

**IN THE COURT OF APPEALS 8/6/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00329 COA**

**BRIAN K. RICHMOND D/B/A AUTOMOTIVE FINISHES**

**APPELLANT**

**v.**

**DESOTO COUNTY BOARD OF SUPERVISORS**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ANDREW CLEVELAND BAKER

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ALLEN B. COUCH

ATTORNEY FOR APPELLEES:

ROBERT P. CHAMBERLIN

NATURE OF THE CASE: ADMINISTRATIVE BOARD

TRIAL COURT DISPOSITION: AFFIRMED DENIAL AND REVOCATION OF CONDITIONAL  
USE PERMIT

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

Brian K. Richmond has appealed from a judgment of the Circuit Court of DeSoto County, affirming an order of the DeSoto County Board of Supervisors, which (1) revoked the conditional use permit granted September 1992; and (2) denied his request to build a 5,000 square foot building to expand the conditional use permit. Finding no error, we affirm.

I.

Between the late 1950s and early 1960s, James Lamar Herbert and Annette Herbert began farming approximately ninety-three (93) acres of land located approximately five (5) miles from the City of Hernando, Mississippi. Vehicles and farm machinery were allegedly repaired on the property, and cattle and horse stalls were manufactured. Following the enactment of the DeSoto County Zoning and Subdivision Regulations in the 1970s, Mr. and Mrs. Herbert's property was zoned agricultural.

In 1991, Brian K. Richmond, grandson of Mr. and Mrs. Herbert, constructed a building on the property, which he used to conduct the business of repairing damaged vehicles. Thereafter in late 1991 or early 1992, the DeSoto County Board of Adjustment informed Mrs. Herbert that she needed a conditional use permit to continue operating the business on the property.

In September of 1992, Mrs. Herbert applied for a conditional use permit to operate the auto repair shop. At the conclusion of a public hearing on the matter, a conditional use permit was approved. Mrs. Herbert died on May 22, 1993.

On June 15, 1993, Merritt Powell, Director of the DeSoto County Planning Commission, wrote Richmond a letter informing him that he was in violation of the conditional use permit. The letter stated:

This letter is to inform you that this office is still receiving complaints about noise and dust from your business. As you know from our conversation the week of June 1, 1993, working on vehicles on your property has to take place inside the building. I will not take any more of your time concerning your conditional use, as we have discussed this fully by telephone.

I had a complaint that you were sandblasting on June 9th, 1993, outside the building. On Thursday, June 10th, approximately 2:30 p.m., I was on Brights Road and your air compressor was running outside and it was very noisy. I did not observe any dust other than ordinary road dust. The noise on the other hand was bad and could be heard from adjoining property.

Mr. Richardson [sic], I hope we can be assured that all work in the future on the vehicles will be done inside your existing building as was granted to you by the DeSoto County Board of Adjustment, If this is not done immediately and we observe work or noise outside, I will be forced to place a stop work order on your business as you are not in compliance with conditions of your conditional use. As Director of Planning Commission, please conform to your conditional use to assure further action will not be taken.

On July 7, 1993, R. Elliott Bickerstaff, of the Stationary Source Compliance Branch with the Department of Environmental Quality, responded to Paul Rose, one of Richmond's neighbor who had complained that dust from sandblasting and open burning on Richmond's property violated the conditional use permit. That letter stated:

On June 18, 1993, the Office of Pollution Control personnel investigated your complaint of dust from sandblasting and open burning at Automotive Finishes. The investigation did not find any problems with dust from the sandblasting operations but it did find that open burning has been occurring. The owner has been informed that open burning is prohibited by State Regulations and requested to cease this practice.

On July 9, 1993, Richmond filed an application with the DeSoto County Board of Adjustment to request the continuation of the conditional use permit received in September 14, 1992, and to request permission to build a building with 5,000 square feet on the property to expand the conditional use. A public hearing was held on August 9, 1993. Approximately thirty persons attended the meeting to oppose the application. However, neither Richmond nor his attorney was present at that meeting. After the hearing, the board of adjustment voted to deny the application and to rescind the conditional use permit granted on September 14, 1992.

