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IN THE
COURT OF APPEALS OF INDIANA

Indiana Department of Transportation,
Appellant-Respondent,

v.

FMG Indianapolis, LLC, Stephen Roudebush, and Jeffory Roudebush,
Appellees-Petitioners.

March 26, 2021

Court of Appeals Case No. 20A-PL-215

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1905-PL-4715

Shepard, Senior Judge.

[1] Since the system of Interstate and Defense Highways was created during the Eisenhower administration, Indiana and every other state has participated in the program under which billions of federal gas tax dollars have been distributed for construction. As a condition for receiving these dollars, states must agree to various federal standards covering topics that run from highway design to highway beautification. This case arises from the standards applicable to billboards.

Facts and Procedural History

[2] The signs at issue in this case were built adjacent to State Road 32 in 1974. The signs are located next to each other, and each sign is supported by two steel posts. The signs do not touch, and they are not structurally connected to each other. In 1989, Stephen Roudebush and Jeffory Roudebush acquired the real

estate where the signs are located and subsequently leased the signs to FMG Indianapolis.

[3] In 1993, the Roudebushes and FMG ("Owners") registered the signs with the Indiana Department of Transportation and applied for a sign permit pursuant to Indiana Code section 8-23-20-25 (1993), that required all outdoor advertising signs in existence on July 1, 1993 along federally-regulated and interstate highways be registered by December 1993. In January 1996, a representative of the Indiana Department of Transportation inspected the signs and recommended approval. In 1998, INDOT approved the application and issued a permit. The Owners then entered into a thirty-year lease for the signs.

[4] In June 2016, INDOT informed the Owners that one of the signs is illegal and must be removed. Owners sought administrative review, and the parties cross-moved for summary judgment. An Administrative Law Judge granted summary judgment for the Owners. The ALJ stated she was leaving undecided issues such as the statute of limitations and equitable estoppel, basing her decision instead on what she termed a "fundamental fairness doctrine." Appellant's App. Vol. 2, p. 43.

[5] INDOT objected to the ALJ's order and requested review by the Department's Commissioner. In April 2019, the Commissioner reversed the ALJ's order and entered summary judgment in favor of INDOT. The Commissioner determined that the statute of limitations did not bar revocation of the permit and that the Department was not equitably estopped from revoking it.

[6] Owners then sought judicial review. Following briefing and argument at a hearing, the court issued findings of fact and conclusions of law vacating the Commissioner's order and entering judgment for the Owners. The court concluded that the statute of limitations is a complete bar to revocation and that INDOT is estopped from revoking the permit. The court also agreed with the ALJ that "fundamental fairness requires that INDOT not be allowed to revoke the [p]ermit after so many years." *Id.* at 14. INDOT now appeals.

Issues

[7] INDOT presents four issues for our review, which we restate as:

I. Whether INDOT has the authority to revoke the Owners' permit and order removal of one sign;

II. Whether its actions are barred by the statute of limitations;

III. Whether INDOT is equitably estopped from revoking the permit; and

IV. Whether INDOT's actions violate principles of fundamental fairness.

Discussion and Decision

Standard of Review

[8] When we consider the decision of an administrative agency, our standard of review is governed by the Administrative Orders and Procedures Act (the Act).

The Act provides that a court may grant relief only if it determines that a party seeking judicial review has been prejudiced by an agency action that is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (2) contrary to constitutional right, power, privilege, or immunity;
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> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (4) without observance of procedure required by law; or
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> (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d) (1987).

[9] A court may not overturn an administrative determination because it would have reached a different result. *Walker v. State Bd. of Dentistry*, 5 N.E.3d 445 (Ind. Ct. App. 2014), *trans. denied*. "An interpretation of statutes and regulations by an administrative agency charged with the duty of enforcing those regulations and statutes is entitled to great weight unless this interpretation would be inconsistent with the law itself." *Id.* at 448. Although this Court defers to an agency's findings of fact, no such deference is accorded to its conclusions of law. *Hotmer v. Ind. Family & Soc. Servs. Admin.*, 150 N.E.3d 705 (Ind. Ct. App. 2020). The burden of demonstrating the invalidity of the agency's action is on the party asserting such. Ind. Code § 4-21.5-5-14(a).

