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October 4, 2004

Jerrily R. Kress, Director
Board of Zoning Adjustment
441 4th St., NW, Rm. 210 South
Washington, DC 20036

Re: BZA Application No. 17218
Scheduled Hearing: 10/12/04

Dear Mr. Kress:

It is not clear to me whether the BZA has a procedure where a scheduled full hearing can be converted to a preliminary hearing. On the assumption that your office can do this, I am enclosing a copy of a Motion I have filed today arguing that the above-referenced case should not go forward on October 12.

If this hearing date were changed to a preliminary hearing to decide this Motion, it would alleviate a lot of hearing preparation for all parties.

Sincerely,

Lynn H. Johnson

BZA
Case No. 17218
Exhibit No. 26

Board of Zoning Adjustment
District of Columbia
CASE NO. 17218
EXHIBIT NO. 26

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

RE: Application of Tonya Harris, TON, Inc., for Variance from Number of Stories and Building Height Requirements and for Special Exception from Lot Occupancy Requirements for 906 T St., NW

Case. No. 17218
Hearing Date: 10/12/04

MOTION TO CONTINUE HEARING UNTIL NOTICES PROPERLY MAILED TO NEIGHBORS

Submitted by
Westminster Neighborhood Association

The Board of Zoning Adjustment currently has before it for consideration the application of Tonya Harris, TON, Inc., pursuant to 11 DCMR § 3103.2 for a variance from the number of stories and building height requirement under § 400, and pursuant to 11 DCMR § 3104.1, for a special exception under § 223 to allow a fourth floor addition to an existing flat not meeting the lot occupancy requirements (§ 403) in the R-4 District at premises 906 T Street, NW (Square 362, Lot 233). A public hearing is currently scheduled for October 12, 2004.

The Applicant, however, has failed to provide adequate notice to the neighbors of the upcoming hearing. 11 DCMR § 3113.13(b) states:

> Notice of the public hearing shall be given by the Director not less than forty (40) days before the date of the hearing by:
> (a) ------
> (b) Mailing the notice to the applicant and to the owners of all property within two hundred (200) feet of the property involved in the application ...

BZA
Case No. 17218
Exhibit No. _____

The Director does this mailing from labels provided by the Applicant. 11 DCMR § 3113.5(a) requires that the applicant submit the names and addresses of these owners at the time the application is filed:

> Each application to the Board shall be made on the appropriate form provided by the Board. All information required by the form shall be furnished by the applicant at the time of filing the application, including:
>
> (a) The name and addresses of the owners of all property located within two hundred feet (200 ft.) of the subject property; provided, however, in the case of a residential condominium or cooperative with twenty-five (25) or more dwelling units, mailed notice may be provided to the board of directors or to the association of the condominium or cooperative that represents all of the owners of all the dwelling units.

While the Applicant did provide a list of names and addresses of property owners within 200 feet of the subject property with its application, this list contained significant inaccurate data. As shown by the attached Affidavit of Mark Jordan, 23% of such names and addresses were in error. Of the 69 neighbors near 906 T Street NW who were required to be notified, only 53 were properly noticed.

Such a significant error results, as a matter of law, in inadequate notice. See *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 403 A.2d 314, (DC 1979). In that case, a single letter of notice to the address of each property was sent, regardless of the number of persons or businesses that occupied the property. Several neighboring properties were multi-unit dwellings, and therefore a number of neighbors were not notified. The Court of Appeals ruled that the notice was inadequate because "[i]t cannot reasonably be presumed that the persons (occupants) sought to be reached have in fact been notified." *Id.* At 318.

Similarly, in this case, because of the significant mailing error rate, it cannot reasonably be presumed that the persons sought to be reached have, in fact, been notified. The erroneous mailings at issue were sent to a named individual. While some of the addresses were the addresses that are within 200 feet of the subject property, there is no way of knowing whether the U.S. Postal Service delivered such mail, it having an incorrect name. Even if such mail were delivered to the address, it would be improper for the current occupant to open correspondence not addressed to him or her. There were also other addresses contained in this list that were not within 200 feet of the subject property, presumably addresses of prior owners who did not occupy the property. None of these addresses could have reached the current property owner.

Fundamental due process requires, at a minimum, sufficient notice of the proceedings. It would be unfair to 23% of the neighbors of the subject property to permit a hearing to go forward without their knowledge or input. As stated in *Dupont Circle Citizens Association:*

> Not only could unnotified occupants have raised new issues, but also they could have provided more facts, facts which perhaps were unknown to participating remonstrants to sway the Board in its determination. In addition, an agency may be swayed by the actual number of persons objecting to an application.

403 A.2d at 321. It cannot reasonably be presumed on the record in this case that the current owners have actual knowledge of the proposed hearing.

Interestingly, and to add further notice problems to this case, the subject property was not posted as required. 11 DCMR § 3113.14 requires the applicant to post the property with notice of the hearing:

> The applicant shall give additional notice of the public hearing by posting the property with notice of the hearing at least fifteen (15) days in advance of the hearing.

11 DCMR § 3113.15 states how such notice shall be posted:

> The applicant shall post notice at each street frontage on the property involved and on the front of each building located on the subject property. Each notice shall be in plain view of the public.

This regulation is clear in its requirement that a notice shall be posted both on any street footage and on the front of the building. 906 T Street has street frontage on T Street, but as shown by the attached photograph, the Applicant has posted the building itself, but failed to post notice on the street footage.



[Photo Taken 10/02/04]

Because of the failure to adequately notify neighbors within 200 feet of 906 T Street NW of the public hearing, as well as the improper posting of the property regarding this hearing, the Westminster Neighborhood Association urges the Board of Zoning Adjustment to suspend the hearing, currently scheduled for October 12, 2004, until such time as proper notice is provided to all affected neighbors.

