COURT OF APPEALS OF VIRGINIA

PUBLISHED

Present: Chief Judge Felton, Judges Frank, Humphreys, Kelsey, Petty, Alston, McCullough, Huff and Chafin
Argued at Richmond, Virginia

KEPA, INC., d/b/a
SHE-SHA CAFÉ AND HOOKAH LOUNGE

v. Record No. 1164-12-3

VIRGINIA DEPARTMENT OF HEALTH

OPINION BY
JUDGE WILLIAM G. PETTY
DECEMBER 17, 2013

UPON A REHEARING EN BANC

FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY
Colin R. Gibb, Judge

Andrew P. Connors (James R. Creekmore; Keith Finch; The Creekmore Law Firm PC, on briefs), for appellant.

Paul Kugelman, Jr., Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Kepa, Inc., doing business as She-Sha Café and Hookah Lounge ("She-Sha"), appeals from an order of the trial court upholding the decision of the Virginia Department of Health ("Department") that She-Sha is not exempt from the regulations[1] of the Virginia Indoor Clean Air Act ("VICAA"). A divided panel of this Court held that She-Sha was not exempt from the regulations of the VICAA and accordingly affirmed the trial court's decision. Kepa, Inc. v. Va. Dep't of Health, 61 Va. App. 696, 740 S.E.2d 26 (2013). We subsequently granted She-Sha's

[1] The Department cited She-Sha for violating Code § 15.2-2825(D) (requiring no-smoking signs) and Code § 15.2-2825(F) (prohibiting smoking).

petition for rehearing en banc and stayed the panel decision.[2] On rehearing en banc, we hold that She-Sha is exempt from the regulations of the VICAA because it is a retail tobacco store.

I. BACKGROUND

On appeal, we view the evidence in the light most favorable to the Department of Health, the party prevailing below. See Hilliards v. Jackson, 28 Va. App. 475, 479, 506 S.E.2d 547, 549 (1998).

She-Sha is a retail tobacco store and restaurant located in Blacksburg, Virginia. The business model for She-Sha involves charging patrons for a flavored, wet tobacco which is heated by a burning coal and then smoked through a water-filled pipe known as a hookah.[3]

She-Sha does not allow its customers to consume any outside tobacco on its premises. Instead, customers pay a fee to rent a hookah filled with hookah tobacco. She-Sha also sells packaged tobacco for customer use off-premises. To go along with hookah and tobacco sales, She-Sha offers customers a menu of food and beverage items.

She-Sha has been in business since 2003, and has nearly half a million dollars in annual revenue. Tobacco and tobacco-related sales, e.g., hookah rentals, accounted for sixty-six percent to sixty-seven percent of She-Sha's revenue in the three months preceding the citations from the Department—December 2009 to February 2010. These sales figures have been consistent since September 2008.[4]

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[2] By granting the petition for rehearing en banc, we vacated the previous panel decision. See Logan v. Commonwealth, 47 Va. App. 168, 170, 622 S.E.2d 771, 772 (2005) (en banc).

[3] A hookah is a "pipe for smoking that has a long flexible tube whereby the smoke is cooled by passing through water." Webster's Third New International Dictionary 1088 (2002).

[4] Prior to December 2009, She-Sha included tobacco-to-go purchases in its merchandise sales figures. Thus, She-Sha's financial records showed a lower percentage of tobacco and tobacco-related sales before that date. According to the sales figures and uncontested testimony from She-Sha, if the tobacco-to-go purchases would have been calculated separately—as they were from December 2009 to February 2010—then the percentage of tobacco and

She-Sha is licensed by the Department of Taxation as an "Other Tobacco Product Retailer." As of February 2010, She-Sha had paid a total of $7,208.72 in other tobacco products taxes to the Commonwealth. She-Sha has a "Restaurant and Retail Tobacco Store" business license that was issued by the Town of Blacksburg. She-Sha is also "a place where food is served," defined in Code § 15.2-2820 as a "restaurant." Accordingly, She-Sha has a permit/license from the Department to operate as a restaurant.

On January 27, 2010, the Department investigated a complaint that She-Sha was allowing customers to smoke in its place of business. In a Food Establishment Evaluation Report, the Department cited She-Sha for two non-critical violations of the VICAA: (1) failure to post no-smoking signs as required by Code § 15.2-2825(D), and (2) failure to prohibit smoking in non-smoking areas as required by Code § 15.2-2825(F).

She-Sha requested an informal fact-finding hearing to dispute the citations. On March 22, 2010, Dr. J. Henry Hershey, the Director of the New River Health District for the Montgomery County Health Department, conducted the informal fact-finding hearing. On July 8, 2010, Dr. Hershey issued a letter opining that the citations were proper.

She-Sha then requested a formal adjudicatory hearing. She-Sha also renewed its request for a summary case by the Department pursuant to Code § 2.2-4020.1.[5] In its request, She-Sha stipulated that it was a restaurant as defined in the VICAA. By letter dated October 12, 2010, the State Health Commissioner informed She-Sha that a summary case decision was inappropriate at that time, but the Department would consolidate the summary case decision proceeding with the formal hearing She-Sha had requested.

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tobacco-related sales since at least September 2008 would have been consistent with the December 2009 to February 2010 sales percentages. The Department stipulated to the accuracy of the sales figures.

[5] This "renewed request" is the only request contained in the agency record; the initial request was not included.

The formal adjudicatory hearing was conducted on March 15, 2011. On May 19, 2011, the hearing officer recommended nine findings of fact and conclusions of law. On June 17, 2011, the Health Commissioner issued a case decision agreeing with and adopting the hearing officer's recommendations. The case decision upheld the violations noted in the report and stated that She-Sha is a restaurant subject to the regulations of the VICAA.

She-Sha appealed the Department's decision to the Circuit Court for Montgomery County on August 12, 2011. The circuit court issued a letter opinion, and subsequent final order, holding that She-Sha is not exempt from the VICAA; therefore, it dismissed the appeal with prejudice. She-Sha then appealed to this Court.

II. ANALYSIS

The question presented to us in this appeal is whether a retail tobacco store[6] that is also a restaurant is exempt from the provisions of the VICAA. We hold that it is.

She-Sha concedes that it is a restaurant; however, it asserts that it is also a retail tobacco store. In her final agency case decision, the Health Commissioner did not make an explicit finding regarding She-Sha's claim that it is a retail tobacco store. However, both the Virginia Department of Taxation and the Town of Blacksburg recognize that She-Sha is engaged in the retail sale of tobacco. Furthermore, on brief, and during oral argument before this Court, the Department conceded that She-Sha is both a restaurant and a retail tobacco store.[7] While we are not bound to accept concessions of law,

[6] The Code of Virginia does not contain a definition of "retail tobacco store."

[7] Specifically, the Department argues on brief: "The fundamental problem with this line of argument is that [She-Sha] is not just a retail tobacco store. It is, in its best case and as stated in its 2010 business license application, a 'restaurant and retail tobacco store.'" Appellee's Br. at 7. Moreover, at oral argument the Department stated, "Except, here, factually we have a hybrid. We do[not] have a retail tobacco store. We have a retail tobacco store and a restaurant." Oral Argument at 23:11.

