IN THE COMMONWEALTH COURT OF PENNSYLVANIA

East Coast Vapor LLC,		:	
	Petitioner	:	
		:	
v.		:	No. 153 C.D. 2023
		:	
Department of Revenue,		:	
	Respondent	:	Argued: October 9, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE STACY WALLACE, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION BY JUDGE WOLF FILED: January 3, 2025

In this case of first impression, we are asked to consider the licensing provisions of the statute commonly known as the Tobacco Products Tax Act (TPTA or Act).[1] The TPTA imposes taxes on tobacco products, including e-cigarettes and e-liquids. It also creates a licensing regime for manufacturers, wholesalers, and retailers of those products.

East Coast Vapor, LLC (East Coast) sells e-cigarettes and e-liquids at retail in Pennsylvania, including e-liquids it makes itself. East Coast applied to the Department of Revenue (Department) for a manufacturer's license under the Act. The Department denied the application because East Coast refused to provide certain information and documents the Department had requested. The Department's Board

[1] Act of March 4, 1971, P.L. 6, *as amended*, added by the Act of July 13, 2016, P.L. 526, 72 P.S. §§ 8201–A to 8234–A.

of Appeals (Board) affirmed that determination by order issued February 3, 2023.

We hold that the provisions of the Act allowing the Department to request information of applicants for a manufacturer's license are invalid, on their face, as an unconstitutional delegation of legislative power to the Department. Accordingly, we vacate the Department's determination. Further, because the offending provisions of the Act are not severable from the process of applying for and granting licenses to manufacturers, we strike the provisions of the Act that establish manufacturer licensing, though we keep intact the provisions regarding licensing of wholesalers and retailers.

I. BACKGROUND

A. Statute at Issue

The General Assembly enacted the TPTA in 2016, creating a new Article XII-a within the Tax Reform Code of 1971.[2] The TPTA imposes taxes on "tobacco products," which Section 1201-A of the Act defines to include loose forms of tobacco and e-cigarettes,[3] but to exclude traditional cigarettes and cigars. 72 P.S. § 8201-A. The term "e-cigarette" includes both the device itself and e-liquid, "a liquid or substance placed in or sold for use in" the device. *Id*. Section 1202-A(a.1) of the Act, 72 P.S. § 8202-A(a.1), imposes a tax on e-cigarettes at the rate of 40% of the purchase price paid by the retailer. Sections 1204-A through 1219-A of the Act, 72 P.S. §§ 8204-A to 8219-A, provide for remittance of the tax, refunds, assessments, tax returns, recordkeeping, and fines for noncompliance. This includes

[2] Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §§ 7101-10004.

[3] An e-cigarette is "[a]n electronic oral device, such as one composed of a heating element and battery or electronic circuit, or both, which provides a vapor of nicotine or any other substance and the use or inhalation of which simulates smoking." Section 1201-A of the Act, 72 P.S. § 8201-A.

the Department's power under Section 1214-A(b) of the Act "to examine the books and records, the stock of tobacco products and the premises and equipment of any taxpayer in order to verify the accuracy of the payment of the tax imposed by [the Act]." 72 P.S. § 8214-A(b).

The second half of the Act imposes a licensing regime. *See* Sections 1220-A through 1230-A of the Act, 72 P.S. §§ 8220-A to 8230-A. Section 1220-A prohibits anyone from selling, transferring, or delivering tobacco products "without first obtaining the proper license provided for in this [Act]." The Act provides for three categories of licensees: manufacturers, wholesalers, and retailers.[4] Wholesalers and retailers are defined as "dealers" under the Act. *Id.* § 8201-A. The Act contemplates that a dealer—i.e., a wholesaler or retailer—could operate under multiple licenses at once, such as by also having a manufacturer's license. *See id.* (defining "dealer"). To obtain a license, a dealer or manufacturer must file with the

[4] Section 1201-A of the Act defines the three categories as follows:

> **"Manufacturer."** A person that produces tobacco products.
>
> **"Wholesaler."** A person engaged in the business of selling tobacco products that receives, stores, sells, exchanges or distributes tobacco products to retailers or other wholesalers in this Commonwealth or retailers who purchase from a manufacturer or from another wholesaler who has not paid the tax imposed by this [Act].
>
> **"Retailer."** A person that purchases or receives tobacco products from any source for the purpose of sale to a consumer, or who owns, leases or otherwise operates one or more vending machines for the purpose of sale of tobacco products to the ultimate consumer. The term includes a vending machine operator or a person that buys, sells, transfers or deals in tobacco products and is not licensed as a tobacco products wholesaler under this [Act].

