No. B337889

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 5

DOUGLAS KRUSCHEN

Respondent-Plaintiff

v.

ANNANDALE TOWNHOUSE ASSOCIATION, INC., *et al.*

Appellant-Defendants

APPEAL FROM JUDGMENT

SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES
CASE NO. 23VECV05191
THE HON. ERIC P. HARMON, JUDGE PRESIDING

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES

(Cal. Rules of Court, Rule 8.208)

There are no interested entities or persons that must be listed in this certificate under Rule 8.208.

Respectfully submitted,

MYERS, WIDDERS, GIBSON,
JONES & FEINGOLD, LLP

Dated: May 5, 2025 By: /s/ James E. Perero

James E. Perero, Esq.

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INTRODUCTION

Respondent Douglas Kruschen ("Respondent") obtained full and complete relief from a skeptical trial court. (CT 207, 224 [election "now voided" and "invalid"].) In its appeal, Appellant Annandale Townhouse Association, Inc. ("Appellant") fails to demonstrate mootness or reversible error. The mootness argument arises from Appellant's effort to manipulate the record and is, in any event, contrary to published case law. Appellant's argument that the inspector of elections was authorized to receive and count late ballots after the polls closed and reduced quorum was

established fails to properly construe applicable authorities and the record. Corporations Code section 7616 provides a separate uncontested and independent basis for the judgment. Further, there is no basis for Appellant to argue that legislation which became January 1, 2024, (after the 2023 election) should retroactively affect the trial court's decision—especially where Appellant failed to raise the issue in the trial court. (CT 162ff.)

The trial court gave careful and nuanced consideration to the pertinent legal and factual issues. In so doing, it found that Appellant's inspector of elections i) lacked authority to accept fifty late ballots out of 181 total (which ballots allowed for cumulative voting) and ii) immediately comingled those fifty late ballots with the entire ballot pool in a manner that prevented the trial court from ascertaining which ballots were properly tabulated. (CT 223.) In the words of the trial court, the Appellant "has not established that any noncompliance [with Civil Code section 5100, *et seq*., or the election operating rules] did not affect the results of the election." (CT 224.) This Court should affirm the Judgment.

FACTUAL BACKGROUND

Appellant is a California nonprofit mutual benefit corporation subject to California's Nonprofit Mutual Benefit Corporation Law (Corporations Code section 7110, *et seq*.). (CT 13 at ¶2 [Verified Complaint]; CT 162 ¶2 [verified admission].) It also is a common interest development ("CID") subject to the Davis Stirling Common Interest Development Act (Civil Code section 4000, *et seq*.) Appellant's members are the record owners of each of

292 condominium units located at the real property subject to Appellant's declaration. (CT 45, 47 ¶2.2.)

A. Appellant's Bylaws

Appellant's Bylaws at Article IV, Section 1 require that its affairs be "governed by a Board of Directors composed of 5 persons, all of whom must be owners of units in the Project." (CT 123 [Appellant's Bylaws, Art. IV, Sec. 1]; CT 20 at ¶46 [Verified Complaint]; CT 165 at ¶46 [verified admission]; CT 216 [Bylaws attached to Verified Complaint as Ex. B admitted in evidence as Ex. 22].) With respect to quorum requirements for member meetings, the Bylaws provide that members may properly adjourn the meeting to "a time not less than Forty-Eight (48) hours nor more than Thirty (30) days from the time the original meeting was called *at which time the quorum shall be reached by Thirty-Three and One Third (33 1/3%) of owners present either in person or by proxy*." (CT 136–37 [italics original].)

B. Appellant's Election Rules

Civil Code section 5105(a) requires Appellant to maintain election and voting rules consistent with the provisions of the statute. In 2019, S.B. 323 expanded these requirements, effective January 1, 2020. (See notes following Civ. Code § 5105(h).)

Appellant adopted election and voting rules (the "Election Rules"). (CT 139 [Election Rules]; CT 20 at ¶48 [Verified Complaint]; CT 165 at ¶48 [Appellant's affirmation that "Exhibit C appears to be the Annandale Election Rules"]; CT 216 [Election

Rules attached to Verified Complaint as Ex. C admitted in evidence as Ex. 17].)

The Election Rules "shall apply for the election of directors." (CT 139 [Preamble].) They require that "secret ballot procedures shall be used when voting on . . . election . . . of directors." (CT 140 at ¶2.) The procedures require that "[t]he secret ballot itself must be inserted into an envelope and sealed," which envelope is then "inserted into a second envelope," which "second envelope is addressed to the inspectors of election of the Association, who will be tallying the votes." (CT 140 at ¶2(d).)

Appellant's members are authorized to "return their secret ballot by mail, hand deliver it to the meeting or complete the ballot at the meeting, and is deemed cast when so delivered or mailed, provided that only those ballots which are delivered to the inspectors of election prior to the polls closing shall be counted." (CT 140 at ¶2(d)(i).)

Pursuant to the Election Rules, the Board, not Appellant's inspector of elections, is endowed with discretion over "the time within which to return the ballot to the Association," subject to the requirement that said time not be less than thirty days. (CT 141 at ¶2(e).) Further, "[t]he time for the return of secret ballots may be extended for reasonable intervals at the discretion of the Board, with or without notice to the Members." (*Id.*)

For secret ballot elections, the Board "shall appoint one or three independent third party(ies) as inspector(s) of election[.]"

(CT 141 at ¶4(a).) The Election Rules require that Appellant's inspector of elections shall (among other things): "(ii) determine the authenticity, validity, and effect of ballots, proxies, etc., if any; (iii) receive ballots; . . . (v) count and tabulate all votes; [and] (vi) determine when the polls shall close." (CT 142 at ¶4(e).)