> [a]n entirely different paradigm, however, applies to questions of fact unique to the litigants and specific to the circumstances of each particular case. . . . On purely factual questions, therefore, we can and do rely on the adversarial process to sort out the contested and the uncontested aspects of the case before we begin our responsibility of applying *de novo* the correct legal principles.

Logan v. Commonwealth, 47 Va. App. 168, 172, 622 S.E.2d 771, 773 (2005).

Thus, based on the evidence before us and the Department's concessions, there can be no dispute that She-Sha is engaged in the retail sale of tobacco and that it is, at minimum, both a retail tobacco store and a restaurant.[8] The dispute arises as to whether She-Sha is exempt from regulation as a restaurant under the VICAA because of its concurrent operation as a retail tobacco store. This presents us with a question of statutory construction.

The Virginia Administrative Process Act ("VAPA") authorizes judicial review of agency decisions. See Code § 2.2-4027. Under well-settled principles, the burden is upon the party appealing such a decision to demonstrate error. Avante at Roanoke v. Finnerty, 56 Va. App. 190, 197, 692 S.E.2d 277, 280 (2010); Carter v. Gordon, 28 Va. App. 133, 141, 502 S.E.2d 697, 700-01 (1998). "Our review is limited to determining (1) '[w]hether the agency acted in accordance with law;' (2) '[w]hether the agency made a procedural error which was not harmless error;' and (3) '[w]hether the agency had sufficient evidential support for its findings of fact.'"

[8] The Department suggests that She-Sha's argument "places every restaurant in the Commonwealth in the position of being able to avoid the Act by simply selling tobacco retail." The dissent picks up on this argument by suggesting that "[w]ith today's holding, any business that prepares or serves food but also names itself a retail tobacco store could . . . easily circumvent regulation under the VICAA." Infra at 15. We reject both arguments as an overly broad reading of our opinion. While Virginia, unlike some states, does not define a retail tobacco store, it is unequivocal from the record that She-Sha's primary business is the retail sale of tobacco. See generally Tenn. Code Ann. § 39-17-1802(13) (defining "retail tobacco store" as "a retail store that derives its largest category of sales from tobacco products and accessories"). The uncontradicted evidence established that two-thirds of She-Sha's revenue came from the sale of tobacco and tobacco-related products. Given the facts before us, coupled with the Department's concessions, it is unnecessary to define the term "retail tobacco store." Similarly, it is unnecessary to decide at what point the sale of tobacco becomes ancillary to a restaurant's primary business of selling food products. Suffice it to say that, here, it is clear that She-Sha is doing more than "simply selling tobacco retail" or merely "nam[ing] itself a retail tobacco store."

Avante at Roanoke, 56 Va. App. at 197, 692 S.E.2d at 280 (quoting Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 242, 369 S.E.2d 1, 7 (1988)).

On appeal from an agency's determination of law,

> "where the question involves an interpretation which is within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the courts[, and] . . . 'judicial interference is permissible only for relief against arbitrary or capricious action that constitutes a clear abuse of delegated discretion.'"

Evelyn v. Commonwealth, 46 Va. App. 618, 624, 621 S.E.2d 130, 133 (2005) (alteration in original) (quoting Johnston-Willis, 6 Va. App. at 244, 369 S.E.2d at 8). Generally, however, "[a]n agency's 'legal interpretations of statutes' is accorded no deference because '[w]e have long held that pure statutory interpretation is the prerogative of the judiciary, and thus, Virginia courts do not delegate that task to executive agencies.'" Commonwealth *ex rel.* Va. State Water Control Bd. v. Blue Ridge Envtl. Def. League, Inc., 56 Va. App. 469, 481, 694 S.E.2d 290, 296 (2010) (quoting The Mattaponi Indian Tribe v. Commonwealth Dep't of Envtl. Quality, 43 Va. App. 690, 707, 601 S.E.2d 667, 676 (2004)); see also Va. Dep't of Health v. NRV Real Estate, LLC, 278 Va. 181, 185, 677 S.E.2d 276, 278 (2009) ("Although decisions by administrative agencies are given deference when they fall within an area of the agency's specialized competence, issues of statutory interpretation fall outside those areas and are not entitled to deference on judicial review."). Accordingly, we conduct a *de novo* review of the agency's interpretation of the statutes in dispute. Id.

"Statutory interpretation is a question of law which we review *de novo*, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." Wright v. Commonwealth, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009). The Virginia Supreme Court has long held that

"when analyzing a statute, we must assume that 'the legislature chose, with care, the words it used . . . and we are bound by those words as we interpret the statute.'" City of Virginia Beach v. ESG Enters., 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (quoting Barr v. Town & Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)). "'Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.'" Tazewell County Sch. Bd. v. Brown, 267 Va. 150, 162, 591 S.E.2d 671, 676-77 (2004) (quoting City of Winchester v. American Woodmark Corp., 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995)).

If multiple sections of a statute are inconsistent or ambiguous when read together, then we "are required to harmonize any ambiguity or inconsistency in the statute to give effect to the General Assembly's intent without usurping 'the legislature's right to write statutes.'" Parker v. Warren, 273 Va. 20, 24, 639 S.E.2d 179, 181 (2007) (quoting Boynton v. Kilgore, 271 Va. 220, 229-30, 623 S.E.2d 922, 927 (2006)). Accordingly, we must give "'every word and every part of the statute, if possible, its due effect and meaning, and to the words used their ordinary and popular meaning, unless it plainly appears that they were used in some other sense.'" Epps v. Commonwealth, 47 Va. App. 687, 714, 626 S.E.2d 912, 924 (2006) (en banc) (quoting Posey v. Commonwealth, 123 Va. 551, 553, 96 S.E. 771, 771 (1918)).

In 1990, the General Assembly enacted Chapter 28.2 of Title 15.2 of the Code of Virginia and entitled it "The Virginia Indoor Clean Air Act." As originally enacted, the VICAA banned smoking in various government buildings and in some public areas. See Code

§ 15.2-2824. In 2009, the VICAA was amended to also ban smoking in all restaurants and bars in the Commonwealth, subject to certain exceptions.[9] See Code § 15.2-2825.[10]

The VICAA begins with a recital of various definitions in Code § 15.2-2820. Significantly, the first substantive section, Code § 15.2-2821, which is titled "Applicability," reads, in relevant part, "Nothing in this chapter shall be construed to . . . [r]egulate smoking in retail tobacco stores, tobacco warehouses, or tobacco manufacturing facilities." Relying on the plain language of this provision, She-Sha argues that it is exempt from the provisions of the VICAA. The Department, on the other hand, argues that we should apply rules of statutory construction to conclude that in enacting Code § 15.2-2825, the General Assembly intended to ban smoking in any business that sells food, regardless of any other business activities it engages in.

