

December 24, 1992

Mr. William Thompson, Jr.
Latah County Prosecutor
Latah County Courthouse
Moscow, ID 83843

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Thompson:

By the prior letter of Mr. Craig Mosman, the Latah County Prosecutor's office requested assistance from this office to investigate the allegation that Latah County Commissioner, Mark Solomon has not resided within the commissioner district from which he is elected. Mr. Solomon was elected to represent Latah County Commissioner District No. 1 in November of 1990. The claim has been made that Mr. Solomon has not continuously resided in District No. 1 since he assumed that office in January of 1991 and has therefore "vacated" his office pursuant to Idaho Code § 59-901.

According to Idaho Code, it is the statutory duty of the county prosecutor to bring any action for usurpation of office against any county, precinct or city officer. Idaho Code § 6-601. As legal counsel to the Latah County commissioners, however, it was Mr. Mosman's belief that he had a conflict of interest that prevented him from conducting an investigation into the allegations and issuing a legal opinion concerning Mr. Solomon's residency status. For that reason, Mr. Mosman requested the attorney general to conduct an investigation and issue a legal opinion in this matter. I apologize for the lengthy delay. This opinion has involved substantially more investigation and legal research than initially anticipated.

FACTUAL INVESTIGATION

In response to your request, Attorney General Investigator, Allan Ceriale, traveled to Latah County to conduct a factual investigation focused on the issue of Mr. Solomon's residence since he was elected to office in November of 1990. Investigator Ceriale interviewed various individuals, gathered relevant documents, and provided Mr. Solomon the opportunity to provide information he believed might be relevant to the investigation. Mr. Ceriale and I traveled to the Moscow Mountain property in the early summer of this year and had the opportunity to meet with Mr. Solomon and observe the improvements located on the property.

Showalter Road Property (District No. 1 Property)

In February 22, 1990, Mr. Solomon signed his Declaration of Candidacy to run for the office of Latah County Commissioner for District No. 1. Within his Declaration of Candidacy, Mr. Solomon stated that his resident address was 2178 Showalter Road (hereinafter "Showalter Road property"). The Showalter Road property is located within Latah County Commissioner District No. 1 on Moscow Mountain approximately 12-15 miles from the city of Moscow. Mr. Solomon purchased the Showalter property in 1978. Mr. Solomon sold the Showalter property in the early summer of 1990, prior to his election to the office of County Commissioner for District No. 1. On January 9, 1990, Mr. Solomon was issued a driver's license from the state of Idaho, and, at that time, listed the Showalter property as his residence. No change of address for the license was located in the public records, nor was there any record of issuance of a renewal license since that date.

Moscow Mountain Road Property (District No. 1 Property)

In August of 1982, Mr. Solomon purchased additional property on Moscow Mountain at the address of 2499 Moscow Mountain Road. This property is also located within Latah County Commissioner District No. 1. There was no building or living quarters on this acreage at the time of the original purchase. Mr. Solomon applied for a building permit in 1984 in order to construct improvements on this property.

During the calendar years 1984 and 1985, Mr. Solomon had purchased a used lumber drying shed from Potlatch Corporation. Following the purchase, Mr. Solomon dismantled the shed and hauled the lumber to the Moscow Mountain property. Mr. Solomon used the lumber from the drying shed to construct a large shop and adjoining living quarters. At the time of the original construction, there was no sewer or water system on the property and no electricity.

After the initial construction, Mr. Solomon made additional improvements to the property through the installation of a water delivery system constructed of ditching and water pipe, solar panels for heat and electricity, a specified service telephone and a drain field. Mr. Solomon also furnished the living quarters with a bed, table, counters, windows and a wood stove.

On September 7, 1989, Mr. Solomon applied for an adjustment to the solid waste user fee charge by Latah County against the Moscow Mountain property. On the form, Mr. Solomon checked the box that stated as follows; "House or mobile home used as a cabin, seasonal use." Additional comments were placed on the form by Mr. Solomon as follows: "Under construction, no residence. Temporary living only." Request for seasonal status on the property was approved for the purpose of reduction of a solid waste user fee by Latah County Commissioners, and a one-year reduction was granted.

