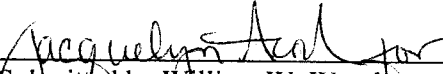


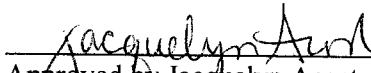


City of Carson Report to Mayor and City Council

July 16, 2013
New Business Consent

SUBJECT: CONSIDER RESOLUTION NO. 13-070 PERTAINING TO LEGISLATIVE INVOCATIONS


Submitted by William W. Wynder
City Attorney


Approved by Jacquelyn Acosta
Acting City Manager

I. SUMMARY

On May 21, 2013, the Office of the City Attorney briefed the City Council on a recent Ninth Circuit Court of Appeals ("Ninth Circuit") decision in *Rubin v. City of Lancaster*, Case No. 11-56318, which provides a ***new and very different position on legislative invocations*** than that reflected in *Rubin v. City of Burbank*, (2002) 101 Cal.App.4th 1194, a state court appellate decision that California cities have relied on for over 10 years in determining the proper procedures for allowing legislative invocations.

Following its review of this May 21, 2013 report, the full City Council referred this subject to the Policy Committee of the City Council for a more careful analysis and possible recommendation of the adoption of an invocation policy consistent with this Ninth Circuit decision.

The item is now on the City Council agenda following the review of, and upon the recommendation of, the Policy Committee. The attached resolution would establish a City invocation policy consistent with the requirements set forth in the opinion of the Ninth Circuit in the *Lancaster* case.

II. RECOMMENDATION

Upon the recommendation of the Policy Committee, WAIVE further reading and ADOPT Resolution No. 13-070, "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA, ESTABLISHING A POLICY REGARDING INVOCATIONS AT CITY COUNCIL MEETINGS."

III. ALTERNATIVES

1. DIRECT the preparation of a revised legislative invocation policy for presentation to the full City Council at a future meeting for consideration and possible action;
2. TAKE any other action as is permitted by law.
3. RECEIVE and FILE this report and take no action on the same.

IV. BACKGROUND

In 2009, the City of Lancaster (“City”) was served with a cease and desist letter from the ACLU challenging the invocations. In response, the City took a number of steps, including the adoption of a written policy and placing a nonbinding measure on the city ballot. As the Ninth Circuit eventually upheld the City’s policies on the basis of everything the City had done to stay neutral, we will go into detail in describing them.

The policy also provided that, it “is not intended, and shall not be implemented or construed in any way, to affiliate the City Council with, nor express the City Council’s preference for, any faith or religious denomination. . . .” and “is intended to acknowledge and express the City Council’s respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Lancaster.”¹ Each congregation was limited to three, nonconsecutive invocations a year.

On April 27, 2010, the former mayor for the City, Bishop Henry Hearn, delivered an invocation (“Hearn’s prayer”) in which he stated:

*Bring our minds to know you and in the precious, hold any righteous and matchless name of Jesus I pray this prayer. Amen and Amen. God bless you.*²

Plaintiffs filed a lawsuit, claiming both Hearn’s prayer and the City’s policy violated the Establishment Clause. Before Hearn’s prayer, and after the City’s new invocation policy was adopted, twenty-six invocations had been given, twenty by Christian denominations (each mentioned Jesus’ name), four were given by metaphysicists, one by a Sikh, and another by a Muslim. No person who had volunteered to pray had been turned down, and no government official attempted to influence the clerk’s selection or scheduling.³

The Ninth Circuit in *City of Lancaster* found that neither Hearn’s prayer nor the City’s invocation policy violated the Establishment Clause. In rejecting the plaintiffs’ arguments, the Ninth Circuit relied principally on the seminal Supreme Court decision of *Marsh v. Chambers*, (“*Marsh*”).⁴ In *Marsh*, the Court upheld a practice by the State of Nevada Legislature to open each meeting with an invocation given by a state-employed chaplain, a Presbyterian minister who had held the position for over 16 years.⁵

¹ See *id.*

² See *id.* at 6-7.

³ See *id.* at 7.

⁴ 463 U.S. 783 (1983).

