

Your petitioner, Joseph Preston Carson III, hereinafter “Carson,” pursuant to city code section 114-930.8 (d) herein sets forth the illegality of the action(s) of the city council and states the grounds thereof:

COUNT ONE

1. Carson contends that council acted illegally when it approved Resolution No. 2009-R7-28 and council acted illegally when it struck Resolution No. 2009-R6 because the decision of council in both instances is contrary to law or its decision is arbitrary and constitutes an abuse of discretion.
2. Joseph Preston Carson III is a person within the meaning of section 114-930.8 (d) of The Code of the City of Richmond, Virginia (2004) hereinafter “the code” and/or “code”, as the term “person” is specifically defined in Section 1-2 of the code, entitled “Definitions and Rules of Construction,” and accordingly your petitioner has standing to appeal the decision of the City Council of Richmond, Virginia, pursuant to code Section 114-930.8(d).
3. Code section 114-930.8 (d) enacted by council pursuant to Section 15.2-2306 of the Code of Virginia, provides that “Any person may appeal any decision of the city council to affirm, modify or reverse a decision of the commission, made pursuant to this division to the circuit court for review by filing a petition at law. The petition shall set forth the alleged illegality of the action of the city council and the grounds thereof. The petition shall be filed within 30 days after the decision of the city council. ... A copy of the petition shall be delivered to the city clerk....”

Accordingly, this court has jurisdiction to adjudicate the appeal and furthermore this appeal has been timely filed.

4. On February 23, 2009 Council voted to approve Resolution Number 2009-R7-28 which resolution stated; “To reverse the decision of the Commission of Architectural Review denying Application No. 08-114, made by DGM Properties, Inc. to construct a 33-unit condominium project on properties known as 3618-3626 East Broad Street and 3609-3611 East Marshall Street in the Chimborazo Park Old and Historic District.”

(Copy attached as plaintiff’s Exhibit “1”)

5. On February 23, 2009 Council voted to strike Resolution Number 2009-R6 which resolution stated; “To affirm the decision of the Commission of Architectural Review denying Application No. 08-114, made by DGM Properties, Inc. to construct a 33-unit condominium project on properties known as 3618-3626 East Broad Street and 3609-3611 East Marshall Street in the Chimborazo Park Old and Historic District.” (Copy attached as plaintiff’s Exhibit “2”)

6. On or about July 25, 2008 developer filed an application with CAR for a certificate of appropriateness for a certain project known as “Oakwood Heights” to be constructed in the east end of Richmond in the Chimborazo Park Old and Historic District.

7. On or about November 25, 2008 CAR denied developer’s application for a certificate of appropriateness.

8. Developer appealed the decision of CAR to council and CAR filed a response with city council as required by code. (See memorandum dated December 23, 2008 concerning Application No. 08-114 which memorandum was filed by CAR with city council in response to developer’s appeal to council and which memorandum is part of the council’s record in this matter.)

9. On February 23, 2009 council reversed the decision of CAR.
10. The real estate belonging to the developer, known as “Oakwood Heights” which is the subject of this appeal is located within the Chimborazo Park Old and Historic District as described in city code section 114-930.5.
11. Certain real estate belonging to Carson, consisting of 9 lots, is located within the Chimborazo Park Old and Historic District as described in city code section 114-930.5. Furthermore, the aforesaid 9 lots belonging to Carson, lie adjacent to the property belonging to the developer and/or lie in the same block as the proposed project known as “Oakwood Heights.”
12. With the exception of the alteration of one historic house, built circa 1900, belonging to the developer located at 3626 East Broad St., the project proposed by the developer is correctly characterized as new construction.
13. City code section 114-930. 7 (c) states as follows: “*Standards for new construction.* The commission of architectural review shall approve new construction which it deems to be compatible with the design, scale, materials, color, height, setback, and other pertinent features of the old and historic district in which it is located. The commission may adopt additional new construction standards for the review of certificates of appropriateness to supplement these standards.”
14. City code Sec. 114-930.2 states as follows: “*Purpose.* The purpose of creating old and historic districts is to provide a means by which the city council may recognize and protect the historic, architectural, cultural, and artistic heritage of the city. This process of historic preservation is a part of the promotion of the general welfare and the protection of community health and public safety of the city through the identification, preservation

and enhancement of buildings, structures, landscapes, settings, neighborhoods, sites and features with special historic, cultural, artistic, and architectural significance. To achieve this general purpose, the city seeks to pursue the following specific purposes:

(1) The identification, designation, and protection of historic resources throughout the city.