Submitted by,

Lynn H. Johnson, Esq.
1413 K Street, NW, Suite 1500
Washington, D.C. 20005
Tele. (202) 371-0962
Counsel for Westminster Neighborhood Association

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of October 2004, a copy of the foregoing Motion to Continue Hearing Until Notices Properly Mailed to Neighbors was served by first class mail, postage prepaid, to:

Robert Cooper, Esq.
Jackson and Campbell
1120 20th Street, NW, Suite 300-South
Washington, DC 20036

Andrew Altman, Director
Office of Planning
801 N. Capitol Street, NW, Suite 4000
Washington, DC 20002

Deborah Thomas, Chair
ANC 1B
1440 W Street, NW, Apt. B-1
Washington, DC 20009

Phil Spalding, Secr.
ANC 1B
1929 13th St., NW
Washington, DC 20009

Lynn H. Johnson, Esq.

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

RE: Application of Tonya Harris, TON, Inc., for Variance from Number of Stories and Building Height Requirements and for Special Exception from Lot Occupancy Requirements for 910 T St., NW) Case. No. 17218

AFFIDAVIT REGARDING ACCURACY OF NOTICE OF HEARING

I, Mark Jordan, having been duly sworn, hereby depose and say:

1) That I live at 932 T Street, NW, Washington, DC.

2) That I have taken a copy of the mailing list in Case No. 17218, marked as Office of Zoning Exhibit No. 7, and compared each name and address therein stated with the name and address as shown by the DC property tax records. The names and addresses from the DC property tax records were taken from DC Office of Revenue Property Tax Assessment Database through their website.

3) That this review shows that out of the universe of 69 valid names and addresses in the applicant's mailing list, 16 of these addresses listed an incorrect owner for the property.

4) That the properties that are in error are shown on the attached three pages which are incorporated herein.

Mark Jordan

SUBSCRIBED AND SWORN to before me this 3 day of October 2004.

Notary Public

My commission expires:

Rhonda Horton
Notary Public, District of Columbia
My Commission Expires 9-14-2007

Information Page- 1 Errors per DC Property Tax Office listing

Square Suffix and Lot: 0361 0082 * Lot Address: 0901 T ST NW Mary Tilardo
Owner: ~~LISA C KING~~ * Owner's Address: 922 T ST NW WASHINGTON, DC 20001-4120

Square Suffix and Lot: 0361 0083 * Lot Address: 1902 9TH ST NW Mary Deuk, LLC
Owner: ~~LHS PROPERTY CORPORATION~~ * Owner's Address: C/O ROBERT W ANNAND 901 N STUART ST # 610 AI

Square Suffix and Lot: 0361 0084 * Lot Address: 1904 9TH ST NW
Owner: JAMES JETER * Owner's Address: 1904 9TH ST NW WASHINGTON, DC 20001-4108

Square Suffix and Lot: 0361 0085 * Lot Address: 1906 9TH ST NW
Owner: G GREEN * Owner's Address: 4304 13TH PL NE WASHINGTON, DC 20017-3807

Square Suffix and Lot: 0361 0086 * Lot Address: 1908 9TH ST NW
Owner: GREGORY N IGBOZURUIKE * Owner's Address: 1821 12TH ST NW WASHINGTON, DC 20009-4421

Square Suffix and Lot: 0361 0139 * Lot Address: 925 T ST NW
Owner: SIOBHAN B FONSECA * Owner's Address: 925 T ST NW WASHINGTON, DC 20001-4119

Square Suffix and Lot: 0361 0140 * Lot Address: 0923 T ST NW Donna Wilson
Owner: ~~DENNIS C RUDDY~~ * Owner's Address: 923 T ST NW WASHINGTON, DC 20001-4119

Square Suffix and Lot: 0361 0801 * Lot Address: 0907 T ST NW
Owner: HAGOS SEYOUM * Owner's Address: 907 T ST NW WASHINGTON, DC 20001-4119

Square Suffix and Lot: 0361 0802 * Lot Address: 0909 T ST NW Michael Nierenstein
Owner: ~~RON L MASSENGILL~~ * Owner's Address: 909 T ST NW WASHINGTON, DC 20001-4119

Square Suffix and Lot: 0361 0803 * Lot Address: 0911 T ST NW
Owner: STEPHEN O BABATUNDE * Owner's Address: 911 T ST NW WASHINGTON, DC 20001-4119

Square Suffix and Lot: 0361 0804 * Lot Address: 0913 T ST NW
Owner: ROBERT M WULFF * Owner's Address: 913 T ST NW WASHINGTON, DC 20001-4119

Square Suffix and Lot: 0361 0805 * Lot Address: 0915 T ST NW
Owner: MAURA M COVE * Owner's Address: 915 T ST NW WASHINGTON, DC 20001-4119

Square Suffix and Lot: 0361 0806 * Lot Address: T ST NW (empty lot)
Owner: DISTRICT OF COLUMBIA * Owner's Address: NON-TAXABLE

Square Suffix and Lot: 0361 0807 * Lot Address: 0919 T ST NW
Owner: BENJAMIN J KIMBERS * Owner's Address: 932 W NORTH AVE BALTIMORE, MD 21217-3940

Square Suffix and Lot: 0361 0825 * Lot Address: 1912 9TH ST NW
Owner: BRENDA NTIM * Owner's Address: 1912 9TH ST NW WASHINGTON, DC 20001-4108

Square Suffix and Lot: 0361 0826 * Lot Address: 1910 9TH ST NW
Owner: AMAUEL WOREDE * Owner's Address: 1910 9TH ST NW WASHINGTON, DC 20001-4108

Square Suffix and Lot: 0362 0193 * Lot Address: WESTMINSTER ST NW
Owner: DISTRICT OF COLUMBIA * Owner's Address: NON-TAXABLE

Square Suffix and Lot: 0362 0194 * Lot Address: WESTMINSTER ST NW
Owner: DISTRICT OF COLUMBIA * Owner's Address: NON-TAXABLE

Square Suffix and Lot: 0362 0195 * Lot Address: WESTMINSTER ST NW
Owner: DISTRICT OF COLUMBIA * Owner's Address: NON-TAXABLE

Square Suffix and Lot: 0362 0196 * Lot Address: WESTMINSTER ST NW
Owner: DISTRICT OF COLUMBIA * Owner's Address: NON-TAXABLE