Richmond appealed to the DeSoto County Board of Supervisors, who affirmed the decision of the board of adjustment. On a bill of exceptions, Richmond appealed to the Circuit Court of DeSoto County, which affirmed the order of the board of supervisors.

## II.

### A. WHETHER RICHMOND WAS AFFORDED DUE PROCESS BY THE BOARD OF ADJUSTMENT?

Richmond contends that he was denied due process since the board of adjustment considered his application for a conditional use permit without giving proper notice to him. Richmond explains that his absence from the hearing was through no fault of his or his attorney and that he should have been given actual notice of the proceedings which affected his property. Richmond concedes that the DeSoto County Zoning Regulations and Subdivision Regulations only require that announcements of public hearings on applications such as his be published in a generally circulated newspaper. He asserts, however, that in the case of a person directly affected, the notice should be actual.

Without ruling on whether Richmond received adequate notice of the meeting date of the board of adjustment, we find that Richmond was in fact afforded notice and a fair opportunity to present his case before the board of supervisors, the ultimate fact finder in this case, and that any ineffective notification by the board of adjustment was thereby cured. The record in the instant case clearly indicates that the board of supervisors held a full hearing on Richmond's application for an expansion

of the existing conditional use. Both parties were given an opportunity to provide testimony and to present evidence. Additionally, the board prepared formal minutes of its proceedings, which contained testimony of the parties, reference to the documentary evidence received, and an order denying the expansion and revoking the prior permit. This assignment of error is without merit.

B. WHETHER THE BOARD OF ADJUSTMENT'S DECISION WAS  
BASED ON FALSE OR PERJURED EVIDENCE?

Richmond contends that based on the minutes of the meeting of the board of adjustment of August 9, 1993, he learned that the board of adjustment considered erroneous evidence in opposition to his application. Richmond argues that since neither he nor his attorney was present at the hearing, he was denied due process in that he was not able to rebut the negative information.

Here again, we must find that having had the opportunity to present his version of the story before a full hearing before the board of supervisors, Richmond's argument that the board of adjustment denied him due process is moot. Furthermore, as correctly asserted by the Appellee, the record does not indicate that Richmond made any claim before the board of supervisors that the evidence presented to the board of adjustment was false, perjured, or improper.

During the hearing on the application, the board of supervisors had the opportunity to review the evidence, determine the credibility of the witnesses and their testimony, and to finally make a decision in opposition to Richmond's application. *Barnes v. Board of Supervisors*, 553 So. 2d 508, 512 (Miss. 1989). Only after a full hearing did the board of supervisors take action on the application. *See Rankin Utility Co. v. Mississippi Public Serv. Comm'n.*, 585 So. 2d 705, 710 (Miss. 1991) (noting that it is within the purview of an administrative agency to determine the weight of the evidence and the credibility of witnesses).

For the reasons stated here and in issue one, we find that this assignment of error is without merit.

III.

WHETHER THE APPLICANT WAS DENIED DUE PROCESS BEFORE THE  
BOARD OF SUPERVISORS AT ITS MEETING ON SEPTEMBER 8, 1993?

Richmond's contention that he was denied due process by the DeSoto County Board of Supervisors is based upon his assertion that he was not allowed to respond to the "falsehoods and unfounded allegations" which included an "altercation involving [him]." Richmond asserts that when he attempted to respond to the allegation, a board member stated "we do not need to bring any names into the meeting." Thereafter, Mr. Tommy Lewis, one of the members stated "I've heard enough, I'm ready to make a motion to uphold the decision of the Planning Commission."

After reviewing the record of the proceedings below, we find Richmond's assertion that he was denied due process by the board of supervisors to be unfounded. There is nothing in the record to support a finding that Richmond was precluded from presenting evidence in support of his

application. This assignment of error is without merit.

