IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2005-485-1958

UNDER	the Land Valuations Proceeding Act 1948
IN THE MATTER OF	a decision of the Land Valuation Tribunal at Wellington dated 9 September 2005
BETWEEN	KENT'S NURSERIES AND HARRY DALE KENT Appellants
AND	UPPER HUTT CITY COUNCIL Respondent

Hearing: 27 September 2006

Court: Mallon J
Mr R P Young (lay member)

Appearances: Appellant appears in Person
N Levy for Respondent

Judgment: 6 August 2007 at 11.30 am

JUDGMENT OF THE COURT

Introduction

[1] Mr Kent's family own a property in Upper Hutt on which there is a nursery. Over several decades Mr Kent has had many issues with the Upper Hutt City Council ("the Council") over the rates payable on this property.[1] Such has been his focus on rating issues that, as he informed this Court, in October 2003 he suspended all work on the nursery to work full time on rates issues. In the context of all the issues about which Mr Kent is concerned, the appeal before this Court from a

[1] *Kent v The Valuer-General* HC WN CP No 57/90 27 July 1993; In the matter of objections by Kent and others: 1992 LVT; *Kent Nurseries v The Valuer-General* HC WN AP 370/97 19 May 1999; *Kent Nurseries v The Valuer-General* 4 November 1997 LVT; *The Valuer-General v Kent* HC WN AP No 227/92 18 August 1994.

decision of the Land Valuation Tribunal ("the Tribunal") is, in Mr Kent's words, "a side show".

[2] This appeal arises out of valuation assessments on the property in September 2001 carried out as part of the Council's three yearly revaluation of all properties. The issues on this appeal concern:

a) The appropriate valuation under s 2 of the Rating Valuations Act 1998 ("the RVA");

b) Whether the property is "farmland" under the Rating Powers Act 1988 ("the RPA") so as to qualify for rates-postponement under s 22 of the RVA; and

c) Whether the property is eligible for an "existing use" value under s 26 of the RVA.

The property

[3] The property is located in Trentham. It has frontages on to Fergusson Drive, Ranfurly Street and Liverpool Street. It comprises 8423 m^2 more or less in total. The property is surrounded by a "fully built up urban residential area".[2]

[4] The property is made up of six separate titles. One title (lot 42 DP 3605) is owned by Harry Kent and Clara Buick ("the smaller property"). The smaller property is located at 514 Fergusson Drive. The land area is 1012 m^2. Because of the separate ownership this property was separately valued in the September 2001 revaluation (Valuation Assessment No 15900 45001) as it had been in previous revaluations also.

[5] The other titles (Lots 40, 41, 46 and Part Lot 47 DP 3605 and Part Lot 1 DP 12640) are in the name of Kent Nurseries ("the larger property"). The larger

[2] Tribunal decision at [3].

property is located at 510-512 Fergusson Drive. The land area of those titles is 7411 m^2. These titles were valued together (Valuation Assessment No 15900 45000).

[6] The property has been used as a nursery since 1926. In its heyday, the nursery serviced 12 retail outlets. This business has since declined to the point where the Tribunal concluded it was no longer being used principally or exclusively as a nursery. Mr Kent does not agree with this conclusion.

[7] The Tribunal's description of the land, as at the Tribunal's site inspection in March 2004, is as follows:

a) Lot 42: There is a two bedroom dwelling built in 1930. It is in a poor state of repair. There are two disused and overgrown glass house frames. There is a shed located at the rear which houses the central power supply and irrigation control system for the nursery.

b) Lot 41: There is a standard three bedroom house built in 1924 in which Mr Kent lives. There is an adjoining shed which Mr Kent says is used for development of prototype nursery equipment.

c) Lot 40: This is vacant land.

d) Lot 46: There are two glasshouses used for propagation. The front part is used as a display area for retail sales. This lot is the best maintained part of the nursery.

e) Part lot 47: The land appeared disused and overgrown. There is a small portable shed near the rear of this lot.

f) Part lot 1: This also appeared disused and overgrown. There are two disused glass houses at the rear.

[8] The Tribunal described the land as being "generally overgrown with grass and untrimmed trees or shrubs". The glass houses and other buildings were

described as "falling into disrepair". The storage sheds were described as "clustered and neglected".

Zoning

[9] For many years the property was in a residential zone. The nursery was a non-conforming activity. It had existing use rights to operate as a nursery because it was established before the Town Planning Act 1953.

[10] In the proposed district plan publicly notified on 26 August 1998 it was proposed that the site be zoned business commercial. Kent Nurseries lodged an objection to the 1998 proposed zoning, seeking that it be zoned rural lifestyle, but withdrew its objection on 4 July 2000. The proposed district plan was published on 27 February 2002.[3]

[11] Nurseries are a permitted activity in the business commercial zone subject to their meeting the performance standards. If they do not meet these standards they are discretionary activities.

Legislative scheme

Overview of rating provisions

[12] The relevant legislation is that which applied when the revaluation was carried out and the subsequent review and decisions were made.[4] Rates were determined by local authorities based on values in the district valuation roll.[5] Authorised rating systems included "the capital value rating system" whereby rates were levied on the capital value of rateable property.[6] That was the system adopted by the Council in Upper Hutt.

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[3] The Tribunal decision at [11] refers to the property being zoned business commercial in a "Transitional District Plan notified on 24 September 1991. That reference appears to us to be in error.
[4] The Rating Powers Act 1988 has since been repealed. A number of amendments have also been made to the Rating Valuations Act 1998.
[5] Section 6 RVA 1998 and s 95 of the RPA.
[6] Section 95 of the RPA.

[13] The local authority was permitted to apply a differential rating to these values as between types or groups of properties.[7] In Upper Hutt the Council applied differential rating between residential and commercial properties.

Revaluation

[14] A local authority was required to revise its valuation roll at intervals of not more than three years.[8] There was also provision for valuations to be altered or updated by an authority on its own motion or by request of an owner or occupier.[9] Valuation services were to be carried out by a registered valuer.[10]

Valuation under s 2

[15] The "capital value" of the land was defined as meaning[11]:

> "… the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require"

Separate valuation

[16] Any land that was capable of separate occupation could be treated as separate property for the purposes of the valuation roll whether or not it was separately occupied. This could be done "if in the circumstances of the case it is reasonable to do so".[12]

Rates-postponement values of farmland

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[7] Section 80 of the RPA.
[8] Section 9 RVA 1998.
[9] Sections 14 and 16 of the RVA.
[10] Section 8 RVA 1998.
[11] Section 2 RVA 1998.
[12] Section 7(4) of the RVA.