} Park

BZA
Case No. 17218
Exhibit No. 7

Square Suffix and Lot: 0362 [redacted] Lot Address: 0915 WESTMINSTER ST NW
Owner: S D LONG * Owner's Address: 915 WESTMINSTER ST NW WASHINGTON, DC 20001-4129

Square Suffix and Lot: 0362 0198 * Lot Address: 0917 WESTMINSTER ST NW
Owner: K MEYER * Owner's Address: 917 WESTMINSTER ST NW WASHINGTON, DC 20001-4129

Square Suffix and Lot: 0362 0199 * Lot Address: 0919 WESTMINSTER ST NW Simon Bell
Owner: ~~DAVID A LAIRD *~~ Owner's Address: 919 WESTMINSTER ST NW WASHINGTON, DC 20001-4129

Square Suffix and Lot: 0362 0200 * Lot Address: 0921 WESTMINSTER ST NW
Owner: TERRENCE CALHOUN * Owner's Address: 910 FRENCH ST NW # B WASHINGTON, DC 20001-4146

Square Suffix and Lot: 0362 0201 * Lot Address: 0923 WESTMINSTER ST NW
Owner: HEATHER S BALLESTERO * Owner's Address: 923 WESTMINSTER ST NW WASHINGTON, DC 20001-412

Square Suffix and Lot: 0362 0202 * Lot Address: 0925 WESTMINSTER ST NW
Owner: ~~RACHEL MAYNARD~~ * Owner's Address: 925 WESTMINSTER ST NW WASHINGTON, DC 20001-4129

Square Suffix and Lot: 0362 0224 * Lot Address: 0924 T ST NW Kevin Humphries
Owner: SILVIO FILARDO * Owner's Address: 924 T ST NW WASHINGTON, DC 20001-4120

Square Suffix and Lot: 0362 0225 * Lot Address: 0922 T ST NW
Owner: MARY FILARDO * Owner's Address: 2814 ADAMS MILL RD NW WASHINGTON, DC 20009-2204

Square Suffix and Lot: 0362 0226 * Lot Address: 0920 T ST NW
Owner: BERNARD A MERCER * Owner's Address: 920 T ST NW WASHINGTON, DC 20001-4120

Square Suffix and Lot: 0362 0227 * Lot Address: 0918 T ST NW
Owner: DEORIA J DAVIS * Owner's Address: 918 T ST NW WASHINGTON, DC 20001-4120

Square Suffix and Lot: 0362 0228 * Lot Address: 0916 T ST NW
Owner: APRIL FULTON * Owner's Address: 916 T ST NW WASHINGTON, DC 20001-4120

Square Suffix and Lot: 0362 0229 * Lot Address: 914 T ST NW
Owner: TIMOTHY M SHANNON * Owner's Address: 914 T ST NW WASHINGTON, DC 20001-4120

Square Suffix and Lot: 0362 0230 * Lot Address: 0912 T ST NW michael Mark
Owner: ~~CLARA J MCNEARY~~ * Owner's Address: 912 T ST NW WASHINGTON, DC 20001-4120

Square Suffix and Lot: 0362 0231 * Lot Address: 0910 T ST NW Juan Puente
Owner: ~~MANNA INC~~ * Owner's Address: 828 EVARTS ST NE WASHINGTON, DC 20018-1722

Square Suffix and Lot: 0362 0232 * Lot Address: 0908 T ST NW
Owner: TONI R SAWYERS * Owner's Address: 3115 11TH ST NW WASHINGTON, DC 20010-2401

Square Suffix and Lot: 0362 0233 * Lot Address: 0906 T ST NW
Owner: TON INC * Owner's Address: 1512R PENNSYLVANIA AVE SE WASHINGTON, DC 20003-3116

Square Suffix and Lot: 0362 0234 * Lot Address: 0902 - 0904 T ST NW
Owner: WILLIAM BRODIE * Owner's Address: 2900 MARLIN DR RIVA, MD 21140-1136

Square Suffix and Lot: 0362 0235 * Lot Address: 1836 9TH ST NW
Owner: S JENKINS * Owner's Address: 1836 9TH ST NW WASHINGTON, DC 20001-4124

Square Suffix and Lot: 0362 0236 * Lot Address: 1834 9TH ST NW
Owner: JAMES RAWLINGS * Owner's Address: 1834 9TH ST NW WASHINGTON, DC 20001-4124

Square Suffix and Lot: 0362 0237 * Lot Address: 1832 9TH ST NW - 2 units: Rosalyn Clark Louis Reese
Owner: NORTH CAPITAL COMMUNITY DEVELOPMENT * Owner's Address: 1330 N CAPITOL ST NW WASHINGTC

Square Suffix and Lot: 0362 02[redacted] * Lot Address: 1830 9TH ST NW Ali Sarabpour
Owner: ~~MINISTRY OF HELP~~ * Owner's Address: 1830 9TH ST NW WASHINGTON, DC 20001-4124

Square Suffix and Lot: 0362 0239 * Lot Address: 1828 9TH ST NW
Owner: JULIA M LOVELACE * Owner's Address: 1828 9TH ST NW WASHINGTON, DC 20001-4124

Square Suffix and Lot: 0362 0240 * Lot Address: 1826 9TH ST NW
Owner: NORTH CAPITAL NEIGHBORHOOD DEVELOPMENT I * Owner's Address: 1330 N CAPITOL ST NW WASHI

Square Suffix and Lot: 0362 0241 * Lot Address: 1824 9TH ST NW
Owner: NORTH CAPTIAL NEIGHBORHOOD DEVELOPMENT I * Owner's Address: 1330 N CAPITOL ST NW WASHI

Square Suffix and Lot: 0362 0242 * Lot Address: 1822 9TH ST NW
Owner: DISTRICT OF COLUMBIA HOUSING AUTHORITY (* Owner's Address: 1133 N CAPITOL ST NE # 2 WASHI

Square Suffix and Lot: 0362 0244 * Lot Address: 905 WESTMINSTER ST NW 2 Units: Tim Plant Brian Monroe
Owner: ~~CHINH P NUYEN~~ * Owner's Address: 267 KENTLANDS BLVD # 1004 GAITHERSBURG, MARYLAND 20878-

