Preferential Assessment of Agricultural Property in South Dakota

by

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PREFERENTIAL ASSESSMENT OF AGRICULTURAL PROPERTY IN SOUTH DAKOTA

*Preferential property tax treatment of farmland and farm residences has become a subject of intense interest, criticism and constitutional debate. This comment analyzes the preferential assessment approach to real property taxation in South Dakota and recommends supplementing preferential assessment with rollback provisions and land use planning measures. The classification statute providing for the designation of property as agricultural and non-agricultural for school taxation purposes is given special emphasis as it presents the greatest source of confusion in the South Dakota preferential property tax system. The author concludes with some specific proposals intended to alleviate the major problem areas in the South Dakota classification statute.**

INTRODUCTION

One of this nation's strongest assets is agriculture.[1] Because of the finite supply of prime agricultural land, the nation cannot afford its loss.[2] Approximately 6.1 percent of United States farmland was removed from agriculture and converted to urban use during the period 1950-1972.[3] This conversion not only involves city residents migrating to the suburbs and constructing homes, but has also meant a significant movement of industrial and commercial enterprises out of the center city.[4] The net loss of this agricultural land to urban development now involves around 1.4 million acres per year.[5] To avoid further land loss and to provide a special tax break for farmers, over half of the states have modified their real property tax laws during the past decade.[6] This modification has resulted in use-value assessment, commonly termed differential

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1. R. Blobaum, The Loss of Agricultural Land (1974) (study report to the Citizens' Advisory Comm. on Envt'l Quality) [hereinafter cited as Blobaum]. The United States enjoys an envied role as a leader in world food production, and the benefits that this abundance brings contributes in great measure to the high standards of living and well-being in America. *Id.*

2. *Id.*

3. G. Morse, Considerations for Rollback Provisions for South Dakota's Use-Value Assessment of Agricultural Lands (Dec. 1975) (research bulletin) [hereinafter cited as Morse]. While South Dakota lost only one percent of its farmland from 1950 to 1972, seventeen states have lost over twenty percent of their farmland and two have lost over fifty percent. *Id.*

4. Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Lands*, 20 S.D. L. REV. 548, 549 (1975) [hereinafter cited as Ellingson].

5. Blobaum, *supra* note 1, at 1.

6. Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117 (1974) [hereinafter cited as Henke].

assessment, which "refers to the value of farmland for agricultural purposes based on productivity and earning capacity"[7] and disregards the value for nonagricultural use or speculative value. Currently, thirty-seven states employ one of the following types of differential assessment: (1) Preferential assessment, (2) deferred taxation, or (3) restrictive agreements.[8] These three types of differential assessment laws will be examined in detail.[9]

South Dakota has adopted the preferential assessment approach to use-value taxation.[10] Preferential assessment of agricultural property is generally implemented to encourage farming by making it more profitable,[11] hence increasing food production while retain-

7. B. Flinchbaugh & M. Edelman, Use-Value Assessment Case Studies (Feb. 1975) (study for Kan. St. U. Cooperative Extension Service) [hereinafter cited as Flinchbaugh & Edelman].

8. *Id.* The following is a state-by-state comparison of the methods of assessing agricultural land:

Market Value	Preferential Assessment	Deferred Taxation	Restrictive Agreements
Alabama	Arkansas	Alaska	California
Arizona	Colorado	Connecticut	Hawaii
Georgia	Florida	Delaware	Maine
Idaho	Indiana	Illinois	Michigan
Kansas	Iowa	Kentucky	New York
Mississippi	Louisiana	Maryland	Pennsylvania
Missouri	New Mexico	Massachusetts	Vermont
Nevada	North Dakota	Minnesota	Washington
Oklahoma	South Dakota	Montana	
South Carolina	Wyoming	Nebraska	
Tennessee		New Hampshire	
West Virginia		New Jersey	
Wisconsin		North Carolina	
		Ohio	
		Oregon	
		Rhode Island	
		Texas	
		Utah	
		Virginia	

9. *See* text accompanying notes 21-65 *infra*.

10. Morse, *supra* note 3, at 8. *See* S.D.C.L. §§ 10-6-31 and 10-6-33 (1967).

11. Cooke & Power, *Preferential Assessment of Agricultural Land*, 47 FLA. B. J. 636 (1973) [hereinafter cited as Cooke & Power]. The following series of diagrams shows the economic impact of preferential assessment on the output and profits of farms:
Figure (a) displays the relationship between output or quantity and cost.

Figure (a)

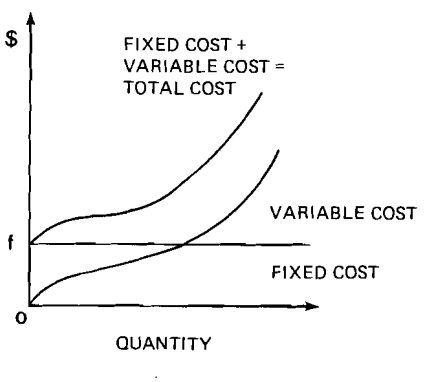
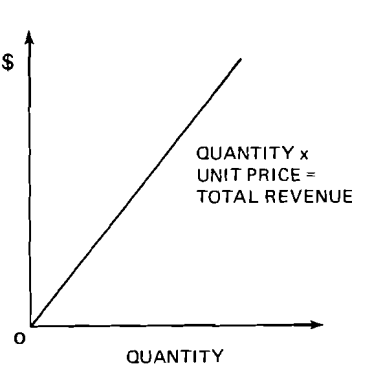
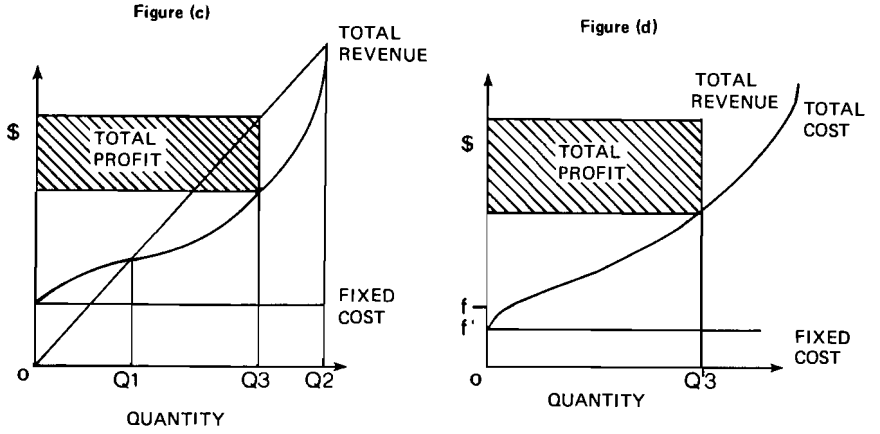


Figure (b)



ing the aesthetic benefits of open space.[12] South Dakota, however, has experienced very little reduction in agricultural land, has increased its agricultural productivity and has kept an abundance of open space.[13] South Dakota's preferential property tax system was designed primarily to provide tax equity for farmers.[14]

While it is questionable whether statutes providing for preferential assessment of farmlands have achieved their objectives of preserving open spaces and encouraging food production,[15] it is certain that such statutes have multiplied litigation concerning their interpretation and implementation.[16] Because of the extensive debate and case law, it is imperative that the overall viability of South Dakota's preferential assessment statutes be analyzed in relation to the alternatives of deferred taxation, restrictive agree-



Fixed cost remains constant at f dollars for all levels of output. Variable cost increases in varying proportions as output increases. Total cost is the sum of fixed cost and variable cost. Price per unit multiplied times quantity yields total revenue. Figure (b) illustrates this relationship. Revenue increases by the same amount for each additional unit sold. Output, assuming a competitive profit-maximizing firm or, in this case a farm, can be deduced by superimposing the total cost relationship upon the total revenue relationship. Profit is greatest where the difference between total revenue and total cost is greatest, at an output of Q3 in figure (c). The shaded area measures total profit. Points Q1 and Q2 are break-even production or output volumes. Preferential assessment tends to reduce the tax on land. This tax is a fixed cost because it does not vary with the level of output. Thus preferential assessment reduces the fixed and, therefore, the total cost of operation. A reduction in fixed cost from f dollars to f' dollars resulting from preferential assessment is shown in figure (d). Note that total cost falls and profit increases. Note also that the profit maximizing quantity or output, Q3, does not change. Clearly, preferential assessment does nothing to increase the output of farm products. Preferential assessment is, in reality, no more than a lump sum subsidy to certain landowners who happen to hold property in an urban fringe area.

