

1 B) Contrary to the provisions of [A.R.S. § 33-1804(A) and (D)]
2 relative to allowing members to speak on an issue before the
3 board prior to the board voting. The [Pinnacle Board] president
4 refused to allow any member of the community to speak on
5 agenda items prior to board votes on those items at board
6 meetings on 11/26/2013, 1/14/14 and at the annual members[']
7 meeting on 2/3/2014. The stated justification was that members
8 would be allowed to speak during a specific period on the agenda
9 after all other business was conducted. I have an audio recording
10 of the 11/26/2013 meeting documenting this behavior.
11

12 C) Contrary to the provisions of [A.R.S. § 33-1804(A),(C),(D), and
13 (E)] relative to open meeting notice and conduct, [Pinnacle's
14 Board] conducted unnoticed e-mail [meetings] of the board to
15 consider open meeting subject matter on or about 6/20/2012, and
16 on 9/2/2013, 9/18/2013, 10/5/2013, and 1/18/2014. The subject
17 matter for these meetings did not satisfy emergency meeting
18 requirements and were never identified in the subsequent
19 regularly scheduled meeting as emergency meetings of the board.
20 The board notified the community in a letter to all homeowners,
21 that it intended to conduct e-mail meetings for efficiency reasons
22 under the provisions of [A.R.S. § 10-3821] and a provision
23 contained in our community By-Laws. The past and new
24 management company along with the board's legal counsel
25 supported this position for e-mail meetings.
26

27 D) Contrary to the provision of [A.R.S. § 33-1804(A),(D), and (E)]
28 relative to committee meetings, and any meeting of a quorum of
29 Board members being subject to open meeting notice and
30 requirements. [Pinnacle's] Architectural Review Committee has
never conducted a noticed public open meeting since July 20,
2011, when the law was changed to specifically include sub-
committees of the board. This committee has only consisted of
board members since 7/20/2011, and from 9/2/2013 thru 2/3/2014
consisted of three board members constituting a quorum of the 5-
member board. There may have been additional times since
7/20/2011 when the committee consisted of a quorum of the
board. I have no documentation of [a] meeting of this committee
because it conducted all its business via e-mail or phone calls
between members.

5. Pinnacle's Answer to the Petition provided, in relevant part, as follows:
All the Complaint items in the Petition are denied.

1 6. On April 29, 2014, the Department issued a Notice of Hearing to the
2 parties notifying them that a hearing on the Petition would be conducted by the Office of
3 Administrative Hearings.

4 7. On July 31, 2014, a hearing was held on the Petition and the parties
5 presented evidence and argument regarding the violations alleged in the Petition.
6 Pinnacle affirmatively alleged that the applicable one-year statute of limitations for
7 alleged violations of A.R.S. § 33-1804(A), (C), (D) and (E) had expired.

8 8. On April 17, 2014, a Recommended Order was submitted to the
9 Department which provides, in relevant part, as follows:

10 In view of the foregoing, it is ORDERED that
11 Petitioner be deemed the prevailing party in this matter.

12 It is further ORDERED that Pinnacle comply with the
13 applicable provisions of A.R.S. § 33-1804(A) in the future.

14 It is further ORDERED that Pinnacle pay Mr. Legere
15 his filing fee of \$2,000.00, to be paid directly to Mr. Legere
16 within thirty (30) days of this Order.

17 It is further ORDERED that Pinnacle pay a civil
18 penalty in the amount of \$2,000.00 to the Department within
19 thirty (30) days of the date of this Order.

20 9. On September 26, 2014, pursuant to A.R.S. § 41-1092.08(D), the
21 Administrative Law Judge Decision was certified by the Director of the Office of
22 Administrative Hearings as the final administrative decision of the Department of Fire
23 Building and Life Safety.

24 10. On or about October 1, 2014, Petitioner filed a Petition for Rehearing that
25 provided, in relevant part, as follows:

26 Petitioner, pursuant to A.R.S. § 41-1092.09(A),
27 respectfully requests a rehearing on the issue which the
28 Administrative Law Judge, allegedly on jurisdictional
29 grounds, declined to consider. See Conclusion of Law #3.
30 Petitioner was not asking the Court to “determine alleged
violations of A.R.S. Title 10” (specifically, §10-3821), but,
rather, whether taking action by unanimous consent via
email under § 10-3821 constitutes a violation of the open
meeting law requirements of §33-1804. The Court seemed

1 to acknowledge and understand the nature of Petitioner's
2 claim when it noted at the beginning of Conclusion of Law #3
3 that "Petitioner asserts that the Board's practice of taking
4 action in the absence of a meeting by obtaining unanimous
5 written consent of the Board's members via email violated
6 the charged provisions of A.R.S. § 33-1804." Yet, the Court
7 then inexplicably stated that it had no jurisdiction to resolve
8 alleged violations of § 10-3821, which was not and never
9 was an issue before the Court. No violations of § 10-3821
10 were alleged and no evidence was presented on such
11 violations. The only question before the Court as it pertained
12 to § 10-3821 was whether the Board could avoid the open
13 meeting law requirements of § 33-1804 by conducting its
14 business via email. Petitioner would like that issue
15 addressed and resolved by the Court and/or the
16 Administrative Agency.

