SUBJECT: LEGISLATIVE INVOCATIONS

SOURCE: CITY ATTORNEY & CITY MANAGER

COMMENT: Due to the interest expressed at the City Council Meeting of February 15, 2005, as well as prior Council meetings, this office was directed to schedule an item concerning options for legislative invocations, for discussion and consideration by the Council. Some background is provided on the history of the case law as well as the City’s handling of the matter (and how the City handles law as interpreted by case precedent, generally).

With regard to Porterville’s own invocations practices, review of the City Council’s minutes shows that legislative invocations were given dating back to May 1, 1962, although the official Agenda Order of Business was not amended to include the Invocation until September 6, 1977. The language of the invocations themselves is not evident from the minutes; however in the more recent past sectarian references were made, and the City had no involvement with regard to the specific words used in the invocations given by individuals other than the Council Members. The City has been allowing volunteers from the Ministerial Association to provide the legislative invocations, and if no one from the Association is present, the Mayor (or presiding Council Member) delivers the invocation.

In 1983, the U.S. Supreme Court reviewed the issue of legislative invocations in the case of *Marsh v. Chambers* (1983) 463 U.S. 783. In that case the Court considered whether a state legislature could engage a paid chaplain who opened the Nebraska legislative sessions with an invocation. Until this case, the Supreme Court had only reviewed prayers given in the context of school activities, and through a complex body of law had put into place an extremely strict review of such activities, which has essentially resulted in prohibitions on any prayer (sectarian or nonsectarian) with regard to educational functions. Rather than applying the complicated and multi-part test used to scrutinize these prayer activities, the Court found that due to the history and tradition in this nation of opening legislative sessions with invocations, such a practice could continue so long as the prayer opportunity was not utilized to proselytize or advance a particular religion. The Supreme Court noted in this particular case, the legislative chaplain had at times in the past made sectarian references, but also noted that he had in fact removed all sectarian references after an objection by a legislator of the Jewish faith.
This was the one and only time the U.S. Supreme Court reviewed legislative prayer, specifically, although the Supreme Court has given little additional insight with regard to the Marsh case. The Supreme Court did provide some additional interpretation in County of Allegheny v. Greater Pittsburgh ACLU (1989) 492 U.S. 573:

“Marsh plainly does not stand for the sweeping proposition...that all accepted practices 200 years old and their equivalents are constitutional today...The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over non-religion), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. There have been breaches of this command throughout this Nation’s history, but they cannot diminish in any way the force of the command.” 492 U.S. 573, 603-05.

The Court in Allegheny also provided, in response to the dissent’s perception of the majority opinion’s indifference toward religion,

“.... the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discrimination among citizens on the basis or their religious faiths. A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed.” 492 U.S. 573.

The case most relevant to public entities within the State of California is Rubin v. City of Burbank (2002) 101 Cal.App.4th 1194. In this case, the Court found that a prayer given by a volunteer of the City Burbank’s ministerial association (under arrangements comparative to the City of Porterville’s past practice) violated the Establishment Clause of the First Amendment, due to the specific sectarian reference (in this particular prayer, to the name of Jesus Christ) at the end of the invocation. Although this particular reference was undoubtedly Christian, the Court found that any specific sectarian reference would be violative of the Constitution. The City petitioned for review of the decision to the California Supreme Court, which denied hearing of the case in February 2002. The City then petitioned the U.S. Supreme Court for review, and the U.S. Supreme Court denied review in May 2003. Because there are no other conflicting California Appellate cases, and there are no conflicting federal 9th
Circuit cases, the Court’s ruling is authority and the law which California public entities must abide by. Furthermore, this line of reasoning has been followed fairly consistently in other federal circuit court decisions.

When the *Rubin* decision was filed (and later when the U.S. Supreme Court denied review), the City received information concerning the decision. When it became clear that there was a sensitivity to this issue, the City Manager and the City Attorney, with the Council’s knowledge, attended a meeting of the Ministerial Association for the purpose of discussing the *Rubin* decision. At that meeting the status of the law was discussed, and the City Manager and Attorney encouraged the Association’s volunteers to comply. When cases are decided affecting City practices, the City’s administration adjusts those practices to the extent that it has the control to do so. It is not necessary for the City Council to take action by Resolution in order to make those changes, unless the City Council directs such action. This is because the City and its officials are tasked with following the laws of this Nation and the State of California, as those laws are interpreted by the Courts.

The task of following these laws becomes difficult when there are strong differences of opinion over the interpretation of those laws, especially when fundamental rights are at issue. Therefore, the Council has directed that options be presented for consideration. The options attached are, by no means, an exhaustive list.

**Option 1: Moment of Silence.** Many Cities have instituted this policy, and many had this practice prior to the *Rubin* decision. This option most likely carries the least risk with regard to City/Council liability.