[17] There was provision for rating relief for farmland where values were influenced by the prospect of future urban development.[13]

[18] In order to qualify for this relief a property needed to be "farmland". That was defined as meaning:[14]

> "rateable property that is separately rated, and is used exclusively or principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees or poultry or other livestock;"

[19] The value of the land also needed to be "in some measure attributable to the potential use to which the land may be put for residential, commercial, industrial or other non-farming developing".[15]

[20] Rates postponed were deemed to be written off at the end of five years from the commencement of the rating period in respect of which they were made and levied.[16] Rates postponed became payable immediately in three circumstances, the relevant ones for present purposes being:[17]

> "(a) The land ceasing to be farmland; or
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> (b) The value of the land ceasing to be to some extent attributable to the potential use to which the land may be put for residential, commercial, industrial, or other non-farming development; or …"

"Existing use" special rateable value

[21] There were also provisions intended to deal with potential rating anomalies created by permitted uses of land being at variance from other uses in the area.[18] These special values were intended to preserve uniformity in the values as between comparable parcels of land used for the same purposes.

[22] These provisions included provision for the local authority of its own motion, or on the application of the owner or occupier of the land, to determine a special

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[13] Section 22 of the RVA and Part X of the RPA.
[14] Section 2 of the RPA.
[15] Section 22(1) of the RVA.
[16] Section 163 of the RPA.
[17] Section 164 of the RPA.
[18] Sections 23 to 31 of the RVA and Part XI of the RPA.

rateable value for "existing use" land.[19] The special rateable value for an "existing use" property was assessed on the assumption that:

> "(a) The actual use to which the land is being put is a permitted activity in an operative district plan in force for the district in which the land is situated (whether or not such a plan is for the time being actually in force); and
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> (b) That use will be continued for the purpose for which the land is actually being used at the time of valuation; and
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> (c) The improvements on the land will be continued and maintained or replaced in order to enable the land to continue to be so used."

Removal of rates-postponement or special rateable values

[23] No rates-postponement value for farmland or certain of the special rateable values needed to be determined unless in the opinion of the local authority that value would be less than the applicable value system of rating in force in the area.[20] However this provision did not apply to the special rateable value for "existing use" properties.

[24] When land "ceases to be used for the purpose" that authorised the rates-postponement value or special rateable value the ratepayer was required to notify the local authority.[21] The value was then treated as having been removed from the valuation roll on the last day of the preceding or current financial year in which the use ceased (depending on whether rates for the current year have been levied).[22] If a rates-postponement value or special rateable value is removed from the valuation roll written notice must be given to owner or occupier.[23]

Objection rights

[25] A general revaluation was to be publicly notified. The owner or occupier of the land was to be given written notice of a refusal to determine a rates-

[19] Section 26 of the RVA.
[20] Section 28 of the RVA.
[21] Section 30(1) of the RVA.
[22] Section 30(2) of the RVA.
[23] Section 31 of the RVA.

postponement value or special rateable value, or the removal of the rates-postponement or special rateable value. There was a right of objection in relation to a revaluation or rates-postponement or special rateable values determinations or removals.[24] The objection was referred to a registered valuer for review.[25] If the objector was dissatisfied with the review the objector had a right to require that the objection be heard by a Land Valuation Tribunal.[26]

September 2001 valuation and review

[26] A general revaluation in Upper Hutt was carried out in September 2001. This resulted in new valuations for both the smaller property and the larger property as follows:

Valuation reference	15900 45000	15900 45001
Capital values	$445,000	$100,000
Land values	$400,000	$77,000
Value of improvements	$45,000	$23,000

[27] Mr Kent objected to these revised valuations on 12 December 2001. Mr Kent's objection was referred to Mr Blucher. Mr Blucher was a registered valuer employed by Quotable Value NZ Limited and had responsibility for the revaluation. Mr Blucher set out his findings in a letter to Mr Kent dated 24 June 2002.

[28] Mr Blucher noted that the 1 September 2001 values originally notified to Mr Kent were assessed assuming a residential zoning. He referred to the proposed district scheme notified on 26 August 1998 proposing rezoning of the land to business commercial. He said that the Council had advised that the business commercial zone was now "operative" in respect of the property because there had been no appeal received within the required time.

[24] Section 32 of the RVA.
[25] Section 34 of the RVA. The reviewer can be the same person who undertook the valuation or made the decision objected to.
[26] Section 35 of the RVA.

[29] Mr Blucher considered that the value of the property lay chiefly in the land and that due to the size, locality and nature of the property it offered "excellent potential for either residential or commercial development such as a motel, restaurant, suburban shops or service industry". He said that his assessment was based on sales of commercial land within Upper Hutt City. His revised valuations were as follows:

Valuation reference	15900 45000	15900 45001
Capital values	$380,000	$100,000
Land values	$350,000	$80,000
Value of improvements	$30,000	$20,000

[30] The nursery had qualified for rates-postponement values because of its operation as a nursery. Rates-postponement values had been assessed from 1989.[27] The rates-postponement for the smaller property was removed immediately prior to the 2001 revaluation.[28] This is recorded in a print out of the valuation record as having occurred on 4 October 2001. Other than this record, the Tribunal decision against which this appeal has been brought notes that there was no documentary evidence before it of the decision to remove the rates-postponement value for the smaller property.

[31] The rates-postponement value was removed from the larger property following Mr Blucher's review as part of the objection process. Mr Blucher's letter of 24 June 2002 said this:

[27] The refusal of the Council to backdate the rates-postponement value to the date of Mr Kent's 1988 application was the subject of unsuccessful challenge by Mr Kent. In 1991, following the transfer of a half share in Lot 42 to Mr Kent's cousin (Ms Buick), the Council removed the rates-postponement values. The Tribunal overturned this decision, and the Tribunal's decision was upheld on appeal. The Tribunal decision of 9 September 2005 (the subject of this appeal) records at [5] "…and the RPV's continued under a further Tribunal decision made in October 2001." We have no copy of, or reference to, a Tribunal decision in October 2001.

[28] Mr Blucher was originally mistaken about this, understanding that it had been removed in the 1998 revaluation (as set out in his letter to Mr Kent dated 7 October 2002) but he corrected this by the time of his second statement of evidence (February 2004) before the Tribunal.

4. Since 1991[29] the property has attracted Rates Postponement values as 'farmland'. This was first set at a time when the property operated as a viable nursery operation. In its heyday we understand this operation used to service up to 12 retails outlets. Our recent inspection of the property depicts a property that is run-down and overgrown.

   Over time with increased competition from local garden centres, this business has dramatically fallen off to the extent that we no longer consider this operation to be economically viable.

5. Today the operation is outmoded and the property severely under utilised for the current scale of operation. Generally vegetable seedlings, herbs and ornamental shrubs are propagated on site. These are sold at local flea markets in Porirua and Victoria Street, Wellington. Part of the site is also used for display and retailing direct to the public. A large proportion of the land is largely idle and overgrown.

