[Cite as *Capital City Community Urban Redevelopment Corp. v. Columbus*, 2009-Ohio-6835.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Capital City Community Urban Redevelopment Corporation et al.,	:	
Plaintiffs-Appellants,	:	No. 08AP-769
	:	(C.P.C. No. 05CVH09-9829)
v.	:	(REGULAR CALENDAR)
City of Columbus et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 24, 2009

Milligan Law Offices, and *Fred J. Milligan*, for appellants Capital City Community Urban Redevelopment Corporation and Charles L. Adrian.

Richard C. Pfeiffer, Jr., City Attorney, and *Paula J. Lloyd*, for appellee City of Columbus.

Dinsmore & Shohl LLP, Michael W. Hawkins, Kelly L. Kauffman, and *Adam R. Todd*, for appellee Columbus Urban Growth Corporation.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Capital City Community Urban Redevelopment Corporation (individually "Capital City") and Charles L. Adrian (individually "Adrian"), plaintiffs-appellants (sometimes referred to collectively as "appellants"), appeal the judgment of the Franklin County Court of Common Pleas, in which the court entered judgment in favor of Columbus Urban Growth Corporation ("CUG") and the City of Columbus ("city"), defendants-appellees, on all counts of appellants' fourth amended complaint. CUG has filed a cross-assignment of error.

{¶2} Lincoln Theater ("the theater") is a building located in Columbus, Ohio. CUG is a not-for-profit corporation created at the direction of the city, with the city controlling, either directly or indirectly, many of CUG's activities. Capital City is a not-for-profit corporation that purchased the theater in 1991, in order to save it from demolition. Adrian is the president of Capital City. On September 17, 2002, Capital City and CUG entered into a real estate sale and purchase agreement ("purchase agreement" or "agreement") concerning the theater. The purchase agreement contained two terms that are at issue in the current case. In paragraph 9(a) of the purchase agreement, CUG, as the buyer, agreed to provide Saturday movies for children for $1 or less for a double feature once the theater was operational and for as long as feasible. Paragraph 9(b) of the purchase agreement provided that a bronze plaque consistent with the façade of the property was to be permanently installed and maintained on the front of the property. Paragraph 9(b) also provided that Adrian may select the size, text, and location of the plaque.

{¶3} On May 7, 2003, Capital City transferred ownership of the theater to CUG by general warranty deed. The general warranty deed contained language that it was

subject to, among other things, paragraph 9 of the real estate purchase agreement between the parties, which was incorporated by reference. In March 2004, CUG affixed a bronze plaque to the front of the theater.

{¶4} On April 22, 2004, CUG transferred ownership of the theater to the city by limited warranty deed. The limited warranty deed provided that the conveyance was made subject to, among other things, easements, conditions, and restrictions of record. After the city acquired title to the theater, the plaque was removed. The city claimed it did not know what happened to the plaque in interrogatories propounded upon it. The chief of staff for the city's mayor, Boyce Safford, also denied in his deposition that he knew what had happened to the plaque. The city eventually filed a notice of correction of record disclosing that the city authorized the removal of the plaque, as well as supplemental responses to appellants' interrogatories, in which the city indicated that Safford authorized the removal of the plaque. In a subsequent deposition, Safford admitted that he had ordered the removal of the plaque at the mayor's direction. In July 2005, after asking the city if it objected to his hanging another plaque and receiving no reply, Adrian had another plaque affixed to the theater, which the city also later removed.

{¶5} On September 7, 2005, appellants filed a complaint against the city and CUG with regard to only paragraph 9(b) of the agreement. On June 14, 2006, the city and CUG filed motions for summary judgment, and appellants moved for partial summary judgment. On October 20, 2006, the trial court issued a decision denying appellants' motion for partial summary judgment and granting the city's motion for summary judgment as to all claims except for whether paragraph 9(b) ran with the land. The court also found that the city had the right to make the decision as to the text, size, and location of the

plaque. The trial court also granted CUG's motion for summary judgment as to appellants' breach of contract claim and denied it as to the fraud claim.

{¶6} On July 19, 2007, appellants filed a fourth amended complaint against the city and CUG, in which appellants sought: (1) a declaratory judgment on Count 1 that both paragraphs 9(a) and (b) of the agreement were binding upon both the city and CUG; (2) judgment for specific performance on Count 2 against the city requiring the city to comply with paragraphs 9(a) and (b) of the agreement by erecting a plaque and providing movies to children on Saturdays for $1; (3) judgment on Count 3 enjoining the city from violating paragraphs 9(a) and (b) by interfering with appellants' right to erect and maintain a plaque on the theater and requiring the city to provide the children's movies; (4) judgment on Count 4 enjoining the city from interfering with the right and easement reserved by appellants to erect and maintain a plaque on the theater; (5) judgment against the city on Counts 5 and 6 for specific performance requiring the city to erect the plaque and provide children's movies; (6) if the foregoing equitable relief is not granted, for a judgment of rescission ordering the city to convey the theater to appellants upon payment by appellants to the city the price paid by CUG to appellants; (7) if the foregoing equitable relief is not granted, judgment for damages for breach of contract against CUG and the city; and (8) judgment for damages against CUG and the city for fraud. On July 26, 2007, the city filed a motion for summary judgment. On August 8, 2007, appellants filed a motion for summary judgment.