⁵ See *id.*

The Ninth Circuit rejected Plaintiffs' reading of *Marsh* and the effect of the *Alleghany* decision. First, the Ninth Circuit found that nowhere in *Marsh* did the Court limit itself to a review to only those invocations given after the chaplain removed references to Christ, and in fact a thorough review of the type of language used and the analysis provided argued against this proposition.

The *Marsh* Court noted again and again the Christian prayers given to our Founding Fathers during the creation and forming of the Constitution and Bill of Rights and the long practice since then of using legislative prayers before opening legislative sessions in state and federal houses. Based upon looking at the *Marsh* Court's reasoning in coming up with a new test for invocations, the Ninth Circuit found that it demonstrated that there was no intent in limiting itself to the Nebraska chaplains prayers that removed all reference to Christ.⁶

Ultimately, the Ninth Circuit found that under the rule established in *Marsh*, so long as an invocation—whether sectarian or not—does not proselytize, advance, or disparage one religion or affiliate government with a particular faith it withstands scrutiny.⁷ Based upon this, the Ninth Circuit found that Hearn's prayer did not per se violate the Establishment Clause because it mentioned Jesus.

The Ninth Circuit next looked at whether the City's policy "viewed in its entirety advanced a single religious sect. Plaintiffs argued that Lancaster's policy violated the Establishment Clause because the fact that a majority (20 out of 26 invocations) were Christian, and explicitly Christian, demonstrated the policy that gave preference to one religion. In rejecting the plaintiffs' arguments, the Ninth Circuit also rejected a "frequency analysis" test adopted by two other circuits, which found a violation of the Establishment Clause whenever an invocation practice results in too large a proportion of sectarian invocations from one religious group.

The Ninth Circuit, instead found that the test under *Marsh* as to when a policy or practice "advances" one religion over others, is "whether the government has placed its imprimatur deliberately or by implication, on any one faith or religion."⁸ In finding that Lancaster's policy did not violate the Establishment Clause, the Ninth Circuit again noted the history of legislative prayer and the Framers lack of concern that an adult will be overly persuaded by the effect of legislative prayer.

The Ninth Circuit ruled that the test for whether Lancaster's policy violated the Establishment Clause was not whether, given the frequency of Lancaster's City-

⁶ See *id.* at 13-14.

⁷ See *id.* at 17.

⁸ See *id.* at 19 (quoting dissent in *Joyner v. Forsyth Cnty* (4th Cir. 2011) 653 F.3d 341, 362).

July 16, 2013

Council meetings, someone would infer favoritism toward Christianity. Rather, it is whether the City itself has taken steps to affiliate itself with Christianity.⁹ Based on this test, the Ninth Circuit upheld Lancaster's policy because they found that Lancaster had "taken every feasible precaution" to ensure evenhandedness.

The Ninth Circuit found that just because most of the speakers have been Christian was not a function of an illegal policy but was a result of demographics. That is, Lancaster did not make a choice of what religion to present, the choice was being made by the citizens who chose to reside in Lancaster and the people who volunteered to give the invocation.

Clearly, *City of Lancaster* is binding law in federal district courts and if someone challenged a California city's invocation practices in federal court, the court would be required to follow the decision in *City of Lancaster*. On the other hand, if a lawsuit was brought in a California state court, the court may follow the California Court of Appeal decision in *Rubin v. City of Burbank*, which came to a different result under very similar facts.¹⁰

The court in *City of Burbank* was asked to consider whether invocation practices at City of Burbank council meetings violated the Establishment Clause. In that case, the court found the invocation practices did violate the Establishment Clause under an analysis that was analogous to the analysis used by the plaintiffs in the *City of Lancaster* decision. Specifically, the court found that any reference to Jesus in an invocation amounted to proselytizing or advancing one religious belief or faith.

