(84), bars the use of state school aid fund moneys paid to school districts for the support of regional planning commissions by school districts.

Therefore, it is the opinion of the Attorney General that the board of education of a school district may use operating funds to support a regional planning commission created by it in accordance with Section 12 of Act 281, P.A. 1945, supra.

FRANK J. KELLEY,
Attorney General.

631210.1

CONSTITUTIONAL LAW:
ELECTIONS—BALLOT DESIGNATION:

An attempt by the legislature to provide by statute that "appointed" judges seeking election after January 1, 1964 shall have a ballot designation as "incumbent" or have the designation of their office would be unconstitutional and void because in violation of Article VI, Section 24, Constitution of 1963, which grants the ballot designation of their office only to elected incumbent justices or judges who are candidates for nomination or election to the same office.

No. 4244 December 10, 1963.

Honorable William D. Ford
State Senator
Lansing, Michigan

You seek the opinion of the Attorney General by your letter of inquiry in which you refer to Article VI, Section 24 of the Constitution of 1963, and ask:

> "Can the Legislature provide by statute that 'appointed' judges seeking re-election [election] after January 1, 1964, shall have a ballot designation as 'incumbent?' "

Article VI, Section 24, Constitution of 1963, is as follows:

> "There shall be printed upon the ballot under the name of each elected incumbent justice or judge who is a candidate for nomination or election to the same office the designation of that office."

This section will become effective January 1, 1964. The following explanation of Section 24 appears in the Address to the People adopted by the Constitutional Convention and published co-ordinately with the proposed Constitution at and prior to the time of its submission to the people:

> "This is a revision of the last paragraph of Sec. 23, Article VII, of the present constitution. The word 'elected' has been inserted in front of 'incumbent'. Hence it provides that only judges who have been elected are eligible for the incumbency designation."

In order to make certain that the Address to the People as it pertains to Article VI, Section 24, accurately reflects the intention of the delegates to the Constitutional Convention, the official record of the Constitutional

Convention at the time of the adoption of Section 24 has been examined and the following is a summary of the action taken there:

The constitutional provision involved is Article VI, Section 24. This section came before the Constitutional Convention in the form of Committee Proposal 96. Section e of the Committee Proposal reads the same as Article VI, Section 24. The Committee Proposal 96 came from the Committee on the Judicial Branch and was considered in the Committee of the Whole on March 6, 1962. (Official Record, Constitutional Convention 1961, p. 1478 et seq.) Section e was reached for consideration in the Committee of the Whole on March 8, 1962. (Official Record, p. 1519) Mr. Danhof, as Chairman of the Committee on the Judicial Branch, yielded to Mr. Cudlip for an explanation of Section e. After referring to the place in the Journal where Section e of Committee Proposal 96 could be found, Mr. Cudlip said:

"The change is that the person who uses the word 'incumbent' on the ballot must have earned his office, must have been elected. Today any judge or justice may use it, appointed or elected. * * *.

"The idea when this 1939 provision was incorporated in our present constitution for elected and appointed judges was to further insure this ideal of stability of the courts, their independence, to give them some reasonable tenure, and to secure able lawyers. We felt in the committee that perhaps that was a very worthy thing because we do want an independent judiciary and we want the guardians of your liberty to be the best. But we did feel, to repeat, that perhaps a justice or judge should not have that privilege unless he had been once before the electorate."

An amendment was then proposed by Delegate Downs to strike the word "elected." Besides Delegate Downs there were eight delegates who spoke for or against the amendment, including you who spoke at length in favor of it. (Official Record, p. 1520)

Mr. Joseph Lawrence, Jr., a delegate from Washtenaw County and a member of the Committee on the Judicial Branch, in speaking against the proposed amendment to Section e said:

"* * * this provision that you find in Section e was given rather lengthy discussion in the Judicial Committee. One of the difficulties we have had in connection with the incumbency label and the use of it has been that an appointed judge could use it at the time of his first appearance before the voters. Now, the purpose of the incumbency label is to give security to judicial officers who might otherwise not be induced to run. When I say that, I say that rather broadly. It is not an effort to give an advantage, or shouldn't be an effort to give an advantage, but it should be one that a judge has earned, one that a judge has shown his ability to have. And the way for him to show that, of course, as far as an opponent is concerned, is by having earned it in an election and not because he happened to be the favorite choice of the governor, who can make his appointment without any responsibility to anyone. The result has been that because of the situation in connection with judicial elections, a person who has in no way earned that designation has been allowed to use it.