Mr. Solomon states that roads to the Moscow Mountain property are not passable by motor vehicle from October or November through April or May of each year. During the winter season, Mr. Solomon states he travels into the property by cross county skis and stays there most weekends (from Friday evening or Saturday morning to Sunday evening or Monday morning). During the summer months (May to September) Mr. Solomon states he is able to drive to the property and he stays at the property after the end of his week (from either Thursday p.m. or Friday through Sunday p.m. or Monday a.m.). Mr. Solomon also listed the Moscow Mountain property as his address on his voter registration card which was completed and filed with the Latah County Clerk's office on the 15th day of July, 1990. (On the same form, he also listed his "mailing address" at that time as 328 No. Washington.) On December 3, 1990, Mr. Solomon applied for an owner-occupied residency exemption for the tax year 1991 pursuant to Idaho Code § 63-105DD for the Moscow Mountain Road property. On the form, Mr. Solomon stated the date he first occupied the property as "5/15/90." This application was submitted by Mr. Solomon to the Latah County Commissioners for the 1991 tax year.

North Washington Street Property (District No. 2)

Mr. Solomon married his current wife, Nadine Solomon, on May 15, 1990. At the time of their marriage, Nadine Solomon owned a residence at 328 N. Washington in Moscow. This property is located in Latah County Commissioner District No. 2. Nadine Solomon purchased the North Washington property in 1987 and has resided at the property since the date of her purchase.

Interviews of neighbors living adjacent to the North Washington property state they have observed Mr. Solomon at the residence on a regular basis since 1988 or 1989 and have formed the opinion, based upon their observations, that Mr. Solomon has resided at the North Washington property since 1989. They observed him coming and going from that property on a regular basis, parking his vehicle there constantly and riding his bike from there to the county courthouse.

Collateral contacts establish that on July 25, 1991, Mr. Solomon applied for his registration on a 1976 Toyota pick-up and listed the North Washington Street property as his current address. Mr. Solomon did likewise on July 29, 1991, for a 1984 pick-up. Mr. Solomon's bank account at First Security Bank also lists his address as the Washington Street property, and his correspondence from the bank is mailed to that address. On June 1, 1990, Mr. Solomon instituted a change of address at the Moscow Post Office from the Showalter property to the North Washington Street property, so his mail could be delivered to the North Washington Street residence. On his W-4 tax forms for the tax years 1990-91, Mr. Solomon lists the North Washington property as his residence.

LEGAL ANALYSIS—RESIDENCY

A. Pre-Election Residency

Residency requirements for elective office in Idaho fall into two basic categories, pre-election and post-election durational residency standards. Pre-election residency qualifications for federal, state and county elected officials are located in ch. 6, title 34, of the Idaho Code. Candidate residency qualifications for the office of county commissioner are set forth in Idaho Code § 34-617:

(2) No person shall be elected to the board of county commissioners unless he has attained the age of twenty- one (21) years at the time of the election and is a citizen of the United States, and shall have resided in the county one year next preceding his election and in the district which he represents for a period of ninety (90) days next preceding his election.

(Emphasis added.)

The Idaho Supreme Court has stated that if a statute is not ambiguous it should be interpreted by applying the plain meaning of the language. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991); George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990); Burt v. City of Garden City, 118 Idaho 427, 797 P.2d 135 (1990). Applying this principle to the phrase "next preceding his election" leads to the simple conclusion that the one-year county and ninety-day district residency qualifications in Idaho Code § 34-617 are pre-election requirements. The term "election" as used in this context has been interpreted by the Idaho Supreme Court to apply to the general and not the primary election. Strecker v. Smith, 66 Idaho 593, 164 P.2d 192 (1945); Bradfield v. Avery, 16 Idaho 769, 102 P. 687 (1909).

Candidate residency standards for the office of county commissioners are also found at Idaho Code § 31-702:

District from which elected. Each member of a board of commissioners must meet the residency requirements in the county and district which he represents as set out in Section 34-617, Idaho Code.¹

¹ County commissioners are the only elected county officials that must comply with residency requirements for both the county and a separate sub-district within the county. This arises from the fact that the commissioners are required to divide the county into three districts, equal in population, and one commissioner must reside in each district. Idaho Code §§ 31-704, 34-617.

