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**MEMORANDUM OF LAW**

**DATE:** July 14, 2009  
**TO:** Honorable Mayor and City Council  
**FROM:** City Attorney  
**SUBJECT:** Invocation at Council Meetings

**INTRODUCTION**

The Permanent Rules of the Council provide that City Council meetings begin with the roll call and then an invocation. Our Office has been asked whether the invocation at Council meetings violates laws requiring separation of church and state.

**QUESTION PRESENTED**

May the City allow an invocation as part of a City Council meeting?

**SHORT ANSWER**

Yes, but only if the invocation is nonsectarian. Any invocation that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause of the First Amendment of the U.S. Constitution. Accordingly, we recommend that the City continue to advise anyone conducting an invocation at a City Council meeting that sectarian prayers are not permitted and that the invocation may not advance a particular religious belief.

**BACKGROUND**

In a Memorandum of Law dated July 22, 1992, this Office advised that the City Council may, if it desires, request that invocations be nondenominational and not reflect a specific religious organization or belief, but that the Council is not required to do so. We also advised that the Council may delegate to the City Clerk its authority to ask invited speakers to present such nondenominational invocations. On May 19, 2003, the U.S. Supreme Court denied review of an appellate court decision that held that inclusion of "sectarian prayer" in city council meetings violated the Establishment Clause. *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (2002). This memorandum discusses the *City of Burbank* opinion and recommends that the City

ensure it continues to advise invocators that sectarian prayers are not allowed and that an invocation cannot be used to advance a particular religious belief.

### ANALYSIS

*City of Burbank* concerned an invocation given by a minister of the Church of Jesus Christ of Latter Day Saints at a Burbank City Council meeting. The invocation concluded: "We are grateful heavenly Father for all that thou has poured out on us and we express our gratitude and our love in the name of Jesus Christ. Amen." *Id.* at 1198. Plaintiff Rubin, of the Jewish faith, was present at the city council meeting and subsequently filed suit for declaratory relief, "challenging the practice of the city to begin the city council meetings with religious prayers invoking the name of Jesus Christ." *Id.* The plaintiff prevailed. The trial court held that the minister's prayer was sectarian and thus the prayer at a public council meeting violated the Establishment Clause of the First Amendment to the U.S. Constitution. The trial court permanently enjoined the City of Burbank from "knowingly and intentionally allowing sectarian prayer at City Council meetings." *Id.* The Court of Appeal upheld the lower court ruling, finding that the Establishment Clause was indeed violated, and that the lower court ruling did not constitute censorship.

The *City of Burbank* decision was based on the law set forth in *Marsh v. Chambers*, 463 U.S. 783 (1983), apparently the only U.S. Supreme Court case that has addressed the issue of legislative prayer. The court in *Marsh* established a test that provides guidance in evaluating the constitutionality of a prayer said during a legislative meeting. The test depends on whether the "prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95.

In *City of Burbank*, the court noted that the trial court had properly applied the *Marsh* test when finding that the reference to Jesus Christ rendered the prayer "sectarian." *City of Burbank*, 101 Cal. App. 4th at 1204. The appellate court defined "sectarian" to be "relating to or characteristic of a sect," and further defined "sect" as "an organized ecclesiastical body, or a religious denomination." *Id.* at 1205. The court further stated: "[t]he trial court's characterization of the invocation as 'sectarian' was merely a definitional determination that the invocation unconstitutionally communicated a preference for one religious faith (or sect) over another." *Id.* The appellate court found that because the trial court concluded that the prayer was sectarian, the "prayer opportunity had been exploited to advance one faith, Christianity, over another." *Id.*

The *City of Burbank* court did not examine much of the minister's invocation beyond the inclusion of the words "Jesus Christ." The court noted that this inclusion impermissibly "conveyed the message that the Burbank City Council was a Christian body, and from this it could be inferred that the council was advancing a religious belief." *Id.* at 1204. The court also noted that there need not be a pattern of this type of speech for the lower court's ruling to apply. The court stated: "we interpret *Marsh* to mean that any legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause." *Id.*

In appealing the lower court ruling, the *City of Burbank* argued that regulating speech as directed by the lower court would amount to unconstitutional censorship or viewpoint discrimination. The court addressed this issue by stating that regulating speech “depends on the nature of the speech involved and the manner of restriction imposed.” *Id.* at 1206. The court looked to *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), which held that prayer at a public school is not “private speech” protected by the Free Speech and Free Exercise Clauses of the First Amendment when it is “authorized by a government policy and take[s] place on government property at government-sponsored school-related events.” *Santa Fe*, 530 U.S. at 302. The court concluded:

In light of the fact that the legislative invocation given at the Burbank City Council meeting took place on government property, was authorized by the long-standing policy of the city council, was part of the official agenda of the council meeting, and was for the purpose of calling for spiritual assistance in the work of the legislative body, we are satisfied that it was not “private speech.”

*City of Burbank*, 101 Cal. App. 4th at 1207.

Based on the reasoning set forth above, the court concluded that “those who provide legislative invocations at the city council meetings were subject to the requirement that the prayers should comport with the First Amendment.” *Id.* However, “[f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end . . . we can think of no more compelling interest than safeguarding the establishment clause of the First Amendment.” *Id.* The court continued:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community . . . . [A] direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

*City of Burbank*, 101 Cal. App. 4th at 1207, citing *Lynch v. Donnelly*, 465 U.S. 668 (1984).

The San Diego City Council’s invocation process appears to be similar to that of the City of Burbank. Each Council invocation is listed as an item on the docket. Rule 2.2 of the Permanent Rules of the Council provides that the invocation be given after roll call. San Diego Municipal Code § 22.0101.5. City Council invocations take place on government property. Thus, the reasons the court found the Burbank City Council invocation to be impermissible apply

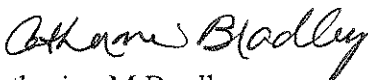
equally to any identical content of an invocation before the San Diego City Council. Accordingly, the First Amendment, as interpreted in *City of Burbank*, requires that the City Council remain neutral to the interests of religion and take steps to ensure that it does not use an invocation to advance one faith or belief over another.

After the decision in *City of Burbank*, the City Clerk began to advise invocators that only nonsectarian prayers are permitted at City Council meetings. We recommend that the City Clerk continue this practice in order to comply with the U.S. Constitution and the cases interpreting it.<sup>1</sup> To further ensure compliance, the Council could give a verbal reminder before the invocation and add language to the Council docket that states the invocation is required by the *City of Burbank* case to be nonsectarian.

### CONCLUSION

Based on the prohibitions established by *Marsh* and *City of Burbank*, the City Council may not “knowingly and intentionally allow sectarian prayer” at City Council meetings. The City must advise invocators that sectarian prayers are not allowed and ensure that invocations are not used to advance one faith or belief over another.

JAN I. GOLDSMITH, City Attorney

By   
Catherine M Bradley  
Chief Deputy City Attorney

CMB:lkj  
cc: Elizabeth Maland, City Clerk  
ML-2009-8

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<sup>1</sup> Advising prayer participants that sectarian prayers are not permitted does not amount to unconstitutional censorship or viewpoint discrimination. *City of Burbank*, at 1205.