

1999

Jean Levanger and Rebecca Levanger v. JOANN VINCENT, KEN FISHER, DIANE DUPLANTY, RON DUPLANTY, JAN NEMCIK, BECKY NELSON, ROSIE PETRONELLA, CORY ALSBERG, GERALD VINCENT, SANDY FISHER, SCOTT FEATHERSTONE, MARTIN ROGUSCHKA, LANCE SWEDISH LAUREL KANGAS, JOHN DOES 1-5, JANE DOES 1-5, and HIGHLAND ESTATES PROPERTIES OWNERS ASSOCIATION, INC. : Brief of

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IN THE UTAH COURT OF APPEALS

JEAN LEVANGER and REBECCA  
LEVANGER,  
  
Plaintiffs/Appellants,

v.

JOANN VINCENT, KEN FISHER, DIANE  
DUPLANTY, RON DUPLANTY, JAN  
NEMCIK, BECKY NELSON, ROSIE  
PETRONELLA, CORY ALSBERG,  
GERALD VINCENT, SANDY FISHER,  
SCOTT FEATHERSTONE, MARTIN  
ROGUSCHKA, LANCE SWEDISH  
LAUREL KANGAS, JOHN DOES 1-5,  
JANE DOES 1-5, and HIGHLAND  
ESTATES PROPERTIES OWNERS  
ASSOCIATION, INC.,

Defendants/Appellees.

Case No. 990301-CA

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM SUMMARY JUDGMENT  
TAKEN FROM THE THIRD JUDICIAL DISTRICT COURT  
FOR SUMMIT, STATE OF UTAH  
Judge Pat B. Brian Presiding

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Rebecca LeVanger.

**FILED**  
JUN 25 1999

PARTIES TO THE PROCEEDINGS  
IN THE DISTRICT COURT

The caption of the case on appeal contains the names of all parties to the proceedings in the district court.

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IN THE UTAH COURT OF APPEALS

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|                                  |   |                    |
|----------------------------------|---|--------------------|
| JEAN LEVANGER and REBECCA        | : |                    |
| LEVANGER,                        | : |                    |
|                                  | : |                    |
| Plaintiffs/Appellants,           | : |                    |
|                                  | : |                    |
| v.                               | : |                    |
|                                  | : | Case No. 990301-CA |
| JOANN VINCENT, KEN FISHER, DIANE | : |                    |
| DUPLANTY, RON DUPLANTY, JAN      | : |                    |
| NEMCIK, BECKY NELSON, ROSIE      | : | Priority No. 15    |
| PETRONELLA, CORY ALSBERG,        | : |                    |
| GERALD VINCENT, SANDY FISHER,    | : |                    |
| SCOTT FEATHERSTONE, MARTIN       | : |                    |
| ROGUSCHKA, LANCE SWEDISH         | : |                    |
| LAUREL KANGAS, JOHN DOES 1-5,    | : |                    |
| JANE DOES 1-5, and HIGHLAND      | : |                    |
| ESTATES PROPERTIES OWNERS        | : |                    |
| ASSOCIATION, INC.,               | : |                    |
|                                  | : |                    |
| Defendants/Appellees.            | : |                    |
|                                  | : |                    |

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JURISDICTION OF THE APPELLATE COURT

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(j) (1996). The appeal was transferred to the Court of Appeals from the Utah Supreme Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are these:

1. Did the Homeowners Association violate Utah statute and its charter documents in approving amendments to its CC&R's by way of mail-in balloting, open extensions of voting periods, and without a determination of those members entitled to vote?

2. Was it an abuse of the trial court's discretion to deny plaintiff's motion to reconsider solely on the grounds that the

motion was too late, without considering new evidence proffered by plaintiffs in support of their motion?

#### Standard of Review

The standard of review on an appeal from the granting of a motion for summary judgment is that no deference is given to the trial court's conclusions, which are reviewed for correctness.

Kunz & Co. v. State, 913 P.2d 765, 768 (Ut. Ct. App. 1996).

As is the case whenever we consider an appeal from a summary judgment, we review the trial court's legal conclusions, including its conclusion that the material facts are not disputed, for correctness. See Utah R.Civ.P. 56(c) (stating that summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law"). This standard allows us to make our own conclusions and does not obligate us to defer to the trial court.