17 11. On November 26, 2014, the Department of Fire, Building and Life Safety
18 issued an Order Granting Request for Rehearing.

19 Testimony

20 In his previous testimony given on July 31, 2014, Mr. Legere testified as follows:

21 12. Mr. Legere testified that he had lived at his residence in Pinnacle since
22 2010. Mr. Legere stated that he had previously served on the Board of Directors
23 (hereinafter "Board") from 2011 through 2012.

24 13. Mr. Legere testified that Pinnacle violated the provisions of A.R.S. § 33-
25 1804 in April 2013. Mr. Legere stated that the financial information provided to the
26 members of Pinnacle for the open meeting for Pinnacle was just a summary of the
27 financial information that was provided to the Board. Mr. Legere testified that the
28 summary was basically a three-sheet summary of Pinnacle's expenses.

29 14. Mr. Legere testified that during the open meeting that occurred on April
30 9, 2013, he stated that the Board had far more financial information than it had provided
to members.

15. Mr. Legere testified that he was prevented from speaking at an open
session meeting on November 26, 2013. Mr. Legere stated that he was promised an

1 opportunity to speak about action items at the end of the open session. Mr. Legere
2 testified that the Board then took action on the items before Mr. Legere was allowed to
3 speak.

4 16. Mr. Legere testified that he tried to speak on action items that were
5 supposed to be presented during the January 14, 2014 open meeting. Mr. Legere
6 testified that he was not allowed to speak at the open meeting until the Board had taken
7 action on the items on which he wanted to speak.

8 17. Mr. Legere testified that in the February 2014 annual meeting for
9 Pinnacle, there were action items listed on the agenda. Mr. Legere stated that he was
10 prevented from speaking at the February 2014 annual meeting for Pinnacle. Mr. Legere
11 testified that the action items that were supposed to be discussed during the annual
12 meeting were delayed and acted upon by the Board through closed session emails that
13 precluded non-board members from participating in the decision-making process.

14 18. Mr. Legere testified that before the June 18, 2013 open meeting, he
15 requested that he be allowed to review the detailed financial records for Pinnacle. Mr.
16 Legere stated that he reviewed the requested documents and had several questions
17 regarding the validity of several expenses that were recorded in the financial
18 documents. Mr. Legere testified that he presented his questions in advance of the June
19 18, 2013 open meeting to the management company for Pinnacle. Mr. Legere stated
20 that the response he received from the management company did not answer his
21 questions.

22 19. Mr. Legere testified that he submitted follow-up questions to clarify the
23 questions he submitted to the management company. Mr. Legere stated that during the
24 June 18, 2013 meeting, the Board agreed to consider and respond to his questions as
25 part of the meeting minutes for the June 18, 2013 meeting. Mr. Legere testified that the
26 Board then issued an email on June 24, 2013 informing him that he would not be
27 receiving a response to any questions.¹

28 20. Mr. Legere testified that the Board had discussed his questions after the
29 June 18, 2014 open meeting and decided via an email conversation that because Mr.

30 _____
¹ See June 24, 2013 email LEGERE0094 (Exhibit 9).

1 Legere's questions had been sufficiently answered during the open meeting, the Board
2 would not provide any additional answers to Mr. Legere.² Mr. Legere testified that the
3 August 20, 2013 open meeting minutes confirmed that the Board had held a closed
4 email meeting after the June 18, 2014 open meeting to decide not to respond to Mr.
5 Legere's questions.

6 21. Mr. Legere testified that minutes for the October 29, 2013 open meeting
7 documented actions taken by the Board between the August 20, 2013 open meeting
8 and the October 29, 2013 open meeting.³ Mr. Legere stated that all of the actions
9 documented in the minutes for the October 29, 2013 open meeting were done by email.
10 Mr. Legere testified that none of the documented actions could be classified as
11 emergency matters. Mr. Legere stated that on January 27, 2014, the Board's president,
12 James Foxworthy, issued an email to Mr. Legere acknowledging that all of the
13 documented actions were done by email.⁴

14 22. Mr. Legere testified that the Board had repeatedly used email voting in
15 June, July, and August of 2014, in place of open meetings.⁵ Mr. Legere stated that all of
16 the actions were taken by the Board members' unanimous email decisions. Mr. Legere
17 testified that he was not aware the Board was voting to decide whether to answer his
18 questions. Mr. Legere stated that no member of Pinnacle was given an opportunity to
19 address the issues before the Board voted by email. Mr. Legere testified that the email
20 process utilized by the Board precluded other members of Pinnacle from participating in
21 the decision-making process. Mr. Legere stated that the Board did not provide
22 members of Pinnacle any notice of the items that it was determining in its email voting.