{¶7} On September 5, 2007, the trial court granted the city's motion for summary judgment, dismissing all of appellants' claims against the city, and denying appellants' motion for summary judgment.

{¶8} On September 20, 2007, CUG filed another motion for summary judgment, and appellants filed a motion for partial summary judgment against CUG on October 4, 2007. On November 23, 2007, the trial court granted CUG's motion as to all claims except the fraud claim and denied appellants' motion.

{¶9} A bench trial was scheduled for July 28, 2008, with regard to the only remaining claim, appellants' claim of fraud against CUG. Before opening statements, CUG filed a motion for directed verdict. The trial court granted CUG's motion.

{¶10} On August 11, 2008, the trial court issued a final judgment in the action, dismissing all of appellants' claims and entering judgment in favor of the city and CUG. Appellants appeal the judgment of the trial court, asserting the following three assignments of error:

> 1. The trial court erred in granting the City's motions for summary judgment and overruling plaintiffs' motion for summary judgment and in holding that the City had sole discretion to determine text, location and size of plaque.
>
> 2. The trial court erred in granting Urban Growth's motions for summary judgment as to all claims but claim for fraud and in overruling plaintiffs' motion for summary judgment.
>
> 3. The trial court erred in granting Urban Growth's motion for directed verdict on the fraud claim.

{¶11} In their first assignment of error, appellants argue the trial court erred when it granted the city's motion for summary judgment and denied their motion for summary judgment and in holding that the city had sole discretion to determine text, location, and size of plaque. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408. Civ.R. 56(C) provides that, before summary

judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks*.

{¶12} Appellants first argue that paragraphs 9(a) and (b) are real covenants that run with the land, thereby binding the city as successor in title to Capital City and CUG. The determination of whether a covenant runs with the land depends on whether the covenant is real or personal. *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta*, 7th Dist. No. 01 CA 60, 2002-Ohio-1540. A real covenant runs with the land; a personal covenant usually does not run with the land. A real covenant is related to the realty, having for its object something annexed to, inherent in, or connected with the land. Id. A covenant is determined to run with the land when the liability to perform it or the right to take advantage of it passes to the assignee of the land. Id., citing 35 Ohio Jurisprudence 3d (1982) 341, Deeds, Section 110. The common-law test of a covenant running with the land requires that its performance or non-performance must affect the nature, quality, value, or mode of enjoyment of the estate demised to which it must relate. *Peto v. Korach* (1969), 17 Ohio App.2d 20, 22-23. Conversely, a personal covenant does not run with the land, and is for the personal use and enjoyment of the land solely by the original parties to the covenant. Id.

{¶13} When determining whether a covenant runs with the land, three factors must be met: (1) intent for the restrictive covenant to run with the land; (2) the restrictive covenant touches and concerns the land; and (3) privity of contract exists. *LuMac Dev. Corp. v. Buck Point Ltd. Partnership* (1988), 61 Ohio App.3d 558, 562. Touching or concerning the land is a determination of whether the property was made more useful or valuable by the covenant. Id. Whether a covenant so inheres in the land as to give a right and create an obligation in the case of assignees, a court must look to the intent of the parties creating the estate. *Lone Star Steakhouse* citing *Peto* at 23, citing *Masury v. Southworth* (1859), 9 Ohio St. 340, 348. Proof of intent for a covenant to run with the land can be determined from the language of the deed read as a whole. Id. at ¶19. It is well-settled that a covenant may run with the land even where the original covenant does not use the words "heirs," "assigns" or "successors." *Masury* at 351-52; *Johnson v. Am. Gas Co.* (1917), 8 Ohio App. 124, paragraph one of the syllabus. Further, a personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. *Counts v. Baltimore and Ohio R.R. Co.* (1961), 177 N.E.2d 606, 609. The covenant is not binding on a successor merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform. Id.

{¶14} Paragraphs 9(a) and (b) of the purchase agreement provided:

> 9. **Buyer's Representations and Warranties.** Buyer hereby makes the following representations and warranties for the benefit of Seller and Seller's successors and assigns, which are true as of the date of this Agreement (except as otherwise hereinafter provided), which shall be true as of the Closing and which shall survive the Closing.

> (a) The Buyer agrees to provide Saturday movies for children once the theater is operational, and for as long as feasible. The cost is to be $1.00 or less for a double feature.
>
> (b) A bronze plaque is to be permanently installed and maintained, on the front of the Property. The size, text, and location of plaque on the building may be selected by Charles L. Adrian and will be architecturally consistent with the Long Street façade of the Property.

