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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

NEIGHBORS OPPOSING PIT EXPANSION, INC.	:	
Plaintiff	:	**CASE NO. 2018 CVH 00617**
	:	**Judge McBride**
vs.	:	
DUKE ENERGY OHIO, INC.		**DECISION**
Defendant	:	

AltmanNewman Co. LPA, D. David Altman and Justin D. Newman, 15 East Eighth Street, Cincinnati, Ohio 45202, and Donald C. Moore, Jr., 1060 Nimitzview Drive, Suite 200, Cincinnati, Ohio 45230, counsel for the plaintiff Neighbors Opposing Pit Expansion, Inc.

Frost Brown Todd, LLC, Grant S. Cowan and Kevin N. McMurray, 301 East Fourth Street, Suite 3300, Cincinnati, Ohio 45202, and James E. McLean, Jr., Duke Energy Corporation, 139 E. Fourth Street, Cincinnati, Ohio 45202, counsel for the defendant Duke Energy Ohio, Inc.

This cause is before the court for consideration of a motion to dismiss filed by the defendant Duke Energy Ohio, Inc. on April 24, 2018. The court held a hearing on the motion on May 10th. At the conclusion of the hearing, the court took the motion under advisement.

Upon consideration of the motion, the record before the court, the written and oral arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The present motion concerns the sale of certain property and a settlement agreement between the parties dealing with that property. The plaintiff Neighbors Opposing Pit Expansion, Inc. is a nonprofit corporation.[1] The plaintiff was formed in 1985 in response to the plans of Cincinnati Gas & Electric Company (hereinafter referred to as "CG&E") to purchase property in Pierce Township for the disposal of utility waste.[2] The defendant Duke Energy Ohio, Inc. is CG&E's successor under two settlement agreements the parties entered into.[3]

Although the parties entered into two settlement agreements, only the one entered into on April 20, 2001 (the "Agreement") is relevant to this decision.[4] The Agreement concerns property that had been improperly transferred from CG&E to Oscar Nelp and Marian Nelp in 1998 (the "Nelp Property").[5] Marian Nelp subsequently died in 1999.[6] Oscar Nelp died in 2010, and his interest was transferred to his children.[7] In December 2017, his children transferred their interests in the Nelp Property to only one of the Nelp children, Dorothea Cloke.[8] Cloke is now the sole owner of the Nelp Property.[9]

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[1] Compl., ¶ 2.
[2] Compl., ¶ 6.
[3] Compl., ¶ 6.
[4] Compl., ¶ 4.
[5] Compl., ¶ 25.
[6] Compl., ¶ 25.
[7] Compl., ¶ 25.
[8] Compl., ¶ 25.
[9] Compl., ¶ 25.

Cloke listed the Nope Property for sale on April 17, 2018.[10] Since the time the parties entered into the Agreement, the Nelp Property had not previously been placed on the market.[11] The Agreement provides:

> "WHEREAS, Tri-State Improvement Company, an Ohio Corporation ('Tri-State'), a wholly-owned subsidiary of CG&E transferred certain real estate in Pierce Township to Oscar George Nelp and Marian L. Nelp (the "Nelps") by Deed dated September 15, 1998 recorded in Deed Book 1136, Page 392, Clermont County, Ohio records."[12]

The Agreement further provides:

> "2. CG&E additionally provides to NOPE its good faith pledge to attempt to reacquire the 30.6214 Acres Parcel [Nelp Property] from the Nelps, and/or from the Nelps' estate, if and when the subject real estate may be placed on the market, or attempted to be sold, at some future time, provided that no permanent residences have been erected on the land. * * *"[13]

On April 19, 2018, the plaintiff filed a complaint, alleging a breach of the Agreement and seeking both injunctive relief and declaratory relief. The plaintiff alleges that the defendant has breached the Agreement by failing to reacquire the Nelp Property since it has been placed on the market. The injunctive relief requests a temporary restraining order, preliminary injunction, and permanent injunction enjoining the defendant to acquire the Nelp Property. The request for declaratory relief seeks a declaration that the defendant has a duty under the Agreement to acquire the Nelp Property, to hold it as an unimproved greenbelt, and then to transfer the property to Pierce Township or the plaintiff.

