Wally - thought you might be interested in my proposed reply to the Realtors "absurd" suggestion of unconstitutionality borrowed from the Hellerstein report. I feel like I'm talking to myself!

Please send me a copy of your ABA outline - I seem to have been left out of the circuit. Thanks.

- Linda
Ch. 86-166 DOES NOT VIOLATE THE DOCTRINE OF NONDELEGATION

Under the doctrine of nondelegation, the constitutional principle of separation of powers requires that the legislature "legislate as far as reasonably practicable", Buttfield v. Stranahan, 192 U.S. 470, 496 (1904) (emphasis added), and provide procedural safeguards and meaningful judicial review of potential abuses of agency discretion. Florida Home Builders Ass’n v. Division of Labor, 367 So.2d 219 (Fla. 1979). This does not forbid delegation of legislative authority to administrative agencies, but rather is a restraint only upon such delegations which "are not accompanied by any standards or guidelines to aid a court or administrative agency in ascertaining the true legislative intent underlying the act." Department of Business Regulation v. National Manufactured Housing Federation, Inc., 370 So.2d 1132, 1136 (Fla. 1979). The doctrine is targeted at statutes which are "couch in vague and uncertain terms or [are] so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law." Conner v. Joe Hatton, Inc., 216 So.2d 209, 211 (Fla. 1968), aff’d on other grounds, 240 So.2d 145 (Fla. 1970).

An examination of the statutes which have been overturned, and a comparison with Ch. 86-166, reveals that Ch. 86-166 amply satisfies the constitutional standard. For
example, statutes which have been held to violate the delegation doctrine include one which purported to authorize the Division of State Planning to designate geographic "areas of critical state concern." *Askew v. Cross Key Waterways*, 372 So.2d 919 (Fla. 1978). In *National Manufactured Housing Federation*, the offending statute authorized a commission to determine whether mobile home park rental charge increases were "unreasonable or not justified under the circumstances." 370 So.2d at 1136. In *Drexel v. City of Miami Beach*, the statute permitted denial of a building permit after "due consideration" was given to the impact upon traffic. 64 So.2d 317 (Fla. 1983). In *Sarasota County v. Barg*, 302 So. 2d 737 (Fla. 1974), statutory terms such as "undue or unreasonable," "harmful," or "significantly contribute [to pollution]" were rejected as unconstitutionally ambiguous. In *Florida Home Builders v. Division of Labor*, 367 So. 2d 219 (Fla. 1979), a statute which authorized the agency to act "only upon a determination of need" was invalidated. See also *Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273 (Fla. 1962) ("where the public interest may best be served thereby" was impermissibly vague); *D'Alemberte v. Anderson*, 349 So. 2d 164 (Fla. 1977) ("reasonably prudent person" was impermissibly vague).

In all of the above cases, the language used was properly rejected as overbroad. What "area" is one of
"critical state concern" -- the entire state? Rural areas? The Everglades? The coastal region? Who can say what is "not justified under the circumstances"? What is "due consideration" or "reasonably prudent"? In all of these cases, the legislature delegated the discretionary power to distinguish among subjects -- geographic areas, rental increases, permit applicants -- without any standard by which such discretion was to be exercised. The real problem in these cases is the grant of discretion in the "absence of legislative delineation of priorities." Cross Key Waterways, 372 So. 2d at 919; see also Orr v. Trask, 464 So. 2d 131 ( Fla. 1985); Lewis v. Bank of Pasco, 346 So. 2d 53 ( Fla. 1976).