12. Henke, *supra* note 6, at 118-19.
13. *See generally* Morse, *supra* note 3.
14. *Id.*
15. Henke, *supra* note 6, at 130; Cooke & Power, *supra* note 11.
16. *See, e.g.*, Staples v. State, 233 Minn. 312, 46 N.W.2d 651 (1951); Eisenzimmer v. Bell, 75 N.D. 733, 32 N.W.2d 891 (1948); Simmons v. Ericson, 54 S.D. 429, 223 N.W. 342 (1929); Milne v. McKinnon, 32 S.D. 627, 144 N.W. 117 (1913); Nielsen v. Erickson (2d Cir. S.D.) (Civ. No. 74-474) (1976); Junck v. Erickson (2d Cir. S.D.) (Civ. No. 74-1438) (1974); Richards v. County Comm'r of Lawrence County (8th Cir. S.D.) (1970).

ments or zoning to determine whether the present system fulfills the legislative objectives of providing tax equity to farmers while bringing in tax dollars to meet the growing cost of public education. Notwithstanding the type of differential assessment system implemented in South Dakota, some basic problem areas must be examined with regard to the classification statute, which provides for the designation of property as agricultural or nonagricultural for school taxation purposes. One major problem area of South Dakota's classification statute is defining the term "agricultural."[17] The problem more specifically involves whether the standards of "agricultural" and "nonagricultural" used in classifying property involve an unlawful delegation of legislative power to the county assessors.[18] Another problem area involves defining the phrase "used exclusively" and determining under which circumstances properties and buildings are used solely for agricultural purposes.[19] A related question involves whether county assessors should be permitted to designate agricultural and nonagricultural uses on the same legal subdivision. A third problem area is whether differential assessment of farmland and farm residences violates the equal protection clauses of the state and federal constitutions.[20] The classification statute authorizes a property tax break for one class of taxpayers at the expense of the rest for the support of public education, which is a social benefit to all citizens. This comment will analyze these problems and offer suggestions to assist in their solution.

DIFFERENTIAL ASSESSMENT

The economic rationale for differential assessment, whether it be in the form of preferential assessment, deferred taxation or restrictive agreements, is that land used for agriculture, unlike land in other businesses, generally consists of a "large tract which is the whole base of the business."[21] Furthermore, while a farmer's income from the land may increase, it usually does not increase as fast as the property taxes on the land.[22] The South Dakota Supreme Court, therefore, maintained that if agricultural lands were taxed at the same rate as other real estate, the result would be the practical confiscation of agricultural lands in many school districts.[23] Differential assessment laws were designed to reduce

17. *See* text accompanying notes 98-116 *infra*.
18. *See* text accompanying notes 168-182 *infra*.
19. *See* text accompanying notes 117-131 *infra*.
20. U.S. CONST. amend. XIV, § 1; S.D. CONST. art. VI, § 18.
21. Great N. Ry. Co. v. Whitfield, 65 S.D. 173, 185; 272 N.W. 787, 793 (1937).
22. Lower Taxes for Farmland and Open Space? What Wisconsin Can Learn About Use-Value Taxation From the Experiences of Other States (1974) (research report) [hereinafter cited as Lower Taxes for Farmland and Open Space?].
23. Great N. Ry. Co. v. Whitfield, 65 S.D. 173, 183; 272 N.W. 787, 792 (1937).

the real estate burden on actively farmed land and differ only "in the degree to which the state or local government obtains something in return for the tax relief afforded the property owner and in the degree of participation by the local government."[24]

Preferential Assessment

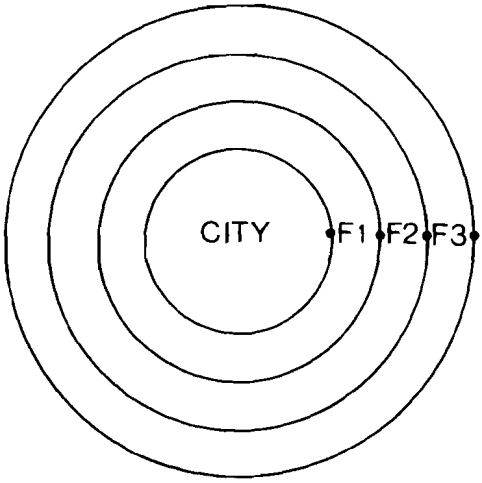
Preferential assessment is the simplest form of differential assessment. The preferential assessment approach implemented in South Dakota for the purposes of school taxation involves a two-step process.[25] First, the county assessor separates all property into two classes, "agricultural" and "nonagricultural."[26] Secondly, the property is assessed consistent with its classification.[27] While property may be classified as agricultural and nonagricultural only for school taxation purposes under the state constitution,[28] preferential assessment applies to all property taxes levied including county, township and special district.

Preferential tax treatment of property for other than school taxation purposes is achieved by using a different definition of market value for agricultural property than for other real estate.[29] The market value of property is generally considered to be the true and full value at its highest and best use.[30] Agricultural property in South Dakota is also appraised for tax purposes according to some portion[31] of its true and full value in money.[32] The true and full value of agricultural property, however, is defined as its use-value.[33] This split definition avoids an outright classification which is not constitutionally permitted, but successfully achieves preferential assessment status for farmland with respect to all property taxes levied.

Preferential assessment was conceived principally to deal with problems caused by the "transitional" zone that develops around every population center.[34] This transitional zone generally stretches from three to twenty miles outside the corporate limits of a municipality[35] and consists of farmland that is subject to the process of changing from agricultural use to urban use for residential,

24. Ellingson, *supra* note 4, at 554.
25. S.D.C.L. §§ 10-6-31 and 10-6-33 (1967).
26. *Id.* 10-6-31 (1967).
27. *Id.* § 10-6-33 (1967).
28. S.D. CONST. art. VIII, § 15.
29. S.D.C.L. §§ 10-6-33 (1967), 10-6-33.1 (Supp. 1976).
30. S.D.C.L. § 10-6-33 (1967).
31. *Id.*
32. The true and full value of agricultural property is generally considered to be "the amount of money that a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for a tract of farmland." Flinchbaugh & Edelman, *supra* note 7.
33. S.D.C.L. § 10-6-33.1 (Supp. 1976).
34. C. Kent, Use-Valuation of Agricultural Real Estate in South Dakota (July, 1975) (interim report to the S.D. Comm. on Taxation) [hereinafter cited as Kent].
35. While a city represents the general circumstance, a river, mountain or other aesthetic or recreational area may also provide a center around which a transitional zone develops.

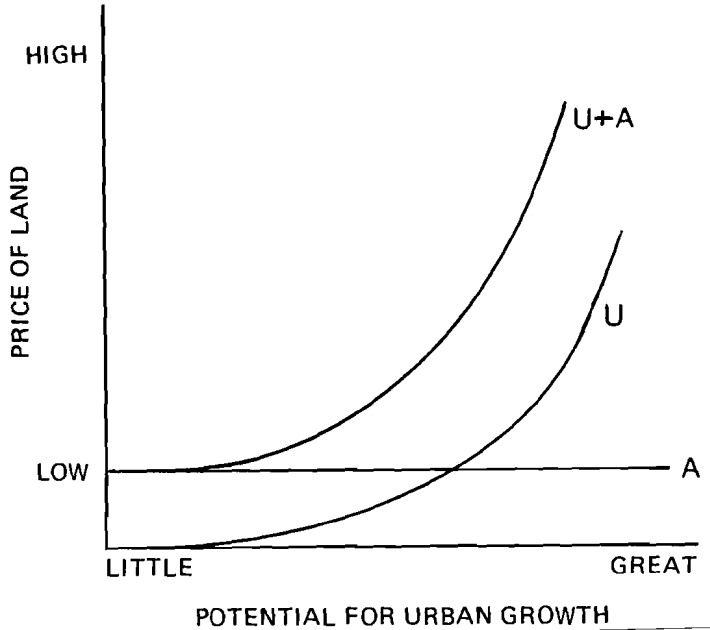
commercial or industrial development.[36] The following diagram assists in illustrating the concept of preferential assessment:



With respect to the preceding diagram, F1 may have an urban development potential value[37] over and above its value as agricultural

36. Kent, *supra* note 34, at 2.

37. Agricultural land located near a growing urban area may command a market price greater than hypothetically identical agricultural land located some distance from an area with urban growth potential. Presumably, the additional market value of the agricultural land situated in the urban fringe stems from speculation that the lands used for nonagricultural purposes command a higher present valued cash inflow than land outside the urban fringe. The following diagram illustrates this point:



property, while F2 and F3 may only possess an agricultural use-value. Under the preferential assessment approach, rural property devoted to agricultural production is appraised for tax purposes proportionate with its use-value.[38] Accordingly, if F1, F2 and F3 were devoted to agricultural production, then the land would be taxed consistently with its agricultural use-value as opposed to any urban development potential value.

