DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO Adams County Justice Center 1100 Judicial Center Dr. Brighton, CO 80601 _____ **LOTTE RADOOR**, Plaintiff: **v.** **CITY OF THORNTON CITY COUNCIL** (including the individual Council members in their official capacity: Heidi Williams, Jacque Phillips, Eric Montoya, Josh Zygielbaum, Adam Matkowsky, Mark Goodman, Val Vigil, Sam Nizam, Janifer Kulmann, **THE CITY OF THORNTON PLANNING DEPARTMENT** (including the individual Board members in their official capacity: Grant Penland, Jay Ruchti. Defendants, **TOPGOLF INTERNATIONAL, INC.** Intervenor.	DATE FILED: June 30, 2017 2:05 PM CASE NUMBER: 2016CV141 **COURT USE ONLY** _____ Case No. 2016 CV 141 Division: C Courtroom: 506

ORDER

Plaintiff, Lotte Raddor, ("Radoor") filed an Opening Brief on April 19, 2017. Defendants, (collectively "Thornton") filed an Answer Brief on May 23, 2017. Intervenor, Topgolf International, Inc. ("Topgolf") filed an Answer Brief on May 24, 2017. Radoor filed Reply Briefs on June 20 and 21, 2017.

The Court takes judicial notice of the court file pursuant to C.R.E. 201(c) and being fully informed, finds and orders as follows:

Background

Radoor filed a Request for Review Under Rule 106(a)(4) challenging the Thornton City Council's approval of an application for a conceptual site plan, for a development permit, and for a specific use permit to construct and operate a Topgolf facility.

Nature of Relief Sought

Radoor seeks an order finding the Thornton City Council abused its discretion in approving Topgolf's permits for their proposed facility, and overturning the corresponding resolutions. Thornton and Topgolf oppose.

Brief Summary of Parties' Arguments

Radoor's Opening Brief

The Thornton City Council (Council) abused its discretion in approving Topgolf's Permits. The Council misconstrued the phrase "private recreation center" within the meaning of the Thornton Development Code (the Code). The City Council also erred in approving the permits as there was no competent evidence on the record demonstrating that Topgolf's Proposed Facility is "private".

The definition of "private recreation center" is pivotal. The Code requires conceptual site plans and development permits to be in compliance with zoning regulations before they are approved. The land that Topgolf targeted for its proposed facility is currently designated as "business park" zoning which prioritize uses that will have a minimum adverse impact on nearby residences. In "business park" zoned areas, "private recreation centers" are an allowed use while "commercial amusement" facilities are not. Here Topgolf and the Council improperly designated the proposed facility as a "private recreation center" in an attempt to circumvent zoning regulations. Topgolf and the Council did so on the basis that Topgolf requires patrons to purchase a "membership" card before utilizing the golf games at the facility. Topgolf's "membership" requirement is

nominal and is effectively a player's club card which keeps track of your score and credit for the driving range. This proposed facility is otherwise open to the general public and therefore is not private.

Plain language construction principles show that "private recreation center" requires that the entire facility be private, and not just a single game within the facility. There is no competent evidence on the record that demonstrates Topgolf's proposed facility will be private. There are many amenities at Topgolf including a 50-table restaurant; a bar; lounge areas; a rooftop terrace where live music events are held; corporate and event meeting space; and gaming areas containing pool, shuffleboard, and video games; all of which are open to the public.

At the Council hearing Topgolf agents testified that their membership requirement applies only to golf and that the general facility is publicly accessible. Because the City Council's decision is dependent on the proposed facility qualifying as "private recreation center"; and because there is no competent evidence in the record demonstrating that Topgolf is a private facility; the Council abused its discretion in approving Topgolf's Permits and its decision must be overturned.

Thornton's Answer Brief

The Council's decision was both reasonable and supported by substantial competent evidence in the record. The Council properly exercised its discretion by relying on competent evidence when rendering its decision to approve Topgolf's project. Thus there is no basis to reverse its decisions.

Radoor's argument is premised on an unsupported conclusion that a facility is not private unless it is completely private. The Council, however, properly exercised its discretion by determining that Topgolf's facility qualifies as a "private recreation center" because (1) the plain language of the Code supports such an interpretation; and (2) its interpretation is in harmony with the goals and

objectives of the zoning scheme.

The Code does not dictate a threshold financial amount for membership is required in order to qualify as a "private recreation center." The Code also does not require that the facility solely provide recreation for the use of members and their guests to the exclusion of any other type of recreation or entertainment. Radoor ignores the simple meaning of a recreation center, which is a place of recreation, or fun and entertainment. The Code already permits a "country club with private membership" in a business park zone; it therefore follows that a "private recreation center" meant for "members and their guests" must be something other than an exclusive private club.

