1980 WL 120840 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 21, 1980

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

Dear Senator McDonald:
You have asked the opinion of this Office on whether the General Assembly could provide by statute a method of allotting electrical service in a newly annexed area either in conjunction with or superseding the consent of the governing body of the municipality. As noted in your letter this consent is required by Article VIII, § 15 of the South Carolina Constitution. The purpose of your request is to obtain some guidance for a committee of the General Assembly studying the possible revision of statutes dealing with municipal annexation.

In 1973, Article VIII, § 15 of the South Carolina Constitution became effective. Act 63, Acts and Joint Resolutions, 1973, p. 67. It provides in part:
No law shall be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, telegraph, . . . or electric plant, . . . or to lay mains for any purpose, or to use the streets for any other such facility, without first obtaining the consent of the governing body of the municipality in control of the streets or public places proposed to be occupied for any such or like purpose. . .. [Emphasis Added]

Except for the emphasized language, the quoted portion of this provisions is almost identical to Article 8, § 4 of the Constitution of 1895. The title and referendum question adopted by the legislature described this amendment as prohibiting 'the General Assembly from granting rights to construct and maintain certain public works and utilities without [the] consent of [the] political entity affected.' Act 63; Joint Resolution No. 1631, Acts and Joint Resolutions, 1972, p. 3184.

In Riley v. Union Station Co., 71 S.C. 457 (1904), the Supreme Court recited, before presenting its opinion, the decree of the circuit court. The decree treated the issue of whether a special act granting the right to a corporation to construct a railroad in the City of Charleston contravened Article 8, § 4. The circuit court found that this provision was not violated because the act expressly provided that 'no street of said city shall be obstructed or interfered with until the consent of the proper authorities of said city shall have been first obtained.'

The court further commented:
The granting of the right is predicated upon the 'consent of the proper authorities of said city . . . first obtained.' Without such consent, there can no grant of such right; and the right is granted only when such consent is had, and not until then. Id., at 467.

The Supreme Court affirmed the decree of the circuit court without discussing this issue.

The case of Town of Brookland v. Broad River Power Co., 172 S.C. 115 (1933) presents precedential authority of a similar nature. The Supreme Court disposed of an appeal from the circuit court without discussing the latter's treatment of Article 8, § 4. The circuit court decree, which is recited preceding the opinion of the Supreme Court, rejected the argument that this

constitutional provision conferred upon a municipality the power to grant a perpetual franchise. In doing so, the circuit court commented:

***2** I do not construe . . . [Article 8, § 4] . . . as conferring any authority upon [a] municipality, but as a limitation of the power of the General Assembly. Id., at 118.

See Nolletti v. Nolletti, 243 S.C. 20 (1963). Similar conclusions are stated in San Antonio Traction Co. v. Altgelt, 200 U.S. 304 (1906) and McQuillin, Law of Municipal Corporation, 3rd.ed., § 34.13, pp. 39-40.

Two cases from Kentucky, which has a constitutional provision similar to Article VIII, § 15, would be more authoritative with regard to your questions. Section 163, Constitution of Kentucky. In City of Nicholasville v. Blue Grass Rural Electric Cooperative Corp., 514 S.W.2d 414 (1974), the Kentucky Court of Appeals was presented with the issue of whether Section 163 was contravened by a statute which provided that a utility already providing electrical service in a newly annexed area could continue and expand its service therein. The Court concluded that the statute was unconstitutional to the extent it granted, or allotted, a right to occupy the streets of a city, including a newly annexed area, without the consent mandated by Section 163. The holding recognized that subject to this limitation, the legislature could enact statutes dealing with what electrical suppliers could operate in these areas. The Court thus confirmed that the right of consent provided cities and towns by Section 163 is final and to that extent is superior to the power of the legislature to grant, allot or limit permission to operate electrical facilities within a municipality. McQuillin, supra, § 34.13. To the same effect, see Whitaker v. Louisville Transit Co. 274 S.W.2d 391, 395 (Ky. 1954).

The type of consent which is mandated by constitutional and statutory provisions similar to Article VIII, § 15 should be relevant to your inquiry. This requirement is considered absolute and cannot be waived or established by acquiesence. 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.

Returning to the question posed by you, the plain language and stated purpose of Article VIII, § 15 would be contravened by a statute which supersedes the consent of the governing body of a municipality to the operation of electrical facilities in its streets or on other public property. This conclusion is supported by the decree of the circuit court in Riley, supra, and the Kentucky cases of City of Nicholasville, supra and Whitaker, supra.

Concerning the question of whether the General Assembly could provide by statute a method that allotted electrical service in conjunction with the consent of the municipality, it is difficult to respond definitively without a particular method being specified. Nevertheless, the authority cited herein above, does provide some guidance.

***3** Article VIII, § 15 does not confer upon municipalities the power to grant rights to provide electrical service, but it does limit the power of the General Assembly to do this by giving municipalities the final right to consent, or to not consent, to the construction or operation of such facilities on its streets or other public property. Town of Brookland, supra, and the related authority cited at page 3 hereinabove; City of Nicholasville and Whitaker, supra; McQuillan, supra, § 34.13. The decision in City of Nicholasville expressly recognized the power of a legislature, subject to the consent of the municipality, to determine what electrical suppliers could operate in or supply newly annexed areas. See Riley, supra. A reasonable inference from this authority is that the General Assembly could establish a method for allotting electrical service in conjunction with the consent required by Article VIII, § 15. See McQuillin, supra, §§ 34.10, 34.10a, 34.13, 34.14. The constitutionally mandated consent, however, cannot be obviated by any such method. Riley, supra; also see the authority cited at page 3 hereinabove concerning waiver and acquiescence.

To summarize, it is the opinion of this Office that a statute which supersedes in some manner the consent of a municipality to the operation of electrical facilities on its streets or other public property would contravene Article VIII, § 15 of the South Carolina Constitution, but a statute which establishes a method of allotting such service in conjunction with the consent of the municipality would not violate this constitutional provision. [1] , [2]

Sincerely,

James M. Holly
Assistant Attorney General

Footnotes

1 Municipalities have been accorded the power to grant franchises and to determine otherwise what electrical suppliers may operate within their boundaries by §§ 58-27-410 to 58-27-450, 58-27-670, 58-27-1360, and 33-49-250, Code of Laws of South Carolina, 1976, as amended. Also note §§ 5-7-30 and 58-27-90.

2 The same principles and conclusions should apply to all areas of a municipality including those newly annexed. See City of Nicholasville, supra, at 417.

1980 WL 120840 (S.C.A.G.)

End of Document