V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

COUNTY OF CHESTERFIELD,

v. Case No.:

C.L. MORRISSETTE, JR., Defendant.

TRIAL MEMORANDUM

Comes now your defendant, C.L. Morrissette, Jr., by counsel, in support of his arguments and states as follows:

STATEMENT OF FACTS

Your defendant is a resident of Chesterfield County, who resides at 12301 Beach Road, Chesterfield, Virginia 23838. On or around June, 2005, Morrissette erected two freestanding signs on his private property. The signs are painted 4 x 8 sheets of plywood supported by posts. The content on the signs is self-explanatory and is attached hereto collectively as Exhibit A. On or around October 12, 2005, a Chesterfield County Code Compliance Officer cited your defendant originally as being in violation of Chesterfield County Ordinance 19-637(u) which is classified as a Class (U) misdemeanor. See Exhibit B. The general chapter 19-637 authorizes the erection of certain signs subject to conditions.

Chesterfield Ordinance Section 19-637(u) authorizes the placement of:

> (u) Signs containing religious, educational, or charitable messages, or which advertise an event for non profit organizations, provided that they do not exceed eight square feet in area, and five feet in height.

According to the Chesterfield County ordinance 19-631, the stated intent justifying the regulation of signs in the county is to "regulate the use of a publicly visible displays or graphics; to protect and enhance the character of roadways and surrounding areas; to prevent diminishing

property values due to excessive signage; to safeguard the public use and nature of roadways; and to minimize visual distractions to motorists along public roads." Chesterfield County Ordinance Section 19-631. See Exhibit C.

Chesterfield County Ordinance Section 19-632 sets forth various definitions applicable to the sign restrictions. Section 19-632 does not include a definition of a (1) religious, (2) education, or (3) charitable message as regulated by 19-637(u).

ARGUMENT

The defendant in this case raises several defenses to the charge including:

1. 19-637(u) does not apply, as a matter of law, to the defendant's signs insofar as they do not include a religious, educational, or charitable message.

2. If the defendant's signs are subject to regulation under 19-637(u), the ordinance is void as vague and subject to arbitrary enforcement.

3. That the ordinance violates the defendant's right to free speech, both on its face and as applied.

In order to preserve the defendant's challenges, both factually and constitutionally, the defendant argues as follows:

A. The defendant's signs are not subject to control under 19-637(u).

Subparagraph 19-637(u) seeks to regulate religious, educational, or charitable messages by limiting the area and height of such signs. In this case, the defendant's signs and/or their content do not fall within the ordinary meaning of religious, educational, or charitable. Specifically, Websters New Collegiate Dictionary defines "religious" as "relating to or manifesting faithful devotion to an acknowledged ultimate reality or deity." Websters New Collegiate Dictionary, Copyright 1973. Websters also defines charitable as "full of love for and

good will towards others." Id. Lastly, Webster defines educational as "a field of study that deals with methods of teaching and learning in schools." Id.

The defendant's signs contain language as set forth on Exhibit A. In this case, and based on the ordinary meaning of these three terms, the defendant's content and/or his signs do not fall within the restrictions created by 19-637(u). Frankly, there do not appear to be any ordinance sections in 19-637 ("limitation on specific signs") which address the content of the defendant's signs. Having said that, the defendant should be found not guilty of violating section 19-637(u) as charged.

B. The Ordinance is unconstitutionally vague, on its face as and as applied.

If the Ordinance is so broad as to include the defendant's signs, then it is unconstitutionally vague. A law is unconstitutionally vague if "men of ordinary intelligence must necessarily guess at its meaning." Hynes v. Mayor of Oradell, 425 U.S. 610, 622 (1976) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). Vague laws violate the due process clause of the Fourteenth Amendment. Smith v. Goguen, 415 U.S. 566, 574 (1974). In general, the danger of vague laws is twofold: They fail to give citizens reasonable notice of what conduct is prohibited, and thus "trap the innocent by not providing fair warning," and they vest unfettered discretion in the police, giving rise to a likelihood of arbitrary enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Kolender v. Lawson, 461 U.S. 352, 357 (1983). Accordingly, Virginia courts have employed a "two pronged test" in evaluating vagueness challenges: "First, the language of the statute must provide a person of average intelligence a reasonable opportunity to know what the law expects from him or her. Second, the language must not encourage arbitrary and discriminatory selective enforcement of the statute." Gray v.

Commonwealth, 30 Va. App. 725, 732, 519 S.E.2d 825, 828 (1999).

The Ordinance here – if read to include the defendant's signs – fails on both counts. As noted earlier, the Ordinance does not provide a definition of "religious," "charitable" or "educational." No reasonable person could be expected to understand that those terms would encompass a sign, like defendant's that criticizes government officials and policies.