We initially note that the exemptions[11] in Code § 15.2-2821 apply to the entire VICAA chapter, whereas the exceptions listed in Code § 15.2-2825 apply only to Code § 15.2-2825. This is significant because

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[9] The dissent seems to suggest that one reason the General Assembly enacted Code § 15.2-2825 was its recognition that "the regulations of the Virginia Administrative Code consider tobacco to be a contaminant." Infra at 14. If that were true, it would seem odd that the General Assembly would expressly allow such a contaminant in: certain operations that prepare or store food for service to the public, Code § 15.2-2825(A)(1); outdoor areas of restaurants, Code § 15.2-2825(A)(2); restaurants on the premises of tobacco manufacturers, Code § 15.2-2825(A)(3); restaurants used for private functions, Code § 15.2-2825(A)(4); and areas of restaurants designated and designed as smoking areas, Code § 15.2-2825(A)(5).

[10] Code § 15.2-2825 is titled, "Smoking in restaurants prohibited; exceptions; posting of signs; penalty for violation." Code § 15.2-2825(A) reads, in relevant part, "[S]moking shall be prohibited and no person shall smoke in any restaurant in the Commonwealth or in any restroom within such restaurant, except that smoking may be permitted in . . . [a]ny restaurants located on the premises of any manufacturer of tobacco products." Code § 15.2-2825(A) provides various exemptions to the restaurant smoking ban. The only Code § 15.2-2825(A) exemption at issue in this case is an exemption for "restaurants located on the premises of any manufacturer of tobacco products." Code § 15.2-2825(A)(5).

[11] Exemption is defined as, "Freedom from a duty, liability, or other requirement; an exception." Black's Law Dictionary 653 (9th ed. 2009).

> [a] proper application of the "whole act interpretation" will ascribe to the exception equal power over all other provisions of the act unless it is specifically limited to particular sections. As is the case with every other section of an act, it must be interpreted as a part of the entire act, with equal power and equal authority to restrain all other provisions of the act, whether they precede or succeed the section itself.

2A Norman J. Singer, Sutherland's Statutes & Statutory Construction § 20:22 (7th ed. 2009).

The Department, however, argues that the General Assembly did not intend to limit the regulation of smoking in a restaurant just because the business also engaged in the retail sale of tobacco. Specifically, the Department argues that smoking in any restaurant is prohibited unless the restaurant falls within an exemption listed in Code § 15.2-2825(A). In advancing its construction of the VICAA, the Department points to the specific exception in Code § 15.2-2825(A) for "any restaurants located on the premises of any manufacturer of tobacco products." The Department argues that because "tobacco manufacturing facilities" are also specifically listed in Code § 15.2-2821, the General Assembly intended for Code § 15.2-2825 to apply to all institutions listed in Code § 15.2-2821 unless there is a specific exemption in Code § 15.2-2825(A). The Department's argument glosses over the plain language used by the General Assembly—"nothing in this chapter shall be construed to regulate smoking in retail tobacco stores." That language makes it clear that the VICAA simply does not apply to retail tobacco stores. If we were to conclude otherwise, we would be required to engage in exactly what the plain language of Code § 15.2-2821 prohibits: we would be construing the provisions of Code § 15.2-2825 to permit the Department to regulate smoking in a retail tobacco store. This we cannot do.

Moreover, "when a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each." Ainslie v. Inman, 265 Va. 347, 353, 577 S.E.2d 246, 249 (2003). "Proper construction seeks to

harmonize the provisions of a statute both internally and in relation to other statutes." Hulcher v. Commonwealth, 39 Va. App. 601, 605, 575 S.E.2d 579, 581 (2003). Indeed, "'statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected homogenous system, or a simple and complete statutory arrangement.'" Id. at 606, 575 S.E.2d at 581 (quoting Moreno v. Moreno, 24 Va. App. 190, 198, 480 S.E.2d 792, 796 (1997)).

The Department's general authority to regulate restaurants is found in Chapter 2 of Title 35.1 of the Code of Virginia. That chapter unquestionably gives the Department the authority to regulate the preparation and sale of food in She-Sha. However, when the General Assembly elected to adopt a statute regulating smoking in restaurants, it chose to make that statute a part of Chapter 28.2 of Title 15.2 of the Code of Virginia.

"In interpreting a statute, we presume that the General Assembly acted with full knowledge of the law in the area in which it dealt." Philip Morris USA Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 576, 643 S.E.2d 219, 225 (2007). Therefore, we must presume the General Assembly was well aware that Chapter 28.2 exempted retail tobacco stores. Had the General Assembly intended to permit the Department to regulate smoking in any facility that prepares and sells food, it would have included such authority in Chapter 2 of Title 35.1 of the Code of Virginia, which contains no such exception. The fact that it did not evidences its intent to continue to permit smoking in a retail tobacco store despite the fact that it also operates as a restaurant.

As written, it is readily apparent that the General Assembly sought to exempt retail tobacco stores from all provisions of the VICAA. She-Sha is unquestionably a retail tobacco store. Therefore, She-Sha is exempt from the provisions of the VICAA, including Code § 15.2-2821.

III. CONCLUSION

For the foregoing reasons, we reverse the decision of the circuit court and remand this case to the circuit court for entry of an order consistent with this opinion.

Reversed and remanded.

Chafin, J., with whom Frank and McCullough, JJ., join, dissenting.

I respectfully dissent from the majority's holding that She-Sha, as a restaurant *and* retail tobacco store, is exempt from regulation under the VICAA. Even if we presume She-Sha is a retail tobacco store as contemplated by the General Assembly, it is not solely a retail tobacco store. It is also a restaurant. As the VICAA prohibits smoking in restaurants, I believe She-Sha is subject to regulation under the VICAA.

At issue is the application of the retail tobacco store exemption in Code § 15.2-2821 and its relation to the restaurant smoking proscription in Code § 15.2-2825. Code § 15.2-2821 states: "Nothing in this chapter shall be construed to: 1. Permit smoking where it is otherwise prohibited or restricted by other applicable provisions of law; or 2. Regulate smoking in retail tobacco stores, tobacco warehouses, or tobacco manufacturing facilities." Code § 15.2-2825 states that "smoking shall be prohibited and no person shall smoke in any restaurant in the Commonwealth," subject to limited exceptions. None of these exceptions apply to She-Sha. She-Sha argues, and the majority holds, that the language of Code § 15.2-2821 entirely exempts She-Sha from compliance with the VICAA because it is a retail tobacco store. Interpreting the statute in this manner ascribes a broad meaning to the term "retail tobacco store" that is not contextually supported and circumvents the purpose of the restaurant smoking ban.

The majority is correct that "[s]tatutory interpretation is a question of law which we review *de novo*, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." Wright v. Commonwealth, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009). "It is a cardinal rule of construction that statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished." Alston v. Commonwealth, 274 Va. 759, 769, 652 S.E.2d 456, 462 (2007) (internal quotation marks omitted).

"Statutes should be construed as a whole," City of Lynchburg v. English Constr. Co., 277 Va. 574, 584, 675 S.E.2d 197, 202 (2009), and "[i]f a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute, Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007).

> Whenever possible, however, it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. A statute is not to be construed by singling out a particular phrase. Provisos, exceptions, exemptions, and grandfather clauses, although facially unambiguous in themselves, are inherently inconsistent with the spirit of the statute of which they are a part. Accordingly, where, as here, a regulatory statute is designed to promote the public welfare and the scope of the coverage intended is drawn in doubt by [an entity] claiming exemption, courts must determine what was intended.

