

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Appeal from: Jefferson County District Court
District Court Judge: The Hon. Lily Oeffler
District Court Case Number: 2021CV000112

Plaintiff-Appellant:
LESLIE ROBIN STEVENS AS TRUSTEE OF
HUNTER’S LIVING TRUST

v.

Defendants-Appellees:
BRANDYCHASE II HOMEOWNERS
ASSOCIATION, INC.; ANTARES PROPERTY
SERVICES, INC. dba ASSOCIA COLORADO
ASSOCIATION SERVICES

*Attorney for Plaintiff Leslie Robin Stevens As
Trustee of Hunter’s Living Trust:*
Troy R. Rackham, #32033
Spencer Fane LLP
1700 Lincoln Street, Suite 2000
Denver, Colorado 80203
Telephone: (303) 839-3860
Email: trackham@spencerfane.com

▲ COURT USE ONLY ▲

Case Number:
2022CA888

OPENING BRIEF

Plaintiff-Appellant Leslie Robin Stevens (“Stevens”), through counsel,
respectfully submits this Opening Brief.

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these Rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

- It contains 9,409 words, which is less than the number of words allowed by C.A.R. 28(g)(1).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

- For each issue raised, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.
- In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Troy R. Rackham
Troy R. Rackham, #323033
SPENCER FANE LLP

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ISSUES PRESENTED FOR REVIEW.	2
III. STATEMENT OF THE CASE.....	2
A. FACTS.	2
1. <i>Background.</i>	2
2. <i>Concerns about the Community.</i>	3
3. <i>Election Managers.</i>	4
4. <i>Failure to Hold Annual Meetings and Elections.</i>	4
5. <i>November 2020 Annual Meeting.</i>	5
6. <i>March 2021 Online Election.</i>	7
7. <i>March 2021 Petition for Special Meeting.</i>	9
8. <i>May 4, 2021 Special Meeting and Action by Written Ballot.</i>	10
9. <i>May 4, 2021 Proxies and Ballots.</i>	11
10. <i>May 4, 2021 Special Meeting.</i>	13
B. COURSE OF PROCEEDINGS.....	14
1. <i>Initial Pleadings in Small Claims and County Court.</i>	14
2. <i>TRO Motion and Hearing.</i>	15
3. <i>Amended Pleadings.</i>	15

4. <i>Cross Motions for Summary Judgment</i>	16
5. <i>Trial</i>	17
IV. SUMMARY OF ARGUMENT.....	18
V. LEGAL ARGUMENT.....	19
A. THE TRIAL COURT ERRED BY HOLDING THAT BC-HOA ONLY MUST SUBSTANTIALLY COMPLY WITH CCIOA AND THE NONPROFIT ACT.....	19
1. <i>Preservation</i>	19
2. <i>Standard of Review</i>	19
3. <i>Statutory Interpretation</i>	19
4. <i>BC-HOA Did Not Comply with CCIOA and the Nonprofit Act</i>	20
a. BC-HOA Did Not Properly Provide Notice of the March 2021 Election	23
b. BC-HOA Excluded Owners from Voting.	24
c. BC-HOA Did Not Allow Proxy Voting.	26
5. <i>CCIOA and the Nonprofit Act Do Not Permit Substantial Compliance</i>	27
B. THE TRIAL COURT ERRED IN FINDING THAT STEVENS VIOLATED CCIOA IN HOW SHE FACILITATED THE MAY 4, 2021 ELECTION.....	31
1. <i>Preservation</i>	31
2. <i>Standard of Review</i>	31
3. <i>CCIOA Did Not Apply to Stevens</i>	31

4. *The Trial Court Erred by Applying a Different Standard to the May 2021 Election and Concluding It Was Invalid.*34

C. THE TRIAL COURT’S SUMMARY JUDGMENT RULING WAS ERRONEOUS.38

1. *Standard of Review*.....38

2. *Preservation.*38

3. *This Court Should Reverse the Summary Judgment Ruling.*39

VI. CONCLUSION.42

TABLE OF AUTHORITIES

Cases

<i>Accetta v. Brooks Towers Residences Condo. Ass'n, Inc.</i> , 2021 COA 87, ¶ 27	19
<i>Ad Two, Inc. v. City & Cnty. of Denver</i> , 9 P.3d 373, 376 (Colo. 2000)	40, 41
<i>Anderson v. Longmont Toyota, Inc.</i> , 102 P.3d 323, 327 (Colo. 2004)	19
<i>Anderson v. Vail Corp.</i> , 251 P.3d 1125, 1129 (Colo. App. 2010)	41
<i>Colo. Office of Consumer Counsel v. Pub. Utils. Comm'n</i> , 42 P.3d 23, 27 (Colo. 2002)	19
<i>Colorow Health Care, LLC v. Fischer</i> , 2018 CO 52M, ¶ 10	27
<i>Gagne v. Gagne</i> , 2014 COA 127, ¶¶ 59-60	41
<i>Giguere v. SJS Fam. Enterprises, Ltd.</i> , 155 P.3d 462, 467 (Colo. App. 2006) 20, 31	
<i>Griswold v. Ferrigno Warren</i> , 2020 CO 34, ¶ 23	24, 25, 30
<i>In re Colorado Indep. Cong. Redistricting Comm'n</i> , 2021 CO 73, ¶ 33	29
<i>Klinger v. Adams Cnty. Sch. Dist. No. 50</i> , 130 P.3d 1027, 1031 (Colo. 2006)	19
<i>Oakwood Holdings, LLC v. Mortg. Investments Enterprises LLC</i> , 2018 CO 12, ¶ 12	20
<i>People ex rel. Rein v. Jacobs</i> , 2020 CO 50, ¶ 40	38
<i>People v. Hernandez</i> , 2021 CO 45, ¶ 45	29
<i>People v. Melendez</i> , 102 P.3d 315, 322 (Colo. 2004)	19, 31
<i>People v. Hyde</i> , 2017 CO 24, ¶ 28	23

<i>People v. Syrie</i> , 101 P.3d 219, 222 (Colo. 2004).....	26, 37
<i>Perfect Place v. Semler</i> , 2016 COA 152M.....	29
<i>Perfect Place, LLC v. Semler</i> , 426 P.3d 325, 331 (Colo. 2018).....	27, 28
<i>Prop. Tax Adm'r v. Prod. Geophysical Servs., Inc.</i> , 860 P.2d 514, 517 (Colo. 1993)	20
<i>Ryan Ranch Cmty. Ass'n, Inc. v. Kelley</i> , 2016 CO 65, ¶ 42.....	23
<i>Smith v. Exec. Custom Homes, Inc.</i> , 230 P.3d 1186, 1189 (Colo. 2010)	20
<i>Thompson v. Maryland Cas. Co.</i> , 84 P.3d 496, 501 (Colo. 2004)	40
<i>Wainscott v. Centura Health Corporation</i> , 2014 COA 105, ¶ 24	19
<i>Weinstein v. Colborne Foodbotics, LLC</i> , 2013 CO 33, ¶ 8	31
<u>Statutes</u>	
C.R.S. § 38-33.2-308(1).....	39
C.R.S. § 38-33.3-102(1)(a)	21
C.R.S. § 38-33.3-306(1).....	21
C.R.S. § 38-33.3-308(1).....	21, 23
C.R.S. § 38-33.3-310(1).....	22
C.R.S. § 38-33.3-310(1)(a)	25
C.R.S. § 38-33.3-310(1)(b)(I)(A)	36
C.R.S. § 38-33.3-310(2).....	22, 35
C.R.S. § 38-33.3-310(2)(a)	26

C.R.S. § 7-127-104(1).....	22
C.R.S. § 7-127-104(3).....	23, 35
C.R.S. § 7-127-109	35
C.R.S. § 7-127-109(1).....	25
C.R.S. § 7-127-109(2).....	25, 35
C.R.S. § 7-127-109(6).....	36
C.R.S. § 7-127-203(1).....	23, 26
C.R.S. § 7-127-203(3).....	39
C.R.S. § 7-127-203(8).....	39, 40
C.R.S. § 7-127-204(3).....	40
Colo. Const. art. V, § 44.4(5)(c)	30
<u>Rules</u>	
C.R.C.P. 56(c).....	38
Crim. P. Rule 43.....	29