…

ACTION

…

3. The current use as a nursery is a conforming use within the Business Zone. For this reason existing use rights no longer apply and any farmland values should be removed.

[32] The revised values were to be used for rating purposes with effect from 1 July 2002. The removal of the rates-postponement values had the effect that the postponed rates that had not been written off became due for payment. Rating invoices were issued on the basis of the revised values.

Tribunal decision

[33] Mr Kent lodged an objection with the Tribunal. The issues before the Tribunal were the same as those that are agreed to be the issues in this appeal, namely:

a) What is the appropriate value to be determined under s 2 of the Rating Valuation Act 1998?

[29] In fact the rates-postponement values had been in place since 1989.

b) Is the property eligible for rates postponement values in accordance with s 22 of the Rating Valuation Act 1998?

c) Is the property eligible for existing use values in accordance with s 26 of the Rating Valuation Act 1998?

[34] The Tribunal considered the zoning to be business commercial. It considered that it was not material whether the nursery was a permitted use or a non-complying activity (because of the non-compliance identified by Mr Blucher in relation to screening along the eastern boundary adjoining residential development and the two residential premises at ground level). This was because the Tribunal accepted Mr Blucher's conclusion that the land was saleable for development in the business commercial zone and the price would be influenced by zoning without regard to the non-complying aspects. The Tribunal reviewed Mr Blucher's valuation method and concluded that the s 2 values were correctly assessed at $380,000 for the larger property and $100,000 for the smaller property.

[35] The Tribunal also rejected Mr Kent's objection concerning the removal of rates-postponement values. A preliminary issue concerned the manner in which Mr Blucher's view had been acted upon. Mr Kent submitted that the decision to remove the rates-postponement values was outside Mr Blucher's brief and further that the Director of Corporate Services at the Council had acted on Mr Blucher's advice without the necessary delegated authority from the Council. Applying *Telecom New Zealand v Christchurch City Council* CA 25/04 7 March 2005 at [39] the Tribunal considered that its function was to decide whether the land was no longer farmland. Whether the power to remove the rates-postponement value was validly exercised was an administrative law question that could be determined only by judicial review.

[36] The Tribunal then turned to consider whether the land had ceased to be farmland. It said this:

> [37] Mr Blucher considered that the nursery activity has diminished over the years so that it was outmoded and the property had become severely under-utilised for the small scale of the current operation in 2002. After

> viewing the property in 2004 we are compelled to agree that many of the buildings are virtually disused or in poor repair and the site is overgrown. There was evidence of seedlings, herbs and ornamentals being propagated on site in a volume that might require the use of a few glasshouses. To a lay person the glasshouses appear neglected. Although much of the land appears idle and overgrown, Mr Kent told the Tribunal that it was in use for future plants and flowers, and the preparation of growing media. There is no evidence of strong sales volumes and we accept that Mr Kent appears to service only a few local outlets as well as selling to the public from the property.
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> [38] The display area, occupying about two thirds of Lot 46, is well maintained but the rest of the land is not. While conducting the Tribunal over the property Mr Kent pointed to overgrown areas which he said were covering nutrient soil, irrigation systems and plant stock. We were not persuaded that much of the land was actually in use apart from some glasshouses and the potting and selling area. The pervading impression was that the overgrown areas were for the time being neglected.
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> [39] It is a fair inference from the appearance of the property that the burden of running the nursery and maintaining the property has got beyond Mr Kent. It does not convey any impression of organisation and businesslike activity. While it may be unfair to Mr Kent to draw conclusions from mere appearances, we cannot find in the evidence any of the features of a business operating significantly beyond the scope of the small retail area on Lot 46.
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> [40] Mr Kent must realise that the Tribunal will be influenced by appearances and will attempt to reach a common sense judgment on a practical question concerning the utilisation of the land unless there is some credible evidence to the contrary. He furnished the Tribunal with a large volume of written material but nothing amongst it to demonstrate that the land is being actively used for propagation and production of seedlings. We have reached the conclusion that it is largely neglected.
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> [41] We accept Mr Blucher's evidence that the houses appear to be in poor condition and that various parts of the property could be developed for a range of uses without affecting the nursery operation. It would have been helpful if the respondent had provided expert evidence from a nurseryman to assist the Tribunal to evaluate the state of the operation from appearance of the land, but we have found in the end that whether or not the land is being used as farmland is a practical question that can be decided on the available evidence.
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> [42] The Tribunal rejects evidence that the property is currently utilised as a working nursery to a level that would warrant its classification as farmland.

[37] The Tribunal reviewed[30] Mr Kent's evidence about his activities in relation to the nursery from about 1980 onwards. It referred[31] to Mr Blucher's evidence that the

[30] At [48] to [53].

present operation, which included retailing as well as plant propagation, could be accommodated on only a small part of the site. It considered[32] that idle land was available for redevelopment and "given the commercial zoning" its use was "commercial" and was not part of the farming operation.

[38] It accepted that the focus was on principal use, avoiding economic considerations. It said there was a mix of residential, nursery, retail and idle land but that it was "nevertheless patently obvious that the use of the property as farmland has diminished to the stage at which we are satisfied on the balance of probabilities that it is no longer the principal use."[33]

[39] The Tribunal also dismissed Mr Kent's objection to the refusal to assess special rateable values. The Tribunal accepted Mr Blucher's conclusion that there would not be any material difference between the existing use values and the s 2 value. This conclusion was based on his evidence which the Tribunal summarised as being:

a) To the extent that the residential dwellings were a non-conforming activity there was little if any difference between residential and commercial land values and so a special rateable value was not deemed necessary;

b) Mr Blucher considered that the other areas of non-compliance could be accommodated with minimal cost and disruption and were not significant enough to warrant the assessment of a special rateable value; and

c) The nursery was a permitted activity within the business commercial zone and Kent Nurseries had existing use rights.

Summary of submissions

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[31] At [54].
[32] At [55].
[33] At [56] to [57].

First issue: section 2 value

[40] Mr Kent does not contest the s 2 valuation for the larger property. He does take issue with the valuation for the smaller property. His first submission under this issue is one he puts as follows:

> "… the allocation of the various rating differentials will correctly determine the basis of the determination of section 2, of the Rating Valuations Act 1988, valuations. In the appellants' submission, this appeal will need to address two general questions in respect of the first issue:
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> - Should a local authority be determined to allocate a property to a residential rating differential, the section 2 valuations should be aligned with comparable residential valuations?
>
> - Should a local authority be determined to allocate a property to a business rating differential, the section 2 valuations should be aligned with comparable business commercial or business industrial valuations?
>
> The appellants seek positive findings.