Virginia Electric & Power Co. v. Board of Cnty. Supervisors, 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983) (citations omitted). "The purpose for which a statute is enacted is of primary importance in its interpretation or construction." Norfolk So. Ry. Co. v. Lassiter, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952). As parts of the same act, Code §§ 15.2-2821 and 15.2-2825 must be interpreted so as not to frustrate one or the other, and so that the intended purpose of the VICAA remains intact. The majority's interpretation fails to do so.

She-Sha's argument rests solely on the exemption language of Code § 15.2-2821(2), that "[n]othing in this chapter shall be construed to . . . regulate smoking in retail tobacco stores." However, it has isolated this second clause of the statute, ignoring the immediately preceding clause that "[n]othing in this chapter shall be construed to [p]ermit smoking where it is otherwise prohibited or restricted by other applicable provisions of law." Code § 15.2-2821(1). The chapter referred to by this statute is Chapter 28.2 of Title 15.2 of the Code of Virginia, which contains the VICAA provisions. She-Sha emphasizes the particular words "nothing in this chapter," and it argues that because the restaurant smoking ban is contained within the same

chapter, the ban therefore does not apply to She-Sha due to the exemption clause. Through this proposition, She-Sha is attempting to take advantage of the exemption in order to "permit smoking where it is otherwise prohibited," which is prohibited by the preceding clause. If Code § 15.2-2821(2) applies to the entire chapter, so too does Code § 15.2-2821(1); and, as such, both provisions apply equally in determining the applicability of the VICAA.

Thus, to be internally consistent, the reasonable interpretation of this particular statute is that a retail tobacco store may be exempt from regulation, so long as said exemption would not permit smoking somewhere that it would otherwise be prohibited. Smoking is "otherwise prohibited" in restaurants by Code § 15.2-2825. Applying this interpretation to these sections gives "full effect to all the statutory language," Moreno v. Moreno, 24 Va. App. 190, 197, 480 S.E.2d 792, 796 (1997), "harmoniz[ing] the provisions of [the] statute both internally and in relation to" the VICAA as a whole, Hulcher v. Commonwealth, 39 Va. App. 601, 605, 575 S.E.2d 579, 581 (2003).

In addition to being internally consistent, an interpretation of Code § 15.2-2821 must be consistent with the VICAA as a whole. The purpose of the VICAA can be drawn from its name: to ensure clean indoor air for the citizenry of the Commonwealth. Fines collected as a result of VICAA violations go to the Virginia Health Care Fund, see Code § 15.2-2825(H), which is "used solely for the provision of health care services," Code § 32.1-367. It is undoubtedly a public health initiative. We are aware, and so too is the General Assembly, that the food regulations of the Virginia Administrative Code consider tobacco to be a contaminant. See 12 VAC 5-421-220(A) (requiring employees to "use any form of tobacco only in designated areas where the contamination of exposed food; clean equipment, utensils, and linens; unwrapped single-service and single-use articles; or other items needing protection cannot result"); 12 VAC 5-421-3140 (stating that "[a]reas designated for employees to . . . use tobacco shall be located so

that food, equipment, linens, and single-service and single-use articles are protected from contamination").

In the VICAA, the legislature chose with care the specific public areas within which it wanted to restrict exposure to tobacco smoke. See Code § 15.2-2823 through -2825. Restaurants are clearly one of those public areas. While most areas subject to the VICAA smoking regulations are listed in Code § 15.2-2824, restaurants have been singled out into an entirely separate provision of their own: Code § 15.2-2825. Interpreting the VICAA as the majority has done, however, strips the significance from the legislative choice to expressly prohibit smoking in restaurants. With today's holding, any business that prepares or serves food but also names itself a retail tobacco store could, without any attempt at compliance, easily circumvent regulation under the VICAA.

As currently written, the statute provides no definition or determinative characteristics as to what would qualify as a retail tobacco store. Further, a retail tobacco store that serves food like traditional restaurants is not simply one or the other, but is a hybrid with the characteristics of both. Though the majority believes it is unnecessary to define the term "retail tobacco store" due to the Department's concessions regarding She-Sha's business, the meaning of the term is important for determining what the legislature intended the exemption to encompass. In the absence of such a concession, we are left with a case-by-case determination of what qualifies as a retail tobacco store. The plain meaning of "retail store" is "a place of business usu[ally] owned and operated by a retailer but sometimes owned and operated by a manufacturer or by someone other than a retailer in which merchandise is sold primarily to ultimate consumers." Webster's Third New International Dictionary 1938 (2002). The meaning of "retail" standing alone is "to sell in small quantities." Id. If selling small quantities of tobacco to ultimate consumers is enough to be considered a retail tobacco store under the statute, then any restaurant could avoid

having to comply with the VICAA by simply selling packs of cigarettes from behind the counter. Any sales of tobacco products would suffice. This plain meaning interpretation creates a minimal threshold with the potential for an absurd result. I do not believe this was the legislature's intent.

The majority does not spell out when a restaurant also qualifies as a retail tobacco store so as to be entirely exempt from the VICAA. At best, therefore, the majority's holding will result in confusion and additional litigation. At worst, the majority's decision will undermine the salutary public health objectives that motivated the General Assembly to enact the VICAA. Although customers of such establishments would remain free to take their business elsewhere, the employees of such restaurants are likely to have far less choice – and far more exposure to tobacco smoke.

In light of the foregoing considerations, the more reasonable interpretation of Code § 15.2-2821, when read in context as one part of the whole VICAA, is that retail tobacco stores are exempt from the VICAA if they are solely that: a retail tobacco store. Where such an establishment overlaps with a public area that the legislature has chosen to specifically regulate, subject to limited exceptions, the purpose of the VICAA is better served by narrowly construing the exemption to apply to entities where smoking would not be otherwise prohibited under the statute. For these reasons, and because She-Sha is not solely a retail tobacco store, I believe She-Sha is not exempt from complying with the VICAA and I would affirm the circuit court's decision.

PUBLISHED

VIRGINIA:

In the Court of Appeals of Virginia on **Tuesday** *the* **7th** *day of* **May, 2013**.

Kepa, Inc., d/b/a
She-Sha Café and Hookah Lounge, Appellant,

against Record No. 1164-12-3
Circuit Court No. CL11009220

Virginia Department of Health, Appellee.

Upon a Petition for Rehearing En Banc

Before Chief Judge Felton, Judges Elder, Frank, Humphreys, Kelsey, Petty, Alston, McCullough, Huff and Chafin

On April 23, 2013 came the appellant, by counsel, and filed a petition requesting that the Court set aside the judgment rendered herein on April 9, 2013, and grant a rehearing *en banc* on the issue(s) raised in the petition.

On consideration whereof, the petition for rehearing *en banc* is granted with regard to the issue(s) raised therein, the mandate entered herein on April 9, 2013 is stayed pending the decision of the Court *en banc*, and the appeal is reinstated on the docket of this Court.