"* * *. Now, if you are for their election, certainly an advantage should not be given to one who has not earned the right to use the word 'incumbent' by having been elected by the people. It seems to me that the designation is misleading in the case of an appointed judge who has not earned the right to use it by having been elected. It actually defeats the purpose that was intended in giving that right to use the word 'incumbent.'" (Official Record, p. 1520)

The amendment was not adopted. (Official Record, p. 1522)

The next proposal was to strike out all of Section e. (Official Record, p. 1522) Twenty-one delegates spoke for or against the amendment to strike out all of Section e. You were one of the delegates who spoke in favor of the amendment. (Official Record, p. 1524) In the course of this debate three principal reasons were given for continuing the incumbency designation in the Judicial Article. These were:

It would minimize the necessity for perpetual campaigning on the part of a judge and would reduce the temptation to postpone the trial of notorious cases until an election year in order to reap the benefit of newspaper publicity.

It would serve as a means of identification for the voter.

If the incumbent is to be permitted to renominate himself . . . .

[This subsequently became a part of the Constitution; for Supreme Court justices in Article VI, Section 2, and for judges of the court of appeals, the circuit court and the probate court in the primary election by Article VI, Section 22.] . . . . the incumbent should have the benefit of the designation to offset the organized support available to his opponents from political parties even though the ballot is nonpartisan. (Official Records, pp. 1522 through 1527) The amendment to strike out Section e was defeated. (Official Record, p. 1527)

In my opinion the explanation of Article VI, Section 24, contained in the Address to the People correctly reflects the intention of the delegates to the Constitutional Convention and the action taken by them in that assembly. I have previously stated my position regarding Article VI, Section 24, in Division II, Item 23, of my Recommendations on Legislative Implementation and Statutory Revision under the Constitution of 1963, which has been delivered in identical counterparts to all members of the legislature. Regarding Section 24 I there said:

"The 1963 Constitution modifies the former constitutional authorization by restricting the designation to use by an elected incumbent justice or judge, the word 'elected' being new. The effect of this change may be easily illustrated. Assume that a circuit court judge died in the summer of 1963 and that the resultant vacancy was filled by gubernatorial appointment. If the appointed judge ran for election at the general election in November 1964 he would not be entitled to use the designation of his office on the ballot because he had not been elected but instead was appointed."

It is a fundamental principle of constitutional construction that the courts

will undertake to determine the intent of the framers of the Constitution and of the people adopting it.

Holland v. Clerk of Garden City, 299 Mich. 465, 470.
City of Jackson v. Commissioner of Revenue, 316 Mich. 694, 720.

In determining the intent of the people in adopting a constitution, consideration should be given to the explanations and statements appearing in the Address to the People.

Holland v. Clerk of Garden City, supra, p. 471.

It appears beyond dispute that it was the intention of the people in adopting Article VI, Section 24, as a part of the Constitution of 1963 to confer the grant of the designation of the office only upon an elected incumbent justice or judge by printing upon the ballot under the name of such elected justice or judge the designation of his office. The language of Article VI, Section 24, cannot be read or understood as granting a similar right to an appointed incumbent justice or judge. The use of the word "elected" in Section 24 forecloses the conclusion that every judge or justice (whether elected or appointed) could use the office designation. This is demonstrated by the opinion of the Court in the case of *Main v. Claremont Unified School District* (1958), 161 Cal. 2d 189, 326 P. 2d 573, 577, where it was said:

> "In its strict sense 'elect' means selection by the appropriate body of qualified voters; when used with reference to selection by a subordinate body, such as a city council or a school board, it connotes appointment or employment. 'The words "elected" and "appointed" ordinarily are not synonymous. In its limited sense, the word "elected" is usually employed to denote the selection of a public officer by the qualified voters of a community. On the other hand the word "appointed" is generally understood to mean the selection of a public officer by one person who is empowered by law to make the appointment. In its broadest sense, however, the word "elected" means merely "selected." When used in that sense the word "elected" is synonmous with the word appointed"; * * *.' "

When all of the provisions of Article VI on the Judicial Branch under the Constitution of 1963 are examined, together with the Debates of the delegates in the Constitutional Convention and the Address to the People, it becomes apparent that it was the intention and design of the people to establish a system for an elected judiciary in Michigan. The former power of the governor under the Constitution of 1908 to fill vacancies in judicial offices by appointment was abolished by the Constitution of 1963. It follows that the word "elected" appearing in Article VI, Section 24, was used in its strict sense and means those justices or judges selected by a vote of qualified electors.

