ROSS EARLE & BONAN, P.A.

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REB LAW REVIEW

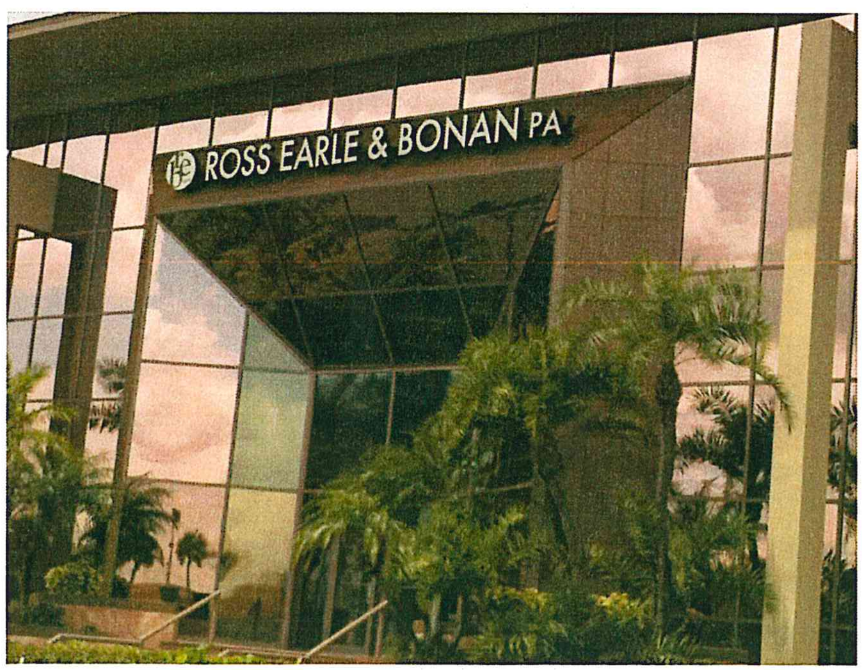
JULY 2013

ROSS EARLE & BONAN NEWS

Ross Earle & Bonan will celebrate it's 10th anniversary in September. Starting with the three founding shareholders, Deborah Ross, David Earle and Elizabeth Bonan, we have grown to now include shareholder Jacob Ensor; associates, John Carrigan and Katherine Woods; and Tom Gallagher and Martin Bonan, of counsel.

David Earle has been appointed by Governor Scott to the 19th Judicial Circuit Nominating Commission. This prestigious commission interviews and recommends judicial candidates for appointment by the Governor. This will be his second term on the commission; having been previously appointed by Governor Jeb Bush.

John Carrigan and his wife, Alexandra, are expecting a baby in late August. Everyone at the firm looks forward to welcoming a new member of the REB Law family.



INSIDE THIS ISSUE:

NEWS	1
LEGISLATIVE UPDATE:	
CONDOMINIUMS	2
COOPERATIVES	5
HOMEOWNERS ASSOCIATIONS	6
MISCELLANEOUS ITEMS FOR ALL ASSOCIATIONS	11

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LEGISLATIVE CHANGES AFFECTING COMMUNITY ASSOCIATIONS
EFFECTIVE JULY 1, 2013

Florida House of Representatives Bills 73, 87 and 7119 were signed into law and became effective July 1, 2013. The following is a summary of the important changes contained in the bills.

<u>CONDOMINIUM ASSOCIATIONS</u>

Condominiums – Insurance – Florida Statute Section 718.111(11)

Section 718.111(11) has been amended to clarify that the association may collect in the same manner provided for the collection of assessments, any cost of reconstruction work necessary due to a unit owner's intentional conduct, negligence or failure to comply with association rules.

Insurance - Florida Statute Section 718.111(11)(g)2

Section 718.111(11)(g)2 clarifies that a unit owner is responsible for the cost of reconstruction of any portions of the condominium property for which her or she is required to carry property insurance, or for which he or she is responsible under subsection (j); the cost of any such reconstruction work undertaken by the Association is chargeable to the unit owner and enforceable as an assessment and may be collected in the manner provided for the collection of assessments pursuant to Section 718.116.

Florida Statute Section 718.111(11)(j)

Clarifies that the Association is responsible for reconstruction of items that are insured by the Association and which are damaged by an insurable event.

