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 Court is considering Motions for Summary Judgment filed by Plaintiff City of Westlake and Defendant City of Cleveland. Both motions seek the Court's Opinion on the following primary issues:

(1) Did Westlake and Cleveland amend the terms of their Water Service Agreement ("WSA") through the parties' Memorandum of Understanding ("MOU") and Westlake Ordinance No. 1989-7 ("Westlake Ordinance 1989-7")?

(2) Is Cleveland entitled to recover "stranded costs" or "costs to cure" from Westlake or its residents?

EXECUTIVE SUMMARY

The Court finds that the parties amended the terms of the WSA through the parties' MOU and Westlake Ordinance 1989-7. The Court first finds that the MOU and Westlake Ordinance 1989-7 should be construed together with the WSA because the plain language of the documents and the parties' integrated process of executing the WSA undisputedly establish that all three documents concerned the same transaction.

After construing the MOU and Westlake Ordinance 1989-7 with the WSA, the Court next finds that the plain language of the parties' MOU and Westlake Ordinance 1989-7 clearly and

unambiguously served to amend the standardized terms of the WSA with regard to Cleveland's non-exclusivity right and the term length of the agreement, and as a result, the notice of cancellation provisions as well. Therefore, the Court finds as a matter of law that (1) Westlake may obtain a secondary source of potable water without violating the WSA; (2) the WSA expired on March 19, 2015, *i.e.*, 25 years after its effective date; (3) the WSA's provision automatically extending the WSA after the first 10-year term to perpetual annual terms, but requiring an unconditional 5-year notice before the agreement can be terminated is unenforceable; and (4) the WSA does not require the purchase of any definable amount of water during the 5-year notice period.

The Court finds that Cleveland is not entitled to recover "stranded costs" or "costs to cure" because there is no evidence that Cleveland is entitled to any such costs under the plain language of the WSA. While the plain language of the Article 4 and Article 23 of the WSA provide methods for Cleveland to potentially increase rates or otherwise in circumstances in which customers take steps to leave the Cleveland Water System or in which customers provide a notice of cancellation, the Court finds that neither situation applies under these facts because the undisputed actions of Westlake only served as reminders to Cleveland that the WSA expired on March 19, 2015 and so Westlake was not contractually bound after that date. As such, the Court finds that Cleveland may not recover "stranded costs" or "costs to cure" from Westlake or its residents as a matter of law.

In conclusion, after viewing all the facts and construing all the evidence in the light most favorable to Cleveland as the non-moving party and in applying the applicable law to the undisputed, material facts of this case, the Court finds that reasonable minds could come to only one conclusion as a matter of law: (1) Westlake has the right to obtain a secondary source of

potable water without being in breach of the WSA; (2) the WSA is unenforceable beyond 25 years from its effective date; (3) the WSA's provision automatically extending the term of the WSA following the first 10-year term to perpetual annual terms, but requiring an unconditional 5-year notice before the agreement can be terminated is unenforceable; (4) the WSA does not require the purchase of any definable amount of water during the 5-year notice period contained in Article 23 of the WSA; and (5) Cleveland may not recover "stranded costs" or "costs to cure" from Westlake or its residents. Consequently, the Court **GRANTS** Plaintiff City of Westlake's Motion for Summary Judgment in granting its request for declaratory judgment and **DENIES** Defendant City of Cleveland's Motion for Summary Judgment.

FACTUAL BACKGROUND

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 the WSA that it entered in 1990 with the City of Cleveland Division of Water.

The cities of Cleveland and Westlake are both duly organized and existing Ohio municipal corporations located within the boundaries of Cuyahoga County, Ohio. The Cleveland Water Department ("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.

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." (Emphasis Added). 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."

The Mayor of Westlake in 1990 (and at the present time) was Dennis Clough. 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. 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.

In addition to the MOU, the City Council of Westlake also passed Ordinance 1989-7 on February 15, 1990. 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...

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."

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 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 were 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 Court granted Westlake's motion and enjoined the City of Cleveland from seeking payment from Westlake's citizens until this action could be determined on the merits.

ARGUMENTS OF THE PARTIES

Plaintiff City of Westlake requests that this Court enter declaratory judgment in its favor in finding the following as matters of law: (1) Westlake has the right to obtain a secondary

source of potable water without being in breach of the WSA; (2) the WSA does not require the purchase of any definable amount of water during the 5-year notice period contained in Article 23 of the WSA; (3) Article 23 of the WSA's provision automatically extending the term of the WSA following the first 10-year term to perpetual annual terms, but requiring an unconditional 5-year notice before the agreement can be terminated is unenforceable; (4) the WSA is unenforceable beyond 25 years from its effective date; and (5) Cleveland may not recover "stranded costs" or "costs to cure" from Westlake or its residents.

In opposition, Defendant City of Cleveland argues that (1) Cleveland is the sole supplier of water to Westlake for the duration of the WSA under Article 5 of the WSA; (2) Westlake may not purchase water from a secondary source until the 5-year notice period required by Article 23.01 of the WSA is complete; (3) Article 23.01 of the WSA is enforceable and requires Westlake to provide Cleveland 5-years notice of cancellation before the WSA can be terminated; (4) the WSA does not automatically expire 25 years after its effective date; and (5) Cleveland can recover costs associated with leaving the Cleveland Water System under Article 4.02(1) and Article 23.01 of the WSA.

