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STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

QUESTION PRESENTED

Whether the State has the authority pursuant to current rules to regulate swimming pools operated by hotels, motels, homeowners' associations, and the like.

CONCLUSION

Rules drafted by the health districts implement the statutory requirement to enforce "minimum standards of health, safety and sanitation for all public swimming pools in the state." Idaho Code § 56-1003(3)(d). Hotels and motels are probably "public pools" subject to inspection and regulation, while the definitions of "public" and "private" pools need to be clarified.

ANALYSIS

The Director of the Idaho Department of Health and Welfare has the authority to promulgate rules establishing health, safety and sanitation standards for all public swimming pools in Idaho. Idaho Code § 56-1003(3)(d). "Public swimming pool" is defined in § 56-1001:

(6) "Public swimming pool" means an artificial structure, and its appurtenances, which contains water more than two (2) feet deep which is used or intended to be used for swimming or recreational bathing, and which is for the use of any segment of the public pursuant to a general invitation but not an invitation to a specific occasion or occasions.

The definition of public swimming pools and the authority to regulate them have not been amended since first coming into statute in 1972. 1972 Sess. Laws Ch. 347, § 5, p. 1017. In recent years, the Department of Health and Welfare has delegated to the seven health districts the responsibility to perform licensing and inspection functions pursuant to Department rules. IDAPA 16.02.14.040. The current rules were drafted by the health districts and properly promulgated by the Department.

The statutory definition of “public swimming pool” is in obvious need of further clarification in order to determine what entities are covered, which is done through rulemaking. Prior to rule changes in April of 2000, the rules governing public swimming pools made a distinction between Type A and Type B pools. IDAPA 16.01.07.004.10. Type A pools were municipal, community, public school, commercial and “institutional” pools, such as those maintained by scouting organizations. Type B pools were defined as “semipublic,” and included athletic club, country club, swimming club, hotel, motel, apartment, multiple housing unit and condominium pools. These definitions were in place from 1982 until 2000. The only exception to the regulatory scheme was for a residential swimming pool, which was defined in 1977 as:

13. Residential Swimming Pool. Any swimming pool, located on private property under the control of the property or homeowner, the use of which is limited to bathing by members of his family or guests. The design, construction and operation of such pools are not subject to the provisions of these Rules.

IDAPA 16.01.07.004.13.

Thus, it is apparent that for a substantial period of time, hotel, motel, apartment and condominium pools were subject to the rules. The question is whether the recent rule changes clearly change that long-standing regulatory scheme, which has been subject to annual legislative review. Idaho Code § 67-5291.

In the 2000 rules changes, the “pool rules” were rewritten and located in a different chapter of rules as a result of the creation of the Idaho Department of Environmental Quality, in whose chapter they had previously resided. The substantive changes important to this analysis are that the distinction between the “municipal” (Type A) and “semipublic” (Type B) pools was eliminated, as was the definition of “residential swimming pool.” The definition of “public swimming pool” remains the same as the statute. IDAPA 16.02.14.010.14 and .16. However, there is a new definition of “private pool”:

15. Private Pool. Any pool constructed in connection with or appurtenant to single family dwellings or condominiums used solely by the persons maintaining their residence within such dwellings and the guests of such persons.

IDAPA 16.02.14.010.15.

Private and special-use pools are specifically excluded from coverage of the rules’ requirements. IDAPA 16.02.14.006.

Comparing the old and new rules, it is apparent that there was at least one significant change in coverage, which was that condominium pools were regulated before as Type B or semipublic pools, and are now specifically identified as private pools. Ownership of the property is no longer the operative concept in the definition, but the living arrangement as single family dwellings or condominiums.

The meaning of “single family dwelling” seems self-evident. In the case of a pool maintained by a homeowners’ association, it is appurtenant to single family dwellings if that is the composition of the development, and would therefore be excluded from the regulatory scheme. Even this seemingly simple concept is problematic, however, since a duplex with a pool would not be excluded from coverage, though there is no appreciable distinction between that and stand-alone housing. The use of the phrase “single family dwelling” to define private pools is therefore somewhat arbitrary.