23 23. Mr. Legere testified that the use of the email process utilized by the
24 Board denied Mr. Legere the opportunity to speak on the issues involved. Mr. Legere
25 stated that the Board would take one position in open meetings and then vote to take an
26 opposite position via email in closed sessions. Mr. Legere testified that the use of the
27 email process violated the State's open meeting law.

28 24. Mr. Legere acknowledged that personal, health, or financial information

29 ² See Exhibit 8 (LEGERE0105).

30 ³ See Exhibit 8 (LEGERE0116).

⁴ See Exhibit 8 (LEGERE0120).

⁵ See Exhibit 9 (LEGERE0121 through LEGERE0135).

1 about an individual member is one of the listed exceptions in A.R.S. § 33-1804.

2 25. Mr. Legere acknowledged that he had no evidence that the Board had
3 ever held a meeting without notice. Mr. Legere testified that the Board's use of the
4 email process avoided the need for a meeting of the Board. Mr. Legere stated that the
5 use of the email process violated the intent of the open meeting law.

6 26. Mr. Legere acknowledged that Article IV, Section Five of the Bylaws of
7 Pinnacle allows the Board the right to take any action in the absence of meeting that
8 they could take at a meeting by obtaining the written approval of all of the members of
9 the Board. Mr. Legere testified he believed that Article IV, Section Five of the Bylaws
10 violated the State's open meeting laws. Mr. Legere asserted that he believed that any
11 decision of the Board had to be made during a meeting of the Board that was open to
12 the public.

13 27. Mr. Legere testified that he did not believe that the actions taken by the
14 Board via email were ratified by the Board in the next open meeting minutes.⁶ Mr.
15 Legere acknowledged that the April 22, 2014 open meeting minutes did contain
16 ratification of an action taken by the Board via the email process.

17 28. Mr. Legere testified that the Board's decision to utilize the email process
18 for taking actions was never documented in open meeting minutes. Mr. Legere
19 acknowledged that the April 22, 2014 minutes documented the use of the email process
20 with attached emails from members of the Board.

21 29. Mr. Legere acknowledged that he was allowed to speak before the Board
22 took formal action at the May 20, 2014 open meeting.

23 30. Mr. Legere acknowledged that he was allowed to speak before the Board
24 took formal action at the April 22, 2014 open meeting.

25 31. Mr. Legere acknowledged that he had been allowed to speak at open
26 meetings after the new management company was retained in March 2014.

27 32. Mr. Legere testified that he was not allowed to speak before the Board
28 took formal action at the annual meeting for Pinnacle in January 2014. Mr. Legere
29 stated that he was not allowed to speak at the annual meeting prior to the Board

30 _____
⁶ See Exhibit R-4 (Open Meeting Minutes for Pinnacle).

1 approving the minutes from the previous annual meeting. Mr. Legere testified that he
2 was prevented from speaking during open meetings in November 2013 and January
3 2014 before the Board took formal action on items presented during the November
4 2013 and January 2014 meetings.

5 33. At the Rehearing on March 31, 2015, Mr. Legere asserted that the use of
6 closed session emails precluded non-board members from participating in the decision-
7 making process and were a violation of the intent of the open meeting laws of the State.

8 34. Mr. Legere testified that discussions regarding delinquent payments from
9 homeowners in Pinnacle were legitimate community business and “must” be discussed
10 and deliberated in open meetings. Mr. Legere stated that if any individual fails to follow
11 community rules that failure is legitimate community business.

12 35. Mr. Legere testified that the Board is the “gate keeper” of compliance
13 with community rules. Mr. Legere asserted that individual members of Pinnacle are
14 entitled to enforce Pinnacle’s covenants through litigation. Mr. Legere stated that
15 homeowners had a right to know what was taking place between the Board and
16 homeowners so that individual members of Pinnacle can make informed decisions as to
17 whether to instigate litigation against individual members who have failed to comply with
18 Pinnacle’s covenants.

19 36. Mr. Legere asserted that potential litigation was insufficient to fall within
20 the exceptions to the State’s open meeting laws. Mr. Legere said that Pinnacle has
21 never actually instigated any litigation against a homeowner member. Mr. Legere
22 asserted that any discussion of violation of Pinnacle’s covenants is legitimate
23 community business that should be discussed openly.

24 37. Mr. Legere reviewed Pinnacle’s response to his Subpoena Duces
25 Tecum.⁷ Mr. Legere testified that minutes establish that Pinnacle discussed financial
26 and other matters in closed session that should have been discussed in open meetings
27 with homeowner involvement. Mr. Legere asserted that Pinnacle failed to provide all of
28 the material that he requested under the subpoena duces tecum.

29 38. Mr. Legere acknowledged that he was not alleging that Pinnacle had

30 _____
⁷ See Exhibit B (Subpoena Duces Tecum/Response).

1 violated the provisions of A.R.S. § 10-3821.

2 39. Mr. Legere acknowledged that Pinnacle is a non-profit organization and
3 that A.R.S. § 10-3821 is applicable for non-profit organizations.