No Discretion Has Been Delegated

In this instance, however, no such discretion has been delegated. The Department of Revenue has long taxed sales and use of tangible personal property; leases and rentals; admissions; storage; telegraph, telephone, and telecommunication services; machines used in manufacturing or furnishing communications, transportation, or public utility services; and fuels under Ch. 212. The new statute did not create an entirely new and independent taxing scheme, or even a new tax. Indeed, the central affirmative taxing provision of the sales tax statute prior to Ch. 86-166 stated that "[i]t is hereby declared to be the
legislative intent that every person is exercising a taxable privilege who . . . rents or furnishes any of the things or services taxable under this chapter." Fla. Stat. § 212.05. Ch. 86-166 merely amended the large list of taxable transactions in section 212.05 to include "performing or providing any service," Fla. Stat. § 212.05(j), among the provisions of the same sales tax scheme. That is, the legislature declared that "any service" was to be considered "a service taxable under this Chapter" -- existing Ch. 86-212.

This is hardly a grant of a discretionary power. Rather, the legislative mandate to the Department of Revenue is that it extend the sales tax to "any services." The language is beyond dispute; the Department's power is utterly nondiscretionary. It cannot exempt some services; it cannot tax fewer than "any services;" it cannot tax services only at certain times or under certain circumstances and not others. The Department must tax "any services." Clearly, it is not the agency, but the legislature, which is making "the initial determination of what policy should be." Cross Key Waterways, 372 So.2d at 920.
The Term "Services" Is Not Impermissibly Vague

Plaintiffs suggest that the lack of a statutory definition or standard for "any services" or "taxable service" should be its downfall under the delegation doctrine. First, as noted above, the statute does not give the department any discretion to exclude a service from taxation. Under the liberal terms of the statute, if it is a service, it must be taxed. The question then becomes whether "services" is a vague term, and if so, whether its meaning can be determined from the statute itself, its context in the sales tax scheme, or external sources, and if not, whether delegation of the authority to distinguish "services" from non-services runs afoul of the Constitution.

There is no reason why the novelty of taxing services in Florida should overwhelm the fact that "services" is logically no different than "tangible personal property." The latter "means and includes personal property, which may be seen, weighed, measured, or touched, or is in any manner perceptible to the senses." Fla. Stat. § 212.02(12). The legislature did not define "tangible personal property" by cataloguing all conceivable forms of personal property in Florida, yet no one can seriously contend that it is unconstitutionally vague absent such a comprehensive compendium. Since the beginning of sales taxation, it has been left to the Department to determine
when a transaction involving personal property falls within
the statute or not. To date, the Department has made a
wealth of administrative decisions distinguishing sales of
tangible personal property (heretofore taxed) or other
taxable transactions from sales of services (heretofore
untaxed). [Are there any administrative decisions holding
that realtors provide a service rather than engage in a
taxable transaction?]

The identification of what is, and what is not, a
service is no more or less uncertain. It is a maxim of
statutory construction that words of common usage are to be
given their plain and ordinary meaning. Gasson v. Gray, 49
So. 2d 525 (Fla. 1951); Gaulden v. Kirk, 47 So. 2d 567 (Fla.
1950). Any Floridian could identify without difficulty the
vast majority of transactions which are "services," and thus
taxable. The realtors, for example, know without a doubt
that what they provide is a "service." Certainly there are
unusual transactions which are difficult to categorize, just
as there have been under the existing sales tax scheme. The
doctrine, however, requires not that the legislature provide
expressly and specifically for every case which might arise
but only that it sufficiently cabin the discretion of the
agency -- this it has done.

Moreover, Florida has long taxed "any services that
are a part of the sale" of tangible personal property,
including any transaction requiring "both labor and material
to alter, remodel, maintain, adjust, or repair" such property. Fla. Stat. § 212.02(4) (former language). There is no basis in reason or law for distinguishing "any services," when incident to a sale of tangible personal property, from "any services" standing alone.