Since property tax assessment values rest upon market value, or some portion of market value,[39] landowners holding agricultural property near a growing urban area could, if not for preferential assessment, pay a property tax based on the speculative rather than the agricultural value of the land. Thus landowners owning hypothetically identical tracts of land for agricultural purposes may pay different amounts of property tax without this special tax break simply because speculation increases the market price of some agricultural land near an urban area. Preferential assessment is presumed to eliminate the difference between taxes on these hypothetically identical tracts of land.[40] Under the preferential assessment approach, as long as the landowner continues to farm the land, he will be assessed at its agricultural use-value.[41] In effect, use-value assessment is a monetary incentive that encourages farmers surrounding a population center to keep their land in agriculture.[42]

While preferential assessment grants property tax relief to farmers whose taxes have been pushed upward by the pressures of urbanization, it also requires nothing of the farmer in return for the tax benefit.[43] The landowner in the urban fringe can, and thus may, eventually sell the land for a nonagricultural use and perhaps receive several times the agricultural value.[44] In this case, the farmer realizes a "windfall gain,"[45] and the burden of the tax

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Note the horizontal axis which represents urban growth potential and the vertical axis which represents the price of land. Relationships between the urban growth potential and the price of land can be mapped as the area bounded by these axes or parameters. Line A shows the constant agricultural value of land for any degree of urban growth potential. Curve U displays the increasing value of land as urban growth potential increases. A summation of these two value lines, U and A, maps the market price of agricultural land as the potential for urban growth increases.

38. *See* Morse, *supra* note 3, at 10.

39. S.D.C.L. § 10-6-33 (1967). Presently, the statute provides that all property shall be assessed at its true and full value in money, but only sixty percent of such assessed value shall be taken and considered as the taxable value of such property. The 1977 South Dakota Legislature, however, passed and the Governor signed a bill providing that all property can be assessed at any percentage between zero and sixty percent of market value at the discretion of the county assessor. S.D.C.L. § 10-6-33 (Supp. 1977).

40. *See generally* Morse, *supra* note 3.

41. S.D.C.L. § 10-6-31 (1967).

42. Morse, *supra* note 3, at 10.

43. Ellingson, *supra* note 4, at 555.

44. *See* Kent, *supra* note 34, at 2.

45. Morse, *supra* note 3, at 10.

revenue loss resulting from lower taxes on agricultural property falls upon the local community.[46]

This illustrates the principal problem of the preferential assessment approach. Premium prices are being paid for property in the urban fringe area because of the expectation that in future years the farmland can be sold for development at many times the current agricultural value.[47] Preferential assessment may encourage pulling land out of agriculture since speculators can purchase land for development or investment purposes, lease it to a farmer and pay taxes based on agricultural use-value while holding it for development at a later date.[48]

Deferred Taxation

Deferred taxation, the most common form of differential assessment,[49] "is preferential assessment plus a 'rollback'."[50] In other words, if land is removed from agricultural use, a rollback tax is levied and the tax revenue lost during the specified rollback period becomes due.[51] The rollback tax is equal to the difference between the taxes that would have been levied on the basis of market value and those levied on the basis of agricultural use value.[52] Consequently, the deferred taxation system recovers some of the tax benefit conferred upon the farmer if and when the property is converted from agricultural use to urban development.[53]

Restrictive Agreement

Under the restrictive agreement approach, the landowner enters into an agreement with the local government that restricts the use of the land to agricultural production for a specified period of time.[54] The agricultural property is then assessed for school district taxation purposes according to its use-value.[55] If the contract with the local government is breached, both rollback taxes and penalties become due.[56] Thus the restrictive agreement approach compensates the local government for the inequitable side effects associated with preferential assessment by requiring a payment of

46. Ellingson, *supra* note 4, at 555.
47. Kent, *supra* note 34, at 2.
48. Morse, *supra* note 3, at 10.
49. Ellingson, *supra* note 4, at 558.
50. Flinchbaugh & Edelman, *supra* note 7.
51. *See* Kent, *supra* note 34, at 16-18. The number of years to which a rollback applies may be statutorily set. The states which use a deferred tax typically set a five year period. Some states, however, have rollback periods as short as two years, while others provide for ten year periods. *Id.* at 18.
52. Flinchbaugh & Edelman, *supra* note 7.
53. Ellingson, *supra* note 4, at 558.
54. Morse, *supra* note 3, at 8.
55. *Id.*
56. *Id.*

back taxes and a monetary penalty when the land is converted to a nonagricultural use.[57]

Comparison of Differential Assessment Methods

While deferred taxation and restrictive agreements do not eliminate the problems caused by preferential assessment, they do lessen both the tax shift and the benefits to speculators by requiring the full tax burden to be paid at the time the land is converted to a nonagricultural use.[58] A use-value system with a strong rollback does not provide the farmer with a complete tax break, but allows him to pay the tax after he sells the land for development when he can better afford it.[59] "The justification for a rollback is that the preference should be given only so long as the property remains in farming."[60] The logical extension of this rationale is that if the government is going to provide a lump sum subsidy to farmers through preferential assessment of the land, then the government should be able to recoup some of the tax money lost to public education rather than benefit the farmer with a "windfall gain" when he sells the land for urban development.

Although use-value assessment reduces tax pressures, it cannot stop urban sprawl since there are still development pressures on the land.[61] The capital gains from land development far outweigh the tax incentive to keep the land undeveloped.[62] Neither deferred taxation nor restrictive agreements decrease the removal of land from agriculture or reduce the growth of urban sprawl.[63] These two forms of use-value assessment, however, may be superior to the preferential assessment approach currently in use in South Dakota since they tend to discourage speculation, which can lead to more rapid removal of lands from agricultural use and growth of urban sprawl.[64] "The only effective control for keeping land in agriculture and reducing urban sprawl appears to be to zone the land as strictly agricultural and then utilize the use-value assessment to partially compensate landowners for gains not realized in property values."[65]

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57. Ellingson, *supra* note 4, at 569.
58. Lower Taxes for Farmland and Open Spaces?, *supra* note 22, at 12.
59. *Id.*
60. Kent, *supra* note 34, at 18. Typically states that use a rollback period vary in the number of years to which it applies. Thus the tax benefit gained by the landowner is not necessarily all returned to the government, but only the difference between the market value and the use-value during the specified rollback period.
61. Lower Taxes for Farmland and Open Spaces?, *supra* note 22, at 13.
62. Morse, *supra* note 3, at 10.
63. *Id.* at 13.
64. *Id.*
65. *Id.* "When land is zoned strictly for agricultural uses, the market value will eventually fall to the capitalized value of the net agricultural income attributable to the land. . . . In this situation the use-value taxes are used as a means of partially compensating farmers for any losses in their new worth." *Id.* at 11.

Viability of South Dakota's Preferential Assessment Approach

Since the public policy in South Dakota has been to preserve the family farm,[66] the implementation of recapture provisions and land use planning measures would further this objective by discouraging land speculators and weekend farmers who, merely because of the preferential assessment treatment, may bring property into agricultural production that has no profitable agricultural use.[67] By reason of the competitive nature of farming, land speculators and weekend farmers inefficiently farming the land increase "the supply of agricultural products which, in turn, decreases their price."[68] Paradoxically, the practice of using preferential assessment in the United States has the overall effect of placing the rural family farmer in a worse economic position than before its enactment.[69] Hence, if some land speculation can be discouraged through a rollback or land use planning measure while retaining the essential benefits of preferential assessment, the family farmer's position in the market place will be improved to the extent that fewer land speculators and weekend farmers would be selling farm products for less than cost.[70]

Family farmers are also disadvantaged to the extent that preferential assessment laws produce sizable reductions in the assessment of some farmland by assessing farmland with a value other than agricultural at its agricultural use-value, which is generally significantly less than the market value of the property.[71] Consequently, school districts dependent on the property tax sustain their revenue levels in the face of preferential assessment by increasing mill levy rates to make up for the lost assessed value of some agricultural land.[72] In effect, if the maximum mill levy for school districts in South Dakota of twenty-four mills on agricultural land has not been reached,[73] preferential assessment could have the effect of raising property taxes thus resulting in significant detriment monetarily to the rural family farmer who continues to devote his land to agricultural use.

