December 18, 2007

Dear City Administrator:

You have the following question, asked on October 4: **Would the city be successful if it challenged the 1985 sales tax distribution agreement it has with The County?**

In my opinion, the answer is probably no, at least at the present time. But because the 1985 Agreement does not have a termination date, because the Agreement has already had a life of over 20 years, and because a recent case, albeit an unreported one, that contains an extensive analysis the duration of contracts that do not have termination dates supports the proposition that in the case of such a contract the courts have the power to supply a " reasonable" termination date, the door on this question might be slightly open. I will discuss that case near the end of this letter.

In reaching my conclusion, I have reviewed the entire history of the sales tax agreements with The County dating back to 1969, which Ms. Shirley Durham was good enough to send to me. Based on the above record, the outline of the history of the sales tax agreements entitled "CITY LOCAL OPTION SALES TAX," which accompanied that record appears to be an accurate one. There are several copies of the 1985 Agreement in the materials the City sent to me, none of which reflect the signature of the parties, but I assume (accurately, I hope) that the agreement adopted by the City on March 28, 1985, and by The County on April 8, 1985, is the Agreement between the parties at issue.

In that Agreement, the city and county ratified the 1969 Agreement between the city and county Ain all aspects as the same has been interpreted in a memorandum opinion of the Chancery Court of The County, Tennessee dated November 28, 1983". [Para.1] That opinion held that the 1969 sales tax distribution agreement between the city and the county applied to the city's share of the 1% sales tax in effect at that time, but not to the city's share of the increase from 1% to 1-1/2% in the sales tax in 1976. In addition, under the 1985 Agreement, the city agreed that it "would not seek retroactive collection from the county of its share of said sales tax increase that has accrued since its enactment." [Para. 2] Finally, and most important, the Agreement provided that:

3. Recognizing its obligation to assist in the support of the County School System, the City agrees that in the event a referendum for an increase in the local option sales tax by an additional one half cent is called by the County Legislative Body prior to July 1, 1985, and same is approved by the voters of The County, that the statutory share of the City shall go to the government of The County, Tennessee for the express and sole purpose of being used for school purposes as provided by statute. It is expressly understood, however, that this provision shall not apply to any amount over and above one-half (2) cent, nor shall it apply to any local option sales tax increase that may be enacted in the future. [Para. 3]

That Agreement is still in existence, and, as far as I can tell from the record and the " CITY LOCAL OPTION SALES TAX" history, the sales tax distribution is following that Agreement, which appears to comply with Tennessee Code Annotated, '67-6-712.

Tennessee Code Annotated, section 67-6-712 provides for the distribution of the county sales tax, as follows:

- One-half of the proceeds goes to the county school system.

- The other one-half is distributed as follows:

- The sales tax collected in the unincorporated portions of the county goes to the county.

- The sales tax collected in the incorporated cities and towns, goes to those cities and towns.

However, the same statute authorizes the county and cities by contract to provide for a different distribution of the second half of the sales tax (the half not allocated to school purposes). The City and The County entered into the first such contract in 1969, and the second one in 1985.

Neither the 1969 nor the 1985 contracts contained a termination date. However, the lack of a termination date in the 1969 contract arose, but only indirectly, in the 1983 case in which the City challenged The County for its failure to pay to the City its statutory share of its 2% sales tax increase enacted in 1976. The Chancellor resolved the case in the city's favor on November 28, 1983, on the ground that:

At the time the original contract was entered into by the parties, there was only one cent available for local government, and the city would have exceeded their [sic.] authority to pledge any future revenue from a tax that was not in existence at the time. The allocation of that additional tax revenue would be the exercise of a governmental function which would be prohibited. [Chancellor's Memorandum Opinion, dated 28 March, 1983.]