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[10] Compl., ¶ 27.
[11] Compl., ¶ 26.
[12] (Emphasis added.) Pls. Ex. 2 to Compl.
[13] (Emphasis added.) Pls. Ex. 2 to Compl.

The court held a hearing on the motion for a temporary restraining order on April 19, 2018 and issued an order the same day granting in part and denying in part the motion for a temporary restraining order. On April 24th, the defendant filed a motion to dismiss Counts 1, 2, and 4 in the complaint, as they relate to the Nelp Property. The plaintiff filed a response in opposition to the motion to dismiss on May 1st, and the defendant filed a reply in support of the motion on May 4th. The court heard oral arguments on the motion on May 10th, after which time the court took the motion under advisement.

In its motion to dismiss, the defendant argues that the plaintiff's claims that are related to the Nelp Property fail as a matter of law because, under the Agreement, the defendant has no duty to acquire the Nelp Property from Cloke. It posits that the definition of "the Nelps," which is limited to Oscar Nelp and Marian Nelp, does not include the Nelps' children, and that accordingly no duty has arisen under the Agreement. The plaintiff responds that "the Nelps" does include the Nelp children because Marian Nelp was deceased at the time the Agreement was entered into, and therefore to give meaning to the term Nelps, which is plural, the children must be included. The plaintiff further maintains that, because its definition of the Nelps is reasonable, the contract language is ambiguous and the court must use extrinsic evidence to determine the parties' intent. The plaintiff also posits that the term Nelps is latently ambiguous. Finally, the plaintiff argues that the term "Nelps' estate" encompasses the present sale and triggers the defendant's duty to acquire the Nelp Property. The plaintiff argues that the term estate should be construed as including Cloke since she came to hold the deed for the Nelp Property through a transfer on death document.

STANDARD OF REVIEW

The defendant's motion to dismiss is made pursuant to Civ.R. 12(B)(6), which provides that a party may move to dismiss an action on the basis of failure to state a claim upon which relief can be granted.

"A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint."[14] "Thus, the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded * * *."[15] "'The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom.'"[16] "It must appear beyond doubt that the plaintiff can prove no set of facts entitling him to relief."[17]

LEGAL ANALYSIS

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[14] *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11, citing, *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).

[15] *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 11, citing Civ.R. 12(B).

[16] *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 12, quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756 (1988).

[17] | *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 12, citing *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995).

The construction of contracts is a matter of law.[18] The primary purpose of a contract is to effectuate the parties' intent.[19] The court's primary objective when construing a contract is "to ascertain and give effect to the intent of the parties."[20] When confronted with an issue of contract interpretation, a court examines the contract as a whole and presumes that the parties' intent is reflected in the contract's language.[21]

Courts use the "plain and ordinary meaning" of the language in a contract unless a different meaning "is clearly apparent" from the contract.[22] "Common, undefined words appearing in a contract 'will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face of the overall contents' of the agreement."[23] Moreover, a word's intended meaning may become clear by considering the context of the other words or phrases in the contract.[24] If the contract language is clear, then the court is confined to the writing in the contract itself to discern the parties' intent and may look no further than the writing alone.[25]

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[18] *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph one of the syllabus (1978).
[19] *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987).
[20] *Drone Consultants, L.L.C. v. Armstrong*, 12th Dist. Warren Nos. CA2015-11-107, CA2015-11-108, 2016-Ohio-3222, ¶ 14, citing *Baruk v. Heritage Club Homeowners' Assn.*, 12th Dist. Warren No. CA2013-09-086, 2014-Ohio-1585, ¶ 60.
[21] *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 38. *See Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Foundation*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992) (courts presume that the parties' intent resides in the language they chose to employ in the contract).
[22] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 37.
[23] Id. at ¶ 38, quoting *Alexander*, 53 Ohio St.2d at paragraph two of the syllabus.
[24] *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 22, citing *Dayton Outpatient Ctr., Inc. v. OMRI of Pensacola, Inc.*, 2d Dist. Montgomery No. 26169, 2014-Ohio-4105, ¶ 13.
[25] *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, quoting *Cooper v. Chateau Estate Homes, L.L.C.*, 12th Dist. Warren No. CA2012-07-061, 2010-Ohio-5186, ¶ 12. *See Sunoco, Inc. (R & M)*, 2011-Ohio-2720 at ¶ 37, ("When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.").