Regulatory Background

[10] About a decade into the interstate program, President Lyndon B. Johnson signed the Highway Beautification Act of 1965 (HBA),[1] the purpose of which, in large measure, was to remove billboards along the interstate highway system in order to promote safe travel and preserve natural beauty. In this regard, President Johnson said: "'We have placed a wall of civilization between us and the beauty of our countryside. In our eagerness to expand and improve, we have relegated nature to a weekend role, banishing it from our daily lives. I think we are a poorer nation as a result. I do not choose to preside over the destiny of this country and to hide from view what God has gladly given.'" 3 AM. LAW ZONING *Highway Beautification Act* § 26:2 (5th ed. 2020).

[11] To achieve its stated objectives, the Beautification Act authorized the U.S. Secretary of Transportation to reduce federal highway funds to states that did not effectively control the erection and maintenance of billboards located in areas adjacent to certain federally-assisted highways. 23 U.S.C. § 131(b). It also provided for establishing federal-state agreements concerning billboard regulations on size, lighting, spacing, and other issues. 23 U.S.C. § 131(d).

[12] In 1967, Indiana adopted the Highway Advertising Control Act to accommodate HBA requirements. *See* Ind. Code §§ 8-12-2-1 to -17 (formerly Acts 1967, ch. 293; repealed by P.L.18-1990, SEC. 299, eff. March 13, 1990).

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[1] 23 U.S.C. § 131.

Recognizing the state's obligation to comply with the HBA's terms, it directed the governor to negotiate an agreement with the federal government regarding the size, lighting, and spacing of signs. *See* Ind. Code §§ 8-12-2-1, -4.

[13] In 1971, Governor Edgar Whitcomb entered into an agreement ("1971 Agreement") with the Secretary of the U.S. Department of Transportation covering these topics.

[14] In 1990, the General Assembly repealed the Highway Advertising Control Act and replaced it with the Billboard Act. *See* Ind. Code §§ 8-23-20-1 to -24.

[15] In April 1993, Indiana Code section 8-23-20-25(a) tasked the Department with permitting of outdoor advertising signs in order to regulate their erection and maintenance along certain of our state's highways. INDOT was directed to adopt rules to carry out the statute's provisions and to implement the HBA. Ind. Code § 8-23-20-25(e). Accordingly, in 1994 INDOT promulgated administrative rules to regulate signs and billboards. *See* 105 Indiana Administrative Code §§ 7-3-1 to -13 (repealed and replaced by 105 I.A.C. §§ 7-4-1 to -23 on July 24, 2019).

I. INDOT's Authority

[16] Although acknowledging its initial mistake in issuing a permit to the Owners, the Department asserts that it has the authority to now revoke the permit and order removal of one of the signs. The Owners dispute that.

[17] Before turning to the challenge of INDOT's authority, we address a threshold issue Owners raise throughout their brief. INDOT's permitting task concerned signs along the interstate and primary system, as such was defined in 23 United States Code section 131(t) on June 1, 1991. Ind. Code § 8-23-20-25(a). As Section 25(a) indicates, the entire billboard regulating and permitting system is based on the location of a sign. If a sign is located adjacent to a highway that is in a category of roads subject to regulation, sometimes referred to as a "control area," the sign is subject to the regulations on outdoor advertising. Conversely, if a highway is not in one of those categories, the sign is not subject to regulation.

[18] Here, while Owners concede that State Road 32 is a highway in a control area (i.e., subject to regulation), they claim it was not designated as such until 1994. Specifically, they assert that State Road 32 (and thus their signs) was not subject to regulation until 1994 when INDOT promulgated 105 Indiana Administrative Code section 7-3-5(c) and listed State Road 32 as a control area.