GLOSSARY

Aslin:	Grant Aslin
Associa:	Antares Property Services, Inc. d/b/a Associat Colorado Association Services
BC-HOA:	BrandyChase II Homeowners Association, Inc.
CCIOA:	Colorado Common Interest Ownership Act
<i>CF</i> :	PDF of Court’s file provided with the record on appeal contained in folder labeled COURT FILES
Community:	BrandyChase II development created in 1979
<i>Ex.</i> :	Exhibit tendered or admitted at trial, contained in the folder labeled 21CV112 EXHIBITS
HOA:	Homeowner’s Association
Hughes:	Laurel Hughes, individual board Manager
Iken:	Stephanie Iken, individual board Manager
Managers:	Miller, Hughes, Ricardo, Orr and Iken
Miller:	Kimberly Miller, individual board Manager
Min:	Minutes on the video, which is <i>Ex. O</i>
Ricardo:	Kathryn “Wendy” Ricardo, individual board Manager
Orr:	Sam Orr, individual board Manager
<i>T1</i> :	First volume of trial transcript (March 22, 2022)
<i>T2</i> :	Second volume of trial transcript from (March 23, 2022)

I. INTRODUCTION.

Stevens owns property in the Community, which had failed to hold elections since 2016. In 2020, it set an annual meeting for November 2020. Stevens obtained 58 proxies and attempted to vote them before the meeting. The HOA refused to allow her to vote her proxies, so Stevens sued.

The HOA later attempted to hold online elections but did not provide proper notice, allow proxy voting, and prevented 25% of the owners from voting. Stevens and many other owners were frustrated, so they petitioned for a special election to remove the Managers. The HOA fought Stevens at every turn. After a majority of the owners voted to remove the Managers, they disputed the election.

The trial court incorrectly entered summary judgment regarding the November 2020 election, but reserved the remaining issues for trial. After a bench trial, it reached factual findings establishing that the HOA did not comply with CCIOA or the Nonprofit Act in how it conducted the March 2021 election. But it nevertheless concluded the March 2021 election was valid because CCIOA and the Nonprofit Act required only substantial compliance. The trial court further concluded that the May 2021 special election was invalid by holding Stevens to a stricter standard than it held the HOA.

This Court should reverse. The trial court's summary judgment was

improper. Its conclusion that CCIOA and the Nonprofit Act required only substantial compliance was erroneous. Finally, the trial court's application of different standards to Stevens was unfair and unsupported.

II. ISSUES PRESENTED FOR REVIEW.

1. Did the trial court err when it held that CCIOA and the Nonprofit Act required only substantial compliance?

2. Did the trial court err in finding that Stevens violated CCIOA in the manner in which she facilitated the May 2021 special election when Stevens was not acting as a managing agent, employee, independent contractor for the HOA?

3. Did the trial court err in entering summary judgment regarding the November 2020 annual election when the proxy forms expressly advised owners that the proxy could "vote" and there were genuine disputes of material fact?

III. STATEMENT OF THE CASE.

A. Facts.

1. Background.

A developer created the Community, which has 160 units, in 1979. BC-HOA is the association of owners in the Community. *Ex. 3*. BC-HOA has bylaws that govern membership, voting, and other affairs of the HOA. *Id.* BC-HOA amended its Bylaws in May 2018 through governance policies. *Ex. 4*, p. 1.

BC-HOA retained Associa to be the Community manager. *T2*, pp. 33:24 – 34:6. Carla Strader and Paul Shoemaker were Associa employees involved in managing the Community. *Id.*, pp. 35:18 – 36:8.

Stevens bought property in the Community in 2010 and obtained a copy of BC-HOA's bylaws, declarations, and articles. *T1*, p. 29:12-30:16. Stevens has served on several HOA boards, including serving as president, and became familiar with CCIOA and how to operate an HOA. *T1*, p. 28:16 – 29:11.

2. Concerns about the Community.

Stevens does not live at her property, but is very concerned about the Community. *T1*, pp. 29:17–30:4. Stevens is concerned about maintenance, management of the Community, and about Associa. *Id.*, pp. 32:22 – 34:11. Some of the stairways were in disrepair. *Id.*, p. 123:7-17. Water heaters were failing and buildings were flooding. *Id.* Routine maintenance requests were ignored. *Id.*

Other owners were also unsatisfied. During a May 4, 2021 special meeting, several owners expressed concern about the condition of the property and Associa's unresponsiveness. *Ex. O*, Min. 17:56–19:05 & 20:16–23:15. James Lobato testified that while he was an owner, he shared Stevens' concerns. *CF*, pp.

2100-2103.¹ Although he did not prefer to be on the Board because of military deployments, he was willing to serve to address owner concerns. *Id.*

Aslin is another owner who expressed similar concerns about maintenance and Associa’s unresponsiveness. *Ex. O*, Min. 12:21–13:50). Aslin explained that Stevens knocked on his door and spoke with him about the Community, so he “joined up.” *Id.* He wanted to serve on the Board but had been “bullied” out. *Id.*

3. Election Managers.

BC-HOA’s Bylaws require the owners to elect 5 members to the Board, “who shall thereafter govern the affairs of” the HOA. *Ex. 3*, p. 3, Art. IV(1). The Bylaws define the “Powers and Duties” of the Board. *Ex. 3*, pp. 3-5, Art. IV(2)(a)-(p). The Bylaws authorize the HOA to “employ for the Association a professional property manager or managing agent who shall have and exercise those duties and powers granted to him by the Board....” *Id.*, p. p, Art. IV(2)(p).

4. Failure to Hold Annual Meetings and Elections.

BC-HOA’s Bylaws require annual meetings of the Association at which elections of the Managers will be held. *Ex. 3*, p. 2, Art. III(3); *Ex. 4*, p.2. They require that at least one third of the unit owners – either in person or by proxy – to

¹ Mr. Lobato testified after the morning recess on March 23, 2022 but his testimony evidently was not captured on the court’s FTR system, which the

attend any meeting or participate in any vote. *Ex. 3*, p. 2, Art. II(3). They further provide that “an affirmative vote of a majority of members present, either in person or by proxy, shall be required to transact the business of the meeting.” *Id.*

The last annual meeting of where Managers were elected was in 2016. *T1*, p. 36:10-20. By 2020, all terms for any Managers had expired. None of the Managers serving on the Board of BC-HOA were elected.

5. November 2020 Annual Meeting.

In 2020, Stevens was frustrated with BC-HOA and Associa. *T1*, pp. 38:1 – 39:3 & 43:18–49:1. Stevens also was frustrated with the lack of participation at annual meetings, which resulted in an unelected Board. *Id.*

In November 2020, Associa sent out an announcement for an annual meeting to occur on November 12, 2020. *Ex. 6*. Before the annual meeting, Stevens canvassed the community several times to talk to homeowners. *T1*, pp. 43:18–49:1. She called and emailed homeowners. *Id.* Stevens wanted to get enough people to either or to provide a proxy so that things would change. *Id.* Stevens collected 58 proxies for the annual meeting. *Id.*, p. 54:10-16. Stevens provided those proxies before the meeting. *Id.*

transcript confirms. *T2*, p. 72:22-23. The trial court’s Findings of Fact summarize Lobato’s testimony. *CF*, 2100-2103.

Stevens expected to appear at the November 2020 annual meeting, vote her conscience and her proxies, and effect a change. *CF*, pp. 955-56. Stevens expected to do that because the proxy form specifically referenced voting and the Bylaws provided that elections shall occur at the annual meeting. *Ex. 3*, p. 2, ¶ 3. Mr. Mazen and Mr. Lobato were two of the owners who provided proxies to Stevens for the express purpose of voting on their behalf. *CF*, p. 2101-2103.

