

1 **Final agency action regarding decision below:**

2  
3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 DENNIS J. LEGERE,

8 Petitioner,

9 vs

10 PINNACLE PEAK SHADOWS HOA,

11 Respondent.

**No. 14F-H1414001-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

12  
13  
14 **HEARING:** July 31, 2014 at 8:00 a.m.

15 **APPEARANCES:** Dennis J. Legere (hereinafter “Mr. Legere” or “Petitioner”)  
16 was represented by his attorney, Tom Rawles, Esq. Pinnacle Peak Shadows HOA  
17 (hereinafter “Pinnacle” or “Respondent”) was represented by its attorney, Troy  
18 Stratman, Esq.

19 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

20  
21 Evidence and testimony were presented and the following Findings of Fact,  
22 Conclusions of Law and Recommended Order are made:

23 **FINDINGS OF FACT**

24 **Background**

- 25 1. The Department of Fire, Building and Life Safety (the “Department”) is authorized by  
26 statute to receive Petitions for Hearings from members of homeowners’ associations  
27 and from homeowners’ associations in Arizona.  
28 2. Pinnacle is a homeowners’ association located in Scottsdale, Arizona.  
29 3. Mr. Legere owns a residence in and is a member of Pinnacle.  
30

1 4. Mr. Legere filed a petition with the Department on or about March 10, 2014, alleging  
2 that Pinnacle had violated the provisions of A.R.S. § 33-1804(A), (C), (D), and (E). Mr.  
3 Legere specifically alleged, in relative part, as follows:

4 A) Contrary to the provisions of [A.R.S. § 33-1804(A)], relative to  
5 appropriate closed session exceptions to open meetings,  
6 [Pinnacle's Board] routinely conducted non-privileged discussions  
and business during closed sessions. . . .

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

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

24 D) Contrary to the provision of [A.R.S. § 33-1804(A),(D), and (E)]  
25 relative to committee meetings, and any meeting of a quorum of  
26 Board members being subject to open meeting notice and  
27 requirements. [Pinnacle's] Architectural Review Committee has  
28 **never** conducted a noticed public open meeting since July 20,  
29 2011, when the law was changed to specifically include sub-  
30 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

1 7/20/2011 when the committee consisted of a quorum of the  
2 board. I have no documentation of [a] meeting of this committee  
3 because it conducted all its business via e-mail or phone calls  
4 between members.

5 5. Pinnacle's Answer to the Petition provided, in relevant part, as follows:

6 All the Complaint items in the Petition are denied.

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

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

#### 14 **Testimony**

#### 15 **Testimony of Dennis J. Legere**

16 8. Mr. Legere testified that he had lived at his residence in Pinnacle since 2010. Mr.  
17 Legere stated that he had previously served on the Board of Directors (hereinafter  
18 "Board") from 2011 through 2012.

19 9. Mr. Legere testified that Pinnacle violated the provisions of A.R.S. § 33-1804 in April  
20 2013. Mr. Legere stated that the financial information provided to the members of  
21 Pinnacle for the open meeting for Pinnacle was just a summary of the financial  
22 information that was provided to the Board. Mr. Legere testified that the summary was  
23 basically a three-sheet summary of Pinnacle's expenses.

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

27 11. Mr. Legere testified that he was prevented from speaking at an open session  
28 meeting on November 26, 2013. Mr. Legere stated that he was promised an  
29 opportunity to speak about action items at the end of the open session. Mr. Legere  
30 testified that the Board then took action on the items before Mr. Legere was allowed to

1 speak.

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

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

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

19 15. Mr. Legere testified that he submitted follow-up questions to clarify the questions he  
20 submitted to the management company. Mr. Legere stated that during the June 18,  
21 2013 meeting, the Board agreed to consider and respond to his questions as part of the  
22 meeting minutes for the June 18, 2013 meeting. Mr. Legere testified that the Board  
23 then issued an email on June 24, 2013 informing him that he would not be receiving a  
24 response to any questions.<sup>1</sup>

25 16. Mr. Legere testified that the Board had discussed his questions after the June 18,  
26 2014 open meeting and decided via an email conversation that because Mr. Legere's  
27 questions had been sufficiently answered during the open meeting, the Board would not  
28 provide any additional answers to Mr. Legere.<sup>2</sup> Mr. Legere testified that the August 20,  
29 2013 open meeting minutes confirmed that the Board had held a closed email meeting

30 <sup>1</sup> See June 24, 2013 email LEGERE0094 (Exhibit 9).