The parties shall file briefs in compliance with Rule 5A:35(b). The appellant shall attach as an addendum to the opening brief upon rehearing *en banc* a copy of the opinion previously rendered by the Court in this matter. It is further ordered that the appellant shall file twelve additional copies of the appendix previously filed in this case. In addition, any party represented by counsel shall file twelve electronic copies of their brief (and the appendix, if the party filing the appendix is represented by counsel) with the clerk of

this Court. The electronic copies must be filed on twelve separate CDs or DVDs and must be filed in Adobe Acrobat Portable Document Format (PDF).[1]

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: *original order signed by a deputy clerk of the Court of Appeals of Virginia at the direction of the Court*

Deputy Clerk

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COURT OF APPEALS OF VIRGINIA

PUBLISHED

Present: Judges Petty, Chafin and Senior Judge Bumgardner
Argued at Salem, Virginia

KEPA, INC., d/b/a
SHE-SHA CAFÉ AND HOOKAH LOUNGE

v. Record No. 1164-12-3

VIRGINIA DEPARTMENT OF HEALTH

OPINION BY
JUDGE TERESA M. CHAFIN
APRIL 9, 2013

FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY
Colin R. Gibb, Judge

Andrew P. Connors (James R. Creekmore; Keith Finch; The Creekmore Law Firm, PC, on briefs), for appellant.

Karri B. Atwood, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Appellant Kepa, Inc. challenges the ruling by the Circuit Court of Montgomery County upholding the Virginia Department of Health's determination that She-Sha Café and Hookah Lounge is not exempt from compliance with the regulations of the Virginia Indoor Clean Air Act. For the reasons that follow, we affirm the circuit court's ruling.

BACKGROUND

Appellant owns and operates She-Sha Café and Hookah Lounge ("She-Sha") in Blacksburg, Virginia. She-Sha has been in operation since 2003 and sells flavored tobacco products for its customers to use on the premises by smoking the tobacco through a hookah.[1] Customers may purchase the tobacco for off-premises use as well. In addition to the hookah-related transactions, She-Sha offers customers a menu of food and beverage items. The

[1] A hookah is a "pipe for smoking that has a long flexible tube whereby the smoke is cooled by passing through water." Webster's Third New International Dictionary 1088 (2002).

Town of Blacksburg issued She-Sha a business license based on a December 2, 2009 application listing the business as a "restaurant and retail tobacco store." She-Sha holds a valid permit from the Virginia Department of Health ("the Department") as a full service restaurant. She-Sha is also licensed by the Commonwealth of Virginia Department of Taxation as an "Other Tobacco Products Retailer."

On January 22, 2010, the Department received a complaint claiming that She-Sha was allowing patrons to smoke within its establishment in violation of the Virginia Indoor Clean Air Act ("VICAA"). On January 27, 2010, in a Food Establishment Evaluation Report ("the report"), She-Sha was cited by the Department for two noncritical violations of the VICAA: an individual was smoking in the building and the facility failed to post "no smoking" signs.[2]

To contest the violations, appellant requested an informal fact finding hearing, which was held on March 22, 2010. By letter dated July 8, 2010, the Department upheld its determination that She-Sha was "properly labeled as a restaurant and that . . . none of [the exceptions to VICAA] apply to She-Sha." The letter noted that a restaurant under VICAA is "any place where food is served," and the term "shall include any bar or lounge area that is part of such restaurant." It also noted that the smoking ban applies to hookah use, as it involves "the carrying or holding of any lighted pipe . . . or any other lighted smoking equipment, or the lighting, inhaling, or exhaling of smoke [from] a pipe . . . ." In conclusion, the Department found that She-Sha was a restaurant because it served food, and even if the hookah lounge was considered a bar or lounge area, the VICAA expressly subjected such areas to its terms.

[2] Code § 15.2-2825(D) requires that restaurants subject to the smoking ban post "signs stating 'No Smoking' or containing the international 'No Smoking' symbol . . . clearly and conspicuously."

Appellant then requested a formal adjudicatory hearing. Appellant also renewed its request for a summary case decision by the Department pursuant to Code § 2.2-4020.1.[3] In its request, appellant stipulated that She-Sha was a restaurant as defined in the VICAA. By letter dated October 12, 2010, the State Health Commissioner informed appellant that a summary case decision was inappropriate at that time, but the Department would consolidate the summary case decision proceeding with the formal hearing appellant had requested.

The formal hearing was conducted on March 15, 2011. On May 19, 2011, the hearing officer recommended nine findings of fact and conclusions of law. The Department issued its case decision on June 17, 2011, in which the Health Commissioner adopted the hearing officer's recommendations. The case decision upheld the violations noted in the report and stated that She-Sha is a restaurant subject to the regulations of the VICAA.

Appellant petitioned the Circuit Court of Montgomery County on August 12, 2011 for an appeal of the Department's final decision in accordance with Code §§ 2.2-4026 and 2.2-4027. Upon consideration of the pleadings and argument of the parties, the circuit court found that the Department made no error of law and dismissed the appeal with prejudice. The court opined that it believed She-Sha should be exempt from the VICAA, but that the statute as written does not allow for its exemption. Appellant now challenges the circuit court's ruling.

I. ANALYSIS

The issue on appeal is whether She-Sha is exempt from complying with the restaurant smoking ban contained in the VICAA. Appellant argues that the circuit court erred in upholding the Department's case decision because She-Sha is a retail tobacco store and the applicability provisions of the VICAA exempt retail tobacco stores from regulation by the other provisions

[3] This "renewed request" is the only request contained in the agency record; the initial request was not included.

within the Act. The Department maintains that even if She-Sha is a retail tobacco store, it is also a restaurant and the VICAA prohibits smoking in restaurants. The Department also contends that the VICAA provides express exemptions to the restaurant smoking ban, none of which apply to She-Sha.

The Virginia Administrative Process Act ("VAPA") authorizes judicial review of agency decisions. See Code § 2.2-4027. Under settled principles, the burden is upon the party appealing such a decision to demonstrate error. Avante at Roanoke v. Finnerty, 56 Va. App. 190, 197, 692 S.E.2d 277, 280 (2010); Carter v. Gordon, 28 Va. App. 133, 141, 502 S.E.2d 697, 700-01 (1998). "Our review is limited to determining (1) '[w]hether the agency acted in accordance with law;' (2) '[w]hether the agency made a procedural error which was not harmless error;' and (3) '[w]hether the agency had sufficient evidential support for its findings of fact.'" Avante at Roanoke, 56 Va. App. at 197, 692 S.E.2d at 280 (quoting Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 242, 369 S.E.2d 1, 7 (1988)).

The reviewing court must determine "'whether substantial evidence exists in the agency record to support the agency's decision. The reviewing court may reject the agency's findings of fact only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion.'" John Doe v. Virginia Bd. of Dentistry, 52 Va. App. 166, 175, 662 S.E.2d 99, 103 (2008) (quoting Johnston-Willis, Ltd., 6 Va. App. at 242, 369 S.E.2d at 7). See Virginia Real Estate Comm'n v. Bias, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983) ("The phrase 'substantial evidence' refers to 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938))).

On appeal from an agency's determination of law,

> "where the question involves an interpretation which is within the specialized competence of the agency and the agency has been

> entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the courts[, and] . . . 'judicial interference is permissible only for relief against arbitrary or capricious action that constitutes a clear abuse of delegated discretion.'"