Development of the Classification Statute in South Dakota

Even if South Dakota modifies its present form of preferential assessment by supplementing it with a rollback provision or land use planning measure, some basic problems involving interpretation

66. Comment, *The South Dakota Family Farm Act of 1974: Salvation or Frustration for the Family Farmer?*, 20 S.D. L. Rev. 575 (1975).
67. *See generally* Cooke & Power, *supra* note 11.
68. *Id.* at 640.
69. *Id.*
70. *Id.*
71. *See* Henke, *supra* note 6, at 124.
72. *Id.* at 125.
73. S.D.C.L. § 10-12-31 (Supp. 1976).

and implementation of the classification statute still exist. To demonstrate the significance and extent of these problems, an examination of the development of the South Dakota classification statute is useful. Key phrases in this examination are "agricultural" and "exclusive use."

The South Dakota Supreme Court in 1929 considered one of the first cases dealing with the classification of property for school taxation purposes.[74] *Simmons v. Erickson*[75] held that the 1923 state law dealing with the classification of property as agricultural and nonagricultural was unconstitutional to the extent that it purported to permit, under certain circumstances and in certain school districts, a lower rate of tax levy upon agricultural land than upon other taxable property in the school district.[76] Under article II, section 2 of the South Dakota Constitution, the legislature is authorized to make any classification of property for taxation purposes provided that it is "based on some ground of difference having a fair and substantial relation to the object of the legislation."[77] The court in *Simmons* defined agricultural lands "as all land not platted into city or town lots, used exclusively for farm and agricultural purposes, . . ."[78] Applying this definition, the court was unable to find any difference in the physical nature or condition of land that would furnish a reasonable basis for distinguishing between agricultural land and "other" land for school taxation purposes.[79]

Following the *Simmons* decision, the South Dakota Legislature of 1929, by a joint resolution, submitted to the people of the state a constitutional amendment empowering the legislature to classify agricultural lands as a separate property class within school districts for school taxation purposes.[80] The proposed constitutional amendment carried by a substantial majority at the general election in 1930, and the constitution was thus amended as follows:

> The Legislature shall make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state. The Legislature is empowered to classify properties within school districts for purposes of school taxation, and may constitute agricultural property a separate class. Taxes shall be uniform on all property in the same class.[81]

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74. Simmons v. Ericson, 54 S.D. 429, 223 N.W. 342 (1929).
75. *Id.*
76. *Id.* at 434, 223 N.W. at 344.
77. *Id.* at 432, 223 N.W. at 343.
78. *Id.* at 431, 223 N.W. at 342.
79. *Id.* at 432, 223 N.W. at 343.
80. *See* Great N. Ry. Co. v. Whitfield, 65 S.D. 173, 272 N.W. 787 (1937).
81. S.D. CONST. art. VIII, § 15.

The 1931 legislature, purporting to act in conformity with the authority granted by the amendment, enacted the following statute:

> Section 1. For the purposes of school taxation, real property within school districts is hereby classified into two separate classes, to-wit:
>
> First — Agricultural lands.
>
> Second — Other real estate.
>
> Section 2. Agricultural lands within school districts include all real estate not platted in the city or town lots or blocks, and not used or occupied for other than agricultural purposes.[82]

The South Dakota Legislature in 1933 further defined the term "agricultural lands" to expressly include "pasture and grazing land."[83] Then, in 1953, the classification statute was again amended to explicitly designate agricultural lands within school districts.

> All real estate platted into outlots designated by symbols, or whose area is measured and expressed in acres and which is valued for assessment purposes on a per acre basis and also includes all real estate not platted into city or town lots or blocks used or occupied exclusively for agricultural purposes, and shall include pasture and grazing lands located both within and without municipalities.[84]

In effect, the legislature removed the requirement that the land only be situated outside a city or town and included "all real estate" located "both within and without municipalities" as agricultural land, if "used and occupied exclusively for agricultural purposes."[85]

In 1967 the South Dakota Legislature further revised the classification statute by changing the term "agricultural land" to "agricultural property."[86] The statute also expanded the definition of agricultural property as follows:

> Agricultural property . . . includes all property used exclusively for agricultural purposes which is not handled for resale by wholesale or retail dealers. It includes all land used exclusively for agricultural purposes both tilled and untilled, the buildings, structures and other improvements on such land, and the livestock and machinery located and used on such agricultural land.[87]

The legislature then defined nonagricultural property as "all property not classified as agricultural property."[88]

In 1976 the South Dakota Legislature added a section to its

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82. 1931 S.D. SESS. L., ch. 256.
83. 1933 S.D. SESS. L., ch. 191, § 1.
84. 1953 S.D. SESS. L., ch. 458, § 1.
85. *Id.*
86. S.D.C.L. § 10-6-31 (1967).
87. *Id.*
88. *Id.*

classification statute providing that agricultural land is to be classified and taxed without regard to zoning.[89] The new section reads:

> Land devoted to agricultural use shall be classified and taxed as agricultural land without regard to the zoning classification which it may be given; provided, however, that all or any portion of such land which is sold or otherwise converted to a use other than agricultural shall be classified and taxed accordingly.[90]

In 1977, the South Dakota Legislature again revised the classification statute and explicitly set forth what was included within the term "nonagricultural property:"

> Nonagricultural property within a school district includes dwellings on agricultural land and automobile garages or portions of buildings used for that purpose by the occupants of such dwellings, and all other property not classified as agricultural property; provided, however, that the dwellings on agricultural land, automobile garages and portions of buildings used for that purpose by the occupants of such dwellings shall not be classified as nonagricultural property if the owner has other agricultural property with an assessed valuation of at least twice the assessed valuation of the dwellings, automobile garages and portions of buildings used for that purpose.[91]

Additionally, the amended statute provides that the first ten thousand dollars of the true and full value of the buildings and structures that are used exclusively for agricultural purposes and situated on agricultural land are exempted from the school district mill levy.[92]

Since its enactment in 1931, the classification statute has contained the requisite of having to "use" the property for agricultural purposes. The term "exclusive use," however, was not added until 1953. Note that the present classification statute uses the word "property" instead of "land." The present statute does not allow the county assessor to rely on the zoning classification in making the determination of what is agricultural and what is nonagricultural. The statute, however, does permit the assessor to consider the buildings, structures, machinery, livestock and other improvements on the land in his classification of the property.

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89. S.D.C.L. § 10-6-31.1 (Supp. 1976).
90. *Id.*
91. S.D.C.L. § 10-6-31 (Supp. 1977).
92. The mill levy for the general fund of any school district is eight mills on all property within the school district. Any additional mill levy beyond the first eight mills up to the maximum mill levy of twenty-one mills on agricultural land is one half for agricultural property the mill levy on nonagricultural property. This is intrinsically related to preferential assessment in that the established school district mill levy is multiplied by a portion of the agricultural use-value assessment to arrive at the tax payable for school district purposes. Thus while preferential assessment benefits only those landowners whose property has a value other than agricultural, the lower school district mill levy rate for agricultural property benefits all farmers. S.D.C.L. § 10-12-31 (Supp. 1976).

PROBLEMS CAUSED BY SOUTH DAKOTA'S CLASSIFICATION STATUTE

"Legislatures have had difficulty defining the type of property eligible for preferential property tax treatment."[93] In order to alleviate the problem, some states have arbitrarily required that to be eligible for such status, the land must be within "an exclusive agricultural use zone."[94] Other states define property eligible for preferential assessment by requiring a minimum acreage.[95] A related area involves whether the weekend farmer and absentee landlord may also qualify for preferential property tax treatment.[96] Additional issues that arise are at what point a farm operation becomes commercial or industrial and whether preferential assessment was implemented to provide a tax break for such large scale farm operations.[97] Because of the evolving nature of agricultural property, preferential assessment is benefiting weekend farmers, absentee landlords, and large farm corporations who do not need the preferential tax treatment as an incentive to continue in agricultural production. At the same time, the school districts within South Dakota are in desperate need of revenue to support public education. Thus the question arises whether the property tax should be a "land tax," or become a "property owners' tax," thus benefiting only those property owners who need the preferential assessment treatment to make it feasible for them to continue farming the land.

What is Agricultural?

In one of the first South Dakota cases defining "agricultural lands," the Supreme Court in *Milne v. McKinnon*[98] stated that a tract of land need not be in use and cultivated for agricultural purposes in order for it to be classified as agricultural land.[99] Thus the unbroken prairie, the timber-covered valleys and the rolling hillsides are agricultural lands before as well as after they have been prepared for husbandry.[100] Although this definition of agricultural lands referred to an assessment for a drainage ditch and did not deal specifically with the classification of land for school taxation purposes,[101] it does set precedent for defining "agricultural land" broadly.