*Id.* (citation omitted).

The party against whom summary judgment is rendered is entitled to all reasonable inferences that may be drawn from the facts. McNair v. Farris, 944 P.2 392, 393 (Ut. Ct. App. 1997) ("we note that in reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party").

As regards the appeal from the denial of plaintiff's motion to reconsider, the standard of review is one of abuse of discretion. Lund v. Hall, 938 P.2d 285, 287 (Utah 1997). The court in Lund further noted: "In reviewing such a motion, we accord no deference to the trial court's conclusions of law but review them for correctness." *Id.*

STATUTES AND RULES WHOSE INTERPRETATION IS OF  
CENTRAL IMPORTANCE TO THE APPEAL

Application of §§ 16-6-27 through 33 of the Utah Nonprofit Corporation and Co-operative Association Act, Utah Code Annotated (1995 Replacement), is of central importance to the appeal. These provisions contain the requirements for holding meetings by members of the Homeowners Association, including determining those entitled to vote, voting requirements and actions taken by members without meetings. Section 16-6-33 provides the only statutorily prescribed alternative to meetings of members, allowing action to be taken by members without a meeting only if "a consent in writing, setting forth the action so taken, shall be signed by all of the members entitled to vote with respect to the subject matter thereof . . . ." *Id.* Applied in conjunction with the Homeowners Association charter documents, these statutes require the decision of the trial court granting summary judgment for the Homeowners Association to be reversed.

Proper application of Rule 54(b) of the Utah Rules of Civil Procedure is of central importance to plaintiffs' appeal of the trial court's denial of their motion to reconsider. The trial court misapplied the law in ruling that the motion to reconsider was procedurally flawed, due to timeliness and waiver.

STATEMENT OF THE CASE

Nature of the Case

This is a derivative action brought by plaintiffs on behalf of members of the Homeowners Association similarly situated to



seek rescission of the Association's execution and recording of amended CC&R's, approved by way of written ballot without benefit of a members meeting, as required by law. Plaintiff's seek injunctive relief and damages against those responsible for the illegal acts.

#### Course of Proceedings

Plaintiffs filed their complaint January 21, 1997. R.9. Defendant Homeowners Association filed its answer February 26, 1997. R.77.

The Homeowners Association filed a motion for summary judgment November 26, 1997. R. 198. A hearing on the motion was heard by the Third District Court, the Honorable Ronald Nehring presiding, on January 9, 1998. R. 411. The Court issued an order granting the motion for summary judgment on May 28, 1998. R. 467.

Plaintiffs filed a motion to reconsider the decision granting summary judgment or to certify the order as final and appealable on July 16, 1998. R. 479. The Court denied the motion to reconsider and granted the motion to certify the summary judgment as final pursuant to Rule 54(b) in its Order of March 3, 1999. R. 1063.

The LeVangers filed a Notice of Appeal on March 31, 1999. R. 1074. The case subsequently was poured-over to the Court of Appeals by Order dated May 18, 1999, and filed May 20, 1999. (The Order has no Bates stamp in the record on appeal but the

index to the record indicates that it should be page 1145 of the record on appeal.)

#### STATEMENT OF FACTS

1. In August of 1994, the Board of Trustees of the Homeowners Association caused amended CC&R's to be submitted for approval by members of the Association solely by means of written ballot. R. 53-54.

2. The notice of the balloting sent to members was not sent to each member. Affidavit of Michael Ferrigno, current President of the Association, R. 473. Mr. Ferrigno's testimony is uncontroverted.

4. I did not vote in 1994 when the Highland Estates Properties Owners Association proposed to amend the CC&R's for the subdivision because I did not receive any notice of the vote.

5. I did not receive any letters soliciting my vote, did not receive copies of the proposed amendments to the CC&R's, nor was I given a ballot with which to cast my vote.

3. The Association mischaracterized the affidavit testimony of Scott Welling, indicated to the trial court that he testified "Mr. Welling's letter [notice of the balloting], along with a ballot and a voting draft of the Amendment to Declaration of Restrictions and Protective Covenants was hand-delivered to each of the members of Highland Estates. (See Affidavit of Scott Welling)." (emphasis added) R. 205.

