

NOTICE

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2017 IL App (4th) 150501-U

NO. 4-15-0501

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

STROMAN REALTY, INC.,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
KREG ALLISON, Acting Director of The Illinois Di-)	No. 11MR224
vision of Real Estate; and THE DEPARTMENT OF)	
FINANCIAL AND PROFESSIONAL REGULA-)	Honorable
TION, DIVISION OF REAL ESTATE,)	John P. Schmidt,
Defendants-Appellants.)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.

Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed the administrative decision below, which ruled that application of the Real Estate Timeshare Act of 1999 (765 ILCS 101/1-1 (West 2006)) and the Real Estate License Act of 2000 (225 ILCS 454/1-1 (West 2006)) to plaintiff's activities in the timeshare resale market did not constitute an impermissible extraterritorial application of Illinois law.

¶ 2 In 2005, defendant, the Illinois Department of Financial and Professional Regulation, Division of Real Estate (Department), received a complaint from an Illinois resident, William B. Humphreys, who alleged that he paid plaintiff, Stroman Realty, Inc. (Stroman)—a Texas company—\$499 to sell his interest in a timeshare property in Gatlinburg, Tennessee. When Stroman failed to perform to Humphreys' expectations, Humphreys complained to the Department.

¶ 3 In August 2005, the Department filed an administrative complaint against Stroman, which it later amended, alleging that Stroman had violated the Real Estate Timeshare

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Carla Bender
4th District Appellate
Court, IL

Act of 1999 (Timeshare Act) (765 ILCS 101/1-1 to 90-10 (West 2004)) and the Real Estate License Act of 2000 (License Act) (225 ILCS 454/1-1 to 999-99 (West 2004)) (collectively, Acts) by acting as a timeshare resale agent without a license. Stroman filed an answer, arguing, *inter alia*, that applying those Acts to Stroman's activities violated the first amendment of the United States Constitution (U.S. Const., amend. I) and the dormant commerce clause (U.S. Const., art. I, § 8), as well as constituting an extraterritorial application of Illinois law. After an April 2010 hearing before an administrative law judge (ALJ), the ALJ concluded that Stroman had violated the Acts. In December 2010 the Real Estate Administration and Disciplinary Board (Board) of the Department adopted the ALJ's findings of fact, conclusions of law, and recommendations. In April 2011, the Director of the Department adopted the Board's recommendations and ordered Stroman to pay a civil penalty of \$25,000.

¶ 4 In May 2011 Stroman filed a complaint for administrative review in the circuit court. In its complaint, Stroman did not challenge the finding that it had violated the Acts. Instead, Stroman raised three legal issues: (1) the proceedings lacked personal jurisdiction over Stroman; (2) the Department's application of the Acts to Stroman's activities violated the commerce clause and Illinois' rule against "extraterritorial application" of Illinois law; and (3) requiring Stroman to obtain a license violated the first amendment of the United States Constitution. After a March 2015 hearing, the court agreed with Stroman that application of the Acts to its business activities violated the first amendment and the dormant commerce clause. As a result, the court reversed the Director's April 2011 order.

¶ 5 On appeal, the Director argues that the circuit court erred by determining that the Acts were unconstitutional as applied to Stroman's business activities. For the following reasons, we conclude that application of the Acts to Stroman constituted an impermissible extraterritorial

application of Illinois law. As a result, we do not reach the Director's constitutional arguments. Because the Acts do not apply to Stroman, we reverse the Director's decision imposing a civil penalty against Stroman.

¶ 6

I. BACKGROUND

¶ 7

A. The Initial Administrative Complaint Against Stroman

¶ 8

In January 2005, Humphreys—an Illinois resident—complained to the Department. Humphreys explained that he owned an interest in a timeshare property in Gatlinburg, Tennessee, which he decided to sell in 2003. Humphreys noticed an advertisement for Stroman's services in the USA Today newspaper. In the ad, Stroman stated that it could help people like Humphreys sell their timeshare interests. Humphreys spoke with a Stroman representative over the telephone about selling his timeshare. As a result of that discussion, in December 2003, Humphreys paid Stroman \$499 with the expectation that Stroman would sell Humphreys' timeshare interest. In January 2005, Humphreys complained to the Department because he was upset with Stroman's failure to sell his timeshare.