[19] Section 7-3-5 provides:

> (a) The territory under the jurisdiction of the department for the purposes of this article shall include all interstates and the Federal-Aid Primary System as defined on June 1, 1991, and any other highways where control of outdoor advertising is required by 23 U.S.C. 131 in effect on December 18, 1991. Where additional roadways become subject to the requirements of 23 U.S.C. 131, as effective on December 18, 1991, such are deemed added to the control areas contained in subsection (c), sixty (60) days after publishing notice of the additions in the Indiana Register. In the event an additional roadway is added, sign

> owners shall have one hundred and eighty (180) days after the date of publication to comply with this rule.

Subsection (c) lists the control areas and includes State Road 32. *See also* Ind. Code § 8-23-1-33 (1990) (defining "primary system" as system of connected main highways as designated by INDOT and approved by U.S. Secretary of Commerce under 23 U.S.C.). As its language indicates, Section 7-3-5 merely catalogs, together in one place, all the highways which had, either by June or December 1991, already been identified as control areas. This rule is simply the product of INDOT's statutory obligation to provide a list of all roadways subject to the permit requirement. *See* Ind. Code § 8-23-20-25(f)(1).

[20] The Owners' suggestion that State Road 32 was not designated as a control area until it appeared in the Section 5 list is illogical and would work an absurd result on the entire permitting system. Indiana Code section 8-23-20-25(a) and (i) required that all permit applications for signs located along the interstate and primary system, as defined in 23 U.S.C. 131(t) on June 1, 1991, were to be filed by December 31, 1993. Under the Owners' reasoning, owners of signs located on regulated highways would not have known they were required to apply for a permit at all, much less by the December 1993 deadline, if the highways were not designated as control areas until April 1994 when INDOT promulgated its rules for outdoor advertising. The Owners' claim rings hollow given that they applied for a permit by the December 1993 deadline as required by Section 8-23-20-25(i), and, for the "type of highway" category on the permit application,

they checked the box labeled "Federal Aid Primary Highway." *See* Appellant's App. Vol. 2, p. 29.

[21] We conclude that State Road 32 had been determined to be a control area by the end of 1991 as it was a route in the Federal-Aid Primary System and thus subject to the statutes, rules, and regulations concerning outdoor advertising prior to 1994. So, we turn to analyzing the propriety of INDOT's revocation of the Owners' permit and its order to remove one of their signs.

A. Permit Revocation

[22] In June 2016, INDOT notified the Owners that their structure is not a side-by-side billboard as they indicated in their permit application but rather two separate billboards. *See id.* at 33. It instructed Owners to remove one of the signs and file an addendum to their permit and informed them that failure to do so would result in revocation of their sign permit. *Id.*

[23] This determination turned on 23 Code of Federal Regulation section 750.706(b), promulgated in 1975, which provides that if multiple sign structures are to be considered as one sign for spacing purposes, the structures must be limited to signs that are physically contiguous or connected by the same structure or cross-bracing. This rule applies to all areas adjacent to the Federal-Aid Primary System. 23 C.F.R. § 750.702 (1975).

[24] In their December 1993 application for a sign permit, the Owners indicated their signs are a side-by-side sign. *See* Appellant's App. Vol. 2, p. 29. Actually, although standing next to each other, they are two separate signs that do not

touch, are not structurally connected to one another, and are each independently supported by two steel posts. *See id.* at 161, 163.

[25] 105 Indiana Administrative Code section 7-3-1(d) (1994) authorized INDOT to revoke a sign permit "in any case where the application for the permit contains false or misleading information or where the permittee has violated any of the provisions of this rule."[2] Here, Owners' assertion that their signs are a single side-by-side sign rather than two separate signs constitutes false or misleading information because the signs do not conform to the mandates of a single sign structure as set forth in 23 Code of Federal Regulation. For this reason, INDOT may revoke the Owners' sign permit pursuant to Section 7-3-1(d).