72 P.S. § 8201-A.

Department an application "in the form and contain[ing] information prescribed by the [D]epartment" as required by Section 1220-A(b). If the application is approved, the license is granted for a one-year period, renewable annually.

The Act separately specifies the conditions each type of licensee must satisfy to obtain a license. For manufacturers, Section 1221-A of the Act states:

> Any manufacturer doing business within this Commonwealth shall first obtain a license to sell tobacco products by submitting an application to the [D]epartment containing *the information requested by the* [*D*]*epartment* and designating a process agent. If a manufacturer designates no process agent, the manufacturer shall be deemed to have made the Secretary of State its agent for the service of process in this Commonwealth.

72 P.S. § 8221-A.

For wholesalers, Section 1222-A of the Act states, in relevant part:

> (a) Requirements.--Applicants for a wholesale license or renewal of that license shall meet the following requirements:
>
> > (1) The premises on which the applicant proposes to conduct business are adequate to protect the revenue.
> >
> > (2) The applicant is a person of reasonable financial stability and reasonable business experience.
> >
> > (3) The applicant, or any shareholder controlling more than 10% of the stock if the applicant is a corporation or any officer or director if the applicant is a corporation, shall not have been convicted of any crime involving moral turpitude.
> >
> > (4) The applicant shall not have failed to disclose any material information required by the [D]epartment, including information that the applicant has complied with this [Act] by providing a signed statement under penalty of perjury.

(5) The applicant shall not have made any material false statement in the application.

(6) The applicant shall not have violated any provision of this [Act].

(7) The applicant shall have filed all required State tax reports and paid any State taxes not subject to a timely perfected administrative or judicial appeal or subject to a duly authorized deferred payment plan.

(b) Multiple locations.--The wholesale license shall be valid for one specific location only. Wholesalers with more than one location shall obtain a license for each location.

Id. § 8222-A.

For retailers, Section 1223-A of the Act states:

Applicants for a retail license or renewal of that license shall meet the following requirements:

(1) The premises in which the applicant proposes to conduct business are adequate to protect the revenues.

(2) The applicant shall not have failed to disclose any material information required by the [D]epartment.

(3) The applicant shall not have any material false statement in the application.

(4) The applicant shall not have violated any provision of this [Act].

(5) The applicant shall have filed all required State tax reports and paid any State taxes not subject to a timely perfected administrative or judicial appeal or subject to a duly authorized deferred payment plan.

Id. § 8223-A.

Finally, Section 1228-A(a) of the Act authorizes the Department to administer the Act and states that "[t]he [D]epartment shall adopt rules and regulations for the enforcement of" the Act. *Id.* § 8228-A(a). The Department does not appear to have promulgated any regulations under the Act.[5]

B. Facts and Procedural History

The facts were stipulated below and are undisputed. *See* Reproduced Record (R.R.) at 48a-51a (Joint Stipulation of Facts). East Coast is a Pennsylvania vaping retailer operating two brick-and-mortal retail vaping stores in Harrisburg, Pennsylvania, and Mechanicsburg, Pennsylvania. It sells e-cigarettes and e-liquids to consumers at both locations. At its Harrisburg location, East Coast buys vegetable glycerin, propylene glycol, water, and artificial flavoring and creates its own custom blend e-liquids. East Coast has maintained that it sells to consumers only and does not wholesale to other retailers or distributors.

In September 2021, East Coast applied to the Department for a manufacturer's license under the Act. It did so "out of an abundance of caution," despite that East Coast believes its retail sales do not require it to be licensed as a manufacturer. Board Decision ¶ 2, R.R. at 85a. Between September and November 2021, East Coast communicated with the Department regarding documents in support of its application. On December 10, 2021, East Coast provided the

[5] Neither Title 61 of the Pennsylvania Code (which contains the Department's regulations) nor the Pennsylvania Bulletin appear to contain any direct reference to the Act or its provisions. A recent proposed rulemaking published by the Department includes a passing reference to the "Other Tobacco Products Tax" relating to electronic payment of that tax and others. 54 Pa. B. 2996 (May 25, 2024). Although the Act does not use the phrases "other tobacco products" or "Other Tobacco Products Tax," that appears to be how the Department refers to, *inter alia*, the 40% tax the Act imposes on e-cigarettes. Pa. Dep't of Revenue, *Other Tobacco Products Tax*, https://www.pa.gov/agencies/revenue/resources/tax-types-and-information/other-tobacco-products-tax.html (last visited January 2, 2025); *see also* Department's Br. at 6 (discussing "Other Tobacco Products").

Department with a "Manufacturing License Application Form" (Application Form), *see id.* at 10a-14a, East Coast's articles of incorporation and operating agreement, invoices from two of East Coast's suppliers, and an exterior photograph of its Harrisburg location, *id.* at 48a-49a.