The Managers bifurcated the business and voting sections of the November 2020 meeting. *T1*, p. 204:2-206:13. They did that to avoid homeowners attending a meeting in close quarters in person during the pandemic. *Id.* The Managers decided to utilize Zoom for the “business” aspects of the meeting. *Id.* The Managers decided to have the annual elections conducted by written ballot. *Id.*

The Managers sent out written ballots that explained the HOA could not meet for the annual meeting due to COVID-19. *Ex. 6*. They provided that the ballots must be returned by 4:00 p.m., but without a date. *Id.* They identified four potential candidates with two blanks to write in a candidate. *Id.*

Stevens was not on the November 2020 ballot. *Id.* Stevens previously indicated she wanted to serve on the Board, but Miller did not list her as a candidate on the ballot. *T1*, pp. 49:14-50:50:3 & 208:11-209:13.

Before the deadline, Stevens provided the 58 written proxies she obtained. *Id.*, p. 54:10-16. Stevens believed she had the right to vote the proxies because the proxies specifically referred to voting and BC-HOA's governance policies expressly provided that once a proxy is presented, the owner is to receive a secret ballot to cast the vote of the proxy. *Ex. 4*, p. 4. When Stevens presented the proxies, she did not receive a ballot to cast each vote. *T1*, p. 58:14-19. Miller testified that there was no way to provide Stevens a ballot to cast the vote of the proxy. *Id.*, pp. 205:2-206:16. Stevens therefore was prevented from voting her proxies and there were insufficient votes for the annual election. *Id.*, p. 55:14-21.

6. March 2021 Online Election.

The Managers decided to conduct another election in December 2020 using an online platform. *Exs. 10 & 11; T1*, pp. 56:1-60:13. The December 2020 election failed. *Id.*, p. 218:24-219:1. So Associa sent out a February 21, 2021 email notice scheduling an election for March 9, 2021 using the same online platform. *Ex. F*. The notice said the election would close March 9, **2020**. *Id.* Although Miller explained that the date was a typo, no follow-up notice or email was sent to correct the typo. *T1*, pp. 220:9-221:13. The notice of the March 2021 election did not itself contain a ballot. *Ex. F*. Instead, the emailed notice of required a recipient to navigate a link to get further information. *Id.*

BC-HOA's governance policies provide that any notice of an election must be sent "[n]ot less than ten nor more than fifty days in advance of any meeting of the Owners" and must be "hand delivered or sent prepaid by United States mail to the mailing address of each home or to any other mailing address designated in writing by the Owner." *Id.* A significant number of owners had not provided an email address. *T1*, pp. 67:15-70:9; *see also Id.*, p. 211:10-16 (Miller confirming that between 35 and 40 owners did not provide an email address). Many owners therefore did not receive notice of the March 2021 election.

The HOA became aware that not all owners received the emailed notice, so between March 1-5, 2021, Associa sent out letters requesting email addresses. *Ex. G*, pp. 1-21. Associa did not send the letters in the 10 to 50 day period required by the bylaws. *CF*, p 2089. No written ballots were mailed or hand-delivered to all owners. *T1*, pp. 223:7-228:25; *T2*, p. 51:20-25. The March 2021 online election did not allow for proxy voting. *T1*, p. 207:14-21.

On March 19, 2021, the HOA announced the results of the March 2021 election. *Ex. 17*, p. 5. They announced two new Managers and three currently serving Managers (Miller, Hughes and Ricardo) were elected. *Id.*

Hours later, Stevens emailed Strader asking for information showing "all the people who voted and number of votes for each person." *Ex. 17*, p. 5. Strader

deferred to Shoemaker. *Id.*, p. 4. Stevens then emailed Shoemaker and asked him to send her “the requested documents” about the March 9, 2021 election “pursuant to CCIOA.” *Id.* Stevens followed up her email several times and asked Associa to produce “Ballots, proxies, and other records related to” the March 2021 online election. *Ex. 17*, p. 3.

On March 31, 2021, Shoemaker provided Stevens “lists of who did and did not vote in the election.” *Id.* Shoemaker attached to his email two spreadsheets. *Ex. 17*, p. 1. The first spreadsheet identified eligible voters but included persons who no longer were eligible. *Ex. H*, p. 2; *T2*, pp. 233:23–234:6 (testifying Neil Smith no longer owned his unit in March 2021). It also did not include Stevens as an eligible voter, although she was an owner. *Ex. H*, p. 2. It identified 33 owners who had not provided an email addresses and could not vote. *T1*, p. 70:2-12.

The second spreadsheet showed who voted. *Ex. H*, p. 3. It included owners (Mukayess) who reported they did not vote in the March 2021 election. *Ex. H*, p. 3; *see also T1*, p. 236:17-25; *Ex. R*.

7. March 2021 Petition for Special Meeting.

While attempting to get information to verify the reported results of the March online election, Stevens prepared petitions for a special meeting to vote on removal of the Managers. *T1*, p. 74:16-22; *Ex. 18*, p. 41. Stevens canvassed the

community to provide the petitions to owners. *TI*, p. 74:23-91:17. She also called and emailed owners. *Id.* Stevens obtained 43 signed petitions. *Ex. 18*, pp. 1-2.

Miller and Hughes reviewed the 43 signed petitions Stevens sent and rejected them. *TI*, p. 74:23-91:17. Associa sent a bulletin to owners advising that Stevens “did not submit enough petitions to require the Association to call a special meeting.” *Ex. 20*. Neither Miller nor any of the other Managers set a special meeting within 30 days of March 11, 2021. *TI*, p. 74:23-91:17.

8. May 4, 2021 Special Meeting and Action by Written Ballot.

After the 30-day deadline for setting a special meeting passed, Stevens scheduled it for May 4, 2021. *Ex. 22*. Stevens emailed owners for whom she had email addresses emails advising them of the meeting, and attached the agenda, ballot and proxy form. *Exs. I & J*. Stevens also mailed to all 160 owners the agenda, ballot and proxy forms for the May 4, 2021 election and meeting. *Ex. L*; *TI*, p. 83:7-86:11. The packet Stevens sent contained a stamped return envelope with a handwritten address corresponding to Stevens’ address. *Ex. L*, p. 5. The sender was listed as “anonymous” to ensure any returned ballots remained secret until they could be counted. *TI*, pp. 86:24-87:6.

Six days before the May 4, 2021 meeting, the HOA’s counsel notified Stevens that the Managers had invalidated the petitions she provided and asked for

additional information. *Id.*, pp. 79:14-81:15. Stevens' counsel provided the information. *Ex. 19.* So Associa advised all owners that "Stevens submitted sufficient petitions to require the Association to call a special meeting of the members" and Stevens "was authorized to schedule a special meeting of the members and send notice of the meeting to the members." *Ex. M.*

The Managers knew Stevens would chair the May 4, 2021 meeting because that is what the agenda said. *Ex. L*, p. 2. The Managers knew the written ballots Stevens provided to all 160 owners were to be returned before the meeting. *Ex. L*, p. 3. With this knowledge, the Managers advised all owners that the "special meeting is valid" and would take place as described by Stevens. *Ex. M.*

9. May 4, 2021 Proxies and Ballots.

On May 4, 2021, fifteen minutes before the meeting was to begin, Stevens sent the Managers an email with photographs of 22 proxies and ballots attached. *Ex. N.* Stevens retained the originals. *T1*, pp. 92:3-93:16. She placed the originals in a folder so they could be examined later. *Id.* Stevens brought the originals to trial and testified to their chain of custody, resulting in their admission. *Ex. 36.*

Two days after the May 4, 2021 election, the HOA's counsel sent correspondence to Stevens and other owners who were elected on May 4, 2021. *Ex. P.* One of the objections was that the proxies Stevens presented were

“unverified” and “illegible.” *Ex. 27*. The HOA never asked Stevens for the originals to verify them or determine if they were illegible. *T1*, pp. 105:11-108:12.

Stevens had received many envelopes with ballots before May 4, 2021. *T1*, pp. 93:17-95:16. Stevens kept those envelopes together, did not open them, and bundled them so they could be counted by a neutral third party. *Id.* In the morning of May 4, 2021, Stevens took the unopened envelopes to a real estate agent not associated with the Community. *Id.* The agent counted the ballots and provided Stevens with the vote totals. *Id.*, pp. 95:15-98:17.