Evelyn v. Commonwealth, 46 Va. App. 618, 624, 621 S.E.2d 130, 133 (2005) (alteration in original) (quoting Johnston-Willis, 6 Va. App. at 244, 369 S.E.2d at 8). Generally, however, "[a]n agency's legal interpretations of statutes is accorded no deference because we have long held that pure statutory interpretation is the prerogative of the judiciary, and thus, Virginia courts do not delegate that task to executive agencies." Commonwealth ex rel. Va. State Water Control Bd. v. Blue Ridge Envtl. Def. League, Inc., 56 Va. App. 469, 481, 694 S.E.2d 290, 296 (2010) (citations and internal quotation marks omitted); see Virginia Dep't of Health v. NRV Real Estate, LLC, 278 Va. 181, 185, 677 S.E.2d 276, 278 (2009) ("Although decisions by administrative agencies are given deference when they fall within an area of the agency's specialized competence, issues of statutory interpretation fall outside those areas and are not entitled to deference on judicial review." (citation omitted)). Accordingly, we conduct a *de novo* review of the agency's interpretation of the statutes in dispute. Id.

The Virginia Indoor Clean Air Act

"Statutory interpretation is a question of law which we review *de novo*, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." Wright v. Commonwealth, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009). The Virginia Supreme Court has long held that "when analyzing a statute, we must assume that 'the legislature chose, with care, the words it used . . . and we are bound by those words as we interpret the statute.'" City of Virginia Beach v. ESG Enters., 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (quoting Barr v. Town and Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)). "'Where the legislature has

used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.'" Tazewell County Sch. Bd. v. Brown, 267 Va. 150, 162, 591 S.E.2d 671, 676-77 (2004) (citation omitted).

Further, "when a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each." Ainslie v. Inman, 265 Va. 347, 353, 577 S.E.2d 246, 249 (2003) (citing Kole v. City of Chesapeake, 247 Va. 51, 56, 439 S.E.2d 405, 408 (1994)). "Proper construction seeks to harmonize the provisions of a statute both internally and in relation to other statutes." Hulcher v. Commonwealth, 39 Va. App. 601, 605, 575 S.E.2d 579, 581 (2003). Indeed, "statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected homogenous system, or a simple and complete statutory arrangement." Id. at 606, 575 S.E.2d at 581 (quoting Moreno v. Moreno, 24 Va. App. 190, 198, 480 S.E.2d 792, 796 (1997)) (internal quotation marks omitted).

The VICAA as currently enacted became effective on December 1, 2009. The main provision at issue in this case involves the restaurant smoking ban contained in Code § 15.2-2825. Code § 15.2-2825(A) states that "smoking shall be prohibited and no person shall smoke in any restaurant in the Commonwealth . . . ." The inspection and regulation of restaurants is within the general purview of the Department, and pursuant to Code § 15.2-2825(I), "[a]ny local health department shall, while inspecting a restaurant as otherwise required by law, inspect for compliance with [Code § 15.2-2825]." "Restaurant" is defined by Code § 15.2-2820 as "any place where food is prepared for service to the public on or off the premises, or any place where food is served. . . . 'Restaurant' shall include any bar or lounge area

that is part of such restaurant."[4] It was both acknowledged by appellant and determined by the Department that She-Sha is a place where food is served; therefore, She-Sha plainly fits the statute's definition of "restaurant."

As a restaurant, She-Sha must comply with the restaurant smoking ban, unless it falls within one of the six expressly stated exemptions to this section of the VICAA set forth in Code § 15.2-2825(A)(1)-(6):

> 1. Any place or operation that prepares or stores food for distribution to persons of the same business operation or of a related business operation for service to the public. Examples of such places or operations include the preparation or storage of food for catering services, pushcart operations, hotdog stands, and other mobile points of service;
>
> 2. Any outdoor area of a restaurant, with or without roof covering, at such times when such outdoor area is not enclosed in whole or in part by any screened walls, roll-up doors, windows or other seasonal or temporary enclosures;
>
> 3. Any restaurants located on the premises of any *manufacturer of tobacco products*;
>
> 4. Any portion of a restaurant that is used exclusively for private functions, provided such functions are limited to those portions of the restaurant that meet the requirements of subdivision 5;
>
> 5. Any portion of a restaurant that is constructed in such a manner that the area where smoking may be permitted is (i) structurally separated from the portion of the restaurant in which smoking is prohibited and to which ingress and egress is through a door and (ii) separately vented to prevent the recirculation of air from such area to the area of the restaurant where smoking is prohibited. At least one public entrance to the restaurant shall be into an area of the restaurant where smoking is prohibited. For the purposes of the preceding sentence, nothing shall be construed to require the

[4] "Bar or lounge area" is defined in the same code section to mean "any establishment or portion of an establishment devoted to the sale and service of alcoholic beverages for consumption on the premises where the sale or service of food or meals is incidental to the consumption of the alcoholic beverages." Code § 15.2-2820. Even though She-Sha is named "She-Sha Café and Hookah Lounge," it does not fit within the Code's definition of "lounge" because it is not devoted to the sale and service of alcoholic beverages.

> creation of an additional public entrance in cases where the only public entrance to a restaurant in existence as of December 1, 2009, is through an outdoor area described in subdivision 2; and
>
> 6. Any private club.

(Emphasis added).

Appellee argues for application of the maxim *expressio unius est exclusio alterius*, meaning "the expression of one thing is the exclusion of another." This maxim is a fundamental principle of statutory construction which gives rise to the implication that "'omitted terms were not intended to be included within the scope of the statute.'" See, e.g. Conkling v. Commonwealth, 45 Va. App. 518, 522, 612 S.E.2d 235, 237 (2005) (quoting Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000)). Applying this principle to the statute at hand, the legislature included certain express exemptions to the restaurant smoking ban, implying that any restaurant that fails to meet the criteria for at least one of the stated exemptions is not exempt from compliance with the smoking ban.

She-Sha does not fit within any of the six stated exemptions. She-Sha does not prepare or store food for distribution as a catering service or other mobile point of service. It does not operate an outdoor, non-enclosed area of its restaurant. She-Sha is not a private club, nor is it used exclusively for private functions. There is no portion of She-Sha that is structurally separate and separately vented from smoking areas. And most pertinently, She-Sha is not a restaurant located on the premises of a manufacturer of tobacco products. Tobacco manufacturing facilities are referenced elsewhere in the VICAA in conjunction with retail tobacco stores and tobacco warehouses. Retail tobacco stores and tobacco warehouses, however, are missing from the exemption language in Code § 15.2-2825(A)(3). The legislature's express inclusion of tobacco manufacturers and exclusion of retail tobacco stores and tobacco

warehouses is evidence of the intent that the latter be subject to compliance with the restaurant smoking ban.

Appellant argues that Code § 15.2-2821, governing applicability of the VICAA, takes precedence over the restaurant smoking ban contained in the subsequent provisions of the chapter and exempts She-Sha from compliance. Code § 15.2-2821 provides: "Nothing in this chapter shall be construed to: 1. Permit smoking where it is otherwise prohibited or restricted by other applicable provisions of law; *or* 2. Regulate smoking in retail tobacco stores, tobacco warehouses, or tobacco manufacturing facilities."[5] (Emphasis added). Appellant asserts that She-Sha is a retail tobacco store and heavily emphasizes the language "[n]othing in this chapter shall be construed to regulate smoking in retail tobacco stores." Appellant claims the Department ignored this controlling language in determining that She-Sha is not exempt from the VICAA.