4. No where in Mr. Welling's Affidavit does he testify that the materials were hand delivered to every member of the Association. See R. 303-309.

5. The LeVangers pointed out to the trial court that Mr. Welling's Affidavit did not established delivery of the notice to all members, hand-delivered or otherwise. Plaintiffs' Memorandum in Opposition. R. 312 (Under the heading, Disputed Facts - "Paragraph 18 of defendant's Statement of Facts is not supported by the Affidavit of Scott Welling. No where in the Affidavit does Mr. Welling testify that all members received a ballot and voting draft by hand delivery.").

6. There is no provision in the Association's Bylaws as they existed in 1994 and 1995, in the Articles of Incorporation then in effect, or its CC&R's prior to the current amendments that allow members to vote by written ballot. R. 24-34 - Bylaws; R. 242-245 - 1972 CC&R's; R. 247-248 - Articles of Incorporation.

7. Section 2.5 of the Association's Bylaws then in effect provided that, at meetings of the members at which a quorum is present or represented by proxy "[a]ll votes may be cast by the members either in person or by proxy." R. 33.

8. Section 2.5 of the Bylaws expressly requires proxies to be received and verified **before** the date of the meeting. In relevant part, the Section reads as follows:

Section 2.5 - Voting Requirements. . . . All proxies shall be in writing and in the case of proxies for the annual meeting, they shall be delivered to a credentials committee consisting of the President, a

Vice President and Secretary of the Association at least ten (10) days prior to said annual meeting. [Five days in advance of special meetings].

R. 33.

9. Section 2.7 of the Bylaws contemplates only in-person meetings of the Association's members. It also allows a method for reconvening meetings to take action when a quorum is not present. It reads as follows:

Section 2.7 - Quorum. At any meeting of the members, the presence of members holding, or holders of proxies entitled to vote, more than fifty percent (50%) of the total votes of the Association shall constitute a quorum for the transaction of business. In the event a quorum is not present at a meeting, the members present (whether represented in person or by proxy), though less than a quorum, may adjourn the meeting to a later date. Notice thereof shall be delivered to the members as provided above. At the reconvened meeting, the members and proxy holders present shall constitute a quorum for the transaction of business.

R. 33.

10. Section 2.8 of the Bylaws contemplates only in-person meetings of the Association's members. It reads as follows:

Section 2.8 - Waiver of Irregularities. All inaccuracies and/or irregularities in calls, notices of meetings and in the manner of voting, form of proxies, credentials and method of ascertaining those present, shall be deemed waived if no objection is made at the meeting.

R. 33. Absent a meeting, objections to inaccuracies and irregularities cannot be accomplished as contemplated.

11. The CC&R's in effect in 1994 contained a provision requiring the vote of a majority of the homeowners to amend the CC&R's ("unless by vote of the owners of the majority of the lots

in said Subdivision; it is agreed to change said Conditions in whole or in part." ).<sup>1</sup> R. 245.

12. No record date for determining members entitled to cast a vote on the proposal to amend the CC&R's was established by the Board of Trustees of the Association. Deposition testimony of JoAnn Vincent, R. 749-752.

13. The Board of Trustees did not prepare or maintain a membership list prior to sending out notice of the proposal to adopt the Amended CC&R's or at any time prior to the recording of the Amended CC&R's. R. 750-753.

14. Section 2.6 of the Association's Bylaws allows only persons who "appear as members upon the transfer books of the Association on the 30th day before such annual members' meeting," to vote. R. 33.

15. The members were not provided a list of members at any meeting of the members of the Association during 1994 and 1995. R. 742.

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<sup>1</sup> The paragraph reads in its entirety as follows:

These conditions shall run with the land and shall be binding upon all parties and all persons claiming under them until March 10, 1982, at which time said Conditions and Covenants shall be automatically extended for successive periods of ten (10) years, unless by vote of the owners of a majority of the lots in said Subdivision, it is agreed to change said Conditions in whole or in part.

R. 33.

16. The Board of Trustees prepared a written ballot to seek approval of the amended CC&R's, which stated "(to be returned by November 30, 1994)." R. 53.