In an effort to guide the county assessor in making his determination of what is "agricultural," a South Dakota Circuit Court in *Nielsen v. Erickson*[102] established the following procedure. The

93. Henke, *supra* note 6, at 121.
94. *Id.*
95. *Id.*
96. *Id.*
97. *See generally* Minnesota Power & Light Co. v. Carlton County, 275 Minn. 101, 145 N.W.2d 68 (1966).
98. 32 S.D. 627, 144 N.W. 117 (1913).
99. *Id.* at 631, 144 N.W. at 119.
100. *Id.*
101. *Id.* at 628, 144 N.W. 117, 118.
102. Nielsen v. Erickson (2d Cir. S.D.) (Civ. No. 74-474) (1976).

assessor should first determine whether the land is rural or urban.[103] If the property is urban, it must be classified as nonagricultural.[104] The property should receive an agricultural land classification if it is rural and in its natural state.[105] If the property is rural but not in its natural state, then the county assessor must determine whether it meets the definition of agriculture as found in the standard dictionaries.[106] The standard legal definition found in Black's Law Dictionary, however, hardly clears up the confusion regarding what is "agricultural property."[107] A South Dakota Attorney General's opinion restricted the elusive definition of agriculture by stating that the mere raising of a garden, poultry, or other products of the soil would not constitute an agricultural use unless it constituted farming within the sense that it is employed in the state of South Dakota.[108] Needless to say, the definition of agricultural as "farming" within the sense that it is employed in South Dakota is hardly a clearly defined statement to guide an assessor's action; much less does such a definition provide a fair and concrete standard under which a taxpayer could challenge the classification of his property.

Another Circuit Court in South Dakota established additional judicial standards to guide the assessor in classifying land as "agricultural" and "nonagricultural."[109] The court stated that a pertinent standard is whether the farm unit is "self-sustaining economically, whether it can produce enough income to pay the taxes and operating expenses and, if so, it is agricultural land, even if only rented out to another tenant."[110] Other factors considered by the assessor and upheld by the court in the classification of property included the size of the tract, the content of the taxpayer's self-listing tax report, the acreage of the farm operation, the primary occupation of the property owner and the primary source of income of the farm operator.[111]

These criteria, however, were disputed by a different Circuit Court Judge in the same county.[112] The court in *Nielsen v. Erickson*[113] stated that with respect to the county assessors' responsibil-

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. BLACK'S LAW DICTIONARY 91 (4th ed. 1968). Agriculture is defined as follows:

> the art or science of cultivating the ground, including the harvesting of crops, and in a broad sense, the science or art of production of plants and animals useful to man, including in a variable degree, the preparation of these products for man's use. In the broad sense, it includes farming, horticulture, forestry, together with such subjects as butter, cheese, making sugar, etc.

108. [1932-34] S.D. ATT'Y GEN. REP. 737, 739.
109. Junck v. Erickson (2d Cir. S.D.) (Civ. No. 74-1438) (1974).
110. *Id.*
111. *Id.*
112. Nielsen v. Erickson (2d Cir. S.D.) (Civ. No. 74-474) (1976).
113. *Id.*

ity in the classification of property as agricultural and non-agricultural, there is nothing in the South Dakota Codified Laws which permits or requires the assessor to consider any of the following criteria:

> Whether the land is economically self-sufficient; . . . whether the owner has another occupation; . . . what the owner's primary source of income is; . . . the amount or value of machinery in relation to the size of the tract; . . . [and] the value of the house.[114]

Hence, the criteria that an assessor is permitted or required to consider are severely limited and thus he has wide discretion in his classification of property. This broad discretionary power creates problems for the assessor in judging what is agricultural and may even amount to an unlawful delegation of legislative power.

The determination of whether or not a given piece of property is agricultural is only one step in the classification process.[115] Next, the assessor must determine if the property is "used exclusively for agricultural purposes."[116] The meaning of "exclusive use" has become a perplexing area with regard to both agricultural land and farm residences.

When is Agricultural Land Used Exclusively for Agricultural Purposes?

In 1933 a South Dakota Attorney General defined "exclusive use" to mean that "if any property is used in part for other than agricultural purposes . . . it should not receive an agricultural land classification."[117] Black's Law Dictionary, however, interprets "exclusively used" more broadly as having reference to a "primary and inherent" as opposed to a "mere secondary and incidental use."[118] Courts in other states called upon to determine what is meant by "exclusive use" have held that if property could be classified as agricultural, "the uniting of any other business, not inconsistent with the pursuit of agriculture, does not take away the protection of the act."[119] In other words, the exclusive agricultural use qualification is satisfied only if the party in possession of such property is primarily engaged in farming.[120]

A South Dakota Circuit Court followed the strict interpretation of "exclusive use" in *Richards v. Commissioners of Lawrence*

114. *Id.*
115. S.D.C.L. § 10-6-31 (1967).
116. *Id.*
117. [1932-34] S.D. ATT'Y GEN. REP. 737, 739.
118. BLACK'S LAW DICTIONARY 675 (4th ed. 1968).
119. Springer v. Lewis, 22 Pa. 191, 193 (1853), *cited in* [1932-34] S.D. ATT'Y GEN. REP. 737, 739.
120. [1932-34] S.D. ATT'Y GEN. REP. 737, 739.

County.[121] This 1970 circuit court decision held that the county assessor does not have the authority under the South Dakota classification statute to separate portions of a single legal subdivision and classify portions of that tract as agricultural and nonagricultural and then to make a combination of the two.[122] The court said that if a taxpayer wishes to designate some portion of his property as nonagricultural, the taxpayer must have it platted for nonagricultural use to receive the separate classification and thus to protect the lands in agricultural use.[123] Conceivably, under the South Dakota classification statute, a farmer could use ninety percent of his land for agricultural purposes and ten percent for nonagricultural purposes and yet have the whole tract of land assessed at the higher tax rate of nonagricultural land if the nonagricultural portion was not platted. Under this strict interpretation of the classification statute, the issue arises whether the statute is violative of the equal protection clauses of the state and federal constitutions since it classifies and assesses some agricultural land as nonagricultural. In addition to the equal protection clauses, the constitutional provision that all taxes must be uniform and equal within the same class[124] may also be contravened to the extent that some agricultural property is being assessed and taxed differently than other agricultural property simply because of its location with respect to nonagricultural uses on a single legal subdivision.

Is a Farm Residence an Exclusive Agricultural Use?

The situation facing the South Dakota courts with regard to farm residences and the exclusive use concept is the disparity between taxes on agricultural and nonagricultural residences.[125] Because of this disparity, city dwellers see an opportunity not only to enjoy the benefits of living in the country, but also to get a tax break in the process, by purchasing a small tract of agricultural land and commuting to their jobs in the city.[126] A few years ago this presented no problem to the taxing authority because the num-

121. Richards v. County Comm'r of Lawrence County (8th Cir. S.D.) (1970).
122. *Id.*
123. *Id.*
124. S.D. CONST. art. VIII, § 15 provides, in part:
The Legislature is empowered to classify properties within school districts for purposes of school taxation, and may constitute agricultural property a separate class. Taxes shall be uniform on all property in the same class.
S.D. CONST. art. XI, § 2 (1967) provides:
To the end that the burden of taxation may be equitable upon all property, and in order that no property which is made subject to taxation shall escape, the Legislature is empowered to divide all property . . . into classes and to determine what class or classes of property shall be subject to taxation and what property, if any, shall not be subject to taxation. Taxes shall be uniform on all property of the same class, and shall be levied and collected for public purposes only.
125. Nielsen v. Erickson (2d Cir. S.D.) (Civ. 74-474) (1976).
126. *Id.*

ber who made the move was small; however, in recent years the "movement has become something of an exodus."[127] The dilemma lies in the fact that a house in the country produces far fewer tax dollars than an identical house in a city, particularly when the number of such country residences is multiplied by several hundred.[128]

In reality, no farm residence is used exclusively for agricultural purposes. Thus under a strict interpretation of the classification statute, the assessor must classify property used partly for personal use as nonagricultural. Irrespective of the wording of the statute, the actual practice in South Dakota has been to classify a farm residence as agricultural property whenever it is located on property used for agricultural purposes. This practice was restricted somewhat by new legislation in South Dakota requiring the landowner to have other agricultural property that is twice as valuable as the dwelling and automobile garage before he receives the agricultural classification.[129] The new legislation further provides that buildings and structures located on agricultural land and used for agricultural purposes are exempt from the school district mill levy for the first $10,000 of the full and true value of the property while buildings and structures on nonagricultural land must pay a higher school district mill levy on the full and true value of all their property.[130] Once again taxes may not be equal and uniform on property in the same class as residences with identical market values may be assessed differently for school taxation purposes on the basis of their location, *e.g.*, city v. country.