LAW

Under Civ.R. 56, summary judgment is appropriate when (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party. *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414; *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327. When a motion for summary judgment is properly made and supported, the non-moving party must set forth specific facts showing that there is a genuine issue for trial and

may not merely rest on allegations or denials in the pleadings. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The non-moving party must produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108, 111. Further, to survive summary judgment, a non-moving party must produce more than a scintilla of evidence in support of their position. *Markle v. Cement Transit Co., Inc.,* 1997 WL 578940, *citing Redd v. Springfield Twp. School District* (1993), 91 Ohio App.3d 88, 92.

Contract Law

(1) *Multiple Documents*

As a general rule of construction, Ohio courts will "construe multiple documents together if they concern the same transaction." *Prudential Ins. Co. of Am v. Corporate Circle*, 658 N.E.2d 1066, 1069 (1995); *see also, Abram & Tracy v. Smith*, 88 Ohio App. 3d 253, 259, 623 N.E.2d 704 (10th Dist.1993) (noting that "a writing should be interpreted as a whole and all the writings that are part of the same transaction should be interpreted together"); *Davison Elec. Co. v. Board of Belmont County Comm'rs*, 1998 Ohio App. LEXIS 4114, *8-9 (7th Dist. Aug. 27, 1998) (emphasizing that "all writings that are part of the same transaction should be interpreted together, and effect should be given to every provision of every writing").

This principle holds true for documents concerning the same transaction "regardless of whether the agreements expressly refer to each other." *Wallace v. Kalniz*, 2013-Ohio-2944, ¶23 (6th Dist.) (internal citations omitted). Furthermore, even if the parties fail to physically attach multiple documents, the court should still construe the documents together if they concern the same transaction. *See, e.g., Gaffin v. Schumacher Homes of Cincinnati, Inc.*, 2013-Ohio-992, ¶ 3, ¶¶ 10-11 (12th Dist.) (reversing the trial court's decision to refuse to interpret multiple documents

together that were part of the same transaction merely because the documents were not physically attached).

However, in some contexts, courts will decline to incorporate other documents into a contract if the parties do not expressly indicate an incorporation provision. *Compare, Market Ready Real Estate Services Inc. v. Weber*, 2013-Ohio-4879, ¶ 16 (10th Dist.) (declining to incorporate the terms of a separate settlement agreement into a cognovit note because the "mere reference" to settlement agreement in the cognovit did not expressly indicated an intent for incorporation) and *Cuyahoga Metro. Hous. Auth. v. Roth Bros., Inc., 2005-Ohio-6491*, ¶ 7-10 (8th Dist.) (rejecting a defendant's attempt to bind a plaintiff to a warranty that was neither expressly nor indirectly incorporated into a contract) with *Christie v. GMS Mgt. Co.*, 124 Ohio App.3d 84, 87 (9th Dist. 1997) (acknowledging that the parties' rental agreement was incorporated into the lease only because the lease specifically incorporated the rental agreement and other attachments).

(2) *Interpretation*

As a general matter, it is well-established that the interpretation of a contract is a matter of law for a court to resolve. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 625 N.E.2d 684 (1995). When resolving issues of contract interpretation, a court's underlying role is to ensure that the contract is "interpreted so as to carry out the intent of the parties, as that intent is evidence by the contractual language." *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, syllabus note 1, 313 N.E.2d 374 (1974); *Foster Wheeler Enviresponse v. Franklin County Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 1997-Ohio-202, 678 N.E.2d 519 (citing that "[t]he cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties").

In reviewing the specific language of a contract to ascertain the parties' intent, a court should adopt the plain and ordinary meaning the contract's language unless the contract provides for another meaning. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 245-46, 374 N.E.2d 146 (1978) (emphasizing that "common words appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument"). In connection, the court should presume that the parties chose the specific language of the contract for a specific purpose and should thus "avoid interpretations that render portions [of the contract] meaningless or unnecessary." *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 88 N.E.2d 1062, ¶ 22 (2008); *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 131, 509 N.E.2d 411 (1987), paragraph one of the syllabus (holding that "[t]he intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement").

If a reviewing court finds that the contract's language is clear and unambiguous, then there are no issues of fact to be determined and the court need not go beyond the plain language of the contract to determine the parties' rights and obligations. *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.*, 15 Ohio St.3d 321, 322 474 N.E.2d 271 (1984); *Alexander*, 53 Ohio St.2d at 246; *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, 821 N.E.2d 159, ¶ 29. As a matter of law, the court must interpret the contract in a manner that is consistent with the clear language of the document and cannot create a new contract by reading in an intent that is not expressed by the parties' clear terms. *Inland*, 15 Ohio St.3d at 322; *Alexander*, 53 Ohio St.2d at 246; *Shifren v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499 (1992).