Square Suffix and Lot: 0362 0267 * Lot Address: 0924 WESTMINSTER ST NW
Owner: MARGERY L PERKO * Owner's Address: 924 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0268 * Lot Address: 0922 WESTMINSTER ST NW
Owner: LYNN H JOHNSON * Owner's Address: 922 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0269 * Lot Address: 0920 WESTMINSTER ST NW
Owner: OTIS F JOYNER * Owner's Address: 920 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0270 * Lot Address: 0918 WESTMINSTER ST NW
Owner: ROMES T CALHOUN * Owner's Address: 918 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0271 * Lot Address: 0916 WESTMINSTER ST NW
Owner: SALLY T MILLER * Owner's Address: 1721 U ST NW APT 2 WASHINGTON, DC 20009-7716

Square Suffix and Lot: 0362 0272 * Lot Address: 0914 WESTMINSTER ST NW
Owner: CHARLES B BAXTER * Owner's Address: 914 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0273 * Lot Address: 0912 WESTMINSTER ST NW
Owner: GEORGE H SMITH * Owner's Address: 912 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0274 * Lot Address: 0910 WESTMINSTER ST NW
Owner: TERRIFIC INC * Owner's Address: 1222 T ST NW WASHINGTON, DC 20009-4462

Square Suffix and Lot: 0362 0275 * Lot Address: 0908 WESTMINSTER ST NW
Owner: KEVIN M DAILEY * Owner's Address: 908 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0276 * Lot Address: 0906 WESTMINSTER ST NW One Penny Grove Inn
Owner: ~~ARGO REALTY~~ * Owner's Address: 616 KENNEDY ST NW WASHINGTON, DC 20011-3012

Square Suffix and Lot: 0362 0277 * Lot Address: 0904 WESTMINSTER ST NW
Owner: W R DUNAVANT * Owner's Address: 904 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0278 * Lot Address: 0902 WESTMINSTER ST NW
Owner: ROCHELLE Y LATHERN * Owner's Address: 902 WESTMINSTER ST NW WASHINGTON, DC 20001-4130

Square Suffix and Lot: 0362 0279 * Lot Address: 1812 9TH ST NW
Owner: LEOLA Q SMITH * Owner's Address: 1812 9TH ST NW WASHINGTON, DC 20001-4134

Square Suffix and Lot: 0393 0024 * Lot Address: 0817 T ST NW Howard Rennon
Owner: ~~DAVID PERRUZZA~~ * Owner's Address: 817 T ST NW WASHINGTON, DC 20001-3127

Square Suffix and Lot: 0394 0092 Lot Address: 1833 9TH ST NW
Owner: EVELYN THOMAS * Owner's Address: 1833 9TH ST NW WASHINGTON, DC 20001-4133

Square Suffix and Lot: 0394 0093 * Lot Address: 1839 9TH ST NW
Owner: BENJAMAIN CRAWFORD * Owner's Address: 1839 9TH ST NW WASHINGTON, DC 20001-4133

Square Suffix and Lot: 0394 0094 * Lot Address: 1841 9TH ST NW
Owner: U JONES * Owner's Address: 1841 9TH ST NW WASHINGTON, DC 20001-4133

Square Suffix and Lot: 0394 0096 * Lot Address: 1845 9TH ST NW
Owner: STEVEN WEINBERG * Owner's Address: 1845 9TH ST NW WASHINGTON, DC 20001-4133

Square Suffix and Lot: 0394 0097 * Lot Address: 1847 9TH ST NW
Owner: MARY C MCRAE * Owner's Address: 1847 9TH ST NW WASHINGTON, DC 20001-4133

Square Suffix and Lot: 0394 0841 * Lot Address: 1835 9TH ST NW
Owner: MARY F JORDAN * Owner's Address: 1835 9TH ST NW WASHINGTON, DC 20001-4133

Square Suffix and Lot: 0394 0842 * Lot Address: 1837 9TH ST NW
Owner: C U SMITH * Owner's Address: 1837 9TH ST NW WASHINGTON, DC 20001-4133

Square Suffix and Lot: 0394 0874 * Lot Address: 1851 9TH ST NW
Owner: SEE FOREVER FOUNDATION * Owner's Address: 1851 9TH ST NW WASHINGTON, DC 20001-4133

Square Suffix and Lot: 0362 2004 * Lot Address: 1820 9TH ST NW Unit: B Premier Properties Grp
Owner: ~~MAKEBA G KELLY *~~ Owner's Address: 1820 9TH ST NW # 0000B WASHINGTON, DC 20001-4124

Square Suffix and Lot: 0362 2003 * Lot Address: 1820 9TH ST NW Unit: A
Owner: DOROTHY WHITAKER * Owner's Address: 1820 9TH ST NW # 0000A WASHINGTON, DC 20001-4124

Square Suffix and Lot: 0362 2005 * Lot Address: 0926 T ST NW Unit: 000A
Owner: NADINE C LEGRAND * Owner's Address: 926 T ST NW # A WASHINGTON, DC 20001-4120

Square Suffix and Lot: 0362 2006 * Lot Address: 0926 T ST NW Unit: 000B
Owner: SHAWN F IRVING * Owner's Address: 926 T ST NW # B WASHINGTON, DC 20001-4120

Universe = 69
No. in Error = 16
Error Rate = 23%

District of Columbia Court of Appeals.

DUPONT CIRCLE CITIZENS ASSOCIATION, Petitioner,
v.
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent, Temple Realty, Inc., Intervenor.

No. 12473.

Argued May 9, 1978.
Decided June 20, 1979.

On petition for review of an order of the board of zoning adjustment granting special exception to intervenor for construction of professional office building, the Court of Appeals, Nebeker, J., held that: (1) citizens association had standing to assert alleged failure to notify other persons of proposed special exception, despite its actual notice of both subject property and hearing on exception, and (2) notice, which consisted of mailing of single letter to address of each property regardless of number of persons or businesses that occupied the property, was inadequate.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning 571
414k571 Most Cited Cases

Citizens association, which sought to challenge board of zoning adjustment's grant of special exception to intervenor for construction of professional office building, had standing to assert board's failure to notify other persons of application and hearing as required by board's rule despite association's actual notice of both subject property and hearing; effectively overturning *Dupont Circle Citizens Association v. District of Columbia BZA*, 364 A.2d 610.

