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FLORIDA’S ADHERENCE TO THE DOCTRINE OF NONDELEGATION OF LEGISLATIVE POWER

CARL J. PECKINPAUGH, JR.

Like the United States Constitution and those of most states, the Florida Constitution separates the powers of government into three branches: the legislative, executive, and judicial. However, in this respect the Florida Constitution is more emphatic than most in that it expressly provides that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” When this section is read together with other provisions of the Florida Constitution which vest the legislative power of the state in the legislature, the supreme executive power in the Governor, and the judicial power in the courts, one result is a doctrinal prohibition of the delegation of legislative power to an agency. Therefore, the legislature may not delegate to any agency the power to set policies or “to declare what the law shall be.” A closely related, but less commonly litigated doctrine prohibits the legislature from delegating judicial power to an agency. The principles of these doctrines are equally applicable to delegations of power by legislative bodies of local governments.

Despite the nondelegation doctrine, in Florida it has long been held that subject to certain statutory guidelines, administrative action may validly entail the exercise of either quasi-legislative or quasi-judicial discretion. However, courts have often had difficulty in explicitly defining what statutory limitations are necessary for a delegation of authority to be sufficiently restrictive. One result has been that in the federal judiciary and in a number of other jurisdi-

1. Fla. Const. art. II, § 3 provides in part: “Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches.”
2. Id.
3. Id. art. III, § 1.
4. Id. art. IV, § 1.
5. Id. art. V, § 1.
6. The definition of “agency” in Florida’s Administrative Procedure Act includes the Governor and all other state officers, departments, departmental units, commissioners, regional planning agencies, boards, districts, and authorities, and other units of government, including counties and municipalities to the extent that they are made subject to the act “by general or special law or existing judicial decisions.” Fla. Stat. § 120.52(1) (1977).
7. State v. Atlantic Coast Line Ry., 47 So. 969, 976 (Fla. 1908).
8. In the cases defining the necessary requirements for a delegation of power by the legislature in Florida, there has been almost no distinction in the standards between delegations of quasi-legislative and quasi-judicial authority. This discussion focuses on the nondelegation of legislative power, but the reasoning may be applied equally to the nondelegation of judicial power.
tions as well, courts have departed from the traditional nondelegation doctrine in favor of the "modern trend" in administrative law. This trend emphasizes the adequacy of procedural safeguards in the administrative process in lieu of strict legislative guidelines for exercise of delegated authority. But in Florida, the courts have continued to adhere to the nondelegation doctrine. Recently, in Askew v. Cross Key Waterways, the Florida Supreme Court stated that "until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of nondelegation of legislative power to be viable in this State."12

Case law on the nondelegation doctrine in Florida essentially begins with the often cited opinion in State v. Atlantic Coast Line Railway, in which Justice Whitfield wrote that:

The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.13

This statement means that the legislature must establish policies and set out definite guidelines and standards limiting the exercise of delegated power.14 "No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved . . . ."15 Once policies and adequate standards are established, the legislature may allow selected agencies or officials to promulgate subordinate rules or to determine the facts to which the legislatively declared policy is to apply.16 But even when the delegation of power sufficiently restricts agency discretion for constitutional purposes, an agency's failure to properly adopt definitive rules may result in the arbitrary exercise of the delegated power. In such an event, the courts will invalidate the agency action.17

12. 372 So. 2d 913, 925 (Fla. 1978). This case was a consolidation of two appeals from the First District Court of Appeal: Cross Key Waterways v. Askew, 351 So. 2d 1062 (Fla. 1st Dist. Ct. App. 1977), and Postal Colony Co. v. Askew, 348 So. 2d 338 (Fla. 1st Dist. Ct. App. 1977).
13. 47 So. 969, 976 (Fla. 1908).
15. Smith v. Portante, 212 So. 2d 298, 299 (Fla. 1968).
17. Straughn v. O'Riordan, 338 So. 2d 832 (Fla. 1976).
The requirement of standards to guide the agency in exercising delegated powers is the essence of the nondelegation doctrine. The supreme court has stated that "[t]he exact meaning of the requirement of a standard has never been fixed. . . . However, when statutes delegate power with inadequate protection against unfairness or favoritism, and when such protection could easily have been provided, the reviewing court should invalidate the legislation." 18 Additionally, when agency action is found to go beyond the statutory guidelines, the courts will invalidate that action, both under Florida's common law and more recently under the provisions of the Administrative Procedure Act. 19

