has not devoted much energy to the winery. She stated that if
there is an option for Ms. Swanberg to continue this winery and get a potential buyer,
it will be someone who can purchase a small boutique winery. If something can't be
done, the winery might cease operation, and the property will become eligible for six
residential parcels, but there is only potential for four homes with picturesque views
of the winery if the subdivision restriction is removed.

Jack Yelverton testified that San Juan County has been trying to promote agricultural
uses because its location does not make it suitable for a manufacturing economy. He
stated that he has experience with starting up small wineries in California, where he
participated in financing and serving on the board of a winery. He commented that it
is difficult to make a profit with a small winery. He concluded that it should be good

1 public policy to help small agricultural-based uses to continue to prosper, provide
employment, and bring visitors to the island.

2 Ms. Thompson gave the staff rebuttal. She stated that the application feels like an
3 appeal of a conditional use permit that should have been brought fifteen years ago.
4 She asked at what point do we stop removing conditions. She commented that maybe
5 the changed circumstances here was that they (presumably the owners and the
County) thought they would be growing grapes all over the property and now realize
that the land does not support this type of use.

6 The Examiner stated that his concern with changed circumstances arises from the
7 doctrine of *res judicata*, which basically provides that a land use applicant cannot
8 reapply over and over again.

9 Bob Querry stated that the restriction arose out of misplaced fear that the winery
would be a noisy business, but that has not been the case. Mr. Querry also stated that
10 the topography of the land and the economic viability of the winery will keep it from
increasing in size.

11 Yvonne Swanberg testified that competition in Washington has increased
12 exponentially due to the Woodinville Wine Village popularity and that her retail sales
are down. She has to be more innovative to make a profit.

14 EXHIBITS

15 The following documents have been entered into the record:

- 16 Exhibit 1: Staff Report
17 Exhibit 2: Application Materials
18 Exhibit 3: Email from Agent
19 Exhibit 4: Staff report for 96CU008
20 Exhibit 5: Board of Adjustment Findings & Decision for 96CU008
21 Exhibit 6: Staff Report for 96CU008R
22 Exhibit 7: Board of Adjustment Findings and Decision for 96CU008R
23 Exhibit 8: Board of Adjustment Findings and Decision for 99CU003
24 Exhibit 9: Email from Jeff Otis
25 Exhibit 10: San Juan Vineyards Revised Site Plan dated 8/2/10
Exhibit 11: Email from Gary Franklin dated August 5, 2010
Exhibit 12: Email from Stan Reitan dated August 3, 2010
Exhibit 13: Email from Jack Yelverton dated August 3, 2010
Exhibit 14: Email from Diane Giesy dated August 4, 2010
Exhibit 15: Letter from Peter and Jeanne Herko dated August 4, 2010
Exhibit 16: Email from R.D. Larson dated July 29, 2010
Exhibit 17: Letter from John and Victoria Miller dated July 22, 2010
Exhibit 18: Washington Tasting Room Magazine, Summer 2010

- 1 Exhibit 19: Touring and Tasting Magazine, Summer/Fall Edition 2010
2 Exhibit 20: Aerial Map of property
3 Exhibit 21: Aerial Map of property, 32.84 acres
4 Exhibit 22: Letter from Yvonne Swanberg dated August 4, 2010

FINDINGS OF FACT

Procedural:

- 5 1. Applicant. The applicants are Yvonne Swanberg and Tim Judkins, owners
6 of the San Juan Vineyards.
7 2. Hearing. The Hearing Examiner conducted a hearing on the subject
8 application on August 5, 2010.

Substantive:

- 9
10 3. Site and Proposal Description. The applicant requests a conditional use
11 permit to allow for food preparation onsite for wine tasting events and to remove a
12 restriction on land division contained in Conditional Use Permit 99CU003. There is
13 no mention of where on-site food preparation is to occur in the application, except for
14 an arrow indicating a proposed kitchen area in the "pavilion" located onsite in the
15 Revised Site Plan (Exhibit 10).

