

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A25-1018**

In the Matter of the Unadopted Rule Petition of Swimply;

Keith Hittner, et al.,
Petitioners,

vs.

Minnesota Department of Health,
Respondent.

**Filed April 13, 2026
Affirmed; rule declared valid
Smith, Tracy M., Judge
Concurring in part, dissenting in part, Connolly, Judge**

Office of Administrative Hearings
File No. OAH 23-0900-40478

Douglas P. Seaton, Nicholas J. Nelson, Alexandra K. Howell, Upper Midwest Law Center,
Minnetonka, Minnesota (for petitioners)

Keith Ellison, Attorney General, Kaitrin C. Vohs, Assistant Attorney General, St. Paul,
Minnesota (for respondent Minnesota Department of Health)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

This matter involves challenges by petitioners Keith Hittner, Sheila Hittner, and
Brandy Logan to the position of respondent Minnesota Department of Health (MDH) that

petitioners' residential swimming pools are "public pools" requiring a license when petitioners rent their pools to customers via a sharing economy application or other platform. First, petitioners appeal the order of an administrative law judge (ALJ) determining that MDH's guidance regarding the rental of residential pools is not an unpromulgated rule because the guidance is consistent with the plain meaning of the governing statute and rule. Second, petitioners ask this court to grant a declaratory judgment that the rule—namely, Minnesota Rule 4717.0250, subpart 7 (2023)—is invalid because it exceeds MDH's statutory authority. Because we conclude that MDH's guidance does not constitute an invalid unpromulgated rule and that rule 4717.0250, subpart 7, does not exceed MDH's statutory authority, we affirm the ALJ's order and declare that rule 4717.0250, subpart 7, is valid.

FACTS

In 2020, a company named Swimply began operating in the Minneapolis area. Swimply provides an online platform for pool owners to make their swimming pools available for rent. Renters typically pay a fee to use the pool for a specified period of time. In May 2021, MDH sent a letter to Swimply, informing it that public pools must be licensed in Minnesota and asking that Swimply contact MDH to discuss how to ensure that the pools listed on its website comply with Minnesota law.

In August 2021, MDH published on its website guidance titled "Residential Swimming Pool and Spa Rentals." The guidance was not promulgated pursuant to administrative rulemaking. The guidance document states, "A homeowner that rents their pool to customers via a sharing economy app[lication] or other platform has effectively

turned their pool into a public pool.” It explains that public pools must be licensed. The guidance also describes the health and safety risks when an unlicensed pool is rented to the public and summarizes the construction, drain, depth, filter, testing, safety, sanitation, and security requirements required for licensure as a public pool. The guidance document includes the definitions of two relevant terms: the statutory definition of “public pool,” *see* Minn. Stat. § 144.1222, subd. 4(d) (2024), and the rule definition of “private residential pool,” *see* Minn. R. 4717.0250, subp. 7.

Petitioners own homes with swimming pools and, starting in 2022, began listing their pools for rent on Swimply. In 2023, MDH issued a letter to petitioners Keith and Sheila Hittner regarding their pool listed on Swimply. The letter cited the definition of “public pool” found in section 144.1222, subdivision 4(d), and informed the Hittners that they needed to obtain a license prior to renting their pool. This letter did not reference the guidance document.

In 2024, the City of Maple Grove issued a letter to petitioner Logan, stating “[p]ools are not permitted to be rented in the city of Maple Grove.” In a subsequent email explaining that Logan’s pool rental did not appear to follow statutory requirements, the city’s zoning enforcement officer provided a link to MDH’s guidance document. Subsequently, Hennepin County Public Health issued a cease-and-desist notice to Logan, citing the private-residential-pool rule, and requiring Logan to discontinue swimming pool operations that are open to the public and to remove the Swimply advertisement. Hennepin County’s letter included a link to the MDH’s website for “more information.”