<u>Note</u>: The change to Section 718.111(11)(j) corrects the 2010 glitch by clarifying that the Association's responsibility for repair of items it insures is only for damage caused by an insurable event, even when provided otherwise in the Declaration.

Official Records - Florida Statute Section 718.111(12)

Condominium associations are required to maintain the official records of the association within the state. These records are open to inspection by any association member or authorized representative at any time. The right to inspect includes the right to copy at the reasonable expense of the member.

Section 718.111(12) has been amended to provide that a member has the right to use his or her smartphone, tablet, portable scanner, or other technology capable of scanning or taking pictures in lieu of the association providing copies to the member, without charge to the member.

Member Directories - Florida Statute Section 718.111(12)

Except for the person's name, unit number, mailing address, and property address, associations are prohibited from making a member's personal information public, including social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, address, and other personal identifying information.

Section 718.111(12) has been amended to provide that an association is now authorized to print and distribute to unit owners a directory containing the name, address, and telephone number of each owner. However, an owner may exclude his or her telephone number from the directory by making a written request to the association. Therefore, we recommend that an Association provide owners with an opportunity to have their phone numbers excluded prior to directories being printed.

Financial Reporting - Florida Statute Section 718.111(13)

Condominium associations have 90 days after the end of the fiscal year to prepare and complete a financial report for the preceding fiscal year. The type of financial statements or information that must be provided is based on the association's total annual revenues. Section 718.111(13) has been amended to include new thresholds for the financial reporting requirements.

The new thresholds for the financial reporting requirements are as follows:

ANNUAL REVENUES	REQUIREMENT
Under $150,000	Prepare report of cash receipts and expenditures
Between $150,000 and $299,999.99	Prepare compiled financial statements
Between $300,000 and $499,999.99	Prepare reviewed financial statements
$500,000 or more	Prepare audited financial statements

A condominium association with less than 50 units regardless of annual revenues must prepare a report of cash receipts and expenditures. This is a reduction from the 75 units in the statute prior to July 1, 2013.

Board Members - Florida Statute Section 718.112(2)

Association board members may serve two-year board terms if provided for in the association's bylaws or articles of incorporation. The requirement that the membership conduct a vote to authorize 2-year terms has been eliminated in Section 718.112(2).

Section 718.111(2) has been amended to provide that a person is ineligible for condominium board membership when the person owes *any* monetary obligation to the association, and prevents the board from listing that person on the election ballot.

Elections and Recalls - Florida Statute Section 718.112(2)

Prior to July 1, 2013, there were no specified procedures or time limitations for challenging the validity of a recall or an association's election process. Section 718.112(2) has been amended to provide that:

- If the Board of Directors fails to duly notice and hold the required Board of Directors meeting after being served with a petition for recall or fails to properly file a Petition for Arbitration challenging the recall then a unit owner representative may file a petition challenging the board's failure to act on a recall. The petition must be filed within 60 days after the expiration of the applicable five-business-day period. The review of the petition is limited to the sufficiency of service on the board and the facial validity of the written agreement or ballots filed. *Section 718.112(2)(j)5.*

- A board member who has been recalled may file a petition challenging the validity of the recall. The petition must be filed within 60 days after the recall is deemed certified. *Section 718.112(2)(j)7.*

- The division is prohibited from accepting a recall petition, regardless of the reason for filing, if there are 60 or fewer days until the scheduled reelection of the board member sought to be recalled, or when 60 or fewer days have elapsed since the election of the board member sought to be recalled. *Section 718.112(2)(j)8.*

- Any challenge to the election process must be commenced within 60 days after the election results are announced. *Section 718.112(2)(d)4.c.*

Windstorm Protection - Florida Statute Section 718.113(5)

Section 718.113(5) has been amended to provide that a condominium board to approve the installation of code-compliant doors and other types of code-compliant hurricane protection in addition to hurricane shutters and impact glass windows.

Limitation on Use of Common Elements - Florida Statute Section 718.303(3)

Although an association may suspend the rights of a unit owner, tenant or guest to use the common elements for failure to comply with the Declaration or reasonable Rules and Regulations of the Association, 718.303(3) has been amended to specifically provide that an association may <u>not</u> restrict the use of the following common elements:

- Limited common elements intended to be used only by that unit;
- Common elements needed to access the unit;
- Utility services provided to the unit;
- Parking spaces; and
- Elevators.