¶ 9

In May 2005, the Department sent a letter to Stroman, demanding that Stroman either (1) cease and desist from engaging in the practice of timeshare brokerage in Illinois or (2) obtain the appropriate Illinois license to do so.

¶ 10

In August 2005, the Department filed an administrative complaint against Stroman, alleging that Stroman violated the Timeshare Act (765 ILCS 101/1-1 to 90-10 (West 2004)) and the License Act (225 ILCS 454/1-1 to 999-99 (West 2004)) by acting as a timeshare resale agent without a license.

¶ 11

B. The Concurrent Federal Action

¶ 12

In June 2005, Stroman filed suit in federal court in Texas, alleging that the De-

partment's regulation of Stroman's business ventures violated the commerce clause of the United States Constitution (see U.S. Const., art. I, § 8, cl. 3). Stroman sought to enjoin the Department from enforcing its licensing rules against Stroman. The Department filed a motion to dismiss, alleging lack of personal jurisdiction and asking the court to abstain from deciding the federal case because of the Department's pending action against Stroman in an Illinois state court. The Texas federal court transferred the case to the Northern District of Illinois, which granted the Department's request to abstain from deciding the case under *Younger v. Harris*, 401 U.S. 37 (1971). The Seventh Circuit affirmed. *Stroman Realty, Inc. v. Martinez*, 505 F.3d 658 (2007).

¶ 13 C. Stroman's *Mandamus* Action

¶ 14 Sometime thereafter, Stroman filed a complaint for a writ of *mandamus*, seeking to compel the Department to dismiss its administrative complaint for lack of personal jurisdiction. The trial court granted the Department's motion to dismiss the writ of *mandamus*. The First District Appellate Court affirmed. *Stroman Realty, Inc. v. Lyons*, No. 1-07-2276 (2008) (unpublished order under Supreme Court Rule 23).

¶ 15 D. The Department's Amended Complaint

¶ 16 In April 2009, the Department filed an amended administrative complaint. The amended complaint claimed that Stroman had committed several violations of the Acts. Specifically, the Department alleged that Stroman violated the License Act by acting as a "broker," as defined by section 1-10 of the License Act (225 ILCS 454/1-10 (West 2008)), without the license required by section 5-15(a) (225 ILCS 454/5-15(a) (West 2008)). The Department alleged that Stroman violated the Timeshare Act by acting as a timeshare "resale agent," as defined by section 1-15 of the Timeshare Act (765 ILCS 101/1-15 (West 2008)), without being licensed as required by section 10-20 of the Timeshare Act (765 ILCS 101/10-20 (West 2008)). In particular,

the complaint alleged that Stroman had acted as a broker for sellers of timeshare interests who were Illinois residents and for sellers of timeshare interests that were located in Illinois. The amended complaint alleged further that Stroman had solicited timeshare owners in Illinois through direct postal mailings.

¶ 17 In detail, the amended complaint alleged that Stroman violated the License Act by acting as a broker without a license. Specifically, the Department alleged that Stroman engaged in the following activities without being licensed: (1) selling timeshare interests owned by Illinois residents; (2) selling timeshare interests in properties located in Illinois; (3) offering to sell timeshares owned by Illinois residents; (4) offering to sell timeshare interests in properties located in Illinois; (5) negotiating the sale of timeshare interests owned by Illinois residents; (6) negotiating the sale of timeshare properties located in Illinois; (7) listing for sale timeshare interests owned by Illinois residents; (8) listing for sale timeshare properties located in Illinois; (9) advertising itself to Illinois residents as in the business of selling timeshares; and (10) assisting in the negotiation of the intended sale of timeshare properties located in Illinois or owned by Illinois residents.