[2] Administrative Law and Procedure 453
15Ak453 Most Cited Cases

As a matter of practical necessity, one with actual notice must be endowed with power to compel compliance, since agency could otherwise largely disregard its notice regulations during hearing proceeding, knowing that it may avoid judicial review by asserting lack of standing of opponents of its action.

[3] Zoning and Planning 534
414k534 Most Cited Cases

Board of zoning adjustment's notice of application for special exception for construction of professional office building and hearing on application, which notice consisted of mailing of single letter to address of each property regardless of number of persons or businesses that occupied property, fell short of notifying occupants of apartment house, although it might be adequate to notify one occupant, and thus was inadequate under board's notice rule, which states that board's legal responsibility extends to notification by mail of each occupant of property situated near subject property. D.C.C.E. ß 1- 1510.

[4] Zoning and Planning 534
414k534 Most Cited Cases

Board of zoning adjustment could solicit aid from applicant for special exception, such as requiring applicant to submit list of names and addresses of abutting property owners, and could also allow applicant to bear portion of administrative and fiscal burden of processing application, by requiring applicant to post notice, file photographs of each posted notice and file affidavit certifying compliance with board's rule; a similar regulation, imposing on applicant responsibility for mailing notices or preparing notices for mailing would also be reasonable.

[5] Zoning and Planning 134.1
414k134.1 Most Cited Cases
(Formerly 414k134)

While board of zoning adjustment is free to amend its regulations, it is not free to disregard their plain wording, and thus all occupants of nonresidential property had to be notified under board's rule stating that board's legal responsibility extends to notification by mail of each occupant of property

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situated near property subject of zoning application.

[6] Zoning and Planning 534
414k534 Most Cited Cases

Whether applicant for zoning exception, having acted in accordance with board of zoning adjustment's instructions, should be penalized for board's inadequate action was irrelevant in determining whether board gave adequate notice of application for exception according to its own regulations.

[7] Zoning and Planning 625
414k625 Most Cited Cases

Where not only could unnotified occupants of nearby buildings have raised new issues, but they also could have provided more facts which might have swayed board of zoning adjustment in its determination on application for special exception for construction of professional office building, and since in addition agency might have been swayed by actual number of persons objecting to application, board's failure to give notice to nearby buildings required by its own rule was not harmless error. D.C.C.E. ß 1-1510.

[8] Zoning and Planning 534
414k534 Most Cited Cases

Board of zoning adjustment, which did not make even oblique reference to waiver provision or board's desire to employ it as basis for desire to employ it as basis for decision granting special exception for construction of professional office building, did not waive rule requiring mailing of notice to occupants of property situated near subject property.

***315** Frederic R. Kellogg, Washington, D. C., for petitioner.

Edward E. Schwab, Asst. Corp. Counsel, with whom Richard W. Barton, Deputy Corp. Counsel, Washington, D. C., adopted the brief of intervenor, for respondent.

Charles R. Donnenfeld, with whom Paul A. Kaplan, Washington, D. C., was on brief, for intervenor.

Before NEWMAN, Chief Judge, and NEBEKER and FERREN, Associate Judges.

NEBEKER, Associate Judge:

The Board of Zoning Adjustment granted a special exception to intervenor for the construction of a professional office building at 1916-1922 N. Street, N.W., which is located within a special purpose district. Petitioner urges four grounds for reversal: (1) improper notice, (2) inadequate and unsupported findings of fact and conclusions of law, (3) the Board's failure to give "great weight" to the issues and concerns raised by the Advisory Neighborhood Commission (ANC) and (4) an erroneous voting procedure. We reverse on the first ground and remand for further proceedings. The facts will be stated as they become relevant to the discussion.

I. Standing

[1] Petitioner complains that the Board violated its notice rule by misidentifying the property and by not notifying the "occupants of property situated within" 200 feet of the intervenor's property. 22 DCRR s 3.3. The intervenor contends that petitioner, having had actual notice of both the subject property and the hearing, has no standing to assert the alleged failure to notify other persons. Dupont Circle Citizens Association v. District of Columbia BZA, D.C.App., 364 A.2d 610, 612 (1976). The Board, having adopted the intervenor's brief rather than filing a separate brief, originally contended that the petitioner lacked standing. However, in a supplemental memorandum regarding standing, the Board altered its stance and now concedes that the petitioner has standing. All agree that the petitioner had actual notice.

The petitioner claims that the Board violated its notice requirements by, Inter alia, not notifying the "occupants of property situated within" 200 feet of the intervenor's property. The relevant regulation provides:

> 3.32 Notice of the public hearing shall be given by the Secretary of the Board within thirty (30) days but not less than ten (10) days before the date of the hearing, as follows:
>
> 3.322 By mailing the notice to the applicant and to the Owners of all property abutting the property involved in the application.
>
> 3.323 By mailing the notice to the Occupants of property situated within two hundred (200) feet of the ***316** property involved in the application.
>
> (22 DCRR s 3.32 (emphasis added).)

The Board mailed notice, addressed to "occupant," to each address of an improved property within 200 feet of the subject property. Four of the addresses were to apartment houses, yet only one letter was

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sent to each address. The petitioner states that this mailing did not comply with s 3.323, which specifies "occupants" rather than "owners," Cf. 22 DCRR s 3.322 (quoted Supra), or "addresses."

The intervenor contends that the petitioner lacks standing to raise the notice issue because it had actual notice of the hearing. Dupont Circle Citizens Association v. District of Columbia BZA, supra (unrelated to the present action). In Dupont, the Board mailed "notice to the occupants of property situated within 200 feet of the property ((in attempting to fulfill) s 3.323)," which is identical to the mode of notice here. As here, the petitioner alleged in Dupont "that the third type of notice listed above is not adequate where, as was done here, the notice was merely stamped 'Occupant' and mailed to each particular address on a list supplied by the applicant." Id. This court did not reach the merits of the allegation, but disposed of the issue by holding that the petitioners lacked standing:

> We find this type of notice to be troublesome since a question exists whether it could reasonably be presumed to reach the persons sought to be reached. However, we need not decide that issue in this case. . . . Since the petitioner had Actual notice of the hearing, as we find Infra, it cannot now be heard to complain of . . . a hypothetical deficiency. (Id. at 612 (emphasis in original).)