[41] As we understand this submission, Mr Kent considers that the value of the smaller property was assessed by reference to residential properties when it should have been assessed by reference to commercial properties if a commercial differential was then to be applied by the Council. He submits that comparable values were $49,000 for the land value and not the $80,000 land value assessed by Mr Blucher.

[42] He also submits that Mr Blucher used an incorrect method to value the land. He submits that Mr Blucher did not comply with the principle that land value and capital value must be assessed first, with the value of improvements being the difference. For this submission Mr Kent relies on Mr Blucher stating that "the property has been valued as a vacant site with a nominal value for the dwelling and nursery improvements".

[43] Ms Levy submits that Mr Blucher adopted the correct approach.

Second issue: rates-postponement value

[44] Mr Kent submits that whether the property is "farmland" is determined by reference to the use to which the land is put by its owner or occupier. Here that is a nursery (which, he says, Kent Nurseries intends to continue to operate). Whether the use is economic is irrelevant, as is the relevant zoning. Mr Kent submits that the local authority and the Tribunal had no evidence of a change in use and therefore no basis to remove the rates-postponement value.

[45] Ms Levy submits that a de minimis use can be disregarded, that use can change over time, and that in this case the nursery has declined to such an extent that it can no longer be described as a principal use let alone an exclusive use. She also submits that Mr Kent was given ample opportunity to produce evidence of a nursery operation but failed to do so.

The third issue: special rateable value

[46] Mr Kent submits that the issue of a special rateable value was not properly before the Tribunal. This is because, Mr Kent says, Mr Blucher did not determine a special rateable value, did not give notice of removal and no objection could be lodged before its removal.

[47] Mr Kent further submits that Mr Blucher was wrong to say that there was no material difference between the "existing use" farmland value and the s 2 value (whether a residential or business commercial value). Mr Kent submits that Mr Blucher appeared to have considered special rating values that applied to unused residential land from an earlier High Court case. Mr Kent submits that was an error because farmland values as assessed in the 2001 revaluation were substantially different.

[48] Ms Levy submits that the property was used for a permitted use, but even if it was not the special rateable value would not be substantially different from the s 2 value.

Appeal jurisdiction

[49] Any person affected by an order of the Tribunal may appeal to the High Court. The appeal is by way of rehearing.[34] The High Court may confirm, discharge or vary the order of the Tribunal, or refer it back to the Tribunal for further consideration. It may generally make such order as it considers just and equitable in the circumstances of the case.[35]

[50] This means that this Court considers itself the matters that were before the Tribunal and which are the subject of the appeal. It does so on the basis of the record from the Tribunal and must bear in mind any advantages the Tribunal had in seeing and hearing the witnesses and, in this case, in inspecting the property.

Issue 1: section 2 value

Preliminary issue: zoning

[51] Mr Blucher's letter dated 24 June 2002 advised Mr Kent that the September 2001 valuation did not take into account the "likely change" to the zoning. He considers that the review of the valuation should take into account this zoning. In his first statement prepared for the Tribunal he stated that "to all intents and purposes" the zoning provisions in the proposed district plan "are effectively operative".[36] In his final statement Mr Blucher referred to the revaluation as at September 2001 being "some 12 months after the zoning, emphasis should be given to the amended zoning, as the basis of any revaluation".[37]

[52] The Tribunal proceeded on the basis that the Business Commercial zoning was "operative" when Kent Nurseries' objection to the proposed zoning was withdrawn.[38] The operative date of the District Plan is determined by clause 20 of the first schedule of the Resource Management Act 1991 ("the RMA").[39] (We

[34] Section 26(1) Land Valuation Proceedings Act 1948.
[35] Section 26(4) Land Valuation Proceedings Act 1948.
[36] Statement of evidence dated September 2002.
[37] Statement of evidence dated February 2004.
[38] Tribunal at [11].
[39] As at September 2001.

understand the District Plan was publicly notified on 27 February 2002[40] and became operative after that date pursuant to clause 20 of the first schedule). However s 19[41] of the RMA enabled an activity to be undertaken in accordance with the relevant change to a plan "as if the new rule or change had become operative and the previous rule were inoperative" where any submission had been withdrawn and the time for appeal had expired.

[53] In these circumstances we consider that Mr Blucher, and in turn, the Tribunal were correct to consider the proposed zoning as the relevant one in assessing the s 2 values, although the District Plan was not published until 27 February 2002. For all practical purposes, in terms of the willing buyer/willing seller principle encapsulated by the s 2 definition, this proposed zoning would be the one most strongly influencing the value of the property. That is because a buyer would purchase the property knowing that it was to be treated "as if" the Business Commercial zoning was operative and knowing that the plan was to become operative in accordance with clause 20 of the first schedule of the RMA.

The larger property

[54] Mr Kent does not take issue with Mr Blucher's revised valuation for the larger property. This was assessed on the basis of comparable commercial properties (and a commercial differential was applied).[42] We therefore do not consider this further.

The smaller property

[55] Mr Kent apparently understands that Mr Blucher's land value has been based on comparable residential land values because the value certificate refers to the land

[40] The Tribunal at [11] and Mr Miller's evidence before the Tribunal refer to the District Plan being "published" on this date. We understand this to mean that this was the date the District Plan was publicly notified.
[41] As at September 2001.
[42] The issue of the differential to be applied was not a matter for the Tribunal or for this Court to determine.

as being category "RD3C". He considers that the land value should have been compared with recent valuations for two adjacent quarter acre properties which both had two land values of $49,000 and are in the "CRSB" category. Mr Kent contends that the valuation for the smaller property should be:

Valuation reference	15900 45001
Capital values	$69,000
Land values	$49,000
Value of improvements	$20,000

[56] In response to Mr Kent's submissions the first issue to be addressed is whether Mr Blucher's land values were in fact based on residential or business commercial sales.

[57] It can be seen (refer [29] above) that the difference between Mr Blucher's revised value and Mr Kent's proposed valuation is in the land value. Mr Blucher had revised this land value upwards from $77,000 at the time of his review (refer [26] above). His letter of 24 June 2002, which set out the revised s 2 values for both the larger and smaller property, stated that his assessment was on the basis of the Business Commercial zone and "based on sales of commercial land" in Upper Hutt. The letter does not distinguish in this respect between the smaller and larger properties. On its face, therefore, the land value of the smaller property has been based on business commercial sales, although we note that the land value for the smaller property has gone up for this reason but the land value of the larger property has gone down.

