



LODI CITY COUNCIL

Hutchins Street Square
125 S. Hutchins Street, Lodi

AGENDA – SPECIAL MEETING

Date: September 30, 2009

Time: 6:30 p.m.

For information regarding this agenda please contact:

Randi Johl

City Clerk

Telephone: (209) 333-6702

NOTE: All staff reports or other written documentation relating to each item of business referred to on the agenda are on file in the Office of the City Clerk, located at 221 W. Pine Street, Lodi, and are available for public inspection. If requested, the agenda shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. To make a request for disability-related modification or accommodation contact the City Clerk's Office as soon as possible and at least 24 hours prior to the meeting date.

A. Roll call

B. Regular Calendar

B-1 Review Policy Regarding Invocations at Council Meetings (CA)

C. Adjournment

Pursuant to Section 54956.2(a) of the Government Code of the State of California, this agenda was posted at a place freely accessible to the public 24 hours in advance of the scheduled meeting.

Randi Johl
City Clerk

****NOTICE:** Pursuant to Government Code §54954.3(a), public comments may be directed to the legislative body concerning any item contained on the agenda for this meeting before (in the case of a Closed Session item) or during consideration of the item.**



**CITY OF LODI
COUNCIL COMMUNICATION**

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AGENDA TITLE: Review Policy Regarding Invocations at Council Meetings
MEETING DATE: September 30, 2009
SUBMITTED BY: City Attorney

RECOMMENDED ACTION: Review Policy Regarding Invocations at Council Meetings and Consider Changes to the Council Protocol Manual.

BACKGROUND INFORMATION: The City of Lodi has agendized Invocations at its Council Meetings since at least 1975. In March of 2006, in response to a California Appellate Decision, *Rubin v Burbank*, (2006) 101 Cal. App.4th 1194, Council adopted as part of the Council Protocol Manual a policy requiring that prayers before the Council be non-sectarian. Since that time, invitations have been sent to all listed religious organizations in the phone book inviting them to give a non-sectarian invocation. However, that policy has not been followed by all of the individuals who have responded to the City's invitation.

On behalf of its Lodi members, the Freedom From Religion Foundation objected to the respondents' departures from the City's policy. The Foundation requests that the City follow the policy adopted as part of the Council Protocol Manual requiring that all prayers before the Council be non-sectarian, meaning that the prayer must not include words or references that reflect a particular religious belief. Council adopted this policy on the advice of the City Attorney's office, based on a California Appellate Court case, *Rubin v Burbank*. In *Rubin*, the City of Burbank argued that its prayers did not violate the Constitution because only twenty percent of the prayers referenced a particular religious belief. The Appellate Court disagreed stating that "any legislative prayer that proselytizes or advances one religious belief or faith or disparages any other violates the Establishment Clause [of the United States Constitution]." (Id. at 1204) The California Supreme Court declined to consider Burbank's appeal.

Notwithstanding the clarity of the California *Rubin* decision, the law on legislative invocations is highly unsettled. Although the *Rubin* Court based its decision on the Federal Constitution, California also has an "Establishment Clause" in its constitution. Nevertheless, California Courts often defer to Federal Courts on constitutional interpretations; therefore, California's establishment clause could be interpreted more broadly by California courts. At the federal level, opponents and proponents of invocations can and do vociferously point to federal appellate court cases in different jurisdictions that support their preferred outcome. The *Marsh v. Chambers* (1983) 463 U.S. 783, case is the only US Supreme Court case directly on point. In *Marsh*, the Supreme Court upheld a state legislature's practice of paying a Christian pastor to say a non-sectarian prayer before legislative sessions, but held that Invocations cannot be used to proselytize.

The issue of prayer before legislative sessions becomes muddier when you add the question of whether the prayers can be sectarian. The question is whether a prayer that simply references a particular religious tradition (i.e. is sectarian) without exhorting conversion or demeaning other faith traditions can

APPROVED: _____
Blair King, City Manager

be considered proselytizing under *Marsh*. Some courts see legislative prayer as government speech (*Rubin*, the California Appellate Court Case) that can and must be censored of all sectarian references. Others see it as private speech that should not be censored as long as the opportunity to pray is open to all. Which view, or whether a third and different view may ultimately prevail is unknown and unknowable.