East Coast did not include with its application a License Application Consent Form (Consent Form), which is referenced on the Application Form. *Id.* at 11a. The Consent Form would "authoriz[e] the [Department's] Bureau of Criminal Investigations to conduct consensual investigations/searches of East Coast's financial accounts and other financial records and credit records." *Id.* at 49a. Instead, East Coast requested in a letter that the Department provide legal authority justifying the Consent Form requirement being applied to an applicant for a manufacturer's license, as opposed to that for a dealer's license. East Coast did not check either box on the Application Form regarding collection and remission of taxes, indicating instead the following instead: "NEITHER--WE SELL CUSTOM BLEND E-LIQUID TO IN-STORE CUSTOMERS ONLY." *Id.* at 12a.

In a December 24, 2021 letter, The Department requested the following additional documentation from East Coast:

> a. License Application Consent Form
> b. Profit/Loss Statement
> c. Sales Agreement
> d. Customer List
> e. Blank East Coast Invoice
> f. Interior Photos

Id. at 49a-50a (footnote omitted). The December 24 letter did not respond to East Coast's request regarding legal authority for requiring the Consent Form of manufacturers. Accordingly, East Coast again declined to provide the Consent Form. East Coast did provide a customer list form and interior photographs. It also

submitted correspondence stating that it did not have any sales agreement to provide and asserting that it is a retailer that does not sell "tobacco products" as defined by the Act to wholesalers, retailers, or manufacturers—it sells only in-store to consumers. For that reason, East Coast asserted it could not provide a form invoice. It also did not provide a profit/loss statement.

In response, the Department requested the Consent Form, as well as financial documents such as profit/loss statements, sales agreements, and customer lists. East Coast provided some of the requested documents, but did not provide the Consent Form, a customer list, or a profit/loss statement, arguing that it has no wholesale customers and that the Department is not authorized to require those documents under the Act.

On February 2, 2022, the Department sent email correspondence denying East Coast's application. Noting the prior communications and partial set of documentation East Coast had provided, the Department stated: "Due to the lack of response and supporting documentation, your application is incomplete and cannot be processed. The [Department] must therefore deny" East Coast's application. R.R. at 47a.

East Coast timely appealed to the Board. The parties submitted briefing and the above-cited stipulation of facts on June 10, 2022. On February 3, 2023, the Board upheld the denial of East Coast's application for a manufacturer's license. In its decision, the Board reasoned in part as follows:

> The General Assembly conferred the licensing authority to the Department to determine and develop the information needed for each dealer or manufacturer application when it enacted [the Act]. By virtue of [Section 1220-A(b) of the Act,] the Department is statutorily allowed to require *whatever information it believes is necessary* to approve an application.

> That is, Sections [1220]-A(b) and [1221]-A give the Department broad discretion to establish criteria it believes is necessary to ensure that all manufacturer license applicants under both Sections [1220]-A and [1221]-A are fiscally sound and responsible to collect and remit the tobacco products tax it collects from retailers. This broad discretion allows the Department to use the same criteria which is set forth statutorily in Section 8222-A. It is only logical and proper for the Department to adopt such criteria when a manufacturer produces tobacco products and then sells the same tobacco products in the same manner as a wholesaler; thus, each manufacturer applicant should be required to fulfill the same requirements as a wholesaler under Section [1222]-A.
>
> . . . .
>
> If an applicant for a[] manufacturing license chooses not to provide the information the Department has deemed necessary to receive the license, then applicant has not met the statutorily established minimum requirements to be eligible for the license.

Board Decision, R.R. at 86a-87a (emphasis added). East Coast appealed to this Court.

II. ISSUES

On appeal,[6] East Coast raises four issues. First, it argues that the Board incorrectly interpreted the Act to allow the Department to require the same

[6] Our review in an appeal from an agency decision determines whether "an error of law was committed, [] constitutional rights were violated, [] a practice or procedure of a Commonwealth agency was not followed, or [] any necessary finding of fact is not supported by substantial evidence of record." *Fletcher v. Pa. Prop. & Cas. Ins. Guar. Ass'n*, 985 A.2d 678, 683 n.12 (Pa. 2009) (citing 2 Pa. C.S. § 704). In reviewing for legal error—as for issues of statutory construction and constitutional issues, like nondelegation—"our standard of review is *de novo* and our scope of review plenary." *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833 (Pa. 2017).

information of manufacturer applicants as it does of wholesaler applicants, despite that the Act treats the two separately and imposes different requirements. Second, and as an alternative in case its interpretive argument is rejected, East Coast challenges the Act as a facially unconstitutional delegation of legislative authority. Third, East Coast argues that to the extent the Board's decision represents the official position of the Department on the meaning of the Act, that determination creates a binding norm, and thus constitutes an unlawful regulation because it did not follow proper regulatory procedure. Finally, East Coast raises the unconstitutional conditions doctrine, arguing that the Department's requirement of the Consent Form impermissibly conditioned the granting of a benefit (the license) on the waiver of constitutional rights.[7] Related to this final argument, East Coast argues that its sale of e-liquids is not part of the tobacco industry, so it is not a historically closely regulated business deserving of less constitutional privacy protection.

