

March 6, 2007

City Manager Bernard F. Lynch  
Mayor William F. Martin, Jr.  
Members of the City Council

**Re: Prayer at City Council Meetings**

Dear Mr. Manager, Mayor Martin, and Members of the City Council:

A number of issues have been raised regarding the Lowell City Council's current practice with respect to conducting legislative prayer at the opening of its meetings, as well as consideration of certain alternatives to such a practice. Namely, the Greater Lowell Interfaith Leadership Alliance (GLILA) has asked the Council to consider adopting a policy whereby five prayers and a moment of silence, representing what GLILA describes as the five major religions as well as atheism, are utilized at the opening of the Council meetings on a rotating basis. Also suggested by some councilors is a policy of opening the meeting with the Lord's Prayer and then following it with one of the six alternatives suggested by GLILA on a rotating basis. All these issues have been referred to the Law Department for a report and recommendation. For the following reasons, it is the opinion of this office that, **while legislative prayer is constitutional, both the current practice of the Council, as well as the policy changes proposed, would result in a violation of the Establishment Clause of the First Amendment of the Constitution.**

Since approximately the 1960's, the Council has opened its meeting with a recitation of the *Lord's Prayer*: "Our Father who art in heaven, hallowed be thy name. Thy kingdom come. Thy will be done on earth, as it is in heaven. Give us this day our daily bread, and forgive us our trespasses, as we forgive those who trespass against us, and lead us not into temptation, but deliver us from evil."<sup>1</sup> The Lord's Prayer is perhaps the "best-known prayer in Christianity," and as St. Augustine writes: "run through all the words of the holy prayers, and I do not think that you will find anything in them that is not contained and included in the Lord's Prayer."

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<sup>1</sup> I note, that the Council's forty year tradition of reciting the Lord's Prayer is not particularly long standing or historical when compared to the tradition of the Congress, the Senate and many other state legislative bodies who have opened their legislative sessions with prayer for nearly 200 years without interruption. I further note that the so-called "forty year tradition" is only anecdotal. The City Clerk has no record of the initiated practice of the Lord's Prayer being recited at the commencement of the Council meetings.

City Manager Bernard F. Lynch  
Mayor William F. Martin, Jr.  
Members of the City Council  
March 6, 2007  
Page 2

*Catechism of the Catholic Church*, Part 4: Christian Prayer. The history of the prayer is that it was taught to and given to Christians by Jesus. Id. The "Lord" in the Lord's Prayer, is the Lord Jesus. Id. The prayer is led by the Mayor. It is brief and voluntary in nature.

GLILA has challenged the custom and practice of the Council's legislative prayer on the grounds that opening all meetings with a Christian prayer is insensitive to non-Christians. In its place, GLILA has proposed that the Council adopt a policy of utilizing prayers from what it describes as the five major religions, namely: Christian, Muslim, Buddhist, Jewish and Hindu, as well as a moment of silence in recognition of atheists. Pursuant to GLILA's proposal, the various prayers, as well as the moment of silence would be utilized on a rotating basis every six weeks. The Council would be led in prayer by various religious leaders. In response to this proposal, some members of the Council have suggested that the Lord's Prayer remain as the opening prayer, and that the other denominational prayers or the moment of silence be utilized on a rotating basis in addition to the Lord's Prayer.

The Supreme Court has addressed the constitutionality of legislative prayer only once: Marsh, Nebraska State Treasurer, et al. v. Chambers. In a 6-3 decision, the *Marsh* court held that the State Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state, did not violate the Establishment Clause of the First Amendment. Marsh, Nebraska State Treasurer, et al. v. Chambers, 463 U.S. 783 (1983).<sup>2</sup> In reaching its conclusion, the Court departed with what had been and continues to be "the most commonly cited formulation of prevailing Establishment Clause doctrine," the so-called "*Lemon* test."<sup>3</sup> Instead, the Court "carv[ed] out an exception to the Establishment Clause." Marsh, Nebraska State Treasurer, 463 U.S. at 797, (Brennan, J., dissent). In creating this exception, the Court relied heavily on the fact that "the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." Marsh, Nebraska State Treasurer, 463 U.S. at 787. The history relied on by the *Marsh* Court included the "contemporaneous writing of the First Amendment and the establishment of legislative prayer in congress," and concluded that "the Framers would not have established a practice that violated their

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<sup>2</sup> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Amendment I, Bill of Rights.

<sup>3</sup> In analyzing whether there is a violation of the Establishment Clause courts have traditionally relied on a three part test: first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster 'an excessive government entanglement with religion.' Lemon v. Kurtzman, 403 U.S. 602 (1971). If the court finds a violation of any one of the three tests, it finds a violation of the Establishment Clause.

City Manager Bernard F. Lynch  
Mayor William F. Martin, Jr.  
Members of the City Council  
March 6, 2007  
Page 3

understanding of the constitutional amendment that they just had composed." Hinrichs, et al. v. Bosma, 440 F.3d 393, 398 (2006). The exemption to the Establishment Clause created by the *Marsh* case is today commonly referred to as "the legislative-prayer exception." Doe v. Tangipahoa Parish School Board, 473 F.3d 188 (2006).

While the *Marsh* case clearly authorizes "legislative prayer," its decision is not without limits. Several circuit courts, state courts, and even a few later Supreme Court decisions have all held that the *Marsh* holding applies only to ecumenical, nondenominational legislative prayer, and does not extend to prayer that is overtly and consistently sectarian.<sup>4</sup> Hinrichs, et al. v. Bosma, 440 F.3d 396. When Justice Kennedy, along with three other Justices, argued that a crèche in a governmental building was constitutional based on *Marsh*, the majority (Blackmun, J.) wrote:

"Indeed, in *Marsh* itself, the Court recognized that not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.' Thus *Marsh* plainly does not stand for the sweeping proposition Justice Kennedy apparently would ascribe to it, namely, that all accepted practices 200 years old and their equivalents are constitutional today. . . . Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, it certainly means at the very least that government may not demonstrate a preference even 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.'"

County of Allegheny, et al. v. American Civil Liberties Union, Greater Pittsburgh Chapter, et al., 492 U.S. 573, 604-605 (1989), quoting in part, Larson v. Valente, 456 U.S. 228,244 (1982). Similarly, federal circuit courts have consistently interpreted *Marsh* as permitting "nonsectarian, non-proselytizing legislative prayers that do not advance or disparage any faith or belief." Doe, 473 F.3d at 200. See also: Most recently, the Fourth Circuit relied upon *Marsh* to resolve two cases involving legislative prayer. In Wynne v. Town of Great Falls, 376 F.3d 292 (4<sup>th</sup> Cir. 2004), the court struck down a town's practice of opening city council meetings with prayers that

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<sup>4</sup> In a separate, but concurring opinion in County of Allegheny, Justice O'Connor "emphasized that both the longstanding existence of legislative prayer and its 'nonsectarian nature' in *Marsh* led her to conclude that the practice did not violate the First Amendment." Hinrichs, 440 F.3d at 399.

City Manager Bernard F. Lynch  
Mayor William F. Martin, Jr.  
Members of the City Council  
March 6, 2007  
Page 4

closely resembled the majority of prayers in this case: brief offerings that ended with supplications like, "In Christ's name we pray." *Id.* at 294. The court placed great reliance on *Marsh's* limitation to nonsectarian prayer and its warning that prayer that advances a particular religion is impermissible; it also discussed at some length the Court's subsequent interpretation of *Marsh* in *Allegheny County*. See *Id.* at 297-301. The court concluded that the Christian prayers at issue violated the rule of these two cases by "affiliation" of the government with the Christian religion. *Id.* at 300. A second case, *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4<sup>th</sup> Cir. 2005), reaffirms *Wynne's* reading of *Marsh* and *Allegheny County* and holds that a local board's nonsectarian prayers were permissible under those cases.

The Ninth Circuit faced a similar issue in *Bacus v. Palo Verde Unified School District Board of Education*, 52 Fed. App'x 355 (9<sup>th</sup> Cir. 2002) (unpublished order).<sup>2</sup> There, the court struck down a school board's practice of sectarian invocations at official meetings, which ended "in the Name of Jesus." *Id.* at 356-57. The court deliberated over whether school board prayer should be analyzed under *Marsh* or under school prayer cases; it ultimately did not have to decide this issue, holding that the practice would even violate the more lenient *Marsh* doctrine. *Id.* at 356. According to that court, the overtly Christian prayers were an inappropriate effort to "advance" Christianity, in *Marsh's* terms, and showed the government's "allegiance" to that faith, in *Allegheny County's*. *Id.* at 357. <sup>3</sup> A similar case in the Sixth's Circuit also deserves mention. In *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6<sup>th</sup> Cir. 1987), the Sixth Circuit struck down the overtly Christian invocations and benedictions used at two Michigan high school graduation ceremonies. Relying on *Marsh* to find that prayer in such settings may in some cases be permissible - a view that the Supreme Court later rejected in *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) - the court held that *Marsh* strictly prohibited the *sectarian* prayers at the commencements, or at any other solemnizing occasions. *Stein*, 822 F.2d at 1408-09; see *id.* at 1410 (Milburn, J., concurring). *Stein* remains valuable for its interpretation of *Marsh*.

In *Rubin v. City of Burbank*, 101 Cal. App. 4<sup>th</sup> 1994, 124 Cal. Rptr.2d 867 (Cal. Dist. Ct. App. 2002), the court struck down as violating the federal constitution a city council's policy of using rotating clergy who offered, in the majority of cases, overtly Christian prayers. And in *Society of Separationists v. Whitehead*, 870 P. 2d 916 (Utah 1993), the court upheld a city council's practice of legislative prayer under the Utah constitution in large part because of the pointedly nonsectarian nature of the invocations.<sup>5</sup> These cases appear to teach the rule that nonsectarian

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<sup>5</sup> Our own state constitution provides as follows: "As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government; therefore, the several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious

City Manager Bernard F. Lynch  
Mayor William F. Martin, Jr.  
Members of the City Council  
March 6, 2007  
Page 5

legislative prayer is constitutionally sound, but sectarian appeals, including those of an overtly Christian nature, are not.

In the present case, the Council's current practice of reciting the Lord's Prayer, as well as the proposed policy alternatives, are all properly analyzed under the "legislative-prayer exception" of *Marsh*, as opposed to the more stringent *Lemon* test.<sup>6</sup> Courts have applied the holdings of *Marsh* to other "deliberative public bodies," such as a city council. *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10<sup>th</sup> Cir. 1998) (en banc) (applying the holdings of *Marsh* to a City Council's right to prohibit a citizen the right to recite his proposed prayer on the grounds that the "prayer" disparaged the Christian faith); *See also: Doe*, 473 F.3d at 198 ("Although Judge Stewart opines that *Marsh* applies only to legislative bodies, *Marsh* contemplated deliberative public bodies more generally.") Since *Marsh*, "the legislative-prayer exception has been sparsely applied." *Doe*, 473 F.3d at 199. In applying the holdings of *Marsh* to the City's current practice, as well as the proposed modifications to such practices, a violation of the establishment clause would likely result.

In the case of the Council's current practice, namely to begin each Council meeting with the Lord's Prayer, the Council is engaging in actions, although inherited, which go beyond that authorized by *Marsh*. The Lord's Prayer is not only overtly sectarian, it is arguably the most Christian prayer of all Christian prayers. It is in fact "the" prayer given to Christians by their Savior, Lord Jesus Christ. In fact, the "Lord" in the Lord's Prayer is Jesus. Moreover, the fact that it is currently the only prayer recited by the Council further leads to a conclusion of an impermissible advancement of a particular religion. While there is absolutely no evidence that it was ever the intention of the Council to impermissibly use the Lord's Prayer to advance the Christian, or even the Catholic faith, a continuation of this practice would, in light of the above holdings, result in a violation of the Establishment Clause.

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teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses; and all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract which may be thereafter made, or entered into by such society: and all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law. Art. III, of the Massachusetts Declaration of Rights.

<sup>6</sup> In this case, although the analysis is not necessary, neither the City's current practice, nor the proposed modifications to such practices would survive scrutiny under the *Lemon* test.

City Manager Bernard F. Lynch  
Mayor William F. Martin, Jr.  
Members of the City Council  
March 6, 2007  
Page 6

Turning to the proposal of GLILA, that the Council adopt a policy of utilizing prayers from what it describes as the five major religions, namely: Christian, Muslim, Buddhist, Jewish and Hindu, as well as a moment of silence in recognition of atheists, such a policy would place the Council in a constitutionally impermissible position of endorsing and establishing "five major religions."<sup>7</sup> See: Weisman v. Lee, 908 F.2d 1090, 1095 (1990)("What is crucial is that a governmental practice not have the effect of communicating a message of government endorsement or disapproval of religion." In Lee, a decision from our own circuit, the court was addressing a practice whereby public school teachers would choose the speaker who would give the prayer at graduation. In reviewing such a practice the court noted: "This has the effect of involving those teachers in choosing among various religious groups, an activity that is surely prohibited by the Establishment Clause", quoting, Lynch, 465 U.S. at 692. This proposed policy would be placing the governmental body in a position of drawing an impermissible distinction between a so-called "major" versus "minor" religion. This is exactly the type of practice that our own Supreme Judicial Court warned against when reviewing the Massachusetts' legislative prayer practice in the late 1970s: "There is no evidence that the State has become embroiled in any difficult decision about which religions are to be represented or what sorts of invocations are to be offered." Colo & others v. Treasurer and Receiver General, 378 Mass. 550, 559 (1979).

Yet another establishment issue which would arise as the result of GLILA's proposal is action of the Council, i.e., the governmental body, selecting and/or approving the content of the prayers to be recited at Council meetings, a practice which was rejected by Marsh. Marsh, 465 U.S. at 795 ("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.") In our own pre-Marsh case, the SJC noted that in upholding legislative prayer in the Commonwealth, that there was no evidence that the content of the prayers was being supervised by the State. Colo & others, 378 Mass. at 559.

Lastly, I turn to the proposal by some members of the Council that it adopt a policy of opening the meeting with the Lord's Prayer and then following it with one of the six alternatives suggested by GLILA on a rotating basis. While well-intentioned and offered in the spirit of compromise, such a policy would clearly violate the Establishment Clause on the grounds that the policy would place the Lord's Prayer in an obvious position of superiority over all other prayers.<sup>8</sup> While I am doubtful that such was the intent of those members of the Council

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<sup>7</sup> It is also likely that some of the prayers selected by GLILA may in fact be overly sectarian as well, but it does not appear necessary to engage in such an analysis.

<sup>8</sup> Perhaps the most important safeguard of the establishment clause is to prevent a "divisive political" debate with respect to religion: "Ordinarily political debate and division, however, vigorous or even partisan, are normal and

City Manager Bernard F. Lynch  
Mayor William F. Martin, Jr.  
Members of the City Council  
March 6, 2007  
Page 7

proposing the policy, the result would nevertheless be the same. Here, the government would be endorsing and mandating a specifically Christian prayer be said at all meetings, while prayers of other faiths may be recited on a rotating basis. Such a policy would demonstrate an official preference for a particular or specific religion which is constitutionally impermissible. Where insistence on the Lord's Prayer would indicate a "purposeful preference" for a particular religion or religious sect, such preference would amount to a "deliberate election of government to favor or align itself with a particular view.

While this Council did not create the current practice of reciting the Lord's Prayer at the opening of its meetings, once challenged, the Council is then charged with either adopting what has been a long-standing practice into a policy, or rejecting the current practice in favor of a new policy, or possibly no policy at all.<sup>9</sup> Courts have found constitutional violations of the Establishment Clause where governing bodies once faced with complaints regarding sectarian references contained in their prayers chose to do nothing. See: Doe, 473 F.3d at 200-201, ("As in the action at hand, but unlike Marsh, the sectarian references in the prayers at issue . . . were not removed after they were challenged, and the prayers consistently advanced the Christian faith. . . . The school board's decision to solemnize its meetings by using Jesus' name impermissibly 'displayed the government's allegiance to a particular sect or creed.'")

Accordingly, once a potentially unconstitutional practice is challenged, as in this case, the Council has an obligation to act. The Council as a deliberative public body has an affirmative obligation to act in the "public interest," for the "citizenry as a whole." Doe, 473 F.3d at 199. Courts have been mindful on this issue of the difficulty legislators may face in asserting, "in public, religious views that their constituents might perceive as hostile or nonconforming." Marsh, 463 U.S. at 799.

In the present case, the permissible options before this Council would include adopting a nonsectarian prayer practice, engaging in a moment of silence, or choosing to not engage in the practice of legislative prayer at all. In determining what constitutes acceptable legislative prayer, the following provides a sound guide: "the kind of legislative prayer that will run afoul of the

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healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process." Marsh, 463 U.S. at 799 (Brennan, J.)(dissent). Here, both the proposal be GLILA as well as the proposed "compromise" position, may indeed open the door to political debate about which religious prayers are to be recited, precisely what the establishment clause forbids.

<sup>9</sup> No amendments shall be made to these rules except at a regular meeting and by the vote of six Councilors; provided each Councilor has received a written copy of the proposed change(s) at least one week prior to the regular meeting at which the vote is to be taken, and provided further, that the Committee on Rules has reported on such change(s). Rule 33. The Council is, by motion, free to waive its own Rules.

City Manager Bernard F. Lynch  
Mayor William F. Martin, Jr.  
Members of the City Council  
March 6, 2007  
Page 8

constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, in contrast a permissible prayer 'typically involves nonsectarian requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body,' or to put another way, a genre of prayer that 'is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose.'" Doe, 473 F.3d at 199.

I trust this answers your inquiry into this matter.

Very truly yours,

Christine P. O'Connor  
City Solicitor

CPO:mfa