<sup>2</sup> See Exhibit 8 (LEGERE0105).

1 after the June 18, 2014 open meeting to decide not to respond to Mr. Legere's  
2 questions.

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

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

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

25 20. Mr. Legere acknowledged that personal, health, or financial information about an  
26 individual member is one of the listed exceptions in A.R.S. § 33-1804.

27 21. Mr. Legere acknowledged that he had no evidence that the Board had ever held a  
28 meeting without notice. Mr. Legere testified that the Board's use of the email process

29 <sup>3</sup> See Exhibit 8 (LEGERE0116).

30 <sup>4</sup> See Exhibit 8 (LEGERE0120).

<sup>5</sup> See Exhibit 9 (LEGERE0121 through LEGERE0135).

1 avoided the need for a meeting of the Board. Mr. Legere stated that the use of the  
2 email process violated the intent of the open meeting law.

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

9 23. Mr. Legere testified that he did not believe that the actions taken by the Board via  
10 email were ratified by the Board in the next open meeting minutes.<sup>6</sup> Mr. Legere  
11 acknowledged that the April 22, 2014 open meeting minutes did contain ratification of  
12 an action taken by the Board via the email process.

13 24. Mr. Legere testified that the Board's decision to utilize the email process for taking  
14 actions was never documented in open meeting minutes. Mr. Legere acknowledged  
15 that the April 22, 2014 minutes documented the use of the email process with attached  
16 emails from members of the Board.

17 25. Mr. Legere acknowledged that he was allowed to speak before the Board took  
18 formal action at the May 20, 2014 open meeting.

19 26. Mr. Legere acknowledged that he was allowed to speak before the Board took  
20 formal action at the April 22, 2014 open meeting.

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

23 28. Mr. Legere testified that he was not allowed to speak before the Board took formal  
24 action at the annual meeting for Pinnacle in January 2014. Mr. Legere stated that he  
25 was not allowed to speak at the annual meeting prior to the Board approving the  
26 minutes from the previous annual meeting. Mr. Legere testified that he was prevented  
27 from speaking during open meetings in November 2013 and January 2014 before the  
28 Board took formal action on items presented during the November 2013 and January  
29 2014 meetings.

30 \_\_\_\_\_  
<sup>6</sup> See Exhibit R-4 (Open Meeting Minutes for Pinnacle).

**Testimony of Michelle O’Robinson**

1 29. Michelle O’Robinson (hereinafter “Ms. O’Robinson”) testified that she is a field  
2 operations supervisor for Vision Community Management. Ms. O’Robinson stated that  
3 she had almost 15 years of experience in the HOA management field. Ms. O’Robinson  
4 testified that she was currently the manager and field supervisor for Pinnacle.

5 30. Ms. O’Robinson testified that she was familiar with A.R.S. § 33-1804. Ms.  
6 O’Robinson stated that she believed that the members of the Board had the right to take  
7 any action in the absence of a meeting that they could take at a meeting if they obtained  
8 the unanimous written approval of all members of the Board. Ms. O’Robinson testified  
9 that it was a common practice in the industry.

10 31. Ms. O’Robinson testified that personal information and financial information for  
11 homeowners is always discussed in an executive session rather than an open session.  
12 Ms. O’Robinson stated that Board actions regarding violations of CCRs are also taken  
13 under consideration in executive sessions rather than open sessions.

**Testimony of James T. Foxworthy**

14  
15 32. James T. Foxworthy (hereinafter “Mr. Foxworthy”) testified that he is the president of  
16 the Board for Pinnacle. Mr. Foxworthy stated that he had been a member of the Board  
17 for four years. Mr. Foxworthy testified that Mr. Legere had previously been a member of  
18 the Board.

19 33. Mr. Foxworthy testified that there were 85 homes in Pinnacle and that Pinnacle has  
20 an annual budget of \$45,000.00. Mr. Foxworthy stated that the Board began to use an  
21 email process in place of open meetings in the fall of 2013. Mr. Foxworthy testified that  
22 use of the email process required a unanimous vote by the Board and the unanimous  
23 vote had to be recorded in writing.