[58] Mr Blucher's first statement of evidence[43] before the Tribunal refers to valuing the smaller property "based on its existing use as a dwelling". His analysis shows land value assessed at $80 per m^2. It is not entirely clear where that figure has come from because both residential land sales (ranging from $90 to $124 per m^2) and Upper Hutt vacant commercial and industrial land sales (ranging from $29.02 to $81.67 per m^2) figures are included in the appendices to which he refers. It is,

however, apparent that his rate of $80 per m^2 is the same as that which he applied to Lot 41 (which has the same land area as the smaller property), less than Lot 40 (a corner Lot which also has the same land area and to which a rate of $85 was applied) and greater than the rate applied to the remaining larger lots that comprise the balance of the larger property (where the rates range from $47 to $55 per m^2).

[59] His later statement of evidence[44] refers to industrial/commercial land sales ranging from $20 per m^2 for large blocks in remote side road localities up to $100 per m^2 for smaller sites in main road localities. A schedule of these sales is attached and residential land and house sales close to the city centre are also provided "as a comparison". His statement further refers to the smaller property being "also" considered based on its existing use as a dwelling.

[60] As we understand it, Mr Kent considers that the smaller property has been compared with (the higher) residential sales and that the (the higher) commercial rating differential has been applied. Given that the rate per m^2 for the smaller property is within (although at or towards the top of) the industrial/commercial range and below the lowest in the range of comparable residential land sales, and in light of the letter of 24 June 2002, it must be inferred that the value has been derived from comparable industrial/commercial sales.[45] That disposes of the first part of Mr Kent's objection to the s 2 value.

[61] The next issue is Mr Kent's submission that the land value for the smaller property was too high when compared with later valuations of his property described by Mr Kent as having a print date of 4 April 2003. These valuations were said to be assessments as at 1 September 2003. They related to the larger property and were said to be "a result of a subdivision".[46] They divide the larger property into three.

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[43] At 7.4 (September 2002).
[44] Paragraph 117 (February 2004).
[45] We note that the land value went up on the review, but in light of the comparable sales information provided in Mr Blucher's evidence there is nothing to indicate that this was other than an adjustment in light of the further work involved in the objection/review process.
[46] Mr Kent has objected to this, but this objection is not before us in this appeal.

[62] One of those three is Lot 41 (on which there is the house in which Mr Kent lives). Under the 4 April 2003 notice that Lot has been assessed with a land value of $49,000 as at 1 September 2001. Mr Kent refers to that valuation as supporting his submission that the land value for the smaller property of $80,000 was too high. Lot 40 also has a land value of $49,000 under the 4 April 2003 notice.

[63] Lot 41 and the smaller property (Lot 42) adjoin each other and have the same land area and shape. That might suggest that the two lots should have the same land values as at 1 September 2001. What also might suggest comparability between Lot 41 and the smaller property (Lot 42) is that both Lot 41 and Lot 42 were assessed by Mr Blucher at $80 per m^2 when considering Mr Kent's objection to the September 2001 revaluation. Lot 40 also has the same land area and shape as Lots 41 and 42, but it is a corner section.

[64] On the face of it, these values indicate that the land value for the smaller property (Lot 42) of $80,000 was high. The closest comparison is between Lots 41 and 42 because they adjoin each other and are not corner lots. At the hearing we asked Mr Kent about any differences between Lots 41 and 42. Mr Kent referred to Lot 41 having a "flood channel" over it which Lot 42 does not. That may be a reason for the lower value of Lot 41. It also may not be a reason, and there may be other reasons. We also do not have evidence as to whether a difference in value between Lot 40 and Lot 42 is or is not appropriate. In the absence of expert valuation evidence on this matter, we are left to speculate. Speculation does not provide a proper basis on which to alter the values determined by the Tribunal.

[65] That is also the position in relation to why Lot 42 was assessed at the upper end of the commercial end industrial land sales (referred to at [58] above). There may be reasons as to why that was or was not appropriate, but in the absence of expert evidence we are left to speculate.

[66] It was for Mr Kent to prove that the s 2 values were wrong. It is not sufficient for Mr Kent to point to possible anomalies. As was said in *Kent's Nurseries v the Valuer-General* HC WN AP 370/97 19 May 1999: "In a case such as

this, absence of any comparable valuation by an expert valuer makes it very difficult indeed for the appellants to succeed, and we find that the challenges to the s 2 valuations fail." We are in the same position and reach the same conclusion.

[67] Mr Kent's final submission under this issue is that Mr Blucher adopted a wrong methodology. We consider that Mr Kent has misinterpreted Mr Blucher's approach. Mr Blucher considers that the highest and best use of the property is a commercial use in which the improvements would be of nominal value. It is for that reason that Mr Blucher has referred to the improvements as having a nominal value.

Issue 2: rates-postponement value

Case law

[68] There are a number of High Court decisions which have examined whether land qualifies as "farmland" for the purposes of rates-postponement values. Some of those decisions have involved Kent Nurseries because rates-postponement values have been one of the rating issues raised by Kent Nurseries over the years. We set out what we see as the relevant points in the High Court decisions to which we were referred.

[69] The policy of the legislation providing for this kind of rating relief was described in *Valuer-General v Tepene Tablelands Ltd* [1993] 2 NZLR 336 at 344 as follows:

> "It seems reasonably plain to us that there has been a gradually evolving parliamentary intent to protect the owners of farming properties from the extraordinary impact of rates levied by territorial authorities in circumstances in which, and to the extent that, those rates are fixed in relation to land values which reflect something more than the value of the farm as a productive unit and as a home for someone who uses the property principally for farming purposes. The protection afforded by s 25A, and to a more limited extent by its predecessor, relates not to added value caused by *actual* non-farming use but to added value from a *potential* use, ie one which has not yet occurred, but could occur in the foreseeable future. It is not necessary that the use will definitely occur; it can be a mere possibility. Nevertheless, the possibility must be a real one before it can be said to give rise to potential value. That is probably self-evident, for it is unlikely that a

> property will gain added value from a theoretically possible future use which intending purchasers would see as being something most unlikely to occur in reality within the foreseeable future.
>
> The policy which must underlie this parliamentary intention seems equally obvious. The New Zealand economy depends very substantially upon the produce of its farms. If farming operations suffer the impost of excessive rates which are unrelated to the value of the farm as a productive unit, that will work as a disincentive to farming production and capital expenditure directed at preserving or increasing levels of production. Such a disincentive would be contrary to the national interest.