{¶15} With regard to paragraph 9(a), appellant contends the terms therein are covenants running with the land that bind the city as successor in title. Because we find all three factors necessary for a covenant to run with the land are present here, we agree. There is no genuine issue of material fact that the intent was for the showing of $1 Saturday movies to run with the land. One need look no further for proof of intent for the movies covenant to run with the land than the specific language of the agreement chosen by appellants and CUG. Paragraph 9(a) provides that the Saturday movies are to be shown "once the theater is operational[.]" It was patent to the parties to the purchase agreement that the theater would not be operational until far into the future, after the city took over ownership of the theater and committed funds to its full rehabilitation. Furthermore, the movies were to be shown "for as long as feasible." Again, this language employed by appellants and CUG clearly demonstrates their intent that the movies would be required to be shown by the party who eventually owned and operated the property, and appellants and CUG both knew that the theater was to be transferred to the city. These terms requiring compliance into the future show the parties intended to bind future owners, specifically, the city. The record before us is replete with documents demonstrating appellants, CUG, and the city all planned, knew of, and acquiesced in the

city's eventual purchase of the theater from CUG. Therefore, we find there existed the necessary intent for the restrictive covenant to run with the land.

{¶16} With regard to whether the covenant touches and concerns the land, we find there is no genuine issue of material fact that the covenant requiring the showing of $1 Saturday movies touches and concerns the land. Importantly, the showing of Saturday movies for children directly relates to the ongoing operation of the theater. The Saturday children's movies are deeply intertwined with how the theater may be used on Saturdays and affects many areas of the business, including maintenance, scheduling, income, purchasing, advertising, and marketing. The property is also made more useful by tremendously increasing the theater's usage by children, as well as their parents, during the Saturday movie times. By becoming a gathering place for children, the theater will also increase the goodwill between it and the nearby neighborhoods, citizens, and the surrounding area. These benefits inure to the theater and city, not to appellants personally. Furthermore, restrictions on the use of land can also constitute "touching" and "concerning" the land. See *Meisse v. Family Recreation Club, Inc.* (Feb. 20, 1998), 2d Dist. No. 97-CA-54. Here, in addition to benefits, the showing of $1 Saturday children's movies are a restriction that limits the use of the land, thereby touching and concerning the land.

{¶17} We also note that the trial court commented that the covenant in paragraph 9(a) could not run with the land because it was ambiguous. The court wondered whether "Saturday movies" meant every Saturday, and questioned what "for as long as feasible" meant. However, we find no ambiguity, and any ambiguity that might exist is for future concern. "Saturday movies" means precisely what it says: $1 children's movies must be

shown on Saturdays. With regard to the phrase "for as long as feasible," the definition of this phrase is for interpretation by the city. If any party disagrees with the city's definition at some point in the future, appropriate action may be taken to determine the definition of this phrase. We find the terms used in the agreement do not, in and of themselves, render the agreement void for ambiguity.

{¶18} The third requirement for a covenant to run with the land is privity of contract. Privity is a succession of interest or relationship. *Metalworking Mach. Co., Inc. v. Fabco, Inc.* (1984), 17 Ohio App.3d 91, syllabus. One is in privity with another if he/she succeeds to an estate or an interest formerly held by the other. Id. at 92. Here, appellants transferred title to CUG, which then transferred the property to the city by deed, fulfilling the privity requirement. The deed between CUG and the city also specifically stated that title in the theater was being conveyed "subject to" "easements, conditions and restrictions of record." There is no dispute that the deed between appellants and CUG was one of record and explicitly indicated that the provisions of paragraph 9 of the purchase agreement between the parties were incorporated therein by reference. Therefore, the requirement of privity is fulfilled.

{¶19} In addition to the above three requirements being met, when a person or corporation is seeking to enjoin the other person from violating a restrictive covenant, a notice requirement is added. *Schurenberg v. Butler Cty. Bd. of Elections* (1992), 78 Ohio App.3d 773, 777. The evidence submitted by the parties here demonstrates conclusively that the city took ownership of the theater with actual notice of the prior instrument containing the restriction in paragraph 9(a). To cite a few examples of the city's knowledge of the provisions, Ellen Barney, vice-president of CUG, and David Baker,

president of CUG, both testified in depositions that the city was aware of and had read the agreement between CUG and appellants. Baker testified that he had specific conversations with city officials regarding the provisions in paragraph 9, and they were fully aware he had agreed to the obligations therein. In addition, appellants' counsel attached to his affidavit in support of appellants' motion for summary judgment an e-mail from John Klein, chief of the real estate division of the city attorney's office, to Donna Hunter, the administrator of the office of land management for the city, in which Klein wrote, "Are you aware that the contract provides as a binding condition that the buyer provide Saturday movies for children at $1.00 or less for a double feature once the theater is open?" Appellees never objected to the authenticity of this document in the court below, thereby waiving the issue. See *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App.3d 78, 83 (failure to move to strike or otherwise object to documentary evidence submitted by a party in support of, or in opposition to, a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C)). Further, Safford testified in his deposition that he had been aware of the provisions of paragraph 9 when he previously worked for CUG and was still aware of them when he was later working on purchasing the theater from CUG for the city. Therefore, the city had actual notice of the restriction concerning Saturday children's movies. Accordingly, we find paragraph 9(a) of the agreement was a covenant running with the land by which the city was bound.