Stevens also canvassed the community on May 4, 2021. *T1*, pp. 93:17-95:16. Stevens received additional sealed envelopes with secret ballots in that process. *Id.* Stevens took those additional sealed envelopes to a bank and asked the bank employee to count them. *Id.* The bank employee declined, but a bank customer counted the ballots and provided Stevens with the count. *Id.*

Stevens reported that by 4:00 p.m. on May 4, 2021, she had received over 81 votes (including the proxy votes) to remove the Managers. *Ex. 26*, p. 1. Stevens emailed the HOA with a copy of all the ballots and proxies she had received. *Id.* She provided photographs of the ballots and proxies. *Ex. 29*. The photographs were attached to the email Stevens sent on May 4, 2021. *Ex. 28*, pp. 3-128.

Stevens retained the originals of the completed ballots. *T1*, pp. 92:3-93:16. Stevens placed the originals in a folder so they could be examined later. *Id.* Stevens brought the originals to trial and testified to their chain of custody, so the trial court admitted them into evidence. *Ex. 36.* The originals confirm that the number of completed ballots provided to and retained by Stevens conforms to the counts Stevens provided on May 5, 2021. *Ex. 26.* The completed ballots confirmed that there were sufficient votes to remove each Manager.

10. May 4, 2021 Special Meeting.

The May 4, 2021 meeting began at 6:00 p.m. and was conducted by Zoom and conference call. The report provided to Stevens by Zoom indicated that there were 43 participants who appeared by Zoom. *Ex. 25*, p. 1. The Zoom attendees needed to identify themselves by name. *T1*, pp. 98:18-103:16. Stevens cross-checked the attendees with an owner list she received from Associa to verify which attendees were owners. *Id.*

Stevens also provided a conference call feature for those owners who could not appear by Zoom. *Id.*, The conference call service Stevens used provided a list of attendees identified by the number from which they were calling. *Ex. 25*, p. 2. Combining the 43 people who attended by Zoom with the 16 callers who called

into the meeting, there were 59 attendees. *TI*, pp. 98:18-103:16. Stevens also had 22 proxies, resulting in a sufficient quorum. *Id.*, 99:17-23.

The May 4, 2021 meeting was video recorded and later posted on YouTube. *Ex. O*; see also https://www.youtube.com/watch?v=WAEnf9_Axfk. Stevens initiated the meeting and followed the agenda previously announced. Within minutes of the meeting, Miller and Hughes, who were serving on the Board as Managers, repeatedly interrupted the meeting. *Id.*, Min. 0:34–5:02, 7:29–8:35, & 14:30–14:42. Owners expressed frustration during the meeting that Miller and Hughes were interrupting. *Id.*, Mins. 7:53–8:35.

The next morning, Stevens sent an email to Associa, the Managers and the Association's counsel. *Ex. 26*. She attached copies of the 22 proxies, the completed ballots cast, and two affidavits confirming the ballots were counted by an independent third party. *Id.* On May 6, 2021, BC-HOA's counsel sent an email asserting many objections to the election. *Ex. 27*. He also emailed the owners elected on the May 4, 2021 ballot asserting the same objections. *Ex. P*.

B. Course of Proceedings.

1. Initial Pleadings in Small Claims and County Court.

Stevens believed she had presented a sufficient number of proxies and was validly elected during the November 2020 meeting, but BC-HOA claimed

otherwise. Stevens wanted a quick resolution of that dispute, so she filed a complaint in small claims court on November 16, 2020. *CF*, p. 17. BC-HOA sought dismissal the small claims case based on jurisdiction, resulting in a transfer of the case to county court with leave to amend. *Id.*, p. 18. Stevens filed a Verified Amended Complaint in county court on February 3, 2021. *Id.*, pp. 858-864. A month later, the county court transferred the case to district court. *Id.*, p. 1.

2. TRO Motion and Hearing.

On May 14, 2021, Stevens filed a motion seeking a temporary restraining order and injunction (“TRO motion”). *CF*, pp. 37-50. After BC-HOA responded (*Id.*, pp. 70-83), the district court held a hearing on June 2, 2021 and again on July 8, 2021. *See Ex. 30* (6-2-21 transcript); *Ex. 31* (7-8-21 transcript). It denied Stevens’ TRO motion on the record. *Ex. 31*, pp. 127:7 – 132:13.

3. Amended Pleadings.

On May 12, 2021, Stevens moved to amend her complaint to add claims against the individual Managers. *CF*, pp. 24-35. The court granted Stevens’ motion and accepted the Second Amended Complaint as filed. *Id.*, p. 188.

On July 1, 2021, Stevens filed a Corrected Second Amended Complaint. *CF*, pp. 421-432. Defendants responded with an Amended Answer, Counterclaims and Jury Demand. *Id.*, pp. 456-481. BC-HOA also moved for leave to assert third

party claims against Aslin and Paul Hoffman, two of the owners identified on the May 4, 2021 ballot. *Id.*, pp. 483-502. The trial court granted BC-HOA's motion on August 9, 2021. *Id.*, p. 842. BC-HOA later dismissed its third party claims. *Id.*, p. 1749-50 (dismissal of Hoffman); *Id.*, p. 1993 (dismissal of Aslin).

4. Cross Motions for Summary Judgment.

On December 3, 2021, Stevens filed a motion for summary judgment. *CF*, pp. 950-968. Stevens filed an amended motion for summary judgment on December 5, 2021. *Id.*, pp. 1288-1309. Defendants responded, *Id.*, pp. 1775-88, and Stevens filed her reply shortly thereafter. *Id.*, p. 1880-1888.

Defendants similarly filed a motion for partial summary judgment. *Id.*, pp. 1175-1189. Stevens filed a response (titled objection), *Id.*, pp. 1751-65, and Defendants replied, making both motions ripe. *Id.*, pp. 1874-1879.

On January 12, 2022, the trial court ruled on the cross summary judgment motions. *CF*, p. 1889-1907. It found the proxies Stevens submitted for the November 2020 election "were not valid for that election," but only for attendance at the 2020 annual meeting. *Id.*, p. 1895. It denied summary judgment on the March and May 2021 elections. *Id.*, pp. 1895-96. It entered summary judgment on Stevens' defamation, breach of fiduciary duty, and civil conspiracy claims as well as her claims against the individual managers. *Id.*, pp. 1897-1906.

5. Trial.

After Defendants abandoned their jury demand, the matter proceeded to a bench trial on March 22-23, 2022. The Court received into evidence the stipulated exhibits, including Stevens' exhibits 1-6, 10-22, 25-33, and Defendants' exhibits A-S. *TI*, p. 8:6-19. Stevens, Miller and Strader testified. *Id.*, pp. 27:23-198:16 (Stevens); *Id.*, p. 199:1-272:20 (Miller); *Id.*, pp. 33:17-65:5 (Strader). Three owners (Lobato, Mukayess, and Hoffman) also testified. *CF*, pp. 2100-05.

After trial, Stevens submitted her proposed Findings of Fact and Conclusions of Law ("FOF"). *CF*, pp. 2023-2071. Defendants also submitted theirs. *Id.*, pp. 2015-2022. On May 24, 2022, the trial court entered its FOF (although the document is mistitled). *CF*, pp. 2072-2110. The court found against Stevens on her breach of contract, CCIOA and breach of covenant of good faith claims. *Id.*, pp. 2106-08. The court found for BC-HOA on its declaratory judgment counterclaim. *Id.*, p. 2109. It also found for BC-HOA on its claim that Stevens violated CCIOA, but did not award any damages. *Id.* It found against BC-HOA on its other counterclaims and entered judgment. *Id.*, pp. 2109-2110.

Stevens timely filed her Notice of Appeal. *CF*, pp. 2111-16.

IV. SUMMARY OF ARGUMENT.

The trial court found that BC-HOA did not strictly comply with CCIOA and the Nonprofit Act, but excused its failure to do so by concluding that only substantial compliance was required. The trial court's decision is unsupported by the text of the statutes or the case law upon which the trial court relied.

The trial court also improperly held Stevens to a different, strict compliance standard, regarding her facilitation of the May 2021 election, which was erroneous. Further, the trial court found Stevens liable under CCIOA when there is no statutory or case law support for doing so because CCIOA does not apply to owners who are petitioning or challenging management.

