

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

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 John & Debborah Sellers

8 Petitioners,

9 vs

10 The Crossings at Willow Creek HOA

11 Respondent.

No. 16F-H1616013-BFS

**AMENDED ADMINISTRATIVE LAW
JUDGE DECISION RECOMMENDING
THAT DIRECTOR GRANT SUMMARY
JUDGMENT TO PETITIONERS¹**

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15 John and Debborah Sellers (“Petitioners”) moved for summary judgment against
16 The Crossings at Willow Creek HOA (“Respondent”) because in July 2015, after three
17 of Respondent’s four board members resigned, the remaining board member continued
18 to conduct Respondent’s business and in January 2016, appointed board members to
19 serve the remaining terms of the board members who had resigned, in violation of
20 A.R.S. § 33-1804 and the final decision in *Dennis J. Legere and Pinnacle Peak*
21 *Shadows HOA*, Case No. 14F-H1414001-BFS-rhg in the Office of Administrative
22 Hearings (“*Legere*”). Petitioners request that Respondent be required to reimburse
23 their filing fee and that sanctions be imposed because Respondent did not immediately
24 recognize the wrongfulness of its conduct after Petitioners filed their petition on April 11,
25 2016.

26 Respondent acknowledged that because the exceptions to the public meetings
27 required by A.R.S. § 33-1804(A) do not include an emergency and Respondent did not
28 comply with the requirements for an emergency set forth in A.R.S. § 33-1804(D)(2), the
29 remaining board member’s actions violated the statute’s requirements. Respondent
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¹ The only change to the decision is the last paragraph of the recommendation, which provides for certification of the decision by the Director of the Office of Administrative Hearings.

1 therefore agreed that it should be required to reimburse Petitioners' filing fee.
2 Respondent also agreed to comply with the requirements of A.R.S. § 33-1804(D)(2)
3 moving forward.

4 However, Respondent argues it did not intentionally the violate A.R.S. § 33-1804
5 because when the three board members resigned, the next regularly scheduled board
6 meeting was not until February 22, 2016, and the remaining board member felt that he
7 needed to act because Respondent "lacked the required number of Directors under its
8 bylaws and its management contract was set to expire."

9 A.R.S. § 41-2198.02(A) provides in relevant part as follows:

10 The administrative law judge may order any party to abide
11 by the statute, condominium documents, community
12 documents or contract provision at issue and may levy a civil
13 penalty on the basis of each violation. For purposes of
14 actions brought under the Arizona mobile home parks
residential landlord and tenant act, the civil penalty shall not
exceed five hundred dollars.

15 By use of the word, "may," the statute affords the Director of the Department of Building,
16 Fire and Life Safety discretion to levy a civil penalty, even in cases where the
17 Respondent homeowners' association admits a statutory violation. *See, e.g. City of*
18 *Chandler v. Arizona Department of Transportation*, 216 Ariz. 435, 438-39 ¶ 10, 167 P.3d
19 122, 125-26 (App. 2007).

20 In *Legere*, the board acknowledged that it routinely and repeatedly took actions
21 after reaching a unanimous decision in email communications without holding a public
22 meeting to serve its own convenience. *See* Decision at Findings of Fact Nos. 42, 47. In
23 contrast, it does not appear that the remaining board member intentionally violated
24 A.R.S. § 33-1804. Respondent did not repeatedly or routinely violate the law, but
25 instead took action due to exigent circumstances based upon a mistake about the law's
26 requirements, which it attempted to correct by appointing interim board members.
27 Under the circumstances, imposition of a civil penalty is not warranted. *See Division of*
28 *Occupational Safety and Health of the Industrial Commission v. Ball, Ball and*
29 *Brosamer, Inc.*, 172 Ariz. 372, 377-78, 837 P.2d 174, 179-80 (App. 1992).

1 Therefore, it is ordered that because Respondent acknowledged that it violated
2 A.R.S. § 33-1804, Petitioners' motion for summary judgment is granted and Respondent
3 is ordered to reimburse to Petitioners their filing fee.

4 However, at this time, because a civil penalty is not warranted under A.R.S. § 41-
5 2198.02(A), Petitioners' petition may be closed without the imposition of a civil penalty.
6 Because it is on notice of the law's requirements, if Respondent again violates A.R.S. §
7 33-1804, a civil penalty should be imposed at that time.

8 Because a hearing on the merits is no longer necessary in this case, it is further
9 ordered vacating the hearing that had been scheduled on August 10, 2016, at 8:30 a.m.

10 *In the event of certification of the Administrative Law Judge Decision by the*
11 *Director of the Office of Administrative Hearings, the effective date of the Order will be*
12 *five days from the date of that certification.*

13 Done this day, July 7, 2016.

14 /s/ Diane Mihalsky
15 Administrative Law Judge

16 Transmitted electronically to:

17 Debra Blake, Interim Director
18 Department of Fire Building and Life Safety

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