{¶20} With regard to Paragraph 9(b), that provision required a bronze plaque to be permanently installed and maintained on the front of the theater property, and indicated the size, text, and location of the plaque on the building may be selected by

Adrian. Appellants contend paragraph 9(b) is also a covenant running with the land that binds the city as successor in title. Because, as with paragraph 9(a), we find all three factors necessary for a covenant to run with the land to be present, we agree with appellants. We find no genuine issue of material fact that the intent was for the requirement for a bronze plaque to run with the land. As with the requirements under paragraph 9(a), the court need look no further for proof of intent for the bronze plaque requirement to run with the land than the specific language of the agreement employed by appellants and CUG. Paragraph 9(b) provides that the bronze plaque was to be "permanently installed and maintained" on the front of the theater property. Again, it was well known to the parties to the purchase agreement that the theater was going to be sold to the city in order to make it operational. Appellants and CUG both knew the theater would not be operational until the city acquired it, and it is incredulous to consider that appellant and CUG desired the plaque to be maintained only during the period it was being rehabilitated. By employing the word "permanently," we find appellants and CUG clearly evinced their intent to have the bronze plaque remain affixed to the property after the city acquired it.

{¶21} With regard to whether the covenant touches and concerns the land, we find there is no genuine issue of material fact that the covenant requiring the permanent installation and maintenance of the bronze plaque touches and concerns the land. Initially, that the plaque was to be physically affixed to the property and was to become a structural component of the building comports with the meaning of touching and concerning the land. Furthermore, the plaque placed both benefits and burdens on the land. It benefited the theater by informing visitors of the history of the theater and who

played a key role in its rescue, which would likely be of value to and a common question among theater patrons. In addition, the plaque also carries with it some burdens, as the monies for installation, maintenance, and possible replacement must be provided by the purchaser. For these reasons, we find the plaque covenant touches and concerns the land.

{¶22} The third requirement for a covenant to run with the land is privity of contract. Here, as explained above with regard to our discussion of paragraph 9(a), appellants transferred title to CUG, which then transferred the property to the city by deed, fulfilling the privity requirement. The deed between CUG and the city also specifically stated that title in the theater was being conveyed "subject to" "easements, conditions and restrictions of record." Therefore, the requirement of privity is fulfilled.

{¶23} In addition to the above three requirements, the city took ownership of the theater with actual notice of the prior instrument containing the restriction in paragraph 9(b). In the same e-mail from Klein to Hunter as referenced above, Klein stated: "Are you aware that the contract provides as a binding condition that * * * a bronze plaque be placed in front of the building of Adrian's cho[o]sing? What is it going to say?" Also as mentioned above, the chief of staff for the mayor, Safford, learned of the provisions in paragraph 9 while employed by CUG prior to his employment with the city. Barney and Baker also testified the city was fully aware of the obligations in paragraph 9 prior to the transaction between CUG and appellants. Therefore, the city had actual notice of the restriction concerning the bronze plaque. Accordingly, we find paragraph 9(b) of the agreement was a covenant running with the land by which the city was bound.

{¶24} Appellants next argue in their first assignment of error that the trial court erred when it granted summary judgment to the city on appellants' claim in Count 2 of their fourth amended complaint that the city was bound by the purchase agreement made by its agent, instrumentality, and partner CUG for its benefit. However, as we have already found that the city was bound by the purchase agreement because the covenants in paragraphs 9(a) and (b) ran with the land, this issue is moot.

{¶25} Appellants next argue that the trial court erred when it found R.C. 2744.02 grants the city immunity from a fraud claim, as appellants alleged under Count 8 in their fourth amended complaint. Although appellants concede that the statute precludes a claim for damages against the city for fraud, appellants contend the immunity provisions in R.C. 2744 do not apply to actions seeking equitable relief. We agree with the trial court and appellants that R.C. 2744 precludes a claim for damages against the city for the tort of fraud. See *Big Springs Golf Club v. Donofrio* (1991), 74 Ohio App.3d 1, 2 (holding that, by its very language and title, R.C. 2744 applies to tort actions for damages). We also agree with appellants that R.C. 2744 does not apply in actions for equitable relief. See id. However, a review of appellants' cause of action under Count 8 of their fourth amended complaint, as well as their prayer for damages, reveals that appellants requested only compensatory and punitive damages and not equitable relief for their claim of fraud in Count 8. Therefore, we find the trial court did not err when it granted summary judgment to the city on appellants' first assignment of error.

