



### AGENDA ITEM FORM

**TYPE OF AGENDA ITEM:**

- CONSENT AGENDA
- PRESENTATION
- ACTION ITEM
- TOWN MANAGER & STAFF COMMENTS
- PUBLIC HEARING
  - Duly Advertised

**PURPOSE OF ITEM:**

- INFORMATION ONLY
- DISCUSSION ONLY
- DISCUSSION AND/OR DECISION
  - Introduction     Resolution
  - Ordinance       Grant/MOU
  - By Motion         Bylaws

**PRESENTER:** Kristin Forrester    **PRESENTER TITLE:** Council Lady

**AGENDA ITEM:**

Research on Invocation for Legislative Bodies and a Policy

**BACKGROUND / SUMMARY:**

At the May 8, 2012 Council Meeting Council Lady Forrester asked for the opportunity to provide research she had done on invocations to be part of the ad hoc committee that was formed to aid in discussions on the matter.

**ATTACHMENTS:**

An Open Letter to Legislative Bodies in the Fourth Circuit Court  
Policy Regarding Opening Invocations Before Meetings

**REQUESTED ACTION:**                     NO ACTION REQUESTED

**FOR MORE INFORMATION, CONTACT:**    Name: Kristin Forrester

Phone#: 703-221-3400                    E-mail: [honkforrester@dumfriesva.gov](mailto:honkforrester@dumfriesva.gov)

*FOR USE DURING MEETING*

**VOTE:**                     PASSED                     NOT PASSED

Y	N		Y	N		Y	N
<input type="checkbox"/>	<input type="checkbox"/>	Barr	<input type="checkbox"/>	<input type="checkbox"/>	Foreman	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	Jurgensen	<input type="checkbox"/>	<input type="checkbox"/>	Toney	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	Vacant					
							Forrester
							Washington

## An Open Letter to Legislative Bodies in the Fourth Circuit

In recent years the historical and cherished tradition of opening public meetings with an invocation has come under attack. A series of lawsuits has been filed challenging different invocation policies and practices. The Alliance Defense Fund (ADF) is a not-for-profit legal alliance defending the right to hear and speak the Truth through strategy, training, funding and direct litigation. Our organization exists to educate the public and the government about important constitutional rights, particularly the freedom of religious expression. ADF has been called upon to assist and successfully defend many public officials nationwide.

In light of recent court decisions, ADF has consulted with legislative bodies to develop neutral and inclusive practices that protect the government as well as all private citizens who choose to participate in public invocations. On July 29, 2011, the U.S. Court of Appeals for the Fourth Circuit decided in *Joyner v. Forsyth County, N.C.*, 653 F.3d 341 (4th Cir. 2011), that legislative prayers delivered by speakers selected through a neutral selection procedure are constitutional. However, the Fourth Circuit established some new guidelines for the implementation of public invocations offered within its jurisdiction (the Fourth Circuit includes the states of North Carolina, South Carolina, Virginia, West Virginia and Maryland). This letter addresses the impact of the *Joyner* decision.

In *Joyner*, the Fourth Circuit reaffirmed that prayer before public meetings of deliberative bodies can be delivered without violating the Establishment Clause of the Constitution. *The court thus made it clear that governmental bodies do not need to abandon the centuries-old tradition of legislative prayer.* The court also acknowledged there are various ways to continue the practice and declined to “set forth some sort of template for the ideal legislative prayer policy.” *Id.* at 354.

A variety of alternative avenues exist for establishing a public invocation policy. The U.S. Supreme Court, in *Marsh v. Chambers*, 463 U.S. 783 (1983), approved a practice of using a chaplain to deliver a public invocation before a deliberative body. Numerous courts, including the *Joyner* court have also affirmed the practice of inviting local clergy to deliver a public invocation. *Joyner*, 653 F.3d at 345. In *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4<sup>th</sup> Cir. 2004), *cert. denied*, and *Turner v. The City Council of the City of Fredericksburg*, 534 F.3d 352 (4<sup>th</sup> Cir. 2008) the Fourth Circuit specifically approved a practice in which the invocation was delivered by the elected members of the city council. ADF stands ready to consult with government leaders who want to outline procedures to allow for public invocations to be delivered by any one of these court approved methods.