4 40. Mr. Legere acknowledged that the bylaws of Pinnacle specifically
5 allowed for the Board to take any action in the absence of a meeting which they could
6 take at a meeting by obtaining the written approval of all of the Directors.⁸

7 41. On July 31, 2014, Michelle O'Robinson (hereinafter "Ms. O'Robinson")
8 testified that she is a field operations supervisor for Vision Community Management.
9 Ms. O'Robinson stated that she had almost 15 years of experience in the HOA
10 management field. Ms. O'Robinson testified that she was currently the manager and
11 field supervisor for Pinnacle.

12 42. Ms. O'Robinson testified that she was familiar with A.R.S. § 33-1804.
13 Ms. O'Robinson stated that she believed that the members of the Board had the right to
14 take any action in the absence of a meeting that they could take at a meeting if they
15 obtained the unanimous written approval of all members of the Board. Ms. O'Robinson
16 testified that it was a common practice in the industry.

17 43. Ms. O'Robinson testified that personal information and financial
18 information for homeowners is always discussed in an executive session rather than an
19 open session. Ms. O'Robinson stated that Board actions regarding violations of CCRs
20 are also taken under consideration in executive sessions rather than open sessions.

21 44. On July 31, 2014, James T. Foxworthy (hereinafter "Mr. Foxworthy")
22 testified that he is the president of the Board for Pinnacle. Mr. Foxworthy stated that he
23 had been a member of the Board for four years. Mr. Foxworthy testified that Mr. Legere
24 had previously been a member of the Board.

25 45. Mr. Foxworthy testified that there are 85 homes in Pinnacle and that
26 Pinnacle has an annual budget of \$45,000.00. Mr. Foxworthy stated that the Board
27 began to use an email process in place of open meetings in the fall of 2013. Mr.
28 Foxworthy testified that use of the email process required a unanimous vote by the
29 Board and the unanimous vote had to be recorded in writing.

30 _____
⁸ See Exhibit R-2 (By-Laws of Pinnacle Peak Shadows Homeowners Association, Inc).

1 46. Mr. Foxworthy testified that Pinnacle had been in full compliance with the
2 State's open meeting law since the new management company took over. Mr.
3 Foxworthy stated that he was excited about the changes instituted by the new
4 management company.

5 47. Mr. Foxworthy testified that the Board had the right to take any action in
6 the absence of a meeting which they could take at a meeting if they obtained the
7 unanimous written approval of all members of the Board via email. Mr. Foxworthy
8 stated that he would not be willing to serve on the Board if a formal meeting was
9 required for every single action that the Board was required to take.

10 48. Mr. Foxworthy testified that personal information and financial
11 information of individual members of Pinnacle were only discussed in closed sessions of
12 the Board. Mr. Foxworthy stated that he vehemently disagreed with Mr. Legere
13 regarding the disclosure of personal and financial information of individual members of
14 Pinnacle. Mr. Foxworthy testified that Pinnacle had retained a new management
15 company and that he believed that Pinnacle was now in full compliance with A.R.S. §
16 33-1804. Mr. Foxworthy stated that financial information of the individual members of
17 Pinnacle was confidential and should never be discussed in open meetings.

18 49. Mr. Foxworthy testified that in 2014 the Board instituted a new policy
19 requiring that all Board members return any personal financial information of Pinnacle's
20 members that the Board member obtained while serving as a member of the Board. Mr.
21 Foxworthy stated that members of Pinnacle were upset with the fact that previous
22 members of the Board had left with personal financial information of members.

23 50. Mr. Foxworthy acknowledged that Pinnacle's previous management
24 company had provided members with summary financial information rather than the full
25 financial information provided to members of the Board. Mr. Foxworthy stated that the
26 new management company now provides members with essentially everything that is
27 provided to members of the Board.

28 51. Mr. Foxworthy acknowledged that Mr. Legere was prevented from
29 speaking in three open meetings before action was taken on action items in the fall of
30 2013 and the early part of 2014. Mr. Foxworthy stated that the policy was changed at

1 the advice of the new management company and that Mr. Legere and other members
2 were now allowed to speak on action items before action was taken by the Board. Mr.
3 Foxworthy testified that Mr. Legere had been complimentary about the new process.

4 52. Mr. Foxworthy testified that in 2013, the Board was experiencing a
5 procedural problem in the amount of time it took to complete an open meeting. Mr.
6 Foxworthy stated that the homeowner discussion was dominating so much of the time
7 available for the open meetings that the Board was exhausted by the end of the
8 meeting. Mr. Foxworthy testified that he talked with the previous management company
9 and was informed that the Board could institute a "time-cap" of three to five minutes for
10 each member and that all commentary could be deferred to a specific spot in the
11 meeting. Mr. Foxworthy stated that the policy has now been changed based on advice
12 from the new management company.

13 53. Mr. Foxworthy acknowledged that under the previous Board policy, Mr.
14 Legere was prevented from speaking at open meetings on at least three different
15 occasions before action was taken by the Board.

