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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CITY OF WESTLAKE OHIO
Plaintiff

CITY OF CLEVELAND OHIO
Defendant

Case No: CV-12-782910

Judge: MICHAEL ASTRAB

JOURNAL ENTRY

CITY OF WESTLAKE'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION, FILED 11/14/2013, IS GRANTED AS TO PRELIMINARY INJUNCTION. OSJ.

Judge Signature Date 2-7-14

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IN THE COURT OF COMMON PLEAS
CIVIL DIVISION
CUYAHOGA COUNTY, OHIO

CITY OF WESTLAKE	][	CASE NUMBER CV-12-782910
	][	
PLAINTIFF	][	
	][	
v.	][	**OPINION OF THE COURT**
	][	
CITY OF CLEVELAND	][	
	][	
DEFENDANT	][	

This litigation involves a Complaint for Declaratory Judgment filed by the City of Westlake on or about May 18, 2012, seeking a judicial determination of its rights and responsibilities under a Water Service Agreement (hereinafter WSA) that it entered in 1990 with the City of Cleveland Division of Water. Specifically, that Complaint seeks guidance from this Court on the following issues:

> (a)Whether Westlake may obtain a secondary source of potable water without being in breach of the WSA;
>
> (b)Whether Westlake is obligated to purchase all of its required potable water from Cleveland during the five-year notice period contained in Article 23 of the WSA;
>
> (c)Whether the WSA's provision automatically extending the term of the WSA following the first ten (10) year term to perpetual annual terms, but requiring a five (5) year notice period contained in Article 23 of the WSA is enforceable;
>
> (d)Whether the WSA is unenforceable beyond twenty-five (25) years from its effective date; and
>
> (e)Whether Cleveland may recover 'stranded costs' or other additional costs to 'mitigate reliability impacts' on neighbors as described in Cleveland's December 14, 2011 letter by unilaterally adjusting customer rates during the notice period.

The Court, due to the nature of the case and the potential economic ramifications, placed the matter on an extended docket and allowed significant time for pre-trial discovery, which was expected to be extensive. While the discovery period was still outstanding and prior to the filing

of any dispositive motions, the Cleveland City Council passed Ordinance No. 1354-13 on November 11, 2013. This Ordinance reflected the belief of the City of Cleveland that the City of Westlake had "taken steps" to leave the Cleveland water system and set forth rate increases for the residents of Westlake designed to recover the costs of what Cleveland believed to be Westlake's departure from the Cleveland water system. The Ordinance is presently in effect, having become law on December 11, 2013, and the first billing statements to Westlake residents reflecting the increased rates are scheduled to be mailed February 15, 2014.

On or about November 14, 2013 the City of Westlake filed a Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction with regard to the rate increase passed by the City of Cleveland, arguing in the Motion that the actions of the City of Cleveland would "cause immediate and irreparable harm to both persons and businesses residing and located in Westlake" and that Cleveland's actions were "contrary to the public interest."

On January 6, 2014 a hearing was called to order to take evidence and hear testimony regarding the merits of Westlake's motion. The hearing concluded on January 13, 2014. Following review of the voluminous evidence submitted, the Court issues its ruling below.

OPINION OF THE COURT

The players in this action, Cleveland and Westlake, are both duly organized and existing Ohio municipal corporations located within the boundaries of Cuyahoga County, Ohio. The Cleveland Water Department (hereinafter CWD) is a self-supporting, regional water utility providing water and related services to the residents of the City of Cleveland as well as to 68 direct service and 8 master meter customers outside of Cleveland's municipal boundaries. CWD's total water account base amounts to approximately 420,000 accounts. The CWD's only means of collecting funds to support its operations and maintain the systems that it operates is through its customers, based upon the rates charged to those customers. The rates charged by CWD vary based upon the service district in which the billed customer is located. There are presently four such districts: "low," "first high," "second high" and "third high." The City of Westlake is located within the "low/first high" districts.

As defined in the WSA, a "direct service customer" means an owner of premises located outside of Cleveland's municipal boundaries who receives water and water-related services from Cleveland and who is billed by and pays to Cleveland directly for said services. In contrast, a

"master meter customer" is a governmental entity which purchases water from Cleveland for resale and delivery to water customers. The City of Westlake is presently a "direct service" customer.

The WSA is obviously an integral component of this entire litigation and the Court believes that this Opinion's readers would benefit from some background as to what exactly the WSA is and how it came to be.

In the 1970's several suburbs sued the City of Cleveland each time it tried to raise the water rates, seeking to enjoin the raising of the rates. In 1975, the City of Seven Hills sued Cleveland and filed petitions seeking regionalization of the water system. Due to these petitions, all communities being serviced by the CWD were joined as parties – some voluntarily, some involuntarily. Westlake was a voluntary party to the action.

A settlement to the regionalization cases was negotiated and in 1981 a stipulated judgment entry was filed in the Common Pleas Court of Cuyahoga County that included a copy of the WSA attached as an exhibit. Westlake was a party to this settlement.

On or about March 19, 1990, Westlake and Cleveland entered into the WSA. Prior to entering the WSA, however, Westlake had legal hurdles to clear due to its own City Charter, as the WSA as presented gave the CWD an exclusive franchise to operate as a public utility for a period in excess of 25 years. This is prohibited by Article XI, Section 5 of that Charter, which states that

> The Council may by ordinance grant a nonexclusive franchise to any person, firm or corporation to construct or operate a public utility on, across, under, over or above any public street or real estate within the Municipality for a period not in excess of twenty-five (25) years; and it may prescribe in the ordinance the kind or quality of service or product to be furnished, the rate or rates to be charged therefor, and such other terms as Council shall deem conducive to the public interest. Such franchise may be amended or renewed in the manner and subject to the provisions established by this Charter for original grants. No consent of the owner of property abutting on any public street or real estate shall be necessary to the effectiveness of any such grant, amendment or renewal.
> All such grants, amendments and renewals shall be made subject to the continuing right of the Council to provide reasonable regulations for the operation of such utilities with reference to such streets and public real estate, including the right to require such reconstruction, relocation, alteration or removal of structures and equipment used in such streets or public realty as shall, in the opinion of Council, be necessary in the public interest. **PLAINTIFF'S EXHIBIT C, WESTLAKE CHARTER.**

This portion of the Westlake Charter must be read in conjunction with Articles 5 and 23 of the WSA. Article 5 provides, in part, that "MUNICIPALITY [Westlake] agrees that PURVEYOR [CWD] shall be the **sole and exclusive supplier of water** to MUNICIPALITY and its inhabitants for the term of this AGREEMENT." **PLAINTIFF'S EXHIBIT D, WSA ARTICLE 5; EMPHASIS ADDED, CAPS IN ORIGINAL DOCUMENT.** Article 23 of the WSA provides, in part, that "the term of this AGREEMENT shall be for a minimum period of ten (10) years commencing on the first day after execution of this AGREEMENT by PURVEYOR, and shall automatically continue in effect from year to year thereafter." **PLAINTIFF'S EXHIBIT D, WSA ARTICLE 23; CAPS IN ORIGINAL DOCUMENT.**

The Mayor of Westlake in 1990 (and at the present time) is Dennis Clough, who offered testimony at the hearing held in this matter. He consulted with (now former) Westlake Law Director Patrick Gareau, who informed him of the conflict. In order to overcome this important hurdle and allow the cities to reach an agreement, a Memorandum of Understanding (MOU) was negotiated between Westlake and Cleveland that served to amend the terms of the WSA. Section 1 of the MOU provided that

> Article 5 of the Contract provides that Cleveland will be the sole and exclusive supplier of water to Westlake. Cleveland and Westlake agree that the language of Article 5 of the Contract is not intended to grant an exclusive franchise to provide water service to Westlake and its inhabitants in violation of Westlake's Charter which prohibits the granting of an exclusive franchise for utility services to any utility company.
>
> Westlake acknowledges that, as of the date of the Contract, Cleveland has been and will continue to be the sole supplier of water to Westlake and its inhabitants during the term of the Contract because there are no alternative sources of water supply to the community. **DEFENDANT'S EXHIBIT 3.**

In addition to the MOU, the City Council of Westlake also passed Ordinance 1989-7 on February 15, 1990, which became part of and further amended the terms of WSA. The ordinance, in part, states that

> SECTION 1: That the Mayor be and he is hereby authorized to enter into a Water Service Agreement for direct service for furnishing to the City of Westlake and its inhabitants potable water, which said Agreement is attached hereto and made a part hereof as though fully rewritten herein and marked Exhibit "A", and further provided that the terms and conditions of the Agreement do not conflict with any provision of the Charter of the City of Westlake...

SECTION 3: That this Council grants to the City of Cleveland, pursuant to Article XI, Section 5, a non-exclusive franchise to construct and operate a public utility for the furnishing to the City of Westlake and its inhabitants potable water for a period of twenty-five (25) years... **PLAINTIFF'S EXHIBIT B, ORDINANCE NO. 1989-7.**

The Court finds that the City of Cleveland acknowledged the MOU and existence of Ordinance 1989-7 via a January 26, 1990 letter from Cleveland Assistant Law Director Marlene Sundheimer to Westlake Law Director Gareau. In that correspondence, offered as "Exhibit XX" by Plaintiff, Ms. Sundheimer directed Mr. Gareau to have Mayor Clough sign the WSA and MOU and further indicated that Westlake Council would need to pass an ordinance authorizing Mayor Clough to enter into the WSA. The Court further finds that it was not presented with any exhibits in this matter that combined all three documents into a cohesive whole.