The *City of Burbank* court looking at *Marsh* and *Alleghany* found that any reference to Jesus in an invocation violated the Establishment Clause relying on the footnote in *Marsh* that noted that the Chaplain had removed all references to Christ in his later invocations.¹¹ The court stated, "[i]t cannot reasonably be argued that the prayer here, with a specific reference to Jesus Christ, is on the same constitutional footing as the prayer before the court in *Marsh*, from which all reference to a specific religion had been excised."¹² And again later, in discussing *Alleghany*, the court stated, "The court's discussion of *Marsh* in *Alleghany* reflects that it considered removal of references to Christ to have been essential to the *Marsh* ruling"¹³

⁹ See *id.* at 22.

¹⁰ 101 Cal.App.4th 1194 (2d DCA 2002).

¹¹ See *id.* at 1201.

¹² See *id.* at 1202.

¹³ See *id.* at 1203.

July 16, 2013

Further, the court found that *Marsh* prohibited all sectarian prayer.¹⁴ The court ordered that the City of Burbank Council not permit sectarian prayer and required the City to advise invocation speakers that sectarian prayers are not permitted.¹⁵ The court rejected an argument that the Burbank Council advising speakers not to provide a sectarian invocation was not a violation of the First Amendment on the basis that it was arguable that the speech would be considered government speech rather than private speech and that honoring the Establishment Clause met the heightened scrutiny of government limitations on speech.¹⁶

In comparing *City of Lancaster* to *City of Burbank*, it seems the two courts could not have decided the same issues looking at the same sources of law so differently. *City of Burbank* found all sectarian invocations to be unlawful. *City of Lancaster* found that only sectarian invocations that had some other evidence of government endorsement of a particular religion to be unlawful.

Under law, California trial courts are bound to follow Court of Appeal decisions.¹⁷ All California courts are bound by the U.S. Supreme Court on federal question, but are not bound by federal appellate courts, even on questions of federal law. State courts, including state appellate courts, generally give great weight to federal court appellate decisions.¹⁸ Additionally, a State Court of Appeal may be willing to revisit its decision, especially where there has been a new development or later development. It is not clear from these rules where this would leave a city that followed the holding in *City of Lancaster* if they were sued in a state court.

As the Ninth Circuit in *City of Lancaster* was interpreting the very same U.S. Supreme Court decisions as the *City of Burbank* court in interpreting the Establishment Clause of the Federal Constitution, it is possible that the Second District Court of Appeal would change its interpretation of *Marsh* in light of the new Ninth Circuit decision. Additionally, a lower court may be emboldened to attempt and find a different result from the court in *City of Burbank* by trying to distinguish *City of Burbank* from their case at issue based on the Ninth Circuit's decision.

Based on the foregoing analysis, the attached resolution establishes the following as the policy of the City of Carson on legislative invocations:

1. The City will formally allow legislative invocations that include sectarian references—those that mention the name of Jesus or otherwise explicitly make references to a particular religion or faith or deity—

¹⁴ See *id.* at 1204.

¹⁵ See *id.* at 1205.

¹⁶ See *id.* at 1206-07.

¹⁷ See Cal. Prac. Guide: Civ. App. & Writs, Ch. 14-D, sec. 14:193.

¹⁸ See *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97-98.

provided those selected to give the invocation are chosen under a neutral policy and practice that makes no distinctions regarding the particular faith of the speaker.

2. The City's invocation policy is being adopted by Council in writing as required by the Ninth Circuit decision.
3. Although the City will request those giving invocations to avoid using the invocation as an opportunity to advance a particular religion, proselytize, or disparage any other faith, the City shall not require that invocation speakers remove all sectarian references from the invocation and/or in any way attempt to influence or edit the content of invocations.
4. City Officials and City Staff are prohibited from taking any action to interfere with a neutral policy or practice to select invocation speakers, and/or attempting to influence those selected to give an invocation and/or the content of the invocation.

V. FISCAL IMPACT

Unknown as of the preparation of this staff report.