The courts must ultimately determine whether an administrative action is within the limits of the delegated authority and whether those limits are sufficient. 20 Statutory limitations will be held unconstitutional if they contain vague terms. Furthermore, a statute will be constitutionally invalid if it is excessively broad in scope, so that no one, including the agency or the courts, can say with certainty whether agency action exceeds the delegated authority. However, if the guidelines on the agency's discretion are sufficiently limiting the sole fact that some "authority, discretion, or judgment" must necessarily be exercised will not invalidate the statutory delegation of authority. 21

In _Department of Citrus v. Griffin_, the Florida Supreme Court enunciated two tests to determine whether a statute violates the nondelegation doctrine: first, could the legislature make any transfer of authority at all; and second, if so, was the transfer accompanied by sufficiently restrictive guidelines on actions of the administrative agency? 22 "[T]hese tests must be tempered by due consideration for the practical context of the problem sought to be remedied, or the policy sought to be effected," 23 but the delegation must leave nothing to the agency's "unbridled discretion or whim." 24

A bifurcated analysis of statutory guidelines facilitates an appropriate examination of the second test enunciated in _Griffin_. The first consideration is whether the guidelines sufficiently limit agency action by specifying which elements or factors must be present before the delegated authority can be properly exercised. When

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21. _Id._
22. 239 So. 2d 577, 580 (Fla. 1970).
23. _Id._
the guidelines fail to delineate these elements or factors, leaving this
fundamental act of policy setting to the agency, that delegation of
authority is unconstitutional.25

Assuming that the guidelines sufficiently specify the elements or
factors limiting the agency’s authority to act,26 the second consider-
ation is how the stipulated elements or factors are modified by
quantitative terms that are susceptible of a reasonable and foresee-
able definition.27 For example, a hypothetical statute could author-
ize agency action to regulate “excessive” noise levels for the protec-
tion of workers in particular industries. In such a statute, the stipu-
lated limiting element for action is the regulation of “noise levels
for the protection of workers in particular industries.” The unde-
defined quantitative term “excessive” modifies the stipulated ele-
ment, but the determination of what constitutes an “excessive”
level of noise is left to the agency’s discretion. Thus, the question is
whether the term “excessive” prevents unforeseeable or arbitrary
agency action in fleshing out the regulatory framework.

Guidelines may appropriately specify which elements or factors
are necessary for agency action, while allowing the agency to inter-
pret the modifying quantitative terms.28 These terms indicate when
the necessary element for agency action crosses the quantitative
threshold of legislative concern, so as to allow the agency to exercise
its delegated authority. Procedural safeguards on the agency’s de-
termination of the required quantities of each element bolster the
probability that these guidelines will be found to be constitutional.29

An examination of recent Florida case law illustrates how the first
consideration of the preceding analysis has been applied by the
courts in passing on the constitutionality of statutory delegations of
power. In Conner v. Joe Hatton, Inc.,30 the court found that a statu-
tory provision prohibiting “unfair trade practices” as related to cel-
ery and sweet corn markets lacked sufficient guidelines to be a
constitutional delegation of authority. The court determined that

25. See, e.g., Cross Key Waterways, 372 So. 2d at 918-19.
26. When ambiguous language is used in delegating power, guidelines will still be suffi-
ciently restrictive if the language has become defined through common law, trade usage, or
federal law (if the legislative intent so indicated). D’Alemberte v. Anderson, 349 So. 2d 164,
167 (Fla. 1977); Conner v. Joe Hatton, Inc., 216 So. 2d 209, 213 (Fla. 1968).
27. See Cross Key Waterways, 372 So.2d at 919.
28. Id.
29. Id.; see also Albrecht v. Department of Envt’l Reg., 353 So. 2d 883, 886-87 ( Fla. 1st
Dist. Ct. App. 1977). These procedural safeguards include an evidentiary hearing for persons
affected by an agency action, and an opportunity for judicial review of the agency action. See
FLA. STAT. ch. 120 (1977). For a comparison of Florida’s Administrative Procedure Act before
and after its substantial amendment in 1975, see Note, Rulemaking and Adjudication Under
30. 216 So. 2d 209 (Fla. 1968).
there was no set meaning in law or common usage for "unfair trade practices." Therefore, the necessary element for agency action was inadequately specified.