Furthermore, when interpreting contracts, courts "* * * are required, if possible, to give effect to every provision of the contract."[26] As such, when "* * * one construction of a doubtful condition written in a contract would render a clause meaningless and it is possible that another construction would give that same clause meaning and purpose, then the latter construction must prevail."[27] Further, courts apply the contract construction maxim that "* * * the expression of one or more persons or things implies the exclusion of those not expressed."[28]

"As a matter of law, a contract is unambiguous if it can be given a definite legal meaning."[29] "[T]he mere fact that a term in a contract is undefined does not necessitate a finding of ambiguity."[30] Although Ohio law does not contain any substantive pronouncements about the nature of recital clauses and their import, they are often intended to "shed light on the circumstances the parties wished to have considered in the

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[26] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 54.

[27] (Internal citations omitted.) *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 54, quoting *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 362, 678 N.E.2d 519 (1997).

[28] *Mercer v. 3M Precision Optics, Inc.*, 181 Ohio App.3d 307, 2009-Ohio-930, 908 N.E.2d 1016, ¶ 13 (12th Dist.), citing *Bank One N.A. v. PIC Photo Finish, Inc.*, 2d Dist. Darke No. 1665, 2006-Ohio-5308, ¶ 23. *See Grine v. Payne*, 6th Dist. Wood No. WD-00-044, 2001 WL 279767, *2 (Mar. 23, 2001), citing *Helberg v. Natl. Union Fire Ins. Co.*, 102 Ohio App.3d 679, 683 (6th Dist. 1995) ("[T]he inclusion of a specific thing implies the exclusion of those not mentioned."); *Grodi v. Premier Associates, Ltd.*, 6th Dist. Erie No. E-99-064, 2000 WL 331520, *1 (Mar. 31, 2000) ("[W]hen certain things are specified in a contract, an intention to exclude all others from its operation may be inferred."); *Board of Educ. of the Youngstown City School District v. Youngstown Educ. Assoc.*, 7th Dist. Mahoning No. 82 C.A. 135, 1984 WL 6538, *3 (Feb. 27, 1984) ("It is a maxim of contract law that the expression of one or more things in a contract implies the exclusion of all not expressed.")

[29] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 37, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

[30] *Collins v. Auto-Owners Insurance Company*, 2017-Ohio-880, 80 N.E.3d 542, ¶ 17, citing *Moccabee v. Progressive Ins. Co.*, 6th Dist. Hurn No. L-98-1069, 1998 WL 700670, *3 (Oct. 9, 1998). *See Fahlnush v. Crum-Jones*, 176 Ohio App.3d 328, 2008-Ohio-1953, 891 N.E.2d 1242, ¶ 16 (1st Dist.) (Internal citations omitted.) (noting the failure to define a term in a contract does not "automatically render" it ambiguous, as long as an "ordinary meaning of the term exists.").

main body of the contract."[31] Moreover, "[i]ntentions not expressed in writing are deemed to have no existence and may not be shown by parol evidence."[32]

In contrast, a "contract is ambiguous if its provisions are susceptible to two or more reasonable interpretations."[33] "The court's construction of a contract should attempt to harmonize all of the provisions of the document rather than to produce conflict in them."[34] "A contract does not become ambiguous because its operation may work a hardship upon one party."[35] Courts have been cautioned that "[o]nly when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling."[36]

As such, when a contract's terms are plain and unambiguous, the court cannot give the contract a meaning different from the meaning in its plain language in order to avoid an inequitable result.[37] Accordingly, the court "* * * cannot formulate a new contract for the parties."[38] Conversely, if the court finds that a contract is ambiguous, "* * * it must decide the meaning of the terms in the contract."[39] Whether a contract contains