<u>**COOPERATIVE ASSOCIATIONS**</u>

Official Records – Florida Statute Section 719.104

Section 719.104(2) concerning official records has been amended to provide that official records of the association must be maintained within the state for at least seven (7) years and made available to the unit owner within forty-five (45) miles of the cooperative property or in the county within which the cooperative property is located. The association may comply with a records inspection request by having a copy of the official records available for inspection/copying on the cooperative property or the association may now offer the option of making the records available to unit owners electronically via the internet by allowing the records to be viewed in electronic format on a computer screen and printed upon request. Any person who is denied inspection is entitled to recover reasonable attorney's fees from the person in control of the records who knowingly denied access to the records. Any person who knowingly or intentionally defaces or destroys accounting records required to be kept by the statute or who knowingly or intentionally fails to create or maintain accounting records required to be created or maintained, may be personally subject to a civil penalty. The association is now required to maintain an adequate number of copies of the required year end financial information in addition to the governing documents and question and answer sheet. An association shall allow a member or his representative to use a portable device including a smart phone, tablet, portable scanner or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of the association providing the member with a copy of such records. The association may not charge the member for the use of the portable device.

The statute is also clarified to provide that certain records are protected and not accessible to unit owners; namely, records protected by the lawyer-client privilege, personnel records and personal identifying information of any person. Provided however, protected personal identifying information shall not include the person's name, unit designation, mailing address, property address and any address, email address, or facsimile number provided to the association to fulfill the association's notice requirements. An association is now authorized to print and distribute to parcel owners a directory containing the name, parcel address and telephone number of each parcel owner; however, an owner may exclude his or her telephone number from the directory by so requesting in writing to the association. Therefore, we recommend that an Association provide owners with an opportunity to have their phone numbers excluded prior to directories being printed.

Mortgagee Consent to Amendments - Florida Statute Section 719.1055

Section 719.1055 has been amended to provide for a procedure to obtain mortgagee consent to an amendment of the cooperative documents if it is so required. The procedure provides for a method of obtaining mortgagee addresses and provides that any mortgagee who fails to respond to a request for consent within sixty (60) days after the date of mailing is deemed to have consented to the amendment.

Closed Board Meetings – Florida Statute Section 719.106

Section 719.106 has been amended to provide that the requirement that board meetings and committee meetings are open to the unit owners does not apply to a board meeting or committee meeting held for the purpose of discussing personnel matters or meetings between the board or a committee of the association and the association's attorney with respect to proposed or pending litigation.

Election Challenges and New Board Member Certification – Florida Statute Section 719.106

Section 719.106(1)(d) has been amended to provide that any challenge to the election process must be commenced within sixty (60) days after the election results are announced. Furthermore, within ninety (90) days after being elected or appointed to the Board, each new director shall certify in writing to the secretary of the association that he or she has read the association's bylaws, articles of incorporation, proprietary lease, and current written policies and that he or she will work to uphold such documents and policies to the best of his or her ability and will faithfully discharge his or her fiduciary responsibility. In lieu of this written certification, a newly elected or appointed director may submit a certificate of having satisfactorily completed the education curriculum administered by an educational provider as approved by the Division within one (1) year before or ninety (90) days after the date of election or appointment. A director who fails to timely file the written certification or educational certificate is suspended from service on the board until he or she complies with the statute.

Director Recall – Florida Statute Section 719.106

The statute concerning the recall procedure of directors has been amended to provide that if a board fails to duly notice and hold the required meeting or fails to file the required petition, the unit owner representative may file a petition challenging the board's failure to act. The petition must be filed within sixty (60) days after the board's failure to act. Furthermore, a board member who has been recalled is now authorized to file a petition challenging the validity of the recall. The petition challenging the recall must be filed within sixty (60) days after the recall is deemed certified. The Division may not accept the filing of a recall petition when there are sixty (60) or fewer days until the scheduled re-election of the board member sought to be recalled or when sixty (60) or fewer days have not elapsed since the election of the board member sought to be recalled.