16 54. Mr. Foxworthy acknowledged that the previous management company
17 had acted as Pinnacle's agent.

18 55. Mr. Foxworthy acknowledged that under the previous management
19 company, only summary financial information was provided to members.

20 56. Mr. Foxworthy acknowledged that under the previous management
21 company, all of the financial information was not discussed and approved by the
22 members of Pinnacle during open meetings. Mr. Foxworthy testified that the full
23 financial reports were discussed and decided upon in closed Board meetings.

24 57. Mr. Foxworthy testified that in the fall of 2013, the Board began to utilize
25 unanimous consent actions taken by email in lieu of holding meetings. Mr. Foxworthy
26 stated that the Board was "looking for something to get everything done." Mr. Foxworthy
27 testified that he would not be willing to serve on the Board if all actions had to be taken
28 in meetings.

29 58. Mr. Foxworthy acknowledged that the Board had been able to perform its
30 functions properly before the use unanimous consent action by email was instituted by

1 the Board.

2 59. Mr. Foxworthy acknowledged that no notice was provided to members
3 when the Board took action by unanimous consent by email. Mr. Foxworthy testified
4 that there would be nothing for members to observe.

5 60. Mr. Foxworthy acknowledged that there are no deliberations by the
6 Board and no opportunity for members of Pinnacle to speak before an email vote of the
7 Board is taken.

8 61. Mr. Foxworthy acknowledged that under the previous management
9 company, officers of the Board were elected in closed sessions, including a closed
10 election that took place on March 5, 2013. Mr. Foxworthy testified that officers of the
11 Board are now elected in open sessions.

12 62. Mr. Foxworthy acknowledged that Pinnacle has an architectural control
13 committee. Mr. Foxworthy stated that the architectural control committee did not have
14 regular meetings under the previous management company. Mr. Foxworthy testified
15 that the architectural committee now has regular meetings.

16 63. Mr. Foxworthy testified that under the new management company, the
17 architectural control meetings are now being scheduled to take place fifteen minutes
18 before the regular open meetings. Mr. Foxworthy stated that notice of the architectural
19 control meetings concern "little stuff."

20 64. Mr. Foxworthy acknowledged that the architectural control committee has
21 met several times in 2013 and 2014. Mr. Foxworthy testified that there had been no
22 notice provided for the architectural control committee meetings. Mr. Foxworthy
23 acknowledged that members would not have been able to participate in the architectural
24 control committee meetings because no notice had been provided.

25 65. On March 31, 2015, John Edgar Schuler (hereinafter "Mr. Schuler")
26 testified that he had been president of the Board since March 10, 2015. Mr. Schuler
27 stated that he previously had been a member of the Board since approximately August
28 or September 2009. Mr. Schuler said that he could only recall three "email meetings"
29 since July 31, 2014.

30 66. Mr. Schuler testified that the email meetings have dealt with maintenance

1 type issues. Mr. Schuler stated that Pinnacle does not normally have open meetings in
2 June, July, or August. Mr. Schuler said that financial matters are now reviewed in open
3 sessions. Mr. Schuler stated that only delinquency reports are discussed in closed
4 session. Mr. Schuler said that he believes the Fair Credit Reporting Act requires
5 Pinnacle to discuss delinquency matters in closed session.

6 67. Mr. Schuler testified that alleged violations of CC&Rs were held in open
7 session unless there was a potential for litigation. Mr. Schuler said that if there was a
8 possibility of litigation, the matters would be addressed in closed session. Mr. Schuler
9 stated that to his knowledge, Pinnacle had never taken legal action against any
10 member.

11 **PROVISIONS OF LAW REFERENCED AT HEARING AND REHEARING**

12 1. A.R.S. § 10-3821 provides as follows:

13 A. Unless the articles of incorporation or bylaws provide
14 otherwise, action required or permitted by chapters 24 through 40
15 of this title to be taken at a directors' meeting may be taken
16 without a meeting if the action is taken by all of the directors. The
17 action must be evidenced by one or more written consents
18 describing the action taken, signed by each director and included
19 in the minutes filed with the corporate records reflecting the action
20 taken.

21 B. Action taken under this section is effective when the last
22 director signs the consent, unless the consent specifies a different
23 effective date.

24 C. The consent signed under this section has the effect of a
25 meeting vote and may be described as such in any document.

26 D. Any director may revoke a consent by delivering a signed
27 revocation of the consent to the president or secretary before the
28 date the last director signs the consent.

29 E. For the purposes of this section, a consent may be signed
30 using an electronic signature as defined in section 44-7002.

31 2. A.R.S. § 12-541 provides as follows:

1 There shall be commenced and prosecuted within one year
2 after the cause of action accrues, and not afterward, the
3 following actions:

4

5 5. Upon a liability created by statute, other than a penalty or
6 forfeiture.