Finally, the trial court erroneously entered summary judgment against Stevens on her claims relating to the November 2020 election. The trial court incorrectly concluded that the proxy forms Stevens submitted were merely for attendance at the meeting – not for voting – despite the fact that the proxies specifically referenced voting. At the very least, there were ambiguities with the forms and there were disputed questions of fact that precluded summary judgment.

V. LEGAL ARGUMENT.

A. The Trial Court Erred by Holding that BC-HOA Only Must Substantially Comply with CCIOA and the Nonprofit Act.

1. Preservation.

Stevens argued that BC-HOA violated the strict requirements of CCIOA and the Nonprofit Act by failing to provide timely and proper notice of the March 2021 online election, by excluding owners from voting, and by failing to permit proxy voting. *CF*, pp. 957, 1294, 2061-62. Stevens therefore preserved these issues. *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004).

2. Standard of Review.

Stevens challenges the trial court's interpretation of CCIOA and the Nonprofit Act. Statutory interpretation is a question of law reviewed de novo. *Accetta v. Brooks Towers Residences Condo. Ass'n, Inc.*, 2021 COA 87, ¶ 27 (citation omitted). Whether a statute requires strict or substantial compliance is a question of law reviewed de novo. *Wainscott v. Centura Health Corporation*, 2014 COA 105, ¶ 24 (citation omitted).

3. Statutory Interpretation.

In construing a statute, the Court must give effect to the legislature's intent, *Colo. Office of Consumer Counsel v. Pub. Utils. Comm'n*, 42 P.3d 23, 27 (Colo. 2002), and avoid interpretations that defeat its intent. *Klinger v. Adams Cnty. Sch.*

Dist. No. 50, 130 P.3d 1027, 1031 (Colo. 2006). The Court must construe statutory language in a manner that gives effect to every word, considering the language in the context of the statute as a whole. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 327 (Colo. 2004). The Court must avoid interpreting a statute in a manner that produces an illogical or absurd result. *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1190 (Colo. 2010).

“[T]o ascertain the legislative intent, [Courts] look first to the plain language of the statute, giving the language its commonly accepted and understood meaning.” *Id.* (citing *Prop. Tax Adm'r v. Prod. Geophysical Servs., Inc.*, 860 P.2d 514, 517 (Colo. 1993)). “Where the statutory language is clear and unambiguous, [Courts] do not resort to legislative history or further rules of statutory construction.” *Id.* (citation omitted).

4. BC-HOA Did Not Comply with CCIOA and the Nonprofit Act.

The trial court held that the March 2012 election was “valid.” *CF*, p. 2106. The trial court forgave BC-HOA for failing to adhere to its bylaws, governance policies, CCIOA and the Nonprofit Act by not timely providing notice of the March 2021 election, by excluding a quarter of the owners from voting, and by failing to permit proxy voting. *Id.*, pp. 2106-07. This Court should reverse.

“In 1991, the General Assembly enacted CCIOA based on the Uniform

Common Interest Ownership Act (1982) (Uniform Act).” *Giguere v. SJS Fam. Enterprises, Ltd.*, 155 P.3d 462, 467 (Colo. App. 2006). The legislature enacted CCIOA “to establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities.” C.R.S. § 38-33.3-102(1)(a). CCIOA mandated that BC-HOA’s bylaws “must provide” numerous items that bind the HOA, including provisions for the election of the executive board and the “qualifications, powers and duties, and terms of office of, and manner of electing and removing, executive board members and officers and the manner of filling vacancies.” C.R.S. § 38-33.3-306(1)(b)-(c). BC-HOA’s bylaws contained such provisions. *Ex. 3*, p. 3.

CCIOA provides that “[m]eetings of the unit owners, as the members of the association, shall be held at least once each year.” C.R.S. § 38-33.3-308(1). For any annual or special meeting, “the secretary or other officer specified in the bylaws shall cause notice to be hand delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner,” which notice shall be sent “[n]ot less than ten nor more than fifty days in advance of any meeting of the unit owners.” *Id.*

BC-HOA’s bylaws also mandated that the HOA “shall” hold annual meetings at which elections would occur. *Ex. 3*, p. 2. The governance policies

provided that meetings of owners “shall be held at least once each year.” *Ex. 4*, p. 2. The governance policies also mandated that “[n]ot less than ten nor more than fifty days in advance of any meeting of the Owners, the secretary or other officer specified in the bylaws shall cause notice to be hand delivered or sent prepaid by United States mail to the mailing address of each home or to any other mailing address designated in writing by the Owner.” *Ex. 4*, p. 2.

Section 310 of CCIOA addresses voting in an HOA. It expressly entitles each owner to vote. C.R.S. § 38-33.3-310(1)(a). It also allows owners to provide a proxy for another to vote. C.R.S. § 38-33.3-310(2)(a). Consistent with these requirements, the HOA’s bylaws provided for proxy voting and mandated that any valid proxy provided by an owner “shall be effective and remain in force unless voluntarily revoked, amended or sooner terminated by operation of law.” *Ex. 3*, p. 9. Similarly, the governance policies provided that “[a]n the event an Owner holds a proxy for another Owner, upon presentation of the proxy to the Secretary of the Association or the Secretary's designee, the Owner is to receive a secret ballot to cast the vote of the Owner who provided the proxy.” *Ex. 4*, p. 4.

BC-HOA is governed by the Nonprofit Act. C.R.S. § 7-127-104(1) provides “[a] nonprofit corporation shall give to each member entitled to vote at the meeting notice consistent with its bylaws of meetings of members in a fair and reasonable

manner.” Any notice of an election “is fair and reasonable if: (a) [t]he nonprofit corporation notifies its members of the place, date, and time of each annual, regular, and special meeting of members no fewer than ten days, or if notice is mailed by other than first class or registered mail....” C.R.S. § 7-127-104(3). Similarly, C.R.S. § 7-127-203(1) provides that “[u]nless otherwise provided by the bylaws, a member entitled to vote may vote or otherwise act in person or by proxy.” *Id.*

The Nonprofit Act’s, CCIOA’s and the bylaws use of the term “shall” is mandatory. *People v. Hyde*, 2017 CO 24, ¶ 28 (“The legislature’s use of the word ‘shall’ in a statute generally indicates its intent for the term to be mandatory.”) (citations omitted). Likewise, CCIOA’s repeated use of the term “must” is mandatory. *Ryan Ranch Cmty. Ass’n, Inc. v. Kelley*, 2016 CO 65, ¶ 42. BC-HOA therefore could not fail to comply with the notice, proxy and voting provisions of CCIOA and the Nonprofit Act. BC-HOA failed to do so, however.

a. BC-HOA Did Not Properly Provide Notice of the March 2021 Election.

First, BC-HOA failed to provide proper notice. The language contained in both C.R.S. § 7-127-104(3), C.R.S. § 38-33.3-308(1) and the governance policies is clear and unequivocal. The notice for any election must be provided to all owners not less than 10 days and no more than 50 days before an election. When

the language is clear and unequivocal, “[i]t must be complied with strictly,” particularly as it relates to elections. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 23. Although compliance with clear statutory mandates may be “more difficult” in the pandemic, courts “do not have the authority to rewrite [statutes] in response to the COVID-19 virus. Only the General Assembly can do that.” *Id.*, ¶ 24.

The trial court made the factual finding that for the March 2021 election, “the mailers were sent on March 1, 2021 and March 4, 2021, which was less than the required ten days before the election.” *CF*, pp. 2088-89. These facts compel only one conclusion – the notice of the March 2021 election did not comply with C.R.S. §§ 7-127-104(3), 38-33.3-308(1), the bylaws or the governance policies.

Further, the notice provided for the March 2021 election had the incorrect date, *Ex. F*, which was never corrected. *T1*, pp. 220:9-221:13. It was not consistent with BC-HOA’s governance policies. *Ex. 4*, p. 2. The notice BC-HOA provided to only those owners with an email address did not accurately “state the time” for the election, nor did it include an agenda or ballot or agenda. *Id.*

b. BC-HOA Excluded Owners from Voting.