¶ 18 The Department alleged further that Stroman had violated the Timeshare Act by engaging in the following activities without a license: (1) acting as a timeshare resale agent for people who live in Illinois, as well as for people who own timeshare properties in Illinois; (2) acting as a timeshare resale agent for developers who have timeshare properties or business offices in Illinois; and (3) offering timeshare resale agent services to Illinois residents through the U.S. Postal Service and by electronic mail.

¶ 19 In June 2009, Stroman filed an answer, raising the following affirmative defenses relevant to this appeal: (1) the Department's claims were barred by the commerce clause of the

United States Constitution (U.S. Const., art. I, § 8, cl. 3); (2) the Department was regulating commercial speech in violation of the first amendment to the United States Constitution (U.S. Const., amend. I); and (3) the State lacked subject-matter jurisdiction over Stroman because the Department was attempting to apply the Acts “extraterritorially.” The ALJ later struck Stroman’s defenses because the Department’s rules contained in the Illinois Administrative Code did not allow for affirmative defenses. See 68 Ill. Adm. Code 1110.120 (2008).

¶ 20 E. The April 2010 Hearing

¶ 21 At an April 2010 hearing before the ALJ on the Department’s amended complaint, the parties stipulated to the admission of several exhibits.

¶ 22 Wayne Stroman, the president of Stroman, testified about Stroman’s business practices. Wayne testified that Stroman developed its own website, where it listed interests in timeshare properties for sale. The listings did not include a price, and an interested buyer would need to contact Stroman’s offices in Texas to negotiate a price. Stroman took out print advertising to draw attention to its website and encourage property owners to list their properties with Stroman. In addition, Stroman sent direct mailings to timeshare owners to inform them of Stroman’s services. When contacted over the telephone by an interested seller, Stroman employees had a scripted checklist of questions to ask the seller. Interested property owners paid a fee to list their properties in Stroman’s system as part of the “commission agreement,” which included an agreement to pay Stroman a percentage of the eventual sale price. Many of those commission agreements were sent by mail to clients in other states, including Illinois. The agreements were signed and mailed back to Stroman’s offices in Texas. Stroman testified further that if an interested buyer made an offer on a property listed on Stroman’s system, Stroman would then communicate that offer to the seller.

¶ 23 Humphreys testified that in 2003, he saw an ad in USA Today for Stroman’s services. Humphreys, while in Illinois, contacted a Stroman employee, Chris French, by telephone, and they negotiated a sale price for Humphreys’ timeshare. A later telephone call from French to Humphreys confirmed that Humphreys would pay \$499 for Stroman’s services. After that call, Stroman sent registration documents and an agreement to Humphreys in Illinois, which Humphreys completed and returned. Stroman also sent Humphreys a checklist that stated, “You understand the first step in procuring a buyer for your property is now complete.” Humphreys testified that his timeshare never sold, and Stroman never presented him with any offers to buy it.

¶ 24 F. The ALJ’s Report and Recommendation

¶ 25 In May 2010, the ALJ issued its report and recommendation. The ALJ found that Stroman (1) served as a broker for Illinois residents interested in selling their timeshares, (2) served as a broker for owners of timeshares located in Illinois, (3) had never held a real estate license under the License Act, and (4) issued direct mail and e-mail solicitations to Illinois residents offering its services as a timeshare resale agent.

¶ 26 The ALJ determined that the Department proved by clear and convincing evidence that Stroman engaged in the practice of being a real estate broker and a timeshare resale agent without a license. See 225 ILCS 454/20-10(a) (West 2010) (prohibiting practicing as a broker without a license); 765 ILCS 101/1-15 (West 2010) (defining “Resale agent” under the Timeshare Act); 765 ILCS 101/10-20 (West 2010) (prohibiting practicing under the Timeshare Act without a license).

¶ 27 Specifically, the ALJ found that Stroman acted as a timeshare resale agent when it (1) “offered to sell [Humphreys’] timeshare interest”; (2) “solicited [Humphreys] to list his timeshare interest for sale”; and (3) “offer[ed] for sale and list[ed] on its database timeshare

properties physically located in Illinois.”