B. Removal of Sign

[26] The Indiana Code declares that a sign in violation of Chapter 8-23-20 or the rules adopted under it, is a public nuisance. Ind. Code § 8-23-20-26(a) (1993). If INDOT determines that a public nuisance exists, it must give the property owner notice of same, with notice that the owner has thirty days to remove the sign. Ind. Code § 8-23-20-26(b), (c).

[27] Given that the Owners' signs are two separate signs and not one side-by-side sign, they violate the spacing requirements for billboards located in an area adjacent to a primary highway. *See* Ind. Code § 8-23-20-4 (1990) (signs located

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[2] This rule was still in effect in 2016 when INDOT issued notice to the Owners.

in adjacent area must conform to standards of spacing set in INDOT rules); 105 Ind. Admin. Code § 7-3-10(a)(2)(B) (1994)[3] (all signs erected after October 4, 1971 in adjacent areas on routes on the Federal-Aid Primary System and inside incorporated municipalities[4] must not be erected within 100 feet of another sign structure in an adjacent area on the same side of the highway).[5] Additionally, Indiana Code section 8-23-20-6(1) and (5) (1990) very succinctly state that signs that are illegal under state statutes or rules or are not consistent with Chapter 8-23-20 may not be maintained in an adjacent area. Because the Owners' signs are within 100 feet of each other on the same side of the highway, they violate the spacing requirements of Chapter 8-23-20 and the rules adopted under it, and they constitute a public nuisance. Accordingly, INDOT has the authority to order removal of one of the Owners' signs.

C. Nonconforming Sign

[28] The Owners respond that their permit should not be revoked nor should one of their signs be removed because they were entitled to a conditional permit pursuant to 105 Indiana Administrative Code section 7-3-7 (1994). Section 7-3-

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[3] This subsection was still in effect in 2016 when INDOT issued notice to the Owners.

[4] There appears to be no dispute that the Owners' signs are inside an incorporated municipality.

[5] There were similar standards in effect when the Owners' signs were erected in 1974. *See* Ind. Code §§ 8-12-2-3, -4, -5 (1967) (no sign shall be erected or maintained in adjacent area after January 1, 1968, except those signs which comply with standards of spacing as set forth in federal-state agreement; signs which are not consistent with standards of 1967 Act or federal-state agreement shall not be permitted); *see also* 1971 Agreement (on routes on Federal-Aid Primary System and inside incorporated municipalities, no sign structure shall be erected after October 1971 within 100 feet of another sign structure on the same side of the highway).

7 provided in part that a conditional permit should be granted to any lawfully erected sign that is not eligible for a permit under Section 7-3-6 (stating permit denial criteria), provided the sign remains substantially the same as it was on the date that its status initially became nonconforming. As we discussed above, the Owners repeatedly claim that their signs were not subject to regulations before 1994. Accordingly, here, they allege their signs were legal when erected in 1974 and should have been granted status as nonconforming signs and issued a conditional permit.

[29] Because the evidence before us is unclear as to whether State Road 32 was designated as a highway in the Federal-Aid Primary System prior to June 1991, we cannot declare with any certainty that the signs at issue here were legal when erected in 1974. Even assuming without deciding that Owners' signs were legal when erected in 1974, at least one of the Owners' signs should have been removed in 1999.

[30] Indiana Code section 8-23-20-9(a) (1990) provides that a sign lawfully erected in an adjacent area that does not conform to Chapter 8-23-20 after June 30, 1968 is not required to be removed until the end of the fifth year after the sign becomes nonconforming. No later than 1991, State Road 32 had been determined to be a route in the Federal-Aid Primary System. Consequently, at that time billboards along State Road 32 were required to comply with state statutes and administrative rules, including spacing requirements. As we discussed in sections A. and B., above, the Owners' signs are two separate signs

that violate the applicable spacing standards.[6] Thus, no later than 1994 Owners' signs became nonconforming. Accordingly, pursuant to Section 8-23-20-9(a), at least one of Owners' signs was required to be removed by the end of 1999 (i.e., 1994 + 5 years = 1999).