In determining the clarity of the contract's language, a court should not find that a term is ambiguous simply because the term is not defined within the contract. *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 2004-Ohio-7102, ¶ 23 (8th Dist.); *Nee v. State Indus., Inc.*, 2013-Ohio-4794, ¶ 28 (8th Dist.). Rather, after attempting to determine the term's meaning from the four corners of the document, the court should find that a term is ambiguous when it is "susceptible to more than one reasonable interpretation." *Michael A. Gerald, Inc. v. Haffke*, 2013-Ohio-168, ¶ 11 (8th Dist.).

If the court finds "doubt or ambiguity" in the terms of a contract, then the contractual language "will be construed strictly against the party who prepared [the contract]." *McKay Mach. Co. v. Rodman*, 11 Ohio St.2d 77, 80, 228 N.E.2d 304 (1967) (reiterating that "he who speaks must speak plainly or the other party may explain to his own advantage"). As such, only if the court determines that the language of the contract is "unclear and ambiguous" or if "the circumstances surrounding the agreement invest the language of the contract with a special meaning," should the court should consider "extrinsic evidence . . . in an effort to give an effect to the parties' intentions." *Home Bank, F.S.B. v. Papadelis*, 2006-Ohio-5453, ¶ 17 (8th Dist.). Such extrinsic evidence from outside the four corners of the contract "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 which demonstrate the construction they gave to their agreement." *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*, 129 Ohio App.3d 45, 56, 716 N.E.2d 1201 (2d Dist. 1998)

Lastly, if the court finds that a contract is "susceptible to two constructions," the court must utilize any such extrinsic evidence in choosing "the interpretation which makes it a fair and

reasonable agreement and which gives the contract meaning and purpose" in effecting the parties' intent. *Drs. Kristal & Forche, D.D.S., Inc. v. Erkis*, 2009-Ohio-6478, ¶ 14 (10th Dist.).

(3) *Municipal Party*

If one of the parties to a contract is a municipal corporation, "contract formation or execution may only be done in a manner provided for and authorized by law." *Ohio Power Co. v. Vill. of Mingo Junction*, No. 04-JE-3, 2004-Ohio-4994, at ¶ 8. Any person who seeks to enter into a contract with a governmental entity is on "constructive notice of the statutory limitations on the powers of the entity's agent to contract. Since state and local laws are readily available for public review, it is a simple matter for a party to educate itself as to the procedural formalities with which government official must comply before they many bind a government entity to a contract." *Union Stockyards v. City of Hillsboro*, 191 Ohio App.3d 564, 2010-Ohio-5975, 947 N.E.2d 183, ¶ 12 (4th Dist.), quoting *Shampton v. City of Springboro*, 98 Ohio St. 3d 457, 461, 2003-Ohio-1913, 786 N.E.2d 883.

As such, before entering into a contract, a party "must ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril." *Lanthrop Co. v. Toledo*, 5 Ohio St. 2d 165, 172-73, 214 N.E.2d 408 (1966). In accordance, the Supreme Court of Ohio has held that "no recovery can be had on a contract that is entered into contrary to one or more of legislated requirements." *Id.*; *see, e.g., Shampton*, 98 Ohio St. 3d at 460 (holding that despite the actions of the city's manager, the parties' failure to comply with a contracting limitation set forth in the city's charter rendered the agreement between the city and the other party invalid); *Percy Squire Co., L.L.C. v. City of Youngstown*, 2005-Ohio-6442, ¶ 22 (7th Dist.) (holding that despite the actions of the city's law

director, no contract existed between the parties because the terms of the city's charter and ordinance were no complied with by the parties).

With regard to the passing of an ordinance by a municipality, Ohio courts have found that the municipality "is engaged in legislating and not in contracting." *Clifton Hills Realty Co. v. Cincinnati*, 60 Ohio App. 443, 49 (1st Dist. 1938) (noting that "[t]he action [of passing an ordinance] lacks all the essential elements of a contract. No one is bound to the municipality as a result [of an ordinance], and the municipality binds itself to no one thereby).

ANALYSIS

In this case of contractual interpretation, both parties argue that there are no material facts in dispute, and so there only remains an application of the relevant law to the material facts under Rule 56(C). After viewing all the facts and construing all the evidence in the light most favorable to the Cleveland as the non-moving party and in applying the applicable law to the undisputed material facts of this case, the Court finds that reasonable minds could come to only one conclusion as a matter of law: (1) Westlake has the right to obtain a secondary source of potable water without being in breach of the WSA; (2) the WSA is unenforceable beyond 25 years from its effective date; (3) the WSA's provision automatically extending the term of the WSA following the first 10-year term to perpetual annual terms, but requiring an unconditional 5-year notice before the agreement can be terminated is unenforceable; (4) the WSA does not require the purchase of any definable amount of water during the 5-year notice period contained in Article 23 of the WSA; and (5) Cleveland may not recover "stranded costs" or "costs to cure" from Westlake or its residents. Consequently, the Court GRANTS Plaintiff's Motion for Summary Judgment in granting its request for declaratory judgment and DENIES Defendant's Motion for Summary Judgment.