{¶26} Appellants next argue under their first assignment of error that the trial court erred when it held that the wording of paragraph 9(b) of the purchase agreement gave the

city the right to decide the location, size, and text of the plaque. Paragraph 9(b) provides, in pertinent part:

> The size, text, and location of plaque on the building may be selected by Charles L. Adrian and will be architecturally consistent with the Long Street façade of the Property.

{¶27} In the October 20, 2006 decision, the court held:

> Upon further examination of section 9(b), this Court has determined that the Plaintiffs do not have authority to decide the text of the bronze plaque that must be affixed to the front of the Lincoln Theatre.
>
> Based on the plain language of the contract, a bronze plaque must be affixed to the front of the theatre; however, the text of this plaque is at the sole discretion of Columbus. There is no language in the Agreement that states that Plaintiffs have any authority to decide the text of the plaque. Mr. Adrian **may** select the text, location, and size, but Columbus does not have to comply with Mr. Adrian's wishes.

(Emphasis sic.)

{¶28} A court's interpretation of a contract is solely to ascertain and effectuate the intent of the parties. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 1996-Ohio-393. The intent of the parties is presumed to reside in the language they chose to use in their agreement. Id. Common, undefined words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or some other meaning is clearly evidenced from the face or overall contents of the instrument. *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559, 2004-Ohio-7102, ¶23, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus. Where a contract's terms are clear and unambiguous, the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations; instead,

the court must give effect to the agreement's express terms. *Uebelacker v. Cincom Sys., Inc.* (1988), 48 Ohio App.3d 268, 271.

{¶29} Here, the trial court seemed to rely upon the word "may" to find that Adrian did not have authority to choose the text, size, and location of the plaque. The term "may" is generally construed as being permissive and not mandatory. See *Columbus Countywide Dev. Corp. v. Junior Village of Dublin, Inc.*, 10th Dist. No. 03AP-73, 2003-Ohio-5447, ¶21. Another court has stated the definition of "may" is "has discretion to." *Mays v. Cincinnati*, 1st Dist. No. C-080827, 2009-Ohio-2885, fn. 5, citing Garner, Dictionary of Modern Legal Usage (1985), 552.

{¶30} In the present case, the trial court apparently read "may" as "may suggest," and took the view that "may" refers to who has the ultimate authority to choose the text, size, and location of the plaque. However, the context in which the word was used does not support the trial court's reading on either count. Instead, "may" is unmodified by "suggest" and grants explicit permission to Adrian to select the text, size, and location of the plaque. The word "may" refers not to who has the authority to make the relevant choices, but to Adrian's option to exercise his discretion to make such choices if he so chooses. To adopt the trial court's rationale would render the provision meaningless. When interpreting a contract, we will presume that words are used for a specific purpose and will avoid interpretations that render portions meaningless or unnecessary. See *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶50, citing *Farmers' Natl. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, paragraph six of the syllabus. The trial court's interpretation would eviscerate the ostensible power granted to Adrian by making Adrian's choices subject to arbitrary rejection by CUG (or the city). It is not logical that appellants

would agree to a provision that Adrian merely has the power to suggest the text, size, and location of the plaque, while granting CUG (or the city) the power to completely ignore his wishes. Furthermore, the trial court's finding that the city has the sole discretion to select the size, text, and location of the plaque is wholly unsupported by any language in the agreement. The agreement makes no mention of the city's (or CUG's) authority to veto Adrian's choices. If the original contracting parties had meant that Adrian may merely suggest the text, size, and location of the plaque, while CUG (or the city) had the final say in these determinations, they could have easily and specifically so stated. To imply such into the agreement would be to add words, language, and context to paragraph 9(b) that are not present. For these reasons, we find the trial court erred when it found that paragraph 9(b) gave the city authority to choose the text, size, and location of the plaque. For these reasons, appellants' first assignment of error is sustained in part and overruled in part.

{¶31} Appellants argue in their second assignment of error that the trial court erred when it granted CUG's motions for summary judgment as to all claims but the claim for fraud, and in denying their motion for summary judgment. Specifically, appellants first assert that the trial court erred when it found CUG's contractual obligation to perform under paragraphs 9(a) and (b) of the agreement terminated when it transferred ownership to the city. We disagree. Initially, the plain language of paragraph 9 fails to indicate any ongoing obligation on the part of CUG to continue to fulfill the requisites of paragraph 9 after the property is sold to a subsequent purchaser in a later transaction. Under paragraph 9(a), CUG agreed to provide $1 Saturday children's movies once the theater was operational. The theater was never operational under CUG's ownership; therefore,

CUG was not yet required to perform anything under the contract. Under paragraph 9(b), CUG was to permanently install and maintain a plaque, which it did during its ownership of the property. Although appellants would have us read into the contract a term that required CUG to continue to enforce the requirements in paragraph 9, even after its sale of the theater to another party, to read this into the agreement would render the results absurd. When interpreting contracts, we look to the meaning that gives the contract vitality, rather than to the meaning that renders performance impossible. *McCabe/Marra Co. v. Dover* (1995), 100 Ohio App.3d 139, 155.