(2) The promotion of harmony of style, form, color, proportion, texture and material between buildings of historic design and those of more modern design. [emphasis added]

(3) The recognition and protection of appropriate settings and environments for historic districts, buildings, structures and sites. [emphasis added]

(4) The enhancement of the quality of life for residents and the providing of attractions to visitors by preserving the historic resources of the city.

(5) The education of residents and visitors about the city's historic resources.

(6) The incorporation of historic preservation into the permit review process of the city.

15. In defining the responsibilities and duties of the Commission of Architectural Review, city code section 114-930.3 (d) states as follows: "*Responsibilities and duties.* The commission of architectural review shall have the power and authority to issue or deny certificates of appropriateness for construction, alteration, reconstruction, repair,

restoration, or demolition within any old and historic districts. In addition, **the commission shall have the duty to: ...**

(6) Adopt architectural guidelines and architectural standards applicable to properties located in old and historic districts. [emphasis added]

(7) Adopt guidelines for the delegation to the secretary of the review and approval of applications for certificates of appropriateness...

16. City code section 114-930.3 (e) states as follows: “(e) *Rules of procedure.* The commission of architectural review shall be authorized to adopt rules of procedure for the transaction of its business and implementation of the purposes of this division. The rules of procedure shall not conflict with this division.”

17. City code section 114-930.7 (g) states as follows: “*Adoption of architectural guidelines.* The commission of architectural review may adopt architectural guidelines for any old and historic district to assist the public and the commission in planning for and reviewing exterior modifications within such district. Such guidelines shall be advisory only and shall not replace the review required by this division.” [emphasis added]

18. **City code section 114-930.4 (e) states as follows: “*Relation to other districts.* Old and historic districts shall be in addition to the underlying zoning and shall be applied so as to overlay and be superimposed on such other zoning districts as permitted by this chapter and shown on the official zoning map.** Any property lying within an old and historic district shall also lie within one or more of such other zoning districts, which shall be known as underlying districts.” [emphasis added]

19. Carson contends that council acted illegally when it approved Resolution No. 2009-R7-28 and council acted illegally when it struck Resolution No. 2009-R6 because the decision of council in both instances is contrary to law or its decision is arbitrary and constitutes an abuse of discretion.

20. The City of Richmond, and hence city council, derives its power and authority to establish historic district(s) and to enact and enforce certain laws pursuant to the establishment of an historic district(s) from Virginia Code section 15.2-2306.

21. Code section 114-930.8 (c) entitled “*Review by City Council*” states in part; “... city council may reverse or modify the decision appealed, in whole or in part, **when it is satisfied that the decision of the commission is in error** under this division, or the city council may affirm the decision of the commission.... [emphasis added].

22. Following its November 25, 2008 meeting, CAR sent the developer a letter dated November 26, 2008 which stated in part: “**Application denied.** Specifically the Commission found the massing of the proposed construction incompatible with the existing Chimborazo Park Old and Historic District.”

23. Pursuant to code section 114-930.8 CAR also filed a response to the developer’s petition for appeal to city council of CAR’s decision to deny developer a certificate of appropriateness, which response set forth in detail the reasons CAR denied the developer’s application. At page 4 of CAR’s response dated December 23, 2008, CAR stated: “...the Commission voted to deny the application for certificate of appropriateness as stated in the minutes due to concerns about the “size, mass, and scale of the proposed development overwhelming the scale present in the existing Old and Historic District.”

24. Council referred the matter to its Land Use Committee which voted to approve the project and hence the Land Use Committee recommended that council reverse the decision of CAR denying developer a certificate of appropriateness.

25. Council met on February 23, 2009 and held a public meeting where developer's appeal was heard by council. Following a 30 minute period of public comment, council voted to reverse the decision of CAR and voted in favor of Resolution No. 2009-R7-28.