7 3. A.R.S. § 33-1804 provides as follows:

8 A. Notwithstanding any provision in the declaration, bylaws or
9 other documents to the contrary, all meetings of the members'
10 association and the board of directors, and any regularly
11 scheduled committee meetings, are open to all members of the
12 association or any person designated by a member in writing as
13 the member's representative and all members or designated
14 representatives so desiring shall be permitted to attend and speak
15 at an appropriate time during the deliberations and proceedings.
16 The board may place reasonable time restrictions on those
17 persons speaking during the meeting but shall permit a member
18 or member's designated representative to speak once after the
19 board has discussed a specific agenda item but before the board
20 takes formal action on that item in addition to any other
21 opportunities to speak. The board shall provide for a reasonable
22 number of persons to speak on each side of an issue. Persons
23 attending may tape record or videotape those portions of the
24 meetings of the board of directors and meetings of the members
25 that are open. The board of directors of the association may adopt
26 reasonable rules governing the taping of open portions of the
27 meetings of the board and the membership, but such rules shall
28 not preclude such tape recording or videotaping by those
29 attending. Any portion of a meeting may be closed only if that
30 closed portion of the meeting is limited to consideration of one or
more of the following:

1. Legal advice from an attorney for the board or the association.
On final resolution of any matter for which the board received
legal advice or that concerned pending or contemplated litigation,
the board may disclose information about that matter in an open
meeting except for matters that are required to remain confidential
by the terms of a settlement agreement or judgment.

2. Pending or contemplated litigation.

1 3. Personal, health or financial information about an individual
2 member of the association, an individual employee of the
3 association or an individual employee of a contractor for the
4 association, including records of the association directly related to
5 the personal, health or financial information about an individual
6 member of the association, an individual employee of the
7 association or an individual employee of a contractor for the
8 association.

9 4. Matters relating to the job performance of, compensation of,
10 health records of or specific complaints against an individual
11 employee of the association or an individual employee of a
12 contractor of the association who works under the direction of the
13 association.

14 5. Discussion of a member's appeal of any violation cited or
15 penalty imposed by the association except on request of the
16 affected member that the meeting be held in an open session.

17 B. Notwithstanding any provision in the community documents, all
18 meetings of the members' association and the board shall be held
19 in this state. A meeting of the members' association shall be held
20 at least once each year. Special meetings of the members'
21 association may be called by the president, by a majority of the
22 board of directors or by members having at least twenty-five per
23 cent, or any lower percentage specified in the bylaws, of the votes
24 in the association. Not fewer than ten nor more than fifty days in
25 advance of any meeting of the members the secretary shall cause
26 notice to be hand-delivered or sent prepaid by United States mail
27 to the mailing address for each lot, parcel or unit owner or to any
28 other mailing address designated in writing by a member. The
29 notice shall state the time and place of the meeting. A notice of
30 any special meeting of the members shall also state the purpose
for which the meeting is called, including the general nature of any
proposed amendment to the declaration or bylaws, changes in
assessments that require approval of the members and any
proposal to remove a director or an officer. The failure of any
member to receive actual notice of a meeting of the members
does not affect the validity of any action taken at that meeting.

C. Notwithstanding any provision in the declaration, bylaws or
other community documents, for meetings of the board of
directors that are held after the termination of declarant control of
the association, notice to members of meetings of the board of
directors shall be given at least forty-eight hours in advance of the

1 meeting by newsletter, conspicuous posting or any other
2 reasonable means as determined by the board of directors. An
3 affidavit of notice by an officer of the corporation is prima facie
4 evidence that notice was given as prescribed by this section.
5 Notice to members of meetings of the board of directors is not
6 required if emergency circumstances require action by the board
7 before notice can be given. Any notice of a board meeting shall
8 state the time and place of the meeting. The failure of any
9 member to receive actual notice of a meeting of the board of
10 directors does not affect the validity of any action taken at that
11 meeting.

12 D. Notwithstanding any provision in the declaration, bylaws or
13 other community documents, for meetings of the board of
14 directors that are held after the termination of declarant control of
15 the association, all of the following apply:

16 1. The agenda shall be available to all members attending.

17 2. An emergency meeting of the board of directors may be called
18 to discuss business or take action that cannot be delayed until the
19 next regularly scheduled board meeting. The minutes of the
20 emergency meeting shall state the reason necessitating the
21 emergency meeting. The minutes of the emergency meeting shall
22 be read and approved at the next regularly scheduled meeting of
23 the board of directors.

24 3. A quorum of the board of directors may meet by means of a
25 telephone conference if a speakerphone is available in the
26 meeting room that allows board members and association
27 members to hear all parties who are speaking during the meeting.

28 4. Any quorum of the board of directors that meets informally to
29 discuss association business, including workshops, shall comply
30 with the open meeting and notice provisions of this section without
regard to whether the board votes or takes any action on any
matter at that informal meeting.