{¶32} In addition, we have already found the covenants in paragraphs 9(a) and (b) run with the land. When an owner of property that is subject to a covenant divests himself or herself of ownership in the property, his or her deed of conveyance not only transfers ownership of the realty, but also effectively assigns to the grantee the obligations under the covenant. *Peto* at 25-26, citing *Pittsburg, C. & St. L. Ry. Co. v. Bosworth* (1888), 46 Ohio St. 81, 86-87. Thus, the former owner is released from future liability under the covenant, which, running with the land to which it attaches, invests each new owner with future liability thereunder, and relieves the former owner from all liabilities arising subsequent to the transfer of ownership. Id. at 26. Accordingly, here, after appellants transferred the theater to the city, it also assigned the city the obligations under paragraphs 9(a) and (b). For these reasons, appellants' second assignment of error is overruled.

{¶33} Appellants argue in their third assignment of error that the trial court erred when it granted CUG's motion for directed verdict on the fraud claim in Count 8 of their fourth amended complaint. Specifically, appellants claim that a motion for directed verdict

pursuant to Civ.R. 50 in a non-jury trial is improper. In its appellate brief, CUG concedes that a motion for directed verdict is improper when a case is tried to the bench, and the court should have converted the motion to a motion to dismiss under Civ.R. 41(B)(2). Citing valid case law, CUG asserts that no prejudice results from the erroneous application of the directed verdict standard because that standard is more rigorous than the involuntary dismissal standard and, thus, satisfaction of the Civ.R. 50(A) standard implies satisfaction of the Civ.R. 41(B)(2) standard. However, citing *Jackson v. Gossard* (1989), 48 Ohio App.3d 309, appellants counter that, because a Civ.R. 41(B) motion may be filed only after presentation of the plaintiff's evidence, any motion for directed verdict made in a non-jury case before presentation of evidence must be denied. Appellants point out that CUG's motion was filed prior to trial and ruled on prior to appellants' opening statement.

{¶34} It is true that Civ.R. 50 motions for directed verdict are applicable only in jury cases, and a motion for a directed verdict in a non-jury case will be deemed to be a motion to dismiss pursuant to Civ.R. 41(B). *Natl. City Bank v. Fleming* (1981), 2 Ohio App.3d 50. It is also true that, because there is no provision for involuntary dismissal at the close of a claimant's opening statement, a motion at such time or earlier is premature and should be denied by the trial court. Id.

{¶35} However, in the present case, appellants were at least partially responsible for any error in this respect. Under the doctrine of "invited error," it is well-settled that a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make. *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. Therefore, a

litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible. *Lester v. Leuck* (1943), 142 Ohio St. 91, 92-93, citing *State v. Kollar* (1915), 93 Ohio St. 89, 91.

{¶36} Here, appellants' counsel approved the trial court's addressing CUG's motion prior to the commencement of trial. After the trial judge addressed whether he should recuse himself due to a possible conflict, the court asked appellants' counsel if he wanted the court to address the motion for directed verdict that day, and appellants' counsel responded, "We do." When the trial court then asked if he needed time to prepare any argument, appellants' counsel stated "no."

{¶37} At the end of his argument, appellants' counsel did raise the issue of whether a motion for directed verdict was the proper style for CUG's motion. However, appellants' counsel then stated, "The motion although styled a motion for directed verdict seems to mean, really is asking for the Court to reconsider its ruling on the motion for summary judgment, which we certainly acknowledge that it has the authority to do." The trial court then responded:

> First of all, I will say regardless how this case is captioned, whether it is motion for directed verdict or motion for reconsideration, I think the Court has the inherent power as stated by counsel to go forward with at this stage. And I gave counsel the opportunity for a continuance in that regard. That was not accepted. So I feel comfortable moving forward today.

Although, after the end of its analysis, the court stated it was granting CUG's motion, pursuant to directed verdict, the trial court's authority to address CUG's arguments had

been muddled by appellants' explicit approval that the trial court had the authority to address the arguments as a reconsideration of its prior ruling on summary judgment.

{¶38} Notwithstanding, CUG has filed a "cross-assignment of error" with respect to appellants' fraud claim. We presume CUG meant its "cross-assignment of error" to be an alternative basis to affirm the judgment pursuant to App.R. 3(C)(2). In its cross-assignment of error, CUG asserts that, although the trial court's ultimate judgment in favor of CUG on appellants' fraud claim was proper, and despite what procedural label the trial court attached to its pre-trial motion, the court should have granted CUG's earlier motions for summary judgment as to appellants' fraud claim. We will construe CUG's argument as being that the trial court should have considered its pre-trial motion as a motion for reconsideration of its earlier denials of summary judgment, as appellants' counsel suggested to the trial court was the proper way to view the motion.

