MEMORANDUM OF LAW

DATE: July 22, 1992

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Constitutionality of Religious Invocations at City Council Meetings

This is in response to your memorandum of May 20, 1992, to the City Attorney. You asked two questions: 1) whether a religious invocation at the opening of City Council meetings as currently required by San Diego Municipal Code section 22.0101 (Rule 3) is constitutional; and, 2) assuming an invocation is constitutional, whether The City of San Diego may, either by direct action of the City Council or via the City Clerk, censor or otherwise impose "prior restraints" on the content of the invocation.

BACKGROUND FACTS

San Diego Municipal Code ("SDMC") section 22.0101 is entitled the "Permanent Rules of the Council." Each Council Rule specifies the procedure(s) the Council must follow. Rule 3 details the procedure for Council meetings and the order in which Council matters are handled. Among other things, Rule 3 requires an invocationF

The first definition listed in Webster's Dictionary for the term "invocation" is: "the action or an act of petitioning for help or support . . .: a prayer of entreaty that is usually a call for the divine presence and is offered at the beginning of a meeting or service of worship." Webster's Third New International Dictionary, 1190 Unabridged (1965).

to be held at the beginning of Council meetings.

Unlike other Council Rules which allocate specific responsibilities to the City Clerk, Rule 3 does not specifically assign responsibility for the invocation to the City Clerk. However, we understand that the duty to arrange for the invocation has fallen on the City Clerk by virtue of implicit delegation by the City Council.

ANALYSIS

There are both federal and California cases discussing the

issues you present. Each of your questions is analyzed separately below.

Question No. 1:

Your first question essentially asks whether the City's requirement of opening Council meetings with a religious invocation is valid under both the U.S. and California Constitutions. Construing the first amendment of the U.S. Constitution, the United States Supreme Court has upheld the practice of having invocations at the opening of legislative sessions in the leading case of Marsh v. Chambers, 463 U.S. 783 (1983). In that case, the Court held that " ╒tσhe opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country . . . ╒Tσhe practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." Marsh at 786. (Emphasis added.) The Court made specific reference to the fact that on September 25, 1789, three days after the appointment of chaplains was authorized by the first Congress, the language of the Bill of Rights was finalized. The conclusion was that legislative invocations were not violative of the then new Bill of Rights.

More recent cases construing the U.S. Constitution have upheld similar practices. See, for example, Zwerling v. Reagan, 576 F. Supp. 1373 (S.D. Cal. 1983) (upholding presidential proclamation of 1983 as the year of the Bible, citing with approval the language of Marsh v. Chambers); United States v. Woodley, 726 F.2d 1328, 1338 (9th Cir. 1983) (citing Marsh with approval, including discussion of Congressional debate, showing the "subject was considered carefully and the action not taken thoughtlessly"); and Van Zandt v. Thompson, 839 F.2d 1215, 1219 (7th Cir. 1988) citing Marsh with approval, stating " ╒tσhe court viewed a legislature's internal spiritual practice as a special case." Id. "We read Marsh to derive partly from the traditions of the nation and of the states and partly from a degree of deference to the internal spiritual practices of another branch of government or of a branch of the government of another sovereign." Id.

Also construing the U.S. Constitution, the California Supreme Court in Sands v. Morongo Unified School District, 53 Cal. 3d 863 (1991) cited Marsh v. Chambers with approval and, in a concurring opinion, stressed the historical importance of legislative prayer in this country:

> Public prayer is an American tradition. It has occupied . . . a long and honorable place in our

> public lives . . . . Our national experience teaches that the mutual independence of church and state is the most conducive system to religious freedom and social and political tranquility. Public prayer does not threaten that harmony or the liberty of conscience which underlies it. On the contrary, it is through such occasions that we reinforce and celebrate the rich diversity that has made us a great and noble people.

Sands v. Morongo, 53 Cal. 3d at 917-918 (Arabian, J., Concurrence). See also, Bennett v. Livermore Unified School District, 193 Cal. App. 3d 1012, 1022 (1987) (legislative prayer is acceptable, although school invocations are not). The United States Supreme Court in the very recent case of Lee v. Weisman, 60 U.S.L.W. 4723 (June 24, 1992), which held that having clergy offer prayers as part of an official public school graduation ceremony violated the Establishment Clause of the U.S. Constitution, specifically approved of the holding in Marsh v. Chambers, 463 U.S. 783 (1983).

As applied to the precise question presented, there is no case on point construing article I, section 4, or article XVI, section 5, of the California Constitution, which are California's equivalent to the first amendment of the U.S. Constitution. Absent case law interpreting these California constitutional provisions as applied to the instant case, we find that federal constitutional law provides the guidance necessary to answer your question and federal law should be followed. Applying the above-cited federal law principles to the present facts, we find that the City Council may lawfully require a religious invocation to open the City Council meetings and that to do so does not violate the U.S. or California Constitutions.

Question No. 2:

Your second question asks whether the City may censor or otherwise impose "prior restraints" on the content of the invocation. Again, the case of Marsh v. Chambers answers the question. Marsh dealt with the practice of the Nebraska state legislature opening each legislative day with a prayer by a chaplain paid by the state. The U.S. Supreme Court in Marsh stated that:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the

> prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Marsh at 794.

Further, the chaplain in Marsh had characterized "his prayers as 'nonsectarian,' 'Judeo-Christian,' and with 'elements of the American civil religion.' Although some of his earlier prayers were often explicitly Christian, Palmer ┌the state-paid chaplainσ removed all references to Christ after a 1980 complaint from a Jewish legislator." Marsh at 793 n.14.

Under the guidelines set forth in the Marsh case, it is clear that the City Council may impose constraints on persons invited to present invocations at Council meetings, for example, by requiring them to be nondenominational. The City Council may delegate that authority to the City Clerk. If it does so, however, the City Council should define the scope of the City Clerk's duty with respect to placing limits on the content of invocations; that definition may be accomplished either in its Council Rules or by other written direction.

As a final matter, we note that your second question specifically asks whether "prior restraints" may be imposed on the invocations. The "prior restraint" doctrine is applied in cases involving "free speech" activities which are protected by both the U.S. and California Constitutions. The giving of an invocation at the invitation of the City Council, however, is not considered to be a free speech activity, and the use of the term "prior restraint" is therefore a misnomer as applied to these facts.

CONCLUSION

The practice of opening legislative sessions with an invocation is a long-standing, legally acceptable custom. The content of invocations was found by the U.S. Supreme Court to be irrelevant as long as active proselytizing was not taking place. Marsh v. Chambers, 463 U.S. 783 (1983). The City Council may, if they so desire, request that invocations be nondenominational, but the Council is not required legally to do so. The Council may delegate its authority to the City Clerk to ask invited speakers to present nondenominational invocations.

JOHN W. WITT, City Attorney
By

Cristie C. McGuire
Deputy City Attorney

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