Second, BC-HOA excluded many owners from voting by not providing written ballots to all owners. BC-HOA claimed the March 2021 election was an action by written ballot. Despite the fact that BC-HOA’s bylaws and governing

policies required a meeting to elect Managers, the Nonprofit Act provides that “any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the nonprofit corporation delivers a written ballot to every member entitled to vote on the matter.” C.R.S. § 7-127-109(1). The ballot provided “shall: (1) State each proposed action; and (b) Provide an opportunity to vote for or against each proposed action.” C.R.S. § 7-127-109(2). This language is mandatory and, like the election code, should be interpreted to require strict compliance. *Griswold*, 2020 CO 34, ¶ 23.

BC-HOA’s president admitted that between 35 to 40 owners could not have voted because they did not have or had not provided an email address. *T1*, pp. 67:15-70:9 & 211:10-16. Conducting an election in which 25% of the owners could not vote did not comply with C.R.S. § 7-127-109(1) or C.R.S. § 38-33.3-310(1)(a) because those owners who had not provided an email address were not “entitled to vote,” which was mandatory.

Even if all owners had provided an email and could access online voting, the notice BC-HOA provided did not itself contain a ballot that stated each proposed action and provide an opportunity to vote for or against each proposed action. *Ex. F*. It therefore did not comply with C.R.S. § 7-127-109(2).

c. BC-HOA Did Not Allow Proxy Voting.

Third, BC-HOA's March 2021 election was invalid because the HOA did not allow proxy voting. C.R.S. § 38-33.3-310(2)(a) and C.R.S. § 7-127-203(1) both allow owners to vote by proxy. BC-HOA's governance policies expressly allowed owners to vote by proxy and required BC-HOA's secretary to provide the proxy holder a ballot "to cast the vote of the Owner who provided the proxy." *Ex. 4*, p. 4. Contrary to these requirements, the March 2021 election did not allow for proxy voting. *TI*, p. 207:14-21; *CF*, p. 2106.

Even if the HOA's noncompliance with the proxy voting provisions of CCIOA and the Nonprofit Act could be forgiven, the undisputed evidence demonstrated that the March 2021 election was invalid. Ineligible voters (such as Mr. Smith) were included as eligible voters. *Ex. H*, p. 2. Eligible voters (such as Stevens) were excluded as eligible voters. *Id.* Owners did not vote in the March 2021 election were identified as having voted. *See Ex. H*, p. 3; *CF*, p. 2103; *Ex. R*.

The trial court's conclusion that the March 2021 election was "valid" cannot be reconciled with its findings that BC-HOA "failed to meet the requirements of the Bylaws and C.R.S. § 7-127-109 by not sending a written ballot to all homeowners," by not providing proper notice and not providing for proxy voting. *CF*, p. 2106. Reversal therefore is required. *People v. Syrie*, 101 P.3d 219, 222

(Colo. 2004) (although appellate court defers to trial court’s factual findings, reversal is required if the trial court “came to a conclusion ... that is inconsistent with or unsupported by the factual findings.”) (citation omitted).

5. CCIOA and the Nonprofit Act Do Not Permit Substantial Compliance.

The trial court validated the March 2021 election by concluding “only substantial compliance was necessary.” *CF*, p. 2106 (citing *Perfect Place, LLC v. Semler*, 426 P.3d 325, 331 (Colo. 2018)). The trial court erred for several reasons.

First, the trial court’s conclusion that only substantial compliance was necessary is not grounded in any of CCIOA’s or the Nonprofit Act’s text. The trial court did not even cite the statute it found required only substantial compliance. A court cannot determine that a statute requires only substantial compliance without construing the statute. *Colorow Health Care, LLC v. Fischer*, 2018 CO 52M, ¶ 10 (citation omitted).

Second, the clear purpose advanced by C.R.S. § 7-127-109 is to allow members to vote in a ballot without attending a meeting. To do that, however, the nonprofit must ensure that it “delivers a written ballot to every member entitled to vote on the matter,” and ensure that the ballot clearly states the proposed actions and provides an opportunity to vote on the proposed actions. The intent of this statute is effectuated only by strict compliance.

It would defeat the clear intent of the statute to find that a nonprofit can bind its members without allowing all of them an opportunity to vote on a clear ballot. If the Managers of an HOA could send ballots only to those owners who they believed would support them, the election process would have no integrity. It would be akin to allowing the Secretary of State in one political party to send ballots only to voters who are members of her political party.

Third, the clear intention of C.R.S. § 38-33.3-310(2)(a) is to allow an owner who is unable to appear for an election to appoint someone else to cast her vote. BC-HOA's governance policies clearly explain this purpose – an owner who has a proxy “is to receive a secret ballot to cast the vote of the Owner who provided the proxy.” *Ex. 4*, p. 4. This purpose is effectuated only by requiring strict compliance. Strict compliance ensures objectivity and integrity in the process. Otherwise, the Managers could allow proxy voting only for those owners who are unavailable to vote and whose votes the Managers expect will be favorable.

Fourth, the authorities upon which the trial court relied either hold the opposite or are inapposite. The trial court first cited *Semler*, which did not involve any voting, notice of voting, or proxy issues. *Semler* instead involved subdividing units under C.R.S. § 38-33.3-213. *Semler*, 426 P.3d at 331. Even if *Semler* involved germane issues, the trial court misinterpreted *Semler*. In the portion of

Semler it relied upon, the Supreme Court commented on the court of appeals' decision, noting that it concluded that "substantial compliance with the statute was all the legislature required." *Id.*, p. 331, ¶ 28 (citing *Perfect Place v. Semler*, 2016 COA 152M, ¶¶ 32, 36). The Supreme Court reversed, explaining "CCIOA nowhere states that its provisions concerning the subdivision of units require only substantial compliance." *Id.*, p. 334, ¶ 48. The Court noted it "has never held that any of CCIOA's provisions may be satisfied through substantial compliance." *Id.* The trial court erred by interpreting *Semler* as requiring only substantial compliance with CCIOA.

The trial court also relied upon two cases to support the proposition that courts have "allowed for altered procedures due to the COVID-19 pandemic." In *People v. Hernandez*, 2021 CO 45, ¶ 45, the Court held "that the trial court did not violate Hernandez's confrontation or equal protection rights by allowing the prosecution to appear, and its witnesses to testify, via a videoconferencing platform at his [make my day] hearing" because the trial court had the discretion to adjust procedures under Crim. P. Rule 43 and the Chief Judge's Administrative Order implemented "to protect the health and safety of those appearing before it and—in turn—the community at large." *Id.*

The trial court also cited *In re Colorado Indep. Cong. Redistricting Comm'n*,

2021 CO 73, ¶ 33. There, the Court evaluated whether the Redistricting Commission’s redistricting plan complied with article V, section 44.3 of the Colorado Constitution. *Id.*, ¶ 28. Some of the opponents of the redistricting plan argued that it did not comply because the Commission deviated from the September 1 deadline provided in the constitution. *Id.*, ¶¶ 31-36. The constitution itself allowed the Commission to “adjust its interim deadlines for the preparation of the preliminary and staff plans when ‘conditions outside of the commission’s control require such an adjustment to ensure adopting a final plan’ by the September 1 deadline.” *Id.*, ¶ 32 (quoting Colo. Const. art. V, § 44.4(5)(c)). The Court noted that it was appropriate to adjust the schedule from the September 1 deadline because of “the unique challenges and delays presented by the ongoing COVID-19 pandemic” which also resulted in “delays in the release of the final census data,” which was the basis for the September 1 deadline. *Id.*, ¶¶ 33, 35. It further noted that the adjustment of the deadline only had the effect of compressing the time allotted for the Court to review the plan, which the Court could accommodate by adjusting its own schedule. *Id.*, ¶ 36.

Neither the redistricting case nor *Hernandez* involved a statute containing mandatory language, such as CCIOA and the Nonprofit Act. When such a statute is implicated even during a pandemic, as it was in *Griswold*, 2020 CO 34, ¶ 23, the

statute must be strictly followed even if unfair because those issues are for the legislature to resolve. *Id.*, ¶ 24.