II. Statute of Limitations

[31] Without specifying which particular statute of limitations applies to these facts, INDOT argues that its actions are not barred because the continuing violation doctrine applies. For their part, the Owners apparently claim, as they did previously, that INDOT's actions are barred by either the six-year statute of limitations on nuisances, *see* Indiana Code section 34-11-2-7 (1998), or the general ten-year statute of limitations in Indiana Code section 34-11-1-2 (1998).

[32] The applicable statute of limitations is ascertained by identifying the nature or substance of a cause of action. *Stickdorn v. Zook*, 957 N.E.2d 1014 (Ind. Ct. App. 2011). Indiana Code section 8-23-20-26(a) provides that a sign that is in violation of that chapter or rules adopted under that chapter is a public nuisance. *See also* 15 Ind. Law Encyc. *Highways* § 40 (2021) (noting that sign in violation of Chapter 8-23-20 or rules adopted under it is public nuisance). The

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[6] *See* Ind. Code § 8-23-20-4 (signs located in adjacent area must conform to standards of spacing set forth in rules adopted by INDOT); 105 Ind. Admin. Code § 7-3-10(a)(2)(B) (all signs erected after October 4, 1971 in adjacent areas on routes on the Federal-Aid Primary System and inside incorporated municipalities must not be erected within 100 feet of another sign structure in an adjacent area on the same side of the highway); 23 C.F.R. § 750.706(b) (multiple sign structures to be considered as one sign for spacing purposes must be physically contiguous or connected by same structure).

nature of this action is a nuisance; therefore, the six-year nuisance statute of limitations applies. Still, our analysis does not end there.

[33] Some time ago, in an action for abating a public nuisance as regards a city street, our Supreme Court concluded: "The statute of limitations, applicable as between individuals, can not [sic] affect a city as to its rights in its streets as trustee for the public." *Cheek v. City of Aurora*, 92 Ind. 107, 114 (1883). This declaration seems readily applicable to INDOT's actions, as a trustee of both the safety and natural beauty surrounding our state's highways. Nevertheless, to further inform our analysis, we examine decisions in other jurisdictions.

[34] Multiple states have determined that, in an action to abate a public nuisance, limitations is no defense. *See Jamail v. Stoneledge Condo. Owners Ass'n*, 970 S.W.2d 673 (Tex. Ct. App. 1998); *Weiss v. Taylor*, 39 So. 519 (Ala. 1905). *See also Mangini v. Aerojet-Gen. Corp.*, 281 Cal. Rptr. 827 (Cal. Ct. App. 1991) (statute of limitations is no defense to action brought by public entity to abate public nuisance); *State v. Schenectady Chemicals, Inc.*, 459 N.Y.S.2d 971 (N.Y. Sup. Ct. 1983), *aff'd as modified*, 479 N.Y.S.2d 1010 (1984) (it is long settled that right to maintain action for public nuisance continues as long as nuisance exists; no one can obtain prescriptive right to maintain public nuisance); *Laurance v. Tucker*, 85 P.2d 374 (Or. 1938) (statute of limitations does not run against public nuisance no matter how long continued).

[35] Moreover, standard authorities are uniform that the bar of the statute of limitations does not apply to actions to abate a public nuisance. *See* 58 Am.

Jur. 2d *Nuisances* § 319 (2021); *see also* 54 C.J.S. *Limitations of Actions* § 235 (2021) (statute of limitations does not run against public nuisance no matter how long it is continued).