C. Events Leading to The 2023 Director Election

In April 2023, Appellant approved a contract proposal from "Correct Elect" for inspector of election services for its fiscal year 2023 director election ("Appellant's Inspector"). (CT 153 [Board Minutes]; CT 216 [minutes attached to Verified Complaint as Ex. D admitted in evidence as Ex. 10].) Michelle Kelly owns Correct Elect and served as the onsite inspector of elections representative for Appellant's 2023 director election. (See CT 608:8–20; 610:20–25.)

On or before August 15, 2023, Appellant's Inspector issued a "General Notice Of Election Meeting / Candidate List." (CT 154 [notice]; RT 616:7–18; CT 216 [notice attached to Verified Complaint as Ex. E admitted in evidence as Ex. 10].) The notice stated that the election would be held on October 17, 2023, at 7:00 pm, at the Appellant's clubhouse in Agoura Hills, California. (*Id.*) The notice further stated that "[t]he secret ballots must be mailed to: Correct Elect, LLC at: P.O. BOX 2609, Covina, CA 91722-9998. Mailed in secret ballots must be received by Appellant's Inspector no later than noon on October 16, 2023." (*Id.*) The notice also stated that "[t]he secret ballots will be distributed approximately thirty (30) days from the date of this letter." (*Id.*)

There is no dispute that ballots and corresponding instructions timely issued to members.

The ballots provided that a voting member "may vote your five votes in any manner you wish. You may vote five votes for one candidate or divide your votes in any manner amongst candidates." (RT 649:19–21 [trial court reading ballot text into record]; CT 216 ["Annandale Secret Ballot – Cumulative Voting" admitted in evidence as Ex. 12]; see also CT 150 at ¶16(a) [Election Rules authorizing cumulative voting].)

The ballot instructions as distributed to members stated, in pertinent part, as follows: "Any secret ballot not received on or before the deadline cannot be counted, except that the Board of Directors reserves the right to extend the deadline by which Secret Ballots must be returned." (CT 221, 216 [instructions admitted in evidence].) The instructions further provided the following text which appeared underlined and in bold: "**Mailed in secret ballots must be mailed and received by Correct Elect, no later than noon, on October 16, 2023.**") (*Id.*)

For the 2023 director election, the initial threshold for achieving quorum was fifty-one percent of the units which number is 149 (292 x 0.51=148.92). (CT 120 [Bylaws Art. II, §§1–3]; RT 624:28–625:26.) By noon on October 16, 2023, Appellant's inspector had picked up all the mailed in ballots, which totaled "90-something." (RT 633:14–20; 635:2–22.) At the meeting on the night of October 17, 2023, Appellant's inspector received approximately thirty to forty walk-in and proxy ballots. (RT 635:5–636:8.)

Appellant's inspector stopped accepting ballots and closed the polls after receiving proxies. (RT 97:11–98:4; 99:16–100:2; 317:14–318:25.) Ms. Kelly admitted that at the October 17 meeting, she orally indicated that she would not accept any further ballots. (RT 643:24–644:9)

D. The Election Meetings and Results

At the October 17 meeting, the final count was 131 ballots received. (RT 637:22–638:18; CT 222.) At the meeting, it was announced that quorum had not been achieved, and the ballots could not be tabulated at that time. (RT 46:2–16; see also, RT 625:27–626:7.) It also was announced that the threshold for reduced quorum *had been achieved* for a continued meeting because of the lower threshold requirement for a reconvened meeting, and that, therefore, no more ballots would be accepted. (RT 46:7–16; 317:14–318:25.) The members present then made a motion and voted to adjourn and reconvene via Zoom two days (48 hours) later, on October 19. (RT 627:22–28.) The October 17 meeting lasted no more than fifteen to twenty minutes. (RT 45:21–46:1.) There was no Board action on that occasion. (RT 46:23–47:2; 102:11–13.) Member meetings are not Board meetings and there is no evidence that any Board meeting was noticed for that occasion or that the Board at any time reopened the polls or in any way authorized an extension of the deadline to receive ballots. (CT 223.)

And yet, despite announcing on October 17 that i) no more ballots were required for reduced quorum and ii) no more ballots would be accepted, Ms. Kelly testified that at about 3:00pm on

October 19, 2023, she gathered 50 additional late ballots from her post office box. (RT 640:23–641:11.)

The October 19 meeting was reconvened via Zoom. (CT 160 [notice and agenda]; CT 216 [notice and agenda attached to Verified Complaint as Ex. H admitted as Exhibit 11); RT 314:28–315:2; 334:12–16.) By holding the reconvened meeting via Zoom, members were prevented from hand delivering or completing ballots at the meeting as required under the Election Rules. (See CT 140 at ¶2(d)(i).) That the polls were not reopened on October 19 is confirmed by the notice and agenda of reconvened meeting, which stated as item number 1, "Quorum Established at Reduced Quorum." (CT 160.) And yet, the fifty late ballots Ms. Kelly gathered on October 19 were included in the final tally of ballots received and tabulated. (RT 642:1–4; 643:10–18).)