It is important to note that the *Joyner* court reviewed an ADF policy adopted by Forsyth County and affirmed that the policy was “neutral and proactively inclusive.” *Id.* at 353. The court went out of its way to clarify that the “policy does many things right, such as striving to include a wide variety of speakers from diverse religious faiths and encouraging potential prayer

leaders not to disparage other faiths.” *Id.* at 345 (internal quotations omitted). However, the court reviewed a series of prayers that were given before the Forsyth County Commission and opined that “sectarian references” were too “frequent.” *Id.* at 352. In other words, although the policy in Forsyth County was constitutional as written, a 2-1 majority of the court determined the manner in which the policy was “implemented” was problematic.

The majority explained: “Legislative prayer must strive to be nondenominational so long as that is reasonably possible – it should send a signal of welcome rather than exclusion. It should not reject the tenets of other faiths in favor of just one. Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. But legislative prayers that go further – prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith – transgress the boundaries of the Establishment Clause.” *Id.* at 349.

The *Joyner v. Forsyth County* decision has thus provided public bodies in the Fourth Circuit with some basic guidelines:

- Legislative prayer is a time honored practice that should be encouraged to solemnize public occasions, encourage participants to act on their noblest instincts, and foster the humility that recognition of a higher hand in human affairs can bring. *Id.* at 347.
- Inviting a wide variety of speakers from diverse religious faiths is one of many valid ways to establish a public invocation practice. *Id.* 345.
- The occasional inclusion of a reference to a specifically named deity, such as Jesus, does not render an invocation practice unconstitutional. *Id.* at 351.
- A legislative body is now required to be “proactive in discouraging sectarian prayer in public settings” in order that such references do not become “too frequent.” *Id.* at 353.

Unfortunately, the court’s decision offers little guidance to governing bodies with regard to what constitutes a “sectarian reference” or when a reference to a specific deity is “occasional” and “infrequent” enough to be deemed legally acceptable. The court does not impose a requirement beyond simply discouraging “sectarian references,” nor does it inform the governing body how to respond in the event “sectarian references” are regularly included in the invocations of invited guest speakers. These ambiguities may invite those who oppose public prayer to initiate future legal challenges on a case-by-case basis. Although future litigation involving a neutral public invocation policy will hinge on the particular facts presented, ADF remains steadfast in our commitment to defend the time-honored tradition of prayer being offered before public meetings.

ADF is prepared to assist legislative bodies in developing policies and practices that rightly preserve the American practice of opening legislative sessions with a prayer and comply with the directives of the Fourth Circuit. We strongly believe that ADF can work with any government body to craft invocation policies that will pass constitutional muster. For that reason,

ADF is not only offering to consult with deliberative bodies in the development of an invocation policy, free of charge, but ADF will also provide a free legal defense to any local governmental body working cooperatively with ADF whose invocation policy is legally challenged.

It should be noted that the Fourth Circuit is unique in mandating that legislative bodies must proactively discourage sectarian references in legislative prayer, and that the legal questions surrounding the government's regulation of legislative prayer are not yet finally resolved. The *Joyner v. Forsyth County* decision is clearly at odds with other federal courts that have evaluated the same issues. It is likely that some of the ambiguity remaining in the Fourth Circuit will eventually be resolved by the U.S. Supreme Court.

In summary, there is no reason for local governments to abandon the tradition of including an invocation before their public meetings. However, until the Supreme Court provides additional clarity, the Fourth Circuit Court of Appeals has instructed that "sectarian references" in invocations should not become too "frequent."

If you have questions about a public invocation policy or practice, the attorneys at the Alliance Defense Fund would be pleased to consult on the matter free of charge.