E. It is the policy of this state as reflected in this section that all
meetings of a planned community, whether meetings of the
members' association or meetings of the board of directors of the
association, be conducted openly and that notices and agendas
be provided for those meetings that contain the information that is
reasonably necessary to inform the members of the matters to be
discussed or decided and to ensure that members have the ability

1 to speak after discussion of agenda items, but before a vote of the
2 board of directors is taken. Toward this end, any person or entity
3 that is charged with the interpretation of these provisions shall
4 take into account this declaration of policy and shall construe any
5 provision of this section in favor of open meetings.

6 **PINNACLE BY-LAW REFERENCED AT THE HEARING**

7 1. Article IV, Section Five – Action Taken Without a Meeting provides as
8 follows:⁹

9 The Directors shall have the right to take any action in the
10 absence of a meeting which they could take at a meeting by
11 obtaining the written approval of all of the Directors. Any actions
12 so approved shall have the same effect as that taken at a meeting
13 of the Directors.

14 **CONCLUSIONS OF LAW**

15 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization
16 to file a petition with the Department for a hearing concerning violations of planned
17 community documents or violations of statutes that regulate planned communities. That
18 statute provides that such petitions will be heard before the Office of Administrative
19 Hearings.

20 2. The burden of proof at an administrative hearing falls to the party asserting a
21 claim, right, or entitlement and the standard of proof on all issue in this matter is by a
22 preponderance of the evidence. See A.A.C. R2-19-119.

23 3. Petitioner asserts that the Board's practice of taking action in the absence of
24 a meeting by obtaining unanimous written consent of the Board's members via email
25 violated the charged provisions of A.R.S. § 33-1804. A.R.S. § 33-1804(A) provides, in
26 relevant part, as follows:

27 Notwithstanding any provision in the declaration, bylaws or
28 other documents to the contrary, all meetings of the
29 members' association and the board of directors, and any
30 regularly scheduled committee meetings, are open to all
members of the association or any person designated by a

⁹ See Exhibit R-2 (By-Laws of Pinnacle Peak Shadows Homeowners Association, Inc).

1 member in writing as the member's representative and all
2 members or designated representatives so desiring shall be
3 permitted to attend and speak at an appropriate time during
4 the deliberations and proceedings. . . .

4 4. A.R.S. § 33-1804 is found in Title 33, which relates to property, Chapter 16,
5 which relates to planned communities. Thus, with certain exceptions that are not
6 applicable here, the legislature has required meetings of homeowners' associations and
7 their committees to be open to the public.

8 5. A fundamental rule of statutory construction requires that every word or term
9 in a statute be given meaning so that construction of certain terms in a statute does not
10 render any of its other terms superfluous.¹⁰ A.R.S. § 33-1804(A) is not ambiguous:
11 Meetings of homeowners associations shall be open to the public.

12 6. A.R.S. § 10-3821(A) provides, in relevant part, as follows:

13 Unless the articles of incorporation or bylaws provide
14 otherwise, action required or permitted by chapters 24
15 through 40 of this title to be taken at a directors' meeting
16 may be taken without a meeting if the action is taken by all of
17 the directors. The action must be evidenced by one or more
18 written consents describing the action taken, signed by each
19 director and included in the minutes filed with the corporate
20 records reflecting the action taken.

19 7. A.R.S. § 10-3821 is found in Title 10, which relates to corporations and other
20 business associations, Chapter 31, which relates to directors and officers of nonprofit
21 corporations, Article 2, meetings and actions of the board. “[A] statute should be
22 explained in conjunction with other statutes to the end that they may be harmonious and
23 consistent; . . . if statutes relate to the same subject and are thus in *pari materia*, they
24 should be construed together with other related statutes as though they constituted one
25 law.”¹¹ Although many homeowners' associations are corporations, Title 33 does not
26 require homeowners associations to be corporations. Not all homeowners associations
27 are non-profit corporations. Title 33, Chapter 16 and Title 10, Chapter 31 do not relate
28

29
30 ¹⁰ See, e.g., *State v. Hoggatt*, 199 Ariz. 440, 443 ¶ 10, 18 P.3d 1239, 1242 (App. 2001).

¹¹ *Pima County by City of Tucson v. Maya Const. Co.*, 158 Ariz. 151, 155, 761 P.2d 1055, 1059 (1988).

1 to the same subject matter. Statutes are not interpreted in a vacuum and legal
2 relationships mandated by one statute cannot be ignored in interpreting another.¹²

3 8. An agency may not disregard clear statutory directives or legislative intent.¹³
4 When statutes conflict, a special statute will prevail over a general statute.¹⁴ Under well-
5 established canons of statutory construction, neither the department nor homeowners
6 associations in Arizona can use title 10 to impliedly repeal duly enacted, unambiguous
7 statutes in title 33, such as A.R.S. § 33-1804(A).

8 9. A.R.S. § 12-541(5) provides a one-year statute of limitations. This petition
9 was filed on or about March 10, 2014. This Tribunal concludes that the expiration of the
10 one-year statute of limitations precludes findings that Pinnacle violated the charged
11 provisions A.R.S. § 33-1804 prior to March 9, 2013.