17. The cover letter with the ballot stated: "Please note: the voting period expires November 30, 1994; ballots must be returned by that date." (emphasis in original - the only words highlighted on the page). R. 54. The cover letter also noted: "The enclosed ballot represents a straight up or down expression of your opinion." R. 54.

18. The Board of Trustees determined on its own and without property owner notice or approval to "extend the voting period on our CC&R's." Newsletter to Members, January, 1995. R. 51. "The CCR's had a deadline of November 30, 1994. A year later votes were still being solicited. The Association never voted to extend the vote or take a new vote." Affidavit of Robert Blackbourn, Jr. R. 356.

19. The Association determined there were 262 lots entitled to vote on the Amended CC&R's. R. 512. The Association counted 149 votes in favor of the Amended CC&R's. R. 512.

20. Of the ballots counted in favor of the Amended CC&R's by the Board of Trustees, 46 are only signed by one of two joint tenants. R. 512.

21. Section 2.5 of the Bylaws of the Association provides that "[i]n the case of a membership owned as joint tenants, each such joint tenant shall have that number of votes determined by

dividing the number of votes attributable to the membership by the number of joint tenants who own the membership." R. 33.

22. During the year that votes were being solicited, ownership of at least 41 lots changed. R. 515-542.

23. Ten of the votes allegedly cast in favor of the Amended CC&R's were cast by property owners who were not property owners at the time of notice of voting on the Amended CC&R's. R. 512.

24. Two of the votes allegedly counted by the Board in favor of the Amended CC&R's were cast by property owners who were not record owners of the lots represented by the ballots. R. 512.

25. Four of the votes allegedly cast in favor of the Amended CC&R's were cast by owners claiming ownership of split lots, but are shown on the records of the Highland Estates as consisting of only one lot. R. 512.

26. The voting notices sent to members by the Board of Trustees misrepresented material facts regarding the proposed CC&R's. The notice of ballot voting authorized by the Board of Trustees misrepresented that the Amended CC&R's reflected "the majority's view of how the subdivision ought to appear and be operated . . . ." R. 54.

27. The Board of Trustees knew, when it authorized the statement that the proposed CC&R's were the majority view in the subdivision, that far fewer than a majority of the property

owners had ever participated in the meetings to consider the proposed CC&R's. R. 745.

28. The notice of ballot voting failed to include information regarding the more controversial aspects of the proposed CC&R's, including the expansion of the authority of the Board of Trustees to amend the Bylaws, the authorization for ballot voting by members, the ability to restrict or limit voting of members, and the ability to levy large, punitive fines for violations of the CC&R's. R. 54 - Notice of Balloting Process; R. 38-49 - Amended CC&R's as recorded; R. 242-245 - CC&R's in effect from 1972.

29. The statements in the notice of voting by ballot and the information omitted was material to the property owners' informed vote on the proposed CC&R's. Affidavit of Christie Bambery, R. 504.

30. The Amendment to Declaration of Restrictions and Protective Covenants for Highland Estates Subdivision, Summit County, Utah, as executed October 3, 1995, and recorded with the Summit County Recorder on October 5, 1995, differed in at least two material respects from the draft CC&R's submitted to members for their approval, excluding entirely the provision regarding limitation of liability for the bridal path easement, and excluding from the definition of residential lots 13 lots. Compare R. 756-767 - Voting Draft of CC&R's with R. 768-779 - Recorded Set of CC&R's.



### SUMMARY OF ARGUMENT

The LeVangers, on behalf of all members of the Association, contest the methods employed by the Board of the Association to amend the CC&R's affecting the members' property. The trustees chose to employ a mail-in balloting process, inventing new rules or ignoring established rules of corporate governance as it suited their purposes in allegedly obtaining approval for the amended CC&R's. Their methods were fatally defective -- no record date for members entitled to vote was established; notice of the altered method for approving the amendments was not provided to all members; the deadline for voting was unilaterally extended, without advance notice; property owners who became such only after the voting process began were allowed to cast ballots; voting tallies were improperly kept. There are genuine issues of material fact (the invalid notice and the vote tallying) and the Association is not entitled to summary judgment on the mail-in balloting issue as a matter of law.