Thus, the court concluded, one with actual notice has no standing to assert any deficiency regarding notice to another.

Espousing a view contrary to that underpinning Dupont, we reversed in an Alcoholic Beverage Control Board case in an analogous situation. See Kopff v. District of Columbia ABC Board, D.C.App., 381 A.2d 1372, 1382-83 (1977), Rehearing denied (1978). The ABC Board was statutorily required to post notice of a hearing and was bound by its own regulations to notify remonstrants, if known to the Board. Id. When the Board rescheduled a hearing on an application, it neglected to post notice and to notify the remonstrants listed on a petition supplied to the Board by the Kopffs, although the Board did notify the Kopffs. Id. at 1374. The Board and the intervenor

> (argued) that actual notice to all petitioners present at the rescheduled hearing cured the . . . defect, that the notice mailed to Mrs. Kopff sufficed for all other known remonstrants, and that "no person allegedly without notice has appeared in protest." (Id. at 1382.)

We held that the Kopffs were the agents of neither the Board nor the remonstrants, so far as the regulatory requirement was concerned, and that the Board therefore could not "shift to private persons its responsibility for the notification." Id. at 1383. In rebutting the claim that actual notice to those present at the hearing "cured the . . . defect," the court stated the following, which we believe to be of sufficient value to quote at length:

> (A)ctual notice to individuals who did appear cannot remedy the lack of notice either to those who were known but not apprised of the rescheduling, or to those who might have seen an accurate "posting" on the premises but did not. Absent potential witnesses remain prejudiced. Accordingly, the Board violated both its duty to notify "known remonstrants," . . . and its duty to post notice on the premises. . . . Neither deficiency could be cured by actual notice to those who appeared.
>
> . . . The argument that "no person allegedly without notice has appeared in protest" is illogical. We cannot expect unnotified individuals to petition for review of an ABC Board decision of which they still may not be aware. We hold, therefore, that in failing to give the notices required by D.C.Code 1973, s 25-***317** 115(b) and 3 DCRR s 20.1, the Board did not afford all potentially concerned individuals an adequate opportunity to be heard. As a result, the Board's capacity (to render an informed decision) was impaired. We shall not speculate about how many more would have attended the hearing if proper notice had been given, or about whether additional attendance would have contributed to the dialogue. That is irrelevant. Because a statutory right to due notice has been violated and cannot be cured until everyone receives notice, the error cannot be deemed harmless. 21

> FN21 The reference in the Board's findings of fact to the paucity of witnesses who appeared to oppose the license implies a possibility that a greater number of opponents could have influenced the Board's decision. Rec. at 274, P 40.

(Id. at 1383.)

As we view Kopff and Dupont in juxtaposition, their incongruity appears obvious. Whereas Dupont states that actual notice disqualifies a party from raising the lack of notice to another, Kopff notes that a party without actual notice could hardly be expected to appear at the proceeding to raise the issue. We note at this point that the parties in Kopff failed to cite the Dupont standing holding and that the

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Kopff opinion makes no reference to it.

Despite this incongruity, the cases relied upon, in each opinion, are consistent. In holding that the petitioner lacked standing in Dupont, we quoted from Clark v. Wolman, 243 Md. 597, 221 A.2d 687, 688 (1966):

> The law, in its majesty, is not designed to require futile action or idle gestures. It is well settled that notification Purposed to inform may be replaced by actual knowledge. 1 Merrill, Notice, 480. And this is especially so when the knowledge has been acted upon without reliance upon the notification's absence or its defects. Ibid.; Cassidy v. Baltimore County Board of Appeals, 218 Md. 418, 146 A.2d 896; 2 Merrill, Notice, 384, 444. (364 A.2d at 613 (emphasis in original).)

While we agree with the Maryland case, it does not mandate the result reached in Dupont. The Clarks were assumed to have standing to assert the notice issue. Id. at 599, 221 A.2d at 688. They claimed that because they did not receive Written notice, as required by city ordinance, the zoning action should be set aside. The court stated that because they had actual notice, and were not prejudiced by reason of their failure to receive written notification, the zoning action should not be set aside. The characteristic distinguishing Clark from Dupont is the assertion of one's Own rights in Clark as distinguished from the assertion of Another 's rights in Dupont. We employed essentially the same rationale in Kopff to differentiate the facts there from the facts of Schiffmann v. District of Columbia ABC Board, D.C.App., 302 A.2d 235 (1973):

> (I)n Schiffmann . . ., this court held that actual notice to the petitioners cured, as to them, any failure to give notice by publication. Petitioners here, however, do not assert a lack of notice to themselves. They assert the rights of those who were entitled to notice but did not receive it and, as a consequence, did not appear at the hearing. (381 A.2d at 1383.)

Therefore, the foundation of Kopff and Dupont is identical; the point of departure lies in the interpretation of the underlying cases.

By a strict interpretation, the holdings of Kopff and Dupont do not conflict. The language of Dupont, that the petitioner "cannot . . . be heard to complain," indicates that the holding was based upon the petitioner's lack of standing rather than whether the notice was adequate. 364 A.2d at 613. By contrast, the holding of Kopff was expressly not based on standing. 381 A.2d at 1383 ("(r)espondents do not challenge petitioners' standing to assert these rights"). Nevertheless, the discussion and extensive quotations above demonstrate a fundamental inconsonance between the two opinions. Each opinion bears on the case before us.

