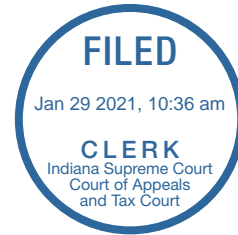


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Indiana Department of  
Transportation, et al.,  
*Appellants-Respondents,*

v.

HGP, LLP,  
*Appellee-Petitioner.*

January 29, 2021

Court of Appeals Case No.  
20A-MI-1176

Interlocutory Appeal from the  
Posey Superior Court

The Honorable Benjamin R.  
Aylsworth, Special Judge

Trial Court Cause No.  
65D01-1906-MI-269

**Weissmann, Judge.**

- [1] The Indiana Department of Transportation (INDOT) regulates advertising signs along Indiana highways. HGP, LLP (HGP) owns a regulated sign, which it allegedly converted to a changeable message board. INDOT determined the change violated state regulations and demanded the sign's removal. But instead of petitioning INDOT for administrative review of its determination, HGP went straight to the courts.
- [2] INDOT appeals the trial court's denial of its partial motion to dismiss HGP's complaint. We find that HGP failed to exhaust the administrative remedies prerequisite to its judicial review claim and that HGP's due process claims fail to state claims upon which relief can be granted. Accordingly, we reverse the trial court's judgment and remand with instructions to dismiss those claims.

## Facts

- [3] On May 31, 2019, INDOT sent HGP a letter explaining that an annual inspection of HGP's advertising sign revealed that the sign had been converted to a changeable message board. According to INDOT, the change violated state regulations prohibiting certain signs from being substantially altered.
- [4] INDOT notified HGP that it had thirty days to either remove the sign from its property or file a petition for administrative review under the Administrative Orders and Procedures Act (AOPA). Otherwise, INDOT's determination that the sign violated state regulations would become final and INDOT would remove the sign at HGP's expense.

[5] HGP did not petition INDOT for administrative review but, instead, sought immediate relief from the courts. On June 28, 2019, HGP filed a complaint against INDOT; its Commissioner, Joe McGuinness; and the Acting Permit Manager of its Vincennes District, Randall Carie.

[6] In its complaint, HGP sought judicial review of INDOT's determination that the sign violated state regulations. HGP also asserted claims for injunctive relief and damages on the following grounds:

1. INDOT's determination violated the due process clause of the Fourteenth Amendment to the United States Constitution and the due course of law clause of Article I, Section 12 of the Indiana Constitution.
2. The exemptions to Indiana's sign regulations provided by Indiana Code § 8-23-20-25(c) violate the free speech clauses of the First Amendment to the United States Constitution and Article I, Section 9 of the Indiana Constitution.
3. The bond required by Indiana Code § 8-23-20-26(d) for judicial review of INDOT's determination violates the open access clause of Article I, Section 12 of the Indiana Constitution.

HGP's federal constitutional claims were brought under 42 U.S.C. § 1983.

[7] INDOT filed a motion to dismiss HGP's judicial review claim, alleging HGP failed to exhaust its administrative remedies under Indiana Code § 4-21.5-5-4. INDOT also moved to dismiss HGP's due process claims and the § 1983 claims against INDOT, alleging they failed to state claims upon which relief could be granted under Indiana Trial Rule 12(B)(6). The trial court denied INDOT's

motion without issuing factual findings or conclusions of law. This interlocutory appeal followed.

## Standard of Review

[8] “A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it.” *Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602, 604 (Ind. 2007). Because a trial court’s grant or denial of such a motion involves only questions of law, our review is *de novo*. *Id.*

[9] When reviewing a motion to dismiss, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant’s favor. *Id.* A complaint may not be dismissed for failure to state a claim unless it is clear on the face of the complaint that the complaining party is not entitled to relief. *Id.*

## Discussion and Decision

[10] INDOT contends its partial motion to dismiss should have been granted because HGP is not entitled to relief on its judicial review claim, due process claims, and claims against INDOT under § 1983.

[11] HGP did not file an appellee’s brief. Normally, an appellant need only establish *prima facie* error to obtain reversal under such circumstances. *Rickman v. Rickman*, 993 N.E.2d 1166, 1167 (Ind. Ct. App. 2013). But the lower standard of review is not applicable where an appeal involves only questions of law. *Id.* Our standard of review therefore remains *de novo*. *Id.*