With great respect and deference to the County Chancery Court, I am not sure that its opinion would have been upheld had it been appealed. Had that case arisen two years later after the Tennessee Supreme Court's decision in Washington County Board of Education v. Marketamerica, 693 S.W.2d 344 (Tenn. 1985), I am not sure that the County Chancery Court would have even ruled in favor of the City. In any event, however legally sound or unsound the County Chancery Court's decision, the city did not appeal it. In addition, as pointed out above, the city and county resolved their dispute over the sales tax distribution with their 1985 Agreement (even though there was a subsequent dispute over when the city's share of that distribution was to begin). For that reason, it appears to me that case is res judicata, and any complaint the city might have over the subsequent sales tax distribution between the city and the county must arise under the 1985 Agreement.

It is said in State ex rel. Russell v. West, 115 S.W.3d 886 (Tenn. Ct. App. 2003), that:

The term " res judicat" is defined as a" [r]ule that a final judgment entered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privities, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action... [T]o be applicable, it requires identity of cause of action, or persons and parties to action, and a quality in persons for or against whom claim is made." Black's Law Dictionary 1172 (5th ed. 1979) (citations omitted). We have recently discussed the doctrine [...] as follows:

The doctrine of res judicata bars a second suit between the same parties or their privities on the same cause of action with respect to all issues which were or could have been litigated in the former suit [...]

Goeke v. Woods, 777 S.W.2d 347 (Tenn. 1989) (quoting from Massengill v. Scott, 738 S.W.2d 629, 631 (Tenn. 1987)). Res judicata [...] appl[ies] only if the prior judgment concludes the rights of the parties on the merits. A.L. Kornman Co. v. Metropolitan Govt of Nashville & Davidson County, 216 Tenn. 205[, 212], 391 S.W.2d 633, 636 (1965). One defending on the basis of res judicata [...] must demonstrate that 1) the judgement in the prior cases was final and concluded the rights of the parties against whom the defense is asserted, and 2) both cases involve the same parties, the same cause of action, or identical issues. Scales v. Scales, 564 S.W.2d 667, 670 (Tenn. Ct. App. 1977), cert denied, (Tenn. 1978). [At 890]

The checklist of things that triggers res judicata applies down the line to the parties to the 1969 Agreement, through the 1983 The County Chancery Court case, and up to the 1985 Agreement. Paragraph 1 of the 1985 Agreement between the City and The County clearly contemplated an end to the litigation between those parties arising out of the 1969 Agreement and the legal disputes between them arising out of that Agreement:

That the agreement between the City and The County, Tennessee as entered into by the respective government of same in 1969 at the time of the consolidation of the County School System and the City School System are hereby ratified by the respective governments in all aspects as same has been interpreted by a memorandum opinion of the Chancery Court of The County, Tennessee dated November 28, 1983.

Paragraph 2 of that Agreement also provides:

That commencing July 1, 1985, the City shall receive its statutory share of the local option sales tax as enacted in 1976, but expressly agrees that it shall not seek retroactive collection from the county of its share of said tax increase that has accrued since its enactment.

The doctrine of res judicata appears to apply to governments as well as private parties. [See State ex rel. Dobo v. County of Moore, 341 S.W.2d 746 (Tenn. 1960), and to judgments reflecting settlements between governments. [See Kershaw v. Federal Land Bank of Louisville, 556 F. Supp. 693 (M.D. Tenn. 1983).]

The Court in State ex rel. Russell, above, also pointed to the long delay of the plaintiff in raising a Tenn. R. Civ. P., Rule 60 claim for relief on a judgment as a reason not to grant the relief. But rule 60.02(5) requires the claim for relief to be made within a “reasonable time." The ten years the plaintiff had waited to make a claim that he was not the father of a child whose support was at issue was not a reasonable time. But the Court also pointed to the narrow interpretation given to Rule 60 by the Courts:

While the language of Tenn. R. Civ. P. 60.02(5) could be read to suggest a broad application of its terms, it has been "very narrowly" construed by the courts of this state. [Citations omitted by me.] Two applications of the rule have been recognized, One is limited to worker's compensation cases, and the other is directed at those cases presently "extraordinary circumstances or extreme hardship." Gaines v. Gaines, 599 S.W.2d 561, 564 (Tenn. Ct. App. 1980); also see Duncan, 780 S.W.2d at 546 (" relief [is provided] only in the most unique, exceptional, or extraordinary circumstances.") A petitioner has "a heavy burden" under Rule 60.02(5). Steioff, 833 S.W.2d at 97. In addition, we have previously noted that" [t]he purpose of Rule 60.02(5) is not to relieve a party from his or her free, calculated and deliberate choices." See Underwood [v. Zurich Ins. Co.] "854 S.W.2d [94,] 97 (Tenn. 1993(]." Holiday, 42 S.W.3d at 94 (additional citations omitted). [At 890] [Emphasis is mine.]

The 1985 Agreement between the City and The County was undoubtedly a product of their "free, calculated and deliberate choices," and occurred over 20 years ago.

But I have also concluded that there appear to be no solid legal grounds that would support the city's claim that the 1985 agreement between the city and the county is legally defective in some manner. However, as will be seen later, the city has an argument that the courts have the power to supply a reasonable termination date to the 1985 Agreement, and that a reasonable termination date would be immediately. But based on the language of the 1985 Agreement, my view is that even if the courts have the power to supply a termination date to contracts, they would not supply an immediate one to the 1985 Agreement.

Marketmedia, above, and, surprisingly, an unreported case handed down by the Tennessee Court of Appeals that upheld a Bradley County Chancery Court decision by the Chancellor, in a dispute between the City of Cleveland and Bradley County over a contract between those parties involving the distribution of the sales tax have some implications for the longevity of the 1985 Agreement. That case involved a contract made by a school board extending past the term of the board. The Court rejected the proprietary-governmental distinction as a basis for resolving that case, declaring that:

As this Court noted in State ex rel. Association For The Preservation of Tennessee Antiquities v. City of Jackson, 573 S.W.2d 750, 754 (Tenn. 1978), " we do not find the dichotomy of ' governmental' and ' proprietary' functions to be particularly helpful from a standpoint of legal analysis...." Attempts to distinguish contract entered into in "governmental" as opposed to " proprietary" capacities contributes only ambiguity and confusion. Courts have been altogether unsuccessful in defining the scope of "governmental" functions. See Garcia v. San Antonio Metro Transit Authority, 469 U.S.528, 105 S. Ct. 1005, 83 LED.2d 1016 (1985). [At 348-49]

The Marketmedia Court went on to uphold a contract between the school board and a private company that exceeded the term of the existing school board, rejecting several claims that the county did not have the authority to make such contracts. One of those claims was that Tennessee Code Annotated, '49-2-203(a)(11) and '49-2-204, and earlier case law interpreting those statutes prohibited counties from entering into such contracts. Tennessee Code Annotated, '7-51-901, which was a product of Public Acts 1983, Chapter 186, allowed counties to enter into long-term contracts of various kinds, but, as the parties conceded, was adopted after the contract was executed by the parties. But the Court, pointing to the legislative history of that statute, declared that:

Senator Cohen and Representative Burnett, the Senate and House Sponsors of the bill, [Public Acts 1983, Chapter 186] indicated that the bill "only clarifies what cities could always do." One sponsor further stated that the legislation was intended to clarify the law in this area because an opinion of the Attorney General had suggested that counties lacked the capacity to enter into contracts requiring payment beyond the current fiscal year. The new legislation and the debate concerning it illustrates that the legislature never intended that Chapter 2 of Title 49 served as a limitation upon the authority of counties to enter into long-term contracts. Comments of the sponsors also indicate that the legislation was intended to eliminate any distinction in contractual capacity between the "governmental" and " proprietary" functions of local government. The new statute effectively obliterates the distinction as it relates to contractual capacity of local governments.... [At 349]

That case appears to support the proposition that even before it was decided cities had the right to enter into long-term contracts that extend past the term of a sitting board, and that if there were any doubts about whether counties had that authority, Tennessee Code Annotated, '7-51-901 et seq., gave it to " municipalities," in which the same statute defined "Municipality" as "any county or municipality or incorporated city or town of the state of Tennessee."