In November 2024, petitioners¹ submitted a petition to the Court of Administrative Hearings (CAH) pursuant to Minnesota Statutes section 14.381 (2024), seeking an order from an ALJ that MDH was enforcing an unpromulgated rule as though it were a duly adopted rule. The ALJ dismissed the petition, concluding that MDH’s guidance document is “a restatement of existing rules and laws, consistent with the plain meaning of Minn. Stat. § 144.1222, subd 4(d), and Minn R. 4717.0250, subp. 7,” and that MDH thus “has not enforced or attempted to enforce a policy or guideline as an unpromulgated rule.”

Petitioners appeal the ALJ’s order pursuant to Minnesota Statutes sections 14.381, subdivision 2, 14.44, and 14.45 (2024). In addition, pursuant to sections 14.44 and 14.45, petitioners ask this court to declare rule 4717.0250, subpart 7, invalid on the ground that MDH exceeded its statutory authority in adopting the rule.

DECISION

Petitioners argue, first, that MDH’s guidance regarding swimming-pool rentals constitutes an unpromulgated rule and that we should reverse the ALJ’s decision and direct MDH to cease enforcement or attempted enforcement of the guidance or the principles that it expresses. This part of petitioners’ case is before us under section 14.44 as effectively an appeal from the ALJ’s decision under section 14.381 that MDH was not enforcing or attempting to enforce an unpromulgated rule.

Petitioners argue, second, that we should declare rule 4717.0250, subpart 7, invalid because it exceeds MDH’s statutory authority. This part of petitioners’ case is before us as

¹ Swimply joined petitioners in the petition to the Court of Administrative Hearings but is not participating in this appeal.

an original action under sections 14.44 and 14.45 to declare a rule invalid. Under section 14.45 a rule is invalid if it violates constitutional provisions, exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures. Minn. Stat. § 14.45.

To provide context for petitioners’ arguments, we first outline the relevant statutory and regulatory history. We then turn to petitioners’ two arguments.

I. Statutory and Regulatory Background

MDH is authorized to regulate “public pools and facilities related to them.” Minn. Stat. § 144.1222, subd. 1 (2024); *see* Minn. R. 4717.0150-.0775 (2023). Minnesota law imposes certain requirements for public pools, including required equipment and safety inspections. Minn. Stat. § 144.1222 (2024). In addition, the operation of a public pool requires an annual license. Minn. Stat. § 157.16, subds. 1, 2 (2024).

In 1994, MDH proposed a revision of the then-existing standards governing public pools. 19 Minn. Reg. 365, 384-408 (Aug. 22, 1994). A proposed rule defined “public pool.” *Id.* at 386. The definition began with “any pool, other than a private residential pool, intended to be used collectively by numbers of persons, and operated by any person whether the person be an owner, lessee, operator, or concessionaire, and regardless of whether a fee for use is charged.” *Id.* The proposed rule also defined “private residential pool”—a term used in the definition of “public pool.” *Id.* That definition described the characteristics of a private residential pool and clarified that “[a] private residential pool is not a pool used as part of a business.” *Id.* Following a public hearing at which public comments were received, an ALJ determined that MDH had the authority to issue the

proposed rule, determined that it was reasonable and necessary, and recommended that, with changes not relevant here, the proposed rule be adopted, which it was. Minn. R. 4717.0250, subps. 7, 8 (1995); 19 Minn. Reg. 1387, 1419-1422 (Dec. 27, 1994).

In 2008, after a young girl was fatally injured when she was drawn into a pool drain system at a country club pool, the legislature passed the Abigail Taylor Pool Safety Act. *See* Hearing on S.F. No. 2833 Before the S. Comm. on Health, Hous. & Fam. Sec. (Mar. 5, 2008) (statement of Sen. Michel). In it, the legislature enacted a statutory definition of public pool, which, in material respects related to this case, remains the same today. 2008 Minn. Laws ch. 328, § 6, at 1320 (codified at Minn. Stat. § 144.1222). It states that a public pool is

any pool other than a private residential pool, that is: (1) open to the public generally, whether for a fee or free of charge; (2) open exclusively to members of an organization and their guests; (3) open to residents of a multiunit apartment building, apartment complex, residential real estate development, or other multifamily residential area; (4) open to patrons of a hotel or lodging or other public accommodation facility; or (5) operated by a person in a park, school, licensed child care facility, group home, motel, camp, resort, club, condominium, manufactured home park, or political subdivision with the exception of swimming pools at family day care homes.