For purposes of this Opinion, the Court will present its finding of facts as presented to this point regarding the WSA and MOU as relating only to the background of the WSA and the process by which Westlake and Cleveland became obligated to one another for purposes of supplying the citizens of Westlake with water and water-related services. The Court is of the position that opining further on the nature of the agreements between the municipalities will stretch the bounds of relevance of the purpose of this Opinion, which is limited to ruling on the Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction filed by Westlake. The Complaint for Declaratory Judgment has yet to be heard on its merits and the Court will not offer opinion on the questions raised in that Complaint until the parties have had the opportunity to fully complete discovery and have the issues heard on their own merits.

Jumping ahead to the present day, as stated above the City of Cleveland, through its City Council, passed Ordinance 1354-13 on November 11, 2013. This Ordinance is self-described as being designed to "supplement the Codified Ordinances of Cleveland, Ohio, 1976, by enacting new Section 535.041 relating to fixed water charges to Westlake to cover costs associated with separation from the Cleveland Water System." **DEFENDANT'S EXHIBIT 132.**

The basic effect of this legislation is to create a fixed charge based upon the meter size of each account in Westlake. For nearly every homeowner, the size of the main would be 1" or smaller, which per Exhibit 132 would result in a $291.00 fixed charge per quarter, or an additional $1,164 per year for the average homeowner in Westlake. The largest fixed charge would go to 8" meters, which at a fixed charge of $5,272 would equate to an additional $21,088

per year for the large commercial establishments for which this is relevant. These charges would continue for 17 quarters, equaling a total sum of $4,947 taken from the income of Westlake homeowners over that period.

This Court heard no evidence that there has been any "separation from the Cleveland Water System" by the City of Westlake. Why then did Cleveland pass Ordinance 1354-13? The answer lies in the WSA, specifically Article 4 of that document, which is reproduced in whole:

ARTICLE 4. WATER RATES

4.01 Rates charged to all customers of PURVEYOR shall be set by the Board of Control of the City of Cleveland subject only to the approval of its Council. PURVEYOR hereby agrees that, for a period of ten (10) years from and after the effective date of this AGREEMENT, the dollar amount of any and all increases in water rates charged by the City of Cleveland to any Direct Service Customer shall not exceed the dollar amount of the increase for any direct service customer within the City of Cleveland by more than 75% in the Low or First High Service District outside the city of Cleveland; by more than 100% in the Second High Service District outside the City of Cleveland; or by more than 130% in the Third High Service District outside the City of Cleveland. Rates shall be calculated on a dollars per mcf (one thousand cubic feet of water) basis. Rate increases for Master Meter Customers shall be 75% of the rate increases for Direct Service Customers located in comparable service districts and 63% of the first rate increase reflecting the elimination of a separate maintenance charge. No increase shall be made in the rate for any customer without simultaneously increasing the rates for all other customers, except that customers entitled to a Homestead Exemption as presently specified and defined by the Codified Ordinances of the City of Cleveland need not be increased.

4.02 Rate increases for the following classes of customers shall not be limited by the provisions of Paragraph 4.01 above:

1) The rate to be charged to all customers or classes of customers who have taken steps toward leaving the Cleveland water system;

2) All rates and charges for unmetered fire supply connections pursuant to Section 535.21 of the Codified Ordinances of the City of Cleveland;

3) All rates ad charges for water supplied from a public fire hydrant set pursuant to Article 17 hereof; and

4) All special rates for the use of water under special circumstances as determined by the Commissioner of Water pursuant to Section 535.26 of the Codified Ordinances of the City of Cleveland.

4.03 PURVEYOR agrees that no water rate shall be changed, instituted or revoked prior to sixty (60) days after the Suburban Water Council of Governments receives written notice of the proposed change, in-situation or revocation. **PLAINTIFF'S EXHIBIT D, WSA ARTICLE 4**

The relevant portion of Article 4, for now, is 4.02(1), which contains the phrase "steps toward leaving the Cleveland water system." The crux of the arguments pertaining to the instant matter revolve around these seven words. The Court will now take a step back and explore what "steps," if any, have been taken by Westlake to leave.

The Court heard through the testimony of Mayor Clough that, on November 10, 2006, Cleveland sent Westlake correspondence regarding an Amended WSA, an Asset Transfer Agreement and a Joint Economic Development Zone Agreement. The Mayor and his law and engineering departments reviewed the correspondence and the attached proposed agreements. Following said review, the Mayor testified that it was his impression that if Westlake agreed to the new proposals the city would be required to give ownership to Cleveland of approximately $65 Million of infrastructure located within Westlake and would further require Westlake to share taxes with Cleveland for economic development. It was further his impression following review that the City of Cleveland would obtain the infrastructure and shared tax money at no cost to Cleveland. Believing that this was a one-sided proposition, the Mayor declined to execute the agreements because he felt it would not be in the best interests of his constituents, and notified the City of Cleveland to that effect. It should be noted that on November 20, 2006 a second complete copy of the same documents was sent to Westlake for its perusal. Finally, the Court finds that the same documents were sent to all customers of CWD during this time period.

Mayor Clough further testified that on April 6, 2007 Cleveland sent what it described as "revised" documents to Westlake for review. Upon review, the Mayor testified that these documents were again the exact same proposals that had been sent twice in late 2006. They were again rejected, for the same reason that the Mayor felt they were not beneficial to the citizens of Westlake.

As stated above, it is the position of Westlake that, based upon the MOU and Westlake

Ordinance 1989-7, the WSA as between the cities would expire on March 19, 2015, which equates to 25 years from the original signatures. The Court takes no position on this issue but simply states this as a fact for purposes of the discussion of Westlake's alleged separation from the Cleveland water system.

Mayor Clough testified that it was this position that caused the City of Westlake to begin feasibility studies to explore alternative agreements for and/or alternative suppliers of water for the city. City Engineer Robert Kelly was put in charge of this project.

In the summer of 2007 Westlake solicited proposals from engineering consultants with expertise in municipal water systems and retained HNTB Ohio, Inc. in 2008. The company undertook a two phase study that explored the feasibility of Westlake obtaining an additional water source, specifically the City of Avon Lake and Avon Lake Municipal Utilities (hereinafter ALMU). The Court notes that the verbiage of the report submitted by HNTB does indicate what would be required to "switch" water suppliers from Cleveland to ALMU. The "Phase I" report was completed in 2008. In addition to investigating ALMU, Mayor Clough testified that Westlake also held a strong desire to become a "master meter" community with CWD and made several requests to CWD for proposals to that effect. It was Mayor Clough's testimony that Cleveland did not indicate any willingness to discuss any master meter accommodations until May 2010, when then-CWD Commissioner Nielson agreed to meet with Mayor Clough regarding the issue.

The meeting between Clough and Nielson took place on May 28, 2010 in Westlake. Per Clough's testimony a memorandum was presented to him by Nielson outlining three potential options for a master meter community – Master Meter Conversion, Virtual Master Meter Arrangement and Menu of Services Approach (PLAINTIFF'S EXHIBIT X) – and Mayor Clough requested a proposed master meter agreement that he and his team could review. On June 10, 2010 Mayor Clough received his response from Cleveland. Mayor Clough testified that what he received was a copy of the same Amended WSA that he had received SIX prior times. To date, per Clough, no proposed master meter agreement has ever been sent by Cleveland.

A few months prior to this meeting, in January 2010, Westlake issued a Request for Proposals (RFP) for a "Business Analysis for a Municipal Water Utility." The RFP's executive summary reads as follows:

> The City has received a request from the City of Cleveland Water Department (CWD) to enter into an amended agreement for the provision of water services to the City and its residents. In order to determine whether the amended agreement may be in the best interest of the City, a feasibility study was conducted by HNTB to look at alternatives to the provision of water including purchasing bulk water from another provider. Based on preliminary estimates, however, with a large number of uncertainties relating to the possible dissolution from CWD, it would be required to complete a model of the water system and to further evaluate prospective costs and other requirements, and that certainly is being considered as Phase 2 of the HNTB study. In order to determine whether to proceed, the City is seeking proposals for a business plan analysis...**DEFENDANT'S EXHIBIT 26.**

In March 2010, HNTB was retained to compile the "Phase 2" study/analysis, which was to include a computerized model of Westlake's water distribution system. That study was completed in November 2011. Following the receipt of the report, which included the requested modeling, Westlake purchased its own software to undertake its own similar modeling study, per City Engineer Kelly.