[36] Not only is the nuisance in this case a public nuisance, as declared by our General Assembly, but as a nuisance that can be abated, it is also a continuing nuisance. *See Petree v. Dep't of Transp.*, 798 S.E.2d 482 (Ga. Ct. App. 2017) (nuisance is continuing if it is one which can and should be abated); *Whittle v. Weber*, 243 P.3d 208 (Alaska 2010) (nuisance is continuing if it can be discontinued or abated); *Lyons v. Twp. of Wayne*, 888 A.2d 426 (N.J. 2005) (if problems are subject to abatement, then, to extent problems qualify as nuisance, they are continuing nuisance); *Hedgepath v. Am. Tel. & Tel. Co.*, 559 S.E.2d 327 (S.C. Ct. App. 2001) (nuisance is continuing if abatement is reasonably and practically possible); *Benton v. Savannah Airport Comm'n*, 525 S.E.2d 383 (Ga. Ct. App. 1999) (continuing nuisance is not permanent in its character, but one which can and should be abated by person maintaining it); *Jacques v. Pioneer Plastics, Inc.*, 676 A.2d 504 (Me. 1996) (nuisance is continuing when it is not of such permanent nature that it cannot readily be removed and abated); *City of Phoenix v. Johnson*, 75 P.2d 30 (Ariz. 1938) (if nuisance can be abated, it is continuing). *See also* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining continuing nuisance as "[a] nuisance that is either uninterrupted or frequently recurring").

[37] And there is widespread consensus that statutes of limitations do not bar an action against a continuing nuisance. *Silvester v. Spring Valley Country Club*, 543

S.E.2d 563 (S.C. Ct. App. 2001) (when nuisance is continuing and injury is abatable, statute of limitations cannot be a complete bar); *Jamail*, 970 S.W.2d 673 (in action to abate continuing nuisance, limitations is no defense); *Moore v. City of Pontiac*, 372 N.W.2d 627 (Mich. Ct. App. 1985) (action not barred by statute of limitations because Michigan recognizes continuing nature of nuisance and wrongful acts were of continuing nature). *See also* 125 Am. Jur. Proof of Facts 3d 293 § 9 (2021) (where billboard is continuing nuisance, statute of limitations may not bar its abatement).

[38] With all of that in mind, we turn to the decision of the Kentucky Court of Appeals which spoke specifically on the topic of a billboard as a continuing public nuisance and the statute of limitations as a bar to abatement. In *Commonwealth of Kentucky, Transportation Cabinet v. Tri-State Poster Advertising Company*, the appellants appealed a court order permanently enjoining the highway department from removing a billboard erected and maintained by Tri-State. 697 S.W.2d 169 (Ky. Ct. App. 1985). The billboard violated the Kentucky Billboard Act because it was erected within 660 feet of the right-of-way of an interstate highway, and such violation constituted a public nuisance under Kentucky statutes. The billboard was erected in 1970, and Tri-State received notices in 1973, 1976, and 1980 advising the sign was illegal.

[39] In 1980, when the highway department notified Tri-State the department was going to dismantle the billboard, the company filed a complaint upon which a permanent injunction was entered in September 1984. On appeal, in response to Tri-State's assertion that prosecution for the violation was barred by the

statute of limitations, the Kentucky Court of Appeals stated succinctly: "The statute of limitations presents no bar to the dismantling of the billboard. The maintenance of the billboard is a continuing nuisance." *Id.* at 171.[7]

[40] In the same vein, the Owners' signs in this case violate Indiana's Billboard Act as they do not conform to billboard spacing standards because they are maintained within 100 feet of each other on the same side of the highway; such a violation has been a public nuisance under Indiana's statute. Although there is little Indiana caselaw on this issue in the context of billboards, the fact remains that the consensus is that the statute of limitations does not bar an action to abate a continuing public nuisance. We conclude that the Department's actions are not barred by the six-year limitation applicable to nuisances.

III. Estoppel

[41] INDOT next contends that it is not equitably estopped from revoking the sign permit. As the party claiming estoppel, the Owners must show "(1) a lack of knowledge as to the facts in question and of the means of acquiring that knowledge; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in position based upon the conduct of the party estopped."