Although it is clear that Idaho Code § 34-617 imposes pre-election residency requirements, it is not easy to determine whether Idaho Code § 31-702 imposes a pre-election or post-election standard. The language, "each member of a board of commissioners . . .," can be construed as applying to a person already a "member" of the board by election or appointment and therefore imposing a post-election residency standard. The post-election interpretation can be buttressed by the proposition that the legislature would not enact two separate statutes both addressing pre-election residency conditions for candidates for county commissioner.

However, the plain meaning of the section heading, "DISTRICT FROM WHICH ELECTED," supports the conclusion that the language imposes a pre-election residency requirement. (Emphasis added.)

A statute is ambiguous if it is susceptible of two reasonable interpretations. State v. Moore, 111 Idaho 854 (App.), 727 P.2d 1282 (1986). See St. Benedict's Hospital v. County of Twin Falls, 107 Idaho 143 (App.), 686 P.2d 88 (1984). If the statute is ambiguous, it is the responsibility of the court to seek out and give effect to the legislative intent and purpose. Sherwood v. Carter, *supra*; Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990); State v. Paul, 118 Idaho 717 (App.), 800 P.2d 113 (1990). Idaho Code § 31-702, is susceptible of two reasonable interpretations: that it applies to pre-election residency or to post-election residency. In trying to ascertain legislative intent, it is proper to examine the legislative history. Mix v. Gem Investors, Inc., 103 Idaho 355 (App.), 647 P.2d 811 (1982); Sunset Memorial Gardens v. Idaho State Tax Commission, 80 Idaho 206, 327 P.2d 766 (1958), Liliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

The most recent amendment to Idaho Code § 31-702 was in 1982:

District from which elected. Each member of a board of commissioners must ~~be an elector of the district he represents~~ meet the residency requirements in the county and district which he represents as set out in Section 34-617, Idaho Code.

Idaho Sess. Laws, ch. 332, p. 839. The language deleted in 1982, "be an elector of the district he represents," is identical to earlier statutes that predate Idaho Code § 31-702. R.C. & C.L., § 1905; C.S. § 3403; I.C.A. § 30-602. In fact, the same language can be found in a statute first enacted by the legislature in 1887. Revised Statutes of Idaho, 1887, Sec. 1746. The 1982 amendment was the first time in almost 100 years that the specific language "be an elector of the district he represents" was deleted from Idaho statutory law. By contrast, Idaho Code § 34-617 (imposing pre-election residency requirements upon candidates for county commissioner) was not adopted until 1970. Initially, it imposed only a one-year county residency requirement upon county

commission candidates. Idaho Session Laws, 1970, Ch. 140, § 197 p. 351. In 1982, it was amended by adding a 90-day pre-election district residency provision. The 1982 amendments to Idaho Code § 34-617 (adding the 90-day district requirement) and Idaho Code § 31-702 (deleting the district elector language and incorporating by reference the one-year county and 90-district residency standards of Idaho Code § 34-617) were enacted in the same bill. Idaho Session Laws, 1982, Ch. 332, §§ 1 & 2, p. 839.

It is apparent that the legislature saw a direct relationship between the provisions of Idaho Code § 34-617 and Idaho Code § 31-702. Prior to 1982, Idaho Code § 34-617 required that a candidate be 21 years of age, a U.S. citizen and reside in the county for one year, but did not impose a district residency requirement. Once the 90-day district residency standard was added in 1982, there was no longer need for a separate statute (Idaho Code § 31-702) to impose the less specific requirement "elector of the district." Since Idaho Code § 34-617 imposes a pre-election durational residency requirement, the legislature's decision in 1982 to incorporate Idaho Code § 34-617 by reference into Idaho Code § 31-702 reveals the intent of the legislature that the latter statute likewise apply a pre-election residency standard.

This interpretation is further supported by the fact that the term "elector" as used in the phrase, "an elector of the district he represents" was a legal term of art which, as defined in art. 6, § 2, of the Idaho Constitution, had precise pre-election durational residency connotations. Prior to 1982, the relevant portion of that section stated:

Qualifications of electors.—Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one (21) years old, who has actually resided in this state or territory for six (6) months and, in the county where he or she offers to vote, thirty (30) days next preceding the day of the election, if registered as provided by law, is a qualified elector;

(Emphasis added.) The terms "elector" and "qualified elector" have been determined by the Idaho Supreme Court to be interchangeable and to have the same meaning. Wilson v. Bartlett, 7 Idaho 271, 62 P. 416 (1990).