Minn. Stat. § 144.1222, subd. 4(d).²

² The definition of “public pool” in the Minnesota Rules was amended to refer to this statutory definition. *See* Minn. R. 4717.0250, subp. 8 (2023) (referring to section 144.1222, subdivision 4(d)).

The statutory definition of public pool excludes private residential pools. The term “private residential pool” continues to be defined by rule 4717.0250, subpart 7, which has remained unchanged since its adoption in 1994. It states:

“Private residential pool” means a pool connected with a single-family residence or owner-occupied duplex, located on private property under the control of the homeowner, the use of which is limited to family members or the family’s invited guests. A private residential pool is not a pool used as part of a business.

Minn R. 4717.0250, subp. 7.

With this background, we turn to petitioners’ arguments.

II. The ALJ did not err by determining that MDH’s guidance document is not an invalid unpromulgated rule.

An administrative agency’s authority to adopt administrative rules is governed by the Minnesota Administrative Procedure Act (MAPA). Minn. Stat. §§ 14.001-.69 (2024). MAPA “requires that administrative rules be promulgated by giving public notice and providing all interested persons an opportunity to submit comments.” *In re PERA Salary Determinations Affecting Retired & Active Emps.*, 820 N.W.2d 563, 570 (Minn. App. 2012). A person may challenge an agency’s actions if the agency is “enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule.” Minn. Stat. § 14.381, subd. 1(a). If an ALJ determines that the agency is enforcing or attempting to enforce an unadopted rule, the ALJ must “direct the agency to cease enforcement of the unadopted rule that is the subject of the petition.” *Id.*, subd. 2.

A rule is defined as “every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.” Minn. Stat. § 14.02, subd. 4 (2024); *see also In re Shakopee Mdewakanton Sioux Cmty.*, 988 N.W.2d 135, 143 (Minn. App. 2023). But an agency policy that interprets a rule or a statute is not subject to MAPA’s rulemaking requirements (1) if the agency’s interpretation corresponds with the plain meaning of the rule or statute or (2) the rule or statute is ambiguous and the agency’s interpretation is longstanding. *Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 667 (Minn. 1984) (interpretation of rule); *see also Shakopee Mdewakanton Sioux Cmty.*, 988 N.W.2d at 145 (interpretation of statute).

A. MDH’s guidance is a statement of general applicability and future effect.

Petitioners argue that MDH is enforcing an unpromulgated rule because its guidance document constitutes an “agency statement of general applicability and future effect.” Minn. Stat. § 14.02, subd. 4. The ALJ agreed with petitioners that the guidance document is a statement of general applicability and future effect. MDH argues that it is not enforcing the guidance because it has not cited the guidance in its regulatory communications but instead has relied only on the governing statute and rule.

The guidance document states that homeowners who rent “their pool to customers via a sharing economy app[lication] or other platform ha[ve] effectively turned their pool into a public pool.” We agree with petitioners and the ALJ that this is a statement of general applicability and future effect because it tells a regulated group (namely, homeowners who

seek to rent their pools) the future effect of using an application like Swimply to rent their pool. And, though MDH did not cite the guidance document when it communicated with petitioners, it published the guidance document on its website, and its enforcement actions appear to apply the policy articulated in the guidance document.

But even though the guidance document is an agency statement of general applicability and future effect, it does not constitute an invalid unpromulgated rule if it conforms with the plain meaning of the governing statute and rule.³ See *Cable Commc'ns Bd.*, 356 N.W.2d at 667. We turn to that question next.

B. The guidance document aligns with the plain meaning of the governing statute and rule.

MDH argues that its guidance corresponds with the plain meaning of the governing statute and rule and that it is therefore not enforcing an unpromulgated rule. The statute at issue is section 144.1222, subdivision 4(d), defining a “public pool.” The rule is rule 4717.0250, subpart 7, defining “private residential pool.” Petitioners contend that both the statute and the rule are ambiguous and that MDH’s guidance is therefore an invalid unpromulgated rule.