24 34. Mr. Foxworthy testified that Pinnacle had been in full compliance with the State’s  
25 open meeting law since the new management company took over. Mr. Foxworthy  
26 stated that he was excited about the changes instituted by the new management  
27 company.

28 35. Mr. Foxworthy testified that the Board had the right to take any action in the absence  
29 of a meeting which they could take at a meeting if they obtained the unanimous written  
30

1 approval of all members of the Board via email. Mr. Foxworthy stated that he would not  
2 be willing to serve on the Board if a formal meeting was required for every single action  
3 that the Board was required to take.

4 36. Mr. Foxworthy testified that personal information and financial information of  
5 individual members of Pinnacle was only discussed in closed sessions of the Board.  
6 Mr. Foxworthy stated that he vehemently disagreed with Mr. Legere regarding the  
7 disclosure of personal and financial information of individual members of Pinnacle. Mr.  
8 Foxworthy testified that Pinnacle had retained a new management company and that he  
9 believed that Pinnacle was now in full compliance with A.R.S. § 33-1804. Mr.

10 Foxworthy stated that financial information of the individual members of Pinnacle was  
11 confidential and should never be discussed in open meetings.

12 37. Mr. Foxworthy testified that in 2014 the Board instituted a new policy requiring that  
13 all Board members return any personal financial information of Pinnacle's members that  
14 Board member obtained while serving as a member of the Board. Mr. Foxworthy stated  
15 that members of Pinnacle were upset with the fact that previous members of the Board  
16 had left with personal financial information of members.

17 38. Mr. Foxworthy acknowledged that Pinnacle's previous management company had  
18 provided members with summary financial information rather than the full financial  
19 information provided to members of the Board. Mr. Foxworthy stated that the new  
20 management company now provides members with essentially everything that is  
21 provided to members of the Board.

22 39. Mr. Foxworthy acknowledged that Mr. Legere was prevented from speaking in three  
23 open meetings before action was taken on action items in the fall of 2013 and the early  
24 part of 2014. Mr. Foxworthy stated that the policy was changed at the advice of the new  
25 management company and that Mr. Legere and other members were now allowed to  
26 speak on action items before action was taken by the Board. Mr. Foxworthy testified  
27 that Mr. Legere had been complimentary about the new process.

28 40. Mr. Foxworthy testified that in 2013 the Board was experiencing a procedural  
29 problem in the amount of time it took to complete an open meeting. Mr. Foxworthy  
30 stated that the homeowner discussion was dominating so much of the time available for

1 the open meetings that the Board was exhausted by the end of the meeting. Mr.  
2 Foxworthy testified that he talked with the previous management company and was  
3 informed that the Board could institute a "time-cap" of three to five minutes for each  
4 member and that all commentary could be deferred to a specific spot in the meeting.  
5 Mr. Foxworthy stated that the policy has now been changed based on advice from the  
6 new management company.

7 41. Mr. Foxworthy acknowledged that under the previous Board policy, Mr. Legere was  
8 prevented from speaking at open meetings on at least three different occasions before  
9 action was taken by the Board.

10 42. Mr. Foxworthy acknowledged that the previous management company had acted as  
11 Pinnacle's agent.

12 43. Mr. Foxworthy acknowledged that under the previous management company, only  
13 summary financial information was provided to members.

14 44. Mr. Foxworthy acknowledged that under the previous management company, all of  
15 the financial information was not discussed and approved by the members of Pinnacle  
16 during open meetings. Mr. Foxworthy testified that the full financial reports were  
17 discussed and decided upon in closed Board meetings.

18 45. Mr. Foxworthy testified that in the fall of 2013, the Board began to utilize unanimous  
19 consent actions taken by email in lieu of holding meetings. Mr. Foxworthy stated that  
20 the Board was "looking for something to get everything done." Mr. Foxworthy testified  
21 that he would not be willing to serve on the Board if all actions had to be taken in  
22 meetings.

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

25 47. Mr. Foxworthy acknowledged that no notice was provided to members when the  
26 Board took action by unanimous consent by email. Mr. Foxworthy testified that there  
27 would be nothing for members to observe.

28 48. Mr. Foxworthy acknowledged that there are no deliberations by the Board and no  
29 opportunity for members of Pinnacle to speak before an email vote of the Board is  
30 taken.