¶ 28 The ALJ explained that “[i]f the only evidence presented was that [Stroman] advertised its timeshare interest advertising services on the Internet and national newspapers, there would be no finding of unlicensed practice.” The ALJ found that Stroman’s business involved not merely advertising timeshare properties, but “listing them for sale and offering them for sale.” The ALJ found further that “[w]hile [Stroman’s] operations may be exclusively conducted in Texas, [Stroman] solicited customers in Illinois and customers who owned timeshare interests in Illinois.”

¶ 29 The ALJ’s order included a heading titled “Respondent’s Practice Involves More Than Advertising.” Under that heading, the ALJ rejected Stroman’s argument that its actions in Illinois consisted of nothing more than advertising its timeshare services. The ALJ noted that Stroman’s website consisted of listings of timeshare properties located throughout the country and abroad. Stroman described its online listings as merely advertisements for the property. The ALJ disagreed, finding that the listings did not include a price and that in order to determine the price, an interested customer had to contact Stroman’s Texas office and negotiate a price.

¶ 30 The ALJ also noted the Department’s evidence explaining that with a typical “Real Estate Multiple Listing Service (MLS),” different brokers could input information, whereas Stroman’s listing service allowed only Stroman agents to input and list properties for sale, for which they charged a fee. The ALJ found that instead of merely listing timeshare properties for sale on its website, Stroman fielded inquiries from potential buyers and communicated with them to attempt to negotiate a sale. Key to the ALJ’s finding in this area was the lack of a price on the listing. The lack of price indicated that Stroman was not merely advertising the properties. Instead, they were advertising them and then acting as a broker to attempt to find a mutually agree-

able price after interested parties contacted Stroman about the listings. The ALJ found that Stroman “finds buyers, presents offers to sellers, conveys whether those offers have been accepted or rejected, and receives a commission.”

¶ 31 The ALJ allowed the parties to introduce evidence on the constitutional issues to create a record on appeal. The ALJ acknowledged that it lacked authority to rule on the constitutionality of the Acts. However, the ALJ rejected the argument that Stroman’s business activities took place entirely outside Illinois.

¶ 32 In conclusion, the ALJ determined that Stroman acted as a broker under the License Act and as a resale agent under the Timeshare Act without the proper licensing. The ALJ recommended that Stroman be fined \$25,000.

¶ 33 G. The Board’s Decision and Recommendation

¶ 34 In December 2010, the Board issued its findings of fact, conclusions of law, and recommendation to the Director.

¶ 35 The Board adopted the findings of fact, conclusions of law, and recommendation reached by the ALJ in its May 2010 report. The Board recommended that the Director assess Stroman a civil penalty of \$25,000.

¶ 36 H. The Director’s Order

¶ 37 In April 2011, the Director entered an order adopting the Board’s December 2010 findings of fact, conclusions of law, and recommendation to the Director. The Director ordered Stroman to pay a civil penalty of \$25,000.

¶ 38 I. Administrative Review

¶ 39 In May 2011, Stroman filed a complaint for administrative review of the Director’s judgment. In it, Stroman did not contest the Director’s finding that Stroman had violated the

Acts. Instead, Stroman raised three legal issues: (1) the proceedings lacked personal jurisdiction over Stroman, (2) the Department's application of the Acts to defendant violated the commerce clause and Illinois' rule against "extraterritorial application" of Illinois law, and (3) requiring Stroman to obtain a license would violate the first amendment of the United States Constitution.

¶ 40 In May 2015, the circuit court entered a written order. In it, the court reviewed the findings of fact, conclusions of law, and recommendations of the Director. The court determined that "Stroman's operations and commercial activities occurred exclusively in Texas" and that Stroman had merely solicited business in Illinois. The court explained "that mere solicitation of an Illinois resident by an out-of-state broker is not enough to justify regulation." As a result, the court determined that application of the Acts to Stroman violated (1) the dormant commerce clause, (2) the first amendment, and (3) the "long-standing" Illinois rule that a statute should not be given extraterritorial effect unless the statute evinces a clear intent to do so. The court therefore reversed the Director's recommendation that Stroman be fined \$25,000.