Conner may be contrasted with Department of Legal Affairs v. Rogers, wherein the court did uphold the constitutionality of a similar delegation of authority. The delegated authority allowed agency action to prohibit "unfair or deceptive acts or practices in the conduct of any trade or commerce." The court found that the statute was valid because it specified that in construing the phrase "unfair or deceptive acts or practices," great weight was to be given to federal interpretations of that phrase as it is used in section 5(a)(1) of the Federal Trade Commission Act. Thus, the statutory reference to federal law provided the necessary guidelines to determine which elements must be present for the exercise of delegated authority.

In Harrington & Co. v. Tampa Port Authority, the supreme court considered the constitutionality of a statute which authorized state port authorities to "grant such number of licenses to competent and trustworthy persons to act as stevedores . . . as it may deem necessary, having due regard to the business of the port and harbor." In reviewing the Tampa Port Authority's denial of an applicant's request for a stevedore's license, the court struck down the statute because the legislature had provided no guidelines to ensure that those selected for licensing as stevedores were not arbitrarily chosen. The standards of trustworthiness and competence were inadequate to guard against arbitrary licensing since many more people would meet those requirements than the number of licenses actually granted.

In Gainesville-Alachua County Regional Utilities Board v. Clay Electric Cooperative, Inc., a statute which authorized the Public Service Commission to resolve territorial disputes between electric utility companies was found to contain adequate standards on the

31. *Id.* at 213.
32. 329 So. 2d 257 (Fla. 1976).
35. 329 So. 2d at 265.
36. 358 So. 2d 168 (Fla. 1978).
37. Ch. 73-206, § 11, 1973 Fla. Laws 466 (current version at *Fla. Stat.* § 311.021 (1977)).
38. 358 So. 2d at 170. Thus, the lack of adequate guidelines left to the agency the legislative task of establishing which factors must be present for granting of a stevedore’s license other than general trustworthiness and competence. Although the Tampa Port Authority limited the number of licenses based upon what may have been "due regard to the business of the port and harbor," there were no real guidelines as to who should get the licenses that were granted.
39. 340 So. 2d 1159 (Fla. 1978).
delegation of power. Factors to be considered by the Commission in resolving territorial disputes as established by the statute were:

the ability of utilities to expand services within their own capabilities and the nature of the area involved, including population and the degree of urbanization of the area and its proximity to other urban areas and the present and reasonably foreseeable future requirements of the area for other utility services.40

The statute provided the necessary limitation on the exercise of agency power by stating that "[t]he commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."41

Thus, this statute precisely set out which factors were necessary to invoke and guide the exercise of agency action.

The statutory use of vague or ambiguous language, when that language is not defined by law or trade usage, can result in unconstitutional guidelines. Such guidelines are so general that they do not sufficiently limit agency discretion. For example, in D'Alemberette v. Anderson,42 the Florida Supreme Court examined a statute which made it illegal for a public official to accept any gift "that would cause a reasonably prudent person to be influenced in the discharge of official duties."43 The court held that since this language was an ambiguous guideline for gauging a person's mental processes, it was an unconstitutional delegation of authority to the agency charged with making that determination.44

In contrast to the preceding cases, in Sarasota County v. Barg45 the statutory guidelines clearly delineated which elements or factors were necessary for agency action. Accordingly, the judicial focus was upon how the legislatively stipulated elements or factors were modified by quantitative terms in the statute. The statute in question prohibited "undue or unreasonable dredging, filling or disturbance

41. 340 So. 2d at 1162 (quoting Fla. Stat. § 366.04(3) (1977)) (emphasis supplied by the court). There is virtually no chance that the agency could exercise its discretion arbitrarily under the legislative mandate that the duplication of electric facilities is to be avoided in the development of the state's power grid. The express purpose of the act was properly and adequately defined.
42. 349 So. 2d 164 (Fla. 1977).
43. Ch. 74-177, § 3, 1974 Fla. Laws 470 (current version at Fla. Stat. § 112.313(2) (1977)).
44. 349 So. 2d at 168. There is no way to determine from the statute which gifts would be prohibited, leaving open the possibility of arbitrary application of the statute.
45. 302 So. 2d 737 (Fla. 1974).
of submerged bottoms," and "unreasonable destruction of natural vegetation" which would be "harmful" or which would "significantly contribute to air and water pollution." The supreme court held that the statute did not contain sufficient guidelines to be a constitutional delegation of authority to the Manasota Key Conservation District. The court stated that the statute "does not provide us with any definition of ‘undue,’ ‘unreasonable,’ ‘harmful,’ or ‘significantly contribute.’ The [statute] does not contain any standards or guidelines to aid any court or administrative body in interpreting these terms." Thus, the court deemed that these quantitative terms were insufficiently defined.