This issue presents a question of statutory and rule interpretation, which appellate courts review de novo. *In re Minn. Living Assistance, Inc.*, 934 N.W.2d 300, 304, 310 (Minn. 2019). A statute or rule is ambiguous “if its language is subject to more than one reasonable interpretation.” *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013). To

³ MDH makes no argument that, if we conclude that the statute or rule is ambiguous, the agency’s interpretation is a longstanding one.

determine whether a statute or rule is ambiguous, we construe its “words and phrases according to their plain and ordinary meaning.” *Shakopee Mdewakanton Sioux Cmty.*, 988 N.W.2d at 146.

1. Statutory Definition of Public Pool

Section 144.1222, subdivision 4(d), defines a public pool as including a pool “other than a private residential pool” that is “open to the public generally, whether for a fee or free of charge.”⁴ Because “private residential pool” is defined by rule, we begin with the statutory phrase “open to the public generally” and turn to the rule in the next subsection.

Petitioners contend that the phrase “open to the public generally” means “that anyone can get in line, buy a ticket, and come through the gates; there is no need for any special invitation, permission, or qualifications.” They argue that a reasonable interpretation of the statute is that “open to the public generally” does not include a situation in which a person advertises their pool for rent on a public website or application because the homeowner could decline to rent to a responding user.

MDH, on the other hand, argues that there is only one reasonable interpretation of the statute, which is that “a pool is a public pool if it is usually made available to the community as a whole, without restrictions to a particular group or category of participants.” It argues that the only reasonable interpretation of the statute is that a pool is “open to the public generally” when a homeowner rents their pool to others by using a platform that markets their pool to the public at large.

⁴ MDH does not argue that any other part of the statutory definition applies.

We agree with MDH that its interpretation is the only reasonable reading of the statute. Homeowners list their pools on sharing economy applications or platforms for the purpose of marketing to the public at large. Users are not limited to persons with personal connections to the homeowners or to any other specified category of participant. The commonsense reading of the statute is that such pools are “open to the public generally.” As noted by MDH, this reading is consistent with the definition of a “place of public accommodation” under the Minnesota Human Rights Act as an “accommodation . . . of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended . . . or otherwise made available to the public.” Minn. Stat. § 363A.03, subd. 34 (2024). Similarly, the only reasonable interpretation of a pool “open to the public generally” is that it includes a pool that is made available to the public for rent without restrictions to a particular category of participants.

Moreover, as MDH persuasively argues, petitioners’ interpretation ignores the word “generally.” In arguing that a rented pool is not public, petitioners rely on the homeowner’s ability to decline a request to rent their pool. But a community public pool does not lose its “public” designation because it excludes users based on time of day or maximum number of participants or based on the user’s improper swimwear, behavior, or refusal to pay a fee. Similarly, when homeowners market their pools to the public, the pools are open to the public generally even if the pool owners exercise some discretion as to which renters to accept.

Petitioners also argue that MDH’s interpretation “open to the public generally” in clause (1) of the definition of public pool really means “advertised to the public generally”

and, as a result, renders superfluous “most of” clauses (2) through (5) of the definition. *See* Minn. Stat. § 144.1222, subd. 4(d). Again, those clauses are:

(2) open exclusively to members of an organization and their guests; (3) open to residents of a multiunit apartment building, apartment complex, residential real estate development, or other multifamily residential area; (4) open to patrons of a hotel or lodging or other public accommodation facility; or (5) operated by a person in a park, school, licensed child care facility, group home, motel, camp, resort, club, condominium, manufactured home park, or political subdivision with the exception of swimming pools at family day care homes.

Id. Petitioners argue that hotels, apartments, camps, and condos often advertise and feature their swimming pools in their advertising, so those pools would already be covered by clause (1). The argument is unpersuasive. First, MDH does not interpret the statute to apply to *advertising* but rather to *renting* pools to the general public. Second, clauses (2) through (5) describe categories of persons—members of an organization, tenants, hotel guests, campers, and so on—who, by virtue of being part of such a category, have access to a pool. If the definition of public pool were limited to clause (1)—open to the public generally—it would not capture those circumstances. MDH’s interpretation therefore does not create superfluity.