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[7] We note that in 2004, citing its opinion in *Tri-State*, the Kentucky court confirmed its declaration in an unpublished decision. *See Vanbar Outdoor Advert. v. Commonwealth of Ky., Transp. Cabinet, and Dep't of Highways*, WL 2260470, at *2 (Ky. Ct. App. Oct. 8, 2004) ("Vanbar further argues that the Department of Transportation is barred from bringing the action pursuant to the statute of limitations. However, the statute of limitations presents no bar to an action concerning an illegal billboard because the billboard constitutes a continuing nuisance.").

LaGrange Cty. Reg'l Util. Dist. v. Bubb, 914 N.E.2d 807, 811 (Ind. Ct. App. 2009). As to estoppel, this Court has observed:

> Estoppel is not generally applicable against government entities for the actions of public officials. The reason behind the rule is two-fold. If the government could be estopped, then dishonest, incompetent or negligent public officials could damage the interests of the public. At the same time, if the government were bound by its employees' unauthorized representations, then government, itself, could be precluded from functioning.

Barnette v. U.S. Architects, LLP, 15 N.E.3d 1, 10 (Ind. Ct. App. 2014) (citations omitted); *see also* 58 Am. Jur. 2d *Nuisances* § 324 (2021) ("The doctrine of estoppel may not be invoked to perpetuate a public nuisance").

[42] In *U.S. Outdoor Advertising Company, Inc. v. Indiana Department of Transportation*, this Court analyzed the application of estoppel with regard to a billboard permit. 714 N.E.2d 1244 (Ind. Ct. App. 1999), *trans. denied* (2000). There, INDOT denied two of U.S. Outdoor's applications for billboard permits after alterations to the billboards rendered them ineligible to receive a certain type of permit. U.S. Outdoor appealed claiming, among other things, that INDOT was equitably estopped from denying the permit applications based upon a conversation between the president of U.S. Outdoor and an INDOT employee during which the employee reportedly stated that U.S. Outdoor could repair the signs as long as it did not increase their size. On appeal, we noted that the U.S. Outdoor president failed to memorialize his conversation with the INDOT employee and the fact that U.S. Outdoor is "engaged in the nationwide

business of billboard advertising which requires that it be familiar with the rules and regulations of the states in which they transact business." *Id.* at 1260. Lastly, we found that U.S. Outdoor had failed to show how the application of equitable estoppel against INDOT would serve the public interest.

[43] With this backdrop, we turn to the propriety of applying estoppel in the present case. Universal Outdoor is the company listed as "Applicant" on the permit application, *see* Appellant's App. Vol. 2, pp. 29, 31, and FMG is the current lessee of the signs on the Roudebushes' property, both of which are or were entities in the billboard advertising industry. As such, an argument that they lacked knowledge of billboard standards and regulations, or the means of obtaining that knowledge, strikes us as somewhat disingenuous. Indeed, "our courts have been 'hesitant to allow an estoppel in those cases where the party claiming to have been ignorant of the facts had access to the correct information.'" *U.S. Outdoor*, 714 N.E.2d at 1260 (quoting *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 355 (Ind. Ct. App. 1981)). Likewise, the Roudebushes are charged with knowledge of laws affecting their property. *See Counceller v. City of Columbus Plan Comm'n*, 42 N.E.3d 146, 149 (Ind. Ct. App. 2015) (quoting *Story Bed & Breakfast, LLP v. Brown Cty. Area Plan Comm'n*, 819 N.E.2d 55, 64 (Ind. 2004) ("[p]roperty owners are charged with knowledge of ordinances that affect their property")), *trans. denied*.