I. Exclusivity Right, Term Length, Notice of Cancellation, Notice Period

Construing Multiple Documents

The Court first construes the parties' MOU and Westlake Ordinance 1989-7 with the WSA because the plain language of the documents and the parties' integrated process of executing the WSA both establish that all three documents concerned the same transaction. As a general rule of contract construction, Ohio courts will "construe multiple documents together if they concern the same transaction." *Prudential,* 658 N.E.2d at 1069; *see also, Abram,* Ohio App. 3d at 259; *Davison,* 1998 Ohio App. LEXIS 4114 at *8-9. This principle holds true for documents concerning the same transaction "regardless of whether the agreements expressly refer to each other." *Wallace,* 2013-Ohio-2944 at ¶23. Furthermore, even if the parties fail to physically attach multiple documents, a reviewing court should still construe the documents together if they concern the same transaction. *See, e.g., Gaffin,* 2013-Ohio-992 at ¶ 3, ¶¶ 10-11.

Here, the Court finds that the parties' MOU and Westlake Ordinance 1989-7 should be construed together with the WSA because the very terms of the MOU and Westlake Ordinance 1989-7 undisputedly concerned the transaction of the parties executing the WSA. *Prudential,* 658 N.E.2d at 1069; *see also, Abram,* Ohio App. 3d at 259; *Davison,* 1998 Ohio App. LEXIS 4114 at *8-9. In the parties' MOU, "Article 5 of the Contract" between Westlake and Cleveland is specifically referenced in addressing and clarifying the WSA's standardized "sole and exclusive supplier of water" provision with respect to Cleveland. Additionally, the parties' MOU is specifically referenced on page 15 of the WSA. In Westlake Ordinance 1989-7, a "Water Service Agreement" between Westlake and Cleveland is specifically referenced. In connection, Westlake Ordinance 1989-7 also addresses and clarifies Article 5 and Article 23 of the WSA

with the inclusion of the Ordinance's "non-exclusive franchise" provision and the 25-year term length provision.

In addressing Cleveland's specific incorporation provision argument, the Court finds that, even in the absence of an explicit incorporation reference throughout the documents, the MOU and Westlake Ordinance 1989-7 were implicitly incorporated into the WSA by the references in both documents to the WSA. *Wallace,* 2013-Ohio-2944 at ¶23, (holding that documents concerning the same transaction should be construed together "regardless of whether the agreements expressly refer to each other"). In accordance, the documents should be construed together with the WSA because the provisions addressing the WSA in both the MOU and Westlake Ordinance 1989-7 establish that both documents substantively concerned the transaction of the parties entering into the WSA.

The Court finds that construing the documents together is further supported by the fact that the MOU and a certified copy of Westlake Ordinance 1989-7 were executed together with the WSA in the course of the parties entering into the WSA. The parties' integrated process of executing the WSA is directly evidenced by Ms. Sundheimer's January 26, 1990 letter to Mayor Clough. In her letter, Ms. Sundheimer stated that she enclosed an original and two duplicate originals of the WSA with her letter and instructed Mayor Clough to execute the WSA on page 15 and to "**sign the [M]emorandum of [U]nderstanding on all three documents.**" (emphasis added). Furthermore, Ms. Sundheimer stated that the "City of Westlake **must pass an ordinance authorizing its Mayor to enter into the Water Service Agreement**" and instructed Mayor Clough to "**attach a certified copy of [Westlake Ordinance 1989-7] to each document.**" (emphasis added). Finally, Ms. Sundheimer instructed Mayor Clough that after "**all the documents have been properly executed and ordinances attached**, please return the

documents to me for execution by the City of Cleveland Water Division" and stated that "[a] fully executed duplicate original will be returned to you for your records." (emphasis added).

This incorporated process of executing the WSA in connection with the parties' MOU and Westlake Ordinance 1989-7 is further corroborated by the testimony of Mayor Clough, who stated that " . . . [when] I finally did receive **a copy of the [WSA] back from Cleveland**, after it was sent to them, **it did contain the Memorandum of Understanding and [Westlake Ordinance 1989-7] so attached**." (emphasis added). In accordance, the Court finds that both the language of the documents and the course of the parties' execution of the WSA clearly establish that the documents all concerned the same transaction. Even if there is a question as to whether the documents were physically attached, the Court finds that this is not material because the evidence undisputedly demonstrates that the substance of the MOU and Westlake Ordinance 1989-7 concerned the transaction of the parties entering into the WSA. *See, e.g., Gaffin,* 2013-Ohio-992 at ¶ 3, ¶¶ 10-11 (holding that documents regarding the same transaction may be construed together even if the documents were not attached). As such, the Court finds that the MOU and Westlake Ordinance 1989-7 should be construed together with the WSA as a matter of law.