Sincerely,



Brett B. Harvey  
Senior Counsel  
Alliance Defense Fund



David A. Cortman  
Senior Counsel  
Alliance Defense Fund



J. Michael Johnson  
Founding Dean  
Pressler School of Law of Louisiana College  
Alliance Defense Fund allied attorney

**POLICY REGARDING OPENING INVOCATIONS  
BEFORE MEETINGS OF THE [NAME OF DELIBERATIVE BODY]**

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WHEREAS, the [name of deliberative body] (“the Council”) is an elected legislative and deliberative public body, serving the citizens of [locale, state]; and

WHEREAS, the Council wishes solemnize its proceedings by allowing for an opening invocation 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 deliberative bodies, upon which we desire to invoke divine guidance and blessing; and

WHEREAS, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court validated 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 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 is not 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, this council is not establishing a policy that defines the Constitutional limits for permissible public invocations, this council intends to adopt guidelines that are consistent with the guidance provided by the several courts that have considered the validity of public invocations; and

WHEREAS, this council is only bound by the decisions of the United States Court of Appeals for the Fourth Circuit, the United States Court of Appeals in several federal circuits have provided general guidance to help ensure that policies concerning public invocations are consistent with the Constitution; and

WHEREAS, in *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4<sup>th</sup> Cir. 2004), *cert. denied*, the United States Court of Appeals for the Fourth Circuit specifically approved as constitutional the invocation policy of a county board making a number of key findings, including the facts that the *Simpson* policy:

(1) Established a practice of compiling a list of local monotheistic congregations, “with addresses taken primarily from the phone book,” whereto the county clerk would send an invitation each December addressed to the “religious leader” of each congregation, *Id.*, at 279; and

(2) Required the county clerk to schedule respondents to the invitation “to give the invocation on a first-come, first-serve basis,” *Id.*; and

(3) Thus, “made plain that [the county board] was not affiliated with any one specific faith by opening its doors to a wide pool of clergy.” *Id.*, at 286; and

WHEREAS, the Fourth Circuit showed little concern that the invocations before board meetings in *Simpson* included prayers that 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 (4<sup>th</sup> Cir. 2002), *cert. denied*, where a town Board “improperly ‘exploited’ a ‘prayer opportunity’ to ‘advance’ one religion over others.” *Id.*, at 298 (quoting *Marsh*, 463 U.S. at 794); and

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

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

(2) Town Council members publicly chided and “ostracized” those who refused to participate in their prayers, *Id.*, at 295; and

(3) The refusal to participate in prayers “adversely affected [a citizens] right to participate in the Council meetings.” *Id.*, at 299, n.4; and

WHEREAS, The Fourth Circuit’s ruling in *Joyner v. Forsyth County*, 653 F.3d. 341 (4<sup>th</sup> Cir. 2011), approved the practice of following a neutral policy that invites religious leaders from diverse religious institutions serving the local community to voluntarily offer an invocation before public meetings, but required the council to proactively discourage “sectarian references” while finding that “occasional sectarian references” do not violate the Constitution; and

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

WHEREAS, the Council intends to adopt a policy that will not show a purposeful preference of one religious view over another by not permitting the faith of the person offering the invocation to be considered when extending an invitation; and

WHEREAS, the Supreme Court recognized in *Marsh v. Chambers*, 463 U.S. at 786, this country’s history and tradition of opening sessions of deliberative public bodies with an invocation and affirmed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that “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 the Council believes that clergy that serve the local community are peculiarly suited through training, tradition, and public service to petition for divine guidance upon the deliberations of the Council, and to accomplish the Council’s objective to solemnize public occasions, express confidence in the future, and to encourage the recognition of what is worthy of appreciation in society. See *Lynch*, 465 U.S. at 693 (O’Conner concurring); 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 and [state] Constitutions and statutes.

NOW, THEREFORE, BE IT RESOLVED by the [name of deliberative body] of [locale, state], that the Council hereby adopts the following written policy regarding opening invocations before meetings of the Council, to wit:

1. It is the intent of the Council to allow a private citizen to solemnize the proceedings of the [name of deliberative body]. It is the policy of the Council to allow for an invocation, which may include a prayer, a reflective moment of silence, or a short solemnizing message, to be offered before its meetings for the benefit of the Council.