Sometime in early 2011, the City of Cleveland retained the Municipal Financial Services Group (MFSG) to conduct an analysis of CWD's water rates and financial status, per the testimony of Alex Margevicius, acting Commissioner of CWD. On March 28, 2011 MFSG released a Comprehensive Financial Plan Report. In drafting the report, MFSG used a "utility basis" methodology to generate proposed water rates for direct service customers outside of Cleveland's municipal boundaries. The "utility basis" methodology is a method of measuring the cost of service by taking into account not only the actual costs of providing the service but also a "risk premium" to acknowledge the risk of servicing customers outside of the provider's boundaries or service area. The report created rate differentials for the different service areas and included an "ownership surcharge" in addition to the risk premium. An "ownership surcharge" is a rate charged to outside customers to acknowledge the financial investment that the owner of the water system has made to those outside customers. The recommendation made by MFSG was for a 10% rate differential above the cost of service for outside customers in order to account for the investment(s) made by Cleveland into its infrastructure. The recommendation support contained the following language:

> Customers inside the corporate limits of the City of Cleveland are responsible for paying all operating and capital costs of the utility <u>should the outside customer decide to no longer be served by CWD</u>. Therefore, CWD is entitled to a

> reasonable return from the non-owner customers based on the value of the assets that are used and useful in providing water service and for the financial risks taken as owners. In order to quantify the value of the return, the utility basis approach is used. The utility basis approach is commonly used within the utility industry to determine an appropriate return from non-owners and it complies with industry practice as outlined in the American Water Works Association Manual M1, *Principles of Water Rates, Fees, and Charges.* **PLAINTIFF'S EXHIBIT ZZ, CHAPTER 8, SECTION 8.3 (EMPHASIS ADDED).**

MFSG also recommended an additional 20% rate differential above the cost of service for outside customers for purposes of providing compensation to Cleveland for unquantifiable business risks associated with servicing customers outside the municipal boundaries. That recommendation was supported as follows:

> There are inherent business risks associated with any utility serving customers outside of its corporate boundaries. In addition to the financial risks that are valued in the utility basis surcharge calculated in the last section, there are operational and regulatory risks that CWD faces as owner and operator of the CWD water system. These operating risks are difficult to value; they deal with issues associated with worst case operating scenarios, including but not limited to unfunded mandates with regard to water quality and emergency system repair and replacements. ***As owner of the water system CWD bears the burden of all risks (financial, legal and operational)*** associated with environmental regulations, system security requirements, insurance requirements, public health and safety and the prevention of water system contamination, and funding of necessary capital reinvestment to continue operating at and enhancing the current level of service. ***To compensate CWD for the unquantifiable business risks associated with serving customers outside their corporate limits, a 20% risk premium should be added to the cost of service differential for each rate district.*** **PLAINTIFF'S EXHIBIT ZZ, CHAPTER 8, SECTION 8.3, SUB-SECTION 8.3.2 (EMPHASIS ADDED).**

The recommendations made by MFSG, including the ownership surcharge and risk premium, were unanimously passed by Cleveland City Council and incorporated in the Cleveland Codified Ordinances, Section 535.04, for the years 2011-2015. These findings were placed at this portion of the Opinion in order to maintain the timeline. The relevance of these facts will be made clear later in this Opinion.

Mayor Clough testified that on December 11, 2011 he received a letter from Cleveland's Chief Operating Officer, Darnell Brown, that indicated that Westlake would be held responsible for $39 Million in "stranded costs" and $17 Million to mitigate impact (referred to as "costs to cure") on other CWD customers if Westlake were to leave the CWD. The correspondence also

addressed deficiencies that Cleveland felt were present in the ALMU system as well as what Cleveland perceived to be flaws in the studies conducted by Westlake and its consultants. SEE, PLAINTIFF'S EXHIBIT Z.

Mayor Clough responded to the 12/11/11 letter from Cleveland by drafting his own return correspondence on January 6, 2012. In that letter he insisted that Westlake did not wish to terminate its relationship with the CWD but wished to amend the relationship to reflect Westlake's desire to buy water in bulk (master meter) and to have more than one water supplier. The letter goes on to deny that any monies are due Cleveland if Westlake were to leave the system. SEE, PLAINTIFF'S EXHIBIT AA.

The next relevant date is March 26, 2012. On that date CEO Darnell Brown wrote back to Mayor Clough but did not cover much new ground in his correspondence. He simply reiterated that CWD was and should continue to be the best option for Westlake's water needs. SEE, PLAINTIFF'S EXHIBIT BB.

On May 18, 2012 Westlake filed with this Court a Complaint for Declaratory Judgment and Injunctive Relief, seeking, as addressed earlier in this Opinion, a declaration from this Court of its rights and obligations under the WSA. The Court placed the matter on its Complex Litigation Track and established a case management schedule that took into account pre-trial hearings and a timeline for discovery to take place.

On March 26, 2013, Mayor Clough corresponded with Mayor Jackson for the purpose of reiterating Westlake's position that the WSA as between the two cities expires on March 19, 2015. As part of that letter he included copies of the MOU and Westlake Ordinance 1989-7. He also requested that Cleveland submit new proposals to Westlake for purposes of negotiating a new water services arrangement. SEE, PLAINTIFF'S EXHIBIT CC.

Cleveland's response was delivered on April 4, 2013 by Paul Bender, the Director of Public Utilities for Cleveland. He reiterated Cleveland's position that the WSA did **NOT** expire on March 19, 2015 and stated that Westlake would need to give a five-year notice prior to separation. He again offered the same amended WSA to Westlake for consideration. SEE, PLAINTIFF'S EXHIBIT DD.

Five Days later, Mayor Clough served up his volley and wrote back to Director Bender. The April 9th letter reiterated Westlake's belief that the MOU and Ordinance were integral parts of the WSA as it was signed in 1990 and that he as Mayor would not have signed the WSA

without those documents.

Mayor Clough's testimony explained the language of the 3/26/13 letter. He stated that he had no desire to leave CWD but needed to explore all options due to his position that the WSA would expire in 2015 and could leave Westlake without a water supplier due to his perceived inability to purchase from CWD after the 25-year period had expired.

It was this concern, the Mayor testified, that caused him, on April 12, 2013, to send a letter to ALMU Chairman David Marquard (SEE, PLAINTIFF'S EXHIBIT FF) seeking a proposed water purchase agreement from that utility.

On May 2, 2013 Mayor Clough sent a letter to Director Bender that will be reproduced in its entirety due to the contents and the ramifications that resulted from the words used:

> While we disagree with your administration's misrepresentation of the existing water agreement between the City of Westlake and the City of Cleveland, I am officially and unequivocally stating the following:
>
> Westlake is prohibited from having a water supply agreement with Cleveland that exceeds the 25 year limitation established in the Westlake Charter. The expiration of the 25 year period is March 19, 2015. This fact was well known by all parties pursuant to the enabling legislation that was the genesis for the Memorandum of Understanding (MOU). This MOU was a condition and requirement of the City of Westlake's execution of your water agreement; to be compliant with the Westlake City Charter.
>
> In 2007, you submitted a new proposed contract. That proposed contract was not acceptable.
>
> The City of Cleveland's original return of the fully executed contract sent back to Westlake in 1990 included a copy of our ordinance, the Memorandum of Understanding and an executed agreement which clearly demonstrated your knowledge, receipt and acceptance of all three parts of the existing water agreement.
>
> Your position of Director should require you to use due diligence when stating that enabling legislation by the city's Council in compliance with a city's Charter is not a condition of a Mayor's authority to enter into a contract or agreement. I am sure that you are aware that it has been the City of Cleveland's policy to verify that a Mayor has been granted specific authority by his/her City Council before executing any contract with the City of Cleveland. It is my understanding that you still require proof by an appropriate legislative authority and are fully aware of conditions established by Charters and legislative bodies before entering into a binding agreement.

> Notwithstanding all of the above, this letter will also serve as official notice that the City of Westlake cannot and will not continue with the purchase of water from the City of Cleveland after the expiration of the 25 year period referenced in the Westlake Charter and the Memorandum of Understanding, all as the same relates to agreement #42180, fully executed on 3-19-1990 and entitled 'City of Cleveland Water Service Agreement' with City of Westlake. However, as stated in previous correspondence, we would certainly entertain a competitive proposal and a new agreement to purchase potable water in bulk from the City of Cleveland. SEE, PLAINTIFF'S EXHIBIT GG (PARAGRAPH NUMBERING OMITTED DUE TO TECHNICAL DIFFICULTIES).

The letter as detailed above was sent via regular U.S. mail to Director Bender and several "cc" recipients.

Cleveland's response (from Director Bender) came on June 13, 2013 and will also be reproduced in its entirety.

> We are in receipt of your letter dated May 2, 2013. While we disagree with your assertion of the so-called 25 year expiration period, based on your statement that 'Westlake...will not continue with the purchase of water from the City of Cleveland,' we are accepting your letter as written notice of cancellation as required under Article 23 of the Water Service Agreement (WSA).
> The assertion that the Westlake Charter prohibits the City of Westlake from entering into a non-exclusive franchise for more than 25 years does not impact the WSA between the City of Westlake and the City of Cleveland. The initial term of the WSA was 10 years, which is considerably less than the 25-year limitation. The subsequent annual renewals – one-year contracts – also do not violate the 25-year limitation. Nothing in the Charter, Ordinance, WSA or Memorandum of Understanding supports your eleventh-hour assertion that the City of Westlake can no longer purchase water from the City of Cleveland after March 19, 2015.
> As a result of your decision, we are accepting your letter as written notice to start the five-year termination period pursuant to Article 23 of the WSA. Accordingly, the parties' Agreement whereby the City of Cleveland supplies potable water to the City of Westlake will expire on May 2, 2018. This five-year termination period is necessary not only to provide both parties with time to separate the City of Cleveland's water mains from the water pipes owned by the City of Westlake, but also to allow the City of Cleveland to recover stranded costs, costs to cure, and any and all other costs it will incur to effectuate Westlake's separation.
> Under Article 4.02 of the WSA, we will take action to increase the rates of customers who have 'taken steps toward leaving the Cleveland water system' to recover those above-described costs. Likewise, upon notice of cancellation, Article 23 of the WSA grants the Director 'sole control over the terms and conditions of the operation of the water system within [Westlake], so long as water is being supplied by [the City of Cleveland] to said territory.' We are taking this action to protect the customers in the 60 communities that will remain in the

Cleveland water system. These customers should not be forced to bear the costs of the City of Westlake's decision. We anticipate a significant additional cost to each Westlake rate payer over five years. If for some reason the Court rules that the five-year termination period no longer applies, we would be forced to recover stranded assets, costs to cure, and other costs in 4-5 quarters at an even higher rate per quarter. This increased quarterly cost would be in addition to what customers in Westlake already pay for water service.