Marketmedia appeared in the unreported 1999 case of City of Cleveland v. Bradley County, 1999 WL 281086 (Tenn. Ct. App.). In theory unreported cases do not have the precedential value of reported cases, but I have no doubt that the courts would reach the same result under similar facts. That case involved two issues: (1) The legality of the 1967 contract between the City of Cleveland and Bradley County under which the former agreed to give the later its share of the sales tax to which it was entitled under Tennessee Code Annotated, '67- 6-712. In 1972 the parties agreed to an amendment to the contract under which the city agreed that the funds from an additional sales tax to be levied in Bradley County would continue to be divided under the original contract; (2) Whether the city was entitled to a share of the proceeds of a capital outlay note issued by the county. I will analyze only the question (1), which deals with the legality of the sales distribution contract between the city and the county.

The city argued that the contract was illegal on several grounds, only two of which appear at issue in the 1985 contract between the City and The County:

- The contract did not have a termination date, therefore it was a contract in perpetuity and terminable at the will of the city. The trial court (The Chancellor) had held that the contract was not in perpetuity because it contained a termination provision.

- The trial court's decision was against public policy because it tied future city council members to a contract relating to government matters. The case does not disclose that the trial court (The Chancellor) addressed this issue.

The Court of appeals upheld the trial court on the perpetual contract claim, declaring that the contract provided that when the average daily attendance (ADA) in the city and county systems reached a certain threshold the distribution of the sales tax would revert to the prescription in Tennessee Code Annotated, '67-7-712. It also rejected the city's second argument,

....because our Tennessee Legislature was the empowering authority which granted the right to contract one-half of the proceeds of the local tax revenues.

The Tennessee Legislature also enacted T.C.A. 7-51-903 pertaining to long-term contracts, which provides:

Except as otherwise authorized by law, municipalities are hereby authorized to enter into long-term contracts for such period of duration as the municipality may determine for any purpose for which short-term contracts not extending beyond the term of members of the governing body could be entered... [At 5]

As pointed out above, Tennessee Code Annotated, '7-51-901(4) defined municipalities to include both cities and counties.

There is an important distinction between City of Cleveland, above, and the 1969 case involving the sales tax contract between the City and The County. In the former case, the tax which the County Chancery Court held was not covered by the contract had not yet been enacted when the contract was signed, and was the exercise of a governmental function that a sitting board could not take away from a future board. In the latter case, the contract had been amended to include the increase in the sales tax. Marketmedia abolished the distinction between governmental and proprietary functions with respect to contracts, but did not necessarily address the question of whether one governmental body could find a future governmental body with respect to a tax that had not been enacted. But in the case of the 1985 contract between the City and The County for the distribution of former' s statutory portion of the sales tax, it does not appear that we are faced with the question of whether the contract covers a tax that has not been passed by the city.

In July, 1985, pursuant to Paragraph 3 of the 1985 Agreement between the city and the county, a countywide referendum increased the sales tax 2%; also under Paragraph 3, the city's statutory share of the sales tax went to The County. In 2004 a city-wide referendum increased the sales tax 3/4% inside the city. Paragraph 3 of the 1985 Agreement also provided that the Agreement did not apply to "sales tax increases that may be enacted in the future." For that reason all of that sales tax increase went into city coffers.

However, the county subsequently held a referendum of county voters which also increased the sales tax 3/4%. What is the legal consequence for the city of that sales tax increase? Under Tennessee Code Annotated, '67-6-706(b)(1) provides that:

If a county legislative body adopts a resolution to levy the tax at the same rate that is operative in a city or town in the county, the election under this section to determine whether the county tax is to be operative shall be open only to the voters residing outside of such city or town. If the county tax is at a higher rate than the rate of the city or town tax, the election shall also be open to the voters of the city or town.