Ms. Kelly's testimony confirmed that how she took possession of the fifty late ballots on October 19 made it impossible to distinguish them from 131 ballots previously received prior to her closing the polls. The trial court elicited testimony from Ms. Kelly as follows:

> "THE COURT: BUT AT SOME POINT, YOU'LL BE ABLE TO LOOK THROUGH DOCUMENTS AND BE ABLE TO SAY, THIS IS THE NUMBER THAT YOU RECEIVED BY MAIL BEFORE THE 17TH.· THIS IS THE NUMBER OF WALK-IN BALLOTS. THIS IS THE

> NUMBER OF PROXY BALLOTS, AND THIS IS WHAT I RECEIVED AFTER THAT MEETING?
>
> "THE WITNESS: I BELIEVE SO. I'M NOT SURE BECAUSE SINCE OCTOBER, I DON'T KNOW WHAT WAS ALL IN THE BOX. I JUST PUT EVERYTHING IN THERE."

(RT 634:27–634:7.) Under direct examination from Appellant's counsel, Ms. Kelly testified as follows:

> Q. AND THE BLOCK OF 50 THAT YOU RECEIVED IN THE MAIL, THAT YOU GOT OUT OF THE MAIL ON THE 19TH, WERE THOSE COUNTED IN SEQUENCE AT THE END, OR AT THE BEGINNING OR –
>
> A. I JUST THREW THEM IN THE BOX AND THEN WE HAND EACH OTHER EACH -- YOU KNOW, WE TRY TO MAKE IT QUICK AS POSSIBLE AND GO THROUGH. SO I WOULDN'T BE ABLE TO DETERMINE LIKE I PICKED THINGS UP. I JUST PUT THEM ALL IN ONE BOX.

(RT 645:3–11.)

On October 19, the official tally of votes was as follows: Victor Martinez - 165, Jeff Atkinson - 155, Anthony Wagner - 139, Scott Perl - 134, James Grossman - 118, Kruschen - 56, Campbell - 50, Batel - 28. (RT 345:25–347:15; CT 222].)

PROCEDURAL BACKGROUND

On November 20, 2023, Respondent filed a complaint, *in propria persona*, naming as defendants Appellant and those five individuals identified as having been elected. (CT 12.) Respondent sought declaratory relief under both Corporations Code section 7616 and Civil Code section 5145, and restitution and other equitable relief under Civil Code section 5145. (*Id.*) On December 1, 2023, the trial court granted Respondent's ex-parte request for an expedited hearing. (CT 215.) By stipulation of Appellant and Respondent the hearing was initially set for January 4, 2024, and later rescheduled to February 27, 2024. (*Id.*) Respondent was represented by counsel at the hearing. (*Id.*) Over the course of three consecutive days, the trial court received exhibits, witness testimony, and argument of the parties. (CT 215–18.)

On March 20, 2024, the trial court issued its ruling. (CT 215.) The trial court found that Appellant's 2023 director election was characterized by numerous instances of noncompliance. (CT 223.) What most troubled the court was Appellant's Inspector's handling of the fifty ballots received after the polls closed. (*Id.*) The trial court physically counted and looked at all of the ballots (*Id.*) It found that "[g]iven the testimony of the inspector of elections and the co-mingled nature of the actual evidence . . . there is no

way to determine which ballots were properly received and counted and which were not." (*Id.*) Further, it found that although the 5th and 6th place finishers "were separated by more than 50 votes, each of the 50 ballots received after October 17, 2023 included the ability to cast 5 votes, including 5 votes for the same person." (CT 223–24.) On that basis, it found that Appellant failed to demonstrate that "any noncompliance did not affect the results of the election." (CT 224.)

On March 26, 2024, the trial court entered Judgment. (CT 207.) On March 28, 2024, Appellant filed its Notice of Appeal. (CT 238.)

On June 11, 2024, Respondent filed Motion for Expedited Appeal, Shortening of Time, and Calendar Preference. (Docket.) On June 28, 2024, this Court denied the motion. (Docket.)

On August 29, 2024, the trial court granted Respondent's motion for attorney fees, which award is separately on appeal in this Court as Second District Appellate Court Case No. B341189.

On April 4, 2025, Appellant filed its opening brief ("AOB") along with a motion seeking Court consideration of a problematic declaration purporting to establish that Appellant's appeal is now moot. Respondent timely opposed the motion and now timely files this response.

THE APPEAL IS NOT MOOT AND IT ADDRESSES ISSUES OF CONTINUING PUBLIC IMPORTANCE AND PRESENTS MATERIAL QUESTIONS

Appellant's mootness argument is flawed for at least two reasons. This first is that it requires a factual predicate not found in the record. As addressed in the previously filed opposition to Appellant's motion seeking consideration of the declaration presented by Victor Martinez (the "Motion"), the Motion fails on procedural and evidentiary grounds. It fails procedurally because Appellant ignored the requirements of California Rules of Court, Rule 8.155(a) and therefore cannot augment the record. It fails on factual grounds because the declaration apparently was signed prior to the facts it seeks to establish and includes objectively false "facts," rendering it temporally impossible and entirely unreliable. The Motion's failure deprives the record of information (disputed or otherwise) necessary to establish Appellant's claim that a subsequent 2024 election 11 months later insulates its prior 2023 election from challenge.

Appellant's reliance on the declaration presented by Victor Martinez is legally and logically unsound. The document is facially invalid—it was executed under penalty of perjury on April 4, 2024, yet purports to describe events that allegedly occurred in September 2024. This five-month chronological impossibility renders it inadmissible under Code of Civil Procedure section 2015.5 (prohibiting reliance and forward-dated declarations). The declaration is not only procedurally defective but materially

unreliable and cannot be used to support any factual claim on appeal.