The Statutory Language is Sufficient to Permit Judicial Review

A key corollary of the doctrine of nondelegation is the availability of judicial review. "[I]t is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature." Cross Key Waterways, 372 So.2d at 919. The analysis in this case must start with the presumption, in cases involving tax statutes, that the legislature has included or omitted all matters which it intends to tax or exempt from taxation. Volunteer State Life Insurance Co. v. Larson, 2 So. 2d 386 (Fla. 1941). In this case, the intent of the legislature is plainly reflected in the statutory language; the agency is utterly without discretion in taxing services. Moreover, the agency has a long history of unquestioned administrative authority to make determinations of whether transactions are taxable transactions -- such as sales of tangible personal property, rentals, telecommunication services, services incidental to
a sale of tangible personal property, or repair, maintenance or alteration services -- rather than nontaxable sales of services. Given these factors, it is clear that this legislation is not "so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct." See Cross Key Waterways, 372 So.2d at 919.

The Supreme Court of Florida has also held that, in evaluating the reviewability of a challenged statute, due regard must be had for the limitations expressed in the agency's general rulemaking powers. Coca-Cola Co. v. Department of Citrus, 406 So.2d 1079 (Fla. 1971). In Coca-Cola, the agency was authorized to promulgate such "proper and necessary rules . . . for the exercise of its powers and the performance of its duties under this chapter." The Court held that "[t]he Department is thereby limited to adopting only rules and regulations which are proper and necessary to accomplish the legislature's stated objective, and may not stray afield as it pleases, exercising the unlimited discretion which is a hallmark of improper delegation . . . . [T]his [s]ection . . . provides the requisite definite, valid limitations on rules and regulations which may be enacted by the Department." 106 So.2d at 1084.

In comparison to the rulemaking powers evaluated in Coca-Cola, the Department of Revenue is subject to even more
restrictive limitations on its rulemaking authority, for it is authorized to make only "rules and regulations not inconsistent with this chapter." Fla. Stat. § 212.18(2)(emphasis added). This stringent restraint on the scope of its rulemaking power, coupled with the lack of discretion under Ch. 86-166 in the first instance, provides clear standards by which a reviewing court can determine whether the agency has performed consistently with the legislative mandate. See Coca-Cola, 406 So. 2d at 1084.

The Sales Tax on Services Must Be Read in Pari Materia With the Sales Tax Statute

Plaintiffs argue that the provisions of Chapter 212, the sales tax statute, "do not interface with the tax on services." Pretrial Memorandum, at 13. This assertion is absurd. The expansiveness and detail of the sales tax code does not stand in stark contrast to Ch. 86-166; rather, it is the very foundation and context of this act. It is presumed that the legislature acts with full knowledge of existing statutes relating to the same subject, Tamiami Trail Tours v. Lee, 194 So. 2d 305 (Fla. 1940), and thus enacts new legislation within the existing framework of the statute. The sales tax on services was an amendment to the existing sales tax statute. Essentially, Ch. 86-166 amended five existing sales tax provisions (three definitions and
two substantive provisions) to insert brief clauses including sales of "any service" or "services taxable under this part" in the existing list of taxable transactions contained in each provision. It is not a separate, self-contained, taxing provision as is, for example, the motor fuel tax. See Fla. Stat. § 212.60 et seq. Clearly, it is as much an integrated part of the sales tax code as are the existing provisions taxing telecommunication services, Fla. Stat. § 212.05(e), or repair services, Fla. Stat. § 212.02(4). When properly read in pari materia with the rest of Chapter 212, the act is "complete and whole in every way with all legal policies of significance set and enacted by the legislature." Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981, 987 (Fla. 1986); Straughn v. K & K Land Management, Inc., 376 So. 2d 421 (Fla. 1976); Brewster Phosphates v. Department of Environmental Regulation, 444 So. 2d 483 (Fla. 1st DCA 1984). "That the text of the act does not direct that it be read in pari materia with Chapter 212, Florida Statutes, is irrelevant . . . 'laws should be construed with reference to the constitution and the purpose designed to be accomplished, and in connection with other laws in pari materia, though they contain no reference to each other'". Id. at 988. As with the state transient rentals tax in Miami Dolphins, this tax provision, read in conjunction with the entire sales tax chapter, "passes muster for
completeness, certainly, and reviewability." Id. Finally, it is beyond question that, when a statute is susceptible of two interpretations, one of which would make it unconstitutional, the court must adopt the interpretation which will uphold the statute's validity. Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981, 987-88 (Fla. 1987); Redwing Carriers, Inc. v. Mason, 177 So. 2d 465 (Fla. 1965).