26. Prior to casting their votes the council members stated their reasons for reversing CAR.

27. **Carson contends that the individual reasons given by council members prior to casting their votes are inadequate as a matter of law and do not comply with city or state code with regard to a finding of error to the decision of CAR denying a certificate of appropriateness to developer.** (A copy of a DVD containing the portion of council's February 23, 2009 meeting regarding the two resolutions and a transcription is attached hereto collectively as petitioner's exhibit "3)

28. Carson contends that although council's resolutions state that council either did or did not find error in the action of the Commission of Architectural Review, as the case may be, the fact of the matter is that when council reviewed the actions of CAR on February 23, 2009, **the individual reasons given by council members prior to their respective votes were not lawful reasons to find error in CAR's decision** as required by the Code of Virginia Section 15.2-2201 et seq. and specifically section 15.2-2306 of the Code of Virginia, and code section 114-930.2 et seq. of the code of the City of Richmond.

29. Carson contends that **because council as a body did not state a specific reason(s) why council found CAR's decision to be in error, council's actions and decision to pass resolution 2009-R7-28 and to strike resolution 2009-R6 is contrary to law, arbitrary and constitutes an abuse of discretion.**

30. Carson contends that because council did not in fact state a reason(s) for its decision finding CAR in error, we are left with only conjecture and speculation as to why council reversed CAR. Accordingly, council's decision is contrary to law, arbitrary and constitutes an abuse of discretion.

COUNT 2

31. Your petitioner, Joseph Preston Carson III, incorporates and re-alleges his allegations contained in paragraphs 1 – 21 contained in Count One hereof as if fully set out in Count Two.

32. The developer has submitted conceptual plans to CAR but **the developer has not submitted plans and specifications setting forth with reasonable specificity the materials, colors and texture of the buildings to be constructed by developer nor has the developer submitted plans and specifications containing the type of windows, exterior doors, lights, signs, site improvements, and other exterior fixtures and appurtenances as required by city code.**

33. Section 114-930.6 (b.) states as follows: "... *Submission of application.* An application for certificate of appropriateness required pursuant to this section shall be submitted to the secretary of the commission of architectural review in writing by the owner of such building or structure. When a work-in-street, land disturbing, building,

sign or demolition permit is required, the applicant shall apply for other necessary permits at the same time an application for a certificate of appropriateness is submitted.

The application for such certificate of appropriateness shall be accompanied by plans and specifications which shall show the proposed exterior architectural features of such building or structure, **which shall include but shall not be limited to the design, arrangement, texture, materials and color proposed to be used in the construction,** alteration, reconstruction, repair, restoration, or demolition of the building or structure **and the type of windows, exterior doors, lights, signs, site improvements, and other exterior fixtures and appurtenances.** [emphasis added] Upon the filing of such application with the secretary of the commission, the secretary shall promptly transmit it with such plans and specifications to the commission....”

34. City code Sec. 114-930.2 states as follows: “The purpose of creating old and historic districts is to provide a means by which the city council may recognize and protect the historic, architectural, cultural, and artistic heritage of the city.... To achieve this general purpose, the city seeks to pursue the following specific purposes: ... (2) The promotion of harmony of style, form, color, proportion, texture and material between buildings of historic design and those of more modern design....”

35. Carson contends that because the developer did not submit plans and specifications including the design, arrangement, texture, materials and color proposed to be used in the construction, alteration, reconstruction, repair, restoration, or demolition of the building or structure and the type of windows, exterior doors, lights, signs, site improvements, and other exterior fixtures and appurtenances as required by city code Section 114-930.6 (b.), and because council reversed the decision of CAR without

requiring the developer to submit plans and specifications including the design, arrangement, texture, materials and color proposed to be used in the construction, alteration, reconstruction, repair, restoration, or demolition of the building or structure and the type of windows, exterior doors, lights, signs, site improvements, and other exterior fixtures and appurtenances, as required by code, council has not lawfully met the requirements of city code with regard to promoting harmony of style, form, color, proportion, texture and material between buildings of historic design and those of more modern design.