[70] This case concerned assessing rates-postponement values for farmland which was described as providing "splendid examples of coastal scenery probably unsurpassed on privately owned land anywhere in New Zealand" and from which five beaches were contained within or could be accessed from the property. The Court set out its view as to how the rates-postponement value was to be assessed. In the course of this the Court said (at pp 343 to 344):

> "… rating relief is related to potential for development or use for development rather than merely to potential for use. There was argument before us concerning what was and what was not a "use" of land. It was suggested by Mr McGuire that land is not "used" in a valuation sense when it lies idle, as it would do if it had been purchased merely for purposes of conservation. It is unnecessary for us to decide this point, but we incline to the view that all land at all times has a use, even if only an intended future use, as in the case of land earmarked for future development but presently lying idle. Certainly, we would regard conservation land as being used for the purpose of conserving its special features or for recreational purposes. On the other hand, it would not ordinarily have a use for development.
>
> Where land qualifies under s 25A(1) the rates postponement value is to be determined under subs (2)(a) so as to exclude the potential value that it has for residential purposes or for commercial, industrial or other non-farming use. Here again we emphasise that the "use" being spoken of is a development use in each case.
>
> The rates postponement value must also be determined so as to preserve uniformity and equitable relativity with comparable parcels of farmland, the valuations of which do not contain any such potential value for development use: subs (2)(b).

[71] The next relevant case is *Johnston v Manukau City Council* [1978] 1 NZLR 68. In that case the local authority had cancelled an earlier decision postponing part of the rates payable on a property. The earlier decision had accepted that the property qualified as "farmland". In cancelling this decision the Council had relied on a valuer's report which included the following:

> "… Approximately two-thirds of the land is rock outcrops, hawthorn, boxthorn, some gorse, one-third is in grass… This land is not now, and has not for years past, been capable of being farmed as a separate unit. … Its value for many years has been in its potential for industrial development… In my opinion this land has for many years been wholly a speculative investment and is not "farm land"…"

[72] The approach in the High Court was to ask whether there had been a change in the use of the land. As there had not been, the Council could not cancel the earlier decision granting the rates-postponement.

[73] The Court of Appeal did not decide whether it was correct that it was necessary to show a change of use. Instead it approached the matter in this way:

a) The question of whether land was "farmland" was to be determined "solely by reference to the use which is made of the land by that occupier";

b) There could be cases where an agricultural use could be disregarded "either on the de minimis principle or as not being bona fide". In that case the use would have "to be so small or else colourable in nature" so as not to amount to a "real" use.

c) Where a real use is made, and that is the only use to which the occupier puts the land, then that use cannot be disregarded on the de minimus principle. As long as it is a real use, it does not matter that is also a limited use.

d) Other considerations would enter the matter if the occupier is using the land for more than one purpose; and

e) The burden was on the appellant to show that it was not open to the Council on the evidence before it to disregard the use on the basis that it was not a real use.

[74] The Court considered that on the basis of the evidence before the Council it could not conclude that the amount of grazing "was so trifling that it should be disregarded".

[75] The next relevant case is *The Valuer-General v Kent* HC WN AP No 227/92 18 August 1994. The background to this case is that in 1991 the Council decided to cancel the rates-postponement values for Kent Nurseries. Kent Nurseries objected and the Land Valuation Tribunal found this cancellation to be wrong. Its approach was to ask whether there had been "such a dramatic change of use of the land" so that the concession on rates should no longer apply. The Council's view was that a commercial nursery had evolved because the display and sales area had become heavily stocked with potted plants. The Tribunal accepted Mr Kent's evidence that he had grown this stock. The Tribunal expressed concern that the Council may not have given any serious consideration to the question of whether the land had ceased to be farmland.

[76] On appeal the High Court considered that there was sufficient evidence for the Tribunal to conclude that there had been no substantial change since the Council had accepted the land to be "farmland" in 1989. It agreed with this conclusion on the evidence given, and in light of the Tribunal having accepted Mr Kent's evidence that the plants for sale had been grown by Mr Kent.

[77] The High Court also considered whether the sale of the half share in Lot 42 to Ms Buick changed the use of that lot. It concluded that it did not. Lot 42 functioned in part as the residence associated with the nursery business and in part as providing incidental nursery facilities. The High Court said:

> "True, there are six separate lots, and each now has an underlying residential zoning. That factor does not in itself create a residential area. The activity which is carried on is horticultural. True, there is a residence (with associated office and sheds) but the activity conducted over the area as a whole is of that farming character. If one led some worthy citizen of Upper Hutt to the premises and asked "is this a residential area or a plant nursery?", the response would be "the latter", and probably would be brusque.
>
> …

> Obviously, so long as there is this "principal" use element, the mere fact that the land is not exploited as a farm to its maximum or that the occupant enjoys the lifestyle afforded, have no relevance. The lazy farmer, and the happy farmer, are still farming.
>
> In this case, the site has operated for many years as "Kent Nurseries". To all appearances, it has been and continues to be a business. Clearly, there is a significant nursery operation. There is residential accommodation, not at all unusual in a farm context, and some land not under intensive use. There are no other competing uses. Mr Kent evidently enjoys the life, along with his other activities, but his good fortune in that respect does not bear on degree of use. There is sufficient nursery application for the land to be described as "used principally for horticulture" when taken as a whole. It is "farmland".

[78] In *Kent's Nurseries v The Valuer-General* HC WN AP 370/97 19 May 1999 it was accepted that the nursery was farmland. The High Court decision records the evidence of the valuer called by the Valuer-General:

> "... Mr Allison considers its existing use is a mixture of plant display activity (2200m^2), growing activity (2000m^2), residential activity (two dwellings)(600m^2), and unused vacant residential (3623 m^2)."[47]

[79] The issue was as to the appropriate value of that land as farmland.

Mr Blucher's approach

[80] Mr Blucher's letter of 24 June 2002 did not deal with the reason for the removal of the rates-postponement value for Lot 42. In relation to the balance of the land Mr Blucher's letter of 24 June 2002 referred to the decline in the business to the extent that he considered the operation to be "no longer" economically viable. He also referred to the nursery being a conforming use with the Commercial Business zone. Neither of these two reasons were valid ones. It is apparent from the 1994 High Court decision in *The Valuer General v Kent* that the Council in 1991 doubted the economic viability of the use, but that this was not the relevant test. Nor did the change in zoning have any relevance to whether there had been a change in use of the land by Mr Kent.

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[47] These areas combine the two separately assessed properties. Including the 600m^2 allocated to the two dwellings, the area used as a nursery was 57% of the total area of 8423m^2. Excluding the dwellings, the nursery is 50% of the total area.

[81] In Mr Blucher's evidence[48] for the Tribunal hearing he considered it did not make sense to conclude that the nursery operation was a farming use because the total operation could easily be accommodated on the reduced land. He considered that the land was not principally or exclusively farmland because of the limited degree of propagation, the existence of two residential dwellings capable of separate sale and the significant under-utilisation of the land. He considered that the principal use was commercial, or commercial and residential, as mirrored by the zoning in the District Plan.

[82] Again, Mr Blucher's views were not based on the correct approach. The questions were to what use was Mr Kent putting the land and was that use a real one.