Tennessee Code Annotated, '67-6-703(a)(1) also provides that:

The levy of the tax by a county shall preclude, the extent of the county tax, any city or town within such county from levying the tax, but a city or town shall at any time have the right to levy the tax at a rate equal to the difference between the county tax and the maximum rate authorized in this chapter.

Tennessee Code Annotated, '67-6-703(b) also provides that if the sales tax is increased in the city, the county has 40 days to adopt a resolution to levy a tax at least equal to the city' s rate, and the city' s sales tax increase ordinance is suspended pending a referendum on the county' s sales tax resolution. Apparently The County's 2004 3/4% sales tax increase occurred several months after the City's 3/4% sales tax increase referendum passed, but it was held in Lenoir City v. Loudon County, 435 S.W2d 824 (1968), that the county could call a referendum on a sales tax increase anytime, that it was not bound to do so within the 40 day period prescribed in Tennessee Code Annotated, '67-6-703(b).

Read together, the above statutory scheme indicates that the county' s 2004 3/4% sales tax levy in effect absorbs the city' s earlier 3/4% sales tax levy, and that it becomes " The tax levied by a county under this part...." under Tennessee Code Annotated, '67-6-712, and is distributed according to the scheme prescribed by that statute. As has earlier been explained, that statute separates the distribution into two halves for that purpose: one-half goes to the county for school purposes; the other half goes into county and city coffers, based on whether it came from collections in the county or in the city, except that the county and the city can make a contract for a different distribution.

The 1985 Agreement contains no termination date, which seems somewhat surprising in light of the absence of one in the 1969 Agreement, and the 1983 case between the City and The County in which it indirectly came up. When the 1969 Agreement was adopted, there was a 1% countywide sales tax. The 1985 Agreement ratified:

the agreements between the City and The County, Tennessee as entered into by the respective governments of same in 1969 at the time of the consolidation of the [two school systems] in all aspects as same have been interpreted by the [County Chancery Courts Opinion of November 28, 1983]

There is not an iota of evidence in the 1985 Agreement that the City intended any kind of termination date for its statutory share of the sales tax. Indeed, Paragraph 3 of the Agreement recognized the city's "obligation to assist in the support of the County School System," and even provided that in event a 2% countywide sales tax was passed in 1985, it would cede its statutory share of that increase to the county.

In 1976 the city enacted a 2% citywide sales tax. The 1982 County Chancery Court's opinion simply held that the city's 1976 2% sales tax did not go to the county under the 1969 Agreement; it was a tax enacted after the 1969 Agreement went into effect. There is no indication in the 1985 Agreement that the city ever intended to compromise that 2% city sales tax, and, as far as I can determine, the city continues to receive its statutory share of that tax.

With respect to the 2004 sales tax increase, first by the city by 3/4% then by the county by 3/4%, it appears to me that The County's increase was neither illegal nor a violation of the 1985 Agreement. As noted above, Paragraph 3 of that Agreement says that it " shall not apply to any increase above the one-half (2) cent [adopted by countywide referendum in 1985], nor shall it apply to any local option sales tax increase that may be enacted in the future." But as I understand the facts, the City is also receiving its statutory share of the second half of the county's 2004 sales tax increase. Nothing in the 1985 Agreement suggests that the Agreement will terminate if the county increases the sales tax after 1985; it says only that " this provision [Paragraph 3] shall not apply to any amount over and above one-half (2) cent, nor shall it apply to any local option sales tax increase that may be enacted in the future. Nothing in Paragraph 3, nor any other part of the 1985 Agreement, expressly or even impliedly says that the Agreement shall end by a date and time certain or when some other event occurs."

The total local option sales tax in the City-County stands at the statutory maximum of 2- 3/4% prescribed by Tennessee Code Annotated, '67-6-702. For that reason, the city cannot adopt a city sales tax above and beyond that rate. Neither the city nor the county can go up on the sales tax.