12 10. Proof by “preponderance of the evidence” means that it is sufficient to
13 persuade the finder of fact that the proposition is “more likely true than not.” *In re*
14 *Arnold and Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

15 11. The Board may place reasonable time restrictions on those persons
16 speaking during the meeting but must permit a member or member's designated
17 representative to speak once the Board has discussed a specific agenda item and
18 before the Board takes formal action on that item. Pinnacle refused to allow Mr. Legere
19 or any other member to speak on agenda items prior to board votes on those items at
20 Board meetings on November 26, 2013, January 14, 2014, and at the annual members
21 meeting on February 3, 2014. This Tribunal concludes that Pinnacle violated the
22 charged provisions of A.R.S. § 33-1804(A) on at least three separate dates after March
23 9, 2013.

24 12. Architectural control meetings are now being scheduled to take place fifteen
25 minutes before the regular open meetings. All meetings of a members' association and
26 the board of directors, and any regularly scheduled committee meetings, must be open
27 to all members of the association. It is the policy of this State as reflected in A.R.S. §

28 ¹² See *Hughes v. Industrial Commission*, 113 Ariz. 517, 520, 558 P.2d 11, 14 (1976) (statute from title
29 relating to real estate cannot amend statute relating to workers' compensation).

30 ¹³ See, e.g., *Cochise County v. Arizona Health Care Cost Containment System*, 170 Ariz. 443, 445, 825
P.2d 968, 970 (App. 1991).

¹⁴ See *State v. Davis*, 119 Ariz. 529, 534, 582 P.2d 175, 181 (1978).

1 33-1804 that all meetings of a planned community must be conducted openly and that
2 notices and agendas must be provided for those meetings that contain the information
3 that is reasonably necessary to inform the members of the matters to be discussed or
4 decided and to ensure that members have the ability to speak after discussion of
5 agenda items, but before a vote of the board of directors is taken. Pinnacle has
6 conducted regularly scheduled architectural committee meetings without notice to
7 members of Pinnacle. This Tribunal concludes that Pinnacle violated the charged
8 provisions of A.R.S. § 33-1804(A).

9 13. Mr. Foxworthy testified that no notice was provided to members when the
10 Board took action by unanimous consent by email. Mr. Foxworthy stated that there
11 would be nothing for members to observe. Mr. Foxworthy acknowledged that there are
12 no deliberations by the Board and no opportunity for members of Pinnacle to speak
13 before an email vote of the Board is taken.

14 14. This Tribunal concludes that the Board's prior practice of taking action in the
15 absence of a meeting by obtaining unanimous written consent of the Board's members
16 via email violated the charged provisions of A.R.S. § 33-1804(A).

17 15. Petitioner asserts that all matters relating to finances should be open
18 session. A.R.S. § 33-1804 provides, in relevant portion, that any portion of a meeting
19 may be closed only if that closed portion of the meeting is limited to consideration of one
20 or more of the following:

21 1. Legal advice from an attorney for the board or the association.
22 On final resolution of any matter for which the board received
23 legal advice or that concerned pending or contemplated litigation,
24 the board may disclose information about that matter in an open
25 meeting except for matters that are required to remain confidential
26 by the terms of a settlement agreement or judgment.

27 2. Pending or contemplated litigation.

28 3. Personal, health or financial information about an individual
29 member of the association, an individual employee of the
30 association or an individual employee of a contractor for the
association, including records of the association directly related to
the personal, health or financial information about an individual

1 member of the association, an individual employee of the
2 association or an individual employee of a contractor for the
3 association.

4 4. Matters relating to the job performance of, compensation of,
5 health records of or specific complaints against an individual
6 employee of the association or an individual employee of a
7 contractor of the association who works under the direction of the
8 association.

9 4. Discussion of a member's appeal of any violation cited or
10 penalty imposed by the association except on request of the
11 affected member that the meeting be held in an open session.

12 **RECOMMENDED ORDER ON REHEARING**

13 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing
14 party in this matter.

15 It is further ORDERED that Pinnacle comply with the applicable provisions of
16 A.R.S. § 33-1804(A) in the future.

17 It is further ORDERED that Pinnacle pay Mr. Legere his filing fee of \$2,000.00, to
18 be paid directly to Mr. Legere within thirty (30) days of this Order. If the filing fee has
19 already been paid no additional sums need to be paid to Mr. Legere.

20 It is further ORDERED that Pinnacle pay a civil penalty in the total amount of
21 \$2,000.00 to the Department within thirty (30) days of the date of this Order. During the
22 rehearing Pinnacle's counsel said that the \$2,000.00 civil penalty had already been
23 paid. No additional civil penalty is found to be appropriate in this matter.

24 *In the event of certification of the Administrative Law Judge Decision by the
25 Director of the Office of Administrative Hearings, the effective date of this Order will be
26 five (5) days from the date of that certification.*

27 Done this day, April 23, 2015.

28 /s/ M. Douglas
29 Administrative Law Judge
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Transmitted electronically to:

Gene Palma, Director
Department of Fire Building and Life Safety

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