Therefore, reading Idaho Code § 31-702 (in its pre-1982 form) in conjunction with the constitutional definition of "qualified elector" would require a candidate for county commissioner to be twenty-one (21) years of age, a citizen of the United States and a resident of the state for six (6) months, and a county resident for thirty (30) days. The only factor added by Idaho Code § 31-702 to the constitutional requirements to be a

qualified elector was that a candidate would have to be registered in the district from which he or she seeks to be elected.²

In 1982, art. 6, § 2, of the Idaho Constitution was amended to reduce the voting age to eighteen (18) and to delete the specific residency requirements and granted the legislature the authority to define the duration of residency necessary to become a qualified elector. Idaho Session Laws, 1982, H.J.R. No. 14, p. 932; ratified at the general election, Nov. 2, 1982.

In 1982, the legislature also amended the statutory definition of "qualified elector" to require a thirty-day (30) residency in the county and state. As a result, if the word "elector" had not been deleted from Idaho Code § 31-702, there would have been a conflict with Idaho Code § 34-617. Prior to its amendment, Idaho Code § 31-702 required a candidate for county commissioner to be an "elector of the district" and thereby as a "qualified elector" was required to be eighteen (18) years of age and satisfy a thirty-day (30) residency in the state and county, but Idaho Code § 34-617 required a county commissioner to be twenty-one (21) years of age and reside in the county for one (1) year.

In conclusion, it is clear that both Idaho Code § 34-617 and § 31-702 prescribe pre-election residency requirements. Based upon the 1982 statutory amendments, the two statutes now set forth a single standard. Therefore, neither of these statutes, standing alone, imposes a continuing post-election residency requirement upon a person holding the office of county commissioner.

B. Post Election Residency

Post election durational residency requirements for elected officials are imposed by Idaho Code § 59-901:

How vacancies occur.—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:

.....

² When the language "an elector of the district he represents" was adopted in 1887, there were no primary elections; and, therefore, registration to vote was only necessary prior to the general election. See Strecker v. Smith, *supra*.

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.

Therefore, if a county commissioner ceases to be a resident of his or her commissioner district, the office of county commissioner is considered vacant. Idaho Code § 59-901; Mechem, Public Officers § 438 (1890); Throop, Public Officers § 425 (1892); *See State v. McDermott*, 52 Idaho 602, 17 P.2d 343 (1932). Once the office of a county commissioner becomes vacant by change of residency, the office cannot be reoccupied by re-establishing proper residency. Mechem, supra; Throop, supra. *See also State v. McDermott, supra*. Once the office is vacant, it remains so until filled by a proper appointment or by a new election. Idaho Code §§ 59-904, *et seq.*

The key word in the application of Idaho Code § 59-901(5) is "resident" as stated "ceasing to be a resident of the state, district or county" (Emphasis added.) The term "resident" is not defined within the statutory provisions of title 59, nor is there a single generic definition for that term in the Idaho Code. The Idaho Supreme Court and Idaho Court of Appeals have issued a number of decisions that define the term "reside," "resident" or "residency."³ The basic conclusion reached by the courts is there is no single definition for the word "resident" but its meaning depends upon the context in the statute and its relationship to other statutes addressing the same or similar subject matter:

Further, the words "residence" and "resident" as used in statutes do not have a uniform meaning. "They are to be construed in the light of the context, with consideration of the purpose of the statutory enactment."

Intermountain Health Care v. Board of Commissioners, 109 Idaho at 414, 707 P.2d at 1053. It is apparent, based upon the decisions of the Supreme Court and the Court of