16 The site currently has a vineyard, winery, storage building, office, store, chapel, and
17 pavilion,. There is an open field with a pond and an area of trees. The wine produced
18 at the winery utilizes grapes grown on the property as well as grapes imported from
19 Eastern Washington.

20 The parcel has an existing conditional use permit (99CU003), approved by the Board
21 of Adjustment in 1999, allowing lectures, classes, tours, wine tasting events, and
22 structures accessory to the winery. Classes, tours, and lectures are restricted to the
23 maximum of 50 people. Classes and lectures are located in the office; tours may be
24 located anywhere on the property. Outdoor events are restricted to wine tasting
25 events for promotion of the wine made at the winery. No more than 10 wine tasting
events are allowed per year with no more than two per month for a maximum of 150
people. Although that application requested approval of the site for weddings,
receptions, and special events, the Board did not approve those uses, as they didn't fit
with the agricultural processing, retail sales of agricultural products, and visitor-
serving facilities.

4. Characteristics of the Area. The surrounding parcels are used for
residential and agricultural purposes, though testimony at the hearing demonstrated
that, while neighboring properties may be designated for residential and agricultural
use, in actuality the properties have not been used for agriculture. These properties

1 are uphill from the winery property. Roche Harbor Road borders the property
2 downhill, at the southern boundary.

3 5. Adverse Impacts of Proposed Use. There was no evidence presented on
4 adverse impacts. Looking to the original conditional use permit, it appears that a
5 concern of the Board of Adjustment was incompatibility of vineyard operations with
6 adjoining residences. As testified by Mr. Querry, the majority of uses in the vicinity
7 are residential. As proposed, food preparation events will be limited to ten per year.
8 Especially since the vineyard can already host food events using off-site facilities, the
9 increase in impacts associated with these limited on-site food events should be
10 insignificant. As to dividing the property, it is possible that a limited portion of the
11 vacant parts of the parcel could be sold to another vineyard operation and thereby
12 increase the degree of incompatibility with surrounding uses. However, if this
13 property is limited to residential use, there would not be any compatibility problem.

14 CONCLUSIONS OF LAW

15 **Procedural:**

16 1. Authority of Hearing Examiner. The hearing examiner is authorized to
17 conduct hearings and issue final decisions on conditional use permit applications.
18 San Juan County Code ("SJCC") 18.80.020 Table 8.1.

19 **Substantive:**

20 2. Comprehensive Plan and Zoning Designations. The subject property is
21 designated as Rural Farm Forest, and the existing land use is vineyard and winery.

22 3. Notice. SJCC 18.80.030(A)(2)(a) requires publication of a notice of
23 application. This application was published on July 7, 2010. SJCC
24 18.80.030(A)(2)(b) & (c) also require notification of the application to all property
25 owners within 300 feet of the subject property and posting of the notice of application
on the subject property. According to staff, the applicant submitted an affidavit
verifying compliance with aforementioned notice requirements.

26 4. Permit Review Criteria. Under Table 3.2 of SJCC 18.30.040, agricultural
27 processing, retail, and visitor-serving facilities for products is a discretionary use,
28 subject to administrative permit approval and consistency with Chapter 18.60 SJCC,
29 Development Standards, unless the administrator requires a conditional use permit
30 based on project impacts under SJCC 18.80.090 and Table 8.2. It appears that the
31 administrator required a conditional use permit in this case. The Code criteria are
32 quoted below, with corresponding conclusions of law. However, because a
33 conditional use permit already affects this property, the Examiner must first
34 determine whether application for this conditional use permit is barred by principles
35 of collateral estoppel.

1 **Collateral Estoppel under Hilltop**

2 5. *Res judicata* applies to quasi-judicial land use decisions. *Hilltop Terrace*
3 *Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 31, 891 P.2d 29 (1995). The
4 term *res judicata* encompasses both claim preclusion, referred to as *res judicata*, and
5 issue preclusion, also known as *collateral estoppel*. *Shoemaker v. City of Bremerton*,
6 109 Wash.2d 504, 507, 745 P.2d 858 (1987). Issue preclusion prevents the relitigation
7 of a previously adjudicated issue. *Id.* It applies when there are: (1) identical issues, (2)
8 a final judgment on the merits, (3) privity, and (4) the absence of injustice for the
9 party against whom it is applied. *Willapa Grays Harbor Oyster Growers Ass'n v.*
10 *Moby Dick Corp.*, 115 Wn. App. 417, 423, 62 P.3d 912 (2003). Additionally, the
11 issue to be precluded must have been litigated and determined in the prior proceeding.
12 *Shoemaker*, 109 Wn.2d at 508.