Suspension of Use Rights – Florida Statute Section 719.303

Section 719.303 has been amended to provide that an association may not suspend the right of a unit owner to use limited common elements intended to be used only by the unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators.

<u>HOMEOWNERS ASSOCIATIONS</u>

Official Records - Florida Statute Section 720.303(5)

Homeowner associations are required to maintain the official records of the association. These records are open to inspection by any association member or authorized representative at any time. The right to inspection includes the right to obtain copies at the reasonable expense of the member.

Section 720.303(5) has been amended to give a member the right to use his or her smartphone, tablet, portable scanner, or other technology capable of scanning or taking pictures in lieu of the association providing copies to the member, without charge to the member.

Member Directories - Florida Statute Section 720.303(5)

Associations are prohibited from making a member's personal information public, including social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, address, and other personal identifying information.

Section 720.303(5) has been amended to provide that an association may print and distribute to unit owners a directory containing the name, address, and telephone number of each owner. However, an owner may exclude his or her telephone number from the directory by making a written request to the association. Therefore, we recommend that an Association provide owners with an opportunity to have their phone numbers excluded prior to directories being printed.

Official Records – Maintenance – Florida Statute Section 720.303(5)

The official records requirements for homeowners' associations are now similar to the requirements for condominium associations. Homeowners' associations must maintain official records for 7 years and the official records must be maintained within 45 miles of the community or within the same county. Homeowners' associations may also maintain records electronically.

Official Records – Access – Florida Statute Section 720.303(5)

A homeowners' association may only charge 25 cents per page for copies of the official records. Previously, an association could charge up to 50 cents per page. An association can charge for personnel costs for those records requests taking more than a half hour to fill and resulting in the copying of more than 25 pages. The association can charge no more than $20 per hour for personnel costs. The association may also use an outside duplicating service and charge the cost of such, as supported by the vendor invoice, to the homeowner. An association may also make records available electronically via the internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request. Members may use a portable device, including a smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of providing the member with a copy of records.

Financial Reporting - Florida Statute Section 720.303(7)

Homeowners associations have 90 days after the end of the fiscal year to prepare and complete a financial report for the preceding fiscal year. The type of financial statements or information that must be provided is based on the association's total annual revenues. Section 720.303(7) has been amended to include new thresholds for the financial reporting requirements.

The new thresholds for the financial reporting requirements are as follows:

ANNUAL REVENUES	REQUIREMENT
Under $150,000	Prepare report of cash receipts and expenditures
Between $150,000 and $299,999.99	Prepare compiled financial statements
Between $300,000 and $499,999.99	Prepare reviewed financial statements
$500,000 or more	Prepare audited financial statements

A homeowners association with less than 50 parcels regardless of annual revenues, may prepare a report of cash receipts and expenditures instead of financial statements, unless the governing documents provide otherwise.

Elections and Recalls - Florida Statute Sections 720.303(10) and 720.306(9)

Prior to July 1, 2013, there were no specified procedures or time limitations for challenging the validity of a recall or a homeowner association's election process. The new laws now provide the following:

- A parcel owner representative may file a petition challenging the board's failure to act on a recall. The petition must be filed within 60 days after the expiration of the applicable five-business-day period. The review of the petition is limited to the sufficiency of service on the board and the facial validity of the written agreement or ballots filed. *Section 720.303(10)(g).*

- A board member who has been recalled may file a petition challenging the validity of the recall. The petition must be filed within 60 days after the recall is deemed certified. *Section 720.303(10)(k).*

- The division is prohibited from accepting a recall petition, regardless of the reason for filing, if there are 60 or fewer days until the scheduled reelection of the board member sought to be recalled, or when 60 or fewer days have elapsed since the election of the board member sought to be recalled. *Section 720.303(10)(l).*

- Any challenge to the election process must be commenced within 60 days after the election results are announced. *Section 720.306(9)(a).*

Reporting Requirements – Florida Statute Section 720.303(13)

Section 720.303(13) has been added to provide that community association managers, who are licensed by the DBPR, must report specified information about the homeowners' associations they manage to the DBPR. In the absence of a community association manager, this duty is placed on the association. The required information includes the association's legal name, federal employer identification number, mailing and physical addresses, the total number of parcels, and the total amount of revenues and expenses from the association's annual budget. The reporting requirement is a one-time requirement and must be complied with by November 22, 2013. The DBPR is creating a web-based form for the reporting requirement.