This Appellate District recently addressed a similar issue in *Election Integrity Project California, Inc. v. Lunn* (2025) 108 Cal.App.5th 443, as modified (Jan. 30, 2025) ("*Election Integrity*"). In *Election Integrity*, the plaintiff ("EIPC") sued Ventura County's Clerk-Registrar, Registrar of Voters ("Lunn") for an alleged violation of the California Election Code. (*Id.* at 445.) Lunn prevailed at trial. (*Id.*) EIPC appealed. (*Id.*) Lunn (as respondent) pointed out that EIPC's declaratory relief action pertained to elections in 2020 and 2021. (*Id.* at 446.) He argued that "declaratory relief is a prospective remedy, and not a vehicle to address past alleged wrongs." (*Id.*) The appellate court quickly dispensed with the argument, stating:

> "But the issues involved here — the rights of the election observers and the integrity of elections — are of continuing public interest. Where the issues involved in an appeal are of continuing public interest, we may decide the appeal even where the appeal might technically be moot. (*Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 Cal.App.4th 914, 921, 45 Cal.Rptr.2d 1.)"

(*Id.*) Indeed, there can be no reasonable dispute that community association elections in California "are of continuing public

interest." *Election Integrity* counsels this Court reject Appellant's mootness argument.

The "continuing public interest" has been found to apply not just in municipal elections, but also in disputes arising from CIDs. In *Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 Cal.App.4th 914 ("*Chantiles*"), the appellate court was asked to consider "the extent of a homeowner association director's rights to inspect the records of the association under Corporations Code section 8334." (*Id.* at 918.) Although the trial court authorized an inspection, the plaintiff homeowner ("Owner") appealed. (*Id.* at 920.) After filing the appeal, the Owner lost his director position as the result of a subsequent election. (*Id.*) The (respondent) homeowner association argued that because the Owner no longer had a director's right to inspect records, the appeal was moot. (*Id.*) The Court considered the appeal, stating:

> "We may, in appropriate circumstances, exercise our discretion to retain and decide an issue which is technically moot. (*Davies v. Superior Court* (1984) 36 Cal.3d 291, 294, 204 Cal.Rptr. 154, 682 P.2d 349.) We do so when the issue is of substantial and continuing public interest. (*DeRonde v. Regents of University of California* (1981) 28 Cal.3d 875, 880, 172 Cal.Rptr. 677, 625 P.2d 220.) Such a resolution is particularly appropriate when the issue is

> " 'presented in the context of a controversy so short-lived as to evade normal appellate review' " (*Evans Products Co. v. Millmen's Union No. 550* (1984) 159 Cal.App.3d 815, 820, fn. 5, 205 Cal.Rptr. 731; see also *San Jose Mercury–News v. Municipal Court* (1982) 30 Cal.3d 498, 179 Cal.Rptr. 772, 638 P.2d 655; *Hardie v. Eu* (1976) 18 Cal.3d 371, 379, 134 Cal.Rptr. 201, 556 P.2d 301); or when it is likely to affect the future rights of the parties (*Evans Products Co. v. Millmen's Union No. 550, supra*, 159 Cal.App.3d at p. 820, fn. 5, 205 Cal.Rptr. 731)."

(*Id.* at 921.)

The court then considered whether circumstances attending membership in CIDs were a subject of "substantial and continuing public interest." (*Id.* at 921.) *Chantiles* observed (in 1995) that

> "[m]embership in condominiums, cooperatives and planned unit developments, known as 'common interest' developments, is increasingly common. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 370, 33 Cal.Rptr.2d 63, 878 P.2d 1275.) Common interest developments number

> in the tens of thousands. (See Sproul & Rosenberry, Advising California Condominium and Homeowners Associations (Cont.Ed.Bar 1991) § 1.1, p. 2 [by 1986 there were 13,000 to 16,000 common interest developments in California.].) Such developments are usually governed by a homeowners' association which is incorporated as a nonprofit mutual benefit corporation under section 7110 et seq. (Sproul & Rosenberry, *922 supra, § 1.9, p. 9.) The homeowners' association is governed by a board of directors. (§ 7210.) The directors are elected by the association members for a term specified by the articles of incorporation, not to exceed four years. (§ 7220, subd. (a).) Chantiles, and the other directors of the Association, are elected for terms of only one year, as is common with many homeowners' associations."

Since *Chantiles* was decided, the number of CIDs in California has grown substantially. "[B]y 2010, California had an estimated 49,000 CIDs, comprising more than 4.9 million housing units." (Advising California Common Interest Communities (2d ed. Cal. CEB 2025) §1.1.) As in *Chantiles*, Appellant conducts elections on an annual basis. (CT 143 at ¶5(a) [inspectors obligated to

tabulate ballots "at the Annual Meeting of the Members"].) Although *Chantiles* arose from a dispute over director inspection rights, *Election Integrity* makes clear that elections are of "continuing public interest." (*Election Integrity, supra,* 108 Cal.App.5th at 445.) Therefore, CID director elections qualify for appellate review notwithstanding any mootness argument to the contrary.

In *Lake Lindero Homeowners Association, Inc., v. Barone* ("*Lake Lindero*") (2023) 89 Cal.App.5th 834, this Court rejected a mootness argument which arose from a CID director election. In *Lake Lindero Homeowners Association, Inc., v. Barone* ("*Lake Lindero*") (2023) 89 Cal.App.5th 834, this Court evaluated a CID respondent's assertion about mootness very similar to that which Appellant presents herein. In *Lake Lindero*, the CID asserted the appeal "should be dismissed as moot because reversal of the challenged order will not grant [appellant] effective relief now that subsequent board elections have taken place since the trial court's order[.]" (*Id.* at 842.) This Court disagreed.