We regret that the City of Westlake had made the decision to leave the Cleveland Water System. The proposed system, with a single connection to a single treatment facility and only 2 million gallons of finished water storage, is a significant departure from the reliability citizens in Westlake currently enjoy. Under the current WSA, the City of Westlake is serviced by 65 points to connection to a network of four interconnected water treatment plants and nearly 35 million gallons of available finished water storage.

We are more than happy to continue our relationship at the same advantageous terms – competitive rates, increased efficiencies from the automated meter reading system, plant automation, distribution system and IT improvements, unparalleled reliability, and redundancy – that many of your neighbors have taken advantage of. These terms are outlined in the Restated WSA, which we have previously sent. Please contact us should you wish to discuss this arrangement. Otherwise we will move forward with the steps necessary to recover the costs associated with Westlake's decision to separate from the Cleveland Water System. **SEE, PLAINTIFF'S EXHIBIT HH.**

Article 23, referenced in the above letter, provides that

The term of this AGREEMENT shall be for a minimum period of ten (10) years commencing on the first day after execution of this AGREEMENT by PURVEYOR, and shall automatically continue in effect from year to year thereafter. This AGREEMENT may be cancelled by any either party hereto by giving written notice to the other party at least five (5) years prior to the effective date of termination, provided that no such notice may be given until five (5) years after the date upon which this AGREEMENT is executed by PURVEYOR. Any notice of cancellation shall be by certified mail, return receipt requested, addressed to the Director in case of PURVEYOR or the highest ranking official in case of MUNICIPALITY. In the event of termination of this AGREEMENT, following notice of cancellation by either party, the Director or his designated representative shall have sole control over the terms and conditions of the operation of the water system within MUNICIPALITY'S geographic territory, so long as water is being supplied by PURVEYOR to said territory.

The Court notes that Article 23 mandates that any notice of cancellation be done via "certified mail, return receipt requested." The Court finds that the letter sent by Mayor Clough on May 2, 2013 was sent via regular mail and therefore the letter did not operate as a notice of

cancellation as far as Article 23 is concerned.

The Mayor, per his testimony, responded in writing to Director Bender on July 24, 2013. That letter stated as follows:

> The contract executed between the City of Westlake was for a period of 25 years in accordance with Ordinance No. 1989-7 that was approved by Westlake City Council and myself on February 16, 1990.
>
> The contract also included a memorandum of understanding that specifically referred to the limitations of the Westlake Charter which prohibits an exclusive franchise to any utility company and that Article 5 of the water agreement did not grant the City of Cleveland an exclusive franchise to provide water service to Westlake and its inhabitants.
>
> The City of Westlake has continuously asked for the ability to become a master meter customer pursuant to Article 14 of said agreement and has yet to receive any proposed agreement from the City of Cleveland. In addition, we have not been contacted to commence discussions on becoming a master meter community.
>
> Article 23.01 clearly states that 'This agreement shall be for a minimum of ten (10) years commencing on the first day after execution of this agreement (March 19, 1990) by purveyor and shall automatically continue in effect from year to year thereafter.' The City of Westlake has notified the City of Cleveland that our agreement will expire on March 19, 2015, in accordance with Ordinance No. 1989-7, the memorandum of understanding and our Westlake Charter. Consequently, we have exceeded the original requirement of a ten year minimum by 15 years.
>
> It is the desire of the City of Westlake to be able to purchase water from more than one source as is expected by our Charter which prohibits exclusive franchises especially when more than one supplier is available.
>
> As requested in discussions and correspondence I will once again, ask that you provide us with a proposal to sell us water as a master meter customer pursuant to Article 14 of the current water agreement between the City of Westlake and the City of Cleveland that is set to expire on March 19, 2015. **SEE, PLAINTIFF'S EXHIBIT II**

The City of Cleveland, through Director Bender, notified the Suburban Water Regional Council of Governments via letter dated September 30, 2013 that the City of Cleveland intended to introduce legislation that would assess a quarterly fixed charge to the residents of Westlake in order to recoup the costs associated with Westlake's perceived termination of water services. The

residents of Westlake received correspondence dated that same day that informed them of the new charges.

On October 14, 2013, the Cleveland City Council was briefed on "Westlake's decision to terminate its relationship with Cleveland Water and seek an alternate water supplier," per briefing materials supplied to Council members. SEE, PLAINTIFF'S EXHIBIT J.

On October 29, 2013, Mayor Clough sent another letter to Director Bender. This correspondence stated, in whole, as follows:

> Since the letter of May 2, 2013, continues to be misinterpreted and misconstrued, I do hereby retract the letter in its entirety and look forward to continued discussions concerning any future contract with the City of Cleveland. SEE, PLAINTIFF'S EXHIBIT LL.

On November 11, 2013, the Cleveland City Council passed Ordinance 1354-13. The ordinance is reproduced as follows:

> Section 1. That the Codified Ordinances of Cleveland, Ohio, 1976, are supplemented by enacting new Section 535.041 to read as follows:
>
> Section 535.041 Fixed Water Charges to Westlake to Cover Costs Associated with Separation from the Cleveland Water System
>
> (a)Effective January 1, 2014 and in addition to the fixed and water consumption charges assessed under Section 535.04, all accounts for direct water service to the City of Westlake shall contain a fixed charge based on meter size to cover costs associated with the separation of Westlake from the Cleveland Water System as provided in this section.
>
> (b)The fixed charge on a quarterly billing stating shall be as follows:

Meter Size	Fixed Charge
1" or smaller	$291.00
2" and 1-1/2"	$569.00
3" and 4"	$1,942.00
6"	$3,468.00
8"	$5,272.00

> (c)If billed monthly, the fixed charge on a monthly billing statement shall be as follows:

Meter Size	Fixed Charge
1" or smaller	$97.00
2" and 1-1/2"	$189.00
3" and 4"	$647.00
6"	$1,156.00
8"	$1,757.00

(d)Fixed charges assessed under this section may be prorated during a billing cycle.

(e)The fixed charges under this section shall be assessed to direct service accounts in Westlake for a period of seventeen (17) quarters or fifty-one (51) months.

Section 2. That this ordinance shall take effect and be in force from the earliest period allowed by law.

This ordinance is now in effect and bills reflecting the increases are due to be mailed to the citizens of Westlake on February 15, 2014.

The Court heard testimony from citizens of Westlake, primarily senior citizens living on fixed incomes, as to the negative impact that these increases would have on their day-to-day lives, including the inability to maintain the necessities of daily living. A very telling example of the impact of the increases actually came from the general manager of a business:

Q. What is your water bill?
A. Our water bill right now I think on an annual basis is $330.
Q. And how much will the fixed water charge increase that bill?
A. It will increase it to over $2,100 a year before using any water at all.
Q. And what is the benefit -- have you been able to determine whether or not that is a benefit to your company?
A. It isn't any benefit to our company. Basically I think we're paying about a minimum water charge now.

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Ms. Vekas went on to testify that the increase is affecting the way her company does business, including forestalling building upgrades and causing contemplation of workforce

reductions.

The Court will now move onto the charges themselves. The gist of Cleveland's concerns in this matter is the infrastructure work that would be necessary to remove Westlake from the water grid and create ancillary distribution networks to service existing nearby customers. If Westlake were to leave the CWD system, a separation of water mains in Westlake would be necessary. Right now, Westlake has 65 points of connection to the CWD system. If the separation were to happen, for example, Bay Village (directly North of Westlake) would be relying on one connection to the Cleveland water system instead of the seven connections that it now has, per the testimony of Alex Margevicius (acting CWD Commissioner). If that one connection were to fail, Bay Village would immediately lose all water service. In order to alleviate this issue, new water mains would need to be constructed to service Bay Village.

Cleveland has investigated the costs of Westlake separating from the water system as far back as 2007, per Margevicius, when a preliminary analysis was undertaken. The 2007 analysis was undertaken by Deputy Commissioner of Water Pierre Haddad. In his investigation, Haddad listed all capital improvements from 1981 through 2007 and created a ratio to calculate Westlake's "benefit" from those improvements. The ratios were developed by dividing the total miles of water lines in Westlake in 2007, which totaled 151 miles, by the total miles of water lines in the entire system, which at that time was 5,323. Differing ratios were developed for projects that benefited specific areas such as the "western suburbs" by utilizing the total miles of water lines in those specific areas for the denominator.

In 2013, Cleveland hired consulting firm Arcadis to conduct a formal analysis of such a separation. The final report submitted by Arcadis calculated $19,050,400 in "costs to cure" and $39,823,000 in "stranded costs" that Cleveland would need to recover from Westlake in the event of a separation.

