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Testimony in Support of JCRAR Action to Suspend DATCP Pool Rule

Senator Nass, Representative Neylon, and members of the Joint Committee for Review of Administrative Rules,

My name is Luke Berg, I am an attorney with the Wisconsin Institute for Law & Liberty. With me today, is WILL's Policy Director Kyle Koenen. We are here to testify in favor of the Committee's motion to suspend the application of DATCP's "public pool" regulations to short-term rentals. The current rules effectively ban hot tubs and pools at vacation homes in Wisconsin, by requiring them to meet the commercial pool code, meant for waterparks and hotels, which is impossible for residential pools to comply with, and which makes no sense. Pools and hot tubs are a standard feature of vacation homes around the country; anyone who has rented a home in Florida or South Carolina knows that every property there has a pool and/or hot tub. There's no reason this isn't possible in Wisconsin as well.

The Committee has ample legal justification for suspending the rule—in our view 5 of the 7 statutory criteria apply here—which I'll get to later, but I first want to provide a little more background about the problem and its scope.

Most residential pool owners can't comply with the commercial pool code, even if they wanted to—for example, DATCP currently won't approve any above ground hot tub or pool of any kind. And for those that could theoretically modify their pools, it typically would require a massive reconstruction, making it cost prohibitive. We've heard from multiple homeowners who got estimates well in the six-figure range. One owner, who you'll hear from later, has a beautiful indoor pool (you'll see pictures) that currently cannot be used by her guests—the estimate to re-build the whole thing was over $150,000.

The commercial pool code is designed for pools that are used by lots of different people at the same time. Much of it has to do with ensuring sufficient circulation when there are many people using the pool—none of which makes sense when applied to a small, home pool, used only by one tenant.

This problem is all around the State. We have heard from many short-term rental owners everywhere who wanted to add a hot tub or pool but have been told they cannot. Others who already had a pool or hot tub—perhaps it was there when they bought it—have been told by DATCP that, to rent the property, they have to gate off and lock the pool or hot tub to make sure the guests can't use it. Multiple people we've talked to have sold their properties or gotten out of the business because of this rule. One family told us they had to physically cut out a pool, because it was not feasible to lock it up. Multiple of these people have submitted written testimony, but we've talked to many more than were able to provide testimony for this hearing.

Before I get to the reasons to suspend the rule, it's helpful to have an overview of the current statutory framework. There are two separate statutes—and agencies—that have some authority over so-called "public pools." The Department of Safety and Professional Services (DSPS) writes the commercial pool code and ensures compliance by approving plans *at the time of construction*. Its authorizing statute, 145.26, *specifically excludes* residential pools from its scope. DATCP, separately, has authority to "license and regulate" "public pools" *after construction*. While its statute, 97.67, doesn't define "public pools," one would assume the scope would overlap. Yet DATCP's regulations expand the definition of "public pool" to include pools or hot tubs at vacation homes. Then, to get a license from DATCP, its regulations require pools to meet DSPS's commercial pool code. In other words, DATCP is imposing requirements that the Legislature has already decided should *not* apply to residential pools.

As to the criteria for suspending a rule under 227.19(4)(d) (incorporated through 227.26(2)(d)), our position is that subs. (1), (3), (4), (5), and (6) all apply here. I'll start with subs. (1) and (4), which are an "absence of statutory authority" or a "conflict with state law."

DATCP's regulation, as applied to short-term rentals, conflicts with state law or exceeds its authority for three separate reasons. First, as just explained, DATCP is imposing construction requirements that the Legislature has deemed do not apply to residential pools. Second, DATCP's regime goes far beyond "licensing and regulation"—it is a de facto ban on hot tubs and pools at vacation homes. And third, a pool or hot tub does not become a "public" pool simply because the home is rented on a short-term basis, any more than it would if the home were rented on yearly basis or if the homeowner had guests over. It is a private transaction between two private parties; only the tenant can use the pool.

For similar reasons, DATCP's regulations also "fail[ ] to comply with legislative intent," (sub. 3), by imposing construction requirements on pools that the Legislature specifically

excluded in § 145.26, by regulating pools that are not "public" (because they are not generally open to the public), and by going far beyond "licensing and regulation."

DATCP's regulations are also "arbitrary and capricious," and impose an "undue hardship," (sub. 6), by making it impossible or cost prohibitive for short-term rentals to have a hot tub or pool, as already explained. The regulations also result in arbitrary and unequal enforcement. It does not occur to many property owners that they would even need a commercial "public pool" license just to install a hot tub at a vacation home—and some county officials are either unaware of this requirement or do not enforce it. Thus, some property owners currently *are* renting a property with a pool or hot tub, without incident (a few have submitted statements, anonymized for obvious reasons).

Finally, to the extent that the Committee believes 97.67 could be interpreted to cover hot tubs or pools at short-term rentals, there has been a "change of circumstances" since enactment of that law (sub. 5). The operative language in 97.67 was in place long before the internet and websites like AirBnb, VRBO, and Swimply transformed (really created) the short-term-rental market we have today, with the market-based oversight that online reviews and pictures provide.

There is no reason a vacation home with a hot tub or small pool should need a separate pool license from DATCP or a complicated regulatory regime. Many homeowners have pools and hot tubs and use them themselves, and with guests, without incident. Most pool and home-sharing websites like Swimply, AirBnb, and VRBO have a robust review system, so owners have a strong economic incentive to keep their hot tub or pool safe and clean. One bad review can kill demand for a property, so the market is a sufficient check.

This is a great opportunity for the Committee to take a common sense, de-regulatory action that will benefit vacationers and small business owners throughout Wisconsin. And now is a great time to act, right before the summer rental season begins. I would urge the Committee to suspend the rule as it applies to short-term rentals and initiate a bill to make that change permanent. My colleague Kyle Koenen will share some excerpts of testimony from individuals that have been affected by this rule and were unable to attend today's hearing.