Contract Interpretation

After construing the MOU and Westlake Ordinance 1989-7 with the WSA, the Court next finds that the plain language of the parties' MOU and Westlake Ordinance 1989-7 clearly and unambiguously served to amend the standardized terms of the WSA with regard to Cleveland's non-exclusivity right and the term length of the agreement, and as a result, the subsequent notice of cancellation provisions as well. It is well-established that the interpretation of a contract is a matter of law for a court to resolve. *Nationwide,*73 Ohio St.3d at 108. When resolving issues of

contract interpretation, a court's underlying role is to ensure that the contract is "interpreted so as to carry out the intent of the parties, as that intent is evidence by the contractual language." *Skivolocki,* 38 Ohio St.2d at 244; *Foster,* 78 Ohio St.3d at 361. In reviewing the specific language of a contract to ascertain the parties' intent, a court should adopt the plain and ordinary meaning of the contract's language unless the contract provides for another meaning. *Alexander,* 53 Ohio St.2d at 245-46. In connection, a court should presume that the parties chose the specific language of the contract for a specific purpose and should thus "avoid interpretations that render portions [of the contract] meaningless or unnecessary."*Wohl,* 118 Ohio St.3d at 277; *Kelly,* 31 Ohio St.3d at 131.

If a reviewing court finds that the contract's language is clear and unambiguous, then there are no issues of fact to be determined and the court need not go beyond the plain language of the contract to determine the parties' rights and obligations. *Alexander*, 53 Ohio St.2d at 246. As a matter of law, the court must interpret the contract in a manner that is consistent with the clear language of the document and cannot create a new contract by reading in an intent that is not expressed by the parties' clear terms. *Inland,* 15 Ohio St.3d at 322; *Alexander,* 53 Ohio St.2d at 246; *Shifren v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499 (1992).

After reviewing the terms of the MOU and Westlake Ordinance 1989-7 together with the terms of the WSA and in accordance with this Court's role to interpret the language so as to give meaning to the parties' intentions, the Court finds that that the clear and unambiguous language of both documents served to amend the standardized terms of the WSA. *Skivolocki,* 38 Ohio St.2d at 244; *Foster,* 78 Ohio St.3d at 361; *Alexander,* 53 Ohio St.2d at 245-46.

With specific regard to the parties' MOU, the Court finds that the clear and unambiguous terms served to amend the WSA's standardized exclusivity provision in Article 5; thus,

Cleveland was not granted an exclusive right to provide water to Westlake and therefore, as a result, Westlake has the right to obtain a secondary source of potable water. In the MOU, the parties agreed that "the language of Article 5 of the [WSA] **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**." (emphasis added). Furthermore, the parties acknowledged that "Cleveland has been and will continue to be the sole supplier of water to Westlake and its inhabitants during the term of the [WSA] **because there are no alternative sources of water supply to the community**." (emphasis added).

While the MOU does not use the word "amend," the Court finds that the plain language of the MOU is nevertheless clear and unambiguous: Cleveland was not granted an exclusive right to supply water under the WSA, but rather only a non-exclusive right so that Westlake could comport with its Charter and due to the fact that Westlake had no other alternative sources of water. The Court must presume that the plain language of the MOU was chosen for a specific purpose, *i.e.*, amending the WSA's standardized exclusivity provision in Article 5 so that Westlake would not violate its Charter, because any other interpretation would render those clear provisions of the MOU to be "meaningless or unnecessary." *Wohl,* 118 Ohio St.3d at 277; *Kelly,* 31 Ohio St.3d at 131.

With specific regard to Westlake Ordinance 1989-7, the Court finds that the clear and unambiguous terms served to amend the WSA's standardized exclusivity provision in Article 5 and to amend the WSA's standardized term length provision in Article 23. As a result, (1) Cleveland was not granted an exclusive right to provide water to Westlake and thus Westlake has the right to obtain a secondary source of water; and (2) the term length of the WSA was 25 years

and thus the WSA is unenforceable after 25 years from its effective date. In Westlake Ordinance 1989-7, Westlake's mayor was granted authority to enter into the WSA "provided that the terms and conditions of the [WSA] **do not conflict with any provision of the Charter of the City of Westlake**" and further granted Cleveland with "**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.**" (emphasis added).

While Westlake Ordinance 1989-7 does not use the word "amend," the Court finds that the plain language of Westlake Ordinance 1989-7 is nevertheless clear and unambiguous: Cleveland was granted a non-exclusive right to supply water and the term of the WSA was set at a period of 25 years so that Westlake could comport with its Charter in entering into the WSA. The Court will presume that the plain language of Westlake Ordinance 1989-7 was chosen for a specific purpose, *i.e.*, amending the WSA's standardized exclusivity provision and the WSA's standardized term length provision so that Westlake would not violate its Charter, because any other interpretation would render those clear provisions of Westlake Ordinance 1989-7 to be "meaningless or unnecessary." *Wohl,* 118 Ohio St.3d at 277; *Kelly,* 31 Ohio St.3d at 131.