A new Section 720.3033 has been added to the statute and provides:

Certification for New Officers and Directors – Florida Statute Section 720.3033(1)

Newly elected directors must certify in writing, within 90 days, that they have read the association's governing documents and policies; that they will work to uphold the documents and policies, and that they will faithfully discharge their fiduciary responsibility to the association's members. In lieu of written certification, the newly elected director may certify that he or she has completed the DBPR's educational curriculum within one year prior to election or with 90 days after election. A director who fails to comply is suspended from the board until he or she complies. The certification is retained for 5 years after the director's election.

Note: Ross Earle & Bonan is a DBPR approved condominium educational provider and has applied for Division certification as an HOA educational provider.

Contracts with Directors – Florida Statute Section 720.3033(2)

Where an association enters into a contract with a director or an entity in which a director has a financial interest, the association must:

1. Comply with conflict of interest procedures outlined in s. 617.0832, F.S.;
2. Comply with disclosure requirements outlined in s. 617.0832, F.S.;
3. Approve the contract or transaction by 2/3 vote of the directors present; and
4. Disclose the contract at the next regular or special meeting of the members.

Upon the motion of any member at the next regular or special meeting, the contract will be voted on and may be canceled by a majority vote of the members present. If the contract is canceled, the association is only liable for the reasonable value of goods and services already provided and is not liable for any fee or damages connected to the cancellation.

Acceptance of Items of Value – Florida Statute Section 720.3033(3)

Officers, directors and managers may not solicit or accept anything of value from any person providing or offering to provide goods or services to the association. An officer, director or manager who does so must be removed from office. The bill includes an exception for accepting food to be consumed at a business meeting with a value of less than $25 per individual or services or items in connection to trade fairs or education programs.

Theft and Embezzlement – Florida Statute Section 720.3033(4)

Officers or directors charged with felony theft or embezzlement involving association funds are removed from office. If the charges are resolved without a finding of guilt, the director or officer shall be reinstated for any remainder of his or her term of office.

Insurance – Florida Statute Section 720.3033(5)

Homeowners' associations must maintain insurance or fidelity bonding for anyone who controls or disburses association funds including management, president, secretary and treasurer of the Association. The members of the association may annually waive this requirement by majority vote.

Limitation on Use of Common Elements - Florida Statute Section 720.305(2)

If a resident does not comply with provisions of the association's declaration, bylaws or rules, the association may suspend the rights of that parcel owner, tenant or guest to use the common elements However, Section 720.305(2) has been amended to specifically provide that an association may <u>not</u> restrict the use of the following common elements:

- Common areas needed to access the parcel;
- Utility services provided to the parcel; and
- Parking spaces (*Specifically, the resident must have a vehicular and pedestrian ingress to and egress from the parcel at all times*).

Amendments Requiring Mortgagee Consent - Florida Statute Section 720.306(1)

There is now a simpler procedure for obtaining mortgagee consent for amendments to the association's governing documents when required. The procedure provides for a method of obtaining mortgagee addresses and provides that a mortgagee who fails to respond to a request for consent within 60 days is deemed to have consented to the amendment.

Amendments to Governing Documents – Florida Statute Section 720.306(1)

Within 30 days after recording an amendment to the governing documents, the association must provide copies of the amendment to the members.

Members' Right to Speak - Florida Statute Section 720.306(6)

The requirement that homeowners' association members and/or parcel owners submit a written request to speak at the association meeting prior to the meeting has been eliminated. Section 720.306(6) has been amended to provide that members and parcel owners may speak if present at the meeting.

Elections – Florida Statute Section 720.306(9)

If a homeowners' association's election process permits candidates to be nominated in advance of the meeting, the association is not required to allow nominations at the meeting.

An election is not required unless there are more candidates than vacancies.

