



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

March 7, 1986

Ref. No. 7215

Carl L. Dunbar
Mayor
City of Spirit Lake
P. O. Box 309
Spirit Lake, ID 83869

RE: Residency/Vacancy/City Council

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mayor Dunbar:

You have asked for our advice in regard to the residency requirement for a member of the city council, and whether by virtue of a change in residency a councilmember's position would be vacant.

Idaho Code §50-702 provides that, "any person shall be eligible to hold the office of councilman of his city who is at the time of election, and remains a qualified elector under the constitution and laws of the state of Idaho." Municipal election laws are set forth in Chapter 4, Title 50 of the Idaho Code. Section 50-402(c) defines a qualified elector as, "any person who is 18 years of age, is a United States citizen and who has resided in the city at least 30 days next preceding the election at which he desires to vote, and who is registered within the time period provided by law." In addition, in order to remain a qualified elector, one must remain a resident. Thus, in order to serve as a member of the city council, a person must be a resident of the city.

The foregoing is supported by the law on resignations and vacancies found in Title 59, Chapter 9. Section 59-901 states that,

"every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office as follows; ...

* * *

* * *

5. His ceasing to be a resident of the state, district or county in which the duties of his office are to be exercised, or for which he may have been elected...."

Under the provisions of this section and §50-702, the council member's office would become vacant when he ceased to be a resident of the city. Thus, the question is, at what point does an individual cease to be a resident of the city so as to create a vacancy?

The definition of residency for these purposes is found in Idaho Code §50-402(d). It states that,

"residence for voting purposes shall be the principal or primary home or place of abode of a person. Principal or primary home or place of abode is that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after a departure or absence therefrom, regardless of the duration of the absence. In determining what is a principal or primary place of abode of a person, the following circumstances relating to such person may be taken into account: business pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse, and children, if any, leaseholds, situs of personal and real property, and motor vehicle registration...

* * *

3. A qualified elector who has left his home and gone to another area outside the city, for a temporary purpose only, shall not be considered to have lost his residence.

4. If a qualified elector moves outside the city, with the intentions of making it his permanent home, he shall be considered to have lost his resident in the city."

The facts set forth in your letter indicate that the council member has taken employment at a ranch ten miles outside the city and in another county. According to your letter, one of the conditions of employment was that the council member reside on the ranch. In addition, the position is a permanent one from which the councilman has expressed no intention of resigning; the councilmember has moved his family to the place of employment and has enrolled his children in school there; he receives his mail at

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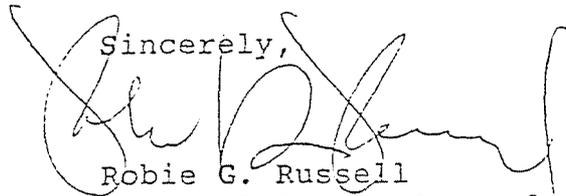
his new place of residence. On the other hand, he still owns his former residence in the city, is making his house payments and intends some day to return to that residence. Based on the foregoing facts and law, it is our opinion that the councilmember is no longer a resident of the city, and thus his position on the council is vacant.

Idaho Code §50-704 provides that when a vacancy on the council exists, it "shall be filled by appointment made by the mayor with the consent of the council, which appointee shall serve only until the next general city election, at which such vacancy shall be filled for the balance of the original term." There is no provision under the law that the person who garnered the second highest total in the balloting for the particular council seat is entitled to be appointed. It is within your discretion as mayor to appoint anyone you choose and after an affirmative vote of the council that person shall hold the office of councilmember.

Although we believe the foregoing to be a true statement of the law, we must caution you that it is merely our opinion, and does not have the force and effect of a court judgment. Thus, if the incumbent councilmember does not choose to voluntarily vacate the office, it will be necessary for you to contact the city attorney and take such legal procedures as are necessary to have a competent court of law declare the office vacant. We suggest that such action be taken before another person is appointed to the office.

If we may be of further assistance please contact us.

Sincerely,



Robie G. Russell
Deputy Attorney General
Chief, Local Government Division

RGR/cp