Some of the evidence of impropriety only came to light following the trial court's granting of partial summary judgment, but before a new trial date had been set, and before the partial summary judgment had been certified as final and appealable. Yet, the trial court, Judge Brian presiding, ruled that he did not need to see the LeVangers' memorandum in support of their motion to reconsider and did not need to see the new evidence and consider its weight. He wrongly held that he did not need to

consider the merits of plaintiffs' new contentions and that plaintiffs were too late in submitting the evidence and had waived the right to present the evidence. He applied the wrong standard of review. The trial court abused its discretion in not considering the merits of the LeVangers' motion to reconsider. Further, this Court may consider without deference the trial court's application of the wrong standard of review.

#### ARGUMENT

#### **I. The Association's Attempt to Approve Amended CC&R's by Means of Mail-in Balloting was Illegal.**

##### A. Mail-In Balloting is Not Allowed by the Association's Charter Documents or Under Utah Statute.

Sections 16-6-27 through 32 of the Utah Nonprofit Corporation and Co-operative Association Act contemplate only in-person meetings when defining the process by which members of a nonprofit corporation may take action. The meeting must be duly noticed and convened, a quorum must be present, and those entitled to vote must be ascertainable. Section 16-6-28 provides for giving notice "to each member entitled to vote at [a member's] meeting." Section 16-6-29 sets out the manner in which a quorum is determined. Section 16-6-30 provides that "[a] member may vote in person or, unless the articles of incorporation or the bylaws otherwise provide, may vote by proxy executed in writing by the member or by his duly authorized attorney in fact."

Section 16-6-33 provides the exclusive statutory means by which action may be taken by members other than in a meeting. It provides:

Any action required by this act to be taken at a meeting of the members . . . or any action which may be taken at a meeting of the members . . . may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the members entitled to vote.

None of the charter documents for the Association, neither the Articles, the Bylaws nor the CC&R's in effect at the time of the mail-in balloting, contain provisions allowing for mail-in balloting. All the relevant provisions of the Association's charter documents contemplate only in-person meetings.

A Pennsylvania appellate court, faced with a situation similar to the one presently contested, held that mail-in ballots were not allowed as a substitute for an in-person meeting. In Sparkes v Wright, 547 A.2d 415 (Sup. Ct. Pa. 1988), the trial court's nullifying a mail ballot vote to amend Bylaws of the nonprofit corporation was affirmed on appeal. After examining the bylaws of the corporation and the state nonprofit corporations act, the court stated: "[W]e note no provision in [the] statute for presence in person at a corporate meeting to be accomplished by mail ballot of the type utilized in this case. . . . Clearly, the provisions of Section 7709 contemplate a means of communication in which all persons involved in the meeting can 'hear each other . . . . Undoubtedly, ballots submitted by mail do not provide this type of communication."

The Utah statutes and the Association's charter documents similarly contemplate means by which members can hear one another and a give-and-take discussion can occur. The Pennsylvania courts struck down a ballot process designed to obtain votes in advance of an in-person meeting. How much more imperative it is for this Court to strike down a balloting process that occurred over an indefinite period with no corresponding member's meeting, with no record date for those allowed to participate, and with inadequate notice to members regarding material information.

B. The Mail-in Balloting Process Was Not the Effective Equivalent of Soliciting Proxies.

In the present action, the trial court, in granting the Association's summary judgment motion, rightly noted that "there is nothing -- few things -- more fundamental to corporations . . . than the process by which those entities amend their charter or their beginning documents so to speak." Reporter's Partial Transcript of Hearing on Motion for Summary Judgment: Court's Ruling. R. 412. The trial court thereafter wrongly concluded, however, that the Association's mail-in balloting process was an effective substitute for an in-person meeting to effect such fundamental changes. The trial court was persuaded by the argument that, since proxies are allowed at in-person meetings, mail-in balloting does not injure any fundamental purpose of corporate governance.<sup>2</sup> The trial court failed to properly view the mail-in balloting process in its context.

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<sup>2</sup>The court noted that: "whereas, here meetings could be

At in-person meetings there is an opportunity for the give and take of discussion. None of that occurred in this case. The notice to members was inadequate to alert them as to the pros and cons of the more controversial provisions of the amendments. It contained misrepresentations. As noted in the Affidavit of Christie Bambery, R. 504, members would have voted differently had they been apprised of all the facts, something that face-to-face meetings provide.