The trial court erred when it concluded that CCIOA and the Nonprofit Act required only substantial compliance, that BC-HOA substantially complied with both statutes, and that the March 2021 election results were valid.

B. The Trial Court Erred in Finding that Stevens Violated CCIOA in How She Facilitated the May 4, 2021 Election.

1. Preservation.

Stevens argued that CCIOA did not apply to her because she was not a managing agent or employee of the HOA. *CF*, p. 2068. Stevens also argued that the May 4, 2021 election was proper under CCIOA and the Nonprofit Act. *Id.*, pp. 2063-65. These issues are preserved. *Melendez*, 102 P.3d at 322.

2. Standard of Review.

Whether CCIOA applies to Stevens is a question of statutory interpretation, which the Court reviews de novo. *Giguere*, 155 P.3d at 467. Whether the May 4, 2021 election complied with the Nonprofit Act also is an issue of statutory interpretation, reviewed de novo. *Weinstein v. Colborne Foodbotics, LLC*, 2013 CO 33, ¶ 8 (citation omitted).

3. CCIOA Did Not Apply to Stevens.

The trial court found in BC-HOA's favor on its counterclaim alleging

Stevens violated CCIOA in the way she facilitated and conducted the May 4, 2021 election. *CF*, p. 2109. The trial court erred in so concluding.

Part 3 of CCIOA applies to the management of an HOA. C.R.S. § 38-33.3-302 governs the powers of an HOA. One of the powers an HOA has is to “[a]dopt and amend bylaws and rules and regulations.” C.R.S. § 38-33.3-302(1)(a). BC-HOA exercised that power and adopted its bylaws (*Ex. 3*) and governing policies. *Ex. 4*. Neither the bylaws nor the governing policies provide that an owner could be liable for the manner in which she calls a special meeting, circulates a petition, or facilitates a special election when the Managers fail to do so.

BC-HOA retained Associa to be the Community manager to assist the Managers in managing the Community. *T2*, pp. 33:24 – 34:6. C.R.S. § 38-33.3-302(3) expressly subjects Associa to Part 3 of CCIOA. It does not, however, subject any individual owner to the management obligations contained in Part 3 of CCIOA. Thus, an individual owner like Stevens could not be obligated to comply with Part 3 of CCIOA or subject to liability for failing to comply with Part 3 of CCIOA unless she also was a “managing agent, employee, independent contractor, or other person acting on behalf of the association.” C.R.S. § 38-33.3-302(3).

BC-HOA never contended that Stevens was a “managing agent, employee, independent contractor, or other person acting on behalf” of BC-HOA. To the

contrary, BC-HOA expressly advised all other owners in the Community that Stevens was not acting on behalf of BC-HOA and “did not have the authority to call a special meeting on her own.” *Ex. 20*. Stevens was acting against the HOA; not on its behalf. They were active opponents in a lawsuit at the time.

The trial court did not cite C.R.S. § 38-33.3-302(3) or any other legal authority that would subject Stevens to management obligations under Part 3 of CCIOA. The trial court did not reference anything in BC-HOA’s bylaws or governing policies that would subject Stevens to legal liability for the way she facilitated the May 4, 2021 election or special meeting. There is no basis for concluding that an owner could be liable under Part 3 of CCIOA for facilitating a special election or conducting a special meeting.

The consequences of imposing personal liability upon a homeowner under CCIOA for facilitating an election or conducting a special meeting would be extraordinary and inconsistent with CCIOA’s intent. For example, BC-HOA’s governing policies provide that during a meeting, “[e]ach person who speaks is to first state his or her name and the address of their home in the Community.” *Ex. 4*, p. 2. If the trial court were cored, an owner who started speaking without first stating her name could be personally liable to the HOA even though the person was not a managing agent or employee of the HOA. The trial court’s legal

conclusion – that Stevens has individual liability under CCIOA for the manner in which she facilitated the May 2021 special election and meeting – finds no support in CCIOA. It relies on an interpretation of CCIOA that is absurd. *Smith*, 230 P.3d at 1190 (courts must “avoid an interpretation that produces an illogical or absurd result.”). This Court should reverse.

4. The Trial Court Erred by Applying a Different Standard to the May 2021 Election and Concluding It Was Invalid.

The trial court found that the March 2021 election was “sufficiently reliable and therefore valid” but the May 2021 special election was “invalid.” *Id.*, p. 2107. This Court should reverse because the trial court erred by applying a different standard to Stevens than to BC-HOA and because the factual record established that the May 4, 2021 election complied with CCIOA and the Nonprofit Act.

As explained above, the March 2021 election did not comply with the notice and proxy voting provisions of CCIOA. It also did not comply with the Nonprofit Act’s provisions allowing for action by written ballot. *Supra* § V(A)(4). Moreover, the results of the March 2021 election could not be verified because ineligible voters were allowed to vote, eligible voters were not allowed to vote, and owners who did not vote were reported as voting. *Supra* § V(A)(4)(c).

Even so, the trial court concluded “the March 2021 election [was] sufficiently reliable] and therefore valid” while the May 2021 election results were

not. *CF*, p. 2107. In reaching these legal conclusions, however, the trial court used BC-HOA's standards for conducting an owner's meeting to invalidate the results of an action by written ballot, which is governed by C.R.S. § 7-127-109 and not BC-HOA's bylaws. The trial court also unfairly applied different standards to Stevens than it did to BC-HOA.

Specifically, the trial court found the results of the May 2021 election could not be verified because quorum "was not established in the sections of the recordings of the May 2021 special meeting that were provided to the Court." *CF*, p. 2017. The trial court erred because it equated the May 4, 2012 special meeting with the election. The election was an action by written ballot – not a meeting.

On April 15, 2021, Stevens sent a written ballot to all 160 owners explicitly requiring all completed ballots to be returned by 5:00 p.m. on May 4, 2021, **before** the meeting was scheduled to occur. Stevens sent the written ballots by U.S. Mail, postage prepaid, 19 days before the written ballots were due. *Id.* In doing so, Stevens complied with the notice provisions of C.R.S. § 7-127-104(3) and the governance policies. *Ex. 4*, p. 1. The materials Stevens sent on April 15, 2021 included forms for proxy voting, which complied with C.R.S. § 7-127-203 and C.R.S. § 38-33.3-310(2)(a). The written ballots Stevens sent (*Ex. L*, p. 3) identified the proposed actions and provided an opportunity to vote for or against

the proposed actions, in compliance with C.R.S. § 7-127-109(2).

Stevens received 22 validly executed proxy forms allowing her to vote for 22 owners and sent those to BC-HOA's secretary at 5:46 p.m. on May 4, 2021. *Ex. N*. Stevens voted her proxies and also received envelopes with a sufficient number of ballots to remove the Managers before the meeting was supposed to begin. *Exs. 26 & 28*. Because a sufficient number of written ballots were provided before the meeting, the action taken by written ballot had "the same effect as action taken at a meeting of members...." C.R.S. § 7-127-109(6). The trial court erred by considering what occurred at the May 4, 2021 meeting because no meeting was required. The action already had taken effect.

The trial court concluded that the May 4, 2021 election results were invalid because the "ballots were collected without any identifying information." *CF*, p. 2107. The trial court erred because C.R.S. § 38-33.3-310(1)(b)(I)(A) required secret ballots, as did BD-HOA's governance policies. *Ex. 4*, p. 4. Moreover, Stevens retained the originals of the completed ballots that she had photographed and sent to the Managers and Associa on May 5, 2021. *TI*, pp. 92:3-93:16. Stevens brought them to trial and the trial court admitted them into evidence. *Ex. 36*. The absence of identifying information on the ballots was immaterial because the originals could have been examined and checked against the role of owners to

validate the number of votes.²

Additionally, the trial court concluded that the May 4, 2021 election results were invalid because the trial court was unable to determine that the broker and bank customer were “neutral third parties.” *CF*, p. 2107. Stevens testified the broker and bank customer had no relationship or affiliation with the Community. *T1*, pp. 93:17-95:16. BC-HOA’s president testified she understood the HOA received the ballots and proxies from the May 4, 2021 election. *Ex. 31*, p. 84:11-13. She also confirmed that the HOA does not have any knowledge or information suggesting that the broker and bank customer had any interest in the Community and has never contacted either person. *Id.*, p. 85:4-8. The trial court’s conclusions therefore were inconsistent with the undisputed factual record, which justifies reversal. *Syrie*, 101 P.3d at 222.