Florida Statute Section 720.307

Members other than the developer are now also entitled to elect at least a majority of the board of the homeowners' association if any of the following events occur:

1. Upon the developer abandoning or deserting its responsibility to maintain and complete the amenities or infrastructure as disclosed in the governing documents.
2. Upon the developer filing a petition for bankruptcy under Chapter 7 of the Bankruptcy Code.
3. Upon the developer losing title to the property through foreclosure or the transfer of a deed in lieu of foreclosure, unless the successor owner has accepted an assignment of developer rights and responsibilities first arising after the date of such assignment.
4. Upon a receiver for the developer being appointed and not being discharged within 30 days after such appointment, unless the Court determines within 3 days after such appointment that transfer of control would be detrimental to the Association or its members.

Members other than the developer are now entitled to elect at least one member of the board if 50% of the parcels in all phases of the community which will ultimately be operated by the Association have been conveyed to the members.
Note: The transition "triggers" described above are in addition to the two triggers in Section 720.307(1)(a) and (b), Florida Statutes, and are similar to those found in the Condominium Act.

Developer Amendments of Governing Documents - Florida Statute Section 720.3075(5)

Prior to turnover, the right of the developers to amend the governing documents is subject to a test of "reasonableness". This prohibits the developer from unilaterally making amendments to the governing documents that: are arbitrary, capricious, or in bad faith; destroy the general plan of development; prejudice the rights of existing non-developer members to use and enjoy the benefits of common property; or materially shift economic burdens from the developer to existing non-developer members.

Delinquent Assessments – Florida Statute Section 720.3085(2)

If a homeowners' association acquires a lot through foreclosure or deed in lieu of foreclosure, a subsequent owner can be liable for delinquent assessments that accrued before the association acquired the lot.

MISCELLANEOUS ITEMS APPLICABLE TO ALL COMMUNITY ASSOCIATIONS

Sales Tax on Event Tickets

Please be advised that under the rules of the Florida Department of Revenue, unless an association is a 501(c)(3) charity, it is necessary for a not for profit corporation to collect sales tax on tickets sold to events within the community. Therefore, if a community association sells tickets to an event at the community clubhouse (such as a dinner and dance) the association should remit sales tax on those tickets to the Department of Revenue.

Mortgage Foreclosure Cases

The legislature has provided an additional method for associations to expedite mortgage foreclosure cases. Section 702.10, Florida Statutes, has been amended to allow any lienholder, instead of just the bank, to utilize the statutory expedited procedure. After the mortgage foreclosure complaint has been filed and all parties have been served, an association may request an order to show cause for the entry of a final judgment. The Court will thereafter issue an order directing the owner(s) to show cause why a final judgment should not be entered, and a hearing will be set on the matter. A final judgment will be entered at the hearing, unless the owner(s) file a responsive pleading, affidavit or other paper raising a genuine issue of material fact or raising a legal defense to the foreclosure action.

Fair Housing Act / Emotional Support Animals

The Department of Housing and Urban Development issued Memorandum FHEO-2013-01 on April 25, 2013 providing guidelines for Service and Assistance Animals under the Fair Housing Act. The memo provides that assistance animals (a/k/a service animals or emotional support animals) are not considered "pets", and are not required to be individually trained or certified. The memo further provides that to evaluate a request for a reasonable accommodation under the Fair Housing Act, an association should make a two-part inquiry:

1. Does the person seeking to use and live with the animal have a disability – i.e. a physical or mental impairment that substantially limits one or more major life activities?

2. Does the person making the request have a disability-related need for an assistance animal? In other words, does the animal work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability?

If the answer to (1) and (2) are "yes", then a reasonable accommodation must be provided. An association may request documentation from the individual's physician, psychiatrist, social worker, or other mental health professional confirming the disability (if it's not obvious), and documentation that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability. However, an association may not ask for the individual to provide access to medical records, medical providers, or detailed documentation of a person's physical or mental impairments. The association must take reasonable measures to protect the confidentiality of any information or documentation disclosed in connection with the requests. Lastly, the breed, size, and weight limitations in the governing documents may not be applied to an assistance animal.

As part of a settlement in a lawsuit against an association in Philadelphia, the Department of Housing and Urban Development also approved a model Reasonable Accommodation Policy for associations, and a form questionnaire to be provided to individuals requesting a reasonable accommodation. Copies of each will be provided upon request.

A request for a reasonable accommodation under the Fair Housing Act involves an individualized assessment in each case. We therefore recommend you contact our office if you have any specific questions or concerns regarding an individual's request to allow an emotional support animal.