³ Criminal Law—State v. McDermott, supra; State v. Flower. Domestic Relations—Willis v. Willis, 93 Idaho 261;460 P.2d 396 (1969); Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949); Hawkins v. Winstead, 65 Idaho 12, 138 P.2d 972 (1943); Duryea v. Duryea, 46 Idaho 512, 269 P. 987 (1928); Ruebelman v. Ruebelman, 38 Idaho 159, 220 P. 404 (1923). Education—Newman v. Graham, 82 Idaho 90, 349 P.2d 716 (1960); Smith v. Binford, 44 Idaho 244, 256 P. 366 (1927). Employment—Tiffany v. City of Payette, 92.3 ISCR 118 (1992); Licensing—Hawkins v. Spaulding, 78 Idaho 533; 307 P.2d 222 (1957). Medical Indigency—IHC Hospitals v. Board of Commissioners, 117 Idaho 207, 786 P.2d 600 (App.) 1990; Intermountain Health Care v. Board of Commissioners, 109 Idaho 412, 707 P.2d 1051 (1985); Cartwright v. Gem County, 108 Idaho 160, 697 P.2d 1174 (1985). Insurance—Aid Insurance Co. (Mt.) v. Armstrong, 119 Idaho 897, 811 P.2d 507 (App.) 1991. Public Elections—Strecker v. Smith, supra; Village of Ilo v. Ramey, 18 Idaho 642, 112 P. 126 (1910).

Appeals that one cannot simply turn to Webster's or Black's Law Dictionary to provide a single appropriate meaning to these terms.⁴

It is a rule of statutory construction that statutes that are "in pari materia" (upon the same matter or subject) should be construed together to achieve a reasonable and consistent result. Greenwade v. Idaho State Tax Commission, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991); State v. Paul, *supra*; George W. Watkins Family v. Messenger, *supra*. The provisions of ch. 9, title 59, apply to vacancies in civil or public office. In fact, the general subject matter of title 59 ("Public Officers In General") is similar to title 34 of Idaho Code entitled "Elections." Title 34 addresses legal issues such as: When will elections be held? What procedure will be followed? Who can vote? Who can be a candidate for office?

Idaho Code, ch. 6, title 34, provides the residency requirements necessary to run for elected office. Ch. 9, title 59, incorporates the same residency standards for persons appointed to fill a vacancy in office. Idaho Code § 59-906 sets forth the specific steps to fill a vacant county office (except county commissioner) and specifically requires the appointee to have the same qualifications as the person elected to the same office:⁵

The person selected shall be a person who possesses the same qualifications at the time of his appointment as those provided by law for election to office.

The word "reside" as applied to a public office is also found at Idaho Code § 59-103:

Residence of certain officers. The following officers must reside within the county of Ada and keep their offices in Boise City:

The Governor.
The Secretary of State.
Auditor.
Treasurer.
Attorney General.

⁴ For a detailed analysis of the legal meaning for the word "residence" compared to "domicile," read *Vanderbilt Law Review*, Vol. 6, p. 561 (1953). The authors begin the article with the statement, "Domicile has a reasonably constant meaning. Residence, on the other hand, is one of the most variable words in the legal dictionary."

⁵ A county commissioner is appointed by the governor. Idaho Code § 59-906A. A county commissioner appointed by the governor must meet the same qualifications as any other appointed county official. Idaho Code §§ 59-906A, 59-908.

Superintendent of Public Instruction.

(Emphasis added.) Residency for public office is also indirectly addressed by Idaho Code § 59-101:

Qualifications in general. Every qualified elector shall be eligible to hold any office of this state for which he is an elector, except as otherwise provided by the Constitution.

(Emphasis added.) Currently, the definition of that term is located at Idaho Code § 34-104:

"Qualified elector" defined. "Qualified elector" means any person who is eighteen (18) years of age, is a United States citizen and who has resided in this state and in the county at least thirty (30) days next preceding the election at which he desires to vote, and who is registered as required by law.

(Emphasis added.)

Therefore, a substantial inter-relationship exists between chapters 1 and 9, title 59, and ch. 6, title 34, Idaho Code, concerning the subject matter of public officers. The relationship is sufficiently strong to support the conclusion that the statutes are "in pari materia" and should be construed together in a consistent and reasonable manner. Since the term "resided" as used in either Idaho Code § 59-103 or 59-901 is not defined within title 59, (and titles 59 and 34 are "in pari materia") it is appropriate to examine title 34 for a definition of the term "resided" or "residence."

Within the statutory definitions in title 34, the term "residence" is defined at Idaho Code § 34-107:

"Residence" defined. (1) "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 absence therefrom.

(2) 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, situs of residence for which the exemption in § 63-105DD, Idaho Code, is filed, and motor vehicle registration.

(3) A qualified elector who has left his home and gone into another state or territory or county of this state for a temporary purpose only shall not be considered to have lost his residence.