36. Carson contends that council unlawfully failed to request the information from the developer that was required by city code Section 114-930.6 (b.) to be available to them and upon which they could make a reasonable decision concerning the harmony of style, form, color, proportion, texture and material between buildings of historic design and those of more modern design.

37. Carson contends that without the plans and specifications as required by code section 114-930.6 (b.), council could not have possibly made a reasonable determination of whether or not the harmony of style, form, color, proportion, texture and material between buildings of historic design and those of more modern design as contained in the Oakwood Heights project will be compatible with the Chimborazo Park Old and Historic District as required by city code and state statute as “Standards for new construction,” section 114-930.7 (c).

38. Carson contends that by reversing the decision of CAR, without requiring the developer to submit a set of plans and specifications as required by Section 114-930.6(b.), city council has effectively removed the area within the boundary lines of the

project known as “Oakwood Heights” from the Chimborazo Park Old and Historic District contrary to the laws of the City of Richmond and contrary to the laws of the State of Virginia.

39. Carson contends that by reversing the decision of CAR without requiring the developer to submit a set of plans and specifications as required by Section 114-930.6 (b), council has unlawfully permitted the developer to build any building within the boundaries of the project so long as the building meets the appropriate building and zoning ordinances but without regard to the overlying historic district where it lies.

COUNT 3

40. Your petitioner, Joseph Preston Carson III, incorporates and re-alleges his allegations contained in paragraphs 1 – 21 contained in Count One as if fully set out in Count Three.

41. City council violated what is commonly known as Dillon’s Rule by voting to reverse CAR based upon politics and other factors such as zoning, contrary to the act preserving historic areas and contrary to state law as specified in code section 15.2-2306 of the Code of Virginia. In *Board of Sup. Loudoun Cty. v. Town of Purcellville*, 276 Va. 419, 437, 666 S.E.2d 512, ___ (2008), The Virginia Supreme Court has stated Dillon’s Rule as follows:

In *City of Richmond v. Board of Supervisors*, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958), we stated the general “Dillon’s rule” as follows:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable.

Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied. *Winchester v. Redmond*, 93 Va. 711; 25 S.E. 1001, 57 Am. St. Rep. 822 [1896]; *Wallace v. Richmond*, 94 Va. 204, 26 S.E. 586, 36 L.R.A. 554 [1897]; *Railway Co. v. Dameron*, 95 Va. 545, 28 S.E. 951 [1898]; *Duncan v. City of Lynchburg*, 2 Va. Dec. 700, 34 S.E. 964, 48 L.R.A. 331 [1900]. *Board of Sup. Loudoun Cty. v. Town of Purcellville*, 276 Va. 419, 437, 666 S.E.2d 512, ___ (2008)

42. City code section 114-930.4 (e) states as follows: “*Relation to other districts. **Old and historic districts shall be in addition to the underlying zoning and shall be applied so as to overlay and be superimposed on such other zoning districts as permitted by this chapter and shown on the official zoning map.*** Any property lying within an old and historic district shall also lie within one or more of such other zoning districts, which shall be known as underlying districts.” [emphasis added]

43. Carson concedes that the project met the underlying zoning requirements insofar as CAR is concerned. However, the Chimborazo Park Old and Historic District is an overlay district which imposes additional restrictions upon the land which must be complied with before new construction may be approved in an Old and Historic District. (CAR does not determine zoning issues.)

44. In voting to reverse the decision of CAR, council ignored the additional restrictions placed upon the land by virtue of the fact that the property owned by the developer, known as the Oakwood Heights development, had been included in the Chimborazo Park Old and Historic District.

45. Developer purchased all of the property located within the Oakwood Heights project after the property was placed in the Chimborazo Park Old and Historic District.

46. Carson has owned some of the property located in the same block as the proposed development for over 24 years and has purchased property located within the block both

before and after the block had been included in the Chimborazo Park Old and Historic District.

47. City council is not required by state statute to designate property as being in an old and historic district, (Va. Code section 15.2-2306), but having exercised its permitted authority under Va. Code section 15.2-2306, council must then abide by state statute in carrying out the requirements of the statute. (See Dillon's Rule cited above.)