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[31] *Fox v. Fox*, 10th Dist. Franklin No. 01AP-83, 2002 WL 722804, *8 (April 25, 2002), citing Fransworth Contracts (1982) 495, Section 7.10.
[32] *Kappes v. Village of Moscow*, 12th Dist. Clermont No. CA97-09-078, 1998 WL 221253, *4 (May 4, 1998), citing *Aultman Hosp. v. Community Mut. Ins.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989).
[33] *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, citing *Cooper*, 2010-Ohio-5186 at ¶ 12.
[34] *Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Foundation, L.L.C.*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Farmers Natl. Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 337, 94 N.E. 834 (1911).
[35] *Board of Trustees of Union Tp. v. Planned Development Co. of Ohio*, 12th Dist. Butler No. CA2000-06-109, 2000 WL 1818540, *3 (Dec. 11, 2000), citing *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 172 (1924). *See Foster Wheeler Enviresponse, Inc.*, 78 Ohio St.3d at362 (holding same.)
[36] *Gates v. Ohio Sav. Assn.*, 11th Dist. Geauga No. 2009-G-2881, 2009-Ohio-6230, ¶ 23, quoting *State v. Portfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 24.
[37] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 62, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 54-55, 544 N.E.2d 920 (1989).
[38] *Board of Trustees of Union Tp.*, 2000 WL 1818540 at *3.
[39] *Pierce Point Cinema 10, L.L.C.*, 2012-Ohio-5008 at ¶ 10, citing *Walter v. Agoston*, 12th Dist. No. CA2003-03-039, 2004-Ohio-2488, ¶ 12.

ambiguous terms is a legal question for the court to resolve.[40] However, the issue of what an ambiguous contract term means is a question of fact.[41]

By way of contrast, when a contract's language is unclear or ambiguous, extrinsic evidence may be considered to give effect to the contracting parties' intentions.[42] Even so, the "* * * extrinsic evidence is admissible in order to interpret, but not contradict, the terms of the contract."[43] The extrinsic evidence considered 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."[44]

Extrinsic evidence may also be presented when a latent ambiguity arises. "A latent ambiguity is a defect which does not appear on the face of language used or an instrument being considered."[45] Instead, a latent ambiguity "* * * arises when language is clear and intelligible and suggests but a single meaning, but some intrinsic fact or some

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[40] *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, citing *O'Bannon Meadows Homeowners Assn., Inc. v. O'Bannon Properties, L.L.C.*, 12th Dist. Clermont No. CA2012-10-073, 2013-Ohio-2395, ¶ 20.

[41] *Pierce Point Cinema 10, L.L.C.*, 2012-Ohio-5008 at ¶ 10, citing *Walter*, 2004-Ohio-2488 at ¶ 12. *See Matheny v. Matheny*, 9th Dist. Wayne No. 12CA0046, 2013-Ohio-2946, ¶ 11, quoting *Maverick Oil & Gas, Inc. v. Barberton City School Dist. Bd. of Edn.*, 171 Ohio App.3d 605, 2007-Ohio-1682, ¶ 19 (9th Dist.) ("Although the contract interpretation is normally a question of law, it becomes a question of fact when an ambiguous term necessitates the introduction of extrinsic evidence to interpret the contract.").

[42] *Lutz v. Chesapeake Appalachia, L.L.C.*, 148 Ohio St.3d 524, 2016-Ohio-7549, 71 N.E.3d 1010, ¶ 9, citing *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313-314, 667 N.E.2d 949 (1996). *See Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 67, citing *Shifrin*, 64 Ohio St.3d at 638 (holding same); *Kelly*, 31 Ohio St.3d at 132, citing *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393 (1925), paragraph two of the syllabus.

[43] *Pierce Point Cinema 10, L.L.C.*, 2012-Ohio-5008 at ¶ 12, citing *Pharmacia Hepar, Inc. v. Franklin*, 111 Ohio App.3d 468, 475, 676 N.E.2d 587 (12th Dist. 1996).

