



# NEW JERSEY PUBLIC RECREATIONAL BATHING CODE UPDATES AND REVISIONS – SWIMMING POOL SAFETY AND MANAGING ASSOCIATION RISK

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In January 2018, the New Jersey Department of Health announced changes to the state Public Recreational Bathing Code. The code applies to all multifamily community pools, public and private, if they are accessible to three or more families. One of the most impactful changes was a requirement to provide at least two lifeguards for pools over 2,000 square feet. Under the revised bathing code, community associations retained their right to exercise a special exemption that allowed them to eliminate lifeguards and first aid staffing requirements. However, it eliminated exemptions for facilities that may have been lifeguard exempt previously, if the pool featured water slides, diving boards, or other such recreational equipment. The revised bathing code further emphasized that lifeguards must not have secondary duties while guarding and would be prohibited from wearing headphones or earbuds and using a cell phone while on duty.

Initial review of the updated code with regard to lifeguards was clear. An association could either

voluntarily comply with additional staff requirements for pools over 2,000 square feet or exercise an exemption and operate without lifeguard staff. In either situation, a user of the swimming pool could make an informed decision about using the swimming pool – be it guarded or not. If an association chose to exercise its right to take the exemption, it would need to post a sign stating “No Lifeguard On Duty”, so bathers would be on notice about swimming in the pool and providing their own proper supervision for themselves and/or their guests.

## April 2018 NJ Department of Health FAQ

In April of 2018, the Department of Health (“DOH”) updated an FAQ on their web page providing an interpretation of the code pertaining to these lifeguard requirements. The DOH advised that, if a community exercised its special exemption, it could still provide a single lifeguard (regardless of the swimming pool’s size) and not be subject to a penalty from the DOH. Essentially, once an association used its exemption

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from the lifeguard requirements and put up the required "No Lifeguard On Duty" signage, the State would not pursue enforcement based on a violation of the code.

While the April DOH 2018 FAQ clarified that community associations could return to single lifeguard operations regardless of their size, there are questions as to whether this is a sensible approach from both a legal and a practical standpoint. An association posting a "No Lifeguard On Duty" sign and providing less than the number of lifeguards called for by the code could arguably provide a false sense of security to those patrons using the pool at any given time. There is a possibility that an individual will see a lifeguard present at the pool, disregard the sign, and assume the lifeguard is equipped to protect the entire pool, even if that is not actually the case. In fact, the 2018 updates to the bathing code provide standards on guarding a pool facility that are similar to standards set forth by the pool industry:

- The American Red Cross Lifeguard training program advises that a lifeguard should be able to identify and reach a victim within 30 seconds and have the victim extricated and begin ventilations within 1.5- 2 minutes. Ellis and Associates, another New Jersey recognized lifeguard training program, maintains an expectation that lifeguards recognize a victim within 10 seconds and respond

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and begin care within 20 seconds. Both entities and the Bathing Code reference "Zones of Protection" that are established and maintained to ensure a timely response by the lifeguard is feasible.

- The Model Aquatic Health Code, a fact based model code developed by the Center for Disease Control, also maintains that "Zones of Protection" be designed such that a lifeguard is capable of reaching a victim within 20 seconds to provide care. So while these training programs do not mention distance, they do enunciate standards such that a lifeguard should be in a position where he/she will reasonably reach a distressed swimmer

at the furthest point from his/her station within 20 seconds. In a 40 foot x 50 foot swimming pool the lifeguard may have to swim up to 46 feet to reach a victim. Considering that lifeguards are trained on feet first entry to initiate a rescue and that the guard would be swimming with a rescue tube this could be approaching the limit of what could be expected from an average lifeguard. Now consider the additional time it could take to recognize and reach a victim, if a pool is busy and the lifeguard must navigate other swimmers to reach a potentially submerged swimmer.

- The Center for Disease Control, the American Red Cross, and Ellis & Associates emphasize the importance of a timely rescue because the likelihood for a successful out-

*"...consider the additional time it could take to recognize and reach a victim, if a pool is busy..."*



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come is reduced as time to rescue grows. According to the National Institute of Neurological Disorders and Stroke, meaningful recovery is dependent on how long the brain has been deprived of oxygen and brain cells will begin to die after 5 minutes. This means that independent of the number of bathers, the size of the pool, the area that a lifeguard is responsible for monitoring and must traverse for a rescue are all very impactful on the outcome for a distressed swimmer.

A community association that is eligible for special exemption can provide coverage as outlined in the Bathing Code or choose to exercise its exemption, advise their patrons, and provide no lifeguards. While something in between may be attractive from a budgetary standpoint and then rationalized as safer than no guard at all, there is a question as to how that will factor into potential liability, in the event of an incident at the pool for which the association is pursued for legal damages. Negligence claims are, after all, based on a deviation from an accepted standard. The fact that the DOH will not enforce certain standards in an "exempt" situation may not excuse deviation from an accepted standard of care.

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### **ASSEMBLY BILL 4191**

On January 31, 2019, Governor Murphy signed Assembly Bill 4191 into law, which revised some of the requirements of the January 2018 code updates. It restored the option for lifeguard exemption to communities with diving boards, slides, and other such recreational features that had been previously ineligible. The law also asserted that the State retained the authority to impose lifeguard and first aid personnel staffing requirements if an increased hazard or safety risk was observed. There was also an aspect of this bill addressing "minor administrative tasks" for lifeguards; the revision states that such tasks are permissible provided that they do not cause an "imminent, significant risk to bather safety."

It is debatable whether many community associations were impacted by losing the option to the lifeguard exemption for recreational features. The authority of the State and the Local Health Authority to require lifeguards in situations where hazards or

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risks are evident is worth noting. On the subject of "administrative tasks," associations should carefully consider whether and what types of secondary duties to assign to a lifeguard, while the guard is actively guarding the pool from an aquatic risk standpoint. Any responsibilities that would take a lifeguard's attention away from the pool, while people are swimming, can potentially be a distraction from their primary safety function. The assignment of such tasks could therefore lead to claims, in the event of a serious pool injury or death.

### **CONCLUSION**

Between the 2018 Bathing Code update, the State's April FAQ, and now the January 2019 code revisions, there is a lot to take in from a swimming pool management perspective. While the intentions of the FAQ and January 2019 code revisions may have been to reduce frustration about the 2018 Bathing Code update, they do not do anything to improve bather safety. In fact, they have made finding the best path for safer operations more difficult.

From a legal standpoint, there is an open question as to how permitting associations to take the special exemption while having some lifeguard presence will play out in the event of a liability claim against an association for failure to adequately guard its pool. The DOH has indicated that associations will not be subject to penalties for taking steps to exercise the special exemption while providing guard coverage that is less than what would be required if an association

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chose not to take the special exemption. There is no precedent as to how this will play out in a court, and potentially before a jury if an association is sued for a loss in such a situation. While an association may be in compliance with the provisions of the Bathing Code, permitting it to take the special exemption, it will remain to be seen what, if any, implications may be raised on the tort liability front.

Each pool presents a different situation and community associations need to evaluate their particular pool, to determine the best course of action in consideration of the issues raised in this article. Associations should contact their legal and insurance professionals concerning these issues and any further questions that may arise. ■

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