

Limiting Access to the City Swimming Pool

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Question: Can a city restrict swimming pool access to only city residents?

Answer: Most likely yes but operationally it might be tricky.

Legal Analysis: If a city is restricting pool access to only city residents, by default that means the city is excluding individuals from other states. This has constitutional implications. Generally, a city swimming pool should not activate the Commerce Clause so first a city needs to consider the Privileges and Immunities Clause (PIC), Article IV, § 2, of the United States Constitution. Under the PIC, “citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” “A State may discriminate against nonresidents only where its reasons are ‘substantial’ and the difference in treatment bears a close or substantial relationship to those reasons.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 274, 105 S. Ct. 1272, 1273, 84 L. Ed. 2d 205 (1985). This does not mean that a state may never use residency to distinguish between persons. The PIC only applies to those activities that are fundamental rights. Recreational Activities are not a fundamental right protected by the PIC. See *Baldwin v. Fish & Game Comm’n of Montana*, 436 U.S. 371, 388, 98 S. Ct. 1852, 1863, 56 L. Ed. 2d 354 (1978) Since swimming is a recreational activity, prohibiting nonresidents from using the pool should not violate the PIC.

Next, a city needs to look at the Equal Protection Clause of the 14th Amendment. “The Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws, and the Kansas Constitution Bill of Rights § 1 provides virtually the same protection. See *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005).” *Miami Cty. Bd. of Comm’rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 315, 255 P.3d 1186, 1207 (2011).” Federal and Kansas courts have long delineated three levels of scrutiny in equal protection cases: (1) the rational basis standard to determine whether a statutory classification bears some rational relationship to a valid legislative purpose; (2) the heightened or intermediate scrutiny standard to determine whether a statutory classification substantially furthers a legitimate legislative purpose; and (3) the strict scrutiny standard to determine whether a statutory classification is necessary to serve some compelling state interest. *Limon*, 280 Kan. at 283–84, 122 P.3d 22; see ***1208 Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (strict scrutiny); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (heightened scrutiny); *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (rational basis).” *Miami Cty. Bd. of Comm’rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 316, 255 P.3d 1186, 1207–08 (2011)

Since swimming is not a fundamental right, and the discrimination is not based on a suspect class such as race or gender, the city would need to be able to show there was a rational basis for the distinction between the two classifications of individuals (city residents and everyone else). This will be fact specific depending on the city's situation. For example, is there a legitimate reason that the city needs to limit the total number of individuals at the pool and wants to ensure that city residents who pay city property taxes are able to access the pool? Factors that would weigh into this analysis would include are the surrounding pools around the city closed? Does the state or the county have limits on numbers of individuals who can mass gather?

If a city can satisfy that the restriction of a pool to city residents satisfies the rational basis test, then the city mostly likely can legally restrict non-residents from using the facility.

Operationally, this will still be challenging. The city will want to make sure that there are policies in place to make sure the rule is not arbitrarily enforced.