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April 15, 2022

VIA ELECTRONIC MAIL:

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

RE: Comment on DATCP CR 22-021

To Whom It May Concern,

The Wisconsin Institute for Law and Liberty (WILL) wishes to submit a comment regarding aspects of the Department of Agriculture, Trade and Consumer Protection's (DATCP) Clearinghouse Rule 22-021, specifically relating to the regulation of pools by the owners of short-term rentals. WILL is a 501(c)(3) law and policy center based out of Milwaukee, Wisconsin. In the past WILL has represented clients at the intersection of short-term rental regulation and pools. With that in mind, we submit today's comment after gathering input from dozens of short-term rental owners that will be negatively impacted by the rule as proposed.

As you know, DATCP's interpretation of its current administrative code requires owners of pools that rent their homes on platforms such as AirBnb and VRBO to meet costly (and often impossible to meet) construction requirements for commercial pools in Wis. Stat. § 145.26 and Ch. SPS 390, Wis. Adm. Code. We have communicated with DATCP that we disagree with its interpretation of the current rules. While we appreciate DATCP's effort in the current proposed rule to make it possible for short-term-rental properties in Wisconsin to have a pool or hot tub, we continue to have concerns about the regulatory burden the proposed rule would impose.

As it relates to DATCP CR 22-021, we will limit our comments to Subchapter VII, which regulates what the department calls "Limited-Use Public Pools." Specifically, this subchapter institutes a licensure requirement for homeowners with pools and/or hot-tubs that offer their home for short-term rental.

The department indicates they solicited feedback from various stakeholders when crafting the rule, including from “various public pool and water attraction businesses, pool design, construction and technical services industries, industry professional associations, Department and local health department agent representatives, as well as the Department of Safety Services.” Notably absent from this list of stakeholders are the Wisconsin citizens who operate short-term rentals with swimming pools or hot-tubs, yet they are subject to nearly 15 pages of new regulation under this proposed rule.

As an initial matter, we question whether DATCP has statutory authority to license and regulate residential pools that are not generally open to the public, but are rented solely in private transactions with individual groups. While DATCP’s authorizing statute (Wis. Stat. § 97.67) does not define “public pool,” a related statute does (Wis. Stat. § 145.26), and the definition there clearly would not cover such pools, an indication of the Legislature’s view of the scope of “public pools.” A home with a pool or hot tub rented on an annual basis, or made available to guests or friends, clearly would not become a “public pool,” and neither does a pool rented on a short-term basis in a private transaction.

Even if DATCP does have statutory authority to regulate pools and hot tubs at short-term rentals, the department makes no compelling case as to why a strict licensing model is necessary to protect the public health and safety for short-term rental users. Short-term rentals with pools have been rented in Wisconsin and nationwide for years, yet the department did not reference any documented complaints related to pools at these rentals in the draft of this rule. After a thorough review of media articles, we were also unable to locate any documented complaints of pools at short-term rentals in Wisconsin. Regulation of this nature should be reserved to achieve a compelling government interest, and to our best knowledge the data does not support this conclusion. Moreover, every major short-term-rental platform (Swimply, AirBnb, VRBO) has an online review system that already provides a sufficient check to ensure that pools and hot tubs are safe, clean, and well-maintained. As anyone who has rented a property knows, just a few bad reviews can quickly kill off any demand, so pool owners have a strong market-based incentive to properly maintain and operate their pool or hot tub.

With that being said, if the department is going to continue in its effort to regulate “limited-use public pools,” we suggest a less restrictive regulatory scheme that focuses on correcting compliance problems. This could be addressed by doing the following:

- Replace pool licensure with a basic registration requirement. This would limit the need for pre-inspections and licensing fees and would instead focus compliance on addressing pool safety complaints from users.
- Set simple, easy-to-understand pool chemistry and safety standards for homeowners to comply with. These regulations should not be overbearing and should mirror manufacturer recommendations to the greatest extent possible.

The current proposed rule also creates a number of logistical problems for homeowners. Most significantly, the requirement for daily water testing would be logistically impossible and costly for many homeowners and would be very disruptive to guests renting the home. A more reasonable alternative would be weekly testing or testing between rental groups. At the very least, DATCP should make clear that remote testing equipment is sufficient, so that short-term-rental hosts do not have to interrupt the privacy of their guests every day.

The proposed licensing process is also problematic. By requiring a pre-inspection before a license is granted, homeowners will likely be left waiting for inspectors to complete that initial inspection before their pool could be rented out. And the annual date for license expiration (which is also the renewal deadline) on June 30 is in the middle of the peak rental season.

Finally, many of the requirements laid out in the rule seem overly prescriptive or unnecessary. For example, the rule requires the following:

- Emergency blankets to be readily available;
- Pool furniture that is clean and in good repair;
- A specific pre-rental checklist; and
- Registration log of all principal renters with a requirement to maintain for a minimum of three years.

If a homeowner fails to meet any one of these or the dozens of other requirements laid out in the rule, it could be grounds for the state denying a pool license. Many short-term rental owners are families trying to earn extra income, and these burdensome requirements could be make-or-break differences for many of them.

In closing, we ask that DATCP abandon its efforts to implement Subchapter VII of the proposed rule, primarily because the department lacks the statutory authority to promulgate said regulations. Additionally, this new regulatory scheme would impose

significant costs on home owners. If the department continues its efforts to implement these measures, we suggest the scope of them be significantly scaled back. We thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kyle Koenen". The signature is written in a cursive style with a large initial "K".

Kyle Koenen
Policy Director
Wisconsin Institute for Law & Liberty