VI. EXHIBITS

1. Resolution No. 13-070. (pgs. 8-12).

Document1

Prepared by: William W. Wynder, City Attorney

TO:Rev06-19-2013

Reviewed by:

City Clerk	City Treasurer
Administrative Services	Public Works
Community Development	Community Services

Action taken by City Council	
Date_____	Action_____

RESOLUTION NO. 13-070

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
CARSON, CALIFORNIA, ESTABLISHING A POLICY
REGARDING INVOCATIONS AT CITY COUNCIL
MEETINGS

WHEREAS, the City Council is an elected legislative and deliberative public body, serving the citizens of the City of Carson ("City"); and

WHEREAS, legislative bodies in America have long maintained a tradition of solemnizing proceedings by allowing for an opening prayer before each meeting; and

WHEREAS, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court, in reviewing and ultimately rejecting a challenge to daily prayers in the Nebraska State legislature by a state-employed chaplain, recognized the tradition of legislative prayer, stating, "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786; and

WHEREAS, the *Marsh* Court noted that, the Continental Congress began each of its sessions with an invocation delivered by a paid chaplain and, additionally, the First Congress, in one of its first official acts, arranged for daily chaplain-led prayer in both chambers. *Id.* at 788. From this, the U.S. Supreme Court inferred that "the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 789; and

WHEREAS, in the recent Ninth District Court of Appeals decision in *Rubin v. City of Lancaster*, 710 F.3d 1087 (2013), the court held the invocation policy of the City of Lancaster to be lawful upon review of the *Marsh* decision and finding that the City of Lancaster had a neutral process for selecting the invocation speakers and the city's policy went to great lengths to ensure the city did nothing to put its seal of approval on any particular religion or faith, and there was no evidence that a public official or city representative had interfered with the city's invocation policy to advance a particular religion; and

WHEREAS, the City Council now desires to adopt a formal written policy to establish rules to allow invocations at City Council meetings, which ensure that (i) the selection of those individuals who give the invocation is neutral, (ii) the invocations are not used by the City to proselytize or advance any one, or to disparage any other, faith or belief, and (iii) an individual's rights to free speech under the First Amendment are protected.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Carson, California, as follows:

1. **SECTION 1.** That the Policy attached hereto as Exhibit A, and incorporated herein by this reference, as if fully set forth, entitled "City Council Invocation

EXHIBIT NO. 01

[MORE]



Policy” is approved. Mayor Dear to CONSIDER, APPOINT, or REAPPOINT members to the Commissions, Committees, and Boards (Exhibit No. 1) in accordance with Ordinance No. 04-1330;

2. Mayor Dear and City Council to CONSIDER REMOVAL of members to the Historical, Utility Users Tax Citizens Budget Oversight and Beautification Committees in accordance with Resolution Nos. 13-066 (Exhibit No. 2) and 13-067 (Exhibit No. 3), with the approval of a majority of the entire City Council present, including the Mayor.

SECTION 2. **Effective Date.** This resolution shall be effective immediately upon adoption.

PASSED, APPROVED, AND ADOPTED this ___ day of July, 2013.

Mayor Jim Dear

ATTEST:

City Clerk Donesia L. Gause, CMC

APPROVED AS TO FORM:

City Attorney



CITY COUNCIL INVOCATION POLICY

CITY OF CARSON

I. PURPOSE

This policy is intended to allow for invocations to be offered at City Council meetings for the benefit of the City and the community. This policy is not intended, and shall not be implemented or construed in any way, to affiliate the City Council with, nor express the City Council's preference for, any faith or religious denomination or lack thereof. Rather, this policy is intended to acknowledge and express the City Council's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of the City of Carson.

II. SCOPE

This policy is applicable to the conduct and proceedings at City Council meetings or any of its subordinate bodies of which members of the City Council are represented. This policy does not authorize or allow invocations or prayers at any other public or non-public meetings of City, including but not limited to, any meeting by City boards, commissions, committees or meetings by City officers or staff.

III. POLICY

In order to solemnize the proceedings of the City Council, it is the policy of the City Council to allow for an invocation or prayer to be offered at its meetings for the benefit of the City Council and the community subject to the following requirements and limitations:

A. Agenda Title and Content.

The invocation shall be listed on the Agenda along with the following notice:

The City Council does not endorse the content of the invocation and does not endorse the invitational speaker's particular faith, belief and/or religious denomination. The City Council does not engage in any prior inquiry, review of, or involvement in, the content of the invocation, except to request the speaker to refrain from using the invocation as an opportunity to attempt to convert others to a particular faith or to disparage any faith or belief. The City Council has an established neutral policy for selecting and scheduling invitational speakers. The City Clerk will make the Council's policy on invocations available upon request for public inspection and copying.