In City of Cleveland v. Bradley County, above, the city made the argument that a contract that contains no termination provision can be terminated at the will of the parties. The unreported case of Johnson v. Welch, 2004 WL 239756 (Tenn. Ct. App.) contains a lengthy treatment on the duration of contracts that have no termination date. It says [and I am going to quote at length] with respect to that argument that such a course, among others, is open to the Tennessee courts:

Contracts silent on time of termination are generally terminable at will by either party with reasonable notice. First Flight v. Professional Golf Co., 527 F.2d 931, 935 (6th Cir. 1975). Even contracts terminable at will can only be terminated upon reasonable notice. McReyonold v. Cherokee Insurance Co., 896 S.W.2d 777, 779 (Tenn. Ct. App. 1994); RESTATEMENT (SECOND) OF CONTRACTS, '205 (1979). Reasonable notice of termination flows from and must be determined in accordance with the standards of good faith and fair dealing implied in every contract. Misco, Inc. v. United States Steel Corp., 784 F.2d 198, 203 (6th Cir. 1986); P.S. & E. Inc. v. Elastomer Detroit, Inc., 470 F.2d 125 (7th Cir. 1972). The determination concerning what constitutes reasonable notice, however, is a fact specific inquiry dependent upon the length of the contractual relationship between the parties, the reliance which either party placed upon the continuing vitality of the contractual relationship, the particular business involved. Id.

The determination that an agreement is sufficiently definite is favored under Tennessee law and the courts will, if possible, construe the agreement to effectuate the reasonable intention of the parties if that intention can be ascertained. APO Amusement Company, Inc., v. Wilkins Family Restaurants of America, Inc., 673 S.W.2d 523, 528 (Tenn. Ct. App. 1984). The duration of contracts need not always be specified in an agreement, and an agreement which contains no express provisions as to its duration may be construed as being perpetual, indefinite, or terminable at will. Id. Quoting 17 Am. Jur.2d Contracts '80 (1964) "The intention of the parties is, of course, the ultimate question to be decided on the construction of an agreement." Cherokee Ins. Co., 896 S.W.2d at 780. [Emphasis is mine.]

The absence of a duration or termination provision in a contract necessitates an inquiry into the intention of the parties and the surrounding circumstances. The absence of a duration provision of a contract does not necessarily render the contract terminable at will, but instead, requires the court to look at the intention of the parties to determine what the parties' intention was concerning duration and to provide a reasonable interpretation and conclusion concerning the parties intent. See Hamblen County v. City of Morristown, 584 S.W.2d 673, 677 (Tenn. Ct. App. 1979); Mid- Southern Toyota, Ltd. v. Bug's Imports, Inc., 453 S.W.2d 544 (Ky. Ct. App. 1970). [At 13-14]

Here the Johnson v. Welch Court took up what is probably the most important Tennessee case dealing with the question of the duration of contracts without a termination date, at least with respect to the City' s question: Hamblen County v. City of Morristown, 584 S.W.2d 673 (1979). There Hamblen County sought to invalidate a contract with the City of Morristown under which the city operated two county high schools; the county sought to restore its right to operate one of those schools. The contract provided that it was "binding and irrevocable." Eleven years after it had entered into the contract, Hamblen County challenged it on several grounds, two of which were that it extended beyond the term of the present board, and that it was a contract in perpetuity.

The Court of Appeals rejected both challenges, pointing out that the contract for the operation of the school board beyond the life of the present board was authorized by statute, and with respect to the allegation that the contract was perpetual, said:

Furthermore, the statement that the contract is "binding and irrevocable" does not render the contract perpetual. The intention of the parties in entering into this contract are manifested within the language of the agreement. The agreement calls for extensive expenditures and long-term commitments. Both parties need protection from arbitrary rescission. This Court interprets irrevocable to mean that the contract could not be revoked at will by one of the parties over objection of the other. [Citation omitted by me.] The contract is and was clearly revocable for material breach by either party or by mutual agreement. [At 677]

The Court also held Hamblen County estopped from denying the validity of the contract. [At 677]