III. DISCUSSION

A. Statutory Construction

"The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921. "The best indication of the General Assembly's intent is the plain language of the statute. When the words of a statute are clear and unambiguous, we may not look beyond the plain meaning of the statute 'under the pretext of pursuing its spirit.'" *Brewington v. City of Phila.*, 199 A.3d 348, 354 (Pa. 2018) (quoting 1 Pa.C.S. § 1921(b)) (citation omitted). Only when the text of a statute is ambiguous may we use other considerations to determine legislative intent, such as those listed

[7] In support of its unconstitutional conditions argument, East Coast invokes its and its employees' rights against unreasonable searches and seizures guaranteed by our federal and state constitutions. *See* U.S. CONST. amend. IV; PA. CONST., art. I, § 8.

in Section 1921(c) of the Statutory Construction Act of 1972.[8] "A statute is ambiguous when there are at least two reasonable interpretations of the text under review." *Warrantech Consumer Prods. Servs., Inc. v. Reliance Ins. Co. in Liquidation*, 96 A.3d 346, 354-55 (Pa. 2014).

East Coast and the Department dispute how to construe the parts of the Act that authorize the Department to require application materials of an ostensible manufacturer licensee—i.e., Sections 1220-A and 1221-A. East Coast argues the Board's interpretation is too broad: it cannot be that the Department can require "whatever information it believes is necessary" incident to a manufacturer's application, without any limitations. Board Decision, R.R. at 86a. East Coast points out that the Act purposefully distinguishes between manufacturers, wholesalers, and retailers, and imposes more lengthy and specific requirements for wholesalers' and retailers' application documents, which include requirements for financial information. East Coast then emphasizes that no such requirements are present in Section 1221-A, which governs manufacturers, which implies that the Department is not authorized to ask such documents of manufacturers. East Coast relies on the interpretive canon *expressio unius est exclusio alterius*.[9] Thus, East Coast asks the Court to construe Sections 1220-A and 1221-A in a way that prohibits the Department from requesting the exact same types of financial information from a manufacturer as it would from a wholesaler or retailer. The Department responds

[8] It provides that "when the words of the statute are not explicit," the intention of the General Assembly may be ascertained by considering "(1) the occasion and necessity for the statute; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any, including other statutes upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretations of such statute." 1 Pa.C.S. § 1921(c).

[9] "[T]he express mention of one thing excludes all others." *St. Elizabeth's Child Care Ctr. v. Dep't of Pub. Welfare*, 963 A.2d 1274, 1275 (Pa. 2009).

only that the Act's text clearly empowers the Department to request the information it sought, so the Act supports its denial of the license.

On the interpretation question, we agree with the Department. Section 1221-A of the Act states only that a manufacturer's application must contain "the information requested by the [D]epartment." 72 P.S. § 8221-A. Nothing in that Section, nor in the more general Section 1220-A(b) contemplating "information prescribed by the [D]epartment," *id.* § 8220-A(b), states a limit on what information the Department may require.

We reject East Coast's reliance on *expressio unius* to create an implicit limit on what can be required of a manufacturer, as opposed to a dealer. All authorities agree that canon "must be applied with great caution, since its application depends so much on context." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012). Here, context cuts the other way. When interpreting the Act, we must give effect to the more specific provisions regarding information dealer applicants must provide, but we "must also listen attentively to what [the Act] does not say." *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020). It empowers the Department to request "information" from manufacturer applicants, without stating any limit on the class of things the Department may require. It does not restrict the scope of the information requests to any subject matter or degree of relevancy.[10] We cannot disregard the letter of

[10] Curiously, this interpretation means that the Board's articulation of the statutory standard—that the Department can ask for whatever information it *believes is necessary* to approve an application—is actually narrower than the statutory language provides. One can imagine information that is relevant or useful, even tangentially, that may not be *necessary*. The Act says nothing about how the information required of manufacturers must be connected to the Department's duties. Even arguably irrelevant information—such as the business's operating hours, its mission statement, or the school report card of the owner's eldest child—could be requested based on the text of the provision.

those words to pursue the spirit of a more tailored licensing regime, as East Coast invites us to do. *Brewington*, 199 A.3d at 354. Nor can we insert limiting words—*material* or *relevant* or *necessary* come to mind—into the statute. *See Ursinus Coll. v. Prevailing Wage Appeals Bd.*, 310 A.3d 154, 171 (Pa. 2024). Though the Act speaks with astounding breadth, it speaks clearly. Our interpretive work ends there.