In Cross Key Waterways, the Florida Supreme Court stated that Barg's "approximations of the threshold of legislative concern" would not invalidate a similar statute today, partly because of the protections of the current version of the Administrative Procedure Act (which were not available at the time of the Barg decision). Thus, the supreme court ostensibly overruled Barg. But a few months after Cross Key Waterways, in Department of Business Regulation v. National Manufactured Housing Federation, Inc., the court cited Barg to support a finding that the use of ambiguous terms in a statute caused the statutory standards to be constitutionally insufficient. The statute involved in this case authorized the Department of Business Regulation, upon petition of fifty-one percent of those mobile home park tenants who would be subjected to a rate increase, to determine what part of certain enumerated increased costs to the owner of the mobile home park "may be passed on to the tenants or prospective tenants in the form of increased rental or service charges if such increases are reasonable and justified under the facts and circumstances of the particular case . . . ," and are not "unconscionable."

Upon first examination of Cross Key Waterways and National Manufactured Housing there appears to be an irreconcilable conflict between the two cases with respect to their treatment of Barg. But on closer examination, the distinction is clear. In Cross Key Waterways, when the court stated that statutes like those in Barg would be upheld today, the court was speaking of statutory guidelines which specify exactly what factors must be present to invoke

46. Ch. 71-904, 1971 Fla. Laws 1581 (uncodified).
47. 302 So. 2d at 742-43.
48. Id. at 742.
49. 372 So. 2d at 919.
50. 370 So. 2d 1132, 1136 (Fla. 1979).
52. Id. § 83.784(1)(a) (1977).
the statute's operation, but which leave the fleshing out of the requisite quantitative terms (e.g., "undue" or "excessive") to the agency.\textsuperscript{53} However, in \textit{National Manufactured Housing}, the ambiguous terms in the statute allowed the Department of Business Regulation to determine on a case-by-case basis what factors should be present to allow a mobile home park owner to pass increased costs on to his tenants. The determination of what factors or elements must be present to invoke the operation of a statute is fundamental policy setting and must be performed by the legislature. In contrast, the agency action of fleshing out the requisite quantitative terms modifying each factor may be permissible under \textit{Cross Key Waterways}, at least when done within the procedural requirements of the present Administrative Procedure Act.\textsuperscript{54} The supreme court's approval of this aspect of agency action is probably the most significant feature of \textit{Cross Key Waterways}.

The above analysis is supported by an analogy to the decision of the First District Court of Appeal in \textit{Albrecht v. Department of Environmental Regulation}.\textsuperscript{55} The statute at issue in that case required review of fill applications by the appropriate board of county commissioners. This board must determine whether the proposed fill operation would violate the law, alter the natural flow of navigable waters, create erosion, cause stagnant areas, damage adjoining land, or detrimentally affect wildlife or marine life to "such an extent as to be contrary to the public interest."\textsuperscript{56} Before a fill permit could be issued, the county commission's findings, together with a biological survey, an ecological study, and in some cases a hydrographic survey, must have been reviewed by the Department of Environmental Regulation.\textsuperscript{57} The court in \textit{Albrecht} stated that the statutory guidelines, in conjunction with procedural safeguards imposed by the Administrative Procedure Act, sufficiently limited the delegation of power. The court noted that the "determination of each application for a fill permit involves complicated decisions which cannot intelligently be guided by specific or quantitative statutory standards."\textsuperscript{58}

\textsuperscript{53} In \textit{Barg}, the statute at issue specified which elements must be present for the statute to operate: i.e., "dredging, filling or disturbance of submerged bottoms," and "destruction of natural vegetation." The only controversy related to quantitative terms modifying the elements: i.e., "undue," "unreasonable," "harmful," and "significantly contribute to air and water pollution." 302 So. 2d at 742.

\textsuperscript{54} \textit{See Cross Key Waterways}, 372 So. 2d at 919.

\textsuperscript{55} 353 So. 2d 883 (Fla. 1st Dist. Ct. App. 1978).