¶ 41 This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 The Director argues that the Acts, as applied to Stroman, did not (1) constitute an improper "extraterritorial" application of Illinois law, (2) violate the commerce clause, and (3) violate the first amendment. We disagree with the Director's first contention and conclude that applying the Acts to Stroman constituted an impermissible extraterritorial application of Illinois law. As a result, we do not reach the Director's remaining arguments.

¶ 44 A. Standard of Review

¶ 45 In an administrative review appeal, we review the final decision of the agency or department, not the decision of the circuit court. *Outcom, Inc. v. Illinois Department of Trans-*

portation, 233 Ill. 2d 324, 337, 909 N.E.2d 806, 814 (2009). The standard of review we apply depends on whether the question presented is one of fact, one of law, or a mixed question of fact and law. *Lombard Public Facilities Corp. v. Department of Revenue*, 378 Ill. App. 3d 921, 927, 881 N.E.2d 598, 604 (2008).

¶ 46 We will accept an agency’s factual findings unless they are against the manifest weight of the evidence. *Van Dyke v. White*, 2016 IL App (4th) 141109, ¶ 19, 60 N.E.3d 1009. An agency’s legal conclusions are reviewed *de novo*. *Id.* Agency determinations involving mixed questions of fact and law—where the facts and law are undisputed but the application of the law to the facts is at issue—will be affirmed unless clearly erroneous. *Id.* That is, the agency’s determination will be overturned if the reviewing court is “ ‘left with the definite and firm conviction that a mistake has been committed.’ ” *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395, 763 N.E.2d 272, 282 (2001).

¶ 47 The Director’s appeal in this case is somewhat unique because it involves two issues concerning the constitutionality of the Acts. Administrative agencies lack the authority to judge the constitutional validity of a statute. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 214, 886 N.E.2d 1011, 1020 (2008). Therefore, because there is no legitimate agency decision to review concerning the constitutional issues in this case, we instead review the circuit court’s decision on those matters. We review a ruling on the constitutionality of a statute *de novo*. *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 22, 25 N.E.3d 570. However, to the extent that the trial court relied on factual findings of the agency, we defer to those factual findings unless they were against the manifest weight of the evidence.

¶ 48

B. The Acts

¶ 49

Stroman does not challenge the Director’s determinations that Stroman violated the Acts. Instead, the issues on appeal concern the constitutionality of applying the Acts to Stroman’s business activities. Nonetheless, we provide an overview of the Acts to provide context.

¶ 50

1. *The License Act*

¶ 51

Section 5-15(a) of the License Act makes it unlawful to act as a “broker *** without a properly issued sponsor card or a license issued under this Act by the Department.” 225 ILCS 454/5-15(a) (West 2010).

¶ 52

The License Act defines a “[b]roker” as a person or organization who does any of the following:

“[W]hether in person or through any media or technology, for another and for compensation, or with the intention or expectation of receiving compensation, either directly or indirectly:

(1) Sells, exchanges, purchases, rents, or leases real estate.

(2) Offers to sell, exchange, purchase, rent, or lease real estate.

(3) Negotiates, offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of real estate.

(4) Lists, offers, attempts, or agrees to list real estate for sale, lease, or exchange.

* * *

(7) Advertises or represents himself or herself as being engaged in the business of buying, selling, exchanging, renting, or leasing real estate.

(9) Assists or directs in the negotiation of any transaction intended to result in the sale, exchange, lease, or rental of real estate.” 225 ILCS 454/1-10 (West 2010).

¶ 53 Section 20-10(a) of the License Act allows the Department to impose a civil penalty upon “any person who practices, offers to practice, attempts to practice, or holds oneself out to practice as a real estate broker, real estate salesperson, or leasing agent without being licensed under this Act.” 225 ILCS 454/20-10(a) (West 2010).