As for Congress, they have no prayer rules or policy. According to the Senate Office of the Chaplain, they let all pastors pray according to their own conscience and have never been challenged. They are open to guest chaplains of all faiths though all appointed chaplains have been "Christian."

Given the fractured state of the law on the issue of Invocations, below is a continuum of possible Invocation policies:

- 1) Remove Invocations from the Council Agenda. (The City could not censor or prohibit prayers from being said during Public Comment as long as they were directed at items within the jurisdiction of the City Council).
- 2) Prayers said privately for the benefit of individual or multiple Council Members prior to the meeting.
- 3) Continue Invocations subject to the City's existing Policy. (Prayer proponents could challenge this practice as censorship of their free speech rights though at least one federal appellate case (*Turner v. City Council of the City of Fredericksburg* (4th Cir. 2008) 534 F.3d 352), authored by retired Justice Sandra Day O'Connor rejected such a challenge finding that an agendized prayer was government not private speech.)
- 4) Allow uncensored Invocations with one or a number of the following measures to avoid any inference that one religion is favored over another:
 - a. Require Invocations to be given before the meeting is called to order.
 - b. Continue to actively encourage all religious traditions within Lodi to give Invocations before the Council.
 - c. Open the opportunity to give an Invocation to leaders of religious faiths that reside in Lodi but must travel outside of Lodi to find a house of worship (those of the Sikh, Jewish and other faiths).
 - d. Open the opportunity to give a Call to Civic Responsibility to non-religious groups.
 - e. Add a disclaimer to the Agenda that the Invocation is offered as an acknowledgement of the diverse religious traditions within Lodi and not as an endorsement of any particular religion or religious belief.
 - f. Prohibit Invocations that directly seek to convert or demean a particular religious belief or the lack thereof.

In addition to the options discussed above, the Alliance Defense Fund (ADF) offered their own model prayer policy along the lines of option 4 above and submitted an agreement under which ADF would provide a defense to the City to defend their model policy. As set forth below, accepting the offer from ADF as currently constructed is not advisable. First, Council must adopt ADF's policy verbatim. Second ADF's offer is only for defense, not indemnity (i.e. if the City were to lose in a litigation action and suffer

an attorney fee award, it would be the City's liability to pay the award.) This concern is exacerbated by the requirement that Council must give ADF discretion regarding litigation strategy. As such, Council could find itself in the untenable position of paying for a judgment where it had no say in the direction of the litigation. Finally, ADF only commits to defending the case through trial. Public interest litigation of this sort rarely if ever settles at the trial level. For the above reasons, ADF's current offer does not provide any meaningful financial support if the Council chose to adopt ADF's proposed policy.

FUNDING: N/A

FISCAL IMPACT: Potential Litigation Costs.

D. Stephen Schwabauer
City Attorney

**POLICY REGARDING OPENING INVOCATIONS
BEFORE MEETINGS OF THE LODI CITY COUNCIL**

WHEREAS, the Lodi City Council (“the Council”) is an elected legislative and deliberative public body, serving the citizens of Lodi, California; and

WHEREAS, the Council wishes to maintain a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Council; and

WHEREAS, the Council now desires to adopt this formal, written policy to clarify and codify its invocation practices; and

WHEREAS, our country’s Founders recognized that we possess certain rights that cannot be awarded, surrendered, nor corrupted by human power, and the Founders explicitly attributed the origin of these, our inalienable rights, to a Creator. These rights ultimately ensure the self-government manifest in our Council, upon which we desire to invoke divine guidance and blessing; and

WHEREAS, such prayer before deliberative public bodies has been consistently upheld as constitutional by American courts, including the United States Supreme Court; and

