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July 14, 2021

Randy Romanski, Secretary-designee
Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Dr.
P.O. Box 8911
Madison, WI 53708-8911

Re: Demand Letter

Dear Mr. Romanski,

The Wisconsin Institute for Law & Liberty (WILL) is a public policy legal center that promotes free markets, limited and sensible government regulation, and economic liberty. WILL represents Swimply,[1] a new and rapidly growing online platform that allows homeowners to make their underutilized residential swimming pools available to members of their local community for birthdays, work events, or just a private space for friends and family to relax on a hot summer day.

On April 5, an employee from the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) unofficially contacted Swimply through their website to inform the up-and-coming company that any pool rented on Swimply is a "public pool," subject to DATCP's licensing and regulatory regime for such pools, an interpretation that, if enforced, would effectively shut Swimply down in Wisconsin, just as it's getting off the ground. Indeed, DATCP noted that "many residential pools will need a lot of modifications before being able to licensed" under DATCP's existing regulations.

DATCP's interpretation—if it is truly the department's official interpretation—conflicts with the text of its own regulation, exceeds DATCP's authority under Wisconsin law, violates the Wisconsin Administrative Procedures Act, is internally inconsistent, and, just as importantly, is bad policy.

Start with DATCP's regulation. Wis. Stat. § 97.67 authorizes DATCP to regulate "public swimming pools," but does not define "public swimming pool" (although another, closely related statute does, Wis. Stat. § 145.26; more on that below). DATCP's implementing regulation defines a "public pool" as a pool or water attraction that is installed at or by various types of places or organizations: a "place of employment," a "public building," a "political subdivision of the state, a motel, a hotel, a tourist rooming house, a bed and breakfast establishment, a resort, a camp, a campground, a club, an association, a housing development, such as an apartment complex, condominium complex, or housing complex having a homeowners' association, a school, a

[1] https://swimply.com/

religious, charitable or youth organization, or an educational or rehabilitative facility." Wis. Admin. Code ATCP § 76.02(1)(a). A residential pool rented on Swimply obviously does not fall into any of these categories; and DATCP has not claimed that it does.

Subsection (1)(b) of DATCP's regulation provides an exception to the definition: "A pool or water attraction is *not* a public pool or water attraction if it serves fewer than 3 individual residences." But there is an exception to the exception—the sentence continues: "*unless* it is used on a regular basis by persons other than the residents." In other words, a pool attached to a small housing development, which would otherwise fall within the definition in subsection (1)(a), is nevertheless not a public pool, *unless* "it is used on a regular basis by persons other than the residents."

DATCP, however, apparently interprets the unless clause—the exception to the exception—as its own independent definition of a "public pool," such that any pool "used on a regular basis by persons other than the residents" becomes a public pool, triggering DATCP's licensing and regulatory requirements. DATCP's employee told Swimply that if a private residential pool owner "rents their pool out by the hour, day, week, whatever," "that is a public pool."

This interpretation is inconsistent with the text of the regulation. The language of the regulation lends itself far more closely to the interpretation that subsection (1)(a) sets the bounds of what "is" a public pool, and subsection (1)(b) further clarifies within those bounds what "is not" a public pool, with a caveat. A private residential pool does not fall under the requirements of (1)(a) and therefore would not be a public pool even if used on a "regular basis by persons other than the residents."

This interpretation also aligns DATCP's regulation with the related statutory definition of a "public pool" in Wis. Stat. § 145.26 (which gives the Wisconsin Department of Safety and Professional Services (DSPS) authority to impose construction requirements on "public swimming pools"). That statute defines "public swimming pools" as pools that "serve or are installed by" various entities (a list similar to that in DATCP's regulation), and further provides that a pool "serv[ing] fewer than 3 individual residences" is *not* a public pool. Notably, that statute does not contain any unless clause similar to that in DATCP's regulation, or suggest anywhere that a pool "used on a regular basis" by others automatically becomes a "public swimming pool."

If the phrase "public swimming pool" in DATCP's authorizing statute, Wis. Stat. § 97.67, has the same meaning as in Wis. Stat. § 145.26—and we see no reason why it would not—then DATCP's interpretation would also exceed its regulatory authority under the statute. But even if section 97.67 allows for a broader definition of "public swimming pools," DATCP's interpretation would violate state law for a separate reason. DATCP's regulations effectively incorporate DSPS's construction requirements. *See* Wis. Admin. Code § ATCP 76.05(4)(a)2 (requiring "[p]roof that the department of safety and professional services … has approved plans and specifications for the pool."). In other words, DATCP would be imposing DSPS's construction requirements on pools that DSPS itself has no authority to regulate. It goes without saying that DATCP has no power to expand another agency's regulatory authority.

DATCP's interpretation is also internally inconsistent. If any pool "used on a regular basis by others," for "whatever" period of time, becomes a "public pool" subject to DATCP's licensing

regime, that would mean that homeowners with pools using short-term home rental services (such as Airbnb) would be unable to rent out their home, children who regularly invite friends to use their pool would be prevented from doing so, and families would be precluded from inviting others in their neighborhood to use their pool. Following the Department's logic, pool owners would have to regulate and limit the amount of people they invite over, at risk of turning their backyard pool into a "public pool" that needs a license from DATCP. We have found nothing indicating that DATCP interprets its regulation to require a license in these situations, and rightly so (though if DATCP does interpret its regulation this way, please let us know).

DATCP's interpretation also violates state law which prohibits agencies from "enforc[ing] any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule." Wis. Stat. § 227.10(2m). State law also requires agencies like DATCP to "promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement." *Id*. § 227.10(1). As explained above, DATCP's licensing and regulatory regime for public pools does not "explicitly" apply to pools rented on Swimply, nor has DATCP promulgated its interpretation as a rule.

Finally, DATCP's interpretation does not make sense as a policy matter. Small groups of family and friends can safely swim in a private residential pool, just like the owners of the pool can. And a pool rented on Swimply is no different from a home rented on Airbnb or Vrbo with a pool attached—which state law gives homeowners a right to do. *See* Wis. Stat. § 66.1014. Swimply has no objection to a reasonable licensing regime for renting a residential pool (provided such a requirement is adopted in a properly promulgated rule), but it is unreasonable to impose the same construction requirements as for large, truly "public" pools, such that a private residential pool needs "a lot of modifications" to be shared on Swimply.

Particularly now, in the immediate aftermath of the COVID-19 pandemic, the reopening of our nation has demonstrated significant demand for outdoor recreational activities like swimming—a timely opportunity for those who have pools they are able to share with others. Swimply allows homeowners to monetize their pool and provides the community with access to a recreational opportunity that would not be available in Swimply's absence. Applying DATCP's existing licensing regime to private pools rented on Swimply would put it out of business in this state, without any opportunity for input or debate on a more reasonable licensing regime.

For these reasons, we ask DATCP to reconsider its interpretation of ATCP § 76.02(1)—or clarify that this is not the department's official position—and to confirm that DATCP will not attempt to enforce its public pool licensing regime against residential pool owners who share their pools on Swimply. We are hopeful that DATCP will agree with our common sense reading of state law,

and we request a response **within 30 days**. To the extent such a resolution is not possible, however, we are prepared to file a complaint in court.

Sincerely,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

Luke N. Berg
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