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Opinion No 88-21  
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March 8, 1988

The Honorable Edward W. Simpson, Jr.  
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Dear Representative Simpson:

By your letter of February 17, 1988, you have asked several questions about a situation in which the City of Clemson and the East Clemson Water District are in the position of serving the same geographic area, due to annexations by the City. After a brief discussion about the East Clemson Water District and general law relevant thereto, each of your questions will be examined.

East Clemson Water District

The East Clemson Water District was established by the General Assembly by Act No. 128, 1953 Acts and Joint Resolutions, as amended. The District is denominated a special purpose district, a public corporation of perpetual succession. In section 3 of Act No. 128, the District is assigned the function of "constructing, operating, maintaining, improving and extending a water distribution system within the district." At the time the District was established, that area of Pickens County was unincorporated; now a substantial part of the District is within the boundaries of the City of Clemson, due to annexations.

As noted, the District was established as a public corporation to have perpetual succession. The District would also be considered to be a political subdivision, separate and distinct from the City of Clemson, Pickens County, and the State. See Op. Atty. Gen. No. 84-132. The effect of the Home Rule Act and relevant constitutional provisions is most important, due to the nature of the District. Article VIII, Section 1 of the State Constitution provides that "[t]he powers possessed by all counties, cities, towns, and other political subdivisions at the effective date of this Constitution shall continue until changed in a manner provided by law." (Emphasis added.) Thus, until the General Assembly changes the special acts for the

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District by general law, such special acts remain valid. Berry v. Weeks, 279 S.C. 543, 309 S.E.2d 744 (1983); Section 4-9-80, Code of Laws of South Carolina (1976, as amended) (preexisting special purpose districts shall continue to function until dissolved as specified therein).

Section 6-11-410 et seq. of the Code provides a mechanism whereby the service areas of special purpose districts created prior to March 7, 1973 may be enlarged, diminished, or consolidated, by action of the appropriate county council. It must be noted, however, that the Supreme Court in Berry v. Weeks, supra, basically stated that a county may not diminish a special purpose district's service area to the point of non-existence. Too, the diminishing of the service area to the extent that the county could fully assume the functions of the special purpose district was deemed not to be proper. The court further noted that "[t]he interaction of counties with special purpose districts existing prior to home rule is indeed confusing. Yet, until the legislature passes a general law affecting the existence of these districts, counties lack the power to abolish them." Id., 279 S.C. at 548. The same reasoning would also be applicable to a take-over of services by a municipality.

To summarize the foregoing, the acts of the General Assembly relative to the East Clemson Water District remain valid and in effect at present and will so continue until altered by the General Assembly by a general act, since Article VIII, Section 7 of the State Constitution prohibits the adoption of an act for a specific county, or until abolished by the specified statutory procedure. The relationship of a municipality to a special purpose district such as the District is a gray area since such has not yet been addressed by the General Assembly. With these principles in mind, your questions will be addressed.

#### Question 1

Can the City acquire the water lines of the East Clemson Water District within its corporate boundaries by adverse possession?

Adverse possession is a means by which one in possession of real property acquires title to the property after a specified period of time if certain conditions are met. The procedure to acquire title to realty through adverse possession is provided in Chapter 67, Title 15, Code of Laws of South Carolina; the elements to be met include possession of realty that is actual, open, notorious, hostile, continuous, and exclusive for the time specified by statute. Mullis v. Winchester, 237 S.C. 487, 118 S.E.2d 61 (1961).

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The City's ability to acquire water lines of the District by adverse possession would be questionable, at best. Adverse possession is usually thought of in terms of real property; whether water lines would constitute property subject to adverse possession is doubtful. Cf., St. Andrews Public Service District et al. v. City of Charleston et al., \_\_\_\_\_ S.C. \_\_\_\_\_, 362 S.E.2d 877 (1987) (sewer lines are property, but not real property). Second, if the District is still in possession of its water lines and is using them, the City could not establish its possession of the water lines, assuming the lines were subject to adverse possession statutes in the first instance. Finally, because the water lines belong to another political subdivision, such property held by a political subdivision is generally excluded from acquisition by adverse possession. See 3 Am.Jur.2d Adverse Possession § 270. The City Attorney should be consulted, so that the relevant facts may be applied to the law of adverse possession, to finally determine the appropriateness of proceeding in this manner.

#### Question 2

Can the City of Clemson require the District to upgrade its lines and fire hydrants inside the corporate limits to meet the standards of the City?

This Office is aware of no authority allowing a municipality to require an adjacent or coexisting special purpose district providing the same services to upgrade its lines and equipment to meet the standards of the municipality.