Even if certain terms were ambiguous, the Court must defer to Council's reasonable interpretation. Council's interpretation was in accordance with the fundamental principles of zoning law and the City's own land use guiding principles. In conjunction with the Comprehensive Plan and North Washington Subarea Plan, the zoning classifications in the Code reflect the goal to group compatible uses together in a dynamic fashion.

Council should be given wide latitude in deciding whether a "golf driving range," not expressly listed anywhere in the code, fits the definition of a "private recreation center." In addition to the legal support for Council's interpretation, Council's decision is amply supported by competent evidence in the record. Council considered extensive competent evidence presented at the public hearing regarding Topgolf's proposed project. Given the high standard of deference afforded to Council when interpreting its own code, this Court should uphold the Council's decision.

Topgolf's Answer Brief

In reviewing Topgolf's Application, the City properly and thoughtfully exercised its duty to ensure the facility's compliance with zoning and other

development regulations, performance criteria and standards adopted by the City. Radoor asks the Court to ignore the City's interpretation of its own zoning and development regulations, and urges the application of arbitrary and baseless definitions limiting "private recreation center, club or area" to only those sites where membership fees are at some unidentified level higher than those Topgolf charges its members. Radoor also argues that a "private recreation center" can only be one where the entire facility is closed to non-members, without exception. Radoor asks this Court to substitute her biased and baseless interpretation of the regulations for that of the City. Colorado law requires deference to the decisions of a municipal body where there is competent evidence to support its decision.

The City's interpretation that the facility complied with all Code requirements was not only reasonable, but was also supported by substantial competent evidence, and the Court must therefore uphold that decision.

Radoor's Reply Brief (City)

Much of the procedural history the Council focuses on is irrelevant, is focused on the wrong aspects, and ignores the factual nature of Topgolf's Proposed Facility and information actually presented to the Council at the hearing**.** The sole issue before the Court is whether the City Council abused its discretion in approving Topgolf's permits. Not only does the record establish that Topgolf's Proposed Facility does not qualify as a private facility, but the Council and Topgolf itself fail to contest anywhere in their answer briefs that the facility is, in fact, open to the general public. The Code speaks for itself and shows that "private recreation center" was not meant to encompass a facility such as Topgolf.

To the extent the Council did interpret "private" to include privately-owned facilities open to the general public, it was a misapplication of the law and a clear abuse of discretion. The record demonstrates Topgolf is much more than a "golf driving range facility" and, in fact, is more equivalent to an open-air, outdoor

nightclub. The golf games at Topgolf, although subject to Topgolf's purported "membership" requirement, are effectively open to the general public. If you remove Topgolf's pretextual "membership" designation, or call the facility what it is – that is, one that is open to the general public – you are left with an outdoor commercial facility that operates for profit and offers golf games of skill to patrons for a fee, something which unequivocally is within the "commercial amusement – outside" designation.

Colorado case law and Thornton City Code are not groundless legal support; both bodies of authority unequivocally demonstrate that, here, "private" is meant to indicate exclusivity or actual membership. Where plain language construction of a word could result in multiple meanings, the precise definition of the word should be determined by looking to supplemental sources such as the context of the ordinance. "Country club with private membership" and "private recreation center" are separately defined in the code to distinguish between the specific activities offered at the facilities and not, as the Council contends, to distinguish between meanings of the word "private." If the word "private" were only meant to apply to privately-owned facilities such that facilities open to the general public would still qualify, there would be no need for the qualifier ". . . members and their guests" in the definition.

It is clear why true private recreation centers are approved in business park zoning while outdoor commercial amusement facilities are not: true private recreation centers are limited enough in nature that they have minimum adverse impact on nearby residential development while outdoor commercial amusement facilities, such as Topgolf's Proposed Facility, run the risk of being a nuisance to neighbors.

The City Council's reliance on opinion evidence carries minimal to no weight as it is the underlying factual evidence that must form the basis for a

competent decision, not merely conclusory allegations. If this argument were correct, it would necessarily do away with any fact-finding requirements of the Council as all the Council would have to rely on is opinion testimony as opposed to underlying facts. When one looks beyond self-serving and conclusory opinions offered by City employees and Topgolf representatives, it is clear that not only is there insufficient evidence on the record to show that Topgolf's proposed facility fits within the definition of "private recreation center" but, indeed, all of the evidence on the record demonstrates the exact opposite;

Radoor's Reply Brief (Topgolf)

The Court should not buy into Topgolf's attempt to frame Radoor and her reasons for bringing this action in a negative light, nor should the Court be persuaded by the amount of time it took for City employees and Topgolf to figure out a way to circumvent the City's zoning laws**.** Radoor has a son with profound sensory disability issues and selecting a house with limited environmental ambient noise and light pollution, such as one next to a golf course, was necessary to ensure the functioning of her family. Instead of having the City and the City Council objectively interpret and apply the City's zoning ordinances, Radoor is left fighting for her rights on her own and seeking relief from this Court to ensure the Council appropriately performed its job.