B. The Nondelegation Doctrine

With that interpretation, we turn to the first of East Coast's constitutional challenges to the Act: that the Act facially violates the nondelegation doctrine. East Coast relies on *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), our Supreme Court's seminal teaching on unconstitutional delegations. Before discussing the parties' arguments in detail, we briefly review *Protz* and our courts' development of the nondelegation doctrine since then.

In *Protz*, the Supreme Court considered former Section 306(a.2) of the Workers' Compensation Act,[11] which provided that physicians evaluating an injured employee's degree of impairment must "apply the methodology set forth in 'the most recent edition' of the American Medical Association['s (AMA)] *Guides to the Evaluation of Permanent Impairment*." *Protz*, 161 A.3d at 830 (quoting *former* 77 P.S. § 511.2(1)). The claimant in that case challenged the statute's incorporation by reference as an impermissible delegation of legislative power to the AMA. The court explained that the Pennsylvania nondelegation doctrine flows from Article II, Section 1 of the Pennsylvania Constitution—which vests legislative power in the General Assembly—and from separation-of-powers principles, which reserve

[11] Act of June 2, 1915, P.L. 736, *as amended*, added by Section 4 of the Act of June 24, 1996, P.L. 350, *formerly* 77 P.S. § 511.2, repealed by the Act of October 24, 2018, P.L. 714, No. 111.

legislation for the legislature. *Id.* at 833. The Court also recognized that the doctrine allows the legislature to delegate "authority and discretion to execute or administer a law." *Id.* But to do so, the enabling statute must obey two fundamental limitations:

> First, . . . the General Assembly must make the basic policy choices, and second, the legislation must include adequate standards which will guide and restrain the exercise of the delegated administrative functions. This means, to borrow Chief Justice Taft's oft-quoted expression, that the law must contain some "intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

Id. at 834 (some citations and internal quotation marks omitted). Applying those precepts, the court concluded that the delegation to the AMA was impermissible. It reasoned that the statute did not include any policy judgment from the General Assembly about which impairment methodology should govern, "nor did it prescribe any standards to guide and restrain the AMA's discretion to create such a methodology." *Id.* at 835.

The *Protz* court noted "one additional wrinkle" that compromised the statute there: the delegation was to the AMA, a private entity. The Court explained:

> Conceptually, this [delegation to a private entity] poses unique concerns that are absent when the General Assembly, for instance, vests an executive-branch agency with the discretion to administer the law. One such concern is that private entities are isolated from the political process, and, as a result, are shielded from political accountability. Because of this, it is perhaps unsurprising that our precedents have long expressed hostility toward delegations of governmental authority to private actors.

Id. at 837 (citations omitted) (collecting cases). The court did not dispositively rely

on the private aspect of the delegation in *Protz*. It held the delegating provision of the statute invalid on ordinary nondelegation principles and found it inseverable from the overall impairment rating provisions; thus, it struck the entire section relating to impairment rating evaluations. *Id.* at 841. Many decisions since have applied that holding within the workers' compensation impairment context.[12]

Our courts have developed the nondelegation doctrine post-*Protz*. First, there are some limiting principles. Our Supreme Court has recognized a sort of *Protz* step zero: for nondelegation concerns to be triggered, there must be a delegation of authority in the first place that actually gives discretionary power to a delegatee. *City of Lancaster v. Pa. Pub. Util. Comm'n*, 313 A.3d 1020, 1029 (Pa. 2024); *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1047 (Pa. 2019); *Pa. Rest. & Lodging Ass'n v. City of Pittsburgh*, 211 A.3d 810, 829 n.19 (Pa. 2019) (finding not a delegation but a grant of municipal power allowing locality to legislate). Further, courts can avoid finding a delegation problem where the statute in question must or may be fairly construed to operate within *Protz*'s strictures. *See Federated Ins. Co. v. Summit Pharmacy (Bureau of Workers' Comp. Fee Rev. Hearing Off.)*, 308 A.3d 329, 344 (Pa. Cmwlth.), *appeal granted*, 325 A.3d 449 (Pa. 2024) (declining to apply nondelegation doctrine when statutory language required construction that resolved the case).