The Tribunal's approach

[83] On the basis of all the evidence, including the Tribunal's inspection of the land, the Tribunal considered that there was a mixed use – a nursery operation, a retail activity associated with the nursery, the provision of residential accommodation and idle land. Of these uses it concluded that the nursery operation was not the principal use.

[84] In relation to the nursery use the Tribunal correctly accepted economic considerations were not relevant (except to the extent that business records of an operation would be evidence in support of the operation of a nursery).

[85] In relation to the idle land the Tribunal accepted a submission from Ms Levy for the Council that "[a]s the property is zoned commercial, any idle land, by default would be available for redevelopment and therefore should not be considered part of the farming operation". It said that commercial "use" was "the obvious determination for the business portion of the land".

[86] Mr Kent takes issue with this because he did not hold the land for this purpose. To the contrary Mr Kent's position was that the land was not for sale (and

[48] September 2002, s 6.3, February 2004, paragraphs 89 to 96.

there was no evidence that he intended to redevelop it or put it to any other commercial use). Mr Kent told the Tribunal that he was continuing to use the land as a nursery and that the idle land "was in use for future plants and flowers, and the preparation of growing media".

The idle land

[87] The potential use of the land is relevant in assessing the s 2 value but not in determining whether the land is principally or exclusively being used as farmland. That is determined solely by reference to the use to which the occupier is putting the land. To this extent Mr Kent is correct. It does not follow, however, that the idle land qualifies as farmland.

[88] On the basis of its inspection and the evidence of Mr Kent the Tribunal did not accept that the land was in use for future plants and flowers and the preparation of growing media. Mr Kent produced no expert or independent evidence to support his position. The Tribunal's assessment was that "the overgrown areas were for the time being neglected".[49] Although it viewed the property in 2004[50] it considered that the property "would have been in much the same condition" in October 2001 (at the time of the revaluation of the roll).[51] The land was "idle" because it had been neglected. If it is not being used at all then it is not being used as "farmland".

[89] In this case the idle land was just part of the land on which Mr Kent and others lived. This was the view of the Tribunal because despite what it had said earlier in its decision (see [85] above) it later said[52] "the use in September 2001 was not principally as farmland because much of the land was idle, and for the same reason it was not principally commercial". As was said in *Valuer-General v Tepene Tablelands Ltd* (at p 343) "Land which is principally used for a non-farming purpose – such as for a residence on a hobby farm is not farmland". We therefore reject Mr Kent's submission on this point.

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[49] At [38] and see also [40] of the Tribunal decision.
[50] See [37] of the Tribunal decision.
[51] See [53] of the Tribunal decision.
[52] At [65].

Exclusive use

[90] This disposes of a further submission made by Mr Kent – that as there is no competing use to the nursery operation, the land is being used exclusively as farmland. The idle land is part of the land on which Mr Kent and others live. That land is not being used exclusively or principally as farmland.

What was the principal use?

[91] The Tribunal considered there was a mixed use, and that the use as farmland had "diminished to the stage" at which it was satisfied that it was no longer the principal use. That is, when looked at as a whole the Tribunal concluded the principal use was not "farmland".

[92] On this rehearing we are not able to say that Mr Kent has established that conclusion was wrong. It is apparent that the operation had declined since 1994 when the High Court said that "[c]learly there is a significant nursery operation" and since 1999 when the nursery and associated retail activity together occupied 4200 m^2 (see [78] above) or 56.67% of the land area of the larger property. At the time of Mr Blucher's and the Tribunal's inspection the operation (including the retail activity) was largely confined to Lot 46 which has an area of 2023 m^2 or 27.3% of the total area of the larger property.

[93] While we (and the Tribunal) accept that an uneconomic utilisation of the land is not relevant, what is relevant here is the Tribunal's finding that Mr Kent had stopped using as part of the nursery operation a substantial portion of the land. In these circumstances we consider that Mr Kent has not discharged his onus in establishing that the Tribunal was wrong.

An alternative approach

[94] We consider that there was a real, although, limited use of part of the land as a nursery. There were two glasshouses in which plants were grown. The plants were

sold both direct to the public and at local flea markets. This is consistent with the zoning of the land having changed from residential to business commercial because of its use as a nursery.[53] (We understand that all the surrounding properties are zoned residential)

[95] In these circumstances it would have been open to the Council to treat the land used in the nursery operation as separate property pursuant to s 7(4) of the RVA. On the material before us it would seem to be "reasonable to do so". Mr Kent is still "farming" part of the property and yet is required to forgo the benefit of rates postponement values being written off because the nursery operation has been neglected while he has been diverted on other issues. That part of the property that is still being used in the nursery operation should still qualify for rates postponement values and not be written off.

[96] We are conscious, however, that neither party made submissions on s 7(4) of the RVA. The issue was not raised in Mr Blucher's review, nor considered by the Tribunal. In the circumstances we invite memorandum from the parties to be filed within 30 days on whether the Tribunal's decision should be varied by upholding Mr Kent's objection in relation to Lots 41, 42 and 46. If the Council agrees to this variation it will not be necessary to refer the matter back to us.

Issue 3: existing use values

Was the issue before the Tribunal?

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[53] The Tribunal state (at para [60] that his change "stemmed from its current use as a commercial nursery". Later the Tribunal state (at para [65]) that this change "was not brought about by Mr Kent's commercial activity but by planning factors and market demand related to the undeveloped state of the property". The latter is not consistent with the evidence before the Tribunal.
The evidence before the Tribunal was:

a) "The site was zoned Business Commercial … reflecting its actual use."[53] (Miller, para 15);
b) "The site is currently used for commercial activity and this is appropriately recognised by the present zoning which has been effective since July 2000."(Miller, para 22);
c) "To reflect the "commercial" nature of this property, in this plan, the land was zoned Business Commercial."(Blucher, para 41); and
d) "The decision to initiate this change stemmed from the current use as a commercial nursery."(Blucher para 105)

[97] Mr Blucher's evidence at the Tribunal was that there had never been an "existing use" special rateable value.[54] Mr Blucher's letter dated 24 June 2002 advised that "existing use rights no longer apply and any farmland values should be removed". The Tribunal said that the removal of "special rateable values for Lot 42 was notified by the 2001 general valuation notice which omitted the previous special rateable values." This, however, refers to the removal of s 22 (farmland) and not s 26 (existing use) values.

[98] Mr Blucher's first statement of evidence[55] for the Tribunal was that the rezoning of the land meant that the property did not now qualify for "existing use" values. In his second statement of evidence he accepted that the nursery was still an "existing use" because it did not fully comply with the performance standards, but he considered the degree of non-compliance was not sufficient to warrant an assessment under s 26 of the RVA.[56] He also considered that because there was "little if any difference between residential and commercial land values, a Special Rateable value was not deemed necessary".[57]

[99] A s 26 value could be assessed by a local authority "of its own motion or on the written application" of the owner or occupier.[58] In this case Mr Kent had not made an application. Mr Blucher said he determined that it was not necessary for a s 26 value to be assessed.