**Option 2: Legislative Invocations in conformity with *Rubin*.** This option formally institutes a policy that mirrors the City of Burbank’s policy in light of the Court decision. If followed, this practice is justifiable under the current status of the law.

**Option 3: “Free Prayer.”** This option is untested with the courts, and in formulating this option the City has tried to allow the free exercise of religious expression, while acknowledging the current Establishment Clause constitutional limitations as defined by the Courts.

**Option 4: Language Circulated by Community Members to the City Council.** The Resolution language of the information previously circulated by a community member has been inserted verbatim. Given the status of the law, and the direction of most of the cases decided in the wake of *Marsh v. Chambers*, the City Attorney cannot recommend this particular option. Furthermore the City Manager has budgetary concerns with regard to this particular policy, as defending this course of action could be costly.

Resolutions pertaining to each of these options are attached.
RECOMMENDATION: This information is presented to the City Council for its consideration. The Council may, but is not required to, take action.

Attachment: 1) Resolution Adopting “Moment of Silence”
2) Resolution Adopting Policy on Legislative Invocations
3) Resolution Adopting Policy of “Free Prayer”
4) Resolution Adopting [Reestablishing] Legislative Invocations
RESOLUTION NO. ____-2005

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PORTERVILLE ADOPTING A “MOMENT OF SILENCE” IN LIEU OF A LEGISLATIVE INVOCATION

WHEREAS, the City of Porterville (the "City") is a charter city organized and existing pursuant to the Constitution of the State of California; and

WHEREAS, in Rubin v. City of Burbank (2002) 101 Cal.App.4th 1194 (review denied February 18, 2002, cert. denied May 19, 2003 538 U.S. 1034), the Court found the inclusion of sectarian prayer during the invocation periods of city council meetings violates the Establishment Clause of the United States Constitution, and that prohibiting such invocations does not constitute censorship or viewpoint discrimination under the Free Speech and Free Exercise Clauses of the First Amendment;

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF PORTERVILLE DOES RESOLVE AS FOLLOWS:

1. The City Council of the City of Porterville hereby adopts, in lieu of any legislative invocation, a “Moment of Silence,” to be held prior to conducting City business at the City Council Meetings.

2. The Moment of Silence portion of the meeting shall provide an opportunity for quiet reflection with regard to the decisions to be considered at the particular meeting as well as with regard to any other issues affecting the community.

3. The Council will continue to allow any individual to exercise his or her Free Speech Rights as set forth pursuant to the First Amendment of the Constitution of the United States of
America, during the Oral Communications period of the City Council Meeting Agendas, consistent with Federal, State, and Local laws.

This Resolution was passed by the City Council members of the City of Porterville at a regularly scheduled meeting thereof on the 1st day of March, 2005, by the following vote:

AYES: 

NOES: 

ABSENT: 

______________________________
Mayor Pedro Martinez, 
City of Porterville

ATTEST:

______________________________
John Longley, City Clerk, 
City of Porterville
RESOLUTION NO. ____-2005

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PORTERVILLE ADOPTING POLICY CONCERNING LEGISLATIVE INVOCATIONS

WHEREAS, the City of Porterville (the "City") is a charter city organized and existing pursuant to the Constitution of the State of California; and

WHEREAS, in Rubin v. City of Burbank (2002) 101 Cal.App.4th 1194 (review denied February 18, 2002, cert. denied May 19, 2003 538 U.S. 1034), the Court found the inclusion of sectarian prayer during the invocation periods of city council meetings violates the Establishment Clause of the United States Constitution, and that prohibiting such invocations does not constitute censorship or viewpoint discrimination under the Free Speech and Free Exercise Clauses of the First Amendment;

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF PORTERVILLE DOES RESOLVE AS FOLLOWS:

1. The City Council of the City of Porterville hereby adopts the policy attached as Exhibit “A” for allowing legislative invocations before commencing city business at the City Council Meetings.

2. The Council will continue to allow any individual to exercise his or her Free Speech Rights pursuant to the First Amendment of the Constitution of the United States of America, during the Oral Communications period of the City Council Meeting Agendas, consistent with Federal, State, and Local laws.
This Resolution was passed by the City Council members of the City of Porterville at a regularly scheduled meeting thereof on the 1st day of March, 2005, by the following vote:

AYES:

NOES:

ABSENT:

__________________________________________
Mayor Pedro Martinez,
City of Porterville

ATTEST:

__________________________________________
John Longley, City Clerk,
City of Porterville
EXHIBIT A

1. The Invocation shall be listed as the first item on the City Council Agenda, prior to the flag salute and roll call. Next to the item will be the following sentence: “The Courts have concluded that sectarian prayer as part of City Council meetings is not permitted under the Constitution.”

2. Volunteers from the Ministerial Association may, on a rotational basis, provide the invocation, in compliance with No. 1 above. The City may designate other individuals or associations, so long as those individuals/associations agree to comply with the above restriction.