WHEREAS, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court rejected a challenge to the Nebraska Legislature’s practice of opening each day of its sessions with a prayer by a chaplain paid with taxpayer dollars, and specifically concluded, “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.” *Id.*, at 786; and

WHEREAS, the Council desires to avail itself of the Supreme Court’s recognition that it is constitutionally permissible for a public body to “invoke divine guidance” on its work. *Id.*, at 792. Such invocation “is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.” *Id.*; and

WHEREAS, the Supreme Court affirmed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), “Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.” *Id.*, at 675; and

WHEREAS, the Supreme Court further stated, that “government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging

the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.” *Id.*, at 693 (O’Connor, J., concurring); and

WHEREAS, the Supreme Court also famously observed in *Zorach v. Clauson*, 343 U.S. 306, (1952), “We are a religious people whose institutions presuppose a Supreme Being.” *Id.*, at 313-14; and

WHEREAS, the Supreme Court acknowledged in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), that the American people have long followed a “custom of opening sessions of all deliberative bodies and most conventions with prayer...,” *Id.*, at 471; and

WHEREAS, the Supreme Court has determined, “The content of [such] prayer is not of concern to judges where . . . 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.” *Marsh*, 463 U.S. at 794-795; and

WHEREAS, the Supreme Court also proclaimed that it should not be the job of the courts or deliberative public bodies “to embark on a sensitive evaluation or to parse the content of a particular prayer” offered before a deliberative public body. *Id.*; and

WHEREAS, the Supreme Court has counseled against the efforts of government officials to affirmatively screen, censor, prescribe and/or proscribe the specific content of public prayers offered by private speakers, as such government efforts would violate the First Amendment rights of those speakers. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 588-589 (1992); and

WHEREAS, in *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2004), *cert. denied*, the United States Court of Appeals for the Fourth Circuit recently reviewed and specifically approved as constitutional the prayer policy of a county board, and made a number of key findings about said policy; and

WHEREAS, the Council is not bound by decisions of the Fourth Circuit, but hereby acknowledges the general guidance provided by the most important of that court’s findings in *Simpson*, including the facts that the policy there:

(1) Allowed for invocations for the benefit of the legislative body itself “rather than for the individual leading the invocation or for those who might also be present,” *Id.*, at 284; and

(2) Established a practice in which various clergy in the county's religious community were invited on a rotating basis to present invocations before meetings of the board, *Id.*, at 279; and

(3) Thus, "made plain that [the county board] was not affiliated with any one specific faith” by allowing different persons from different religious convictions and backgrounds to offer the invocations. *Id.*, at 286; and

WHEREAS, the Fourth Circuit showed little concern that the prayers before board meetings in *Simpson* were “traditionally made to a divinity that is consistent with the Judeo-Christian tradition,” *Id.*, at 280, because “*Marsh* also considered, and found constitutionally acceptable, the fact that the prayers in question fit broadly within ‘the Judeo-Christian tradition.’” *Id.*, at 283 (quoting *Marsh*, 463 U.S. at 793); and

WHEREAS, the Fourth Circuit’s ruling in *Simpson* can be distinguished from its earlier decision in *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2002), *cert. denied*, where a town council “improperly ‘exploited’ a ‘prayer opportunity’ to ‘advance’ one religion over others.” *Id.*, at 298 (quoting *Marsh*, 463 U.S. at 794); and

WHEREAS, the Council intends to avoid all of the unique circumstances that rendered the practices at issue in *Wynne* unconstitutional, including the facts that:

(1) The Town Council’s resolution declared its intent that “the Town’s prayers are not just for the Council members but for all of the Town’s citizens,” and thus prayers were “directed at” the citizenry, *Wynne*, 376 F.3d at 301, n.7; and

(2) The Town Council “steadfastly refused” to invoke any “deity associated with any specific faith other than Christianity,” *Id.*, at 300, n.5; and

(3) The Town Council “advance[d] its own religious views in preference to all others,” *Id.*, at 302; and

(4) Town Council members publicly chided and “ostracized” those who refused to participate in their prayers, *Id.*, at 298; and

WHEREAS, the Council intends, and has intended in past practice, to adopt a policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others; and

WHEREAS, the Council recognizes its constitutional duty to interpret, construe, and amend its policies and ordinances to comply with constitutional requirements as they are announced; and

WHEREAS, the Council accepts as binding the applicability of general principles of law and all the rights and obligations afforded under the United States Constitution.