{¶39} Although the trial court stated it was granting CUG's motion under the directed verdict standard, the standard for deciding a motion for summary judgment and a motion for directed verdict is the same. See *Knop v. Toledo* (1995), 107 Ohio App.3d 449; *Motorists Mut. Ins. Co. v. Rockwell* (1990), 69 Ohio App.3d 159. That is, in each instance, the evidence is construed most strongly in favor of the party against whom the motion is directed, and the motion must be denied unless from the evidence so construed reasonable minds could reach no other conclusion, but that, under the applicable law, the movant is entitled to a judgment in his favor. *Rayburn v. J.C. Penney Outlet Store* (1982), 3 Ohio App.3d 463.

{¶40} In order to recover for fraud, a plaintiff must prove five things: (1) a material false representation; (2) knowingly made; (3) with the intent to induce reliance;

(4) reasonable reliance upon the misrepresentation by the plaintiff; and (5) damages proximately caused by the reliance. *Carter-Jones Lumber Co. v. Denune* (1999), 132 Ohio App.3d 430, 434. A complaint alleging fraud must state the specific circumstances surrounding the alleged fraud with particularity. Civ.R. 9(B).

{¶41} After reviewing the record, we find there is no evidence that CUG made a false representation to appellants. Appellants claimed in their complaint that CUG acted fraudulently by entering into the purchase agreement and acquiring title to the property when it knew that neither CUG nor the city had any intention of honoring the contract. There is simply no evidence in the record to demonstrate that CUG did not intend to honor paragraphs 9(a) and (b), or knew the city was not going to honor paragraphs 9(a) and (b). As for CUG, it complied with the terms of the purchase agreement. CUG maintained the plaque during its ownership of the theater, and the terms of the purchase agreement did not place a duty on CUG to show the Saturday children's movies until the theater was operational; thus, CUG did not violate paragraphs 9(a) and (b). Furthermore, Barney testified that it was always CUG's intention to fulfill all the points on the contract and knew how important paragraphs 9(a) and (b) were to appellants. Neither Barney nor Baker had any knowledge of any misstatements to appellants concerning CUG's intentions as to the plaque or Saturday movies. As for CUG's knowledge regarding the city's intentions, both Barney and Baker testified that at no time did they know that the city did not wish to honor paragraphs 9(a) and (b). Baker testified that he could infer the city was not happy about paragraph 9, but the city never told him it was not going to honor it.

{¶42} Appellants contend that the evidence demonstrating that CUG knew neither it nor the city intended to honor paragraphs 9(a) and (b) was that CUG and the city were

working together to acquire the theater for the city, the city approved the terms of the contract between CUG and appellants, CUG discussed the obligations of paragraphs 9(a) and (b) with city officials, and the city quickly removed the plaque after purchasing the theater from CUG. None of these facts go to whether CUG knew neither it nor the city was going to comply with paragraphs 9(a) and (b). Thus, we find that, even if appellants did not invite any error with regard to CUG's motion for directed verdict, the trial court properly found CUG was entitled to judgment as a matter of law. Therefore, appellants' third assignment of error is overruled, or, in the alternative, CUG's cross-assignment of error is sustained.

{¶43} Accordingly, appellants' first assignment of error is sustained in part and overruled in part, appellants' second assignment of error is overruled, and appellants' third assignment of error is overruled, or, in the alternative, CUG's cross-assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded to that court for further proceedings in accordance with law, consistent with this decision.

Judgment affirmed in part
and reversed in part; cause remanded.

TYACK, J., concurs.
McGRATH, J., concurs in part and dissents in part.

McGRATH, J., concurring in part and dissenting in part.

{¶44} Because I am unable to agree with the majority's disposition of appellants' first assignment of error, I respectfully dissent in part.

{¶45} As noted by the majority opinion, in order for a covenant to be a real covenant and to run with the land, it must be shown that: (1) it was the intent of the original covenantee and covenantor that the covenant run with the land; (2) the covenant "touches and concerns" the land at issue; and (3) privity of estate exists between the dominant and servant estates. *Dingle v. Dick*, 10th Dist. No. 01AP-142, 2001-Ohio-8754 (citations omitted). In order for a real covenant to run with the land, it must meet all three of these requirements. For several reasons, I do not find that the covenants found by the majority to exist run with the land.

{¶46} First, I find the intent element is missing. "Proof of intent can be determined from the language of the deed read as a whole." *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta*, 7th Dist. No. 01 CA 60, 2002-Ohio-1540, ¶19. In this case, neither the purchase agreement nor the deed contains any indication that the original contracting parties intended for paragraphs 9(a) and (b) to run with the land. For example, in *Candlewood Lake Assn. v. Scott*, 10th Dist. No. 01AP-631, 2001-Ohio-8873, this court found that the deed restrictions affirmatively stated a clear intention when the deeds contained the following language, "[t]he Restrictions *shall run with the land* and shall be binding upon the Association and upon all parties ('Owners') having or acquiring any right, title or interest in the real property or any part thereof." (Emphasis sic.) Here, neither instrument contains similar language.