13 In the context of land use applications, a second application for a similar proposal can
14 be considered only if there is a substantial change in circumstances or in conditions
15 relevant to the application or a substantial change in the application itself.
16 *Hilltop*, 126 Wn.2d at 32. In other words, a land use application cannot be
17 reconsidered if the application and circumstances relevant to the application are
18 identical.

19 Washington case law interpreting *Hilltop* has generally held that consideration of a
20 new application based solely on significant changes to a proposal is not permitted.
21 *DeTray v. City of Olympia*, 121 Wn. App. 777, 789, 90 P.3d 1116 (2004). Rather, the
22 changes must be relevant to and resolve the disputed conditions in the previous
23 application. For example, in *Hilltop*, the developer amended his original proposal to
24 mitigate the problems the Board had previously cited for denial, i.e., incompatibility
25 with surrounding uses. Even though the amended proposal remained “virtually
identical” to the original proposal, the changes (relocating a cell tower, accompanying
structures, and access road) resolved the core disputed issue of neighborhood
compatibility. Therefore, these changes were “substantial,” and *res judicata* did not
apply. *Hilltop*, 126 Wn.2d at 28. If changes in the second application (for essentially
the same land use project) do not resolve, or at least mitigate the original application's
disputed conditions, then the second application's changes are not “substantial.”
Consequently, *res judicata* bars reasserting essentially the same previously rejected
feature in a subsequent land use application. *DeTray*, 121 Wn. App. at 790.

In the testimony given at the public hearing, neither staff nor the applicants were able
to clearly identify the reasons the conditions were imposed in 1996 when the original
conditional use permit was considered. However, reviewing the Board of
Adjustment’s Findings and Conclusions helps clarify the intent of these conditions
(Exhibit 5). With respect to food preparation, Finding 19 addressed SJCC
16.44.050(D), which stated that the purpose of the Rural designation was to protect
agricultural and timber lands from urban and suburban forms of development. It

1 seems that the Finding was designed to ensure a connection between the agricultural
2 use and the retail operation on the site:

3 *“A portion of the wine sold and tasted in the retail shop would be*
4 *processed on the property, thereby establishing a connection between the*
5 *commercial and agricultural use of the property. To ensure a continued*
6 *connection between the agricultural use and commercial use of the*
7 *property, the applicant should demonstrate that a significant quantity of*
8 *wine is being processed on the property and displayed for sale in the retail*
9 *shop. Goods sold in the retail shop should be limited to wine, wine related*
10 *products, wine tasting, packaged food items, and other agricultural*
11 *products grown and produced on the property. On-site food preparation*
12 *should be prohibited.”*

13 The Examiner concludes that a sufficient change of circumstances exists to consider
14 the new application proposing on-site food preparation for wine tasting events. The
15 testimony at the public hearing sufficiently demonstrated that the pairing of food and
16 wine in wine tasting events has evolved into a common and important component of
17 wine marketing. Food pairings are now commonly associated with vineyard
18 operations and they were not at the time the conditional use permit was approved.
19 Further, the wine industry has become much more competitive since approval of the
20 conditional use permit and food pairing events are an important marketing strategy to
21 maintain commercial viability. Food pairings now constitute part of the connection
22 between agricultural and commercial use.

23 With respect to Condition 5 of the 1996 permit, which precluded further subdivision
24 for the life of the use, the second sentence provides some guidance on the intent of
25 the Board: *“At no time shall the ownership, management, or leasing of the retail shop*
be operated separately from the vineyard or winery.” Again, the Board’s intent was
to ensure the continued connection between the agricultural use and the commercial
use on the property. Mr. Judkins’ testimony similarly reflects this intent, having been
present at staff meetings regarding the conditional use permit. Furthermore, Finding
26 states that the size of the property was designed to provide and maintain visual
separation from other land uses and to contain any adverse impacts to be generated by
the winery.