There is no hint in that case that such a contract is terminable at the will of the parties, or is a perpetual contract. In the case of the 1985 Agreement, it is pointed out above that it is a continuation of the 1969 Agreement (which stemmed from the consolidation of the city's and the county's schools), and the city's own declaration in the 1985 Agreement that the city had an obligation to support The County schools. In light of Hamblen County v. City of Morristown, it seems a stretch, that the courts would lightly let the City out of the 1985 Agreement with The County. That case was even handed down before Marketmedia made it clear that both cities and counties had the authority to enter into long-term contracts. I am not sure how the courts would have handled City of Cleveland v. Bradley County, above, had they not been able to conclude that the contract itself contained a termination date based on ADA attendance shifts.

But Hamblen County v. City of Morristown gave no clue as how long the contract between those parties would be required to go on, assuming no material breach or mutual agreement: 25 years, 50 years, 100 years? The case speaks of the" intention of the parties in entering into this contract being manifest in the language of the agreement," but gives no guidance as to how long a" long-term commitment" intended by the parties should last. It may be that the parties had no idea how long the commitment was to last, or simply intended that it last until the parties themselves decided to modify the contract.

There is little more guidance from Johnson v. Welch, above, on that question. That case says of Hamblen County v City of Morristown, that:

We think Hamblen County and In re Miller [a New Jersey case, 447 A.2d 549 (N.J. 1982)] teach us that it is the duty of the court to consider what the intention of the contracting parties was at the time the Agreement was entered into to determine the length of the parties=obligations. [At 15]

Further, said the Johnson v. Welch Court:

It has long been held in this jurisdiction that contract terms may be implied in appropriate cases. Minor v. Minor, 863 S.W.2d 51, 54 Tenn. Ct. App. 1993). A contract must be construed with reference to the situation of the parties, the business to which it relates and its subject matter. Id. At 54. Where the duration of the contract is indefinite, the courts will imply that they intended performance to continue for a reasonable time:

What constitutes a reasonable time within which an act is to be performed where a contract is silent upon the subject depends on the subject matter of the contract, the situation of the parties, their intention in what they contemplated at the time the contract was made, and the circumstances attending the performance. Minor at 54 (quoting 17 Am.Jur.2d Contracts, '479 (1991). [At 15]

Unfortunately, none of that language tells us what, if any, termination date is appropriate with respect to the 1985 Agreement between the City and The County. But the language in Hamblen County v. City of Morristown that the intent of the parties when they entered into a contract can be ascertained from the language of the contract works hard against any argument by the city that it is time for that contract to be terminated. Both that case and Johnson v. Welch leave us with the question of when it will be time for the contract to be terminated. Marketmedia and statutes that have generally given municipalities the right to enter into long term contracts, and Tennessee Code Annotated, '67-6-712, which specifically authorizes contracts for the distribution of cities' statutory share of sales tax should probably encourage municipalities to make sure that all long-term contracts have a clear ending date. Unfortunately, that advice is not helpful in this particular case.

It may be possible for the city to find city and county records, and perhaps parole evidence from political leaders during the period the1985 Agreement was being negotiated, dealing with how long the parties expected the Agreement to last. Surely that question must have come up during that period, particularly in light of the 1969 Agreement and the 1983 County Chancery Court case.

It strikes me that a solution to this problem might be a legislative one, although it may be that counties would object to legislation that would put a term on contracts providing the distribution of cities' statutory share of the sales tax under Tennessee Code Annotated, '67-6- 712, in cases where the contract did not contain a termination date. I imagine that would be particularly true of any state that imposed a term on such contracts already in operation. I have given the question of whether such a statute would operate as a retrospective law or an impairment of a contract under Article I, '21, and Article XI, '2, of the Tennessee Constitution only a cursory look. Such contracts, because they are authorized by state law between two local governmental entities, may not even be subject to the limitations of those constitutional provisions.

But I have delayed in analyzing the Agreement for so long that I will put that question off unless the city is interested in a possible legislative solution to the question.

Sincerely,

Sidney D. Hemsley

Senior Law Consultant

SDH/