[44] *Lutz*, 2016-Ohio-7549 at ¶ 9, quoting *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*, 129 Ohio App.3d 45, 56, 716 N.E.2d 1201 (3d Dist. 1998).

[45] *Violante v. Village of Brady Lake*, 11th Dist. Portage No. 2012-P-0054, 2012-Ohio-6220, ¶ 48, quoting *Conkle v. Conkle*, 31 Ohio App.2d 44, 51, 285 N.E.2d 883 (5th Dist. 1972).

extraneous evidence creates a necessity between two or more possible meanings, as where the words apply equally well to two or more different subjects or things."[46] "Where a latent ambiguity exits, extrinsic evidence may be offered to determine the intended meaning of the parties."[47]

In turning to the case at bar, the court finds that the Agreement is clear and unambiguous, and that the term "Nelps" does not include the Nelp children. As quoted above, the Agreement defines the term Nelps as including only George Nelp and Marian L. Nelp: "Oscar George Nelp and Marian L. Nelp (the "Nelps").[48] As a defined term, there can only be one meaning for the term Nelps, which is that the Nelps includes only two people, George Nelp and Marian Nelp. It would have been easy for the parties to include the names of the Nelp children or to state, "Oscar Nelp, Marian L. Nelp, and their children (the 'Nelps')," but they did not. Because the children have not been included in the list, it is implied that they have been excluded from it.[49]

The plaintiff argues that this definition is inapplicable to later operative provisions, which give rise to the defendant's duty to purchase the Nelp Property, because the definition is found in the recitals. However, as discussed above, there is no Ohio law stating that a definition placed in a recital is inapplicable throughout the remainder of the contract. Indeed, many terms are defined in the recitals of the Agreement, which are then applied throughout the remainder of the Agreement, such as Neighbors Opposing Pit Expansion, Inc. ("NOPE"), the real estate conveyed to the Nelps consisting of a 30.6214

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[46] *Violante*, 2012-Ohio-6220 at ¶ 48, quoting *Conkle*, 31 Ohio App.2d at 51.
[47] *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.*, 113 Ohio App.3d 75, 84, 680 N.E.2d 240 (2d Dist. 1996).
[48] Pls. Ex. 2 to Compl.
[49] *See Mercer v. 3M Precision Optics, Inc.* 2009-Ohio-930 at ¶ 13, citing *bank One N.A.*, 2006-Ohio-5308 at ¶ 23.

acres parcel ("30.6214 Acres Parcel"), and the Cincinnati Gas & Electric Company ("CG&E"), among others.[50]

The plaintiff also argues that, if the term Nelps is limited to only Marian Nelp and George Nelp, then its pluralized form is rendered meaningless because Marian Nelp died before the parties entered into the Agreement. Thus, under the plaintiff's argument, the term Nelps in the operative provision should be read to mean Oscar Nelp and his children so that the term Nelps can be given its full meaning. As discussed, a latent ambiguity arises, not from the clear language of the contract, but from some extraneous fact that gives rise to two or more possible meanings.

The plaintiff is correct that courts should, when possible, give effect to all terms and provisions in a contract.[51] However, although Marian Nelp died prior to the parties entering into the Agreement, the term Nelps, in its plural form, still has meaning in the Agreement. The term Nelps is first introduced when discussing Oscar Nelp and Marian Nelp purchasing the Nelp Property, while Marian Nelp was alive, and the term is used three times in that fashion. In other words, even when considering the extrinsic fact that Marian Nelp was deceased as of 2001, the plural version of the Nelps still has meaning, without construing the term as including the Nelp children, because the term Nelps refers several times to actions undertaken by both Oscar Nelp and Marian Nelp.

The term Nelps has a definite meaning, that being Oscar Nelp and Marian Nelp. Because the term Nelps is clear and unambiguous, the court must apply it as written. The court finds that the Nelps, as used in Paragraph Two of the Agreement, does not include the Nelp children. As quoted, Paragraph 2 of the Agreement provides:

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[50] Pls. Ex. 2 to Compl.
[51] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 54.