## I. Judicial Review Claim

- [12] INDOT argues that the trial court should have dismissed HGP’s judicial review claim because HGP failed to exhaust its administrative remedies. “It has long been Indiana law that a claimant with an available administrative remedy must pursue that remedy before being allowed access to the judicial power.” *Carter v. Nugent Sand Co.*, 925 N.E.2d 356, 359 (Ind. 2010). This rule is now codified as part of AOPA. *Id.* See Ind. Code § 4-21.5-5-4.
- [13] Indiana Code § 4-21.5-5-4(a) specifically provides that “[a] person may file a petition for judicial review under [AOPA] only after exhausting all administrative remedies available within the agency whose action is being challenged[.]” Indiana Code § 4-21.5-5-4(b)(1) further provides that “[a] person who . . . fails to timely object to an order or timely petition for review of an order within the period prescribed by this article . . . has waived the person’s right to judicial review under this chapter.”
- [14] INDOT claims its determination that HGP’s sign violated state regulations was subject to administrative review under Indiana Code § 8-23-20-26(c). We agree. That statute required INDOT to provide notice of its determination to HGP and advise that HGP had thirty days to “file a petition for review” under AOPA. Ind. Code § 8-23-20-26(c)(3)-(4). Because HGP’s complaint acknowledges that HGP did not pursue this administrative remedy, we conclude that HGP waived judicial review of INDOT’s determination. Ind. Code § 4-21.5-5-4(b)(1).

## II. Due Process Claims

- [15] INDOT also argues that the trial court should have dismissed HGP’s due process claims under both the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Indiana Constitution. These constitutional provisions “prohibit state action which deprives a person of life, liberty, or property without the ‘process’ or ‘course of law’ that is due, that is, a fair proceeding.” *Indiana High Sch. Athletic Ass’n, Inc. v. Carlberg by Carlberg*, 694 N.E.2d 222, 241 (Ind. 1997) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-57, 94 L. Ed. 865 (1950)). The same analysis is applicable to HGP’s federal and state claims. *See id.*
- [16] “The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’ Only after finding the deprivation of a protected interest do we look to see if the State’s procedures comport with due process.” *Perdue v. Gargano*, 964 N.E.2d 825, 832 (Ind. 2012) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S. Ct. 977, 989, 143 L. Ed. 2d 130, 149 (1999)).
- [17] Here, the trial court made no finding as to whether HGP had any protectable interest at stake. And the only interest asserted in HGP’s complaint—a property interest in its sign—was not deprived by INDOT’s nonfinal determination that the sign violated state regulations. Still, assuming INDOT’s determination somehow deprived HGP of its alleged property interest in the sign, the factual allegations of HGP’s complaint indicate that due process was not denied.

- [18] “An essential principle of due process is that a deprivation . . . ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’”  
*Howard v. Inc. Town of N. Judson*, 661 N.E.2d 549, 553 (Ind. 1996) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985)).
- [19] As explained in Part I of this opinion, Indiana Code § 8-23-20-26(c) required INDOT to notify HGP that its sign violated state regulations and to advise HGP that it had thirty days to file a petition for review under AOPA. HGP’s complaint acknowledges that INDOT complied with this statutory procedure and that HGP simply did not request the administrative review hearing available to it.
- [20] Because HGP’s complaint acknowledges that HGP was both notified of INDOT’s determination and given an opportunity to be heard on the issue, we conclude that HGP’s due process claims fail to state claims upon which relief can be granted.

### III. § 1983 Claims

- [21] Finally, INDOT seeks dismissal of HGP’s claims against INDOT under 42 U.S.C. § 1983. We note that, in HGP’s complaint, both § 1983 claims demand injunctive relief against INDOT by name and that HGP prays for damages under § 1983 without specifying a particular defendant. But as INDOT acknowledged in its Appellant’s Brief, HGP explicitly disclaimed any § 1983 claims against INDOT in its brief in response to INDOT’s partial motion to

dismiss.<sup>1</sup> App. Vol. II pp. 56-57. In doing so, HGP appropriately conceded that “[a] state or state agency . . . may not be sued as a ‘person’ under § 1983, no matter what relief is requested.” *Id.* at 56 (quoting *Severson v. Bd. Of Trs. Of Purdue Univ.*, 777 N.E.2d 1181, 1190 (Ind. Ct. App. 2002), *trans. denied*).

[22] When an issue ceases to be a matter of real controversy between the parties, the errors assigned become moot questions, and we will not retain jurisdiction to decide them. *Castetter v. Lawrence Twp.*, 959 N.E.2d 837, 841 (Ind. Ct. App. 2011). Here, any issue concerning HGP’s § 1983 claims against INDOT ceased to be a real controversy before the trial court issued its order denying INDOT’s partial motion to dismiss. But to the extent the trial court considered such claims in issuing its denial, we deem moot its alleged error in doing so.

[23] The judgment of the trial court is reversed, and we remand this case with instructions for the trial court to dismiss HGP’s judicial review claim and due process claims and for further proceedings consistent with this opinion.<sup>2</sup>

Mathias, J., and Altice, J., concur.

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<sup>1</sup> HGP likewise disclaimed any § 1983 claims for damages against McGuinness and Carie in their official capacities. App. pp. 57

<sup>2</sup> The following claims appear to remain: HGP’s (1) state free speech claim against INDOT; (2) open access claim against INDOT; (3) federal free speech claim for damages against McGuinness and Carie, in their individual capacities; and (4) federal free speech claim for injunctive relief against McGuinness and Carie, in their official capacities. We make no ruling on the validity of those claims or on HGP’s ability to assert additional claims, as permitted by the Indiana Trial Rules.