27 The removal of Condition No. 5 is not as clear cut as allowing on-site food
28 preparation. In authorizing any change to conditions, the County must be careful to
29 avoid setting a precedent that encourages all permit holders to request modifications
30 to conditions simply due to the passage of time or because they didn’t get what they
31 wanted the first time around. There must be a legitimate and substantial change in
32 circumstances or application to justify the reconsideration of a permit condition. In
33 her testimony, Ms. Thompson identified a substantial change in the application. As
34 she noted, the change could be that the applicants are no longer proposing to use the
35 entire parcel for a vineyard. As testified, the wine industry has become more

1 competitive, making it unlikely that the entire parcel would be used for wine
2 operations. More significant, the property owners are no longer proposing to use the
3 entire property for a vineyard. At least as one alternative, they would like to sell off
4 the vacant portions of the parcel for residential use. This is a substantial change in
5 the application that justifies a modification to Condition No. 5. Modifying Condition
6 No. 5 to allow subdivision for residential use would adequately address the
compatibility concerns of the Board of Adjustment. Using some portions of the lot
for residential use, of course, enhances compatibility with adjoining residential uses.
In fact, such a condition would more effectively address compatibility issues because
any subdivision for residential use would permanently reduce the size of the vineyard.

7 **Conditional Use Permits – Criteria for Approval**

8 **SJCC 18.80.100(D)(1):** *The proposed use will not be contrary to the intent or*
9 *purposes and regulations of this code or the Comprehensive Plan;*

10 6. SJCC 18.20.010 defines “agricultural processing, retail, and visit-serving
11 facilities for products” as the commercial processing (preparing for market, packing,
12 and sales) of agricultural commodities, and the on-site facilities for retail display and
13 sale of such agricultural commodity products. As determined above, the pairing of
14 food and wine is now a common and accepted feature of on-site wine marketing and
sales and should be considered as part of the retail sales operation for a vineyard.
Allowing subdivision for residential purposes is also consistent with the RFF
designation, since single family residences are allowed outright in this district.

15 **SJCC 18.80.100(D)(2):** *The proposal is appropriate in design, character and*
16 *appearance with the goals and policies for the land use designation in which the*
proposed use is located;

17 7. As condition, no new structures will be allowed for the food processing
18 operations. The food operations will make no visible difference to the exterior of the
19 facilities. As discussed in the Findings of Fact, the food processing activities should
20 not create any significant increase in adverse impacts. As noted previously, single
family homes are allowed in the RFF district so the allowance of subdivision for that
purpose should be consistent with the criterion above.

21 **SJCC 18.80.100(D)(3):** *The proposed use will not cause significant adverse impacts*
22 *on the human or natural environments that cannot be mitigated by conditions of*
23 *approval;*

24 8. As discussed in the Findings of Fact, no significant adverse impacts are
25 associated with the proposal.

1 **SJCC 18.80.100(D)(4):** *The cumulative impact of additional requests for like actions*
2 *(the total of the conditional uses over time or space) will not produce significant*
3 *adverse effects to the environment that cannot be mitigated by conditions of approval;*

4 9. The most significant cumulative impact to consider is the precedent set by
5 allowing a change in conditions of approval. Given the fact that the applicants did
6 present a substantial change from their original proposal and the approved change in
7 condition will make the project more compatible with adjoining uses, the precedent
8 set here is a positive one. As to the cumulative impacts of allowing food processing
9 on-site for vineyards, as conditioned and proposed for this project the on-site food
10 preparation activities should not even be discernable to adjoining uses except in the
11 sense that vineyards that employ this marketing strategy are more likely to remain
12 viable operations.

13 **SJCC 18.80.100(D)(5):** *The proposal will be served by adequate facilities including*
14 *access, fire protection, water, stormwater control, and sewage disposal facilities;*

15 10. The staff report provides that the site is served by adequate public
16 facilities and there is no evidence to the contrary.