1 49. Mr. Foxworthy acknowledged that under the previous management company,  
2 officers of the Board were elected in closed sessions, including a closed election that  
3 took place on March 5, 2013. Mr. Foxworthy testified that officers of the Board are now  
4 elected in open sessions.

5 50. Mr. Foxworthy acknowledged that Pinnacle has an architectural control committee.  
6 Mr. Foxworthy stated that the architectural control committee did not have regular  
7 meetings under the previous management company. Mr. Foxworthy testified that the  
8 architectural committee now has regular meetings.

9 51. Mr. Foxworthy testified that under the new management company, the architectural  
10 control meetings are now being scheduled to take place fifteen minutes before the  
11 regular open meetings. Mr. Foxworthy stated that notice of the architectural control  
12 meetings concern "little stuff."

13 52. Mr. Foxworthy acknowledged that the architectural control committee has met  
14 several times in 2013 and 2014. Mr. Foxworthy testified that there had been no notice  
15 provided for the architectural control committee meetings. Mr. Foxworthy  
16 acknowledged that members would not have been able to participate in the architectural  
17 control committee meetings because no notice had been provided.

18 **PROVISIONS OF LAW REFERENCED AT HEARING**

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

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

28 B. Action taken under this section is effective when the last  
29 director signs the consent, unless the consent specifies a different  
30 effective date.

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

1 D. Any director may revoke a consent by delivering a signed  
2 revocation of the consent to the president or secretary before the  
3 date the last director signs the consent.

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

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

7 There shall be commenced and prosecuted within one year  
8 after the cause of action accrues, and not afterward, the  
9 following actions:

10 . . . .

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

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

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

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

7 2. Pending or contemplated litigation.

8 3. Personal, health or financial information about an individual  
9 member of the association, an individual employee of the  
10 association or an individual employee of a contractor for the  
11 association, including records of the association directly related to  
12 the personal, health or financial information about an individual  
13 member of the association, an individual employee of the  
14 association or an individual employee of a contractor for the  
15 association.

16 4. Matters relating to the job performance of, compensation of,  
17 health records of or specific complaints against an individual  
18 employee of the association or an individual employee of a  
19 contractor of the association who works under the direction of the  
20 association.

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

24 B. Notwithstanding any provision in the community documents, all  
25 meetings of the members' association and the board shall be held  
26 in this state. A meeting of the members' association shall be held  
27 at least once each year. Special meetings of the members'  
28 association may be called by the president, by a majority of the  
29 board of directors or by members having at least twenty-five per  
30 cent, or any lower percentage specified in the bylaws, of the votes  
in the association. Not fewer than ten nor more than fifty days in  
advance of any meeting of the members the secretary shall cause  
notice to be hand-delivered or sent prepaid by United States mail  
to the mailing address for each lot, parcel or unit owner or to any  
other mailing address designated in writing by a member. The  
notice shall state the time and place of the meeting. A notice of  
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

1 proposal to remove a director or an officer. The failure of any  
2 member to receive actual notice of a meeting of the members  
3 does not affect the validity of any action taken at that meeting.

4 C. Notwithstanding any provision in the declaration, bylaws or  
5 other community documents, for meetings of the board of  
6 directors that are held after the termination of declarant control of  
7 the association, notice to members of meetings of the board of  
8 directors shall be given at least forty-eight hours in advance of the  
9 meeting by newsletter, conspicuous posting or any other  
10 reasonable means as determined by the board of directors. An  
11 affidavit of notice by an officer of the corporation is prima facie  
12 evidence that notice was given as prescribed by this section.  
13 Notice to members of meetings of the board of directors is not  
14 required if emergency circumstances require action by the board  
15 before notice can be given. Any notice of a board meeting shall  
16 state the time and place of the meeting. The failure of any  
17 member to receive actual notice of a meeting of the board of  
18 directors does not affect the validity of any action taken at that  
19 meeting.

20 D. Notwithstanding any provision in the declaration, bylaws or  
21 other community documents, for meetings of the board of  
22 directors that are held after the termination of declarant control of  
23 the association, all of the following apply:

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

25 2. An emergency meeting of the board of directors may be called  
26 to discuss business or take action that cannot be delayed until the  
27 next regularly scheduled board meeting. The minutes of the  
28 emergency meeting shall state the reason necessitating the  
29 emergency meeting. The minutes of the emergency meeting shall  
30 be read and approved at the next regularly scheduled meeting of  
the board of directors.