² The trial court’s insistence that Stevens prove the identity of every owner who voted on the secret ballot in the May 2021 election is another example of the trial court applying a different standard to Stevens than it did to the HOA. The HOA did not prove the identify of every voter in the March 2021 election before announcing the results. The trial court found the March 2021 votes were “valid” even though no ballots were retained to verify who executed them and the spreadsheets showed ineligible voters were allowed to vote, eligible voters were not allowed to vote, and owners were listed as having voted when they did not. If the May 2021 results were not valid because the ballots did not identify who voted, the March 2012 results were also invalid for the same reason.

C. The Trial Court’s Summary Judgment Ruling Was Erroneous.

1. Standard of Review.

This Court reviews entry of summary judgment de novo. *People ex rel. Rein v. Jacobs*, 2020 CO 50, ¶ 40 (citation omitted). “Summary judgment is only proper if the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Id.* (quoting C.R.C.P. 56(c)).

“In considering whether summary judgment is appropriate, a court grants the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts and resolves all doubts against the moving party.” *Id.* at ¶ 41 (citation omitted). “Summary judgment is a drastic remedy, and it should only be granted when it is clear that the applicable legal standards have been met.” *Id.* at ¶ 42 (citation omitted).

2. Preservation.

Stevens preserved this issue for appeal by raising it in her response to Defendants’ summary judgment motion. *CF*, p. 1755-59. The trial court ruled against Stevens, thereby preserving the issue. *Id.*, pp. 1894-95.

3. This Court Should Reverse the Summary Judgment Ruling.

In its summary judgment order, the trial court ruled the proxies Stevens submitted “were not valid for that election,” but only for attendance at the 2020 annual meeting that occurred by Zoom. *CF*, p. 1895. This Court should reverse.

It was undisputed that BC-HOA’s Articles, bylaws and governance policies required the HOA to hold an annual meeting during which “there shall be elected by ballot of the members a Board of Managers.” *Ex. 3*, p. 2; *Ex. 4*, p.2. CCIOA also contains that requirement. C.R.S. § 38-33.2-308(1).

BC-HOA set an annual meeting to occur on November 12, 2020, but the Managers bifurcated the business and voting sections of the meeting. *T1*, p. 204:2-206:13. Associa mailed a written ballot to the owners. *CF*, p. 1326. Associa also mailed a proxy form to the owners. *Id.*, p. 1328. After Associa mailed the notice, ballots and proxy form, Stevens obtained 58 proxies for the November 2020 meeting. *Id.*, p. 54:10-16. Stevens provided those proxies before the meeting to obtain ballots, consistent with the governing policies. *Ex. 4*, p. 4. BC-HOA’s secretary did not provide her with written ballots as the HOA’s governing policies required but instead rejected Stevens’ vote. *CF*, p. 1793.

The Nonprofit Act provides that “[a]n appointment of a proxy is effective against the nonprofit corporation when received by the nonprofit corporation,

including receipt by the nonprofit corporation of an appointment transmitted pursuant to paragraph (b) of subsection (2) of this section.” C.R.S. § 7-127-203(3). C.R.S. § 7-127-203(8) requires a non-profit to accept the proxy appointment. A nonprofit may only reject a proxy in limited circumstances inapplicable here. C.R.S. § 7-127-204(3).

It was undisputed that BC-HOA refused to allow Stevens to submit her proxy votes and also refused to provide her a ballot for each proxy she had. BC-HOA failed to follow its own bylaws, governing policies, and C.R.S. § 7-127-203(8). The trial court erred by interpreting BC-HOA’s proxies as merely for attendance to establish a quorum. The proxy form included a section at the bottom allowing an owner to authorize a person to serve as her proxy. *CF*, p. 1328. It also expressly advised owners that the specific owner “you designate to **vote** your proxy must be at the meeting for your vote to count.” *Id.* (emphasis added).

The proxy form is like a contract, the interpretation of which “is a question of law that is reviewed de novo and [this Court] need not defer to a lower tribunal’s interpretation of the contract.” *Ad Two, Inc. v. City & Cnty. of Denver*, 9 P.3d 373, 376 (Colo. 2000) (citation omitted). Courts interpret the words used according to their plain and ordinary meaning. *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004) (citation omitted). Here, the plain and ordinary

meaning of the word vote when used as a verb means “to express or signify will or choice in a matter, as by casting a ballot.” See <https://www.dictionary.com/browse/vote>.

Accordingly, owners who received the proxy form reasonably would believe that by completing the form and authorizing a proxy, the owner was authorizing the proxy to cast a ballot to signify a choice. The trial court erred in its interpretation of the proxy form because it rendered the express guidance that the person designated by the owner as her proxy would “vote” the proxy.

If the proxy forms were not for voting but referenced voting, they were ambiguous. *Gagne v. Gagne*, 2014 COA 127, ¶¶ 59-60 (internally inconsistent terms in document render it ambiguous); *Ad Two, Inc.*, 9 P.3d at 376 (“Terms used in a contract are ambiguous when they are susceptible to more than one reasonable interpretation.”). When, as here, a document is ambiguous, “the determination of the parties' intent is a question of fact.” *Gagne*, 2014 CO 127, ¶ 52.

Disputed issues of fact existed regarding the intent of the proxy form and whether an owner who executed it understood that she was authorizing the proxy holder to attend the meeting, present the proxy, and receive a ballot to vote. The trial court erred in granting summary judgment. *Anderson v. Vail Corp.*, 251 P.3d

1125, 1129 (Colo. App. 2010) (when “there are legitimate disputes of material fact ... “summary judgment [is] inappropriate.”).

VI. CONCLUSION.

For the foregoing reasons, Stevens respectfully request the Court reverse the trial court’s judgment against her and remand for further proceedings.

Respectfully submitted this 16th day of September, 2022.

/Troy R. Rackham
Troy R. Rackham
Spencer Fane LLP
1700 Lincoln Street, Suite 2000
Denver, Colorado 80203
Telephone: (303) 839-3860
Email: trackham@spencerfane.com

Counsel for Stevens-Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed and served via CCEF on this 16th day of September, 2022 upon the following:

Joseph Kummer, Esq.
Jachimiak Peterson Kummer, LLC
860 Tabor Street, Suite 200
Lakewood, CO 80401
Email: jkummer@jpk.law

/s/ Troy R. Rackham
Troy R. Rackham

Your filing has been successfully submitted to the court. Your filing is not considered final until the court accepts it.

Filing Information:

Filing ID: BA427EFC0275F
Court Location: Court of Appeals
Case Number: 2022CA000888
Case Caption: Stevens, L v Brandy Chase
Authorized Date: 09/16/2022 3:33 PM
Submitted By: Troy Rackham

Filing Party(ies):

Party	Type	Status	Attorney
Leslie Robin Stevens As Trustee of Hunter's Living Trust	Plaintiff-Appellant	Active	Troy Robert Rackham (Spencer Fane LLP)

Documents:

Document ID	Document	Title	Statutory Fee	Security
651CF39C9E8B0	<u>Opening Brief</u>	Opening Brief	\$0.00	Public

Service:

Party	Type	Attorney	Organization	Method
Antares Property Services Inc D/b/a Associa Colorado Association Services	Defendant-Appellee	Joseph Robert Kummer	Jachimiak Peterson Kummer LLC	E-Service
Brandy Chase II Hoa Inc	Defendant-Appellee	Joseph Robert Kummer	Jachimiak Peterson Kummer LLC	E-Service

Submission Options:

Note To Clerk: N/A
Authorizer: Troy Robert Rackham
Submit Options: Submit to the court and serve selected parties.

Billing Information:

Statutory Filing Fees: \$0.00
E-Filing Fees: \$12.00
Service Fees: \$12.00
Total Fees: \$24.00
Billing Reference: 5504585.0001