[100] It was not necessary for Mr Blucher to advise Mr Kent of this decision. This is because the requirement under s 31 of the RVA is to give notice of:

a) "Any determination" by the local authority of the "special rateable value";

b) "Any refusal" by the local authority "of an application to determine … the special rateable value";

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[54] Page 211 of the notes of evidence.
[55] September 2002 statement.
[56] February 2004 statement paragraphs 58 to 63.
[57] February 2004 statement paragraph 105.
[58] Section 26(1) of the RVA.

c) "Any removal" of the "special rateable value".

[101] None of these occurred. Rather there was no special rateable value under s 26 determined, no application for one and no removal of any such value because none was in place to remove. This means that Mr Kent had no right of objection to the Tribunal. This is because the objection right[59] applies to a decision "required to be notified" under s 31. We therefore consider that Mr Kent is correct that the issue was not properly before the Tribunal. If Mr Kent wishes to have an assessment made under s 26 he must make an application for that assessment.

Eligibility

[102] In case we are wrong in our view that the issue was not before the Tribunal, and because both parties addressed us on this issue, we consider the Tribunal's conclusion that a special rateable value under s 26 was not required. It is not clear whether the Tribunal accepted Mr Blucher's view that the property was a "substantially" permitted activity. If it did then our view is that this would not on its own be a reason for not assessing a s 26 value.

[103] The Upper Hutt District Plan, Business Commercial zone, provides that "[a]ll activities other than those identified below are permitted provided they meet the standards specified in the Plan for permitted activities". Nurseries are not "identified below" and are therefore permitted. Mr Blucher accepted that the property did not meet "the standards specified". The degree of non-compliance is not material. We consider that this meant that the nursery was operating under "existing use" rights and therefore that portion of the property being used in the nursery operation qualified for a potential assessment under s 26. The dwellings would also qualify for potential assessment under s 26 either because they are necessary for the nursery operation or because they are located at ground level. The latter is relevant because dwellings at ground level are not a permitted activity in the Business Commercial zone.

[59] Section 32 of the RVA.

[104] The next question is whether the local authority was required to assess a value under s 26 where it considered that the s 26 value would be less than the capital value. Section 28, which provides an express power for the local authority to take that approach for other special rateable values, does not apply to an existing use rateable value. That suggests that a local authority is required to determine the special rateable value for an existing use at least when an owner makes an application. That was not the case here.

[105] In the absence of an application, however, we consider that there can be no requirement on the local authority to assess an existing use special rateable value. The local authority "may" do this "of its own motion", but there is nothing in s 26 that requires it to do so. If there would be no difference between the s 2 value and the existing use value that seems to us to be a valid reason for not determining a special rateable value.

[106] The final question under this issue is whether there was evidence before the Tribunal that a special rateable value would have been less than the s 2 value. The s 2 values were based on the highest and best use being business/commercial. Those values are to be compared with the value that would be determined under s 26.

[107] The value under s 26 is determined on the assumption that "the actual use to which the land is being put is a permitted activity". The actual use to which a portion of the land is being put is a nursery operation. The value is to be assessed so as to preserve uniformity with the values ascribed to comparable nurseries in the district that are permitted uses in the zones in which they are located (rather than by reference to commercial or residential properties).

[108] The only expert evidence we have in relation to that is Mr Blucher's evidence before the Tribunal. He referred to four nurseries, but included the rate per m^2 at which the land value was assessed for only three of them. Those rates were \$28 per m^2, \$42.82 per m^2 and \$52 per m^2. The first of those is not relevant because it is not a permitted activity in its zone. Mr Blucher does not state whether the latter two were permitted activities but we have assumed they are in the absence of

evidence otherwise. The rates on the latter two compare with the value Mr Blucher assessed for Lot 46 which we calculate at $44.50 per m^2.[60]

[109] In relation to Lots 41 and 42, if this is a necessary part of the nursery operation their value is to be assessed by reference to comparable nurseries in the district that are permitted uses in the zone in which they are located. These lots were valued at $80 per m^2 and $85 per m^2 less several discounts[61] compared with the rates of $42.82 per m^2 and $52 per m^2 referred to at [108] above (although the relativity of these values is arguably less direct).

[110] If Lots 41 and/or 42 are not a necessary part of the nursery operation their values are to be assessed by reference to comparable dwellings in the district that are permitted uses in the zones in which they are located. Comparable values as set out in Mr Blucher's evidence[62] reflect between $80 per m^2 and $90 per m^2.

[111] We consider that even if the issue was before the Tribunal, Mr Kent has not established that the Tribunal was wrong, on the evidence before it, to conclude the s 26 value for Lot 46 would have been different from its s 2 value. Whether the values for Lots 41 and 42 would have been different depends on whether they are a necessary part of the nursery operation. In any event, this would require Lots 46, 41 and 42 to be treated as separate property under s 7(4) of the RVA. (Treating the larger property as a whole Mr Blucher's overall rate is $42 per m^2 plus 15% for three street frontages). We do not need to resolve these points because we agree with Mr Kent that the issue was not before the Tribunal.

Result

[112] The answers to the issues before us are:

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[60] We have derived this from the first page of Appendix 11 in Mr Blucher's February 2004 evidence. On the second page of his Appendix that rate would be 42 per m^2.
[61] Using page 1 of Appendix 11, but at $42 per m^2 using page 2 of Appendix 11 of Mr Blucher's February 2004 evidence.
[62] These relate to sales and not "values" comparable rates.

a) Mr Kent has not established that the Tribunal erred in upholding the assessed s 2 values;

b) Mr Kent has not established that the Tribunal erred in upholding the decision to remove the rates-postponement values from the property when assessed as a whole. A portion of the property may be eligible for the retention of rates-postponement values if s 7(4) of the RVA is applied. Memoranda from counsel are invited on the application of s 7(4) within 30 days of the date of this judgment if the parties are unable to resolve the issue by agreement;

c) Mr Kent is correct that this issue was not before the Tribunal. It is therefore also not before us.

Costs

[113] Mr Kent has not been successful. The Council are entitled to the costs of this appeal on a 2B basis. The Council sought to cross appeal the Tribunal's decision not to make an award of costs against Mr Kent. We disallow this cross appeal. Costs before the Tribunal are a matter for its discretion and we decline to interfere in the exercise of that discretion.

Final comment

[114] Mr Kent has had rating issues for what is now a considerable period of time – sometimes he has been successful and sometimes not. We express the hope that the Kents and the Council are able to find some more constructive approach for the future.

Mallon J
(For the Court)

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