With regard to "stranded costs," the Court was presented with comprehensive lists of capital improvement projects, some dating back to 1981, with ratios purporting to show the amount that Westlake benefitted from each project. Witness Said Abou Abdallah, who co-authored the report for Arcadis, testified regarding these issues and his testimony was inconsistent as to what exactly constituted "capital improvements" under the WSA and how the percentages attributable to Westlake were calculated in light of the 2007 CWD report by Pierre

Haddad that showed differing water main mileage statistics. Specifically, there was a 585 mile discrepancy between the "Haddad" and Arcadis numbers, resulting in a higher ratio attributable to Westlake under the Ardadis report. For example, instead of a 2.7% benefit to Westlake under the "Haddad" numbers for projects benefitting the entire system, the ratio rose to 3.11%. Further, the Arcadis report, per the testimony of Abdallah, utilized the water main mileage in Westlake in 2013 as the numerator for all calculations. He testified that he did not know how many miles of lines existed in 1981 nor in 1990 (when the current WSA was signed). Plaintiff's Exhibit GGG shows that in 1981 there were 104 miles of water lines in Westlake, while in 1990 there were 129. There are currently 162 miles in Westlake, although the Arcadis report used 147.26 for unknown reasons. Regardless, when calculating ratios there could be significant discrepancies created when utilizing 147.26 when the number at the time could have been as low as 104.

In another example, Exhibit B to the WSA requires Cleveland to bear the expense of cleaning and relining distribution mains, but those projects were attributed to Westlake in the Arcadis report as a capital improvement project. The witness admitted that he had not reviewed WSA Exhibit B prior to writing/researching his report. From 1981 to 2013, the total amount on cleaning/relining alone that was attributed to Westlake is $2,246,892.

Mr. Abdallah also testified that he also did not review Exhibit C to the WSA prior to writing the report. This addendum sets forth six phases of capital improvements which Cleveland's engineers determined would be "beneficial to the efficient operation and expansion of the water system as a whole." SEE, PLAINTIFF'S EXHIBIT D (WSA). Despite the preamble to the addendum that stated the "whole" system would benefit, only the western suburbs of Cuyahoga County were included in the ratios, thus increasing Westlake's proportional share.

In total, Abdallah attributed $49,470,000 worth of capital improvement projects dating back to 1981 to Westlake. It is clear, however, that projects from 1981 must have been paid off in total or at least in significant part over the years through regular water rates and charges. The testimony of the other co-author of the Arcadis report, John Mastracchio, was offered to show what remained of the $49+Million list of capital improvements. Mastracchio testified that the useful life of a capital improvement project generally exceeds the amount of time that it would take to amortize the debt incurred to fund the project. Accordingly, if a capital project is financed with debt, the project will remain on Cleveland's books even after the debt has been paid in full.

Mastracchio did not compare the amount that residents of Westlake actually paid in water revenues from 1981-2013 to the amount that Cleveland spent on capital improvement projects during that time period. He concluded that there would be $19,211,000 in stranded capital costs should Westlake leave the Cleveland water system.

Article 25 of the WSA provides an interesting sidelight to the costs issue. Article 25 is entitled "Termination of All Prior Agreements" and provides as follows:

> 25.01 All prior water service agreements, supplemental water service agreements and conditions of water service between PURVEYOR and MUNICIPALITY, verbal or written, are hereby terminated.
> 25.02 MUNICIPALITY AND PURVEYOR release each other of any and all claims arising under or in connection with any previous water service agreements between them.

It has been clearly established that Westlake and Cleveland entered into the WSA at issue in March, 1990. Several of the costs/charges laid out in the Arcadis report date to before this Agreement was signed and the testimony/evidence was not clear if any of those charges pre-dated the present WSA.

As to stranded operating costs, there was interesting testimony presented regarding the nature of the costs when compared to the Comprehensive Financial Plan Report (CFPR) put together by MFSG (**PLAINTIFF'S EXHIBIT ZZ**) and the Arcadis report. On its face, it would appear that Arcadis rounded up numbers from the CFPR. An example is found when looking to MFSG allocating 6.17% of the costs of customer account services to Westlake's district. The same allocation appears as 6.20% in the Arcadis report. While Mastracchio testified that the 6.17% number was used in the actual calculations (chalking up the rounding to an Excel "phenomena"), it is stunning to this Court that such poor proofreading (or Excel programming skills) could allowed to exist in such an important report. The alleged number presented to the Court for stranded operating costs was $20,612,000.

It should be further noted that the Arcadis team did not account for the ownership surcharge or risk premium (to customers outside of Cleveland's municipal boundaries) included in the existing water rates when presenting these numbers as final.

The Court makes the following additional findings of fact in this matter:

- There is no reference in the WSA to "stranded costs" or "costs to cure."
- There is no definition of or criteria listed to determine the meaning of "customers who

have taken steps toward leaving the Cleveland water system" in the WSA.

- The City of Westlake did not officially serve any "notice of cancellation" upon the CWD or City of Cleveland as that term is defined in the WSA.
- The City of Westlake has not left the CWD.
- The City of Cleveland has taken no steps to physically begin the separation of Westlake from the Cleveland water system.

The City of Westlake has petitioned this Court for an injunction to forestall the imposition of the fixed quarterly charges sought to be collection by the CWD, through the City of Cleveland.

An injunction is an extraordinary remedy in equity where there is no adequate remedy at law. **Cementech, Inc. v. City of Fairlawn**, 109 Ohio St.3d 475, 477 (2006). The purpose of an injunction is to preserve the status quo pending the outcome of the case on the merits. *See*, **Yudin v. Knight Indus. Corp.**, 109 Ohio App.3d 437, 439 (1996).

In deciding to grant injunctive relief, a court must consider four factors: (1) there is a strong likelihood of success on the merits; (2) the plaintiff will suffer irreparable harm if the defendant's conduct is not enjoined; (3) the harm to the plaintiff outweighs the harm to others caused by an injunction; and (4) the preliminary injunction serves the public interest. **Corbett v. Ohio Bldg. Auth.**, 86 Ohio App.3d 44, 49 (1993); **Cleveland v. Cleveland Elec. Illuminating Co.**, 115 Ohio App.3d 1 (1996).

The burden of proof for the Court to consider in this matter, and for the plaintiff to show, is proof by clear and convincing evidence. **KLN Logistics Corp. v. Norton**, 174 Ohio App.3d 712 (2008).

> Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt in criminal cases. It does not mean clear and unequivocal...
> The mere number of witnesses, who may support a claim of one or the other of the parties to an action, is not to be taken as a basis for resolving disputed facts. The degree of proof required is determined by the impression which the testimony of the witnesses makes upon the trier of facts, and the character of the testimony itself. Credibility, intelligence, freedom from bias or prejudice, opportunity to be informed, the disposition to tell the truth or otherwise, and the probability or improbability of the statements made, are all tests of testimonial value. Where the

evidence is in conflict, the trier of facts may determine what should be accepted as the truth and what should be rejected as false. **Cross v. Ledford**, 161 Ohio St. 469, 477-478 (1954).

"In determining whether to grant injunctive relief, courts have recognized that no one factor is dispositive." **Cleveland Elec. Illuminating Co.**, 115 Ohio App.3d at 24. "The four factors must be balanced, moreover, with the 'flexibility which traditionally has characterized the law of equity.'" **Id.**, *quoting* **Friendship Materials, Inc. v. Michigan Brick, Inc.**, 679 F.2d 100, 105 (6th Cir. 1982).

"Irreparable harm is harm for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." **Mike McGarry & Sons, Inc. v. Gross**, 2006-Ohio-1759 at ¶18 (8th Dist., No. 86603). "[W]hen there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though plaintiff's case of irreparable injury may be weak. In other words, what plaintiff must show as to the degree of irreparable harm varies inversely with what plaintiff demonstrates as to its likelihood of success on the merits." **Id.** at ¶19 (quoting, **Blakeman's Valley Office Equip., Inc. v. Bierdeman**, 152 Ohio App. 3d 86 (2003); *accord,* **In re DeLorean Motor Co.**, 755 F.2d 1223, 1229 (6th Cir. 1985) (citing with approval, "a test that would allow a court to grant a preliminary injunction. . .where [plaintiff] at least shows serious questions going to the merits and irreparable harm which decidedly outweigh any potential harm to the defendant if an injunction is issued.").

In order to begin the analysis of this matter, the Court must first look to the construction of the language at issue, primarily whether or not the terms contained in the WSA are ambiguous as drafted. This is a question of law for the Court to decide. Contractual language is considered ambiguous where the meaning of the language cannot be determined from the four corners of the agreement, or where the language is susceptible to two or more reasonable interpretations. *See*, **Co. Wrench v. Andy's Empire Constr., Inc.**, 2010-Ohio-5790 (8th Dist. No. 94959). "The question of whether or not an ambiguity exists is a question of law that is reviewed de novo." **Casillas v. Stinchcomb**, 2005-Ohio-4019 at ¶7 (6th Dist., No. E-04-041). If a contract is clear and unambiguous, then its interpretation is a matter of law subject to a de novo review. **Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm**, 73 Ohio St. 3d 107, 108 (1995). "If a

term is ambiguous, its interpretation is a question of fact, and the standard of review is abuse of discretion." Any factual findings made by the trial court must be reviewed with great deference. **Taylor Bldg. Corp. of Am. v. Benfield**, 117 Ohio St. 3d 352, 360 (2008). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." **Blakemore v. Blakemore**, 5 Ohio St.3d 217, 219 (1983).