Then there are so-called private delegations, like the delegation to the AMA in *Protz*, which we continue to view with skepticism. We have found private

[12] *See, e.g.*, *Dana Holding Corp. v. Workers' Comp. Appeal Bd (Smuck)*, 232 A.3d 629, 649 (Pa. 2020) (concerning retroactive application of *Protz* to cases pending at time of decision); *Pa. AFL-CIO v. Commonwealth*, 219 A.3d 306, 308 (Pa. Cmwlth. 2019) (upholding amendment intended to replace section struck in *Protz* against a second nondelegation challenge).

delegations unlawful in the building-code context for reasons similar to *Protz*—the legislative body attempts to delegate legislative choices about a technically complex set of standards to a private body with putative expertise. *See Pa. Builders Ass'n v. Dep't of Lab. & Indus.*, 284 A.3d 1287, 1291 (Pa. Cmwlth. 2022); *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1211 (Pa. Cmwlth. 2018) (en banc). We have also overturned private delegations in land use cases where a locality attempts to delegate what amounts to a veto power to private landowners. *See Southpointe Golf Club, Inc. v. Bd. of Supervisors of Cecil Twp.*, 250 A.3d 495, 507 (Pa. Cmwlth. 2021); *425 Prop. Ass'n of Alpha Chi Rho, Inc. v. State Coll. Borough Zoning Hr'g Bd.*, 223 A.3d 300, 313 n.9 (Pa. Cmwlth. 2019).

Finally, our Supreme Court has upheld some delegations against constitutional challenge. These are public delegations to executive officials or departments. In *Wolf v. Scarnati*, 233 A.3d 679, 701 (Pa. 2020), *superseded by constitutional amendment as stated in Corman v. Acting Sec'y of Pa. Dep't of Health*, 266 A.3d 452, 457 (Pa. 2021), the court concluded that a statute delegating to the Governor the power to suspend laws did not offend nondelegation. This was because "the General Assembly made the basic policy choices about which circumstances are necessary to trigger" that extraordinary power, and there were sufficient cabining standards because under the statute, "the scope of the emergency, not the Governor's arbitrary discretion, . . . determines the extent of the Governor's powers." *Id.* at 704-05. In *In re Formation of Independent School District Consisting of Borough of Highspire, Dauphin County*, 260 A.3d 925, 934 (Pa. 2021) (*Borough of Highspire*), the court upheld a statute that delegated to the Pennsylvania Secretary of Education power to determine the proposed creation of an independent school district. The court explained that the statute comprehensively set out the

legislature's policy choices, such that "the Secretary's own preferences are not valid considerations regarding good education policy." *Id.* at 939. The court noted that these constraints on the Secretary's discretion were present in the law even before *Protz* was decided. *See id.* (citing caselaw).

Applying this decisional law to the instant case is straightforward. East Coast claims that Sections 1220-A and 1221-A, if they truly authorize the Department to request any documentation whatsoever of an applicant, delegate legislative power to the Department that is entirely unconstrained and allows the Department to act arbitrarily. It points out that, unlike the provisions regarding dealers that at least contain some enumerated criteria or requirements of applications, there is nothing in the manufacturer's provision that suggests what information would be appropriately required. The Department responds only that the necessary policy choices are implicit in the Act—the General Assembly obviously chose to create a new taxing and licensing regime for e-cigarettes. The Department emphasizes that tobacco products are highly regulated and that "the delegation of authority to an agency is construed liberally when the agency is concerned with protecting the public's health and welfare." Department's Br. at 20 (quoting *Pennsylvania Restaurant*, 211 A.3d at 829 n.19).

Initially, we note that Section 1221-A of the Act represents a delegation of decisionmaking power to the Department. By requiring the applicant to provide "the information requested by the [D]epartment," that Section authorizes the Department to request information. The Department must exercise discretion in doing so, as evidenced in this case by the extensive back-and-forth with East Coast regarding what documentation would be needed and why. The Act plainly speaks to and authorizes such decisions by the Department. *Cf. City of Lancaster*.

We agree with the Department that the General Assembly made sufficient basic policy choices in the Act, such that it could delegate. The Act requires licensure for all manufacturers and dealers of tobacco products and punishes unlicensed sales. Section 1229-A of the Act, 72 P.S. § 8229-A. The Act's licensing provisions also apply different scrutiny when licensing different types of business. *Compare* 72 P.S. §§ 8221-A and 8223-A. This is all for good reason: the General Assembly chose, as a policy matter, to prioritize the certain collection of taxes imposed under the Act, and it chose a licensing regime as the tool to accomplish that. That is why, for example, Section 1202-A(b) of the Act requires that retailers purchase tobacco products only from a licensed dealer—it ensures the tax is collected from either the retailer or the licensed dealer, because a person known to and licensed by the Department is on the hook to "remit the tax to the Department." 72 P.S. § 8202-A(b).