48. Council may not act or adopt a set of rules contrary to state law when establishing a commission of architectural review nor may council vote to reverse a decision of CAR for reasons insufficient at law. (See Dillon's Rule cited above.)

49. Carson, being a property owner located in the same historic district as developer's project, is entitled to equal protection of the law and is also entitled to having the rules and regulations and the various laws imposed by the establishment of an historic overlay district enforced pursuant to the laws of the city of Richmond, pursuant to the laws of the Commonwealth of Virginia and in accordance with the 14th Amendment to The Constitution of the United States of America.

50. Carson contends that council has acted illegally and has not enforced the various laws imposed by the establishment of an historic overlay district pursuant to the laws of the city of Richmond, pursuant to the laws of the Commonwealth of Virginia and in accordance with the 14th Amendment to The Constitution of the United States of America.

COUNT 4

51. Your petitioner, Joseph Preston Carson III, incorporates and re-alleges his allegations contained in paragraphs 1 – 21 contained in Count One as if fully set out in Count Four.

52. Under the statutory scheme as provided by the state legislature and the code of the city of Richmond, **any person** may appeal a decision of CAR and/or a decision by city council after council hears an appeal from a decision of CAR.

53. While Carson agrees with the final decision of CAR with respect to CAR's denial of developer's application for a certificate of appropriateness, Carson contends that Carson is not limited or constrained in his petition for appeal to this court by CAR's reasons for denial as set forth by CAR in CAR's process of approving or denying the developer's application for a certificate of appropriateness.

54. In addition to the reasons set forth by CAR in its denial of a certificate of appropriateness, Carson contends that the certificate for appropriateness should have also been denied for the following reasons:

a. The block currently consists of two-story homes, situated on lots having an average width of approximately 25 feet each. The Oakwood Heights project consists of four buildings. (See developer's conceptual plans submitted by the developer and included in the city clerk's record as part of CAR's response to the developer's appeal to city council.) Two of the proposed buildings are four-story buildings located in the interior of the project and do not face a public street, but instead face a 20 foot wide private driveway with a sidewalk on one side only. Carson contends that these two interior buildings are not compatible with the design, scale, height, set back and other pertinent features of the Chimborazo Park Old and Historic District.

b. Carson contends that in order to be compatible with the design, scale, height, set back and other pertinent features of the Chimborazo Park Old and Historic District, the proposed private driveway, which Carson contends is tantamount to a public street, although privately owned, providing the primary ingress and egress to the two interior buildings within Oakwood Heights, should have a pavement width of 30 feet with sidewalks on either side of the driveway, resulting in an overall width of 50 feet similar to north 36th street which abuts the western side of the block and runs parallel to the proposed private driveway and is wide enough to permit parallel parking in the street.

c. Carson contends that in order to be compatible with the design, scale, height, set back and other pertinent features of the Chimborazo Park Old and Historic District the Oakwood Heights buildings facing the private driveway, which Carson contends is tantamount to a public street, although privately owned, providing the primary ingress and egress to the two interior buildings within Oakwood Heights, should conform to the front yard set back requirement of houses located on North 36th Street which runs parallel to the private driveway.

d. Carson contends that in order to be compatible with the design, scale, height, set back and other pertinent features of the Chimborazo Park Old and Historic District, head in parking, or parking at a 90 degree angle in front of a building and within the front yard set back, should not be permitted adjacent to the private driveway, which Carson contends is tantamount to a public street, although privately owned, providing the primary ingress and egress to the two interior buildings within Oakwood Heights

e. Carson contends that constructing paved parking spaces within the front yard setback of the buildings facing the private driveway, which Carson contends is

tantamount to a public street, although privately owned, providing the primary ingress and egress to the two interior buildings within Oakwood Heights, and therefore permitting parking perpendicular to the front of a building is not compatible with the design and front yard set back requirements within the rest of the block and is not compatible with the general character of Chimborazo Park Old and Historic District in general.