Appellant's interpretation of Code § 15.2-2821 is inconsistent with Code § 15.2-2825. Since interpretation of multiple, related statutory provisions must give full effect to each provision while remaining true to the purpose and intent behind them, Code §§ 15.2-2821 and 15.2-2825 must be construed together. As discussed above, smoking is "otherwise prohibited" in non-exempt restaurants by Code § 15.2-2825. If Code § 15.2-2821 was intended by the legislature to provide a blanket exemption for tobacco warehouses, tobacco manufacturing facilities, and retail tobacco stores not operated exclusively as such, then there would have been no need for the legislature to expressly exempt restaurants on the premises of tobacco manufacturers later in Code § 15.2-2825(A)(3). Since these facilities would already be covered

[5] The statute does not define "retail tobacco store," and no finding of fact was made as to whether She-Sha is a retail tobacco store as contemplated by the statute. Such a finding is unnecessary, however, in light of the trial court's finding that She-Sha is a restaurant, and thus subject to the VICAA.

by Code § 15.2-2821, such an interpretation effectively renders the exemption in Code § 15.2-2825 meaningless. Further, Code § 15.2-2825 regulates smoking in restaurants, not retail tobacco stores. Thus, it does not conflict with Code § 15.2-2821.

For these reasons, we reject appellant's arguments. Even though appellant recognizes that She-Sha can simultaneously be both a retail tobacco store and a restaurant, it seeks to be treated as one to the exclusion of the other, and thereby circumvent the statutory obligations associated with being a restaurant. The statutory provisions read in conjunction with each other show that the legislature did not intend an all-encompassing exemption for retail tobacco stores not operating exclusively as such. Even if it were to be determined that She-Sha is a retail tobacco store as contemplated by the VICAA, She-Sha is also a restaurant as defined by the statute, and She-Sha does not fall within any of the stated exemptions to the restaurant smoking ban. Without an applicable exemption, She-Sha must comply with the VICAA restaurant smoking ban, including posting the appropriate signs and prohibiting patrons from smoking.

Attorney's Fees

Appellant requests it be granted attorneys' fees and costs associated with the proceeding pursuant to Code § 2.2-4030. This section provides as follows:

> In any civil case brought under Article 5 (§ 2.2-4025 et seq.) of this chapter . . . in which any person contests any agency action, such person shall be entitled to recover from that agency . . . reasonable costs and attorneys' fees if such person substantially prevails on the merits of the case and the agency's position is not substantially justified, unless special circumstances would make an award unjust.

Code § 2.2-4030(A). Where a party does not substantially prevail on the merits of the case and the agency's position is substantially justified, attorneys' fees and costs will not be awarded.

For the reasons stated above, appellant did not substantially prevail on the merits of the case and the Department's position was substantially justified. Appellant's argument for

exemption from the VICAA was rejected, and the Department's case decision was upheld as a reasonable interpretation of the statutory provisions. In light of this outcome, it is inappropriate to award appellant attorneys' fees and costs.

III. CONCLUSION

Because She-Sha is a restaurant as contemplated by the VICAA, it is subject to the restaurant smoking ban and must comply with its requirements. She-Sha does not fall within any of the stated exemptions to the restaurant smoking ban, and the VICAA does not provide an all-encompassing exemption for retail tobacco stores that simultaneously operate as a restaurant subject to the VICAA smoking ban. Interpreting the VICAA as such would render other provisions of the statute superfluous. For these reasons, the circuit court did not err in upholding the Department's decision that She-Sha was not exempt from compliance with the VICAA.

Affirmed.

Petty, J., dissenting.

In analyzing statutes, we employ principles of statutory construction to construe those statutes in a way that comports with the intent of the legislature. Indeed, the majority uses several such principles in order to construe Code § 15.2-2825 in a way that would prohibit smoking in the She-Sha Café and Hookah Lounge, a business that unquestionably is engaged in the retail sale of tobacco products.[6] In doing so, however, the majority ignores the express intent of the General Assembly prohibiting such construction. The plain and unambiguous language of Code § 15.2-2821 explicitly states that "*[n]othing* in this chapter shall be *construed* to . . . [r]egulate smoking in *retail tobacco stores*, tobacco warehouses, or tobacco manufacturing facilities." (Emphasis added). Accordingly, by doing exactly what Code § 15.2-2821 expressly prohibits, the majority glosses over the plain language of the statute and applies the Indoor Clean Air Act to a business the General Assembly clearly intended to exclude. Therefore, I dissent.

The General Assembly passed the Indoor Clean Air Act in 1990 as Chapter 28 of Title 15.2 of the Virginia Code. The Act banned smoking in various government buildings and in some public areas. It also required certain restaurants to provide separate smoking and non-smoking areas. See Code §§ 15.2-2800 to -2810. In 2009, the General Assembly repealed Chapter 28 and replaced it with Chapter 28.2. The new Indoor Clean Air Act banned smoking in

[6] The business model for She-Sha involves charging patrons for a flavored, wet tobacco which is heated by a burning coal and then smoked through a water-filled pipe known as a hookah. She-Sha sells tobacco and tobacco-related products as well as food and alcohol to its customers. However, it derives the majority of its revenue from the sale of tobacco. Tobacco and tobacco-related sales, e.g., hookah rentals, accounted for sixty-six to sixty-seven percent of She-Sha's revenue in the three months preceding the citations from the Department of Health. These sales figures have been consistent since September 2008. She-Sha has a license from the Virginia Department of Taxation classifying it as an "Other Tobacco Products Retailer." As of February 2010, She-Sha has paid over $7,200 in taxes, as required for retail tobacco sales. While food and alcohol are also sold, the revenue from these sales is less than one-third of the total revenue.

all restaurants and bars in the Commonwealth. See Code § 15.2-2825.[7] However, the General Assembly carried over an express provision from the repealed Act that exempted retail tobacco stores from any of the Act's provisions that regulated smoking. Code § 15.2-2821. Thus, it would seem to me that before we engage in an analysis of whether She-Sha is a restaurant as defined in Code § 15.2-2820, or whether the Department of Health may enforce the provisions of the Act pertaining to restaurants, we first must determine if the business is a retail tobacco store. If it is, no amount of statutory-construction gymnastics can overcome the definite and precise language of Code § 15.2-2821—"[n]othing in this chapter shall be construed to regulate smoking in retail tobacco stores . . . ." In other words, if She-Sha is a retail tobacco store, we do not need to concern ourselves with any of the provisions of the Indoor Clean Air Act, including its definition of a restaurant, because they simply do not apply.