After criticizing the CID's failure to file a motion to dismiss (*id.* at 843), this Court observed that:

> "The challenged order grants declaratory relief embracing a disputed judicial construction of the bylaws and statutes governing the vote required to remove a director from the Association's board. Under these circumstances, the general

> rule governing mootness becomes subject to the case-recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination.' (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541 [63 Cal.Rptr. 21, 432 P.2d 717].)"

(*Id.* at 843.) It continued: "Even if we accept [the] contention that we [cannot] reinstate the former board . . . this does not render the appeal moot." (*Id.* at 844.) In deciding to consider the appeal, the Court noted that it encompassed the appellant's "construction of the relevant bylaws and statutory provisions, which remain enforceable against him and the rest of the Association's current membership for future recall elections." (*Id.*)

With regard to its mootness discussion, *Lake Lindero* bears meaningful similarities to the instant case. In both cases, the CID is located in Agoura Hills, represented by the same firm, and the party asserting mootness failed to seek dismissal of their own appeal. Both cases involve CID elections. Both cases involve the construction of statutory provisions and the governing documents of a CID. Both cases address enforceability issues affecting future CID elections. This Court's reasoning in *Lake Lindero* applies with equal force to Appellant's mootness argument herein. The argument should be rejected.

Appellant offers no meaningful support for its argument that this Court should refuse to review Appellant's own appeal. Its cited cases are inapposite. (See *Sherwyn & Handel v. Dep't of Soc. Servs.* (1985) 173 Cal.App.3d 52, 58 [declining review of claim challenging government interference with surrogate parenting arrangement brought by plaintiffs who had no standing]; *PG&E Corp. v. Pub. Utilities Com.* (2004) 118 Cal.App.4th 1174, 1219–20 [declining review of "administrative proceedings [sought] simply because someone claims uncertainty as a consequence of a vague statute or regulation."]; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 50, *as modified on denial of reh'g (Feb. 28, 2005)* [affirming trial court's decision to dismiss plaintiff's case as nonjusticiable]; *Wilson v. Los Angeles County Civil Service Commission* (1952) 112 Cal.App.2d 450, 450 [action to annul employment eligibility list which at the time of appeal had "long since expired" rendering any decision about the list "completely ineffectual"]; *Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1179–80 [declining to consider "speculative litigation" based on Proposition 65 where at the time of judgment, the plaintiff no longer believed the pled claims had merit].) In addition to being inapposite, Appellant offers no meaningful analysis of how its cited cases compel rejection of its own appeal. This Court should reject Appellant's mootness argument and give full consideration of Appellant's appeal.

STANDARD OF REVIEW

This Court reviews issues of statutory interpretation and the interpretation of governing documents *de novo*. (*Roybal v. Governing Bd. of Salinas City Elementary School Dist.* (2008) 159 Cal.App.4th 1143, 1148.) However, it must affirm trial court factual determinations if supported by substantial evidence. (*In re Michael G.* ["*Michael G.*"] (2012) 203 Cal.App.4th 580, 589.)

> "In viewing the evidence, [the reviewing court looks] look only to the evidence supporting the prevailing party. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872, 274 Cal.Rptr. 168.) [It discards] evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. (Ibid.) Where the trial court or jury has drawn reasonable inferences from the evidence, [the reviewing court has] no power to draw different inferences, even though different inferences may also be reasonable. (*McIntyre v. Doe & Roe* (1954) 125 Cal.App.2d 285, 287, 270 P.2d 21.) The trier of fact is not required to believe even uncontradicted testimony. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028, 213 Cal.Rptr. 69.)"

"Defendants raising a claim of insufficiency of the evidence assumes (sic) a daunting burden[.]" (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678 [(emphasis added; internal quotes omitted].) "The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts[.]" (*Michael G.,* 203 CA4th at 589; see also *Schmidt v. Sup.Ct.* (2020) 44 Cal.App.5th 570.)

As noted in *Michael G.*,"[i]n deciding whether to raise a substantial evidence claim on appeal, appellate counsel should keep in mind that the appellate court accepts the evidence most favorable to the order as true and discard[s] the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (203 Cal.App.4th at 595 [internal quotes omitted; brackets original].)

The reviewing court is obligated to "look to the entire record of the appeal, and will not limit their appraisal 'to isolated bits of evidence selected by the respondent.'" (*Bowers v. Bernards* (1984)150 Cal.App.3d 870, 873 [citing *People v. Johnson* (1980) 26 Cal.3d 557, 577, and *Teamsters Agr. Workers Union v. International Brotherhood of Teamsters* (1983) 140 Cal.App.3d 547, 555, fn. 4].)

Appellant fails to meaningfully engage with the applicable standard of review. As noted by the Court in *Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465: "Arguments should be tailored to the applicable standard

of review. Failure to acknowledge the proper scope of review is a concession of a lack of merit." Appellant gives short shrift to authorities governing its own inspector's conduct. It improperly frames evidentiary disputes as if they were subject to re-litigation on appeal, ignoring the deference owed to the trial court's findings under the substantial evidence standard. Appellant fails to meet the applicable standards on appeal and this Court should affirm.