As a result of finding that the clear and unambiguous terms of Westlake Ordinance 1989-7 served to amend the standardized term length provision in Article 23 from the 10-year term extending from year to year thereafter to a specific term length of 25 years, the Court finds not only that the WSA expired 25 years after its execution, but also that Article 23's provision requiring a 5-year notice of cancellation is accordingly inapplicable and unenforceable in this situation. Here, the date which occurred 25 years following the parties' execution of the WSA was March 19, 2015. As such, unless either party had desired to terminate the agreement upon a date prior to March 19, 2015, there was no need for a notice of cancellation by either party at any

point because the WSA was already set "to cancel" on March 19, 2015. It cannot be argued that Mayor Clough's May 2013 "official notice" letter constituted any such desire to cancel the agreement at an earlier date because the express language of the letter explicitly states that Westlake would not continue forward with the agreement "after the expiration of the 25 years period," *i.e.*, after March 19, 2015. Consequently, the Court finds that the 5-year notice of cancellation requirement is inapplicable in this situation as a result of the fact the WSA was already set "to cancel" on March 19, 2015 and the fact that Westlake's actions via the above-referenced correspondence only reiterated to Cleveland that Westlake was going to abide by the March 19, 2015 cancellation date.

Since the Court has found that the language of the MOU and Westlake Ordinance 1989-7, as construed together with the WSA, is clear and unambiguous in amending the terms of the WSA, the Court need not go beyond that plain language of the documents to determine the parties' rights because there are no issues of fact to be determined. *Alexander*, 53 Ohio St.2d at 246. As a matter of law, the Court must interpret the documents in a manner that is consistent with the parties' clear language and cannot create a new contract by reading in an intent that is not expressed by the parties' clear terms. *Inland*, 15 Ohio St.3d at 322; *Alexander,* 53 Ohio St.2d at 246; *Shifren v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499 (1992). As such, the Court finds as a matter of law that (1) Westlake may obtain a secondary source of potable water without violating the WSA; (2) the WSA expired on March 19, 2015, *i.e.*, 25 after its effective date; (3) the WSA's provision automatically extending the WSA after the first 10-year term to perpetual annual terms, but requiring an unconditional 5-year notice before the agreement can be terminated is unenforceable; and (4) the WSA does not require the purchase of any definable amount of water during the 5-year notice period.

In the alternative and for purposes of completeness, if the Court were to have found the terms of the MOU and Westlake Ordinance 1989-7 to be unclear or ambiguous in looking only within the four corners of the documents, the Court finds that the circumstances, objectives, and actions of the parties as presented by extrinsic evidence all support a finding that the parties intended for the MOU and Westlake Ordinance 1989-7 to amend the standardized terms of the WSA. *Home Bank, F.S.B.*, 2006-Ohio-5453 at ¶ 17; *St. Elizabeth Med. Ctr.*, 129 Ohio App.3d at 56. In first looking to the circumstances surrounding the execution of the WSA, it is clear that Westlake had not entered into any prior water service agreement with Cleveland because Westlake believed that it did not have authority under its Charter to enter into the standardized terms of the WSA. While many other suburban communities had entered into a standardized water agreement with Cleveland by 1989, Westlake was indeed only one of a handful of suburbs that had not entered into a water agreement with Cleveland for the express reason that Mr. Gareau had advised Mayor Clough that Cleveland's standardized water agreement, as written in Article 5 and Article 23, directly conflicted with Article XI, Section 5 of Westlake's Charter.

In then looking to the parties' intentions in executing the WSA, it is clear that the parties' purpose was to resolve the known and recognized conflicts between the WSA and Westlake's Charter so that the parties could enter into an agreement. The testimony of Mayor Clough establishes that it was at his request that Mr. Gareau negotiate a water service agreement with Cleveland that did not conflict with Westlake's Charter. With such intentions, Mr. Gareau approached Ms. Sundheimer and advised her that Westlake did not have the authority to execute the WSA as written because Article 5 and Article 23 of the standardized water agreement expressly conflicted with Westlake's Charter. Cleveland therefore had direct knowledge at the start that Westlake believed it needed to remove the exclusivity and term length obstacles before

Westlake would enter into the agreement. Not only was Ms. Sundheimer admittedly aware of this fact, she also testified that her intentions in dealing with Westlake were to accomplish what was necessary to get Westlake to enter into the agreement:

> A: The **purpose** was, one of my assignments as an Assistant Director of Law was to engage with the five communities that had not signed the standard water service agreement form to – **with the goal** of having them sign on with all the other communities. And so I approached, I believe there were five of them, and **what will it take for your community to sign? So that was the goal.**
>
> Q: All right. And were you aware of the issues that Westlake had with signing the water service agreement?
>
> A: Well, I believe their law director **made me aware of what their issues were.**
>
> ...
>
> A: As I recall, I believe the issue that Mr. Gareau presented to me that **Westlake had a charter provision [sic] prohibited Westlake from signing this agreement, and that was the subject of our discussion.**

In finally looking to the parties' actions, it is clear that the parties negotiated the terms of the MOU and Westlake Ordinance 1989-7 so that they could remove the obstacles in Article 5 and Article 23 in amending the WSA. With regard to the MOU, Cleveland acknowledged via the testimony of Ms. Sundheimer that the parties engaged in negotiating the MOU as "an accommodation" in order to get Westlake to sign the MOU. With regard to Westlake Ordinance 1989-7, the evidence establishes that Cleveland was presented with a copy Westlake's proposed Ordinance 1989-7 prior to the parties executing the WSA. After receiving the copy of the proposed Ordinance and Article XI, Section 5 of Westlake's Charter, Ms. Sundheimer sent Westlake an original and two duplicate copies of the WSA and specifically stated that Westlake must pass an ordinance and requested that Westlake execute and attach a certified copy of the ordinance to the original copy of the WSA and to the duplicate copies of the WSA.