> If an ambiguity exists in a contract, then it is proper for a court to consider 'extrinsic evidence,' i.e., evidence outside the four corners of the contract, in determining the parties' intent. **Blosser v. Carter** (1990), 67 Ohio App.3d 215, 219. Such extrinsic evidence may include (1) the circumstances surrounding the parties at the time the contract was made, (2) the objectives the parties intended to accomplish by entering into the contract, and (3) any acts by the parties that demonstrate the construction they gave to their agreement. **Id.** However, courts may not use extrinsic evidence to create an ambiguity; rather, the ambiguity must be patent, i.e., apparent on the face of the contract. **Schachner v. Blue Cross & Blue Shield of Ohio** (C.A.6, 1996), 77 F.3d 889, 893. *See*, **Covington v. Lucia**, 151 Ohio App. 3d 409, 414 (2003).

The Court finds that there is indeed patent ambiguity in several portions of the WSA, starting with the phrase at the crux of the entire week-long hearing, taken from Article 4.02: "***The rate to be charged to all customers or classes of customers who have taken steps toward leaving the Cleveland water system.***" The Court will drill down to the last portion of that sentence – "*taken steps toward leaving the Cleveland water system.*"

The terms contained in this phrase can be viewed as having many possible interpretations, and the hearing in this matter further compounded the problem of defining the phrase. For example, the testimony of Darnell Brown and Paul Bender, both representatives of the Defendant, offered the following direct inconsistencies:

> Q: And if Westlake wanted to go to be a master meter community, go to master meter system, would you regard that as taking say a step towards leaving the system?
>
> A: **Yes.** (CROSS-EXAM. OF BENDER, Vol. 4 at 702-703:24-2) (emphasis added).

> Q: And again in the context of this never having been done before, did you consider this to be a step toward leaving the system?
>
> A: **No.** And I'll tell you why. Because 100 percent – going from 100 percent direct service to 100 percent master meter probably would have been something that we could have negotiated and come to some terms on. (CROSS-EXAM. OF BROWN, Vol. 4 at 735-736:22-4) (emphasis added).

The WSA itself offers no guidance, so the Court will look to the dictionary as a start.

First of all, what is a "step?" Merriam-Webster's online dictionary offers 11 definitions of the word "step," with the seventh being most relevant to our present situation: "*an action, proceeding, or measure often occurring as one in a series.*" *See*, **Merriam-Webster.com**, Merriam-Webster, n.d. Web. 4 Feb. 2014. (http://www.merriam-webster.com/dictionary/step).

"Toward" is defined by Merriam as "*along a course leading to*" in the most relevant definition offered amongst many. *See*, **Merriam-Webster.com**, Merriam-Webster, n.d. Web. 4 Feb. 2014. (http://www.merriam-webster.com/dictionary/leave).

The word "leave" is defined many ways by Merriam as well. The most relevant definitions state that "leave" or "leaving" means that one is "*going away from*" or "*terminating association with.*" *See*, **Merriam-Webster.com**., Merriam-Webster, n.d. Web. 4 Feb. 2014. (http://www.merriam-webster.com/dictionary/leave).

Combining the above definitions into a cohesive whole we come up with "*an action along a course leading to terminating association with*" as an alternative to the WSA phrase.

The key testimony regarding Westlake's actions in apparent contravention of the WSA revolve around the (1) efforts of Westlake to become a "master meter" community, (2) discussions with ALMU as an additional or alternative supplier of water (including the retention of consultants, the issuance of RFPs for business plans and meetings with EPA officials as part of those discussions) and, (3) Mayor Clough's May 2, 2012 letter to Cleveland.

With regard to the "master meter" discussions, Article 14 of the WSA provides, in relevant part, that "[n]othing in this AGREEMENT shall prohibit MUNICIPALITY from becoming a master meter community if MUNICIPALITY and PURVEYOR can reach mutually agreeable terms and conditions for such change in status." (**PLAINTIFF'S EXHIBIT D, ARTICLE 14.01**).

The WSA clearly provides for the opportunity to have discussions regarding a conversion to a master meter community. If the provision is there it confuses the Court as to how the City of Cleveland could believe that attempting to exercise a provision in the WSA could be construed in any way as a "step" towards leaving. This gives this Court great pause for concern as to the due diligence that the City of Cleveland undertook before proposing Ordinance 1354-13 to the City Council.

Further disturbing to this Court are the apparent efforts of the City of Cleveland to pay lip

service to Westlake's requests for a proposed master meter agreement. Despite the provisions of Article 14 it is the opinion of this Court that Cleveland did not act in good faith with regard to the numerous requests made by Westlake for the simple ability to *negotiate* to become a master meter community.

The Court finds that the City of Westlake's efforts to negotiate a master meter arrangement with Cleveland did not constitute a step towards leaving the Cleveland water system.

With regard to Westlake's contact with ALMU over the potential for utilizing that system in some form or fashion, the evidence as presented at the hearing made it clear to this Court that a water system in and of itself necessitates a massive infrastructure, millions upon millions of dollars for maintenance and upkeep and huge and complicated regulatory and administrative hurdles. The decision to evaluate one's supplier of water is not on the same level as swapping the company that provides ink to the city printers. In evaluating the evidence, it is not disputed that Westlake officials met with representatives of ALMU and that Westlake even requested a proposed water service agreement from ALMU. It is further clear that Westlake undertook engineering studies, met with representatives of the Ohio EPA to discuss regulatory issues and purchased software to evaluate Westlake's existing water infrastructure.

In the business world an executive would be on the streets if he or she undertook a major transaction for the company without conducting a detailed due diligence investigation. Depending on the nature of the transaction, a due diligence investigation would include cost/benefit analysis, marketing studies, financial analyses of the parties involved, legal investigations, and so on and so forth. The investigation would, most likely, further include multiple meetings with executives from the other side of the transaction, individuals involved in governmental regulation (if relevant), and the creation of teams/working groups to handle the task. The entire operation is undertaken with the understanding that the company must answer to the shareholders or investors, as it is their money the company is utilizing to do the deal.

There are obviously huge decisions to be made by municipal corporations, where elected officials are utilizing limited taxpayer dollars to underwrite their transactions. The City of Westlake is a large suburb and home to not only many residents but also to numerous businesses of varying sizes and a large hospital. The supply of water is probably the most important

resource for a municipal corporation. Without water flowing through mains and into taps bad things will happen and they will happen very quickly to not only the residents and businesses, but also to the elected officials tasked with the duty to maintain that flow of water.

The evidence presented in the week-long hearing pointed to the City of Westlake undertaking a detailed due diligence investigation of its water supply options. In other words, Mayor Clough was doing his job by putting together working teams and engaging consultants and analysts to ascertain those options and to generate reports detailing the specifics of what it would take to get the job done, or if getting the job done would be in the best financial interests of the taxpayers of Westlake.

The City of Cleveland went to great lengths playing semantical games with the language contained in some of the reports presented to the Court. For example, it was pointed out that the Agreement for Professional Services entered into between Westlake and HNTB (PLAINTIFF'S EXHIBIT V) contains the following language: "This Agreement is entered into between the City of Westlake, Ohio (Owner) and HNTB Ohio, Inc. (HNTB) for the following reasons: 1. Owner intends to evaluate water distribution system improvement alternatives related to switching from its current municipal water supplier, the City of Cleveland, to a different municipal water supplier, the City of Avon Lake..."

The words "switching from" were the key words attacked by the City of Cleveland. For sake of brevity, the City of Cleveland made further points with regard to reports generated by HNTB and other entities that contained similar phrasing. The Court will address all of those right now. Yes – the words "switching from" are contained in the Agreement. The Court can clearly read those words and they do carry meaning. The remainder of that sentence is also important and contains many hedge words that the City of Cleveland failed to focus on, primarily "evaluate" and "alternatives." The Court places this Agreement into the context of due diligence – Westlake is engaging HNTB to "evaluate" the situation. What would it take to make a switch? Is a switch feasible? As to "alternatives" that word speaks for itself – any supplier other than Cleveland would be an "alternative" to Cleveland. Plaintiff's Exhibit V does not indicate anything beyond an effort by Westlake to explore what would be needed to make some sort of move, either in part or in total, from the Cleveland water system. A further example is contained in Defendant's Exhibit 120, which is an agreement between Westlake and Brandstetter Carroll,

Inc., another consulting firm. The Scope of Services sets out the following baseline for the work that Brandstetter Carroll is to undertake:

> The City of Westlake (City) wants to establish a separate and independent water system creating an open market to purchase water at wholesale pricing from ***either*** Avon Lake Municipal Utilities (ALMU) or Cleveland Water Department (CWD). **SEE, DEFENDANT'S EXHIBIT 120.**

Once again, nothing in this statement indicates clearly that Westlake is planning on leaving CWD. The document actually reflects Westlake's desire to become a Master Meter community (which is permitted pursuant to successful negotiations under the WSA) and this consultation contract is a means to an end of conducting due diligence on that front.