2. Although the invocation may be listed in the program or schedule of events, it shall not be considered an agenda item for the meeting or 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 shall be voluntarily delivered by an eligible member of the clergy in the [name of locale]. To ensure that such person (the "invocation speaker") is selected from among a wide pool of the [locale's] clergy, on a rotating basis, the invocation speaker shall be selected according to the following procedure:

a. The Clerk to the [name of deliberative body] (the "Clerk") shall compile and maintain a database (the "Congregations List") of the religious congregations with an established presence in the local community of the [name of locale].

b. The Congregations List shall be compiled by referencing the listing for "churches," "congregations," or other religious assemblies in the annual phonebook publication distributed by the company that holds the telecommunication franchise for [name of locale], research from the Internet, and consultation with local chambers of commerce. All religious congregations with an established presence in the local community of [name of locale] [May need to define the geographical boundaries, e.g., within the city limits] are eligible to be included in the Congregations List, and any such congregation can confirm its inclusion by specific written request to the Clerk.

c. The policy is intended to be and shall be applied in a way that is all-inclusive of every diverse religious congregation in the [name of locale]. 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 I.R.C. § 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 [name of locale].

e. The Congregations List shall also include the name and contact information of any religious congregation located outside the [name of locale] if such religious congregation is attended by at least one resident of the [name of locale] and such resident requests the inclusion of said religious congregation by specific written communication to the Clerk.

f. The Congregations List shall be updated, by reasonable efforts of the Clerk, in November of each calendar year.

g. Within thirty (30) days of the effective date of this policy, and on or about December 1 of 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.

h. 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 [name of the deliberative body] makes it a policy to invite members of the clergy in [locale] to voluntarily offer an invocation 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 that the 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. The U.S. Court of Appeals for the Fourth Circuit opined in *Joyner v. Forsyth County*, 653 F.3d 341, 349 (4<sup>th</sup> Cir. 2011), that prayers at the opening of legislative sessions "must strive to be nondenominational so long as it is reasonably possible[; ]should send a signal of welcome rather than exclusion[; ]should not reject the tenets of other faiths in favor of just one[; ... and may not] repeatedly suggest the government has put its weight behind a particular faith." The Court further instructed the deliberative body to "be proactive in discouraging sectarian references" to*

*avoid "occasional" references from becoming too "frequent" when the invocations are viewed as a collective. The County requests that you comply with these court guidelines accordingly*

*On behalf of the [name of deliberative body], I thank you in advance for considering this invitation.*

*Sincerely,  
Clerk to the Council*

- i. As the invitation letter indicates, the respondents to the invitation shall be scheduled on a first-come, first-serve basis to deliver the invocation.
  - j. In the event an eligible member of the clergy believes that the clerk has not complied with the terms of this policy, the clergy member has the right to have the matter reviewed by the Council.
5. No invocation speaker shall receive compensation for his or her service.
  6. No guidelines or limitations shall be issued regarding an invocation's content, except that the Council shall request by the language of this policy that invocations in the form of a prayer, when considered collectively, should avoid having "sectarian references" become too frequent and no invocation should proselytize or advance any faith, or disparage the religious faith or non-religious views of others.
  7. The Clerk shall make every reasonable effort to ensure that a variety of eligible invocation speakers are scheduled for the Council meetings. In any event, no invocation speaker shall be scheduled to offer an invocation at consecutive meetings of the Council, or at more than three (3) Council meetings in any calendar year.
  8. Neither the Council nor the Clerk shall engage in any prior inquiry, review of, or involvement in, the content of any invocation to be offered by an invocation speaker.
  9. To clarify the Council's intentions, as stated herein above, the following disclaimer shall be included in at least ten (10) point font at the bottom of any printed program or schedule of events published by the Council and shall be read aloud prior to the introduction of the invocation speaker:  
  
*"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 do not necessarily represent the religious beliefs or views of the Council in part or as a whole. No member of the community is required to attend or participate in the invocation and such decision will have no impact on their right to actively participate in the business of the Council."*
  10. Shortly before the opening gavel that officially begins the meeting and the agenda/business of the public, the Chairperson 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 show respect for the traditional observances and/or the Council to stand.

11. 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, 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 [name of locale].

**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 [name of deliberative body] of [Locale, name of state], on \_\_\_\_\_, 20\_\_.

For: \_\_\_\_\_

Against: \_\_\_\_\_

THUS ADOPTED at the regular meeting of the [name of deliberative body] of [locale, name of state], on \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
CLERK

\_\_\_\_\_  
CHAIR of COUNCIL