If the lines of the District are not kept in repair, the following from Section 5-31-10 of the Code may be useful:

Any municipal corporation of this State having power to construct and operate a plant for water supply or any person contemplating the laying of pipes for supplying water to a municipal corporation or to a community of citizens may lay water pipes for the purpose of carrying water on or under the bed of any nontidal navigable stream of this State and, with the approval of the county authorities in any county, on or under any highway of such county. Such pipes shall be so laid as not to interfere with the free use of such highway or the navigation of such streams by boats to the same extent that they would be navigable if such pipes were not laid.

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Every such municipality or person, having laid such pipes, shall keep them in repair.

Perhaps a person aggrieved by the condition of the pipes could use this statute to force compliance therewith.

### Question 3

Can the City of Clemson extend new lines to the customers of the District inside the city limits?

Assuming that the customers of the District referred to are those who are presently being served, so that both the City and the District would be serving the same customers, the answer is that such probably could not be undertaken by the City. To do so would have the effect of usurping the District's function as prescribed by the General Assembly in an area prescribed by the General Assembly. As noted earlier, Article VIII, Section 1 of the State Constitution preserves the powers of the District until changed by law. The City extending its lines to the District's customers would also have the effect of abolishing a substantial portion of the District; such has not been contemplated by the legislature. Berry v. Weeks, supra. Such could also be viewed as tampering with or impairing the District's water services, a violation of section 8 of Act No. 128 and a misdemeanor.

### Question 4

Can the City of Clemson require the District to enter into a franchise agreement and charge a franchise fee as a condition of continuing business in the corporate limits?

A municipality is authorized to grant franchises for the furnishing of water services to the inhabitants of the municipality by Section 5-31-50 of the Code. However, the General Assembly has already authorized the District to serve customers in the geographic area which is part of the City; the District derives its right to operate a water system from the legislature and is not dependent upon a franchise, license, or other permit of the city to carry on its business.

It should be noted that section 3(6) of Act No. 128 authorizes the District to "[b]uild, construct, maintain and operate water lines and water mains throughout the district, and from time to time enlarge and extend the same." Further, section 8 of Act No. 128 declares unlawful the action of a person which

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tampers with or impairs the district's water system, equipment, and so forth. The District's authority has thus been conferred by the General Assembly, and the city should be cautious in interfering with the District's operation.

#### Question 5

Are there any other alternatives available to the City to resolve these issues relative to the District's operation within the corporate limits of the City of Clemson?

As municipalities expand the corporate limits into formerly rural areas served by special purpose districts or public service districts, the question of providing identical services in overlapping geographic areas has become an increasing concern to all involved. One suggestion would be adoption of general laws by the General Assembly to address these recurring issues; a general law would be preferable since the problem occurs across the State and since the prohibitions of Article VIII, Sections 7 and 10 (no laws to be enacted for a specific county or municipality, respectively) would be avoided. A declaratory judgment action might be undertaken, to have the rights of the District and the City judicially determined, as another alternative.

An analogous situation is presented in City of Abbeville v. Aiken Electric Cooperative, Inc., 287 S.C. 361, 338 S.E.2d 831 (1985), a copy of which is enclosed. In an instance in which an electric cooperative provides electrical services, by virtue of assignment of area by the Public Service Commission, to residents of an area newly annexed into a city, the city may condemn and thus acquire the utility only after the Public Service Commission has found that service provided by the electric cooperative is inadequate, undependable, or unreasonably discriminatory. While there are statutes covering this situation, unlike the District-City of Clemson situation, the decision discusses some constitutional concerns which also arise in the District-City of Clemson. Additionally, the District in this case is similarly protected by Article VIII, Section 1 of the Constitution, so that a result similar to that in City of Abbeville could also be reached with respect to the City of Clemson-East Clemson Water District situation.

For additional guidance, we are also enclosing copies of 1 McQuillin, Municipal Corporations, §§ 3A.17 and 3A.21, concerning the competing theories examined when various governmental entities attempt to provide services of the same nature in the same geographic area. We trust that the information contained herein will prove to be useful to the City of Clemson.

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A manual search through opinions issued by this Office located several which, while published, are not yet on our computer data base. Enclosed are opinions dated November 10, 1972 and November 11, 1966, concerning the City of Clemson and the East Clemson Water District. While these opinions were rendered before the adoption of the Home Rule Act and Article VIII of the State Constitution, the results reached therein are consistent with the results reached in today's opinion. The latter opinion also contains authority for the proposition that annexation by a municipality of an area served by a water district did not destroy the water district; instead, each would continue to function as before the annexation.

Sincerely,

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Enclosures

REVIEWED AND APPROVED BY:

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