But whether the Act includes sufficient standards to restrain the Department's discretion is a separate question under *Protz*. We agree with East Coast[13] that it does not, at least as it pertains to manufacturers. The only substantive text in Section 1221-A beyond the grant of authority to require information is regarding designation of a process agent. Unlike in Sections 1222-A and 1223-A (for dealers), there are no express criteria, standards, priorities, or even goals articulated regarding the *purpose(s) for which* the Department can request information of a manufacturer applicant. This allows the Department to make unconstrained, arbitrary, capricious requests for any information whatsoever. In that sense, the Act is quite the opposite of the agency delegations our Supreme Court has upheld: "the [Department]'s own preferences are [*the only*] valid considerations

[13] We note that the Department does not discuss this portion of the *Protz* standard separately.

regarding" what information a manufacturer applicant must provide. *Contra Borough of Highspire*, 260 A.3d at 939 (emphasis added). The Act includes no other considerations.[14] "Broad discretion and standardless discretion are not the same thing." *Scarnati*, 233 A.3d at 705. This is the latter.

The facts of this case illustrate how the delegation is both legislative in nature and totally unconstrained. The Department requested the Consent Form from East Coast, which would expressly waive constitutional rights to privacy incident to the Department's separate investigative power to "examine the books and records . . . of any taxpayer." 72 P.S. § 8214-A(b). The choice to require waiver of constitutional protections in exchange for a state-given benefit (here, a license) is a legislative choice, not an administrative one.[15] The Department felt no need to respond to East Coast's request for legal authority supporting its demand for the Consent Form (which legal authority this Court finds lacking). And its denial referenced only a lack of "supporting documentation"—it did not differentiate among the very different types of documents East Coast had not provided, which includes a sales agreement, a profit/loss statement, and the Consent Form. East Coast gave an explanation regarding the sales agreement, and repeatedly asked the Department why it must provide the Consent Form. The Department did not apparently consider, and certainly did not respond to, those explanations and questions, but stood on its unexplained choice to require those documents. We

[14] We reject the Department's position, articulated for the first time at oral argument, that Section 1214-A(b) of the Act limits what documentation the Department can request of a manufacturer applicant. That Section applies to "taxpayers," and the Department concedes it does not apply at the licensing stage.

[15] *See, e.g.*, Section 7 of the Local Option Small Games of Chance Act, Act of Dec. 19, 1988, P.L. 1262, *as amended*, 10 P.S. § 328.304 (providing, by statute, for "waiver of confidentiality" "by the filing of a[license] application with [a state agency]").

cannot say for sure without knowing the Department's motives, but this appears to be the kind of "arbitrary, *ad hoc* decision making" we are concerned about when the statute gives no standards to guide agency discretion. *Protz*, 161 A.3d at 835. The Act provides no such standards, and we are not permitted to write those standards in when they are plainly absent.[16] *Id.* at 839 (rejecting as unreasonable a reading of the offending statute that would add language to the text). We hold Section 1221-A of the Act represents a facially unconstitutional delegation of legislative authority to the Department. *See id.*

Having concluded that the delegation is unconstitutional, we must decide what to do about it. If we can, we must adopt a reading of the Act that removes the offending provisions but allows the Act to remain operative and certain. *Protz*, 161 A.3d at 838-40. That entails a severability analysis. The Act contains no severability provision, but "as a rule, 'the individual provisions of all statutes presumptively are severable.'" *Id.* at 840 (quoting 1 Pa.C.S. § 1925). "Nevertheless, we will decline to sever when, after the void provisions are excised, the remainder of the statute is incapable of execution in accordance with the General Assembly's intent." *Id.* (citing *Stilp v. Commonwealth*, 905 A.2d 918, 972 (Pa. 2006)).

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[16] For this reason, we cannot avoid the nondelegation problem here by adopting a different construction of the Act. If there were any permissible way for us to glean limiting principles from the unambiguous text of the Act, we would do so. But we may "not rewrite a . . . law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). We reject the Department's invitation to look to the spirit of the Act or practical considerations in order to divine some limiting standard. This would be legislating from the bench and, respectfully, the decision the Department cites for that concept was a plurality opinion, predated *Protz* and our now-well-developed law on interpretation under the Statutory Construction Act, and has been distinguished because it involved a delegation to the judiciary, not an agency. *See Protz*, 161 A.3d at 834 (distinguishing *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 291 (Pa. 1975) (plurality opinion)).