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

4. Any quorum of the board of directors that meets informally to  
discuss association business, including workshops, shall comply  
with the open meeting and notice provisions of this section without

1 regard to whether the board votes or takes any action on any  
2 matter at that informal meeting.

3 E. It is the policy of this state as reflected in this section that all  
4 meetings of a planned community, whether meetings of the  
5 members' association or meetings of the board of directors of the  
6 association, be conducted openly and that notices and agendas  
7 be provided for those meetings that contain the information that is  
8 reasonably necessary to inform the members of the matters to be  
9 discussed or decided and to ensure that members have the ability  
10 to speak after discussion of agenda items, but before a vote of the  
11 board of directors is taken. Toward this end, any person or entity  
12 that is charged with the interpretation of these provisions shall  
13 take into account this declaration of policy and shall construe any  
14 provision of this section in favor of open meetings.

### 15 **PINNACLE BY-LAW REFERENCED AT THE HEARING**

- 16 1. Article IV, Section Five – Action Taken Without a Meeting provides as follows:<sup>7</sup>

17 The Directors shall have the right to take any action in the  
18 absence of a meeting which they could take at a meeting by  
19 obtaining the written approval of all of the Directors. Any actions  
20 so approved shall have the same effect as that taken at a meeting  
21 of the Directors.

### 22 **CONCLUSIONS OF LAW**

23 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to  
24 file a petition with the Department for a hearing concerning violations of planned  
25 community documents or violations of statutes that regulate planned communities.

26 That statute provides that such petitions will be heard before the Office of  
27 Administrative Hearings.

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

3. Petitioner asserts that the Board's practice of taking action in the absence of a  
meeting by obtaining unanimous written consent of the Board's members via email

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<sup>7</sup> See Exhibit R-2 (By-Laws of Pinnacle Peak Shadows Homeowners Association, Inc).

1 violated the charged provisions of A.R.S. § 33-1804. The powers and duties of  
2 administrative agencies such as the Office of Administrative Hearings are limited to  
3 those granted by statute and such agencies do not have any common-law or inherent  
4 powers. The jurisdiction of the Office of Administrative Hearings over homeowner  
5 association matters is limited in cases such as the instant one and the Administrative  
6 Law Judge can only determine whether the Association violated provisions of the  
7 planned community documents, i.e., Articles of Incorporation, Bylaws, Covenants  
8 Conditions and Restrictions, or has violated A.R.S. Title 33, Chapter 9 or 16. See  
9 A.R.S. §§ 41-2198 and 41-2198.01(B). The Office of Administrative Hearings has  
10 limited jurisdiction. This Tribunal lacks the authority to determine alleged violations of  
11 A.R.S. Title 10 and cannot consider the provisions of the Arizona Constitution or any  
12 other legal authority other than A.R.S. § 33-1804, cited in the Petition.

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

17 5. Proof by “preponderance of the evidence” means that it is sufficient to persuade  
18 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*  
19 *Baker Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994).

20 6. The Board may place reasonable time restrictions on those persons speaking  
21 during the meeting but must permit a member or member's designated representative  
22 to speak once the Board has discussed a specific agenda item and before the Board  
23 takes formal action on that item. Pinnacle refused to allow Mr. Legere or any other  
24 member to speak on agenda items prior to board votes on those items at Board  
25 meetings on November 26, 2013, January 14, 2014, and at the annual members  
26 meeting on February 3, 2014. This Tribunal concludes that Pinnacle violated the  
27 charged provisions of A.R.S. § 33-1804(A) on at least three separate dates after March  
28 9, 2013.

29 7. Architectural control meetings are now being scheduled to take place fifteen  
30 minutes before the regular open meetings. All meetings of a members' association and

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

11 **RECOMMENDED ORDER**

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

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

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

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

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

23 Done this day, August 19, 2014.

24 /s/ M. Douglas

25 Administrative Law Judge

26  
27 Transmitted electronically to:

28  
29 Gene Palma, Director  
30 Department of Fire Building and Life Safety