(4) A qualified elector shall not be considered to have gained a residence in any county or city of this state into which he comes for temporary purposes only, without the intention of making it his home but with the intention of leaving it when he has accomplished the purpose that brought him there.

(5) If a qualified elector moves to another state, or to any of the other territories, with the intention of making it his permanent home, he shall be considered to have lost his residence in this state.

(Emphasis added.) Definitions set forth within a specific title apply to the use of those terms within the various chapters of that title. Cameron v. Lakeland Class A School District No. 272, etc., 82 Idaho 375, 353 P.2d 651 (1960); Roe v. Hopper, 90 Idaho 22, 408 P.2d 161 (1965). The term "resided" is used repeatedly within ch. 6, title 34, to define residency requirements for federal, state, county and city public offices. Furthermore, Idaho Code § 59-906 incorporates the provisions of ch. 6, title 34, pertaining to residency qualifications for county officers. If the definition for "residence" in Idaho Code § 34-107 applies to ch. 6, title 34, then by incorporation the same definition of "residence" in Idaho Code 34-107 applies to Idaho Code § 59-906.

There is, however, a phrase within the definition of "residence" (Idaho Code § 34-107), that casts uncertainty on the scope of its application. The phrase "'Residence,' for voting purposes," raises the question whether the legislature intended to apply the definition to both voters (qualified electors) and candidates. The answer to this question requires us to examine the historical inter-relationship between qualifications (including residency) for voters and those for office holders.

As stated previously, Idaho Code § 59-101 provides that any "qualified elector" can run for public office. To be a qualified elector a person must meet certain residency standards set forth by Idaho Constitution, art. 6, § 2 (pre-1982) or by Idaho Code § 34-402 (post-1982). Therefore, the legal criteria for a qualified voter (voter eligibility) and candidate eligibility have been interwoven throughout Idaho's history. Furthermore, until 1982, a candidate for county commissioner had to "be an elector of the district he represents." Idaho Code § 31-702. To be a qualified elector for his or her district

actually required meeting residency standards for the state, county and district. Art. 6, § 2, Idaho Constitution (prior to the 1982 Amendment). For most of Idaho's history the qualifications to be an eligible elector and a qualified candidate have been identical. Therefore, looking at the long-standing policy of synonymous requirements for voting and office holding, we conclude that the term "resided" has the same meaning for both voters and public officers.

C. Factual/Legal Application

The definition of "residency" located at Idaho Code § 34-107(1), was amended in 1982 to include the following changes:

"RESIDENCE," DEFINED. (1) "Residence," for voting purposes, shall be the ~~place in which a qualified elector has fixed his habitation and to which, whenever he is absent he has the intention of returning~~ 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 departure or absence therefrom, regardless of the duration of the absence.

(Emphasis added.) Idaho Session Laws, ch. 215, p. 589. Adding the language "principal or primary home or place of abode" addresses the reality that individuals may live at more than one location. The individual may have both a summer and winter home, or some recreational property or may even be a commuter located out of state for business reasons. "Principal or primary home or place of abode" is defined to be the place of fixed habitation and, if absent, is the place to which a person has the present intention of returning. The duration of absence does not matter.

Subsection (2) of Idaho Code § 34-107 identifies a number of objective circumstances to determine a person's primary or principal place of abode:

[B]usiness pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse and children, if any, leaseholds, situs of personal or real property, situs of residence for which the exemption in section 63-105DD, Idaho Code, is filed, and motor vehicle registration.

Subsection (2) is entirely new language added in 1982. It provides a list of factors that "may be" considered in determining a person's residence. It reveals the legislature's intent that the information to be examined goes beyond the stated intent of the person in question. Statements made by a person after a controversy has arisen are subjective and

can be self-serving. The language in subsection (2) signals the need to balance the personal statements of the individual at issue with objective circumstances that may also reveal a person's intent or state of mind regarding his or her principal home or place of abode.

Focusing on the issue of residency of Commissioner Solomon, it is clear from our legal analysis that he must reside not only in Latah County but also in Commissioner District No. 1.

From approximately 1978 to the summer of 1990, Commissioner Solomon owned a parcel of property (Showalter Road property) in Latah County Commissioner District No. 1. Commissioner Solomon does not claim that he maintained a home or place of abode on the Showalter property after his election as Latah County Commissioner in November of 1990. Therefore, the Showalter property cannot be considered his legal residence in Latah County Commissioner District No. 1 during his tenure as county commissioner.