NOW, THEREFORE, BE IT RESOLVED by the Lodi City Council that the Council hereby adopts the following written policy regarding opening invocations before meetings of the Council, to wit:

1. In order to solemnize proceedings of the Council, it is the policy of the Council to allow for an invocation or prayer to be offered before its meetings for the benefit of the Council.

2. The prayer shall not be listed or recognized as an agenda item for the meeting or as part of the public business.

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

4. The prayer or invocation shall be voluntarily delivered by an eligible member of the clergy in the City of Lodi. To ensure that such person (the “invocation speaker”) is selected from among a wide pool of Lodi’s clergy, on a rotating basis, the invocation speaker shall be selected according to the following procedure:

a. The Clerk to the Council (the “Clerk”) shall compile and maintain a database (the “Congregations List”) of the religious congregations with an established presence in the local community of Lodi.

b. 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 Lodi, research from the Internet, and consultation with local chambers of commerce. All religious congregations with an established presence in the local community of Lodi are eligible to be included in the Congregations List. Any such congregation not otherwise identified for participation may request its inclusion by specific written communication to the Clerk.

c. This policy is intended to be and shall be applied in a way that is all-inclusive of every diverse religious congregation in the community of Lodi. The Congregations List is compiled and used for purposes of logistics, efficiency and equal opportunity for all of the community’s religious leaders, who may themselves choose whether to respond to the Council’s invitation and participate. Should a question arise as to the authenticity of a religious congregation, the Clerk shall refer to criteria used by the Internal Revenue Service in its determination of those religious organizations that would legitimately qualify for Section 501(c)(3) tax-exempt status.

d. The Congregations List shall also include the name and contact information of any chaplain who may serve one or more of the fire departments or law enforcement agencies of Lodi.

e. The Congregations List shall be updated annually, by reasonable efforts of the Clerk.

f. Within thirty (30) days of the effective date of this policy, and annually each calendar year thereafter, the 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.

g. The invitation shall be dated at the top of the page, signed by the Clerk at the bottom of the page, and read as follows:

Dear religious leader,

The Lodi City Council makes it a policy to invite members of the clergy in Lodi to voluntarily offer a prayer before the beginning of its meetings, for the benefit and blessing of the Council. As the leader of one of the religious congregations with an established presence in the local community, or in your capacity as a chaplain for one of the local fire departments or law enforcement agencies, you are eligible to offer this important service at an upcoming meeting of the Council.

If you are willing to assist the Council in this regard, please send a written reply at your earliest convenience to the Clerk to the Council at the address included on this letterhead. Clergy are scheduled on a first-come, first-serve basis. The dates of the 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 Council requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocation speaker, nor to disparage any faith or belief different than that of the invocation speaker.

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

*Sincerely,
Lodi City Clerk*

h. As the invitation letter indicates, the respondents to the invitation shall be scheduled on a first-come, first-serve basis to deliver the prayers.

5. No invocation speaker shall receive compensation for his or her service.

6. The Clerk shall make every reasonable effort to ensure that the eligible invocation speakers that are scheduled for the Council meetings represent a variety of faiths and that the Clerk strive to invite all available faiths from the community. In any event, no invocation speaker shall be scheduled to offer a prayer at consecutive meetings of the Council, or at more than three (3) Council meetings in any calendar year.

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

8. Shortly before the opening gavel that officially begins the meeting and the agenda/business of the public, the President of the Council shall introduce the invocation speaker and the person selected to recite the Pledge of Allegiance following the invocation, and invite only those who wish to do so to stand for those observances of and for the Council.