\textsuperscript{56} \textit{FtA. STAT.} \textsection 253.124(2) (1977).

\textsuperscript{57} \textit{Id.} \textsection 253.124(3).

\textsuperscript{58} 353 So. 2d at 886. The statute set out exactly what factors must be present for the Department of Environmental Regulation to deny a fill application, but left the fleshing out
In reaching its decision in *Albrecht*, the court focused on the phrase "to such an extent as to be contrary to public interest." The court implicitly recognized that "to such an extent" was a quantita-
tive term that was incapable of precise legislative definition. How-
ever, by specifying what factors the agency must consider, the statu-
tory guidelines for agency action sufficiently limited agency discre-
tion in determining when a proposed fill operation would be con-
trary to the public interest.\(^5\)

An examination of the cases discussed indicates that when the
requirements for a constitutional delegation are met through basic
policy setting by the legislature and by adequate guidelines on ad-
ministrative discretion, then the policy may properly be "‘fleshed
out’ by administrative action to meet changing circumstances
\ldots\"\(^6\) This is both practically necessary and clearly permissible.\(^6\)

In *Cross Key Waterways*, the Florida Supreme Court further clar-
ified the distinction between legislative policy setting and the dele-
gation of power to "flesh out" the articulated policy. The court also
laid to rest any doubt that the nondelegation doctrine would not
remain viable in Florida by affirmatively announcing that Florida
would not follow the so-called "modern trend" in administrative
law, which focuses upon procedural safeguards in the administra-
tive process rather than on strict legislative guidelines on agency
action.\(^6\) In so doing, the court struck down two designations by the
Administration Commission\(^6\) of Areas of Critical State Concern.\(^6\)

The process for establishing an Area of Critical State Concern (an
Area) is outlined in the Environmental Land and Water Manage-
ment Act of 1972 (the Act).\(^6\) This Act represented the legislature's

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59. 353 So. 2d at 886.
60. Rogers, 329 So. 2d at 269 (England, J., concurring).
61. *Cross Key Waterways*, 372 So. 2d at 919.
62. Id. at 924-25.
63. The Administration Commission is composed of the Governor and Cabinet. FLA. STAT.
64. The Green Swamp and Florida Keys Areas of Critical State Concern were invalidated.
These Areas of Critical State Concern were established pursuant to FLA. STAT. § 380.05 (1977).
65. This Act also established the Development of Regional Impact process which may be
invoked for certain developments that would have a substantial effect on more than one
county. FLA. STAT. § 380.06 (1977). The Act follows almost verbatim the American Law
response to the constitutional mandate for protection of the state's natural resources. To effectuate the purposes of the Act, a portion of land regulatory powers previously delegated to local governments was redelegated by the legislature to the Administration Commission.

The legislature attempted, through the Act, to delegate to the Administration Commission two distinct authorities: first, the authority to identify and designate Areas of Critical State Concern; and second, the authority to determine land development controls for the designated areas. The first of these two powers was declared unconstitutional by the supreme court due to inadequate guidelines for the agency's exercise of power. However, the court implicitly found the second delegation to be constitutionally proper.

The supreme court found that the guidelines for designating an Area were constitutionally inadequate. These guidelines consisted of whether an Area has a "significant impact upon environmental,

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66. *Cross Key Waterways*, 372 So. 2d at 914. FLA. CONST. art. II, § 7 provides: "Natural resources and scenic beauty.—It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

67. Rhodes, *The Florida Environmental Land and Water Management Act: The First Operational Year*, 49 FLA. B.J. 214 (1975). The First District Court of Appeal was concerned that such a redelegation was offensive to the tradition of local control of land use regulations. Nonetheless, even that court recognized the legality of it, when accompanied by adequate standards, since the Florida Constitution does not prohibit such state reclamation of regulatory power and reassignment of that power to state agencies through legislation. The power exercised by local governments was delegated by the state in the first instance, and the state could appropriately redelegate that power to another agency. *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1065 (Fla. 1st Dist. Ct. App. 1977), aff'd, 372 So. 2d 913 (Fla. 1978).

68. FLA. STAT. § 380.05 (1)-(2) (1977). An Area of Critical State Concern may be designated only if it is:

(a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.

(b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.

(c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.