In 1982, Commissioner Solomon purchase a second parcel of property (Moscow Mountain property) in Latah County Commissioner District No. 1. Commissioner Solomon has maintained his ownership of that parcel to the present time. It is the Moscow Mountain parcel that Commissioner Solomon maintains that he has used as his principal or primary home or place or abode during his term as Latah County Commissioner from January of 1991. From 1984 to 1989, Commissioner Solomon constructed substantial improvements on the property. Based upon our investigation, it is difficult to establish when Commissioner Solomon commenced and completed the different stages of construction on the property. It was obvious, based upon a site visit in June, 1992, that the improvements were considerable and provided for very habitable accommodations. The structure and furnishings we observed were sufficient that Commissioner Solomon could, if it was his intention, establish the property as his principal or primary home or place of abode.

The actual circumstance that has given rise to the allegation that Commissioner Solomon has not continued to reside in Commissioner District No. 1 was his marriage to Nadine Solomon in May of 1990. At the time of their marriage, Nadine Solomon owned property in Commissioner District No. 2 on North Washington Street. She has continuously owned the property up to the present time. Both Nadine and Commissioner Solomon state the property is owned as her sole and separate property. This statement is confirmed by the fact that Commissioner Solomon is not listed as a co-owner in the Latah County Assessor's office.

The complaint has been made that Commissioner Solomon actually resides at the District No. 2 property on Washington Street. This is based upon the claim that

Commissioner Solomon actually stays there with his wife, Nadine. If it is true that Commissioner Solomon has established legal residency in District No. 2, then he has vacated his public office. If the office is vacant, merely re-establishing his residency in District No. 1 would not eliminate the vacant office. Essentially, it is an all or nothing proposition. If Commissioner Solomon has continuously "resided" in District No. 1 during his term, then there is no vacancy. If at any time during his term, Commissioner Solomon has established legal residency in District No. 2, the office has become vacant and remains so until filled by proper appointment or election.

Commissioner Solomon maintains that his principal or primary home is on Moscow Mountain property in Commissioner District No. 1. He states that this property has continuously been his principal or primary home during his tenure as Latah County Commissioner. If Commissioner Solomon's statement of intent were sufficient, then the issue would be resolved. This approach, however, would ignore the legislature's enactment of Idaho Code § 34-107 (definition of residency) and its list of objective factors. Many of the factors in subsection (2) are easier to apply if the issue concerns state or county residency as compared to district residency within a particular county. Factors such as "business pursuits," "employment," and "income sources" are not particularly helpful to determine district residency at least in this particular situation.

Looking at the other identified factors, the results are equivocal. Commissioner Solomon has owned real property on Moscow Mountain since 1982 within Commissioner District No. 1. Very substantial improvements have been made (including the location of large amounts of personal property on the Moscow Mountain property) and Commissioner Solomon maintains these improvements existed prior to taking office in January of 1991. Commissioner Solomon did apply on December 3, 1990 (for the 1991 tax year) for a real property exemption pursuant to Idaho Code § 63-105DD for the Moscow Mountain property, but it was not approved.⁶

Contrary information arises from the fact that Commissioner Solomon applied for registration on July 25, 1991, for his 1976 Toyota pick-up and on July 29, 1991, for a 1984 pick-up and listed the North Washington Street property (District No. 2) as his current address. Nadine Solomon's residence prior to her marriage to Commissioner Solomon was clearly at the North Washington property. Since their marriage, Nadine Solomon has continued to claim a real property homeowner's tax exemption pursuant to Idaho Code § 63-105(DD) on the North Washington property. This application was made under penalty of perjury, and if that is not her legal residence, she would, at a minimum, owe Latah County back taxes with penalty and interest. Based upon our

⁶ The Latah County Assessor stated that Commissioner Solomon was told that both he and his wife could not claim Idaho Code § 63-105DD exemptions for different properties, and as a result Commissioner Solomon did not pursue his tax exemption claim for the Moscow Mountain property.

investigation, it is our conclusion that Nadine Solomon has maintained the North Washington property as her residence throughout Commissioner Solomon's tenure as County Commissioner. Accepting Commissioner Solomon's statement at face value, Commissioner Solomon and Nadine Solomon have two different legal residences. However, there is no legal requirement that a husband and wife must have the same legal residence.