9. In the event that the invocation speaker does not or cannot appear as scheduled, or in the event that no invocation speaker has volunteered or been scheduled for a particular meeting, shortly before the opening gavel that officially begins the meeting and the agenda/business of the public, the President of the Council shall: introduce the person selected to recite the Pledge of Allegiance; announce that the Pledge will be delivered after a moment of silence for individual prayer or reflection; and invite only those who wish to do so to stand for those observances of and for the Council.

10. This policy is not intended, and shall not be implemented or construed in any way, to affiliate the Council with, nor express the Council's preference for or against, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the Council's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Lodi.

11. To clarify the Council's intentions, as stated herein above, the following disclaimer shall be included in at least 10 point font at the bottom of any printed Council meeting agenda: "Any invocation that may be offered before the official start of the Council meeting shall be the voluntary offering of a private citizen, to and for the benefit of the Council. The views or beliefs expressed by the invocation speaker have not been previously reviewed or approved by the Council, and federal law does not allow the Council to endorse the religious beliefs or views of this, or any other speaker."

NOW, THEREFORE, BE IT FURTHER RESOLVED that this policy shall become effective immediately upon adoption by the Council.

THUS INTRODUCED at the regular meeting of the Lodi Council, on _____, 2009.

For: _____

Against: _____

THUS ADOPTED at the regular meeting of the Lodi Council, on _____, 2009.

CLERK

COUNCIL PRESIDENT

THE ALLIANCE DEFENSE FUND

ATTORNEY-CLIENT AGREEMENT

1. This Agreement is entered into between The Alliance Defense Fund (hereinafter referred to as "ADF"), and:

City of Lodi; Lodi City Council Members Susan Hitchcock, Larry Hansen, Bob Johnson, Phil Katzakian and Joanne Mounce in their official capacities as members of the Lodi City Council and Larry Hansen in his official capacity as Mayor of the City of Lodi,

(hereinafter referred to collectively as "the Client"), and concerns the legal representation of the Client by ADF in the defense of ADF's model invocation policy adopted by the City of Lodi including any litigation filed against the City of Lodi seeking to declare Lodi's invocation policy based upon ADF's model policy unconstitutional.

2. ADF will supply legal representation at no charge and cover all costs of such representation in the above-referenced case. The Client agrees to cooperate fully with attorney J. Michael Johnson as lead counsel, and its other participating attorneys, including but not limited to Mark C. Bowman and further agrees that said attorneys will collectively have authority to make strategy decisions in matters concerning the legal representation of the Client in such case. ADF shall consult with Client through its City Attorney and keep Client fully apprised of the case progress. No settlement of any nature shall be made without Client's complete approval.

3. If at any point in the litigation of the case ADF and its participating attorneys believe, in their sole judgment, that the Client is not cooperating fully in the case, the Client agrees that ADF and its participating attorneys may withdraw from the case in accordance with applicable canons of professional conduct.

4. It is further agreed that in the event that client should prevail, ADF may collect

and retain any award of fees from the opposing party representing litigation costs and attorney's fees to the extent permitted by law.

5. The Client further agrees not to make any statements to the news media regarding the case without prior approval from and discussion with their attorneys in this matter.

6. It is further agreed that any responsibility ADF has assumed under the terms of this agreement applies only to the period of time that the case referenced above remains in litigation in the trial court. ADF has no obligation by this agreement to represent the Client on further appeal or litigation of this matter, but will reevaluate the case at such time and offer its continued representation on appeal as ADF deems appropriate.

The foregoing Agreement is understood, accepted and agreed to this _____ day of _____, 2009.

THE ALLIANCE DEFENSE FUND

By: _____
J. Michael Johnson, Senior Legal Counsel

CLIENT

City of Lodi; Lodi City Council Members Susan Hitchcock, Larry Hansen, Bob Johnson, Phil Katzakian and Joanne Mounce in their official capacities as members of the Lodi City Council and Larry Hansen in his official capacity as Mayor of the City of Lodi

By: _____
Title: