

Prayer in Public Meetings

In recent times this has become a volatile issue in Utah. It has been the tradition in many, if not most, Utah cities and towns to have a ceremony at the start of council meetings that includes a prayer. This practice has come under criticism and challenge. The challenges usually involve the allegation that the prayer is either an impermissible establishment of religion by government and violates the constitutional requirement of separation of church and state. Needless to say this is very complicated law, not understood by most, and the issue can devolve into unseemly confrontations. This chapter is not going to resolve the issue or even educate the reader on the nuances of the law. It is intended to give a summary of the current state of the law in Utah and some advice, welcome or not.

The United States Supreme Court has held that the practice of “legislative” prayer¹ does not violate the federal constitutional prohibition on establishment of religion, but the issue does not end there. There is also the Utah Constitution to be considered. Because of the unique history of Utah, the Utah Constitution is more detailed and restrictive in the area of religion than the United States Constitution. In addition to language similar to the federal constitution that prohibits laws that establish religion or prohibit the free exercise thereof, the Utah Constitution provides that “[t]here shall be no union of church and state, nor shall any church dominate the state or interfere with its function. No public money or property shall be appropriated for or applied to any religious worship exercise or instruction or for the support of any ecclesiastical establishment.”² It is the restriction on the use of public money and property for a religious exercise that causes a problem when it comes to prayer at council meetings.

In the case of *Society of Separationists v. Whitehead*³ the Utah Supreme Court reviewed whether Salt Lake City's practice of opening its city council meetings with prayer was consistent with the Utah Constitution. The court determined that prayer at council meetings was a religious exercise but still found the practice of having a prayer as part of an opening ceremony for a city council meeting as constitutional. In doing so, the court concluded that Article I, Section 4 of the Utah Constitution does not impose an absolute ban on government expenditure of public funds or use of public property in support of religion or religious institutions. Instead, a "neutrality" requirement was read into the "no public money or property" language of Article I, Section 4, and the court concluded the following:

The middle ground we adopt rests on the concept of governmental neutrality that underlies our constitution's religion and conscience clauses, which in this instance, means neutrality in the use of public money or property. When the state is neutral, any benefit flowing to religious worship, exercise, or instruction can fairly be characterized as indirect because the benefit flows to all those who

¹ *Marsh v. Chambers*, 463 U.S. 783 (1983).

² Article I, Section 4 of the Utah Constitution.

³ 870 P.2d 916 (Utah 1993).

are beneficiaries of the use of government money or property, which may include, but is not limited to, those engaged in religious worship, exercise, or instruction.⁴

Having read the neutrality requirement into Article I, Section 4, the Utah Supreme Court then went on to establish the analytical elements of neutrality that must be present for a benefit to be found constitutionally indirect and therefore permissible.

Use of public money or property that benefits religious worship, exercise, or instruction or any ecclesiastical establishment qualifies as an indirect benefit and survives constitutional scrutiny only if

- (1) The money or property is provided on a nondiscriminatory basis
- and (2) The public money or property is equally accessible to all.⁵

In another case, the Utah Supreme Court determined that a municipality cannot deny a person the opportunity to participate in the opening ceremony based on the anticipated content of the prayer.⁶ In that case a city had an established policy and practice of opening its city council meetings with a prayer. An individual, Mr. Snyder, made a written request for information from the city regarding the guidelines or restrictions for giving the opening prayer. The city responded to him, through the city attorney, that "[t]he municipal council has not established formal policies regarding the nature and/or content of this reverence portion of their agenda. However, the council has established the policy that all council meetings will start with prayer." The city also explained that "[t]he purpose of the 'prayer' is to allow individuals the opportunity to express thoughts, leave blessings, etc. is not a time to express political views, attack city policies or practices, or mock city practices or policies."

By letter, Mr. Snyder requested that he be allowed to offer the opening prayer at the next available opportunity and enclosed a copy of his proposed prayer. The city informed him that "[t]he text of [his] proposed prayer [was] unacceptable" because it did not comport with "the guidelines set forth in the City Attorney's response" and stated that "[u]ntil your proposed prayer satisfies these guidelines, an invitation to participate in our opening ceremonies will not be forthcoming." The Utah Supreme Court found that it was unconstitutional for a city to deny the opportunity to pray if the denial was based on the proposed content of the prayer.

What these two cases mean in laymen's terms is that a city or town that has prayer as a part of its opening ceremony must not favor particular religions or religion in general in scheduling presenters and must provide the opportunity to all that want to pray, speak, or emote. Even the nonreligious or the irreligious must be allowed the same opportunity to participate in the municipality's opening ceremony of its council meetings. The city or town cannot edit the content of the presentation.

⁴ *Society of Separationists*, 870 P.2d 916, 937 (Utah 1993).

⁵ *Society of Separationists*, 870 P.2d 916, 938 (Utah 1993).

⁶ *Snyder v. Murray City Corp.* 72 P.3d 325 (Utah 2003).

Contrary to what some who challenge prayer may claim, the Utah Supreme Court cases do not prohibit a municipality's agenda from having the word prayer or invocation on it or require all cities and towns to have formal a written policy and they do not prohibit members of councils from religious expression during meetings. They do require neutrality, nondiscrimination, and equal access to the right to present thoughts, readings, or prayers if the city or town has the practice of opening its meetings with prayer. It is permissible, when you know that a prayer is going to be said as part of the opening ceremony, to have the agenda reflect specifically that a prayer will be said. Likewise it would only be polite that, if the presenter was going to recite a poem or speech in lieu of the prayer, this be accurately reflected on the agenda.

Although the court cases do not specifically require the adoption of a formal written policy regarding this matter, such a policy may be the best way to insure that the law is complied with. The policy should attempt to make sure that the opportunity to participate in the council meeting opening ceremony is provided on a nondiscriminatory basis and is accessible to all.

If a city or town is committed to maintaining the ceremony of having prayer open council meetings the Salt Lake City policy that was upheld by the Utah Supreme Court is a good example of what a policy should contain.⁷ It is a good example not because it is the best or only possible policy, but because it is a policy that the Utah Supreme Court has already found to be constitutional. The resolution establishing the policy states in part the following:

The Salt Lake City Council has traditionally invited the presentation of thoughts, readings, and invocations, along with the Pledge of Allegiance to the Flag, as an Opening Ceremony before certain of its meetings. This opening to the City's legislative process is solely for a secular purpose, among other reasons to: (1) provide a moment during which Council members and the audience reflect on the importance of the business before the Council; (2) promote an atmosphere of civility; (3) encourage lofty thought and high-mindedness; (4) recognize cultural diversity; (5) foster sensitivity for and recognize the uniqueness of all segments of our community. The presentations shall be done on a volunteer basis and without cost to the City. The presentations are intended to be nondenominational and non-proselytizing in character; however, the City will not dictate the form or content of any such presentation. It is the formal policy of the Salt City Council to seek out a wide variety of community organizations, churches, and individuals to offer thoughts, readings, and invocations at council meetings to achieve its stated purposes.

To carry out the policy, the resolution contained a written procedure to follow. This procedure include designating a city employee responsible to schedule the presentation of

⁷ It is my understanding that as of the date of this writing Salt Lake City no longer follows this same policy and now does not start its meeting with prayer.

thoughts, readings, and invocations, that if the scheduled presenter does not show up at the meeting, the employee is to ensure that no last minute substitution's is made; that the City will mail a letter every six months to area churches and civic groups inviting them to contact the city employee to schedule a thought, reading, or invocation; that individuals who are not given this invitation are also welcome to present by giving the city a written request to do so; that the city council will be given a report every six months containing the names and affiliation of those who have made presentations; that an adopted "suggestion for presenters" outlining the city's goals and objectives for the opening ceremony be given to each proposed presenter; and that the title of the matter on the agenda is changed to "Invocation, Reading, or Thought."

Since the Utah Supreme Court has already approved Salt Lake City's policy, an adopted policy that contains substantially the same elements will probably be upheld if challenged in court.

Many municipalities currently have the policy that only members of the council are allowed to give the prayer at the meetings. This is probably not a policy that satisfies the law. A member of a city council has the right to speak a prayer at anytime he or she has the floor, but this is not the same as the city or town having a formal invocation as part of the opening of a council meeting. If there is a formal opening that includes prayer, it will be considered by the courts as a religious exercise. The issues of equal access and nondiscrimination are satisfied by having a policy that only elected council members can pray. The city or town would also need to allow others who request to do so to participate.

The following are suggestions for cities and towns on this subject:

First, since this will always be a contentious issue in Utah, carefully decide whether prayer adds enough to your meetings to justify the effort. Council members should remember that no one is taking away their right to personal prayer. You can always retire to your closets and pray in secret if you need guidance.

Second, if you decide that prayer is an important part of the council meeting, then adopt a formal policy on how this will be carried out. While the policy does not necessarily have to be in writing, it always helps to do so. Review the policy every time a new council takes office as the policy may change as the make up and temperament of the council membership changes.

Third, allow your staff the time and resources to comply with your own policy. It is unfair to rely on your staff to see that the policy is complied with if you are not going to give the staff member sufficient time and support to carry out the policy in accordance with the law.

Fourth, provide for participation by the non-religious as well as the religious. The courts require not only equality of treatment among religious groups but also that you not discriminate against the non-religious and the irreligious. This may mean that at times

the opening ceremony of your meeting may contain presentations of thoughts, readings, or even diatribes in place of the prayer.

Fifth, at the meeting, do not ask for volunteers from your staff, the audience, or council members to offer the prayer. This can result in embarrassing situations for them and will not comply with the law.

Sixth, the agenda should reflect what is going to happen at the meeting. I believe in giving fair warning to the public of what to expect. If you know it is going to be a prayer, then it is proper to have it on the agenda as a prayer. If you know it is not going to be a prayer, then include what it is on the agenda. If you just want to have the same thing on every agenda for convenience sake, then use a generic term like “reverence,” “opening ceremony,” or “invocation/thought/reading.”

Finally, with regard to the dissenters among us, they may ask for an opportunity to present something in your opening ceremony. This may be required if you are going to allow prayer as part of your meeting. While the law may not require a response to these requests, good manners do. Respond with the information they request and be prepared to schedule their presentation.