Delegation to an Expert Agency is Most Appropriate When
Detailed Legislative Guidance is Impractical

The Supreme Court of Florida "has always been of the view that these [improper delegation] 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." Department of Citrus v. Griffin, 239 So. 2d 577, 580 (Fla. 1970). In the area of taxation, as in the area of rate-making discussed in Griffin, a greater degree of delegation must be tolerated unless the legislature is be overwhelmed with the burden of making highly case-specific distinctions. As discussed in the Hellerstein Report, at 39, a "growing category" of delegation cases in Florida have been resolved in light of the cautionary statement in Cross Key Waterways that "the specificity of standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite
standards." 372 So. 2d at 918; Reynolds v. State, 383 So. 2d 228 (Fla. 1980); Straughn v. K & K Land Management Co., 326 So. 2d 421 (Fla. 1976); Department of Citrus v. Griffin, 239 So. 2d 577 (Fla. 1970). As the Hellerstein Report stated: "The legislature need not be burdened to the point of paralysis. The subject matter may be such that only a general scheme or policy can be laid down by the legislature and the detailed execution is left to the agency." Id. at 39. As stated by the Supreme Court, "[o]bviously, the very conditions which may operate to make direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of detailed or specific legislation impractical or undesirable." Griffin, 239 So. 2d at 577. The Court continued, "it should be remembered that our constitution does not deny to the legislature necessary resources of flexibility and practicality, and when a general approach is required, judicial scrutiny ought to be accompanied by recognition and appreciation of the need for flexibility." Id. This policy was again emphasized in one of the Supreme Court's most recent nondelegation decisions, Microtel, Inc. v. Florida, 464 So. 2d 1189, 1191 (Fla. 1985), in which the Court reiterated the propriety of delegating "subordinate functions" to an agency with "expertise and flexibility . . . . Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation." Id.
The further delineation between "services" and non-services is precisely the sort of technical area which should properly be left to an administrative agency. The distinction between an improper delegation and a proper one is "one between delegation of the power to make the law, which necessarily involves a discretion as to what the law shall be, and the conferring of authority or discretion in executing the law pursuant to and within the confines of the law itself." Joe Hatton, 216 So. 2d at 209. The "fundamental and primary policy decision" -- the decision to tax "any services" -- was made by the legislature. If the act properly is read in pari materia with the sales tax code which it amends, then it is clear that the legislature has adequately and properly addressed all policy questions. It remains for the agency to prepare guidelines in the form of proper, consistent rules and regulations and to make the initial technical determinations as to what "services" are in the infrequent cases in which that is likely to be an issue, just as it has always had the authority to determine in the first instance, subject to judicial review, what falls within the broad realm of "tangible personal property." It is especially absurd to burden the legislature with the task of cataloguing services when, as here, all services are taxed and none are exempted.

The real dispute which brings the Realtors into this court is a challenge to the wisdom or folly of taxing
services. There is no constitutional basis in the delegation doctrine for challenging this amendment to the sales tax statute, nor can this amendment be distinguished from the rest of that statute as constitutionally flawed. The underlying issue is one of policy, which is, as always, without question the realm of the legislature and not the courts. Moore v. State, 343 So. 2d 601 (Fla. 1977). And the legislature has spoken -- loudly over the hue and cry of its opponents -- not just once, but twice. The Realtors have twice lost their battle in the proper arena with the proper argument; here they should not be permitted to disguise their policy disagreements in the robes of constitutional doctrine.