Based on the extrinsic evidence before the Court, it is clearly apparent that Westlake had legal issues with Cleveland's standardized water agreement that would impede or prohibit the cities from contracting with one another, but that both parties wanted to remove those recognized obstacles so they could enter into the WSA, and the parties took actions accordingly in negotiating the MOU and Westlake Ordinance 1987-9 so that Westlake could enter into the agreement without violating its Charter. Thus, the Court finds that the circumstances surrounding the execution of the WSA, the objectives of the parties in executing the WSA, and the actions of the parties in executing the WSA all indisputably establish that the parties intended for the terms of the MOU and Westlake Ordinance 1989-7 to amend the WSA with regard to Article 5 and Article 23. *St. Elizabeth Med. Ctr.*, 129 Ohio App.3d at 56.

In accordance, the Court finds that this interpretation of the documents, as based on the extrinsic evidence, allows the parties' agreement to be fair and reasonable in giving meaning to the contract and in effecting the parties' intentions. *Erkis*, 2009-Ohio-6478 at ¶ 14. Since it is clear that the parties' purpose and intent in negotiating the MOU and Westlake Ordinance 1989-7 were to remove the known and recognized obstacle between the standardized terms of the WSA and Westlake's Charter, the Court's failure to interpret the MOU and Westlake Ordinance 1989-7 as amending the WSA would result in a failure to give meaning to the parties' intentions. As such, the Court finds that the interpretation advanced above allows for the agreement to be a fair and reasonable one in giving effect to the parties' clear intentions.

While Cleveland semantically argues that the MOU did not amend the WSA, but rather "merely reinforced the parties' understanding" regarding certain parts of the WSA, the Court finds that the MOU served no other functional purpose than to actually amend the WSA because the MOU's specific grant of a non-exclusive right is the direct opposition of Article 5's

standardized grant of an exclusive right. The first sentence of the parties' MOU recognized that Article 5 of the standardized WSA provides Cleveland with an "exclusive" right to provide water. However, in the very next sentence, the parties agreed that "the language of Article 5 of the Contract **is not intended** to grant an exclusive franchise" to Cleveland (emphasis added). As such, the Court finds that the clear negation of the standardized exclusivity right in the second sentence of the MOU can serve no other operational purpose than to amend the WSA.

Furthermore, while Cleveland argues that Westlake Ordinance 1989-7 could not have amended the terms of the parties' WSA because it was a one-sided legislative enactment, the Court finds that Westlake Ordinance 1989-7 still amended the terms because these particular facts establish that Westlake's enactment of Ordinance 1989-7 was essentially recognized by both parties as a pre-condition that had to be satisfied in order for Westlake to enter into the WSA. If one of the parties to a contract is a municipal corporation, "contract formation or execution may only be done in a manner provided for and authorized by law." *Ohio Power Co.,* 2004-Ohio-4994, at ¶ 8. Any person who seeks to enter into a contract with a governmental entity is on "constructive notice of the statutory limitations on the powers of the entity's agent to contract. Since state and local laws are readily available for public review, it is a simple matter for a party to educate itself as to the procedural formalities with which government official must comply before they may bind a government entity to a contract." *Union Stockyards,* 191 Ohio App.3d at 564, quoting *Shampton,* 98 Ohio St. 3d at 461.

Here, the Court finds the evidence demonstrates that both parties had both constructive and actual notice of the conflicts between the WSA and Westlake's Charter. This is amply demonstrated by the testimony of Mayor Clough, Mr. Gareau, and Ms. Sundheimer who all recognized that Westlake believed it had material conflicts between its Charter and the

standardized WSA. Their testimony, as referenced above, makes it clear that the parties' agreed-upon purpose in having Westlake enact Ordinance 1989-7 was to allow Westlake to enter into the WSA so as not to violate its Charter. Of special importance again is the January 26, 1990 letter from Ms. Sundheimer to Mayor Clough that stated that Westlake would have to pass an ordinance in order to authorize Mayor Clough to enter the WSA. The Court thus finds that this declaration, in comportment with the totality of the circumstance surrounding the parties' actions, evidences the fact that Westlake's enactment of the Ordinance 1989-7 was a necessitated prerequisite condition to the parties being able to enter into the WSA.

As a result, the Court finds that Westlake was not only legislating via its enactment of Ordinance 1989-7, but was also satisfying the parties' understood prerequisite that was necessary to amend the standardized terms of the WSA so that Westlake could enter into the WSA with Cleveland without violating its Charter. While Westlake Ordinance 1989-7 was not signed or initialed by Cleveland, the fact that 1) Cleveland was directly advised by Westlake of Westlake's issues with the WSA, that 2) Cleveland was on notice that Westlake would not/could not enter into the WSA without amending certain terms of the WSA, and that 3) Cleveland advised Westlake that it needed to enact the Ordinance before Westlake could enter into the WSA all support a finding that the terms of Westlake Ordinance 1989-7 were clearly negotiated by the parties and that the execution of Ordinance 1989-7 was recognized as a necessary pre-condition. Thus, the Court finds that Westlake Ordinance 1989-7 had both legislative and contractual effects under these particular facts, and so the enactment Westlake Ordinance 1989-7 should be viewed as the satisfaction of the parties' purpose in amending certain terms of the WSA.