We see no ambiguity in the term “open to the public generally” and conclude that it plainly includes a homeowner’s pool that is rented to the public through a shared economy application or other platform.

2. Rule Definition of Private Residential Pool

To meet the statutory definition of public pool, the pool must be one “other than a private residential pool.” Minn. Stat. § 144.1222, subd. 4(d). “Private residential pool” is

defined by rule 4717.0250, subpart 7, as “a pool connected with a single-family residence or owner-occupied duplex, located on private property” under the homeowner’s control, and used only by “family members or the family’s invited guests.” The rule also provides that “[a] private residential pool is not a pool used as part of a business.” Minn. R. 4171.0250, subp. 7.

Petitioners contend that the phrase “used as part of a business” is ambiguous because the threshold for when a pool becomes “used as part of a business” is not defined.⁵ To support their argument, petitioners advance many hypothetical situations in which a nominal amount of money is exchanged for use of a pool and contend that those examples could not possibly be considered “used as part of a business.” Notably, they provide no evidence that any of these hypothetical situations have actually occurred here. In any event, just because a rule is broad does not mean it is ambiguous.

Petitioners also argue that the phrase is ambiguous because “business,” as defined by Black’s Law Dictionary, is “[a] commercial enterprise carried on for profit,” *Black’s Law Dictionary* 246 (12th ed. 2024), and, given the expense of constructing and maintaining pools, homeowners will not turn a “profit” by “an occasional private rental.”

⁵ Petitioners also briefly assert that satisfaction of the definitional element that a private residential pool be used only by family members and the family’s invited guests is “not seriously contested here” because petitioners “invite” the users who rent their pools via the application. MDH, however, does contest that users who rent via an application constitute a “family’s invited guests.” As MDH notes, a sharing economy application like Swimply does not market only to persons already known to the family. Instead, it markets to the general public to rent swimming pools for hourly rates when the pools are unused by the homeowners. We agree with MDH and reject petitioners’ assertion that renters in these circumstances constitute a “family’s invited guests.”

This argument, too, is unavailing. As MDH convincingly argues, even under Black’s definition of “business,” a homeowner does not need to show a gross profit on their pool in order to be engaged in business. Instead, the ordinary meaning of “business” comprehends engaging in the commercial transaction of renting a pool for money. Thus, the only reasonable interpretation of the rule is that it excludes from the definition of “private residential pool” a pool that is rented to the general public through a shared economy application or other platform. For this reason, we see no ambiguity in the phrase “used as part of a business.”

Finally, we note that, during oral argument before this court, petitioners argued that a reasonable interpretation of the statute and the associated rule is that “an infrequent, informal short-term rental” does not make a homeowner’s pool a “public pool.” But petitioners do not tie their frequency and formality arguments to the language of the statute or rule, and we see nothing in the statute or rule that suggests a frequency or formality element when homeowners rent their pool to the general public via a sharing economy application or other platform.

Petitioners instead seem to be making a policy argument that the law *should* permit homeowners to rent their pools to the public via a sharing economy application or other platform, if not as often as they wish, at least some number of times without being subject to the rules governing public pools. Such a policy argument should be addressed to the legislature. As MDH points out, during a special session in 2025, the legislature amended section 144.1222, subdivision 2d(b), to exclude spa pools (i.e., whirlpools, *see* Minn. R. 4717.0250, subp. 9) from the definition of “public pool” when they are part of a single-unit

property rental and are intended for use only by the renters. 2025 Minn. Laws 1st Spec. Sess. ch. 3, art. 1, § 45, at 1507. Notably, the legislature also imposed certain safety requirements for spa pools in those circumstances. *Id.* But the legislature did not similarly exclude swimming pools associated with single-unit rentals from the definition of “public pool.” Nor did it exclude swimming pools that are rented on their own, as is the case here. If petitioners wish to remove swimming pools from the statutory definition of public pool when rented to the public via an application, they can seek legislative change. *See Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206, 213 (Minn. 2014) (stating that, “if . . . [a law] needs revision in order to make it embody a more sound public policy, the Legislature, not the judiciary, must be the reviser” (footnote omitted)), *superseded by statute*, 2015 Minn. Laws ch. 65, art. 6, § 10, at 526-27 (codified at Minn. Stat. § 169A.53, subd. 3 (2024)).