Assuming the health districts used “condominium” as defined in Idaho Code, the rule also refers to a living arrangement whereby the housing unit is owned separately and all owners have undivided interests in common areas. Idaho Code § 55-101B; § 55-1501, *et seq.* It does not matter whether the units are being purchased, or rented from the actual owner. Idaho Code § 55-1516. In that they consist of joint and separate property interests, condominiums are analogous to homeowners’ associations.

However, there is no indication in the rule that the health districts intended to use the term “condominium” in its strict legal definition; in daily life, many types of living arrangements are referred to as “condos,” including vacation time shares. In addition, there are vacation destinations in Idaho comprised of true condominium ownership of suites with kitchens, where people do not actually reside on a permanent basis. Therefore, resorts consisting of condominium units could be excluded from inspection and licensing while resort hotels of equal size would not, based on the definition of “private pool.” Since the scope of authority is ambiguous and potentially arbitrary, neither the regulators nor the pool owners are afforded certainty about their obligations.

Apartment complexes are not single family or technically condominium living arrangements, yet may also have common areas and pools. It is not apparent that there is any meaningful public policy distinction between apartments and condominiums such that one is excluded from the rule, when both are multi-family units. In addition, there may be difficulties in determining when to enforce the pool rules in a development that may start out with rented townhouses and transition over time to a true condominium form of ownership, or that consists of a mixture of single family and townhouse or apartment units. Since it is not clear to the pool owners being regulated or to the enforcers of the rules whether they are covered in these scenarios, a court may find the private pool rule void for vagueness as to apartments and other multifamily arrangements.

Motels and hotels cannot fit into the definition of single family or condominium dwellings, even with the ambiguities described, and so cannot be excluded from coverage as private pools under the pool rules. Considering the analysis from another perspective, the statutory definition of “public swimming pool” is probably broad enough to cover hotels and motels. A swimming pool at a hotel or motel is intended for the use of “any segment of the public pursuant to a general invitation,” which in this case is the segment of the public that pays for the use of the pool as part of the room rental. Hotels and motels do make a general invitation to the public to stay at their facilities and subsequently use the pools. In the case of resort hotels and motels, use of the pool is one of several amenities that make the resort a desirable destination, which the public is paying to enjoy. In this regard, they are like municipal and commercial pools that all would agree are public in nature, and for which one pays a fee to swim.

However, the new definition of “private pool” and elimination of the listing of public pools has introduced a level of ambiguity as to which entities are subject to enforcement. In addition, though it appears that hotels and motels are included as public pools, the rules are probably not enforceable as to apartments, townhouses and mixed density developments. The rule drafters are encouraged to clarify the rules after making policy decisions about what entities should be covered. They may wish to consider simply listing those entities that are regarded as “public,” or making the distinction made by California’s Public Health Department, which defines private pools as those maintained by an individual for the use of family and friends, but which also includes as public pools a list “including, but not limited to” all commercial pools, community pools, pools at hotels, motels, resorts, and so forth. Cal. Admin. Code, title 17, § 7775.

CONCLUSION

Since the statutory definition of “public swimming pool” does not provide a very clear line between “public” and “private,” the rules drafted by the health districts must interpret the definition and make clear what entities are subject to the appropriate health, safety and sanitation requirements. While reasonable minds might differ, it is more likely than not that a court would determine that hotels and motels are subject to these rules, taking into account the statutory definition of “public pool,” their long-standing coverage, the commercial nature of the use of the pools (unlike a homeowners’ association pool that is not open to the public), and the new definition of “private pool” that does not include them.

It should be understood that an Attorney General’s guideline is not a directive but is an objective review of what statutes and rules authorize, as well as the best prediction available of how a reviewing court is likely to view that authority. It appears that the changes to the rules in 2000 have created an ambiguity that make enforcement problematic, and that an amendment of statute or rule should be considered.

Very truly yours,

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