f. City code section Sec. 114-930.6(a) states as follows: “Certificate of appropriateness. (a) *Approval required.* No building or structure or any exterior portion thereof, sign **or paving** shall be constructed, altered, reconstructed, repaired, restored or demolished within any old and historic district unless the building or structure or any exterior portion thereof, sign or paving is approved by the commission of architectural review or, on appeal, by the city council, **as being architecturally compatible with the buildings, structures, sites and general character of the old and historic district.** All such approvals shall be evidenced by a certificate of appropriateness. No permit to construct, alter, reconstruct, repair, restore or demolish any building, structure or site shall be issued by the commissioner of buildings unless the applicant has first obtained approval of a certificate of appropriateness for such work. [emphasis added]

g. Carson contends that having paved parking spaces in front of the interior buildings facing the private driveway, which Carson contends is tantamount to a public street, although privately owned, providing the primary ingress and egress to the two interior buildings within Oakwood Heights, is incompatible with the general character of the Chimborazo Park Old and Historic District in violation of section 114-930.6 (a) of the city code.

h. Carson contends that in order to be compatible with the design, scale, height, set back and other pertinent features of the Chimborazo Park Old and Historic District the two Oakwood Heights buildings facing the private driveway, which Carson contends is tantamount to a public street, although privately owned, providing the primary ingress and egress to the two interior buildings within Oakwood Heights, should be two-stories in height as viewed from the private driveway. Since the contour of the land slopes downward away from the private driveway and toward the east, Carson does not object to the height of the interior buildings facing the private driveway becoming four-story buildings as viewed from the rear, (east), so long as the buildings appear to be two-story buildings when viewed facing east from the western side of the private driveway which runs north and south and parallel to North 36th Street.

COUNT FIVE

55. Your petitioner, Joseph Preston Carson III, incorporates and re-alleges his allegations contained in paragraphs 1 – 21 contained in Count One as if fully set out in Count Five.

56. Under the statutory scheme as provided by the Virginia state legislature and the code of the city of Richmond, **any person** may appeal a decision of CAR and/or a decision by city council after council hears an appeal from a decision of CAR.

57. While Carson agrees with the final decision of CAR with respect to its denial of developer's application for a certificate of appropriateness, Carson contends that Carson is not limited or constrained in his petition for appeal to this court by CAR's reasons for

denial as set forth by CAR in CAR's process of approving or denying the developer's application for a certificate of appropriateness.

58. In addition to the reasons set forth by CAR in its denial of a certificate of appropriateness, Carson contends that the certificate for appropriateness should have also been denied for the following reasons:

a. Carson contends that although the developer submitted conceptual plans to CAR, the developer did not submit plans and specifications pursuant to city code section 114-930.6 (b) which shall show the proposed exterior architectural features of such building or structure, which shall include but shall not be limited to the design, arrangement, texture, materials and color proposed to be used in the construction, alteration, reconstruction, repair, restoration, or demolition of the building or structure and the type of windows, exterior doors, lights, signs, site improvements, and other exterior fixtures and appurtenances.

b. Carson contends that because the developer did not submit detailed plans as required by city code section 114-930.6 (b) that **Carson is unable** to determine or assess whether or not the arrangement, texture, materials and color proposed to be used in the construction and the type of windows, exterior doors, lights, signs, site improvements, and other exterior fixtures and appurtenances other pertinent features will be compatible with the Chimborazo Park Historic District.

59. Section 114-930.6 (b.) states as follows: "... *Submission of application.* An application for certificate of appropriateness required pursuant to this section shall be submitted to the secretary of the commission of architectural review in writing by the owner of such building or structure. When a work-in-street, land disturbing, building,

sign or demolition permit is required, the applicant shall apply for other necessary permits at the same time an application for a certificate of appropriateness is submitted.

The application for such certificate of appropriateness shall be accompanied by plans and specifications which shall show the proposed exterior architectural features of such building or structure, **which shall include but shall not be limited to the design, arrangement, texture, materials and color proposed to be used in the construction,** alteration, reconstruction, repair, restoration, or demolition of the building or structure **and the type of windows, exterior doors, lights, signs, site improvements, and other exterior fixtures and appurtenances.** [emphasis added] Upon the filing of such application with the secretary of the commission, the secretary shall promptly transmit it with such plans and specifications to the commission....”