V.

WHETHER THE OPERATION AND CONTINUATION OF THE FAMILY OWNED BUSINESS ON THE SUBJECT PROJECT WAS "GRANDFATHERED" IN AS EXISTING PRIOR TO THE ADOPTION OF THE DESOTO COUNTY COMPREHENSIVE PLAN AS TO SUBDIVIDING AND ZONING?

Here, Richmond contends that because the DeSoto County Zoning Ordinance was not enacted until the early 1970s, after his family began using the property as an automobile repair shop, its usage constituted a pre-existing, nonconforming use of the property. Richmond concedes, however, that there is no record of his request for a nonconforming use permit in the minutes of the meetings of the board of adjustment nor in the minutes of the meeting held by the board of supervisors. Richmond asserts that this was principally due to the fact that he was not present at the meetings of the board of adjustment on August 9, 1993, nor was he allowed to raise the issue before the board of supervisors at its meeting on September 8, 1993.

Appellee counters by arguing that (1) Richmond's original application for a conditional use permit and his subsequent application for an expansion to the conditional use foreclose his argument as to the pre-existing use; and (2) a nonconforming use is not applicable where the activities are expanded, which is evidenced by Richmond's request to expand the conditional use permit.

In the instant case, Richmond asserts that a nonconforming use existed prior to the issuance of the conditional use permit. However, as indicated from the following provision of the DeSoto County Zoning and Subdivision Regulations, Article IX, the question of whether a nonconforming use existed is a question of fact, which is decided by the board of adjustment:

7. Existence of a nonconforming use. In cases, of doubt, and on specific questions raised, whether a nonconforming use exists shall be a question of fact and shall be decided by the Governing Authority after public notice and hearing and receipt of the report and recommendation of the Board of Adjustment.

A review of the proceedings below indicates that after Richmond constructed a building on the property in which to carry on the family business and otherwise conduct his business of repairs to damaged vehicles in 1991, the owner of the property, Mrs. Herbert was informed that she needed to have a conditional use permit in order for the business to continue on the property. Thereafter, Mrs. Herbert filed an application for the conditional use permit. During the September 1992, hearing on the matter, Mrs. Herbert allegedly voiced concern that a conditional use permit was not necessary because the garage and the business conducted on her property had been in existence for more than thirty-two (32) years and was otherwise "grandfathered". At the conclusion of the hearing, a conditional use permit was granted instead of a nonconforming use permit. Because the minutes of the September 1992, hearing were not included in the record presented to this Court, we are unable

to determine the extent, if any, to which Mrs. Herbert argued that she was entitled to a pre-existing nonconforming use permit. More significantly, however, is the fact that Mrs. Herbert did not appeal the board of adjustment's decision. Neither did Richmond raise the issue at the hearing before the DeSoto County Board of Supervisors on the current matter. Moreover, Richmond did not raise the issue again until the appeal was taken to the circuit court and again before this Court. Just as the circuit court was precluded from reviewing evidence outside of the record on the current matter, so is this Court. *See CIG Contractors, Inc. v. Mississippi State Bldg. Comm'n*, 510 So. 2d 510, 514 (Miss. 1987)(citations omitted) (noting that a party is "barred from pursuing [theories] for the first time on appeal").

Richmond's assertion that he was not present to raise this issue at the meeting of the board of adjustment is moot, as previously discussed. Additionally, Richmond's assertion that he should have been allowed to present the issue before the board of supervisors is without merit. As indicated above, there is nothing in the record to support a finding that Richmond was precluded from raising the issue or was otherwise prevented from presenting evidence on the issue.

For the foregoing reasons, the judgment of the circuit court is affirmed.

**THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY IS AFFIRMED.  
APPELLANT IS TAXED WITH COSTS OF THIS APPEAL.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ,  
McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**