

1980 WL 120932 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 17, 1980

*1 The Honorable Heyward McDonald
Senator
Senatorial District No. 7
604 Gressette Senate Office Building
Columbia, South Carolina 29202

Dear Senator McDonald:

With regard to the opinion of this Office addressed to you and dated October 3, 1980 [copy attached], you have asked that we again review the portion of the proposed annexation bill quoted therein to determine whether it creates a presumption of consent which contravenes [Article VIII, § 15 of the South Carolina Constitution](#). Although it does not appear that the proposal creates a presumption of consent, in reviewing your recent inquiry another issue was revealed which was not dealt with in the October 3 opinion. That opinion focused on whether the consent mandated by [Article VIII, § 15](#) was contravened by the proposed bill. The additional issue noted during our examination of your most recent inquiry is whether the timing of the consent by the municipality required by the proposal satisfies [Article VIII, § 15](#).

The proposed language expressly requires prior to annexation the consent of the municipality to the continuation of the electrical service assignment in effect in an area immediately preceding annexation. The October 3 opinion viewed the consent and annexation as a simultaneous transaction, but this may not have been accurate. Upon again reviewing the proposed language in response to your request, a problem with the timing of the consent provided by the proposed bill was noted.

[Article VIII, § 15](#) mandates that streets or other public places cannot be used or occupied for certain purposes without the consent of the governing body of the municipality in control of such streets or public places. A municipality does not control or have jurisdiction over streets or other public places in an area until the area becomes a part of the city, that is until the area is annexed. 62 *C.J.S.*, *Municipal Corporations*, §§ 72, 76; McOuillan, *Law of Municipal Corporations*, 3rd ed., § 7.46. Therefore, the consent required by [Article VIII, § 15](#) can be exercised only after the streets and other public places are annexed into and under the control of the municipality. [City of Nicholasville v. Blue Grass Rural Electric Cooperative](#), 514 S.W.2d 414, 417 (Ky. 1974); see §§ 33-49-250, 58-27-1360, 58-27-670, *Code of Laws of South Carolina*, 1976, which provide for consent operable after annexation and incorporation. In addition to the necessary consent being operative only after the area is annexed, no authority has been found which provides that the municipality can be bound or estopped by a commitment of consent prior to annexation. The authority which was found provides that the requirement of consent is absolute and is not satisfied by waiver, acquiescence or estoppel. [City of Allegheny v. Millvale Railway Co.](#), 28 A. 202 (Pa. 1893); [East Tennessee Telephone Co. v. Anderson County Telephone Co.](#), 74 S.W. 218 (Ky. 1903); [State ex rel United Railways Co. v. Public Service Commission](#), 192 S.W. 958 (Mo. 1917) [citing [Gray v. Walker](#), 16 S.C. 143 (1880) concerning the nature of the consent]; [Holland Realty and Power Co. v. City of St. Louis](#), 221 S.W. 51 (Mo. 1920); [McQuillin](#), *supra*, § 34.28, p. 77.

*2 Since our opinion to you of October 3 and the previous related opinion of August 21, 1980, authority has been found which concludes that provisions similar to [Article VIII, § 15](#) apply only to utilities entering into municipalities and not to utilities operating with existing facilities in newly annexed areas prior to their annexation. [Town of Culpepper v. Virginia Electric and Power Co.](#), 215 Va. 189, 207 S.E.2d 864 (1974); see Op. of the Atty. Gen., No. 3432, 1972, which was issued prior to the 1973 revision that broadened the language of [Article VIII, § 15](#) and to the decision in [City of Nicholasville](#), *supra*, and which deals with public corporations operating in newly annexed areas.¹ Based on research to date, this Office is not in a

position to conclude that this authority should be applied to limit substantially the application of [Article VIII, § 15](#) for several reasons, in addition to the existence of decisions to the contrary. First, the language of this constitutional provision, which was revised in 1973, is broader than those in the aforementioned and related authority in that it applies to the use and occupation of the streets and other public places and the maintenance of facilities and to the granting of rights with regard thereto. Further, the proposed bill in effect does grant the right to occupy and use the streets and other public places of a municipality. The statutes previously enacted by the General Assembly concerning the operation of existing electrical providers in newly annexed areas sought to preserve the consent of the municipalities. §§ [33-49-250](#), [58-27-1360](#), [58-27-670](#). In adopting these statutes, the General Assembly must have been seeking to comply with their interpretation of [Article VIII, § 15](#). Also, various other statutes and constitutional provisions give municipalities certain powers concerning the operation and provision of electrical services within their boundaries, and these may affect the continued operation of pre-existing facilities after annexation. §§ [5-7-30](#), [58-27-90](#), [58-27-410](#) to [58-27-450](#), [58-27-620](#), [58-27-640](#), [58-27-670](#); [Article VIII, §§ 16 and 18](#) concerning utilities operated by municipalities. However, the aforementioned authority does render less certain the conclusion reached in the two previous opinions that the consent mandated by [Article VIII, § 15](#) applies to utilities providing areas electrical service with existing facilities prior to their annexation.

While, as stated in the October 3 opinion, the proposed bill does not conflict with [Article VIII, § 15](#), the pre-annexation consent provided by that proposal cannot serve as the consent mandated by [Article VIII, § 15](#) and cannot be made binding on the municipality. To the extent the October 3, 1980, opinion conflicts with this opinion, it is hereby modified.

Sincerely,

James M. Holly
Assistant Attorney General

Footnotes

- 1 This opinion is not listed in the annotations to [Article VIII, § 15](#).

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