APPELLANT'S INSPECTOR IMPROPERLY COUNTED 50 LATE BALLOTS THAT WERE IRREVERSIBLY COMINGLED WITH 131 TIMELY BALLOTS

The trial court properly determined that Appellant's Inspector had no authority to extend the deadline for receipt of mailed ballots and that only those ballots received prior to the closing of the polls could be counted and tabulated. (CT 221.) Moreover, substantial evidence supports the trial court's findings that a) the deadline for receipt of mailed ballots was October 16; 2023, at noon; b) the Board did not extend the deadline; c) Appellant's Inspector closed the polls on October 17 and did not reopen them; and d) on October 19, Appellant's Inspector comingled fifty late ballots with 131 timely ballots in a manner that rendered it impossible to distinguish between them, and then tabulated all of them. (CT 222–23.) Moreover, Appellant ignores that that trial Court granted relief under Corporations Code section 7616 and AB 1458 is inapplicable to the appeal. This Court should affirm.

A. The Inspector Had No Power to Extend the Deadline for Mailed Ballots or to Receive Ballots After the Polls Closed

On the question of inspector power, Appellant relies on Civil Code section 5110(c)(3) & (5)–(9) and Election Rules section 4(e)(iii)–(viii) to argue that Appellant's Inspector (and not the Board) is empowered to "determine whether to accept ballots or close the polls." (AOB 29.) Appellant boldly declares "[n]othing in the Election Rules [T.E. 17] restricts this authority[.]" (*Id.*) But this inventive conclusion bears no relation to controlling authority.

Civil Code section 5115(c)(3) obligates inspectors to "[r]eceive ballots." (See also, Election Rules § 4(e)(iii) [same].) However, Appellant cites no authority which would empower an inspector to change the deadline for receipt of mailed ballots, accept ballots after the polls had closed, or to reopen the polls.

Here, the Election Rules expressly reserve this power to Appellant's board of directors. (See CT 140 at ¶2(d)(i).) The Election Rules at section 1(b) require Appellant to give notice of the "date and time by which . . . ballots are to be returned[.]" (CT 139, 221.) The Election Rules at section 1(d)(i) further provide that only ballots delivered "prior to the polls closing shall be counted." (CT 140, 221.) Further, the Election Rules at section 2(e) vest with the Board discretion over whether to extend the return of ballots. (CT 141, CT 221.) Appellant reasserted this rule in the voting instructions distributed to members. (CT 221.)

Appellant fails to explain why the Election Rules do not limit its inspector's powers in the manner described. Appellant relies on what is (at best) *dicta* from *Lake Lindero*, 89 Cal.App.5th 834, to support the proposition that an inspector of election can accept and count "ballots received in between the adjourned meeting and the reconvened meeting." (AOB p. 29 [citing without explanation *Lake Lindero*, 89 Cal.App.5th at 840–41, fn. 6].) But the question is not whether, as a matter of law, an inspector for a CID director election may ever receive ballots between an adjourned and reconvened election meeting (assuming *Lake Lindero* even demonstrates this). The question is whether pursuant to Appellant's governing documents, Appellant's Inspector was authorized to a) accept mailed ballots received after October 16, 2023, at noon, or b) accept any ballots submitted after the polls had closed. As noted, reduced quorum was already achieved prior to the reconvened meeting. (CT 222.) *Lake Lindero* does nothing to impugn the trial court's analysis of Appellant's governing documents or its decision that Appellant's Inspector was not authorized to extend the deadline for ballots.

Appellant also relies on testimony from Ms. Kelly. (AOB 31–32.) It may be true that in other CIDs, an inspector of elections is empowered to accept, count, and tabulate ballots received after an initial noticed election meeting and prior to a reconvened election meeting. But Ms. Kelly's testimony does not address the particularities of Appellant's 2023 director election, including its Election Rules. Moreover, Appellant provides no reason that either the trial court or this Court should defer to Ms. Kelly's

interpretation of the rules governing Appellant's 2023 director election.

The trial court properly found that the Election Rules operated to the inspector's power to extend the deadline for receipt of mailed ballots or to accept ballots after the polls had closed. Appellant's Inspector is not above the Election Rules; she is bound by them. A CID's election integrity relies not on an inspector's improvisation, but on rule-bound execution of delegated authority. Appellant offers nothing to the contrary. This Court should affirm.

B. The Ballot Deadline Was Not Extended

There is no dispute that the deadline for receipt of mailed ballots was noon on October 16, 2023. Appellant's notice of election meeting and voting instructions both affirmed that the deadline for mailed ballots was noon on October 16, 2023. (CT 154, 221.) Two witnesses testified that no Board action occurred on October 17. (RT 46:23–47:2; 102:11–13.) The trial court noted that "[t]here was no evidence to establish that the Board of Directors authorized the extension of the deadline." (CT 223.)

C. The Inspector Closed the Polls on October 17

The trial court found that Ms. Kelly closed the polls on October 17 prior to counting ballots. (CT 222.) The ballots accepted as of that date were sufficient to satisfy reduced quorum at the reconvened Zoom elections meeting. (*Id.*; RT 46:7–16, 317:14–318:25.) This was confirmed by the notice and agenda of the second elections meeting which occurred October 19. (CT 160, 222.) Even

if conflicting evidence exists, this Court is bound to affirm where any substantial evidence supports the trial court's finding. (See *People v. Penunuri* (2018) 5 Cal.5th 126, 142 ["'[c]onflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]'" [citing *People v. Zamudio* (2008) 43 Cal.4th 327, 357].)

Appellant suggests (without authority) that the trial court was obligated to identify express testimony from Appellant's Inspector that she "closed the polls" or Appellant's Inspector's statement that "she would not accept any more ballots." (AOB p. 31.) Appellant characterizes its inspector as being "adamant [in her testimony] that she did not close the polls." (*Id.*) But even the limited evidence Appellant cites is enough to support the Judgment. The inspector admitted to closing the polls if only to "announce that we didn't have a quorum." (RT 642:23.)

