

MEMORANDUM

Department of the City Attorney Confidential-Privileged



To: Honorable Mayor and City Council
From: Steven T. Mattas, City Attorney
Subject: Invocation at City Council Meetings
Date: December 15, 2004

Mayor Esteves has included a discussion item on the City Council agenda regarding the possibility of having an invocation as a part of City Council meetings. The purpose of this memorandum is to advise you of the legality of invocations as part of a City Council meeting. As set forth below, an invocation is permissible under federal and state law.

The U.S. Supreme Court has held that a legislative body may allow for a short, non-denominational invocation prior to a session of a legislative body. Marsh v. Chambers, 463 U.S. 783. In *Marsh*, the Supreme Court held that the Nebraska legislature's policy of opening sessions with a short, non-denominational invocation delivered by the chaplain did not violate the Constitution. In their *Marsh* decision, the Supreme Court expressly made a very narrow exception for legislative prayer, arguing that it was acceptable because an invocation before a session is a historic tradition which was respected and utilized during the sessions creating the Establishment Clause itself. A City Council meeting is considered a deliberative body. Therefore, a short, non-denominational invocation may be given prior to the start of the Council meeting. In order to meet the standard set in *Marsh*, the invocation should remain short and non-denominational. The prayer must not be a "proselytizing activity" or "symbolically place the government's official seal of approval on one religious view." (*Marsh*, 463 U.S. at 792.) The invocation should be "harmonized with the tenets of some or all religions." (*Id.*) In the analysis of the facts of the case, the Supreme Court noted favorably that Nebraska chaplain removed all references to "Christ" from the invocations. The Court noted that there was no indication that the prayer was used to "proselytize or advance any one, or to disparage any other, faith or belief." (*Id.*)

In the recent case of Rubin v. City of Burbank, (2002) 101 Cal. App. 4th 1194, the California Court of Appeal interpreted Marsh to mean that any legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause of the U.S. Constitution. In particular, the opinion noted that specific reference to "Jesus Christ" in an invocation would violate the Establishment Clause, and was therefore impermissible. The Court of Appeal ordered the City of Burbank to not permit such sectarian prayer and required the City to advise those who participate in conducting prayer at city council meetings of this limitation.

An opening invocation or legislative prayer is therefore permissible at meetings of the Milpitas City Council so long as it satisfies the constitutional requirement that it not be used to advance one faith or belief over another. Persons invited to give an invocation should be clearly informed that the invocation should be short, non-denominational, and should not be used to proselytize or to advance or disparage any particular religious viewpoint.

Please let us know if you have any questions.

c: Thomas J. Wilson, City Manager

CITY OF MILPITAS, CALIFORNIA
STANDARD OPERATING PROCEDURE

SUBJECT: INVOCATIONS AT CITY COUNCIL MEETINGS

1. Purpose

All regular meetings of the Milpitas City Council shall be scheduled to begin with a short, non-denominational invocation, to be delivered by a clergy member or any other suitable person.

2. Responsible Party

Mayor and City Councilmembers

3. Policy and Procedure

- a. Each City Councilmember shall be assigned a month to be responsible for securing an appropriate person or persons to lead a non-denominational invocation. Sitting members of the City Council shall be assigned a month according to the following seniority: Mayor; Vice Mayor; remaining Councilmembers in descending order of seniority of tenure in office.
- b. A City Councilmember may elect to not participate. In the event that a City Councilmember elects to not participate, the responsibility for securing an appropriate person to deliver the invocation shall be on the next City Councilmember according to the seniority guide described in (a).
- c. Invocations shall be non-sectarian in nature.
- d. Invocations shall not proselytize, advance or disparage any religious belief or faith.
- e. Invocations shall be crafted so as to avoid references to specific deities or tenets associated with any particular religious faith or denomination.

Executed: September _____, 2005

Approved as to Form:

Charles Lawson, City Manager

Steve Mattas, City Attorney