Nevertheless, the majority concludes that because She-Sha meets the definition of a restaurant, as defined in Code § 15.2-2820, the Indoor Clean Air Act applies to it regardless of whether it is primarily a retail tobacco store. This conclusion is based upon the assumption that the General Assembly did not intend to exempt from Code § 15.2-2825 those businesses mentioned in Code § 15.2-2821, if that business also operates as a restaurant. Specifically, the majority reasons that smoking is prohibited in any establishment that prepares or serves food to the public unless the establishment is specifically exempted by Code § 15.2-2825(A). In advancing its construction of the Act, the majority points to the specific exemption in Code § 15.2-2825(A) for "any restaurants located on the premises of any manufacturer of tobacco products." The majority states that because a tobacco manufacturing facility is also specifically exempted in Code § 15.2-2821, the General Assembly intended for Code § 15.2-2825 to apply to

[7] Code § 15.2-2825(A) provides various exemptions to the restaurant smoking ban. The only Code § 15.2-2825(A) exemption at issue in this case is an exemption for "restaurants located on the premises of any manufacturer of tobacco products." Code § 15.2-2825(A)(5).

any business listed in Code § 15.2-2821 unless there is a specific exemption in Code § 15.2-2825(A). The majority applies the statutory construction principle of *expressio unius est exclusio alterius* to reach the conclusion that "[t]he legislature's express inclusion of tobacco manufacturers and exclusion of retail tobacco stores and tobacco warehouses is evidence of the intent that the latter be subject to compliance with the restaurant smoking ban."

This conclusion stands in stark contrast to the plain language of the relevant statutory provisions. Code § 15.2-2821 exempts "tobacco manufacturing facilities" from the application of the Indoor Clean Air Act. Code § 15.2-2825(A) exempts restaurants "located on the premises of any manufacturer of tobacco products" from the application of the Indoor Clean Air Act. "Tobacco manufacturing facilities" and "premises of any manufacturer of tobacco products," as used in the Indoor Clean Air Act, are not synonymous; they describe completely different things.[8] We know this to be true because

> "[w]e look to the plain meaning of the statutory language, and presume that the legislature chose, with care, the words it used when it enacted the relevant statute." Moreover, when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.

Zinone v. Lee's Crossing Homeowner's Ass'n, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011) (quoting Addison v. Jurgelsky, 281 Va. 205, 208, 704 S.E.2d 402, 404 (2010)).

While the Indoor Clean Air Act does not provide a definition for "tobacco manufacturing facilities," as used in Code § 15.2-2821, Code § 15.2-2820 does provide a definition for "facility," as used in connection with other terms in the Indoor Clean Air Act: "'Educational

[8] I note that the premises of Philip Morris USA, a tobacco manufacturer in the Richmond area, is "[l]ocated on a 200-acre site." However, the actual tobacco manufacturing facilities on this premises consist of "six connected buildings that cover a total of 43 acres." Offices & Facilities, Philip Morris USA, http://www.philipmorrisusa.com/en/cms/Company/Corporate_Structure/Offices_Facilities/default.aspx?src=top_nav (last visited February 19, 2013).

facility' means any building used for instruction of enrolled students"; "'Health care facility' means any institution, place, building, or agency . . . ."; "'Recreational facility' means any enclosed, indoor area used by the general public and used as a stadium, arena, skating rink, video game facility, or senior citizen facility." Looking at the various definitions of "facility" in the Indoor Clean Air Act, the common theme running throughout each one is that "facility" includes some type of building or structure which facilitates the desired function. Indeed, the plain and ordinary meaning of facility is "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." Webster's Third New International Dictionary 812 (1981). Thus, the plain meaning of "tobacco manufacturing facility" is some type of building or structure which facilitates the manufacture of tobacco.[9]

The Indoor Clean Air Act does not provide a definition for "premises of any manufacturer of tobacco products." However, the key term in this phrase, for our purposes, is

[9] This definition accords with the definition of "manufacturing facility" used in Code § 15.2-5000. Although, Code § 15.2-5000 is not applicable here, and it specifically states that the definition is to be used for bonding purposes only, it is nonetheless instructive in our quest for an acceptable definition of tobacco manufacturing facilities. Code § 15.2-5000 states,

> "Manufacturing facility" means (i) any facility which is used in the manufacturing or production of tangible personal property, including the processing resulting in a change of condition of such property, (ii) any facility which is used in the creation or production of intangible property as described in § 197(d)(1)(C)(iii) of the Internal Revenue Code of 1986, as amended, to be any patent, copyright, formula, process, design, pattern, knowhow, format, or other similar item, or (iii) any facility which is functionally related and subordinate to a manufacturing facility if such facility is located on the same site as the manufacturing facility.

"premises." The plain and ordinary meaning of premises is "a specified piece or tract of land with the structures on it," or "the place of business of an enterprise or institution." Webster's, supra, at 1789. Thus, "premises of any manufacturer of tobacco products" would include any land with structures on it that a tobacco manufacturer uses as its place of business.

Accordingly, "premises," as used in Code § 15.2-2825(A), has a different meaning than "facilities," as used in Code § 15.2-2821. Code § 15.2-2821 exempts tobacco manufacturing *facilities* from the Indoor Clean Air Act. This means that any buildings or structures which facilitate the manufacture of tobacco are exempt from the Indoor Clean Air Act under Code § 15.2-2821. This exemption would apply to restaurants located within a tobacco manufacturing facility; it would not apply to restaurants located on the premises of a tobacco manufacturer. This is where Code § 15.2-2825(A) presumably fills the gap left by Code § 15.2-2821. Code § 15.2-2825(A) exempts "restaurants located on the premises of any manufacturer of tobacco products." This means that a restaurant located on land with structures on it that the tobacco manufacturer uses as its place of business is exempt from the Indoor Clean Air Act under Code § 15.2-2825(A). Accordingly, a tobacco manufacturer could have a restaurant in its manufacturing *facility*, and that restaurant would be exempt from the Indoor Clean Air Act under Code § 15.2-2821. On the other hand, a tobacco manufacturer could have a stand-alone restaurant located on its *premises*, and that restaurant would be exempt from the Indoor Clean Air Act under Code § 15.2-2825(A).

The language of Code § 15.2-2821 is clear. If a business is a retail tobacco store, tobacco warehouse, or tobacco manufacturing facility, then it is exempt from all provisions of the Indoor Clean Air Act. *Nothing* in the Indoor Clean Air Act can be construed to regulate smoking in the business.

The Department of Health argues that a restaurant could avoid the requirements of the Indoor Clean Air Act by selling packets of cigarettes and labeling itself as a retail tobacco store. Indeed, a restaurant's ability to masquerade as a retail tobacco store would undermine the General Assembly's purpose in implementing the Indoor Clean Air Act. I am not unmindful of the Department's public policy concerns. Accordingly, I would adopt a primary purpose test to determine whether a business is a retail tobacco store, and therefore, exempt from the provisions of the Indoor Clean Air Act under Code § 15.2-2821. In order for a business to fall under the Code § 15.2-2821 exemption for a retail tobacco store, the primary purpose of the business must be the sale of tobacco. I do not propose a bright-line, formulaic approach to the classification of a business. Instead, the primary purpose of a business can be determined by looking at the totality of the evidence, including whether the business derives the majority of its revenue from the sale of tobacco. Both the Department and the trial court refused to determine whether She-Sha was a tobacco retail store. Because of this refusal, I would remand this case to the trial court with instructions to remand to the Department of Health for it to make a determination whether She-Sha is a retail tobacco store and thus exempt from the operation of the Indoor Clean Air Act.