

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 18

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SWIMMING POOLS - Health club swimming pools, regulation
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SWIMMING POOLS - Hotel swimming pools, regulation of
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16.10.1201(3);
MONTANA CODE ANNOTATED - Sections 2-4-102(11),
50-51-103, 50-53-102(5), 50-53-103(1), 50-53-107.

HELD: 1. The statutes in Title 50, chapter 53, MCA,
concerning public swimming pools, apply to
health club swimming pools.

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2. Title 50, chapter 53, MCA, authorizes the Department of Health and Environmental Sciences to adopt interpretive rules concerning construction standards relating to safety for public swimming pools generally.
3. Section 50-51-103, MCA, authorizes the Department of Health and Environmental Sciences to adopt legislative rules, having the force of law, concerning construction standards relating to safety for swimming pools operated in connection with hotels, motels or tourist homes.

4 June 1981

Dr. John J. Drynan, Director
Department of Health and
Environmental Sciences
Cogswell Building
Helena, Montana 59601

Dear Dr. Drynan:

You have requested my opinion on the following questions:

1. Do the statutes in Title 50, Chapter 53 of the Montana Code Annotated (MCA) concerning public swimming pools, apply to privately owned hotel, apartment, and condominium swimming pools, but not to membership health clubs that charge monthly or yearly dues and are not open to the general public?
2. Is the Department of Health and Environmental Sciences authorized by Title 50, Chapter 53, MCA, to adopt regulations for swimming pools relating to safety and construction standards?

I. Public Swimming Pools.

Title 50, chapter 53, MCA, implements "the public policy of this State to regulate public swimming pools to protect public health." § 50-53-101, MCA. It establishes standards for public swimming pools and

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duties of pool operators and provides criminal penalties for violations. §§ 50-53-106 to 109, MCA. Your Department is charged with the enforcement of chapter 53. §§ 50-53-103 to 105, MCA.

Your letter indicates that it has been the policy of the Department to apply this chapter not only to publicly owned swimming pools, but also to privately owned swimming pools that are operated in conjunction with hotels, apartments and condominiums and to private membership clubs, such as the YMCA, that allow nonmembers to use the pool for a daily or per-use fee. However, the Department has not applied chapter 53 to private membership clubs that allow nonmembers to use the pool only if hosted by a member of the club.

Your first question is whether this distinction is justified. It is my opinion that it is not. Chapter 53 applies to all "public swimming pools." § 50-53-101, MCA. The definition of "public swimming pool" is:

[A]n artificial pool and bathhouses and related appurtenances for swimming, bathing, or wading, including natural hot water pools. The term does not include:

(a) swimming pools located on private property used for swimming or bathing only by the owner, members of his family, or their invited guests; or

(b) medicinal hot water baths for individual use.

§ 50-53-102(5), MCA. The Department's rules state:

"Public swimming pool" means any swimming pool, other than a private residential pool available only to the family of the homeowner and his guests, intended to be used collectively by numbers of persons for swimming or bathing operated by any person as defined herein, whether he be owner, lessee, operator, licensee, or concessionaire, regardless of whether a fee is charged for such use. [Emphasis added.]

ARM § 16.10.1201(3). Neither the statute nor your rule provides any basis for the distinction you have made. The statute refers broadly to all artificial pools

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except "swimming pools located on private property used for swimming or bathing only by the owner, members of his family, or their invited guests...." The reference to family supports a narrow exception for strictly private swimming pools annexed to a residence for the use of a family and its friends.^{1/} Your rule comports with this interpretation, providing only the limited exception of "a private residential pool available only to the family of the home owner and his guest." A health club pool, which is regularly used collectively by many families and guests, does not fall within this exception.^{2/} Therefore, membership health club pools are covered by chapter 53.

II. Construction Standards For Safety.

Your second question concerns the Department's authority to adopt rules concerning safety and construction standards for pools. Under chapter 53, the only expressly delegated authority to adopt legislative rules, having the force of law, is limited to rules for sanitation. However, it is my opinion that chapter 53 as a whole impliedly authorizes the adoption of interpretive rules, which are not binding on the courts, concerning construction and safety standards as well. A third question arises out of this interpretation. Does the effect of the construction rules differ as applied to hotel and motel swimming pools, since the Department has additional regulatory power over hotels and motels under chapter 51? I believe it does. As applied to hotel and motel swimming pools, the construction and safety rules have the force of law.