Analysis of Problem Areas of South Dakota's Classification Statute

The South Dakota classification statute has caused both the taxpayer and the county assessor a great deal of confusion in the interpretation of the terms "agricultural" and "exclusive use."[131] When there is no satisfactory "statutory definition, the common and generally understood meaning of a word should be applied in the construction of [a] statute."[132] It is evident from the multiple legislative amendments[133] and the extent of the case law concerning the terms that there are "no common and generally understood" meanings. Because of the many problems created by the confusion regarding the property tax classification system, and the infinite implications of those problems, emphasis will be limited to the constitutional attacks of equal protection and separation of powers.

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127. *Id.*
128. *Id.*
129. S.D.S.B. No. 190 (1977).
130. *Id.*
131. *See* text accompanying notes 98-130 *supra.*
132. State v. City of Madison, 55 Wis. 2d 427, ——, 198 N.W.2d 615, 619 (1972).
133. *See* text accompanying notes 80-92 *supra.*

Agricultural Land and Equal Protection

The South Dakota classification statute, by granting a special property tax break to a class of taxpayers, involves an equal protection question.[134] That question is whether a tax based exclusively on property violates the equal protection clauses of the federal and state constitutions to the extent that it differentiates on the basis of agricultural or nonagricultural use of property.[135] The equal protection clause of the federal constitution does not preclude states from resorting to classification for purposes of legislation so long as the classification rests " 'upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[136] Furthermore, unless all persons similarly circumstanced are treated alike, the requirements of the federal and state constitutions of uniformity and equality of taxation on all property within the same class will not be met.[137] Consequently, an individual may not be discriminated against in the taxes he is required to pay for public purposes.[138]

The South Dakota Supreme Court in *Great Northern Railway Co. v. Whitfield*[139] believed it "reasonable for a Legislature, in an agricultural state, to offer inducements to agriculture through its tax laws."[140] One member of the court stated that "agricultural lands" have inherent characteristics with respect to their use that differentiate them sufficiently to justify their separate classification.[141] Similarly, a Washington court in *Stiner v. Yelle*[142] stated that generally speaking "farming is not a commercial pursuit" but "a way of life" that provides the farmer in more prosperous times with a modest livelihood and perhaps some financial gain from the rise in land values.[143] The court in *Stiner* held that there may be other differences justifying the agricultural classification for the

134. The equal protection clause in the U.S. CONST. amend. XIV, § 1 reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The equal protection clause in the S.D. CONST. art. VI, § 18 provides:

> No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

135. *Id.*

136. Great N. Ry. Co. v. Whitfield, 65 S.D. 173, 181, 272 N.W. 787, 791 (1937) (*citing* F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)).

137. S.D. CONST. art. VIII, § 15; S.D. CONST. art. XI, § 2 (1967). *See also* note 134 *supra.*

138. *See* U.S. CONST. amend. XIV, § 1; S.D. CONST. art. VI, § 18.

139. 65 S.D. 173, 272 N.W. 787 (1937).

140. *Id.* at 185, 272 N.W. at 793.

141. *Id.* (Roberts, J. concurring specially).

142. Great N. Ry. Co. v. Whitfield, 65 S.D. 173, 272 N.W. 787, 795 (1937) (*citing* State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P. 91, 94).

143. *Id.*

purposes of apportioning the tax burden, in addition to the marked difference between land utilized in an agricultural pursuit and land utilized incident to commercial and other pursuits.[144] The Washington court further held that a classification designed to conserve a source of tax revenue and to foster and promote agriculture and the common good is not arbitrary.[145] The classification of property as agricultural land, therefore, appears to comply with equal protection requirements to the extent that the separate classification is justified by inherent characteristics.

On the contrary, preferential assessment of property for other than school taxation purposes may violate the equal protection clause to the extent that the statute defines the term market value differently for agricultural property than for other real estate.[146] This has the effect of segregating real property into the classes of agricultural and nonagricultural for taxation purposes. While this issue has not been litigated in the South Dakota courts, a strong argument appears that the equal protection clauses of the state and federal constitutions are violated since there is no constitutional authorization for such differentiation on the basis of market value except for the purposes of school taxation. Additionally, a constitutional amendment was found necessary to provide the legislature with the authority to differentiate assessments for the purpose of school taxation, if such discrimination is based on a ground reasonably related to the legislative objective.[147] Thus it logically follows that constitutional authorization is required for preferential tax treatment of agricultural property for purposes other than school taxation.

Exclusive Use and Equal Protection

From the indications of the 1970 circuit court decision of *Richards v. County Commissioners of Lawrence County*,[148] South Dakota appears to make a strict interpretation of the phrase "exclusive use" in reference to agricultural property. Presently, if the taxpayer wishes to place any portion of a legal subdivision into the nonagricultural classification, the taxpayer must have it platted as such.[149] The requirement of platting can be a financial burden for many taxpayers and is merely an administrative convenience. If the landowner does convert a portion of a legal subdivision to nonagricultural use without having the nonagricultural land platted, then his agricultural land will be assessed as nonagricultural and taxed accordingly.[150] This may violate the equal protec-

144. *Id.*
145. *Id.*
146. S.D.C.L. § 10-6-33.1 (Supp. 1976).
147. S.D. CONST. art. VIII, § 15. *See also* text accompanying notes 80-81 *supra*.
148. Richards v. County Comm'r of Lawrence County (8th Cir. S.D.) (1970).
149. *Id.*
150. *Id.*

tion clause of the state and federal constitutions in that the same class of property is being taxed differently without a reasonable basis.[151] In turn, this different assessment of the same class of property would appear to violate the principle that all taxes must be equal and uniform on all property within the same class.[152]

To remedy this inequitable situation, two alternatives are available. One solution would be to grant county assessors the authority to assess property at its present use-value as agricultural or nonagricultural within a legal subdivision, whether platted or not, where both agricultural and nonagricultural classifications exist on the same tract of land.[153] On the other hand, perhaps the more feasible alternative would be to take a broad approach to the phrase "exclusive use" and allow preferential assessment status for any use of the property on a legal subdivision not inconsistent with the predominantly agricultural use.[154]

The classification of farm residences as property "used exclusively" for agricultural purposes also raises serious constitutional questions.[155] One question is whether the equal protection clauses of the state and federal constitutions are violated to the extent that agricultural residences are assessed differently than nonagricultural residences for school taxation purposes.[156] Realistically, residences in both the city and the country are used predominantly for personal use. Additionally, there would seem to be no more rational basis or public purpose in encouraging construction of buildings and improvements on farmland than in the urban areas.[157] The rationale for taxing farm residences as agricultural property, however, goes back to the inability of county assessors to differentiate classes of property on the same legal subdivision. Under the present classification statute in South Dakota, the house is usually located on the same legal subdivision as agricultural land, and thus the county assessor must make a determination whether or not the subdivision as a whole is used exclusively for agricultural purposes.[158] The practice in South Dakota has been to classify a farm residence as agricultural property whenever a residence is located on agricultural land and is occupied by an individual engaged in agriculture. In reality few farm residences are used exclusively for agricultural purposes. Thus the county assessor should be permitted to separate the house from the rest of the property and assess

151. U.S. CONST. amend. XIV, § 1; S.D. CONST. art. VI, § 18; *See* note 134 *supra.*

152. S.D. CONST. art. VIII, § 15; S.D. CONST. art. XI § 2 (1967); *see* note 124 *supra.*

153. *But see* Richards v. County Comm'r of Lawrence County (8th Cir. S.D.) (1970).

154. *See* Springer v. Lewis, 22 Pa. 191 (1853).

155. U.S. CONST. amend XIV, § 1; S.D. CONST. art. VI, § 18; *see* note 134 *supra.*

156. *Id.*

157. *Contra*, Eisenzimmer v. Bell, 75 N.D. 733, 32 N.W.2d 891 (1948).

158. Richards v. County Comm'r of Lawrence County (8th Cir. S.D.) (1970).

the house as nonagricultural and the property surrounding the house as agricultural, if used for that purpose.