In sum, we conclude that both the statute and the rule are unambiguous and that MDH’s guidance that a “homeowner that rents their pool to customers via a sharing economy app[lication] or other platform has effectively turned their pool into a public pool” aligns with the statute’s and rule’s plain meanings. As a result, MDH is not enforcing an invalid unpromulgated rule. *See Shakopee Mdewakanton Sioux Cmty.*, 988 N.W.2d at 145. We therefore affirm the decision of the ALJ.

III. Minnesota Rule 4717.0250, subpart 7, does not exceed MDH’s statutory authority.

Petitioners also contend that MDH exceeded its statutory authority when it adopted rule 4717.0250, subpart 7, defining “private residential pool.” Appellate courts review whether an administrative agency acted within its statutory authority de novo. *Hibbing*

Taconite Co. v. Minn. Dep't of Nat. Res., 17 N.W.3d 160, 164 (Minn. App. 2025). Appellate courts “look to the plain language of the authorizing statute to determine what an agency’s powers include.” *Id.* “An agency’s authority may be stated either expressly in statute or implied from the express powers given to the agency by the Legislature.” *Id.* (quotation omitted). “[A]ny doubt about the existence of an agency’s authority is resolved against the exercise of such authority.” *Id.* (quotation omitted).

As authority for the rule, MDH cites Minnesota Statutes section 144.1222, subdivision 1, which grants the commissioner of health responsibility for “the adoption of rules and enforcement of applicable laws and rules relating to the operation, maintenance, design, installation, and construction of public pools and facilities related to them.” MDH also cites its broad authority under Minnesota Statutes section 144.12, subdivision 1 (2024), to “adopt reasonable rules pursuant to chapter 14 for the preservation of the public health.”

Petitioners do not dispute that the legislature has given MDH the authority to regulate public pools, as reflected in section 144.1222, subdivision 1.⁶ Rather, they argue

⁶ Although the parties do not address it, we note that section 144.1222, subdivision 1, was passed in 1995—the year after rule 4717.0250, subpart 7, was promulgated. *See* 1995 Minn. Laws ch. 165, § 1, at 507. In 1994, when the rule was promulgated, MDH relied on other statutes relating to swimming pool sanitation and safety, Minn. Stat. § 145A.02, subd. 11 (1994), and inspection of certain public pools, Minn. Stat. §§ 157.01, subd. 2(a)(4), .04 (1994), as its authority for regulating swimming pools. Because petitioners do not challenge the authority of MDH to regulate public pools, we—like the parties—address MDH’s authority to regulate public pools by reference to section 144.1222, subdivision 1, even though it was passed after the rule was promulgated. We also note that the other statutory authority relied on by MDH in this appeal—section 144.12, subdivision 1, relating to the preservation of the public health—was in place and relied on by MDH in 1994 and remains unchanged today.

that rule 4717.0250, subpart 7, defines “private residential pool” more narrowly than the statutory authority permits and thereby impermissibly expands MDH’s authority beyond public pools. Specifically, petitioners challenge the provision in the rule definition that a private residential pool is not a pool that is “used as part of a business.”⁷

For this argument, petitioners analogize to many hypothetical situations in which people do work activities at home, arguing that homes do not become “non-residential” or automatically become a “business” when people work from home. But these situations are not analogous because the language of the challenged rule focuses on using the *pool* as part of a business (such as renting out the pool itself). In all of petitioners’ hypotheticals, if the *home* was used for the business—such as an in-home daycare or hair salon—those businesses would still be subject to the relevant industry regulations.