Finally, the Court will again reproduce the summary of the RFPs put out by Westlake seeking business plans for water services:

> The City has received a request from the City of Cleveland Water Department (CWD) to enter into an amended agreement for the provision of water services to the City and its residents. In order to determine whether the amended agreement may be in the best interest of the City, a feasibility study was conducted by HNTB to look at alternatives to the provision of water including purchasing bulk water from another provider. Based on preliminary estimates, however, with a large number of uncertainties relating to the possible dissolution from CWD, it would be required to complete a model of the water system and to further evaluate prospective costs and other requirements, and that certainly is being considered as Phase 2 of the HNTB study. In order to determine whether to proceed, the City is seeking proposals for a business plan analysis...**DEFENDANT'S EXHIBIT 26.**

A careful reading of this document again shows prudence by Westlake in evaluating its alternatives. Nothing indicates imminent departure or plans to depart at all. It in fact indicates that there are a "large number of uncertainties" relating to such a decision. This again is not the smoking gun that Cleveland is seeking in this matter.

This theme is pervasive throughout the case put on by Cleveland – any effort by Westlake to investigate alternatives is viewed by Cleveland as a concrete step towards leaving the water system. The Court views the actions of Westlake as an effort to consider all options before making a decision of this magnitude, a decision which clearly has massive costs and potentially serious infrastructure-related ramifications. The Court believes the Westlake had and has every right to investigate all of its options with regard to its water supply and should be permitted to do so without fear of having its citizens subjected to increased charges prior to a

final decision even being made. The chilling effect of such precedent could be enormous and could lead to municipalities not considering options/alternatives that may in the end be in the best interest of their taxpaying citizens.

The Court finds that Westlake's contact with ALMU and its engagement of analysts and consultants was undertaken as part of a due diligence investigation in this matter. The Court does not find that it was a "step" toward leaving the Cleveland water system but finds that the actions of Westlake were instead a step towards investigating alternatives. The consistent testimony of the Plaintiffs' witnesses was that an investigation has been undertaken but that no decisions have been made at this point in time. This is consistent with a prudent exercise of governmental duties. Cleveland is not Standard Oil with Mayor Jackson playing the role of John D. Rockefeller. Yes, there are contractual obligations between the two cities, but Westlake should be permitted to re-evaluate those obligations without fear of potentially crippling economic retribution hanging over the heads of its citizens and business owners.

Moving on to another alleged "step," the Court has made a finding, and stated on the record during the hearing, that it does not consider Mayor Clough's May 2, 2012 (PLAINTIFF'S EXHIBIT GG) letter to be a notice of cancellation pursuant to Article 23 of the WSA. The words contained in that letter ("Westlake cannot and will not continue with the purchase of water from the City of Cleveland after the expiration of the 25 year period...") do Westlake no favors when taken out of context. Context, however, is important, and a review of the letter as a whole clearly brings out the fact that Westlake is again acting on its position that the WSA expires in 2015.

Although the Court has found that there was no notice of cancellation under Article 23, Cleveland would contend that the May 2nd letter was yet another "step" towards leaving the system under Article 4.02.

The Court heard much evidence regarding the Memorandum of Understanding (MOU) and Westlake Ordinance No. 1989-7. It is Westlake's position, as outlined previously in this Opinion, that these purported addendums to the WSA amended the WSA as it applies to Westlake and allow Westlake to seek alternative suppliers of water (by disallowing an "exclusive" franchise to Cleveland) and serve to terminate the WSA after 25 years, in 2015.

The Court reminds that parties that the whole reason we are involved in litigation in this matter *is* the WSA and Westlake's attempts, through the Complaint filed, to have that document

interpreted by the Court. The questions sought to be answered have already been outlined earlier in this Opinion and include some of the very questions outlined in the prior paragraph. The Court has already stated that these issues are not yet ripe for consideration in this Opinion, but the Court will make a finding that reflects that Westlake's actions to date have been undertaken based upon its interpretation of the WSA and the purported addendums thereto, without commenting on whether or not Westlake's interpretation has any legal merit. There were some questions asked as to whether or not the filing of the Complaint for Declaratory judgment could be considered a "step" towards leaving the water system. That contention is so patently absurd that the Court will not spend more than this sentence considering that non-issue.

The Court finds that Mayor Clough's May 2, 2012 letter was not a "step" toward leaving the Cleveland water system under Article 4.02. The Court finds that Mayor Clough was acting under a belief (accurate or inaccurate) that the WSA's termination is imminent and that without a new WSA he could not continue to purchase water from Cleveland without being in violation of the Westlake City Charter.

Moving back to the start of this discussion and the Court's efforts to better define the key phrase "*steps towards leaving the Cleveland water system*" by offering a slightly more specific phrase of "*an action along a course leading to terminating association with* [the Cleveland water system]."

The Court answers this question in the negative, for the reasons already stated above. To be necessarily repetitive, there is no question that Westlake has taken actions, but the Court has not been shown by clear and convincing evidence that those actions are being taken along a course leading to termination with the Cleveland water system. The Court understands and respects the position of the City of Cleveland with regard to these steps/actions but the Court cannot reconcile those actions by Westlake with the response levied by Cleveland.

The Court will now look specifically at Cleveland Ordinance 1354-13, the passage of which is the catalyst for this Opinion. Right off the bat the Court has issues with the legislation, which was designed to "cover costs associated with the separation of Westlake from the Cleveland Water System..."

The phrasing used in the Ordinance is stated in the affirmative – Westlake is separating from the Cleveland water system. There is no evidence before this Court that states that Westlake

is affirmatively separating from CWD. The City Council was briefed on October 14, 2013 with regard to the situation. Plaintiff's Exhibit J is a copy of the briefing materials used at that meeting. According to that document, Council was briefed on the "City of Westlake's decision to terminate its relationship with Cleveland Water and seek an alternative water supplier." SEE, PLAINTIFF'S EXHIBIT J. Further in the briefing materials it is affirmatively stated that "The City of Westlake has taken steps to leave the Cleveland Water system and has *officially* notified Cleveland of their intention to terminate the Water Service Agreement." ID. (emphasis added). This portion is explained in more detail later in the briefing materials:

> The City of Westlake has made it clear that they do not wish to continue being a direct service customer of Cleveland. There is no automatic path from their current direct service status to mater meter, back up or any other type service. It must be successfully and mutually negotiated, and we cannot assume it will be successfully negotiated. Instead we must take the City of Westlake at its word and take appropriate and necessary actions to protect our remaining rate payers. ID. AT 5.

The evidence presented at the hearing in this matter does not coincide with the briefing materials presented to the City Council. The evidence did show that Westlake has made overtures for YEARS to the City of Cleveland seeking master meter status and that Cleveland has not acted in good faith in reciprocating those overtures. To come before the City Council at this late date and affirmatively state to the members of council that it is essentially too late to negotiate and that the legislation must be passed is not taken well by this Court when in fact Cleveland had years to negotiate with Westlake. Looking at this specific point as well as all of the other issues addressed in this Opinion, the Court must openly wonder as to whether or not the Cleveland City Council was provided sufficiently accurate information by those making the briefing before the Council voted to significantly raise the water charges of an entire community?

At this point in the litigation, the Court has found that there has been no separation. Director Bender testified that there has been no separation. (CROSS-EXAM OF BENDER, VOL.4 AT 662:9-12). With no separation there are no costs to be incurred. As such, how can the citizens of Westlake be charged for something that has not yet happened? When interpreting a statute, "words in a statute or ordinance are to be given their plain and ordinary meaning, unless it is otherwise clearly indicated." **City of Cleveland v. Berg**, 1980 Ohio App LEXIS 11325 (8th

District). In this case, the words are very clearly, and inaccurately, stated in the affirmative as to Westlake's separation status with regard to the Cleveland water system. The Cleveland City Council, in ratifying this legislation, in essence levied the detailed charges as to an event that has not yet happened, or may never happen, as per the evidence presented at the hearing.

The testimony presented at the hearing, and presented earlier in this Opinion, detailed that the Cleveland City Council, in 2011, passed legislation that established an ownership surcharge and risk premium for customers of CWD residing outside of the municipal boundaries of Cleveland. In the CFPR (Comprehensive Financial Plan Report) prepared by MFSG that served as the basis for the surcharge and risk premium, it is specifically stated that the reasoning for the ownership surcharge is because

> customers inside the corporate limits of the City of Cleveland are responsible for paying all operating and capital costs of the utility should the outside customers decide to no longer be served by CWD. Therefore, CWD is entitled to a reasonable return from the non-owner customers based on the value of the assets that are used and useful in providing water service and for the financial risks taken as owners. **SEE, PLAINTIFF'S EXHIBIT ZZ (CFPR, CH.8, SEC.8.3).**

As to the risk premium, the rationale was "to compensate CWD for unquantifiable business risks associated with serving customers outside their corporate limits." **ID. AT SUB-SECTION 8.3).**

Testimony was deduced as to the AWWA M-1 Manual as being an authoritative text on the subject of water rates. In that manual, risk and risk premiums are discussed:

> This risk category relates to the uncertainty and consequences of unplanned events that result in the inability of the entity to meet its financial obligations. It is perhaps the single most important risk factor and is commonly cited by court authorities. Municipalities extending outside-city services are ultimately responsible for paying all operating expenses and capital costs incurred by the utility. . . . Municipal utility debt obligations persist though outside-city customers may elect to discontinue service from the municipality or government-owned utility. **SEE, AWWA M-1 MANUAL AT CHAPTER V.1, P. 162-163.**

As found previously, there is no definition of, nor means of accounting for, stranded costs and costs to cure. This would leave the Court to find that the imposition of the ownership surcharge and risk premiums are designed to underwrite that risk. The MFSG clearly stated that there are "unquantifiable business risks" when it comes to outside customers. The heights of naivety would be scaled if it is to be assumed by CWD that no municipality would ever choose

to leave the system. To not factor that potentiality nor to have a concrete means of assessing specific charges should the potentiality occur, would, in this Court's opinion, be shocking to any businessperson who has ever drafted a contract. If nothing else, it can easily fall into the "unquantifiable" category. It would appear that the MFSG analysis *does* factor that potentiality through the ownership surcharge and risk premium assessments, which were adopted into law by the City of Cleveland, through the language of Section 8.3 as detailed above. The Court finds that the ownership surcharge and risk premiums were designed to guard, in part, against the very risk that Cleveland is facing today, and that no evidence was presented to this Court to show that Cleveland had factored monies collected through these additional charges into the numbers utilized to factor the amounts upon which Ordinance 1354-13 was based.