The federal government recently defined the term "exclusive use" in relation to business uses of residences in the 1976 Tax Reform Act.[159] "Exclusive use" under the Act has been interpreted as meaning that the taxpayer "must use a specific part of the home solely for the purpose of carrying on his trade or business."[160] The test is not satisfied, however, if the taxpayer uses any portion for both business and personal purposes.[161] When this federal definition is applied to farm residences under the classification statute in South Dakota, the result would be that the residence as a whole would not be classified as agricultural, but the farmer could receive a tax break if a portion of his house was used exclusively for agricultural purposes.

Since most farm residences are not exclusively used for agricultural purposes because of the nature of a home as primarily personal, farm residences should be taxed as nonagricultural land for school taxation purposes and thus accorded the same property tax treatment as urban residences. South Dakota legislators recognized this problem and introduced Senate Bill 190 into the 1977 legislature.[162] Senate Bill 190 sought to amend the present classification statute to provide that all residences shall be assessed as nonagricultural.[163] The bill was amended on the floor of the South Dakota House of Representatives, however, to provide that a landowner cannot get the agricultural classification unless the landowner has agricultural land exceeding twice the value of the residence.[164] This legislation may solve the problem of the unintentional preferential tax treatment of luxurious homes built in the urban fringe by people who commute to their jobs in the city and perhaps some weekend farmers whose homes could not be realistically classified as agricultural property. The classification statute may, nevertheless, still be violative of equal protection because it assesses rural and urban residences differently on the basis of their location, which may not be a rational justification for such classification. Additionally, the requirement for receiving an agricultural classification of the assessed valuation of the agricultural property exceeding twice the assessed valuation of the residence and garage appears to be an arbitrary ratio to the extent that the legislature has not shown any justifiable purpose for using this particular formula as opposed to other formulas for classifying homes as agricultural and nonagricultural. The statute, however, will provide additional

159. Tax Reform Act of 1976, § 601, Pub. L. No. 94-455.
160. COMMERCE CLEARINGHOUSE, TAX REFORM ACT OF 1976—LAW AND EXPLANATION, 225 (1976).
161. *Id.*
162. S.D.S.B. No. 190 (1977).
163. *Id.*
164. *Id.*

revenue for public education because it will permit assessors to separate houses with twice the value of the land from the rest of the property in a legal subdivision and thus to assess the house at its market value and the land at its use-value.[165] Unfortunately, Senate Bill 190 in its final form does not go far enough. Perhaps the South Dakota Supreme Court will supply some answers to the problems raised by the farm residence and equal protection question in *Nielsen v. Erickson.*[166]

The Classification Statute and the Delegation of Legislative Power

As a general rule, the power to classify and tax property resides almost exclusively in the state legislature and cannot be delegated to either of the other branches of the government, or to any individual, officer, board or commission.[167] One exception to this general rule is that the power to classify and assess property may be delegated to political subdivisions of the state within constitutional limitations.[168] The power of a political subdivision to classify property and levy taxes must nevertheless "be expressly and distinctly granted, and must be exercised in strict conformity with the terms of the grant."[169]

The South Dakota classification statute expressly provides that the county assessor shall classify property as "agricultural" and "nonagricultural" for school taxation purposes.[170] The constitutional limitations imposed upon the classification statute with respect to the separation of powers doctrine requires that a statute that vests undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of power.[171] Thus quasi-legislative power such as that granted by the South Dakota classification statute to the county assessor may be delegated provided the regulatory standards are sufficient to limit the discretion of the county assessor and enable him to classify and tax all property within the class equally and uniformly, thereby preventing violation of the constitutional requirement of uniformity of taxation.[172] In other words, the delegation is not "constitutionally offensive" where a clearly defined policy has been established and where "understandable standards" have been adopted to guide the county assessors' actions.[173] Because of the confusion surrounding

165. *Id.*
166. Nielsen v. Erickson (2d Cir. S.D.) (Civ. 74-474) (1976).
167. 84 C.J.S. § 8 (1954).
168. Berdahl v. Gillis, 81 S.D. 436, 136 N.W.2d 633 (1965).
169. 84 C.J.S. § 8, p. 57 (1954). *See also* S.D.C.L. § 10-6-31 (1967).
170. S.D.C.L. § 10-6-31 (1967).
171. Affiliated Distillers Brands Corp. v. Gillis, 81 S.D. 44, 130 N.W.2d 597 (1964).
172. S.D. CONST. art. XI, § 2. *See supra* note 124.
173. Affiliated Distillers Brands Corp. v. Gillis, 81 S.D. 44, 48, 130 N.W.2d 597, 599 (1964).
The theory of administrative rulemaking is that in certain fields and in some respects the public interest is better served by dele-

the terms "agricultural" and "nonagricultural" in the South Dakota classification statute,[174] the classification statute, when taken alone, obviously does not provide a county assessor with adequate standards to classify and assess property equally and uniformly. Thus this unregulated discretion results in an unlawful delegation of legislative power.

It cannot be said that the South Dakota Legislature adopted no standards, as the terms "agricultural" and "nonagricultural" do establish guidelines, however vague, within which the county assessor can classify property for school taxation.[175] In recent years, government has become far too large and complex to exercise all its inherent power and, therefore, has increasingly found it necessary to delegate various legislative powers.[176] For these same reasons, the requirement of adequate and understandable standards for each legislative delegation of power has become unrealistic, and thus delegation of power without meaningful standards has become a necessity in modern government.[177] Even though legislatures are delegating more and more discretionary power to other branches and levels of government, the requirement of some safeguards in the delegation is nevertheless still "a useful tool for protecting against arbitrary administrative power."[178]

The constitutional requirement of standards is designed to protect the public against unnecessary and uncontrolled discretionary power in the hands of administrators.[179] Another public policy consideration is that a governmental agency should be required to establish safeguards by way of standards to enable the taxpayer to determine in advance the classification of his property for school taxation purposes. Since the classification of "agricultural" and "nonagricultural" property must be made by the county assessor on an individualized basis because of its nature as a question of fact,[180] it is imperative that South Dakota promulgate some understandable standards to guide the county assessor in his classification of the property for school taxation purposes in order to avoid an unlawful delegation of legislative power. The three alternative sources of standards to remedy the unlawful delegation of legislative power to the county assessor are the legislature, the administrative agencies, and the judiciary.

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gating a large part of detailed law-making to expert administrators, controlled by policies, objects and standards laid down by the legislature, rather than having all the details spelled out through the traditional legislative process. *Id.*

174. *See* text accompanying notes 98-116 *supra.*

175. S.D.C.L. § 10-6-31 (1967).

176. *See* K. Davis, ADMINISTRATIVE LAW § 2.10 (3rd Ed.) (1972) [hereinafter cited as Davis].

177. *Id.*

178. *Id.* at § 2.01.

179. *Id.* at § 2.08.

180. Minnesota Power & Light Co. v. Carlton County, 275 Minn. 101, 145 N.W.2d 68 (1966).

Legislative Standards

One solution to the lack of meaningful standards in the South Dakota classification statute lies with the legislature, as the legislature decides tax policy.[181] The legislature set forth the tax policy with respect to the classification of property in South Dakota Codified Laws section 10-6-31.[182] Thus it can and should change that policy to comply with the requirement of meaningful standards. The South Dakota Legislature has already adopted the following standards for determining the value of agricultural land:

(1) The capacity of the land to produce agricultural products . . . ;
(2) Soil, terrain, and topographical condition of property;
(3) The present market value of said property as agricultural land . . . ;
(4) The character of the area or place in which said property is located; and
(5) Such other agricultural factors as may from time to time become applicable.[183]

The South Dakota Legislature could also adopt separate standards comparable to those used for valuation of agricultural land to assist the county assessor in classifying property as "agricultural" and "nonagricultural."

Administrative Standards

In the absence of statutory standards, the administrative branch has the power to provide guidelines for the county assessor.[184] It is the duty of the Secretary of Revenue to exercise general supervision over the administration of the assessment and tax laws in South Dakota to ensure that all assessments of property are made relatively just and equal.[185] The Secretary of Revenue also has the power to make rules and regulations relating to the duties imposed upon him or the Department of Revenue.[186] Under this statutory authority, the Secretary of Revenue promulgated the following definitions:

(1) "Agricultural land," all land exclusively devoted to the production of agricultural products;
(2) "Agricultural products," all those products commonly known and referred to as food and fiber, including dairy products, livestock, growing crops, and the like, and which are produced, raised or grown upon agricultural land.[187]

181. Nielsen v. Erickson (2d Cir. S.D.) (Civ. No. 74-474) (1976).
182. S.D.C.L. § 10-6-31 (1967).
183. S.D.C.L. § 10-6-33.1 (Supp. 1976).
184. *See* S.D.C.L. § 10-1-13 (1967).
185. *Id.* § 10-1-15.
186. *Id.* § 10-1-13.
187. 1974 A.R.S.D. § 64:06:03:00:01.