Id. § 380.052(2). Additional restrictions on the designation of Areas are: no more than five percent of the state's land area may be under supervision as Areas of Critical State Concern, id. § 380.05(17); no rule may be adopted which would provide for a moratorium on development in the Area, id. § 380.05(1)(b); and no rule may limit the vested or other legal rights of persons within the Area nor interfere with the right to complete any development that has been authorized by registration of a subdivision under FLA. STAT. § 478 (1977), id. § 380.05(15).

69. Id. § 380.05(5)-(15).

70. 372 So. 2d at 919.

71. Id. at 920.

72. Id. at 925.
historical, natural, or archaeological resources of regional or statewide importance" and whether the Area is "significantly affected by," or has "a significant effect upon, an existing or proposed major public facility or other area of major public investment."\(^{73}\)

The court stressed that the designation process was not deficient because of the statutory quantitative terms "significant impact," "significantly affected by," or "significant effect upon."\(^{74}\) Instead, the court held that "[t]he deficiency in the legislation here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest," since the "Act treats alike, as fungible goods, disparate categories of environmental, historical, natural and archaeological resources of regional or statewide importance," and gives no clue as to what is to be considered a "major public investment."\(^{75}\)

Despite its holding in Cross Key Waterways, the court looked with favor on an alternative scheme of designation of Areas by the legislature, as exemplified by the Big Cypress Area of Critical State Concern,\(^{76}\) which left to the Administration Commission the task of "fleshing out" the legislative policy through adoption of land development regulations.\(^{77}\) The court also noted with approval a scheme which would utilize legislative ratification of proposed administrative designations of Areas.\(^{78}\) Subsequently, however, the court indicated that the legislature should not be limited exclusively to these two alternatives to avoid violating the nondelegation doctrine. The legislature might develop a different scheme—as long as the constitutional tests could be met.\(^{79}\)

\(^{73}\) **FLA. STAT.** § 380.05(2)(a), .05(2)(b) (1977). The guideline established by § 380.05(2)(c), as to whether the proposed area was "of major development potential," was not considered by the court because it was not used in either designation of these Areas of Critical State Concern. Furthermore, that guideline depends upon a legislatively approved state comprehensive plan which includes additional specific criteria for the operation of this guideline. See 372 So. 2d at 919-20.

\(^{74}\) 372 So. 2d at 919. These are legislatively fixed approximations of when each element or factor will be sufficient to allow the agency to designate an Area. Such quantitative approximations may be properly used in a statute delegating authority to an administrative agency.

\(^{75}\) *Id.* (quoting Cross Key Waterways v. Askew, 351 So. 2d 1062, 1069 (Fla. 1st Dist. Ct. App. 1977)) (footnotes omitted). Since any of these diverse categories may justify designation of an Area, it is impossible to say which elements are necessary for a designation. To uphold this provision as an adequate guideline would be to allow the Administration Commission to act according to whim. See Dickinson v. State, 227 So. 2d 36, 37 (Fla. 1969).

\(^{76}\) This Area was established pursuant to **FLA. STAT.** § 380.055 (1977).

\(^{77}\) Cross Key Waterways, 372 So. 2d at 920. This judicial perspective indicates that the second part of the Area of Critical State Concern process, i.e., the authority to determine the land development controls for the areas designated, contains sufficient guidelines to meet the tests for constitutionality.

\(^{78}\) *Id.* at 925.

\(^{79}\) See *id.* at 926.
While the Florida Supreme Court continues to adhere to the doctrine of the nondelegation of power, the doctrine's significance has been considerably eroded in the federal judiciary and in a number of other jurisdictions as well. The leading proponent of this movement away from the nondelegation doctrine and its requirement of strict legislative standards on agency discretion is Professor Kenneth Davis. He believes that the nondelegation doctrine has no place in modern government, primarily because administrative agencies have an increasingly important function in the daily operations of government. 80

One argument against the nondelegation doctrine is that strict legislative guidelines on delegations of power impede the administrative process and decrease governmental efficiency. Conversely, the "modern trend" in administrative law is a relaxation of the legislative-standards requirement in favor of an analysis focusing upon procedural due process safeguards on administrative actions. This shift in focus would still protect against the possibility of administrative caprice and yet allow greater latitude in agency actions to meet the constantly changing needs of the public. 81 Such a relaxation of the nondelegation doctrine is theoretically proper, Davis claims, because the constitutional grant of legislative power is only initially made in the legislature, which may in turn delegate any portion it desires. 82