After then interpreting the documents in connection with the extrinsic evidence surrounding the execution of the parties' WSA, the Court finds as a matter of law that (1)

Westlake may obtain a secondary source of potable water without violating the WSA; (2) the WSA expired on March 19, 2015, *i.e.*, 25 after its effective date; (3) the WSA's provision automatically extending the WSA after the first 10 year term to perpetual annual terms, but requiring an unconditional 5 year notice before the agreement can be terminated is unenforceable; and (4) the WSA does not require the purchase of any definable amount of water during the 5 year notice period.

II. "Stranded Costs" or "Costs to Cure"

The Court first finds that Cleveland is not entitled to recover "stranded costs" or "costs to cure" from Westlake because there is no provision under the parties' WSA or otherwise that provides for the recovery of "stranded costs" or "costs to cure." After reviewing the plain language of the documents, the Court finds that there is no reference, definition, or calculation providing for "stranded costs" or "costs to cure." In then looking to what the plain language of the documents does provide, the Court finds that Cleveland is still not entitled to recover any such costs via rate increases or otherwise because the Court additionally finds that Westlake did not take steps towards leaving the Cleveland Water System under Article 4 of the WSA and that Westlake never provided Cleveland with a notice of cancellation under Article 23 of the WSA.

While the plain language of Article 4.02(1) of the WSA provides that rates may be increased with regard to a class or customers "who have taken steps towards leaving the Cleveland water system," the Court finds that Cleveland may not increase rates upon Westlake under Article 4 because Westlake did not take steps towards leaving the Cleveland Water System, but rather repeatedly reminded Cleveland of the expiration of the WSA.

As consistent with the Court's earlier finding that the parties amended the WSA to set the term of the agreement for a period of 25 years, the Court has established that the WSA was set to

expire of its own accord on March 19, 2015. The Court therefore finds that the testimony of Mayor Clough in 2006, emphasizing that the WSA expires on March, 19, 2015, the statements made by Mayor Clough in September of 2011, stating that Westlake is leaving the Cleveland Water System, the letter from Mayor Clough in March of 2013, stating that the WSA expired in March of 2015, and the letter from Mayor Clough in May 2013, providing "official notice" to Cleveland that Westlake "cannot and will not continue with the purchase of water from the City of Cleveland after the expiration of the 25 year period" were not progressive actions towards leaving the system, but simply were recurring reminders of the fact that Westlake was not contractually obligated to purchase water from Cleveland after the established termination of the agreement on March 19, 2015. Thus, the Court finds that Cleveland cannot recover under Article 4 of the WSA because Westlake's repeated reiterations of the amended terms of the WSA do not constitute active "steps" towards departing from the Cleveland Water System.

Additionally, while the plain language of Article 23.01 of the WSA provides that "the Director or his designated representative shall have sole control over the terms and conditions of the operation of the water system" in the event that a party terminates the agreement "following notice of cancellation by either party," the Court finds that Cleveland may not increase rates or otherwise upon Westlake under Article 23 because the Court finds that Westlake did not need to provide Cleveland with a notice of cancellation under these facts. As reasoned above, the notice of cancellation provision is inapplicable in this situation because the WSA was already set "to cancel" on March 19, 2015 and because Westlake never expressed a desire to terminate the WSA at any point earlier than upon March 19, 2015. Mayor Clough's March letter and May 2013 "official notice" letter undisputedly do not express any intent to cancel the WSA at a prior date to March 19, 2015, but rather simply reaffirmed the contractual fact that the WSA expired 25 years

following its execution and so Westlake was not contractually bound to purchase water after March 19, 2015. The Court thus finds that Cleveland cannot recover under Article 23 of the WSA because Article 23.01's notice of cancellation provision was never triggered by Westlake under the circumstances of this case.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

In so holding, the Court grants Plaintiff's request for declaratory judgment and the Court hereby declares the following as matters of law: (1) Westlake has the right to obtain a secondary source of potable water without being in breach of the WSA; (2) the WSA is unenforceable beyond 25 years from its effective date, *i.e.*, March 19, 2015; (3) the WSA's provision automatically extending the term of the WSA following the first 10-year term to perpetual annual terms, but requiring an unconditional 5-year notice before the agreement can be terminated is unenforceable; (4) the WSA does not require the purchase of any definable amount of water during the 5-year notice period contained in Article 23 of the WSA; (5) Cleveland may not recover "stranded costs" or "costs to cure" from Westlake or its residents and, as such, (6) Cleveland is permanently enjoined from enforcing Ordinance 1354-13.

IT IS SO ORDERED. FINAL.

JUDGE MICHAEL K. ASTRAB

2/29/16

DATE