Effectively, those opposed to the amendments were denied the opportunity, in open debate, to present opposing views to those of the proponents of the amendments. The solicitation of the ballots was done by those who desired the change, so that they had the exclusive opportunity to persuade.

It is true that proxies effectively allow persons to vote without attending the meeting. However, the monumental difference between proxies and mail-in ballots is that proxies are give to those persons who will attend the meeting and represent the interest of the person giving the proxy. Nothing of the kind happens with mail-in ballots.

The trial court was incorrect as a matter of law when it determined that the mail-in balloting substantially complied with Utah law and the Association's charter documents.

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conducted by attendance through proxy, the argument that meetings are necessary to encourage the vigorous exchange of views, is severely undercut." R. 416.

C. The Mail-in Balloting Process Was Not Made More Legitimate Due to the Association's Ability to Achieve the Same Result With Even Less Participation at a "Reconvened Meeting."

One argument raised below by the Association, and improperly given great weight by the trial court in reaching its decision, is the red herring notion that the balloting process was a much better substitute than the equally available "reconvened meeting" approach.<sup>3</sup> As the argument goes, Section 2.7 of the Bylaws allows for the calling of a reconvened meeting, at which any members then present constitute a quorum for the transaction of business. The Association argued that that section could have been used by the trustees to achieve the same result but was consciously disregarded in favor of the more participatory mail-in balloting process.

That argument fails completely given the specific provision of the CC&R's requiring a majority of the property owners to approve changes to the CC&R's. That more specific requirement under the then-effective CC&R's controlled over the more general bylaw provision dealing with quorum requirements at reconvened meetings.

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<sup>3</sup> The trial court noted:

If I were to point out, however, the most salient reason that, in my view, the [ballot] voting process was an appropriate substitute, it's this: That based on the state of the record, the reconvened meeting process was detrimental to the fundamental objective of encouraging and maximizing participation in the decision-making.

It is black-letter law that in interpreting potentially conflicting clauses, specific provisions control over general provisions. See, e.g., Twin Lakes Village Property v. Crowley, 857 P.2d 611, 614, 617 (Idaho 1993) ("[b]ecause corporate documents are equivalent to contracts among the members, the normal rules governing the interpretation of contracts apply . . . . It is well established that specific provisions in a contract control over general provisions . . . ."); Norman v. Recreation Centers of Sun City, 752 P.2d 514, 517 (Ariz. App. 1988).

The trustees did not have the option of approving amendments to the CC&R's at a sparsely attended "reconvened meeting," since a majority of property owners had to approve any amendment to them. The trial court should not have given the weight it did to the manufactured contention that mail-in balloting was to be preferred over reconvened meetings.

Second, the Association now says it "could have" employed the reconvened meeting scenario but wanted to obtain participation. In fact, the Association wanted to avoid a meeting. It had had previous meetings at which there was heated discussion regarding changes to the CC&R's. The matter had always been tabled. Prior presidents of the Association had attempted to obtain approval for CC&R amendments and had been rebuffed. The Association's argument regarding increased participation flies in the face of the facts and is disingenuous.

D. Mail-In Balloting Coupled With Failure to Establish Record Date, Open Extension of Voting Period, and Failure of Notice Rendered the Association's Actions Unlawful.

Even assuming for the sake of argument that the mail-in balloting process alone was not illegal, the facts before the trial court clearly established a pattern of conduct throughout the voting process that invalidated the results.

The prior attorney for the Association, Scott Welling, filed an Affidavit which was represented to the trial court as establishing the fact of adequate delivery of the notice of the mail-in balloting to the members. No where in the Affidavit does Mr. Welling testify to the fact of delivery of the documents by any means to the members of the Association. The Affidavit of Mr. Ferrigno, the current President of the Association, clearly establishes the contrary fact. Notice of the balloting process was not given to all members and is, thus, fatally flawed.