Appellant's theory—that quorum can be declared while still accepting ballots—undermines both the finality of the voting process and the express requirements of the Election Rules. The Election Rules plainly state that "[o]nly those ballots which are delivered to the inspectors of election prior to the polls closing shall be counted." (CT 140 ¶ 2(d)(i).) The October 19 notice and agenda stated that reduced quorum had been achieved—an

acknowledgment that voting had concluded. (CT 160.) It is axiomatic that polls must close before ballots are counted to determine quorum; otherwise, the tabulation would be circular and manipulable. Appellant's approach invites *post hoc* uncertainty that both the Davis-Stirling Act and procedural due process are designed to prevent.

Substantial evidence supports the Court's finding that the polls were closed October 17 and not reopened, as reflected in the notice and agenda for the reconvened meeting, confirming that quorum was established at 33 1/3% of Appellant's voting power. (CT 160, 222.)

D. The Inspector Tabulated Fifty Late Mailed Ballots Which Were Comingled with Timely Ballots

Ms. Kelly gathered fifty ballots from her post office box which arrived after i) the deadline for receipt of mailed ballots and ii) the close of the polls. (CT 222.) In so doing, Appellant's Inspector failed to properly discharge her duty to "determine the . . . validity, and effect of ballots[.]" (Civil Code section 5115(c)(2); Election Rules section 4(e)(ii) [not cited in AOB].) The Inspector should not have counted or tabulated these ballots. Appellant cites no applicable authority to the contrary. And yet, Appellant's Inspector comingled fifty late ballots with 131 timely ballots in a manner that prevented the trial court from determining which of the 181 total ballots were appropriately tabulated. As the trial court noted, "each of the 50 ballots received after the October 17,

2023 [sic] included the ability to cast 5 votes including 5 votes for the same person." (CT 223–24.) Appellant's Inspector proceeded to tabulate the comingled ballots. (*Id.*; RT 345:25–347:15, 634:27–634:7, 645:3–11.) Therefore, the trial court determined it was impossible for either the inspector or the trial court to determine valid election results.

E. Corporations Code Section 7616 Provides an Independent Basis to Affirm

Appellant fail**s to** challenge the trial court's ruling under Corporations Code section 7616, thereby forfeiting appellate review as to that independent ground for judgment. Respondent's verified complaint specifically alleged, and the trial court expressly ruled upon, a claim brought under section 7616 to determine the validity of the 2023 director election. (CT 12, 215–24.) The court's ruling voided the election and reseated the 2022 board *status quo ante* pursuant to the broad equitable powers granted under section 7616(d), which permits the court to "direct such other relief as may be just and proper."

The AOB fails to contest this cause of action, does not identify section 7616 in its Table of Authorities, and offers no legal argument addressing its application. Because section 7616 provides an entirely sufficient and uncontested legal basis for the trial court's judgment, this Court should affirm even without reaching the merits of the Civil Code section 5145 claim. The trial court specifically invoked section 7616(d) as a statutory basis for its remedy. Appellant's silence on this point is tantamount to

conceding that the judgment should stand and that the trial court's remedy under section 7616(d) was not only lawful, but compelled by the trial court's factual findings.

F. AB 1458 Has No Application to This Dispute

Appellant relies on AB 1458 to assert that public policy requires reversal. But the legislation became law after the facts at issue in this dispute. Appellant fails to identify any provision providing for retroactive effect. (AOB 32–35.) Civil Code section 3 expressly prohibits retroactive application unless the statute states otherwise: "No part of [the Civil Code] is retroactive, unless expressly so declared." AB 1458 includes no such language. Therefore, it cannot apply to an election held in 2023. AB 1458 has no application whatsoever to this appeal and should be disregarded.

Moreover, even if AB 1458 were retroactive, it would not alter the trial court's ruling. In its argument, Appellant fails to acknowledge that at the second election meeting on October 19, 2023, quorum had been achieved without the additional fifty ballots. This is reflected by the parties' "Stipulation and Order Amending the Bylaws of the Annandale Townhouse Association, Inc." included as part of the Bylaws and admitted in evidence by the trial court. (CT 136; CT 213 [noting Exhibit B to Respondent's Verified Complaint admitted in evidence as trial Exhibit 22].) The stipulation arose from litigation initiated by Respondent in 2019. (CT 136.) It provides that quorum at the October 19 meeting had

been automatically reduced to thirty-three and 1/3 percent (33 1/3%). (CT 136–37.)

When the polls closed on October 17, 2023, the inspector possessed 131 ballots. (RT 637:22–638:18; CT 222.) At a reduced quorum requirement of 33 1/3%, the number necessary to achieve quorum on October 19, 2023, was 98 ballots (292/3=97.33). As noted by the notice and agenda for the reconvened meeting, quorum was established at the October 19 meeting without the need for any additional ballots. (CT 160 [Item 1 "Quorum Established At Reduced Quorum"].) Appellant asserts that AB 1458 "was adopted to address, *inter alia*, incumbent directors taking advantage of associations' inability to obtain a quorum to conduct elections." (AOB 33.) Because quorum had been achieved on October 19 under the law and governing documents then-existing, there was "no inability to obtain quorum" that would have benefitted from then-pending legislation.

Appellant repeatedly characterizes the 2023 election as a "landslide," but the certified results contradict this rhetoric. Respondent received 56 votes; the fifth-place winner received 118. Because each ballot permitted up to five cumulative votes, this difference reflects only approximately 12.4 ballots (62/5)—a margin of just over 4% of the total. Here, when fifty late ballots—nearly 10% of the membership—were improperly received and counted after the polls had closed. Civil Code section 5145 squarely places the burden on Appellant to prove that this noncompliance did not affect the outcome, and Appellant failed to do so.