We conclude that MDH did not exceed its statutory authority in defining “private residential pool.” When rule 4717.0250, subpart 7, was promulgated, “private residential pool” was used in the rule definition of “public pool” that was promulgated at the same time. *See* Minn. R. 4717.0250, subp. 8 (Supp. 1994); 19 Minn. Reg. at 386. Thus, a definition of the term “private residential pool” was important to determining the meaning

⁷ Petitioners also comment that the definitional element that use of a private residential pool is “limited to family members or the family’s invited guests” is “at least questionable” because a pool will remain a private residential pool in its ordinary meaning even if a family decides to “put up with uninvited passersby jumping into their backyard pool once in a while.” This single comment, based on an unlikely hypothetical situation, does not persuade us that MDH exceeded its authority by including the provision regarding family members and the family’s invited guests.

of “public pool.” MDH had express authority to pass the rule under section 144.1222, subdivision 1, as part of the agency’s regulation of public pools and, even if that authority were not express, MDH has implied authority from that same provision to define what public pools are not—namely, private residential pools.⁸ *See Hibbing*, 17 N.W.3d at 164.

In addition, we agree with MDH that the rule is authorized by section 144.12, subdivision 1, as a reasonable rule for the preservation of public health. MDH has cited many examples of waterborne illnesses that can be spread via swimming pool water. While users of private residential pools can also suffer from the hazards of a poorly maintained or constructed pool, the threat to public health increases when pools are open for use by the general public. The definition of “private residential pool” is thus important to distinguish public pools, which pose a greater threat to public health, from private residential pools. We therefore conclude that rule 4717.0250 falls within MDH’s authority because it is for the preservation of public health.

Because MDH did not exceed its statutory authority, we conclude that rule 4717.20, subpart 7, is valid.

Affirmed; rule declared valid.

⁸ The rule definition of “private residential pool” remains important to defining a public pool. In the Abigail Taylor Pool Safety Act, the legislature redefined “public pool,” but it did not similarly provide a statutory definition for “private residential pool.” *See* Minn. Stat. § 144.1222, subd. 4(d).

CONNOLLY, Judge (concurring in part, dissenting in part)

I concur in that part of the majority opinion that states that Minn. R. 4717.0250, subp. 7 (2023), does not exceed the statutory authority of respondent Minnesota Department of Health (MDH). However, I respectfully dissent from the rest of the opinion. I would reverse the decision of the administrative law judge (ALJ), who decided that MDH was not enforcing an unpromulgated rule through its guidance document, which treats backyard swimming pools that are rented out as “public pools” and thus subject to MDH regulation.

I believe, as did the ALJ, that the guidance document constitutes an agency statement of general appealability and future effect. As the ALJ stated in the order:

The Guidance Document provides the rule and statutory definition of pool, spa pool, public pool, and private residential pool, along with public pool requirements. The Guidance Document provides rule and statute citations and links in addition to the descriptions. The Guidance Document also includes a statement that homeowners who rent “their pool to customers via a sharing economy app[lication] or other platform has effectively turned their pool into a public pool.” This is a statement of general applicability and future effect.

(Footnotes omitted.) Since agency rules include “every agency statement of general applicability and future effect,” the only way that this guidance document could not be considered a rule subject to the notice-and-comment procedure is if it comes within an exception. *See* Minn. Stat. § 14.02, subd. 4 (2024).

In this case, the ALJ invoked an exception to this definition of the agency rules. An “agency is not deemed to have promulgated a new rule” in situations where “the agency’s interpretation of a [preexisting] rule [or statute] corresponds with its plain meaning.” *Cable*

Commc 'ns Bd. v. Nor-West Cable Commc 'ns P'ship, 356 N.W.2d 658, 667 (Minn. 1984). In other words, an agency need not go through the formal rulemaking process if all it wants to do is reiterate what a statute or properly-promulgated rule already says. On the other hand, if an agency wants to clarify or specify the meaning it will give to ambiguous language in a preexisting statute or rule, that *does* qualify as a new agency rule and *is* subject to notice-and-comment requirements. See *In re Shakopee Mdewakaton Sioux Cmty.*, 988 N.W.2d 135, 143-44 (Minn. App. 2023) (stating notice-and-comment requirements apply if an agency action “make[s] specific the law enforced or administered by the agency” (quotations omitted)).