Had the notice been intended for an in-person meeting, the members who failed to receive proper notice of the meeting would have had a means for protesting the improper notice. In an ad hoc mail-in balloting, extending over more than one year, must members invent ad hoc methods for objecting to the adequacy of the notice as well? One can plainly see how, once begun in ad hoc fashion, the entire Association governing process becomes tainted.

Even more importantly, assuming the notice was properly given to members, it defined a deadline for the mail-in voting to



end - November 30, 1994. Yet, admittedly without advance or complete notice to members, the Association's board unilaterally extended the balloting for more than 9 months thereafter.

This highlights another important aspect of why this ad hoc process of obtaining members' votes was doomed to result in a complete denial of members' rights to govern their affairs. Those trustees in favor of amending the CC&R's, having created their own ad hoc voting process, now saw nothing wrong with extending the voting deadline indefinitely<sup>4</sup> and without advance notice, once it became apparent that, by November 30, 1994, there were not sufficient votes to approve the amendments. It should not be forgotten that the November 30th deadline was announced in the only notice claimed by the Association to have been provided to the members regarding the vote to be taken on the CC&R amendments.

Naturally, since it had become their game, played according to rules they invented as they went along, the trustees who favored the CC&R amendments failed to give thought to whether members should now (after passing of the announced deadline) be allowed to re-vote, to rescind their votes, to vote on whether to extend the deadline for voting, to be given a new deadline, or to have a new record date of those eligible to vote established and

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<sup>4</sup>The January, 1995 newsletter established no new deadline for the mail-in ballot voting process, simply announcing that: "The Homeowners Board has voted to extend the voting period on our CC&R's." R. 51.

announced, all in fairness to the members' fundamental rights as owners of the Association. Why weren't members told in advance of the proposal to extend the deadline, and to hear and consider the reasons for desiring to extend the deadline?

Just as importantly, no one in charge determined a "record date" for determining those members allowed to vote on the measure.<sup>5</sup> Thus, over the extended period that voting occurred, property ownership changed hands in at least 41 instances and 10 of those new owners voted in favor of the matter.

The proponents' zeal to adopt the amendments to the CC&R's, and their belief that they could invent the rules that seemed appropriate, also led them to count multiple votes on so-called

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<sup>5</sup> Highlighting the importance of a record date, Section 16-10a-707 of the Utah Revised Business Corporation Act provides for statutorily fixing a record date in the absence of one being set by those in authority:

(1) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to be given notice of a shareholders' meeting, **to determine shareholders entitled to take action without a meeting, to demand a special meeting, to vote, or to take any other action.** If the bylaws do not fix or provide for the manner of fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(2) If not otherwise fixed under Section 16-10a-703 or Subsection (1), the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is **the close of business on the day before the first notice is delivered to shareholders.**

(emphasis added).

"illegally split lots," which were clearly not recorded as such with the County. Also, they did not feel compelled to count joint tenancy votes as only ½ of a vote in cases where the ballot was clearly only signed by a single joint tenant.

The trial court's determination, therefore, not only is against the great weight of authority on the issue, but also completely ignored the cumulative effect of granting the trustees the right to create rules which they determined to be better suited for the situation faced by the Association. As usual, self-interest led to the creation of one-side ad hoc rules, and the ignoring of other, plainly stated and specific rules contained in the Association's charter documents.

**II. The Trial Court Abused its Discretion by Failing to Consider the Probative Value of Additional Evidence and Employing the Wrong Standard of Review**

The trial court wrongly ruled that it was constrained by the lateness of the submission of new evidence by plaintiffs to deny, solely on procedural grounds, plaintiffs' motion to reconsider the grant of summary judgment. The trial court noted that it had seen none of the memoranda or other submissions regarding plaintiffs' motion to reconsider. The trial court abused its discretion in determining that it had no reason to review the pleadings or the evidence submitted by plaintiffs in making its ruling.

In its Order, the trial court noted that Plaintiffs' failure to seek to obtain the documents and additional evidence prior to

the hearing on the Association's motion for summary judgment constituted "a waiver of the basis on which plaintiffs now seek reconsideration and procedurally there is no basis to set aside the order of the Honorable Ronald E. Nehring granting the defendant summary judgment." R. 1065. The trial court incorrectly applied a standard of review based on Rule 56 of the Utah Rules of Civil Procedure in cases in which the summary judgment motion resolves all matters in a case, and not on Rule 54(b), when partial summary judgment can be reviewed and revised at any time before conclusion of the entire case.

