

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
10 vs

11 PINNACLE PEAK SHADOWS HOA,

12 Respondent

No. 14F-H1414001-BFS-rhg

**ADMINISTRATIVE
LAW JUDGE DECISION**

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15 **HEARING:** March 31, 2015, at 8:00 a.m.

16 **APPEARANCES:** Dennis J. Legere (hereinafter "Mr. Legere" or "Petitioner")
17 appeared on his own behalf. Pinnacle Peak Shadows HOA (hereinafter "Pinnacle" or
18 "Respondent") was represented by its attorney, Maria R. Kupillas, 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 on Rehearing are made:

23 **FINDINGS OF FACT**

24 **Background**

25 1. The Department of Fire, Building and Life Safety (the "Department") is
26 authorized by statute to receive Petitions for Hearings from members of homeowners'
27 associations 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.

1 4. Mr. Legere filed a petition with the Department on or about March 10,
2 2014, alleging that Pinnacle had violated the provisions of A.R.S. § 33-1804(A), (C), (D),
3 and (E). Mr. 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
7 and business during closed sessions. . . .

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

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

 D) Contrary to the provision of [A.R.S. § 33-1804(A),(D), and (E)]
relative to committee meetings, and any meeting of a quorum of
Board members being subject to open meeting notice and
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

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
8 parties notifying them that a hearing on the Petition would be conducted by the Office of
9 Administrative Hearings.

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

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

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

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

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

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

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

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

summary was basically a three-sheet summary of Pinnacle's expenses.

1
2 14. Mr. Legere testified that during the open meeting that occurred on April
3 9, 2013, he stated that the Board had far more financial information than it had provided
4 to members.

5 15. Mr. Legere testified that he was prevented from speaking at an open
6 session meeting on November 26, 2013. Mr. Legere stated that he was promised an
7 opportunity to speak about action items at the end of the open session. Mr. Legere
8 testified that the Board then took action on the items before Mr. Legere was allowed to
9 speak.

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

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

20 18. Mr. Legere testified that before the June 18, 2013 open meeting, he
21 requested that he be allowed to review the detailed financial records for Pinnacle. Mr.
22 Legere stated that he reviewed the requested documents and had several questions
23 regarding the validity of several expenses that were recorded in the financial
24 documents. Mr. Legere testified that he presented his questions in advance of the June
25 18, 2013 open meeting to the management company for Pinnacle. Mr. Legere stated
26 that the response he received from the management company did not answer his
27 questions.

28 19. Mr. Legere testified that he submitted follow-up questions to clarify the
29 questions he submitted to the management company. Mr. Legere stated that during the
30 June 18, 2013 meeting, the Board agreed to consider and respond to his questions as

1 part of the meeting minutes for the June 18, 2013 meeting. Mr. Legere testified that the
2 Board then issued an email on June 24, 2013 informing him that he would not be
3 receiving a response to any questions.¹

4 20. Mr. Legere testified that the Board had discussed his questions after the
5 June 18, 2014 open meeting and decided via an email conversation that because Mr.
6 Legere's questions had been sufficiently answered during the open meeting, the Board
7 would not provide any additional answers to Mr. Legere.² Mr. Legere testified that the
8 August 20, 2013 open meeting minutes confirmed that the Board had held a closed
9 email meeting after the June 18, 2014 open meeting to decide not to respond to Mr.
10 Legere's questions.

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

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

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

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

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

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

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

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

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

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

29 30. Mr. Legere acknowledged that he was allowed to speak before the Board

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

1 took formal action at the April 22, 2014 open meeting.

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

4 32. Mr. Legere testified that he was not allowed to speak before the Board
5 took formal action at the annual meeting for Pinnacle in January 2014. Mr. Legere
6 stated that he was not allowed to speak at the annual meeting prior to the Board
7 approving the minutes from the previous annual meeting. Mr. Legere testified that he
8 was prevented from speaking during open meetings in November 2013 and January
9 2014 before the Board took formal action on items presented during the November
10 2013 and January 2014 meetings.

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

14 34. Mr. Legere testified that discussions regarding delinquent payments from
15 homeowners in Pinnacle were legitimate community business and "must" be discussed
16 and deliberated in open meetings. Mr. Legere stated that if any individual fails to follow
17 community rules that failure is legitimate community business.