The "modern trend" in administrative law is premised upon the belief that administrative agencies are repositories of expertise in certain specialized fields which cannot adequately be dealt with in detail by the legislature or the courts. 83 The experience and intuitive impressions of these administrative experts, especially in the field of economic regulation, are inarticulable in the form of precise standards. Nonetheless, the collective administrative experience is important for the exercise of governmental functions. Therefore, agency discretion should not be hampered by strict adherence to the legislative-standards requirement on delegations of power. Procedural safeguards on the administrative process are designed to prevent abuse of administrative discretion. 84 Furthermore, Davis states four reasons why the legislature cannot form all major policy decisions into a statute which delegates power to an administrative agency:

80. See 1 K. Davis, supra note 11, at § 3.15.
81. Id.
82. Id. § 2.4.
84. 1 K. Davis, supra note 11, at § 2.12.
(1) No matter how expert their helpers may be, legislators are less than omniscient and usually are wise, when they establish an agency, to attempt no more than to legislate broad frameworks for administrative policy-making. (2) Problems of policy are often beyond the highest expertness, so that meaningful answers have to come from focusing on facts and circumstances of concrete cases, limiting the decision to a single set of facts, and leaving the policy open for other circumstances. (3) A legislative body is ill-equipped to resolve controversies of named parties; that function usually calls for court procedure or for the adjudicative procedure of an agency. (4) Even questions suitable for legislative determination are often delegated for some such reason as failure of legislators to agree, preference of legislators to compromise disagreements by tossing the problem to administrators, draftsmanship which is intentionally or unintentionally vague or contradictory, or some combination of such factors.  

However, it has become painfully clear to another commentator that administrative agencies quickly identify with the very interests which they regulate. Accordingly, the agencies become ineffective at protecting the "public interest," despite well-meant procedural safeguards. More importantly, as Judge J. Skelly Wright has observed, a broad delegation of power will yield one of two undesirable results: "On the one hand, if the problem is really intractable, it is unlikely that the agency, with all its expertise, will do any better . . . [than the legislature]. Alternatively, it is possible that the agency will be able to deal with the problem forcefully." In the latter event, however, any administrative accomplishments are achieved at the expense of democracy (to the extent that there are any accomplishments at all). An administrative accomplishment is effected by appointed bureaucrats—not by the elected representatives of the people, who would be more likely to truly safeguard the "public interest." Furthermore, administrative accomplishments achieved under a broad delegation of power are especially damaging to the democratic ideal when the delegation of power is made because there is no legislative consensus to facilitate the formulation of specific standards for agency action.

Florida's courts have recognized the inherent value of legislatively controlled policy formulations. The state's courts have maintained the "basic philosophy of democracy" by their adherence to the non-
delegation doctrine and the concurrent requirement of strict standards on delegations of power. 90

In other jurisdictions with statutes that provide for the designation of particular Areas in order to control their development, several statutes have been unsuccessfully attacked on the basis of the nondelegation doctrine. However, in each of those cases, the guidelines on designation of Areas by administrative agencies were considerably more restrictive than the Florida statute, with the legislatures in those states taking a larger role in the designations. 91 Thus, a California statute required that any development within a specified "coastal zone" must be approved by a regional planning council, upon a finding that "the development will not have any substantial adverse environmental or ecological effect." This statute was upheld against attack under the nondelegation doctrine. 92 In enacting that statute, the California Legislature had delineated a narrow "coastal zone" as the area in which the statute was to operate and provided additional guidelines on the further restriction of the Area controlled by the statute. 93

Likewise, the Rhode Island Supreme Court upheld a statute which provided for regulation of all fresh water wetlands by the director of the Department of Natural Resources and the municipality in which the wetlands were located. 94 The court emphasized the fact that "the director is given jurisdiction over only a very limited area, wetlands. The term ‘wetlands’ is precisely defined . . . ." 95 The court also cited an earlier Rhode Island case upholding a delegation of authority, stating that "we placed great weight on the fact that the administrative agency was given discretion to act only in a well defined geographical area." 96 This same reasoning contributed to the upholding of the validity of a New Jersey statute which regulated development within a statutorily defined "coastal area" 97 and a Massachusetts statute which regulated development on Martha's Vineyard (a geographic area of Massachusetts expressly delineated by the statute). 98

The important common element of the statutes above, which dif-

91. Cross Key Waterways, 372 So. 2d at 920-22.
93. Id.
95. Id. at 666.
96. Id.
ferentiates them from the Florida statute at issue in *Cross Key Waterways*, is that each statute designated a well-defined geographic area in which development was to be controlled. Therefore, there was no problem with standards on the delegation of power to designate the Areas, since that power had not been delegated. However, there may still be a problem in those states with regard to the delegation of the power to determine exactly what the development controls should be within the designated Areas. But for purposes of this discussion, the important consideration is that the courts above were influenced by the legislative delineation of the geographic areas and thus implicitly recognized the value of the standards requirement of the nondelegation doctrine.