B. Invocation Participation is Voluntary.

No member of the City Council or City employee or any other person in attendance at a City Council meeting shall be required to participate in any prayer or invocation that is offered.

C. Selection and Scheduling of Invitational Speakers.

The invocation shall be voluntarily delivered by an eligible member of the clergy or a religious leader in the City. To ensure that such person ("the invitational speaker") is selected from among a wide pool of the city's clergy/religious leaders, the invitational speaker shall be selected and scheduled to speak according to the following procedure:

1. City Clerk's Responsibilities.. The City Clerk shall compile and maintain a database (the "Congregations List") of the religious congregations with an established presence in the City.
2. Compilation of Congregations List. The Congregations List shall be compiled by referencing the listing for "churches," "congregations," or other religious assemblies in the annual Yellow Pages phone book(s) published for the City, research from the internet (for example but without limitation, searching for any local church, synagogue, temple, chapel or mosque) and consultation with local chambers of commerce. All religious congregations with an established presence in the City shall be eligible to be included in the Congregations List, and any such congregation can confirm its inclusion by specific written request to the City Clerk.
3. Annual Update of List. The Congregations List shall be updated, by reasonable efforts of the City Clerk on an annual basis. However, as provided, in subsections 2 and 3, above, any eligible congregation or chaplain may be added to the list at any time by written request to the City Clerk.
4. Invitations Mailed Annually. Within forty-five (45) days of the effective date of this policy, and periodically thereafter and as needed, the City Clerk shall mail an invitation addressed to the "religious leader" of each congregation listed on the Congregations List, as well as to the individual chaplains included on the Congregations List.
5. Content of Invitation. The invitation shall be dated at the top of the page, signed by the Mayor at the bottom of the page, and read as follows:

Dear religious leader:

The City Council makes it a policy to invite religious leaders in the City of Carson to voluntarily offer a prayer or invocation before the beginning of its meetings, for the benefit and blessing of the City Council. As the leader of one of the religious congregations with an established presence in the City, or in your capacity as a chaplain that works for an agency or organization that provides service to the public, you are eligible to offer this important service at an upcoming meeting of the City Council.

If you are willing to assist the City Council in this regard, please send a written reply at your earliest convenience to the City Clerk at the address



included on this letterhead. Invocation speakers are scheduled on a first-come, first-serve or other random basis. The dates of the City Council's scheduled meetings for the upcoming year are listed on the following, attached page. If you have a preference among the dates, please state that request in your written reply.

This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the City Council requests only that the prayer or invocation opportunity not be exploited as an effort to convert others to the particular faith of the invitational speaker, nor to disparage any faith or belief different from that of the invitational speaker.

On behalf of the City Council, I thank you in advance for considering this invitation.

*Sincerely,
Mayor*

6. Scheduling Speakers. Invitational speakers shall be scheduled by the Office of the Mayor on a first-come, first-serve basis or other random basis. Speakers are not required to have received the letter described in subsection f, above, to be scheduled to speak so long as they are a member of the clergy or a religious leader of an organization or congregation on the Congregations List.

7. Volunteers in Event Speaker Does Not Show. If the selected invitational speaker does not appear at the scheduled meeting, the Mayor may ask for a volunteer from among the Council or the audience to deliver the invocation or simply invite a moment of silence as the Mayor deems appropriate.

8. Limit on Same Speaker. The Office of the Mayor shall make every reasonable effort to ensure that a variety of eligible invitational speakers are scheduled for the City Council meetings. In any event, no invitational speaker shall be scheduled to offer an invocation at consecutive meetings of the City Council, or at more than three (3) City Council meetings in any calendar year.

D. No Compensation for Speakers.

No invitational speaker shall receive compensation for his or her service in performing the invocation.

E. No Involvement by City in Content of Invocation.

Neither the City Council nor the City Clerk shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invitational speaker.