{¶47} Nor do the instruments contain the words "heirs," "successors," or "assigns." Although the absence of such language is not determinative, the use of such language is clearly reflective of intention. *Peto v. Korach* (1969), 17 Ohio App.2d 20. In that regard, the purchase agreement defines Columbus Urban Growth Corporation

("CUG") as "Buyer" and only CUG is referenced in paragraph 9. Another significant point of interest contained in paragraph 9 is that Capital City, which drafted the purchase agreement, chose to include language relating to its "successors and assigns," but the paragraph makes no reference to CUG's "successors and assigns." As the drafter, if Capital City had intended paragraphs 9(a) and (b) to run with the land, it should have (and presumably would have) chose to expressly include language relating to CUG's "successors and assigns" just as it did its' own.

{¶48} Similarly, the deed contains no language suggesting that paragraphs 9(a) and (b) were to run with the land. Although the deed mentions paragraph 9 of the purchase agreement, the deed does not state what terms are contained in paragraph 9, nor was the purchase agreement recorded with the deed. Additionally, the deed references the purchase agreement entered into "between the parties," which again defined Capital City as the "Seller" and only CUG as the "Buyer."

{¶49} Further, paragraph 11 contains an integration clause that states the purchase agreement "constitutes the entire Agreement between the parties * * * and supersedes all prior agreements with respect to the subject hereof and no oral or implied agreements exist." This paragraph would appear to vitiate against finding that the covenants were to run with the land, as neither the purchase agreement nor deed expressly stated that they did, and neither instrument made reference to CUG's nor did it make reference to "successors and assigns."

{¶50} Nor do I find the covenants in paragraph 9 "touch and concern" the land. Touching or concerning the land is a determination of whether the property was made more useful or valuable by the covenant. *Lone Star Steakhouse*, citing *LuMac Dev. Corp.*

v. Buck Point Ltd. Partnership (1988), 61 Ohio App.3d 558, 562. While I can, in the abstract, appreciate the majority's rationale for finding that paragraph 9(a) ($1.00 Saturday movies) and 9(b) (the plaque) touch and concern the land, I disagree with the legal significance the majority has attached to them, especially the plaque. I fail to find any aspect of affixing a plaque to a building that "touches and concerns" the land or its use in a direct and not a collateral way; the connection between the two are merely collateral.

{¶51} I also agree with the trial court's finding that the wording of paragraph 9(a) is ambiguous. The purchase agreement is silent as to what "feasible" means, nor does it shed any light on what circumstances would render a circumstance "unfeasible." Thus, the term of restriction is not only unclear, but its duration is unreasonable because it is undefined. See, e.g., *MJW Ent., Inc. v. Laing*, 2d Dist. No. 21253, 2006-Ohio-4011, ¶19 (term of the restriction was "clear and of reasonable duration, since development is only restricted for so long as" seller remained alive).

{¶52} In sum, I find that paragraphs 9(a) and (b) are not covenants that run with the land, and it is my position such finding comports with the requirement that restrictive covenants must "be construed strictly against the restriction and in favor of the free use of land." *Nutis v. Schottenstein Trustees* (1987), 41 Ohio App.3d 63, 65.

{¶53} Rather, I find paragraphs 9(a) and (b) are personal covenants, to which the city cannot be bound because Capital City has failed to demonstrate the city had actual or constructive notice. There is no evidence in the record to support the conclusion that the city had notice that it would be bound by CUG's agreement with Capital City. First, the e-

mails relied upon by the majority were not properly authenticated,[1] and, thus, do not constitute Civ.R. 56(E) evidence. In fact, it does not appear that the trial court considered these e-mails in rendering its decision, and I find it inappropriate to do so here. Second, the depositions of David J. Baker, a CUG employee, Ellen P. Barney, a former CUG employee, and Boyce Safford, a former CUG employee and current employee of the city,[2] suggest, at most, that the city was aware that CUG had agreed to the provisions in paragraphs 9(a) and (b), but there is no Civ.R. 56 evidence that demonstrates the city had actual knowledge or was aware that it could (or would) be bound by CUG's agreement. Additionally, although the deed references the purchase agreement, the fact that the purchase agreement was not recorded precludes a finding that the city, as a successor in interest, had constructive knowledge. Thus, I disagree with the majority's position that the city had actual and constructive notice.

{¶54} For the foregoing reasons, I would overrule appellants' first assignment of error, and affirm the judgment of the trial court.

---

[1] The e-mails were attached to the affidavit of Capital City's counsel, who, as neither the sender nor receiver of said e-mails, can attest to the authenticity of the same.

[2] Although Boyce Safford had knowledge of the items set forth in paragraph 9, he acquired that knowledge while within the scope of his employment with CUG. Thus, despite his later employment with the city, the knowledge he acquired while working at CUG cannot be imputed to the city. Accord, *DiPietro v. Lighthouse Ministries*, 159 Ohio App.3d 766, 2005-Ohio-639, ¶23 ("An employee's knowledge is imputed to his employer *only if* the employee obtained the knowledge while acting within the scope of his employment"). (Emphasis sic.)