These definitions do not provide "understandable standards" for the county assessor under the classification statute but do set precedent for the Secretary of Revenue to promulgate rules and regulations which would achieve his stated purpose of equal and just classification of property by county assessors.

Nevertheless, if the Secretary of Revenue fails to promulgate meaningful standards, the County Board of Equalization, also an administrative agency, can establish reasonable rules to carry out its duties and is empowered to promulgate rules for the enforcement of taxing statutes provided such rules do not enlarge the scope of the statute.[188] If no standards are provided by the South Dakota Legislature or the Department of Revenue, it is incumbent upon the county assessor to structure and confine his discretionary power as far as practicable through appropriate standards, principles and rules.[189]

Judicial Standards

If the legislative and administrative branches of the government fail to limit the discretion placed in the hands of the county assessor by the South Dakota classification statute, it is up to the judiciary to ensure that private parties are protected against arbitrary action and that justice is achieved. The most relevant discussion of the problem of classifying land as "agricultural" and "nonagricultural" and the criteria used by the court in that determination is found in the Minnesota Supreme Court case, *Staples v. State*.[190] In Minnesota, agricultural land primarily used for agricultural purposes is classified for school maintenance purposes.[191] Thus it is very similar to the classification statute in South Dakota. The Minnesota court, lacking adequate legislative standards,[192] set forth the following factors:

> [T]he location of the property and its general surroundings are material. The specific use to which it is devoted is important. If land partakes of the character of city property and is occupied for residential purposes only by persons engaged in city pursuits, for tax purposes the property may well be regarded as urban, even though some distance from a city. . . . [W]here it is in the general neighborhood of farms, where it is devoted to rural rather than urban uses, or is readily adaptable to rural though not necessarily agricultural uses, it should be classified as rural . . . even though the property be within the corporate limits of a municipality.[193]

188. 84 C.J.S. § 8 (1954).
189. Davis, *supra* note 176, at 46.
190. 233 Minn. 312, 46 N.W. 651 (1951).
191. *Id.*
192. *See* M.S.A. § 273.13, Subd. 6, Class 3b (Supp. 1976).
193. Staples v. State, 233 Minn. 312, 46 N.W. 651 (1951).

Recommended Standards for the Classification Statute

The South Dakota Legislature, administrative agencies or judiciary can and should prescribe understandable criteria to be used by a county assessor in his classification of property to ensure equality and uniformity of taxation and to prevent an unlawful delegation of legislative power. The following factors appear to be determinative of the agricultural nature of property:

(1) *Present Use of the Property.* The classification statute provides that agricultural property includes all property used exclusively for agricultural purposes. Thus the present use of the property would be indicative of the agricultural nature of the land.[194]

(2) *Location and General Surroundings of the Property.* The location of agricultural property is important to the extent that the taxpayer may have no fire or police protection, public sewer, water or sidewalk maintenance and thus his property could be considered rural. If the lands surrounding the taxpayer's property are lands where extensive farming operations are carried on, then this could be a factor in the type of land classification.[195]

(3) *Sales Volume of Farm Products.* The Federal Government recently held hearings on the definition of the term "farm" for census purposes and defined it in relation to the sale of farm produce. This national definition of a "farm" requires the selling of farm produce worth $1,000 or more yearly in order to qualify as a farm.[196] Thus the sale of farm produce could be used as a criteria in ascertaining what is agricultural, as agricultural productivity is indicative of the agricultural use of property.

(4) *Economically Self-Sustaining Farm Unit.* Agricultural use could be established by determining that the farm operation could produce enough income to pay the taxes and operating expenses. The land is not being efficiently farmed if it is not economically self-sustaining.[197] Although size of the farm is not conclusive,[198] as the acreage of the property decreases, its utilization by the occupant engaged primarily in farming becomes less specific as it becomes less of an operational unit.

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194. S.D.C.L. § 10-6-31 (1967).
195. *See generally* Staples v. State, 233 Minn. 312, 46 N.W. 651 (1951).
196. Redefinition of the Term "Farm": Hearings before the Subcomm. on Family Farms and Rural Development of the House Comm. on Agriculture, 94th Cong. 1st Sess. 2 (1975).
197. Junck v. Erickson (2d Cir. S.D.) (Civ. No. 74-1438) (1974).
198. [1965-66] S.D. ATT'Y GEN. REP. 360.

(5) *Such other agricultural factors as may from time to time become applicable.* This merely provides flexibility for the county assessor in his classification of property as agricultural or nonagricultural and permits the assessor to consider the present general farming operations in the community.[199]

While these standards will assist the assessor in his classification of property, the assessor still must exercise a great deal of discretion. In addition to these standards, it may be helpful to the county assessor and the courts if the legislature inserted a preface to the classification statute stating the objectives or goals of the preferential assessment legislation. Thus in reviewing classification controversies, a court would be better able to determine the legislative intent of the statute.

The problem areas of the South Dakota property tax system, however, will never be completely remedied until the system is reevaluated and revised. Some additional changes which would assist in improving the property taxation process in South Dakota would be to:

(1) Require additional and continual training for the county assessor in addition to minimum entry requirements;[200]

(2) Provide state financial aid to upgrade local assessment practices;[201]

(3) Provide for an audit to ensure the enforcement of uniform and equal taxation at the local level;[202]

(4) Ensure independence of the county assessor from political pressures;[203] and

(5) Compensate the county assessor commensurate with his duties.[204]

CONCLUSION

While South Dakota's property tax system has provided tax equity for farmers, it has also increased the school tax levy, led to land speculation, and in general, been detrimental to the rural

199. *See* S.D.C.L. § 10-6-33.1 (Supp. 1976).

200. *See generally* S.D.C.L. § 10-3-1.1 (Supp. 1976). Presently, no education is required of county assessors during the first two years of their employment. *Id.*

201. A. Stauffer, Property Assessment and Exemptions: They Need Reform 32-33 (1973) (research brief for the Educ. Commission of the States).

202. *Id.* at 38.

203. S.D.C.L. § 10-3-3 (1967). The county assessor is appointed by the county commissioners. The employment of the county assessor can be terminated by the county commissioners without cause during the first year of the five year term. After the first year of such term, cause must be provided for such termination. *Id.* at § 10-3-5.

204. S.D.C.L. § 10-3-6 (1967). The salary of the county assessor is set by the county commissioners. Generally, the compensation paid county assessors has been low and not commensurate with the character of the services, amount of labor and dignity of office as provided by statute.

family farmer. One author aptly stated that, "Any special tax break for one class of taxpayers at the expense of the rest deserves close scrutiny."[205] Preferential assessment of agricultural property has resulted in either a substantial loss in public revenue or a shift in the tax burden to nonagricultural taxpayers.[206] While some needy farmers may have benefited by use-value assessment, "so have prosperous corporations, land speculators, and weekend farmers."[207] Thus it is imperative that South Dakota re-evaluate its preferential assessment approach and consider supplementing preferential assessment with a rollback provision and a land use planning measure to remedy the adverse effects of the present system.

Notwithstanding the type of differential assessment system implemented in South Dakota, some basic problem areas of the South Dakota classification statute are in drastic need of revision. First, standards ought to be established by the judiciary, legislature or administrative agencies to provide county assessors with some guidance in their classification of property to avoid an unlawful delegation of legislative power and to ensure that taxes are equal and uniform within a class. The following standards appear to be determinative factors in ascertaining the agricultural nature of property:

(1) Present Use of the Property;
(2) Location and General Surroundings of the Property;
(3) Sales Volume of Farm Products;
(4) Economically Self-Sustaining Farm Unit; and
(5) Such other agricultural factors as may from time to time become applicable.

Secondly, county assessors ought to be granted authority to assess property at its present use as agricultural or nonagricultural whether platted or not and classify accordingly where both classifications exist on the same legal subdivision. Alternatively, the legislature or the court could take a liberal approach to the phrase "exclusive use" and allow preferential assessment status for any use of the property not inconsistent with the predominantly agricultural use.

Finally, farm residences ought to be excluded from the phrase "agricultural property" and taxed at the same rate as urban residences to avoid a constitutional challenge on equal protection grounds and to ensure equal and uniform taxation on all residences for the purposes of school taxation.

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205. Henke, *supra* note 6, at 130.
206. *Id.*
207. *Id.*