Moreover, a reading of the statute broad enough to encompass defendant's signs encourages selective enforcement. Such a broad interpretation allows the government to single out signs, such as the defendant's that are critical of government officials.

C. The Ordinance violates the First Amendment

Residential lawn signs with political messages are core speech entitled to a high degree of First Amendment protection. City of Ladue v. Gilleo, 512 U.S. 43 (1994). In Ladue, which struck down a near-total ban on such signs, the Court recognized the long tradition of respect for individual liberty in one's home. The principle has special resonance when government seeks to constrain a person's ability to speak at home. Id. Signs that react to a local event, or express a view on a controversial issue, both reflect and animate change in the life of a community. These signs also play an important role in political campaigns and signal a homeowner's position on various issues. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been a distinct medium of expression. Id. Moreover:

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." . . . .Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. . . . Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.

Id. at 56-57. In light of the importance of residential signs as a means of expression, the Court should be very reluctant to impose criminal penalties for political signs on public property.

The Fourth Circuit has set forth the First Amendment test for such sign ordinances as follows:

> [W]e first question whether the [restriction] burdens any speech. If we find any burden, we must then determine whether the [restriction] imposes content neutral or content based restrictions. If it is content neutral, we must then decide whether the [restriction] serves any substantial interest of [the government]. If the [government] identifies any interest, we must then determine whether the [government] narrowly tailored the [restriction] to further this stated interest. Finally, we must also assess whether the [restriction] leaves open ample alternative means for communicating the desired message.

Arlington County Republican Committee v. Arlington County, 983 F.2d 587, 593 (4th Cir. 1993). The Ordinance at issue here fails this test. First, it is a content based restriction that regulates some kinds of speech more harshly than others. Second, even if the regulation were content-neutral, it would be unconstitutional because it is not narrowly tailored to serve any substantial interest.

1. The Ordinance is content-based.

"With rare exceptions, content discrimination in regulations of the speech of private citizens on private property . . . is presumptively impermissible, and this presumption is a very strong one." Ladue, 512 U.S. at 59 (O'Connor, J. concurring). The Ordinance at issue here is content-based because it regulates the size of a sign based solely on its "religious, educational, or charitable message[]." Indeed, much of Section 19-631 (which is attached hereto for the Court's convenience), essentially parses various types of signs by content, and imposes different sets of restriction according to each type of message. For example, the Ordinance restricts imposes specific restrictions on farming signs, residential community identification signs, "now hiring"

signs, Christmas tree vendor signs, and campaign signs. With respect to the size of signs, "religious, educational, or charitable" signs are restricted to eight square feet, while farming signs are allowed twelve square feet, residential community identification signs are allowed twenty square feet, and Christmas tree vending signs and campaign signs may be thirty-two square feet.

Courts have consistently struck down ordinances that impose different time, place and manner limitations on signs based on their content. For example, in Cafe Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274 (11th Cir. 2004) the court invalidated an ordinance that, like the Ordinance at issue here, imposed content-based size limitations on signs. The present case is indistinguishable. Whatever may be the County's interest in regulated the size of signs, it may not discriminate based on content when it does so.

2. The Ordinance cannot even meet the standard for content-neutral restrictions.

Even if the Ordinance were somehow considered content-neutral, it would not meet the First Amendment requirement that it be narrowly tailored to serve a substantial government interest.

According to the County Code, the purposes for the sign limitations are "to regulate the use of publicly visible displays or graphics; to protect and enhance the character of roadways and surrounding areas; to prevent diminishing property values due to excessive signage; to safeguard the public use and nature of roadways; and to minimize visual distractions to motorists along public roads." Chesterfield Ordinance 19-631. But the sign regulations are not narrowly tailored to achieve those purposes.

First, it is apparent that Chesterfield County's interests in promoting highway safety and reducing visual clutter do not require signs to be limited to eight square feet. If that were the

case, the County would not permit larger farming signs, residential signs, political campaign signs, and Christmas tree signs. Second, given the setbacks required by the County (15 feet from all property lines and 20 feet from public right of ways; *see* Chesterfield Ordinance 19-636), a size limitation of eight square feet unreasonably limits property owners' ability to reach passersby with messages.

C.L. Morrissette

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CERTIFICATE

I certify that on this 25th day of April, 2006, a true copy of the foregoing document was faxed and mailed to Tara McGee, Chesterfield County Assistant Attorney, at 717-6297 and P.O. Box 40, Chesterfield, Virginia 23832.

_____
Charles A. Gavin