¶ 54 *2. The Timeshare Act*

¶ 55 The Timeshare Act applies to “[r]esale agents.” The Timeshare Act defines a “[r]esale agent” as the following:

“[A] person who, for another and for compensation, or with the intention or expectation or receiving compensation, either directly or indirectly sells, offers to sell, or advertises to sell within this State any timeshare interest previously sold to a purchaser or solicits within this State any owner of a timeshare interest to list the owner’s timeshare interest, wherever located, for sale.” 765 ILCS 101/1-15 (West 2010).

¶ 56 Section 10-20 of the Timeshare Act provides that any “resale agent shall comply with the provisions of the Real Estate License Act of 1983 *** and the rules adopted pursuant to that Act, including licensure.” 765 ILCS 101/10-20 (West 2010).

¶ 57 C. Extraterritorial Application of Illinois Statutes

¶ 58 Stroman argues that applying the Acts to Stroman would violate the principle of Illinois law that Illinois statutes shall not be applied “extraterritorially” to entities outside of Illi-

nois. We address this argument first to avoid the constitutional arguments raised by Stroman. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 262, 930 N.E.2d 895, 922 (2010) (“Constitutional issues should be addressed only if necessary to decide a case.”). We agree with Stroman that applying the Acts to its activities in this case constitutes an impermissible extraterritorial application of Illinois law.

¶ 59 A “ ‘statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute.’ ” *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 184-85, 835 N.E.2d 801, 852 (2005) (quoting *Dur-Ite Co. v. Industrial Comm’n*, 394 Ill. 338, 350, 68 N.E.2d 717, 722 (1946)). Without that clear intent, the statute “has no extraterritorial force and is operative only as to persons or things within Illinois.” *Khan v. Van Remmen, Inc.*, 325 Ill. App. 3d 49, 61, 756 N.E.2d 902, 913 (2001).

¶ 60 The Director does not contest Stroman’s interpretation of Illinois law on this issue. Nor do the parties contest any of the Director’s findings of historical fact. Instead, the parties disagree about whether the facts as found by the Director establish that the Department applied the Acts extraterritorially. As this issue involves a mixed question of fact and law, we apply the *clearly erroneous* standard of review. *Van Dyke*, 2016 IL App (4th) 141109, ¶ 19, 60 N.E.3d 1009.

¶ 61 In this case, the application of the Acts to Stroman’s timeshare activities constituted an extraterritorial application of the Acts. Stroman did not have a sufficient presence in Illinois to allow the Department to regulate Stroman by applying the Acts to Stroman’s business activities. As the Director found, Stroman’s “operations may be exclusively conducted in Texas.” We agree. The Director makes no claim that Stroman ever entered Illinois. The entire basis for applying the Acts to Stroman’s activity was founded on Stroman soliciting and advertis-

ing in Illinois—which Stroman performed remotely from Texas.

¶ 62 As explained above, Illinois statutes may be applied only to “persons or things within Illinois.” *Khan*, 325 Ill. App. 3d at 61, 756 N.E.2d at 913. In the relationship between Stroman and Humphreys, neither Stroman nor the real estate in question was located within Illinois. Any services provided by Stroman were performed while Stroman was located in Texas. The only connection to Illinois was Humphreys’ status as a resident and Stroman’s remote solicitation of Humphreys. That was insufficient to allow Illinois regulatory law—specifically the Acts—to apply to Stroman. Applying the Acts to Stroman constituted an impermissible extraterritorial application of Illinois law. We therefore reverse the Director’s decision.

¶ 63 III. CONCLUSION

¶ 64 For the foregoing reasons, we agree with the circuit court insofar as it concluded that the legislature expressed no intent to apply the Acts extraterritorially. We reverse the Director’s decision that applying the Acts to Stroman did not constitute an extraterritorial application of the Acts. We do not reach the circuit court’s decision that the Acts were unconstitutional as applied to Stroman.

¶ 65 Director’s decision reversed.