[2] We endorse our prior position as expressed in Kopff, and therefore hold that ***318** the petitioner has standing to raise the notice issue. A contrary position would provide an inadequate opportunity to enforce the notice provisions. While injury in fact is generally required for standing, See, e. g., Warth v. Seldin, 422 U.S. 490, 499-501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), the very purpose of the notice provisions obviate the need for this requirement for standing to challenge compliance with notice specifications. One without notice is rarely in a position to complain of his ignorance, being unaware of the ignorance. As a matter of practical necessity, one with actual notice must be endowed with the power to compel compliance. An agency could otherwise largely disregard its notice regulations during the hearing proceedings, knowing that it may avoid judicial review by asserting the lack of standing of the opponents of its action.

In M. A. P. v. Ryan, D.C.App., 285 A.2d 310 (1971), we noted that, "(a)s a matter of internal policy, . . . no division of this court will overrule a prior decision of this court . . . and that such (a) result can only be accomplished by this court en banc." Id. at 312 (footnote omitted). The full court is aware of the situation created by Dupont and Kopff, as explained above, and of the disposition of this case with regard to the issue of whether standing may transcend the reception of actual notice. All members of the court are mindful of the primary need for decisional uniformity among divisions of the court. On the other hand, it cannot be gainsaid that en banc consideration consumes judicial resources which are already spread thin. It is in an effort to accommodate these two conflicting considerations that the division has proposed resolving this particular decisional conflict without formal en banc consideration. This method of resolution in no way abandons the M.A.P. rule or compromises the rule on uniformity of decision. Non-division members of the court are able to be confident of the soundness of the analysis and decision of the division, without formal en banc consideration. Since no member of the court has requested formal en banc consideration and no member has objected to our adherence of Kopff on the standing issue, this decision may be deemed to comport with M.A.P.; it effectively overturns the Dupont standing holding.

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II. Adequacy of the Notice

[3] As to whether the notice complied with s 3.323, we note that our scope of review is limited. See D.C.Code 1973, s 1-1510. Nevertheless, we hold, as a matter of law, that the notice was inadequate under s 3.323. The Board's contrary ruling is "plainly erroneous." Bernstein v. District of Columbia, D.C.App., 376 A.2d 816 (1977). As quoted above, s 3.323 states that the Board's legal responsibility extends to the notification by mail of each Occupant of property situated near the subject property. The Board mailed a single letter to the address of each property, regardless of the number of persons or businesses that occupied the property. While this procedure may be adequate to notify one occupant, it falls short of notifying, for example, the occupants of an apartment house, as in the case here. It cannot reasonably be presumed that the persons (occupants) sought to be reached have in fact been notified. Dupont Circle Citizens Association v. District of Columbia BZA, supra at 612.

The intervenor states that the regulatory scheme does not anticipate the notification of the residents of properties within 200 feet of the property under consideration. It reasons that "section 3.322 provides for the mailing of notice to abutting property Owners," but that the section fails to provide for notice to Residents of the abutting property. A fortiori, it concludes, tenants occupying buildings at a greater distance from the subject property need not be notified. Such an interpretation of the regulations would be reasonable if s 3.323 did not exist, but is hardly convincing in view of its plain terms: "mailing the notice to the occupants of property situated within two hundred . . . feet." The intervenor's attempt at amending the regulations, by way of its brief, demonstrates the logical poverty of its position. For example, the intervenor states that "the Board mailed ***319** notice . . . to all Properties within 200 feet of the subject property (Rule 3.323)." (Emphasis added.) Were the regulation intended to read thus, it would have been simple enough to have so worded it.

Both the Board and the intervenor rely upon the possibility that the four notices mailed to the four apartment houses may have been received by the managers, who may have posted them for the buildings' occupants. The Board indicates that we "must Presume that the resident managers of the affected buildings did not post the notices received from respondent, in order to find any failure of notice." Respondent's Brief at 6 (emphasis in original). No showing is attempted by the Board, however, to indicate that the apartments' managers were residents of the buildings, that a letter addressed to "occupant" would be more likely delivered to a resident manager than to another occupant of the building, or that, if a letter did reach a resident manager, the manager would be more likely to post the letter in the lobby than to send it to the owner, to file it or to discard it. The sole reference to this issue in the record, quoted below, indicates that the posting would be unlikely.

The best view of the issue may be gained from extracts of the hearing at which the Board's vote was taken. At page 56 of the record, Chairman Harps expresses his concern over the amount of time the Board has spent in addressing the question in past cases:

> (W)e've gone over this at every meeting so far. Now what procedure have you followed?
>
> MR. HATTON (Secretary to the Board): Nothing special to require the management (of the multi-occupant buildings) to do anything. Obviously we can't contact the individual residents, and we have not come up with a means of requiring the management to post our notices that we mail out to occupants within 200 feet.
>
> CHAIRMAN HARPS: I see. Now, we've discussed it in Executive Committee meetings, or in the open public meeting, whatever it was. As I recall there was a time when we sent a notice out to occupant, and some of the people in apartment buildings got it and some people didn't get it, because the postman gets a letter to occupant and he might put it in somebody's box and he might not. . . .
>
> Now, what is the recommendation of the staff with regard to this? We can't meet this every month and sit here and spend a half hour talking about it.
>
> MR. McCANTS (Member of the Board): Well, Mr. Chairman, it seems to me that until the Board (has) promulgated new regulations to take care of this, then we have to abide by whatever rules that we have presently existing.
>
> CHAIRMAN HARPS: Well, the only rule is to notify every occupant within 200 feet, and notifying every occupant means by mail.
>
> MR. McCANTS: That's right.
>
> MR. HATTON: Let me say this. There is a requirement at the present time that the applicant submit a list of the . . . premises within 200 feet.
>
> Now, once in a while, occasionally but rarely, there is some indication that the properties or premises are apartment structures. Most of the time there is no indication to us as to what kind of a building sits on that property.

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What I'm thinking about sitting here listening to the discussion is, that we need to amend our requirements that would make it incumbent on the applicant to indicate with this listing which properties might be apartment buildings. If they would do that, then we could mail a notice, not to occupant, but to the manager of the building, and that notice would then instruct the management to post the hearing notice somewhere in the lobby. But we have to rely on somebody else to do some of it.