Section 50-53-103(1), MCA, expressly delegates to the Department of Health and Environmental Sciences the authority to adopt "rules for sanitation in public swimming pools." Therefore, rules relating to cleanliness and other precautions against disease are

^{1/} See Lucas v. Hesperia Golf & Country Club, 255 Cal. App. 2d 241, 63 Cal. Rptr. 189, 194 (Cal. Dist. Ct. App. 1967); Adams, Inc. v. Louisville and Jefferson County Board of Health, 439 S.W.2d 586, 589 (Ky. 1969).

^{2/} See Lucas v. Hesperia Golf and Country Club, supra.

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legislative rules, which have the force of law. See § 2-4-102(11)(a), MCA. By its plain meaning, however, section 50-53-103(1), MCA, does not authorize the adoption of legislative rules concerning life safety and accident prevention.^{3/}

Chapter 53 as a whole does impliedly authorize the adoption of interpretive rules concerning construction standards relating to life safety and accident prevention. Section 50-53-107, MCA, states:

Public swimming pools and public bathing places, including pool structures, methods of operation, source of water supply, methods of water purification, lifesaving apparatus, safety measures for bathers, and personal cleanliness measures for bathers, shall be sanitary, healthful, and safe. [Emphasis added.]

Sections 50-53-104 and 108, MCA, grant to the Department the discretionary power to enforce this requirement for safe pool structures. With this discretionary enforcement power necessarily goes the authority to adopt interpretive rules stating publicly how the enforcement power will be exercised. See Skidmore v. Swift & Co., 323 U.S. 134 (1944).

The effect of such interpretive rules is discussed by Professor Davis in his analysis of Skidmore. He says:

An administrator who has a discretionary power but no delegated power to make rules may state how he will exercise his discretion, and the result may be interpretative rules to which a court may give effect of law if the court is persuaded by the rules. But because the legislative body has not delegated legislative power to the administrator, the rules are not binding on the court; the court is free, if it chooses, to substitute its judgment as to the content of the interpretative rules.

^{3/} See Vinson v. Howe Builders Association of Atlanta, 233 Ga. 948, 213 S.E.2d 890, 891 (1975); but cf. Adams, Inc. v. Louisville and Jefferson County Board of Health, supra, 439 S.W.2d at 589 (holding that "health measures" encompass reasonably related safety measures).

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2 K. Davis, Administrative Law Treatise § 7.10 at 51 (2d ed. 1979). This analysis accords with section 2-4-102(11)(b), MCA, which states:

[I]nterpretive rules...may be adopted...under express or implied authority to codify an interpretation of a statute. Such interpretation lacks the force of law. [Emphasis added.]

Under the implied authority of chapter 53, then, the Department of Health and Environmental Sciences may only adopt interpretive rules, which do not have the force of law, concerning construction standards relating to life safety and accident prevention. However, your letter points out that with respect to hotel or motel swimming pools, more explicit authority is provided in section 50-51-103, MCA. That statute, applicable to hotels, motels, rooming houses, retirement homes and tourist homes, states:

The department [of health and environmental sciences] may adopt and enforce rules to preserve the public health and safety. These rules shall relate to construction, furnishings, housekeeping, personnel, sanitary facilities and controls, water supply, sewerage and sewage disposal system, refuse collection and disposal, registration and supervision, and fire and life safety code. [Emphasis added.]

This statute expressly delegates to the Department the authority to adopt rules concerning construction standards for hotels or motels relating to safety. If a hotel or motel provides a swimming pool for the use of its guests, that swimming pool must comply with any rules specifying construction standards adopted by the Department pursuant to section 50-51-103, MCA. The Department has adopted such a rule. ARM section 16.10.618 states:

The construction and operation of any swimming pool, hot bath, mineral bath, or public swimming place in connection with any hotel, motel, or tourist home shall be in accordance with Title 50, Chapter 53, MCA and department

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rules regarding the construction and operation of swimming pools.

Because this rule was adopted under the expressly delegated authority of section 50-51-103, MCA, it has the force of law. See § 2-4-102(11)(a), MCA. Thus, the same rules concerning construction standards for safety which are interpretive only in their application to public swimming pools generally, have the force of law as applied to hotel, motel, or tourist home swimming pools.

THEREFORE, IT IS MY OPINION:

1. The statutes in Title 50, chapter 53, MCA, concerning public swimming pools, apply to health club swimming pools.
2. Title 50, chapter 53, MCA, authorizes the Department of Health and Environmental Sciences to adopt interpretive rules concerning construction standards relating to safety for public swimming pools generally.
3. Section 50-51-103, MCA, authorizes the Department of Health and Environmental Sciences to adopt legislative rules, having the force of law, concerning construction standards relating to safety for swimming pools operated in connection with hotels, motels or tourist homes.

Very truly yours,

MIKE GREELY
Attorney General