The Court has already opined its concerns regarding the methodology utilized to arrive at the final numbers for the costs to cure/stranded costs that were utilized as the basis for the charges levied by Ordinance 1354-13. The Court finds that the discrepancies brought out at the hearing with regard to the 2007 Haddad report versus the 2013 Arcadis report (total main mileage, variance in Westlake main mileage over the years and apparent rounding issues) call into question the validity of the charges that Cleveland seeks to recover in this matter. Further, the fact that prior agreements were in place prior to 1990 (when the current WSA was signed) causes consternation to this Court. As stated earlier, the present WSA contains language in Article 25 that terminates and releases both sides from all prior claims of those prior agreements. This should arguably include recoupment of capital costs incurred under those prior agreements unless provided for elsewhere in the WSA, which provision(s) the Court did not find upon inspection. As the drafters of the Arcadis report were apparently not made aware of this provision, is Cleveland seeking to charge Westlake residents for capital costs that were erased under the prior agreement(s)?

The discrepancies with regard to the nature of the charges continue with regard to what exactly constitutes a capital improvement. As stated earlier in this opinion, witness Said Abou Abdallah from Arcadis testified that he was not aware of the addendums to the WSA that assigned certain projects to capital status. For example, the cleaning and relining of mains is designated in Exhibit B of the WSA as an expense attributable to Cleveland but he accorded "capital improvement" status to the projects, thus passing the expense, contrary to the WSA, to

Westlake.

The Court finds as a matter of law that Cleveland Ordinance No. 1354-13 does not convey proper authority to the City of Cleveland to impose the fixed water charges on the citizens of Westlake.

The Court further finds that the charges sought to be imposed by the City of Cleveland against the citizens of Westlake were not shown to this Court to be sufficiently accurate based upon the evidence and testimony received. "Rates charged by a municipality providing water services may be challenged for lack of 'reasonableness.'" **City of Lakewood v. City of Cleveland**, 1976 Ohio App. LEXIS 7222, *4 (8th District). The evidence as presented creates very grave concerns in the mind of the Court and, as such, the Court will not countenance the imposition of approximately $58,000,000 in charges against the citizens of a single community based upon the information presented by the City of Cleveland at the hearing. Based upon the totality of the evidence presented the Court finds that the inconsistencies in calculation make the charges as levied unreasonable.

The Court has made multiple findings that the City of Westlake has not only not taken "steps" towards leaving the Cleveland water system but also that the charges that the City of Cleveland is seeking to impose upon the citizens of Westlake are potentially based upon flawed or incorrect data and are thus unreasonable as drafted. There is a distinct possibility that some of the charges may have been waived when the parties entered the 1990 WSA. There is also the possibility that some of the charges may have been paid in part or in full through the ownership surcharge and risk premium assessments placed by CWD on all customer water bills. The Court is also of the position that the City of Cleveland lacks the authority to even issue the charges against Westlake because there has been no actual separation from the Cleveland water system. The Court believes, clearly and convincingly, that, given the evidence presented, there is a likelihood of success on the merits in this matter.

As stated earlier in this opinion, "[i]rreparable harm is harm for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." **Gross**, 2006-Ohio-1759, at ¶18. To establish irreparable harm, "Plaintiff must establish injury that is not remote or speculative, but is actual and imminent." **Cleveland Elec. Illuminating Co.**, 115 Ohio App. 3d at 15.

Westlake is a city that has residents that live in neighborhoods that vary from communities of million-dollar homes to trailer parks, with every level in between. Similarly, the city hosts a variety of businesses, ranging from sole proprietorships up to large multi-national corporations. The Court heard from a small and select microcosm of the community at the hearing held in this matter and found that the testimony was designed to tug at the heartstrings of the Court. Speculation on testimonial motives aside, it is crystal clear that actual, imminent and irreparable harm is about to occur to every single resident and business located within the municipal boundaries of the City of Westlake. It does not matter to this Court whether a resident lives on a fixed income that will be devastated by these charges or makes millions of dollars playing professional football – the fact that these charges are due to be levied is harm to each and every person affected.

The bills are due to be mailed out in the middle of February. The amount is clearly quantified. As stated above, the charge will affect each citizen and/or business in a different manner. There is, however, no adequate remedy at law for residents who cannot pay their expenses because of the increased water charges. The suggestion by Cleveland to collect but escrow the funds is not acceptable to this Court – the injury/harm to the citizens of Westlake remains as long as this case is pending. Due to the complexity of the issues and the need to undertake further discovery and draft/argue dispositive motions, the matter could be over a year away from a trial date. Although the actual amount to be charged is quantifiable, the economic harm during this period to Westlake citizens, businesses, and the Westlake Community at large cannot be as easily quantified. *See,* **Eller Media Co. v. City of Cleveland,** 161 F. Supp. 2d 796, 807 at fn. 4 (N.D. Ohio 2001), ("[I]n cases in which there is undoubtedly economic harm, but the amount of harm is difficult or impossible, the court may issue the injunction because the injury is 'irreparable' in the sense that it can never be accurately quantified. *See, e.g.*, **Basicomputer Corp. v. Scott**, 973 F.2d 507, 511 (6th Cir. 1992) (stating that 'an injury is not fully compensable by money damages if the nature of plaintiff's loss would make damages difficult to calculate.')." Businesses will lose profitability, stunting their ability to hire employees or stay competitive. *See, generally,* DIRECT EXAM. OF VEKAS, VOL. 1, 80-88. Countless citizens will cut back or forego the purchase of necessities such as groceries and medication. It is simply impossible to measure these impending injuries.

As to balancing the potential injury to the parties to this matter, the Court believes that it is without question weighed nearly in complete favor of the City of Westlake. Taking into consideration that the citizens of Westlake are being forced to pay a fixed charge for an ***occurrence that has not even taken place yet*** (the separation of Westlake from CWD), the Court cannot see how they do not have the greatest exposure in this matter. Any damage to CWD or Cleveland is speculative for the same reasons – Westlake has not left the system. Further, the issues already raised by the Court with regard to the computation of the actual charges sought to be recovered by Cleveland leaves this Court in doubt as to any actual, quantifiable number to attribute to Cleveland in the damages column. It should also be remembered that Cleveland is now collecting the ownership surcharge and risk premiums being charged to outside customers. It would behoove Cleveland to perhaps escrow some of those funds to offset any future losses should any municipality decide to leave the water system.

Courts should take "particular caution * * * in granting injunctions, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government." **Danis Clarkco Landfill Co. v. Clark County Solid Waste Management District, 73 Ohio St. 3d 590, 604 (1995)**; *Quoting*, **Leaseway Distrib. Centers, Inc. v. Dept. of Adm. Serv.** (1988), 49 Ohio App.3d 99, 106, 550 N.E.2d 955, 962; **Dandino v. Hoover** (1994), 70 Ohio St.3d 506, 639 N.E.2d 767.

Clearly the Court understands the ramifications of this decision and has heavily considered the public interests involved. There is no question in the Court's mind, however that the public interest is being served by reaching the decision contained herein. There are literally thousands of citizens who did not ask for these charges, and a great many whom may be seriously burdened by the imposition thereof. The fact that this Court has found that the City of Cleveland does not appear to have the authority to prospectively issue these charges for an event that has not even taken place yet put even has more emphasis on the public interest considerations of this decision. Further, in addressing the aspect of interfering with the operation of another department of government, nearly all of the relevant issues that the Complaint for Declaratory Judgment seeks resolution of are factors that weighed into the passage of Cleveland Ordinance 1354-13. The Court is of the position that the only option to maintain the status quo

pending that full and final hearing is to enjoin Cleveland from issuing invoices to Westlake citizens that reflect the fixed charges.

The City of Westlake has more than met its burden of clear and convincing evidence in this matter. The Motion for Preliminary Injunction is **WELL-TAKEN** and **GRANTED.**

IT IS ORDERED, ADJUDGED AND DECREED that the City of Cleveland, by and through the Department of Public Works and/or the Cleveland Water Department, is hereby enjoined from issuing to any customer located in the City of Westlake any billing statement containing any fixed charges related to Cleveland Ordinance 1354-13 and/or Section 535.041 of the Code of Ordinances for the City of Cleveland.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Order shall remain in effect pending further Order of this Court.

JUDGE MICHAEL K. ASTRAB

2/7/14

DATE

RECEIVED FOR FILING

FEB 07 2014

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