18 35. Mr. Legere testified that the Board is the "gate keeper" of compliance
19 with community rules. Mr. Legere asserted that individual members of Pinnacle are
20 entitled to enforce Pinnacle's covenants through litigation. Mr. Legere stated that
21 homeowners had a right to know what was taking place between the Board and
22 homeowners so that individual members of Pinnacle can make informed decisions as to
23 whether to instigate litigation against individual members who have failed to comply with
24 Pinnacle's covenants.

25 36. Mr. Legere asserted that potential litigation was insufficient to fall within
26 the exceptions to the State's open meeting laws. Mr. Legere said that Pinnacle has
27 never actually instigated any litigation against a homeowner member. Mr. Legere
28 asserted that any discussion of violation of Pinnacle's covenants is legitimate
29 community business that should be discussed openly.

30 37. Mr. Legere reviewed Pinnacle's response to his Subpoena Duces

1 Tecum.⁷ Mr. Legere testified that minutes establish that Pinnacle discussed financial
2 and other matters in closed session that should have been discussed in open meetings
3 with homeowner involvement. Mr. Legere asserted that Pinnacle failed to provide all of
4 the material that he requested under the subpoena duces tecum.

5 38. Mr. Legere acknowledged that he was not alleging that Pinnacle had
6 violated the provisions of A.R.S. § 10-3821.

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

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

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

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

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

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

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

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

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

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

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

15 48. Mr. Foxworthy testified that personal information and financial
16 information of individual members of Pinnacle were only discussed in closed sessions of
17 the Board. Mr. Foxworthy stated that he vehemently disagreed with Mr. Legere
18 regarding the disclosure of personal and financial information of individual members of
19 Pinnacle. Mr. Foxworthy testified that Pinnacle had retained a new management
20 company and that he believed that Pinnacle was now in full compliance with A.R.S. §
21 33-1804. Mr. Foxworthy stated that financial information of the individual members of
22 Pinnacle was confidential and should never be discussed in open meetings.

23 49. Mr. Foxworthy testified that in 2014 the Board instituted a new policy
24 requiring that all Board members return any personal financial information of Pinnacle's
25 members that the Board member obtained while serving as a member of the Board. Mr.
26 Foxworthy stated that members of Pinnacle were upset with the fact that previous
27 members of the Board had left with personal financial information of members.

28 50. Mr. Foxworthy acknowledged that Pinnacle's previous management
29 company had provided members with summary financial information rather than the full
30 financial information provided to members of the Board. Mr. Foxworthy stated that the

1 new management company now provides members with essentially everything that is
2 provided to members of the Board.

3 51. Mr. Foxworthy acknowledged that Mr. Legere was prevented from
4 speaking in three open meetings before action was taken on action items in the fall of
5 2013 and the early part of 2014. Mr. Foxworthy stated that the policy was changed at
6 the advice of the new management company and that Mr. Legere and other members
7 were now allowed to speak on action items before action was taken by the Board. Mr.
8 Foxworthy testified that Mr. Legere had been complimentary about the new process.

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

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

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

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

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

29 57. Mr. Foxworthy testified that in the fall of 2013, the Board began to utilize
30 unanimous consent actions taken by email in lieu of holding meetings. Mr. Foxworthy

1 stated that the Board was “looking for something to get everything done.” Mr. Foxworthy
2 testified that he would not be willing to serve on the Board if all actions had to be taken
3 in meetings.

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

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

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

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

17 62. Mr. Foxworthy acknowledged that Pinnacle has an architectural control
18 committee. Mr. Foxworthy stated that the architectural control committee did not have
19 regular meetings under the previous management company. Mr. Foxworthy testified
20 that the architectural committee now has regular meetings.

21 63. Mr. Foxworthy testified that under the new management company, the
22 architectural control meetings are now being scheduled to take place fifteen minutes
23 before the regular open meetings. Mr. Foxworthy stated that notice of the architectural
24 control meetings concern “little stuff.”

25 64. Mr. Foxworthy acknowledged that the architectural control committee has
26 met several times in 2013 and 2014. Mr. Foxworthy testified that there had been no
27 notice provided for the architectural control committee meetings. Mr. Foxworthy
28 acknowledged that members would not have been able to participate in the architectural
29 control committee meetings because no notice had been provided.