3. In the event that a member of the Ministerial Association is not available for a particular meeting’s invocation, the invocation shall be given by the Mayor, or the Council Member presiding over the particular meeting, and shall be given in compliance with No. 1 above.

4. In the event that an invocation is given by an individual that does not comply with No. 1, above, it will be noted on the record, and the individual may not be permitted to give another invocation during a subsequent legislative invocations period of a City Council Meeting.

5. Nothing in the above standards shall be construed as a prohibition or restriction on individuals’ Free Speech and Free Exercise Rights under the First Amendment of the Constitution of the United States of America, in particular with regard to views expressed during the oral communications period of the City Council meeting, consistent with Federal, State, and Local laws.
RESOLUTION NO. ___-2005

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PORTERVILLE ADOPTING POLICY PROVIDING FOR FREE PRAYER IN LIEU OF LEGISLATIVE INVOCATION

WHEREAS, the City of Porterville (the "City") is a charter city organized and existing pursuant to the Constitution of the State of California; and

WHEREAS, in Rubin v. City of Burbank (2002) 101 Cal.App.4th 1194 (review denied February 18, 2002, cert, denied May 19, 2003 538 U.S. 1034), the Court found the inclusion of sectarian prayer during the invocation periods of city council meetings violates the Establishment Clause of the United States Constitution, and that prohibiting such invocations does not constitute censorship or viewpoint discrimination under the Free Speech and Free Exercise Clauses of the First Amendment; and

WHEREAS, the City Council of the City of Porterville desires to balance the Free Exercise Rights of Individuals under the First Amendment with the purpose and import of the Establishment Clause of that State Constitutional provision;

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF PORTERVILLE DOES RESOLVE AS FOLLOWS:

1. The City Council of the City of Porterville hereby adopts the policy attached as Exhibit "A" for allowing "Free Prayer" prior to the commencement of the City Council Meetings.

2. The Council will continue to allow any individual to exercise his or her Free Speech Rights pursuant to the First Amendment of the Constitution of the United
States of America, during the Oral Communications period of the City Council Meeting Agendas, consistent with Federal, State, and Local laws.

This Resolution was passed by the City Council members of the City of Porterville at a regularly scheduled meeting thereof on the 1st day of March, 2005, by the following vote:

AYES:

NOES:

ABSENT:

____________________________
Pedro Martinez, Mayor
City of Porterville

ATTEST:

____________________________
John Longley, City Clerk,
City of Porterville
1. The "Free Prayer" period shall precede the City Council Meeting and shall be listed prior to the Roll Call on the agenda.

2. Anyone present for the “Free Prayer” period shall be permitted to participate. All who are present shall be respectful of any and all views expressed, and respectful of the differences in the views and opinions that may be held by those that are present.

3. The time and place for the period shall be scheduled with the Council Members and reasonable notice shall be provided so that any community members wishing to participate will have the opportunity to do so.

4. In the event a quorum of the Council Members is present for the free prayer, the Council Members shall be prohibited from discussing City business, in accordance with the Brown Act.
RESOLUTION NO. ____-2005

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PORTERVILLE PROVIDING FOR LEGISLATIVE INVOCATIONS

WHEREAS, the City of Porterville (the "City") is a charter city organized and existing pursuant to the Constitution of the State of California; and

WHEREAS, in *Rubin v. City of Burbank* (2002) 101 Cal.App.4th 1194 (review denied February 18, 2002, cert. denied May 19, 2003 538 U.S. 1034), the Court found the inclusion of sectarian prayer during the invocation periods of city council meetings violates the Establishment Clause of the United States Constitution, and that prohibiting such invocations does not constitute censorship or viewpoint discrimination under the Free Speech and Free Exercise Clauses of the First Amendment; and

WHEREAS, the City Council of the City of Porterville believes that the above ruling does in fact violate the Free Speech and Free Exercise Clauses of the First Amendment, and furthermore that such ruling should not be controlling with regard to the City of Porterville;

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF PORTERVILLE DOES RESOLVE AS FOLLOWS:

1. In upholding both the long-standing American tradition of opening legislative meetings with invocations offered by local clergy and the First Amendment to the Bill of Rights, the City Council of the City of Porterville hereby reinstates its policy of inviting a local ministerial association to provide clergy which will voluntarily offer invocations during the opening ceremonies of the City Council’s open sessions.

2. The Council further resolves to refrain from providing or restricting the content of these invocations in any way, thus complying with the intent and letter of this nation’s Constitution.
This Resolution was passed by the City Council members of the City of Porterville at a regularly scheduled meeting thereof on the 1st day of March, 2005, by the following vote:

AYES:

NOES:

ABSENT:

________________________________________
Mayor Pedro Martinez,
City of Porterville

ATTEST:

________________________________________
John Longley, City Clerk,
City of Porterville