In this case, MDH did not follow notice-and-comment procedures before it published the guidance document stating that backyard pools are automatically “public pools” whenever they are offered for short-term rental. MDH does not dispute that it published the guidance document and is acting according to it. The first question in this case therefore is whether the guidance document comports with both the plain meaning of the statutory phrase “open to the public generally,” and the plain meaning of the promulgated rule’s reference to “a pool used as part of a business.” If those phrases are even ambiguous on this question, then MDH is enforcing an unpromulgated rule and should be ordered to cease and desist from doing so.

I do not believe the statutory phrase “open to the public generally” is unambiguous. “A statute is . . . ambiguous if its language is subject to more than one reasonable interpretation.” *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013).

In order to qualify as a “public pool” pursuant to Minn. Stat. § 144.1222, subd. 4(d) (2024), a swimming pool must meet two criteria. First, it must be a “pool other than a private residential pool.” Minn. Stat. § 144.1222, subd. 4(d). Second, it must fall into at least one of the following subcategories: (1) is “open to the public generally, whether for a fee or free of charge”; (2) is “open exclusively to members of an organization and their guests”; (3) is open to residents of places like apartments; (4) is open to patrons of places like hotels; or (5) is operated by a place like a park, school, motel, camp, or condominium. *Id.*

Here, MDH asserts, and the ALJ agreed, that even a single, short-term rental means that a pool (A) is *not* “a private residential pool” and (B) *is* “open to the public generally.”

I believe, as petitioners do, that the phrase “open to the public generally” means that anyone can get in line, buy a ticket, and come through the door; there is no need for any special invitation, permission, or qualifications. That also comports with the dictionary definition of “public.” As a noun, the word refers to “[t]he people of a country or community as a whole”; as an adjective, it means “[o]pen or available for all to use, share, or enjoy.” *Black’s Law Dictionary* 1485 (12th ed. 2024). Backyard swimming pools at single-family homes are not “open to the public generally” in any of these ordinary senses of the phrase. I do not believe that offering a property for rent makes it “open to the public generally.”

The ALJ held that the phrase “open to the public generally” refers to a swimming pool that is advertised to the public generally.

The ALJ’s decision stated:

Pools listed with Swimply are open to anyone, anywhere. . . . Petitioners list their pools on the Swimply platform for the express purpose of renting out their pool to non-specific members of the public. The Swimply platform is freely accessible by the public regardless of geographical location or familiarity with the hosts and anyone can request to rent a pool listed on Swimply. Although homeowners have a level of discretion in deciding who can use their pools once a request has been made, they do not seek to exclude the public at large

This would seem to suggest that simply advertising your pool for rent means that it is open to the public generally. I do not believe it does. Moreover, the structure of Minn. Stat. § 144.1222, subd. 4(d)(2)-(5), enumerates several alternative ways that a pool may qualify as “public” even if it is not open to the public generally. It can be open to residents of places like apartments and to patrons of places like hotels, or it can be operated by a facility like a camp or condominium. But of course, most hotels, apartments, camps, and condominiums are advertised in exactly the same way the ALJ described Swimply listings here: to “anyone, anywhere,” for rent or purchase by “non-specific members of the public.”

Moreover, these facilities’ swimming pools are featured permanently in those advertisements. If this kind of public advertising was enough to make a “public pool” then most of subdivision 4(d)(2)-(5) would be largely superfluous. This is not a likely reading of the statute, which must be interpreted “to give effect to all of its provisions.” *Shakopee Mdewakaton Sioux Cmty*, 988 N.W.2d at 146 (quotation omitted).

Thus, it seems to me that open to the public generally can mean when the owner lets in the public to the pool and not when the owner advertises the pool to the public. However, if these are both permissible readings of the statute then it is indeed ambiguous. In that

event, the plain-language exception does not apply. Consequently, MDH needed to comply with the notice-and-comment requirements in adopting a rule pursuant to Minn. Stat. §§ 14.14, .22 (2024). MDH did not. Therefore, I do believe that the guidance document is an unpromulgated rule and would reverse the decision of the ALJ on that basis.