30 65. On March 31, 2015, John Edgar Schuler (hereinafter “Mr. Schuler”)

1 testified that he had been president of the Board since March 10, 2015. Mr. Schuler
2 stated that he previously had been a member of the Board since approximately August
3 or September 2009. Mr. Schuler said that he could only recall three "email meetings"
4 since July 31, 2014.

5 66. Mr. Schuler testified that the email meetings have dealt with maintenance
6 type issues. Mr. Schuler stated that Pinnacle does not normally have open meetings in
7 June, July, or August. Mr. Schuler said that financial matters are now reviewed in open
8 sessions. Mr. Schuler stated that only delinquency reports are discussed in closed
9 session. Mr. Schuler said that he believes the Fair Credit Reporting Act requires
10 Pinnacle to discuss delinquency matters in closed session.

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

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

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

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

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

29 C. The consent signed under this section has the effect of a
30 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.

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

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

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

19 **CONCLUSIONS OF LAW**

20
21 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization
22 to file a petition with the Department for a hearing concerning violations of planned
23 community documents or violations of statutes that regulate planned communities. That
24 statute provides that such petitions will be heard before the Office of Administrative
25 Hearings.

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

29
30 _____
⁹ See Exhibit R-2 (By-Laws of Pinnacle Peak Shadows Homeowners Association, Inc).

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

5 Notwithstanding any provision in the declaration, bylaws or
6 other documents to the contrary, all meetings of the
7 members' association and the board of directors, and any
8 regularly scheduled committee meetings, are open to all
9 members of the association or any person designated by a
10 member in writing as the member's representative and all
11 members or designated representatives so desiring shall be
12 permitted to attend and speak at an appropriate time during
13 the deliberations and proceedings. . . .

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

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

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

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

31 7. A.R.S. § 10-3821 is found in Title 10, which relates to corporations and other
32 business associations, Chapter 31, which relates to directors and officers of nonprofit
33 corporations, Article 2, meetings and actions of the board. "[A] statute should be
34 explained in conjunction with other statutes to the end that they may be harmonious and

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

1 consistent; . . . if statutes relate to the same subject and are thus in *pari materia*, they
2 should be construed together with other related statutes as though they constituted one
3 law.”¹¹ Although many homeowners’ associations are corporations, Title 33 does not
4 require homeowners associations to be corporations. Not all homeowners associations
5 are non-profit corporations. Title 33, Chapter 16 and Title 10, Chapter 31 do not relate
6 to the same subject matter. Statutes are not interpreted in a vacuum and legal
7 relationships mandated by one statute cannot be ignored in interpreting another.¹²

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

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

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

20 11. The Board may place reasonable time restrictions on those persons
21 speaking during the meeting but must permit a member or member's designated
22 representative to speak once the Board has discussed a specific agenda item and
23 before the Board takes formal action on that item. Pinnacle refused to allow Mr. Legere
24 or any other member to speak on agenda items prior to board votes on those items at
25 Board 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 _____
28 ¹¹ *Pima County by City of Tucson v. Maya Const. Co.*, 158 Ariz. 151, 155, 761 P.2d 1055, 1059 (1988).

29 ¹² *See Hughes v. Industrial Commission*, 113 Ariz. 517, 520, 558 P.2d 11, 14 (1976) (statute from title
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 charged provisions of A.R.S. § 33-1804(A) on at least three separate dates after March
2 9, 2013.

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

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

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

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

- 27
28 1. Legal advice from an attorney for the board or the association.
29 On final resolution of any matter for which the board received
30 legal advice or that concerned pending or contemplated litigation,
the board may disclose information about that matter in an open

1 meeting except for matters that are required to remain confidential
2 by the terms of a settlement agreement or judgment.

3 2. Pending or contemplated litigation.

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

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

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

20 **RECOMMENDED ORDER ON REHEARING**

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

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

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

28 It is further ORDERED that Pinnacle pay a civil penalty in the total amount of
29 \$2,000.00 to the Department within thirty (30) days of the date of this Order. During the
30 rehearing Pinnacle's counsel said that the \$2,000.00 civil penalty had already been
paid. No additional civil penalty is found to be appropriate in this matter.