Rule 54(b) of the Utah Rules of Civil Procedure provides that in cases where an order or decision of the court does not dispose of all the issues or the claims, "the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." The Utah Supreme Court, in Timm v. Dewsnup, 851 P.2d 1178, 1181 (1993) has noted: "We have also previously held that rule 54(b) permits reconsideration of a non-final judgment 'since it facilitates the just and speedy resolution of disputes in the trial court.' Kennedy v. New Era Indus., Inc., 600 P.2d 534, 536 (Utah 1979)." Judge Nehring, in the hearing on defendant's motion for summary judgment, noted that the court's ruling did not dispose of all issues in the case. The trial court was free to reconsider its decision.

The newly obtained evidence included the ballots relied on by the Association's board in approving the recording of amended CC&R's, previously denied plaintiffs during earlier stages of discovery by the Association. That evidence clearly establishes that the Association did not approve the amendments to the CC&R's by majority vote of the members. Votes were miscounted. Votes by one of two joint tenants were counted as one vote, plainly in violation of the express provisions of the Bylaws. New move-ins were allowed to vote throughout the balloting process. Lots were improperly given multiple votes.

The Affidavits submitted with the motion to reconsider clearly establish that written notice of the balloting process was not provided to members and that members would have voted differently had they been aware of the contents of the proposed amended CC&R's.

Plaintiffs' motion to reconsider fell squarely within the exception to the "law of the case" doctrine set out by this Court. The law of the case doctrine suggests denial of motions to reconsider when, "in the case of summary judgment, a subsequent motion fails to present the case in a different light, such as when no new, material evidence is introduced." Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 43 (Utah Ct. App. 1988). Here there was new and material evidence for the trial court to consider and it was an abuse of its discretion to rule that, procedurally, the plaintiffs were "too late" with the

information. There was no new trial date set. All issues in the case had not been disposed of. The parties were not prejudiced by the timing of the submission of the new evidence, and the evidence was highly probative.

In Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah Ct. App. 1994), this Court noted what factors a court could consider in:

determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a "different light" or under "different circumstances;" (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Id. at 1311 (citations omitted).

When a trial court simply chooses to ignore the motion, as it did in this case, and give no consideration to any of those factors, it is clearly an abuse of its discretion.

Trial courts in Utah have been overturned for relying on purely procedural grounds in denying motions to reconsider. Thus, in Timm, 851 P.2d at 1185, the decision of the trial court on the motion to reconsider was reversed and the trial court was told to "address the motion on its merits."

In the present case, the trial court applied the wrong standard of review in determining that it was inappropriate for it to consider the new evidence and reconsider its decision.

That constituted an abuse of discretion and misapplication of the law.

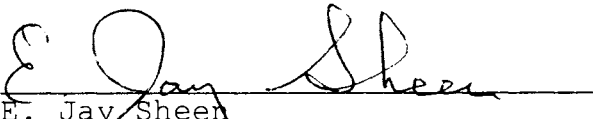
#### CONCLUSION

The trial court's decision to grant summary judgment in favor of the Association was incorrect and should be reversed. There are genuine issues of material fact and the Association is not entitled to summary judgment as a matter of law.

The trial court abused its discretion in failing to consider the merits of the LeVangers' motion to reconsider. The court applied the wrong standard of review and the trial court's decision must be reversed.

DATED: June 25, 1999.

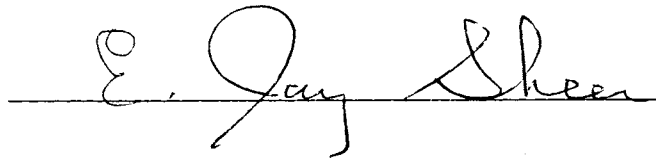
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By   
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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 1999, two copies of Brief of Appellant were mailed to:

Paul M. Belnap  
Burt Ringwood  
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A handwritten signature in cursive script, reading "E. Jay Sheen", is written over a horizontal line.



## ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, no addendum to Appellant's Brief is necessary.