[44] Owners assert INDOT should be estopped because they entered a thirty-year lease with FMG in reliance on approval of their permit by INDOT employees. Even given the Department's mistake in issuing the permit, the prevailing view

on such situations does not favor the Owners. As this Court stated in *U.S. Outdoor*, "'[g]enerally, reliance on misinformation provided by a government employee is not a basis for estoppel because the government could be precluded from functioning if it were bound by its employees' unauthorized representations.'" *Id.* at 1260 (quoting *Nat'l Salvage & Serv. Corp. v. Comm'r of Ind. Dep't of Envtl. Mgmt.*, 571 N.E.2d 548, 556 (Ind. Ct. App. 1991), *trans. denied* (1992), *cert. denied*, 506 U.S. 871, 113 S. Ct. 205, 121 L. Ed. 2d 146 (1992)). Moreover, Owners have benefited financially from INDOT's mistake for over two decades.

[45] Furthermore, "courts are reluctant to apply equitable estoppel unless it is in the public interest to do so." *U.S. Outdoor*, 714 N.E.2d at 1260 (citing *Nat'l Salvage & Serv. Corp.*, 571 N.E.2d at 556). Here, the Owners do not show the application of estoppel against INDOT would serve the public interest. Rather, INDOT is serving the public interest by enforcing state and federal laws designed to promote safety on our state's highways and to preserve the aesthetics and natural beauty surrounding those highways for the benefit of the public. By doing so, INDOT also ensures Indiana's receipt of federal funds to improve our roadways.

[46] Owners have not made a proper showing of the three factors required for equitable estoppel. In addition, application of such doctrine would not be in the public interest. *See, e.g.*, *People ex rel. Dep't Pub. Works v. Ryan Outdoor Advert., Inc.*, 114 Cal. Rptr. 499, 504 (Cal. Ct. App. 1974) (declining to apply equitable estoppel to prevent removal of unlawful billboards and stating, "it is

well settled that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public").

IV. Fundamental Fairness

[47] INDOT maintains that its revocation of the Owners' permit is not fundamentally unfair. Fundamental fairness is a factor of due process — due process in administrative hearings requires that all hearings be orderly, judicious, impartial, and fundamentally fair. *City of New Haven v. Chem. Waste Mgmt. of Ind., L.L.C.*, 701 N.E.2d 912, 921 (Ind. Ct. App. 1998), *trans. denied* (1999). Yet, the Owners do not argue that they did not receive due process. Rather, the Owners, adopting the ALJ's approach, claim that "fundamental fairness requires that INDOT not be allowed to revoke the Permit after so many years." Appellees' Br. p. 45. This is merely a restatement of their argument favoring application of estoppel. Nothing in the record suggests that the Owners did not receive due process, and, having already determined that the factors of estoppel have not been met in this case, we conclude INDOT's revocation is not fundamentally unfair.

[48] Lastly, Outdoor Advertising Association of Indiana, Inc. was granted leave to appear as amicus curiae in support of the Owners. The Association contends that if the Court accepts INDOT's arguments, it would have a "profound effect" on Indiana's outdoor advertising industry in that INDOT would be allowed "to revoke a permit at any time, for any reason." Amicus Br. pp. 8, 9. While we recognize the outdoor advertising industry's reliance on INDOT's

permitting of billboards, we do not agree with its extreme prediction of random, baseless revocations. Far from being unjustified, INDOT's action in revoking the Owners' permit is authorized because of the Owners' representations in their permit application that were inconsistent with the statutes and regulations in effect at that time. Furthermore, a sign not conforming to the statutes and regulations is a continuing public nuisance, for which an action to abate is not barred by the statute of limitations.

[49] The Association also raises a constitutional argument, which it acknowledges was not raised by either of the parties. An amicus is not permitted to raise new questions but rather must accept the case as it finds it at the time of its petition to intervene. *Anderson Fed'n of Teachers, Local 519 v. Sch. City of Anderson*, 252 Ind. 558, 254 N.E.2d 329 (1970). Thus, we do not address the constitutional issue the Association has lifted up.

Conclusion

[50] We conclude that INDOT's order revoking the Owners' sign permit and ordering that one of the signs be removed is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance law, and the Owners, whose burden it was to show such, have failed. The trial court's reversal of the order of the Commissioner was in error.

[51] Reversed.

Riley, J., and Kirsch, J., concur.