



CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

OFFICE OF THE CITY ATTORNEY

300 Sixth Street

Joel P. Landeen, City Attorney

City web: www.rcgov.org

Phone: 605-394-4140

Fax: 605-394-6633

e-mail: joel.landeen@rcgov.org

MEMORANDUM

TO: Mayor and City Council

FROM: Joel P. Landeen, City Attorney

DATE: 4/3/13

RE: Options for a Prayer Policy

On January 7th of this year the City received a letter from the Freedom From Religion Foundation which requested that the City end its long standing tradition of beginning its Council meetings with an invocation. At the February 4th City Council Meeting the City Council voted to continue having an invocation and directed that my office prepare a formal written policy regarding the invocation. Having conducted research on the matter and having reviewed invocation policies used by other governmental entities, I have determined that the most appropriate way to proceed is to identify specific options that have been used when creating policies and let the Council determine which options it would like to incorporate into the policy. For each option, I will also provide an analysis to aid you in making your decision.

As an initial matter, I would like to generally discuss the legal issues surrounding legislative prayer. The First Amendment to the United States' Constitution states in part, "Congress shall make no law respecting an establishment of religion." This constitutional provision is commonly known as the Establishment Clause. The Establishment Clause has been made applicable to state and local governmental entities through the Due Process Clause of the Fourteenth Amendment to the United States' Constitution. The South Dakota Constitution also contains a similar provision. The letter from the Freedom of Religion Foundation alleges that Rapid City's practice of opening its meetings with an invocation violates the Establishment Clause.

The seminal case on the constitutionality of legislative prayers is *Marsh v. Chambers* which was decided by the United States' Supreme Court in 1983. In the *Marsh* case, a member of the Nebraska Legislature challenged the body's practice of opening the legislative session

with an invocation led by a Christian minister who was paid for by the tax payers. The traditional test used by the courts to determine if a governmental action violates the Establishment Clause is called the *Lemmon* Test. The test is named after the Supreme Court decision in *Lemmon v. Kurtzman* and requires that 1) the governmental action must have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances, or inhibits religion; and 3) the action must not further an “excessive government entanglement” with religion. In *Marsh*, The Supreme Court did not use the *Lemmon* test to analyze the constitutionality of legislative prayer, but instead carved out a new exception to Establishment Clause jurisprudence and upheld the legality of opening the meetings of legislative bodies with a prayer. The Supreme Court’s decision was largely based on the long history in the United States of opening the meetings of legislative bodies with a prayer. The general consensus regarding the *Marsh* opinion is that legislative bodies can open their meetings with a prayer so long as the prayer has not been exploited to proselytize, to advance any one religion, or to disparage any other faith or belief. The Federal Circuits are of differing opinions on what exactly this means and have struck down the practice in certain cases where invocations were determined to advance, or show preference for any one particular belief or religion.

In order to put the City in the best legal position should a lawsuit be filed, I would continue to recommend that a formal policy be adopted to address invocations at a City Council meeting. I have attached several policies from other jurisdictions to this memo to give you an idea of what such a policy would look like and what some of the common elements of these policies are. While I believe a policy incorporating some, or all of these options would put the City in a better position to defend its practice of having an invocation, I will stress that by no means is it a guarantee of victory should we be sued. These options are not in any particular order.

OPTIONS

1. Move the Invocation prior to the roll call and make clear that no one is required to participate.

Many policies move the invocation prior to the roll call and stress that the invocation is not a formal part of the meeting. I do not believe there is any serious dispute that no one can be required to participate in the invocation against their will. Where this issue has arisen, plaintiff’s have argued that even though they did not want to participate in the prayer, when the group that was in attendance at the meeting was told to rise and bow their heads they felt compelled to do so out of fear of being ostracized or having their business before the body be negatively impacted by their refusal to participate. I think it is particularly problematic to expect an Alderman to miss the roll call and the start of the meeting in order to avoid participating in the invocation. In my opinion, moving the invocation prior to the roll call would alleviate these issues. Alderman or citizens who did not wish to participate could choose to wait outside the council chambers and still be able to enter and participate in the roll call and the start of the meeting.

2. State that the invocation is not to be used as a platform to proselytize, or to advance any particular religion, or to disparage any other faith or belief.

Many of the decisions which have struck down invocations to open meetings have done so on the basis that the prayers in question advanced one faith, generally the Christian faith, over other faiths. To proselytize means to convert, or attempt to convert, a person from one religion, belief, or opinion to another. In addition to its long tradition, the purpose of an invocation is to solemnize the proceedings. It should not be used as an attempt to convert others, nor should it be a platform to disparage other people's beliefs. While I do not advocate that we dictate what the people delivering the invocation can say, or that we review and approve their invocations beforehand, I do believe it is important we provide some guidance and let people who deliver the invocation know this type of prayer is not acceptable. If someone chooses to ignore this policy, then we could simply not invite them back to deliver an invocation in the future.

3. State that the prayer should not be sectarian.

This provision is in many policies and is an attempt to make the invocation more tolerable of people of other faiths who may be present for the invocation. I think it is important to note that there is no per se rule that a legislative invocation be non-sectarian. The Supreme Court in the *Marsh* case stated that:

The content of a 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.

Courts which have upheld invocation practices have found this to mean that a prayer can be sectarian, so long as it does not advance any one religion or disparage others.

However, it is important for you to understand that many of the cases where invocations were struck down were based on the fact that the invocations were most often performed by Christian ministers and frequently invoked the name of Jesus. The Courts that decided these cases determined the governmental entity had improperly advanced, or showed preference for, the Christian religion because the invocation was predominantly performed by Christian ministers and/or was overly sectarian. These cases are a threat to the exception carved out in *Marsh*, because in many areas there is a lack of diversity and the fact that the people performing the invocation are primarily Christian more than likely reflects the area's demographics rather than a government endorsement of one particular religion. If this line of analysis becomes the law of the land it would essentially negate the *Marsh* exception because in many areas, including Rapid City, the diversity of faiths required to "balance out" the invocations would be difficult if not impossible to achieve. Unfortunately, the Supreme Court has not decided to review one of these cases yet, so we have no binding precedent on which we can rely.

4. Formalize the process of selecting people to do the invocation and make the process as inclusive as possible.

Currently the person who delivers the invocation is coordinated by the Mayor's Office through the Ministerial Association. I believe that we can continue to use the Ministerial Association, but would suggest that we also include a process for people or groups that may not be eligible to participate in the Ministerial Association and would otherwise be excluded.

5. Place a time limit on those delivering the invocation.

This would serve several purposes. It helps make the meeting more efficient and would help highlight that this is an invocation and not a sermon. I also believe that if people know they only have a certain amount of time it might encourage them to give more thought to what they want to say prior to the meeting. In my experience most problems arise when people come to the podium unprepared and attempt to wing it.

6. Decide not to make a policy at all.

The argument in favor of this would be that instead of defending a new policy along with defending the City Council's tradition of having an invocation to open its meetings, we would just be defending the tradition.

Conclusion

We have received offers to help defend the opening of the City Council meetings with an invocation. In addition to the direct offers, there are several other organizations which have been identified as potential sources of help. These groups are the Alliance Defending Freedom, the Liberty Counsel, the Liberty Institute and the American Center for Law and Justice. Up to this point I have hesitated to contact these groups personally to avoid the perception that my recommendations or advice were being overly influenced by their input. Now that my recommendations are public, I would like authorization to consult with these groups, get their input on a final policy and also discuss potential help in defending any lawsuit should one be filed.