> "2. CG&E additionally provides to NOPE its good faith pledge to attempt to reacquire the 30.6214 Acres Parcel [Nelp Property] from the Nelps, and/or from the Nelps' estate, if and when the subject real estate may be placed on the market, or attempted to be sold, at some future time, provided that no permanent residences have been erected on the land. * * *"[52]

Because the term Nelps is unambiguous and the parties' intent is clear from the language used, the court cannot use extrinsic evidence to further construe that language.

The plaintiff also argues that the term "Nelps' estate," in Paragraph 2, encompasses the Nelps' children. The phrase in Paragraph 2, the operative provision regarding acquisition, reads: "from the Nelps, and/or from the Nelps' estate."[53] The term "Nelps' estate" is not defined in the Agreement, however, that does not necessarily render it ambiguous. Courts apply the plain and ordinary meaning of a word in such cases. Merriam-Webster defines an estate as "the assets and liabilities left by a person at death."[54] As the defendant argues, the plain and ordinary meaning of estate does not include people, such as the Nelp children.

Moreover, it would have been easy for the parties to add the Nelps' children to Paragraph 2 of the Agreement so that it would read: "from the Nelps, from the Nelps' estate, and/or from the Nelps' children." However, the parties declined to include this language in the Agreement, and it is not the place of the court to rewrite the Agreement, even though it may place a hardship on the plaintiff.

As such, the court finds that the defendant only has a duty to reacquire the Nelp Property under Paragraph 2 of the Agreement when the Nelp Property is placed on the

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[52] (Emphasis added.) Pls. Ex. 2 to Compl.
[53] Pls. Ex. 2 to Compl.
[54] *Merriam Webster Dictionary*, https://www.merriam-webster.com/dictionary/estate (accessed May 16, 2018).

market by either the Nelps, both of whom are deceased, and/or their estate. Because Cloke is neither included in the definition of the Nelps nor included in the definition of the Nelps' estate, the defendant has no duty to reacquire the Nelp Property from Cloke now that she has placed it on the market.

Accordingly, dismissal is appropriate on the plaintiff's claims that are predicated upon the Agreement. Therefore, the defendant's motion to dismiss should be granted on Count 1 (breach of the 2001 Agreement), Count 2 (injunctive relief), and Count 4 (declaratory relief), as Count 4 relates to requesting a declaratory judgment based upon the plaintiff's rights in the 2001 Agreement, specifically Paragraph 51 of the Complaint.

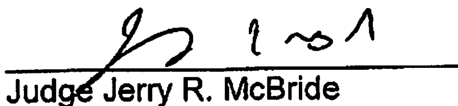
CONCLUSION

For the aforementioned reasons, the court finds the defendant Duke Energy Ohio, Inc.'s motion to dismiss is well-taken and is hereby granted.

Counsel shall conference by telephone and call Rosemary at 513-732-7108 within five days of the date of this Entry in order to schedule a hearing on. the plaintiff's application for preliminary injunction/case management conference.

IT IS SO ORDERED.

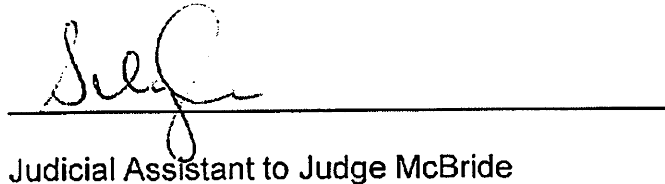
DATED: 5-18-18



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry were sent on this 18th day of May 2018 by e-mail to Justin D. Newman, at jnewman@environlaw.com, D. David Altman, at daltman@environlaw.com, and Donald C. Moore, Jr., at dmoore@moorelaw.com, Attorneys for the Plaintiff, and to Grant S. Cowan, at gcowan@fbtlaw.com, Kevin N. McMurray, at kmcmurray@fbtlaw.com, and James E. McLean, Jr., at james.mclean@duke-energy.com, Attorneys for the Defendant Duke Energy Ohio, Inc.



Judicial Assistant to Judge McBride