It is a matter of common knowledge that vacancies in judicial offices have occurred subsequent to the general November election of 1962 and that such vacancies have been filled by gubernatorial appointment. In a few instances additional judgeships created by the legislature have been filled in the same manner. Primarily your concern must be whether an act passed by the legislature and signed by the governor conferring a ballot designation of their

offices upon appointed incumbent justices or judges who become candidates for nomination or election to succeed themselves would be in violation of Article VI, Section 24 of the Constitution of 1963 and therefore unconstitutional. In my opinion such an act would be unconstitutional and void.

It is true that Article VI, Section 24, does not in express words contain a prohibition against the use of the ballot designation by an appointed incumbent justice or judge but the inclusion of such language is unnecessary to place the legislature under constitutional restraint. Although not expressed, the restraint is necessarily implied.

In the case of *Rathbone v. Wirth* (1896), 150 N.Y. 459, 45 N.E. 15, 23, the Court of Appeals in the concurring opinion of Judge O'Brien said:

> "When the validity of such legislation is brought in question, it is not necessary to show that it falls appropriately within some express written prohibition contained in the constitution. The implied restraints of the constitution upon legislative power may be as effectual for its condemnation as the written words, and such restraints may be found either in the language employed or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law."

The foregoing statement of the law was quoted with approval by the Supreme Court of Indiana in the case of *State ex rel. Geake et al. v. Fox* (1902), 158 Ind. 126, 63 N.E. 19, 21.

In *Fraser et al. v. Brown, et al.* (1911), 203 N.Y. 136, 96 N.E. 365, 367, the Court of Appeals again said:

> "No Constitution was ever drawn so as to be an effective foundation for the government of a state without applying thereto the doctrine of implication. It is well established that whatever is necessary to render effective any provision of a Constitution, whether it is a grant, restriction, or prohibition, 'must be deemed implied and intended in the provision itself.' "

The Supreme Court of Oklahoma stated the applicable law in the case of *Board of Commissioners of Logan County v. State ex rel. Short* (1927), 122 Okl. 268, 254 P. 710, 712, by these words:

> "The Constitution, of course, does not expressly inhibit the power the Legislature has assumed to exercise, but an express inhibition is not necessary. The affirmation of a distinct policy upon any specific point in a state Constitution implies the negation of any power in the Legislature to establish a different policy."

The Supreme Court of Florida, quoting from its own prior decisions, announced the following rules in the case of *Thomas v. State of Florida ex rel. Cobb* (1952), 58 So 2d 173, 177, 178, 34 A.L.R. 2d 140:

> "* * * when the Constitution made specific provisions with reference to this matter, it amounted in effect to a prohibition in the exercise of the power in any other way."
>
> " 'When a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way.' "

" 'When the Constitution prescribes the manner in which a thing shall be done or a fact ascertained by implication, it prohibits the Legislature from by statute providing a different manner—the one prescribed in the Constitution is exclusive of all other modes.' "

In my opinion your stated question must be answered in the negative because action by the legislature to accomplish the purpose contemplated by your question would violate Article VI, Section 24 of the Constitution of 1963 and therefore void.

FRANK J. KELLEY,
Attorney General.

631216.1

NEWSPAPER: Qualifications for publishing of legal notices.

A newspaper which qualifies for the publication of legal notices is not deprived of its qualification as such by the practice of the publisher in combining the news, editorial and advertising content published therein with additional advertising in another publication under a different name, which is distributed separately without charge to all boxholders in the community.

No. 4192 December 16, 1963.

Mr. C. Homer Miel
Prosecuting Attorney
Montcalm County
Stanton, Michigan

You have requested my opinion as to whether a certain newspaper published under the name "X News" in a city in your county qualifies for the publication of legal notices under RJA § 1461, as amended by Act No. 246, P.A. 1963, and under Act No. 247, P.A. 1963. By RJA you refer to the revised judicature act of 1961, being Act No. 236, P.A. 1961, as amended.[1] Section 1461, as amended, defines the term "newspaper," which definition reads in pertinent part as follows:

"(1) The term 'newspaper' as used in the revised judicature act of 1961 shall be construed to refer only to a newspaper published in the English language for the dissemination of local or transmitted news and intelligence of a general character or for the dissemination of legal news, which

"(a) has a bona fide list of paying subscribers or has been published at not less than weekly intervals in the same community without interruption for at least 2 years,

"(b) has been established, published, and circulated at not less than weekly intervals without interruption for at least 1 year in the county where the court is situated. * * *

"(c) annually averages at least 25% news and editorial content per

1 C.L.S. 1961 § 600.101 et seq., M.S.A. 1962 Rev. Vol. § 27A.101 et seq.

lands are not used for public purposes.
2 O.A.G. 1947-48, No. 384, p. 323.