Appellant then doubles down (as it must) on a vote count which included fifty late improperly counted and tabulated ballots, claiming a "landslide" victory. (AOB 34–35.) Appellant resorts to *ad hominem* commentary, characterizing Respondent's trial success as stemming from 'torture' of election notices and asserting that the court ruled 'to satisfy [Respondent's] ego'—a rhetorical flourish devoid of legal or factual support. (*Id.*) Unfortunately for Appellant, mudslinging on appeal does not meet the standard of review. As the law and record make clear, Respondent's burden at trial was not, as Appellant asserts, to present evidence that "the outcome would be any different if the [inspector] had not counted the additional fifty (50) ballots." (AOB 35.) Rather, Civil Code section 5145 requires that when a plaintiff provides evidence of a violation, the defendant association then has the burden to prove that its noncompliance did not affect the results. (CT 218.) As the brief and the trial court's ruling make clear, Appellant failed to meet its burden. (CT 224 [Appellant "has not established that any noncompliance did not affect the results of the election"].)

Appellant's footnoted argument that the 2022 directors were "indispensable" parties misrepresents both the law and the procedural posture of this case. Corporations Code section 7220(b) provides only that "each director shall hold office until the expiration of the term for which elected and until a successor has been elected and qualified." This provision does not immunize directors from displacement where an election is adjudicated *void ab initio* under Corporations Code section 7616(d).

The court's March 20, 2024 ruling did not extend, alter, or contravene the 2022 directors' terms. Instead, it restored the pre-election *status quo ante* after finding that the 2023 election was legally void. This relief is explicitly authorized under Corporations Code section 7616(d), which permits the court to "direct such other relief as may be just and proper."

Appellant's position is further undermined by its failure to provide any authority for the proposition that displaced directors must be joined in a post-election validity challenge. Indeed, Corporations Code section 7616(c) explicitly requires notice only to "the person whose right to office is contested"—here, the purported 2023 directors. It does not require joinder of directors whose service predates the voided election.

Moreover, joinder was not required under Code of Civil Procedure section 389 because the 2022 directors were not subject to new legal obligations or liability; they were simply reinstated to the *status quo ante* after a void election. Appellant cites no authority to support the notion that reinstated directors must be joined under Corporations Code section 7616.

RESPONDENT IS ENTITLED TO RECOVER ATTORNEY FEES ON APPEAL

Respondent requests this Court to confirm that Respondent is entitled to recover fees incurred in connection with defending the trial court's entry of judgment on appeal. It is well established that "statutes authorizing attorney fee awards in lower tribunals

include attorney fees incurred on appeals of decisions from those lower tribunals." (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927; see also *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637 ["fees, if recoverable at all . . . are available for services at trial and on appeal."]) The Court should affirm the judgment and also confirm Respondent's entitlement to recover his reasonable fees and costs incurred with respect to this appeal.

CONCLUSION

The trial court properly voided Appellant's 2023 director election notwithstanding Appellant's arguments on appeal. The mootness argument fails because Appellant fails to establish facts it claims are necessary to the argument. Even if those facts are established, this Court properly gives full consideration to the appeal because it presents issues of continuing public importance and material questions appropriate for judicial determination.

Appellant also fails to establish any basis for reversal under the applicable standards of review. The trial court properly interpreted the governing authorities—including the Election Rules, which withheld from Appellant's Inspector the discretion to unilaterally extend the deadline for receipt of mailed ballots or to receive ballots after the close of the polls. Substantial evidence shows that the ballot deadline was not extended, Appellant's Inspector closed the polls on October 17 and did not reopen the polls, and then comingled fifty late ballots with 131 timely ballots before tabulated the result in a manner that made it impossible to distinguish between them. Furthermore, Appellant omitted from

its opening brief any reference to Corporations Code section 7616 thereby forfeiting challenge to same. Additionally, AB 1458 has no application to this dispute.

The law, the governing documents, and the facts all point in one direction: Appellant's 2023 director election was void and invalid. On the other hand, the trial court's ruling was consistent with applicable law, thoughtfully considered, and just. This Court should confirm that Respondent is entitled to recover its reasonable attorney fees on appeal and affirm the Judgment.

Respectfully submitted,

MYERS, WIDDERS, GIBSON, JONES & FEINGOLD, LLP

Dated: May 5, 2025

By: /s/ James E. Perero

James E. Perero, Esq.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 7,481 words as counted by the Microsoft® Word for Microsoft 365 MSO (Version 2502 Build 16.0.18526.20286) 64-bit word-processing program used to generate this brief.

MYERS, WIDDERS, GIBSON, JONES & FEINGOLD, LLP

Dated: May 5, 2025

By: /s/ James E. Perero
James E. Perero, Esq.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of eighteen (18) and not a party to the action; my business address is 39 N. California St., Ventura, California 93001.

On May 5, 2025, I served the foregoing document described as **RESPONDENT'S BRIEF** on the interested party(ies) in this action:

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[X] (BY ELECTRONIC SERVICE E-MAIL) As follows I transmitted a PDF version of this document by electronic mail to the party (s) identified on the above service list using the e-mail address (es) indicated.

Los Angeles Superior Court
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Van Nuys, CA 91401

[X] **(**BY MAIL**)** I caused such envelope to be deposited in the mail at Ventura, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with my firm's practice of collecting and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.
[x] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 5, 2025, at Ventura, California.

Sandra Puga

Sandra Puga