MR. McCANTS: Yes, but we can't instruct some management company to

***320** CHAIRMAN HARPS: We could instruct them, but it wouldn't be effective.

Following this discussion, Mr. McCants stated that the applicant should not be penalized as a result of the inadequacy of the Board's regulations and practices. He states, "I don't see where the applicant has not complied with the regulations, and what I see are inadequate regulations. But whatever the inadequacies, it's not the applicant's making, it lies somewhere else. And for that reason I would move that we move forward with this case and hear it." The Chairman then called for a second and, without further discussion, the motion passed.

From the above discussion, several important points may be gleaned. First, the Board was well aware of the issue and had addressed it on many occasions in the past. The principal remonstrant at the hearing stated that the Board was advised on the subject by the Corporation Counsel in July of 1975. Second, the members felt that the procedures of sending one letter, addressed to "occupant," to each address, was inadequate under the regulations and that the regulations and procedures should be changed. Third, the Board felt that its faults should not be visited upon the head of the applicant, and therefore, the hearing on the merits of the application should go forward without readvertisement. It is unclear whether the vote was based wholly or only partially upon the desire not to disadvantage the applicant.

[4] As to the Board's awareness of the issue and the issue's history, the regulations remain unamended. However, by a December 12, 1977 document, the Board directed applicants to indicate which of the buildings, within 200 feet, are multi-tenant facilities and to indicate, for those buildings, the name and address of a building manager or "other responsible person who can post a copy of the notice in the lobby or some other conspicuous place in the building." We question whether the notice in this case would have been adequate, even had this procedure been followed. If Mr. McCants and Chairman Harps, as quoted above, were correct in their statements that the Board may not compel the posting in the lobby, it is difficult to understand how the Board would reasonably anticipate that the occupants would be notified. Unless the building manager were to take a vigorous stand against the applicant, it would appear less likely that they would notify their tenants than that the Kopffs would notify the persons appearing on their petition. See Kopff v. District of Columbia ABC Board, supra at 1383. "We cannot endorse the Board's attempt to shift to private persons its responsibility for the notification." Id. At the same time, we find no error in the Board's policy, in meeting its responsibilities, of soliciting aid from the applicant, such as requiring the applicant to submit a list of names and addresses of abutting property owners. We also do not fault the Board's policy of allowing the applicant to bear a portion of the administrative and fiscal burden of processing an application, as exemplified in 22 DCRR s 3.33, which requires the applicant to post notice, file a photograph of each posted notice and file an affidavit certifying compliance with the rule. A similar regulation, imposing on the applicant the responsibility for mailing notices or for preparing notices for mailing, would seem reasonable should the Board decide to promulgate such a rule.

[5] Concerning the second point, the adequacy of the notice, we hold that the requisite notice was not given. In a portion of the record quoted above, one member of the Board expressed the hopelessness of attempting to notify each resident of a multi-tenant building. It was upon essentially the same thesis that the ABC Board unsuccessfully requested this court to reconsider its decision in Kopff, which interpreted the D.C.Code as requiring the Board to notify persons, whose names appeared upon petitions, of an impending hearing. As has the ABC Board, the BZA has imposed the responsibility upon itself and, as is discussed above, may shift it to the applicant. Furthermore, on remand, the Board may require the applicant to furnish the Board with the suite, room or apartment number ***321** of the multi-tenant facilities within 200 feet. As "occupant" is not limited to one who employs property as a dwelling, all the occupants of the non-residential property must be notified under the regulation. While the Board is free to amend its regulations, it is not free to disregard their plain wording. E. g., Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957). An agency should interpret its regulations forthrightly rather than in a strained or

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contorted manner.

[6] The third point regards the basis for the Board's vote. As the quotation from the record indicates, the Board voted to hear the case on the basis that the Applicant had complied with the Board's regulations. The issue of whether the Board had complied with the regulations was never expressly considered, despite it being, at that point, the only issue raised by the opposition. Viewing the vote in the light most favorable to the Board it may be assumed that the Board implicitly ruled that the mailings accorded with the regulation, and, upon that basis, the Board decided to hear the merits of the case. If this is the case, then the Board impermissibly employed an irrelevant criterion: whether the applicant, having acted in accordance with the Board's instructions, should be penalized for the Board's inadequate actions. The criterion has no bearing upon whether the Board gave adequate notice according to its regulations. The Board's mistake is accentuated because the irrelevant factor was the apparent controlling reason for the motion's passing.

[7] Having evaluated the other allegations of deficiencies in mailed and posted notices, the possibility of actual notice to the occupants and the possibility that the interests of unnotified occupants have been represented by the participating protestants, we hold that the omission here was not harmless error. See D.C.Code 1973, s 1-1510; Kopff v. District of Columbia ABC Board, supra at 1383. Not only could unnotified occupants have raised new issues, but also they could have provided more facts facts which perhaps were unknown to participating remonstrants to sway the Board in its determination. In addition, an agency may be swayed by the actual number of persons objecting to an application. Id. at 1383 n.21.

III. Other Issues Raised by Intervenor.

[8] On the issue of waiver raised by the intervenor, we hold that the Board did not waive s 3.323, and therefore we do not meet the issue of whether the waiver was "for good cause shown" and "not otherwise prohibited." Not even an oblique reference is made in the record to the waiver provision, 22 DCRR s 1.3, or the Board's desire to employ it as a basis for decision. A claim of waiver cannot be invoked as post facto whitewash.

In a supplemental memorandum, the intervenor has urged the court to hold this decision in abeyance pending the resolution of a petition for review that was filed in this court on November 6, 1978 (No. 14090). That petition is similar to the petition before us here in that it involves the identical parties and the same property, in consolidation with some adjoining property. In part, the later petition arises from the notice given by the Board. In attempting to fulfill s 3.323, the Board mailed notices to the owners of the multi-occupant structures within the 200-foot perimeter, relegating to them the Board's responsibility to notify the occupants of the structures situated on their land. While these facts are not before us here, we commend this opinion to the Board and the intervenor for a close reading in deciding whether to oppose the first ground, cited in the petition for review, for remand of that case for readvertisement and rehearing.

Due to our holding and remand, we need not reach the other issues raised by the petitioner. The decision of the Board is reversed for failure to provide proper notice.

Reversed and remanded.

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