60. Upon information and belief, developer did not file the other necessary permits at the same time as an application for a certificate of appropriateness was submitted as required under section 114-930.6 (b).

61. Carson also contends that because plans and specifications were not submitted by the developer as required by code, CAR and /or council should have denied the application for a certificate of appropriateness for that reason alone.

62. Carson also contends that because plans and specifications were not submitted as required by code, CAR and subsequently council have unlawfully given the developer permission to build whatever buildings the developer wants to build upon the site, so

long as the buildings meet the requirements of the applicable building and zoning codes and without regard to the overlying historic district.

COUNT SIX

63. Your petitioner, Joseph Preston Carson III, incorporates and re-alleges his allegations contained in paragraphs 1 – 21 contained in Count One as if fully set out in Count Six.

64. The Virginia Legislature by enacting code section 15.2-2306 of the Code of Virginia as amended has provided its citizens with the right to file appeals of decisions of CAR and/or council to the circuit court and subsequently to petition the Supreme Court of Virginia.

65. In order for the legislative scheme concerning historic districts as set forth in the Code of Virginia to work properly and in order to protect the rights of any person to appeal a decision made by CAR and/or council each entity (CAR, council and the circuit court) must maintain the proper procedure and follow the appropriate statutes and/or ordinances and city codes so that ultimately the Supreme Court of Virginia may have a proper record upon which to adjudicate an appeal to that court if the Supreme Court of Virginia decides to grant an appellant a writ of appeal.

66. Because any person may appeal the decision of council when council affirms or reverses CAR, it is incumbent upon council to clearly state the reasons for its actions so that a person entitled to appeal the decision of council to the circuit court has a complete, unambiguous record upon which to base an appeal.

67. While individual council members made statements just prior to casting their vote, council as a body did not state the reasons for council's reversal of CAR other than stating in its resolution that CAR was in error.

68. Although code section 114-930.8 (c) grants council the right to call witnesses, none were called in this instance. Council allowed 15 minutes of public comment from those in support of the resolution and 15 minutes of public comment from those in opposition to the resolution.

69. Carson contends that because council did not in fact state a reason(s) for its decision finding CAR in error, council's decision is contrary to law, arbitrary and constitutes an abuse of discretion.

70. Carson contends that because council did not in fact state a reason(s) for its decision finding CAR in error, we are only left with conjecture and speculation as to why council reversed CAR. Accordingly, council's decision is contrary to law, arbitrary and constitutes an abuse of discretion.

71. Carson contends that because council did not state a specific reason(s) why council found CAR's decision to be in error and because Carson has a statutory right to appeal a decision of council to affirm or reverse a decision of CAR to the circuit court, such vague and/or arbitrary action by council constitutes an abuse of discretion.

72. Carson also contends that because he has the right to appeal a decision of city council pursuant to city and state code, and because the vague and arbitrary decision by council detrimentally affects his right of appeal to the circuit court, the actions of city council in this case also violates the due process clause of Article 1, Section 11 of The

Constitution of the Commonwealth of Virginia, and the equal protection clause of the 14th Amendment to The Constitution of the United States of America.

73. Article 1, Section 11 of The Constitution of Virginia states as follows:

Section 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases. — That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five. Va. Constitution Va. Con. Art. 1 § 11 (1971)

74. Section 1 of the 14th Amendment to The Constitution of the United States of America states as follows:

Section 1. Citizenship Rights Not to Be Abridged by States. -- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Constitution U.S. Con. 14th Amd., § 1 (1868)

WHEREFORE, your Plaintiff prays that this court reverse the action taken by council on February 23, 2009 and affirm the decision of CAR denying the developer a certificate of appropriateness or in the alternative, modify the decision of council in accordance with Count Four herein.

Respectfully Submitted,

JOSEPH PRESTON CARSON III

By _____
Of Counsel

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Counsel for the petitioner

CERTIFICATE

I hereby certify that in accordance with city code section 114-930.8 (d) a true copy of the foregoing Petition for Appeal, addressed to the city clerk, was delivered by hand to the city clerk's office located in City Hall in Richmond, Virginia on this 25th day of March, 2009.

David M Branch