17 **SJCC 18.80.100(D)(6):** *The location, size, and height of buildings, structures, walls*
18 *and fences, and screening vegetation associated with the proposed use shall not*
19 *unreasonably interfere with allowable development or use of neighboring properties;*

20 11. No exterior structural modifications are proposed. Any new homes built
21 under the modifications to Condition No. 5 will have to comply with applicable
22 development standards, which ensure compatibility with adjoining uses.

23 **SJCC 18.80.100(D)(7):** *The pedestrian and vehicular traffic associated with the*
24 *conditional use will not be hazardous to existing and anticipated traffic in the*
25 *neighborhood;*

12. The limited opportunities for on-site food preparation will not have any
significant impact on traffic. For the residential use, subdivision approval is
contingent upon adequate traffic facilities.

SJCC 18.80.100(D)(8): *The proposal complies with the performance standards set*
forth in Chapter 18.40 SJCC;

13. For food preparation, the staff report determines compliance with this
condition because the site is already developed and there will be no new structures
built. There is no evidence to the contrary so the Examiner concludes the criterion is
met for on-site food preparation. The residential uses allowed by the modification to
Condition No. 5 will probably not trigger any requirements in Chapter 18.40 SJCC,

1 but if they do compliance will be addressed during subdivision and building permit
2 review.

3 **SJCC 18.80.100(D)(9):** *The proposal does not include any use or activity that would*
4 *result in the siting of an incompatible use adjacent to an airport or airfield (RCW*
5 *36.70.547); and*

6 14. There is no airport adjacent to the proposed uses.

7 **SJCC 18.80.100(D)(10):** *The proposal conforms to the development standards in*
8 *Chapter 18.60 SJCC.*

9 15. For on-site food preparation, no structures will be constructed and there
10 will be no significant increase in use of the vineyard so there is nothing discernable
11 from the record that would trigger the application of the Chapter 18.60 SJCC
12 development standards. For the proposed residential uses, compliance will be
13 addressed during subdivision and building permit review.

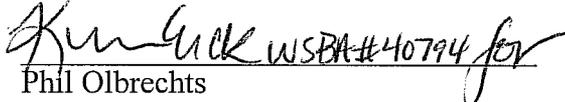
14 DECISION

15 The proposed project is consistent with all the criteria for a conditional use permit.
16 The proposal is approved subject to the conditions listed in the staff report. Condition
17 No. 5 of Conditional Use Permit 99CU003 is hereby modified to provide as follows:

18 5. *All vineyard operations shall remain on one lot. Portions of the*
19 *subject property that are not used for vineyard operations may be*
20 *subdivided for single-family use only. This condition shall be recorded on*
21 *any lots created by a subdivision.*

22 On-site food preparation events are expressly limited to ten per year. The primary
23 purpose of the events will be to feature and market wine.

24 Dated this 19th day of August, 2010.

25 
Phil Olbrechts
County of San Juan Hearing Examiner

1 **Effective Date, Appeal Right, and Valuation Notices**

2 Hearing examiner decisions become effective when mailed or such later date in
3 accordance with the laws and ordinance requirements governing the matter under
4 consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be
5 subject to review and approval by the Washington Department of Ecology pursuant to
6 RCW 90.58.140, WAC 173-27-130 and SJCC 18.80.110.

7 This land use decision is final and in accordance with Section 3.70 of the San Juan
8 County Charter, such decisions are not subject to administrative appeal to the San
9 Juan County Council. See also, SJCC 2.22.100

10 Depending on the subject matter, this decision may be appealable to the San Juan
11 County Superior Court or to the Washington State shorelines hearings board. State
12 law provides short deadlines and strict procedures for appeals and failure to timely
13 comply with filing and service requirement may result in dismissal of the appeal. See
14 RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to
15 promptly review appeal deadlines and procedural requirements and consult with a
16 private attorney.

17 Affected property owners may request a change in valuation for property tax purposes
18 notwithstanding any program of revaluation.
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