The Florida Legislature, reacting quickly to the holding in *Cross Key Waterways*, has formulated a designation process which is similar to the foregoing legislative schemes for the control and development of certain geographic areas. At a special session in December 1978, the legislature adopted a bill, to be effective through the next regular session, to legislatively designate the two Areas of Critical State Concern which had been invalidated by the court's decision. At the 1979 regular session, the legislature passed a comprehensive amendment to the Area of Critical State Concern designation process, which should rectify the constitutional problems of the earlier version of the process.

In the 1979 amendment to the designation process, guidelines as to what areas could be designated by the Administration Commission were greatly expanded. The general types of categories of areas and resources to be protected by the Act are much the same—environmental or natural resources of regional or statewide importance, historical or archaeological resources, and areas having significant impact upon, or being significantly impacted by, major public facilities or investments. However, within each of these types of categories, the legislature has refined the guidelines such that only the most important resources or areas within each category would warrant protection under the Act. This refinement is significant because, contrary to the previous legislative failure to delineate priorities among the disparate competing resources and areas, the new guidelines more narrowly define the areas that can be considered for designation.

Also, under the amended version of the Act, any rule adopted by the Administration Commission designating an Area of Critical

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100. Fla. HB 1150 (1979).
101. *Id.* § 4.
State Concern must be submitted with a detailed report to the legislature prior to the next regular session. The legislature may then reject, modify, or take no action relative to the rule. Although the Administration Commission under the new scheme would still adopt land development regulations to guide development in an Area, no such regulation would become effective prior to legislative review of the Area designation. Finally, in the amendment, the legislature specifically adopted the Green Swamp Area and the Florida Keys Area as Areas of Critical State Concern for an indefinite time. There can be no doubt that these legislative designations, together with the older designation of the Big Cypress Area of Critical State Concern, meet the necessary constitutional requirements.

The Cross Key Waterways decision is an excellent example of the benefits of the nondelegation of legislative power doctrine as applied by Florida's courts. The court, in its review of designations of Areas of Critical State Concern by the Administration Commission, determined that the legislative guidelines on the exercise of delegated power left too much unbridled discretion to the agency. In fact, the court concluded that the standards were so insufficient that it could not determine whether the designations made by the Administration Commission complied with the guidelines. Therefore, the court declared that part of the statute unconstitutional. The legislature then took immediate action to review those designations made by the Administration Commission and to redesignate them as Areas of Critical State Concern after concluding that they were indeed within the scope of the types of areas that the legislature had originally intended to be protected by the Act. The legislature also refined the guidelines on designations of Areas by the Administration Commission to eliminate the objections that the supreme court had regarding the possibility of abuse of discretion in making those designations. This legislative action resulted in a much stronger statute for the protection of the public interest in designations of Areas of

102. Id.

103. Id. Since the requirement for the land development regulations is review of the Area designation by the legislature, rather than affirmative ratification of the designation, this legislative acquiescence, in itself, would not have been sufficient to save the designation process from constitutional infirmity. Additional guidelines are necessary to determine which areas could be designated.


105. Id. § 6.

106. The Big Cypress Area of Critical State Concern was established pursuant to Fla. Stat. § 380.055 (1977).

107. The Florida Supreme Court has stated quite clearly that the legislature may always make these Area designations itself since there would be no delegation of power in such a legislative designation. Cross Key Waterways, 372 So. 2d at 925.
Critical State Concern without sacrificing the benefits from those
designations already made or scheduled to be made. In the future,
even the short-term inconveniences of a decision like Cross Key
Waterways can be avoided when the legislature meets its responsi-
bilities as the state's policy setting body by restricting the power
delegated to agencies through use of clear guidelines and standards
on agency discretion which specify exactly what factors the agency
must consider in its exercise of the delegated authority.