We were not able to examine the issue of residence related to state and federal tax purposes because both federal and state income tax returns are confidential and Mr. Solomon and Nadine Solomon did not consent to allow us to review their returns for the years he has served as Latah County Commissioner.

Collateral information revealed that Commissioner Solomon completed a change of address at the Moscow post office on June 1, 1990, from the Showalter property to the North Washington property. Commissioner Solomon's bank account also lists his address as the Washington Street property. Commissioner Solomon's W-4 tax forms for the tax years 1990 and 1991 list the North Washington property as his residence. Commissioner Solomon filled out and filed a voter registration card on June 25, 1990, and listed the Moscow Mountain property as his address but the North Washington property as his mailing address.

Commissioner Solomon's response to providing the North Washington property as his mailing address to the post office, bank, vehicle registration and voter registration was that it was done for convenience because it was difficult to receive mail at the Moscow Mountain property. This is not an unreasonable explanation.

Neighbors adjacent to the North Washington property state they have observed Mr. Solomon there on a regular basis and, weather permitting, Commissioner Solomon also rides his bike to the courthouse. Commissioner Solomon does not dispute this information as he admits staying in town during the commissioner's work week which is from either Monday through Thursday or Monday through Friday. The time he physically spends at Moscow Mountain is limited to a two- or three-day weekend and vacation periods. Commissioner Solomon concedes it is not possible to drive a vehicle to the Moscow Mountain property during the winter season from either October and November to April or May, depending upon the severity of the weather. However, Commissioner Solomon states he continues to stay at the Moscow Mountain property on a regular basis during the winter months and is able to gain access to the property by cross county skiing or snow shoes. Based upon the information available, we have no reason to contest Commissioner Solomon's assertion that he physically stays at the Moscow Mountain property on an average of two days per week.

Principal or primary home or place of abode, as stated earlier, requires both fixed habitation and a present intention to return if absent. Commissioner Solomon has continuously maintained throughout this controversy that his principal or primary home or place of abode is at the Moscow Mountain property. Physical presence alone is not necessary to establish a person's principal or primary home or place of abode. College students as electors are able to leave the state for nine months and attend school and still be considered Idaho residents. Military personnel may be physically stationed outside the boundaries of Idaho for years and as electors still maintain Idaho as their legal residence. Business commuters may work all week out of state, even maintaining a separate apartment or home, but as electors still claim Idaho as their legal residence.

We recognize Commissioner Solomon's statements and factual circumstances present arguments on both sides of this issue. At the heart of our analysis is the legal conclusion that the term "reside" as used to define a vacancy in office (pursuant to Idaho Code § 59-901) is equivalent to principal or primary home or place of abode and that intention, not "physical presence," remains the dominant factor for establishing legal residence. Factual circumstances may support or contradict a person's statement of intent. In this situation the factual circumstances do both. Looking at the entire picture, however, we conclude the factual investigation does not sufficiently establish that Commissioner Solomon's legal residence, as an office holder, as the North Washington property in Commissioner District No. 2. Therefore, we cannot conclude that Commissioner Solomon has vacated the office of Latah County Commissioner for District 1 by ceasing to be a resident of that district.

If the legislature had chosen to define "reside" in the context of Idaho Code § 59-901 to focus solely or predominantly on the issue of physical presence, then we would likely reach the opposite conclusion. Such legislation would support a public policy requiring a public official to spend the majority of his or her time in the district, county or state from which he or she is elected. However, this would be a significant change from Idaho's history of applying the same definition for residency to Idaho's public office holders, public candidates and electors. This change would need to be accomplished by clear and concise language enacted after the legislature has the opportunity for public debate and consideration. Thus, until that change occurs, our conclusion is the term "resides" as applied to office holders in Idaho Code § 59-901 has the same meaning as the term "residency" found at Idaho Code § 34-107.

In order to answer this inquiry, it required a factual determination. Our conclusion is based upon the facts we gathered during the Attorney General's investigation. Our fact finding is not binding on the county commissioners nor the district court. If this issue is pursued beyond the conclusion in this opinion, the factual determination would have to be made by a court of law.

Very truly yours,

STEVE TOBIASON
Deputy Attorney General
Chief, Legislative Affairs Division