Here, the offending language is limited to two places in the Act: Section 1220-A's reference to application information being "in the form and contain[ing] information prescribed by the [D]epartment," 72 P.S. § 8220-A, and Section 1221-A's requirement for a manufacturer's application to contain "the information requested by the [D]epartment," 72 P.S. § 8221-A. Similar to the offending language in *Protz*, excising just this language—which is the only way the Department can obtain any information about an applicant—would render the manufacturer-application process incomprehensible. We cannot believe the General Assembly would intend for the Department to make the determination whether to grant a manufacturer's license with no information at all. That would be arbitrariness by other means. Thus, because Section 1221-A (and Section 1220-A, to the extent it is applied to manufacturer applicants) cannot function without the impermissible delegation, we must strike those portions of the Act. *Protz*, 161 A.3d at 841.

Because we strike the entirety of Section 1221-A, the Department will be unable to license manufacturers under the Act, including East Coast.[17] We leave

[17] We must strike unconstitutional delegations as we find them "without consideration of the exigencies that arise." *Protz*, 161 A.3d at 841. In passing, we note that the consequences of making manufacturers unlicensable under the Act appear to be limited. Section 1220-A(a) of the Act prohibits sale, transfer, or delivery of tobacco products without a license, but that prohibition does not apply if all of an entity's sales are exempt from the tax the Act imposes. *Id.* § 8220-A(a). Any manufacturer that is subject to the tax because it sells or trades in tobacco products with retailers is, definitionally, also a wholesaler under the Act. *See id.* § 8201-A (defining wholesaler). Thus, to the extent the tax applies to a manufacturer, that entity could and must be licensed as a dealer. Finally, the tax is imposed on a "dealer of manufacturer," but only "at the time the tobacco product is first sold to a retailer." *Id.* § 8202-A(a.1). Retailers may only buy tobacco products from licensed *dealers* (not manufacturers), so there will always be a dealer (retailer or wholesaler) responsible to pay the tax. 72 P.S. § 8202-A(a.1), (b). Other provisions relating to manufacturers do not distinguish between licensed and unlicensed status. *See id.* §§ 8204-A (remittance of tax), 8214-A (record keeping), 8232-A (allowing import of sample tobacco products but not requiring licensure).

Sections 1222-A and 1223-A (and Section 1220-A, to the extent it is applied to dealer applicants) undisturbed, meaning the Department may continue to license wholesalers and retailers under the Act. In finding constitutional invalidity we of course neither "formally repeal the law" nor issue "a formal remedy [such as] an injunction [or] declaration"; we merely "recognize[] that . . . 'a legislative act contrary to the constitution is not law' at all." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 627 n.8 (2020) (plurality opinion) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

In light of Section 1221-A's infirmity, the Department erred in denying East Coast's application for the stated reason (i.e., a lack of requested documentation). Ordinarily, we would vacate the determination and direct the agency to process the application anew under the proper understanding of the law. *Perrotta v. Dep't of Transp., Bureau of Driver Licensing*, 216 A.3d 1178, 1192 (Pa. Cmwlth. 2019) (distinguishing vacatur from grant of license, and ordering the former). But here, the authorizing provision of the statute is facially unconstitutional, so "no . . . circumstances exist under which the statute would be valid" and no remand is appropriate. *Clifton v. Allegheny Cnty.*, 969 A.2d 1197, 1222 (Pa. 2009). Thus, we will vacate, rather than reverse, the Department's determination, and direct the Department not to further consider East Coast's application. *See* 42 Pa.C.S. § 706 (authorizing vacatur and reversal); *Perrotta*, 216 A.3d at 1192 (vacating rather than granting license).

IV. CONCLUSION

For the foregoing reasons, we conclude that Section 1221-A (and Section 1220-A, to the extent it is applied to manufacturer applicants) of the TPTA

is an unconstitutional delegation of legislative authority to the Department.[18] Accordingly, the Department erred in denying East Coast's application on the basis that East Coast did not provide the requested information, which request the Department was not lawfully authorized to make. We vacate that determination.

MATTHEW S. WOLF, Judge

President Judge Cohn Jubelirer dissents.

Judge McCullough dissents.

[18] Given this conclusion, we do not address East Coast's remaining arguments on appeal.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

East Coast Vapor LLC, Petitioner	:	
v.	:	No. 153 C.D. 2023
Department of Revenue, Respondent	:	

O R D E R

AND NOW, this 3rd day of January 2025, the determination of the Department of Revenue (Department) issued February 3, 2023, is VACATED in accordance with the foregoing Opinion. The Department shall not further consider the application filed by Petitioner under Section 1221-A of the Tobacco Products Tax Act.[1]

Jurisdiction relinquished.

MATTHEW S. WOLF, Judge

[1] Act of March 4, 1971, P.L. 6, *as amended*, added by the Act of July 13, 2016, P.L. 526, 72 P.S. §§ 8201–A to 8234–A.