To the extent Topgolf asserts that City staff offered opinions as to whether Topgolf's Proposed Facility conforms with zoning requirements, those opinions are conclusory, self-serving, and are insufficient in and of themselves to establish zoning compliance**.** "Private" is an adjective, it necessarily has to modify a noun, in this case the word "center" in "private recreation center**."** Since "private" applies to "center," the entire "center" or facility must be private. True private recreation centers are not open to the general public but, instead, are open only to those that have paid membership fees, a characteristic that is not exhibited by

Topgolf's Proposed Facility. All of the areas in a Topgolf facility that a "member" can enter a person of the general public can also enter. Topgolf's "membership" requirement offers no actual exclusivity with respect to entering the facility; instead, "membership" is effectively a one-time transaction that amounts to the purchase of a player's score tracking card.

The City's position concerning "private" is non-binding opinion testimony and does not give the City Council an unrestricted opportunity to do what it wants. If a City employee's opinions were in and of themselves dispositive, there would be no need for the City Council to review applications. Topgolf also misconstrues the Code and ignores the fact there is no evidence on the record reflecting when or how the Director of Planning made a determination. Here there is no actual conflict between the regulations at issue; that is, there is no conflict between the definitions of "commercial amusement-outside" and "private recreation center," the definitions co-exist without being contradictory. Ultimately, and as the result of specific inquiry by Radoor, the City determined that there were no documents, communications or otherwise, reflecting that an interpretation was made, what that specific interpretation was, or what the Director of Planning considered in making that interpretation.

Code § 18-43 makes clear that the Council is charged with approving applications where those applications comply with the Code, including "zoning and development regulations" present in the Code. NWO District requirements govern such issues as whether or not a particular building can be finished with wood paneling, reflective glass, or steel accents, and can supersede other, conflicting requirements. However, broader zoning use category requirements, such as outdoor commercial entertainment facilities being banned in business park zoned areas, are not superseded. Accordingly, the Council abused its discretion in approving Topgolf's permits and the City Council's decision must be overturned.

Issue

Whether the City Council of Thornton ("City Council") abused its discretion in finding that Topgolf is a "private" recreation center?

Principles of Law

C.R.C.P. 106 (a)

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

> (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

Standard of Review

In a C.R.C.P. 106(a)(4) action, the Court must determine "whether the body or officer has exceeded its jurisdiction or abused its discretion." The Court's review is limited to the record before the hearing body. C.R.C.P. 106(a)(4)(I). "The district court exercises no fact finding authority in its review of an agency decision." *Sapp v. El Paso Cty. Dep's of Human Servs.*, 181 P.3d 1179, 1182 (Colo. App. 2008) (citing *Bourgeron v. City & Cty. of Denver*, 159 P.3d 701, 706 (Colo. App. 2006)).

The court may overturn an agency's decision "only if the court finds the agency acted in an arbitrary and capricious manner, made a determination that is unsupported by the record, erroneously interpreted the law, or exceeded its constitutional or statutory authority." *Bourgeron,* 159 P.3d, at 706; see also *Kruse v. Castle Rock,* 192 P.3d 591, 601 (Colo. App. 2008) ("Governmental proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of the governmental body's rulings must be resolved in its

favor."). Therefore, if an agency's interpretation of a code provision or rule is reasonable, the Court must affirm it. See *Quaker Ct. LLC v. Bd. of Cty. Comm'rs*, 109 P.3d 1027, 1030 (Colo. App. 2004); *Denver v. Bd. of Adjustment*, 55 P.3d 252, 254 (Colo. App. 2002).

Analysis

Contextually, the court acknowledges that governmental entities' decisions are afforded great deference in reviews under Rule 106(a)(4). The reviewing court may not substitute its judgment for that of the fact finder-agency. The reviewing court "may only determine if the record supports the decision, not whether [it] would arrive at a different decision." *Morris-Schindler, LLC v. City & Cnty. of Denver*, 251 P.3d 1076, 1080 (Colo. App. 2010). "The burden is therefore on the party challenging a governmental body's action to overcome the presumption that the government's acts were proper." *Kruse*, 192 P.3d at 601. Such is the legal terrain that guides this court's assessments herein.

Is the proposed Topgolf facility "private"?

Radoor argues that the Council misconstrued the term "private recreation center" as a subtext to improperly permit the Topgolf facility and that such action/interpretation was an abuse of discretion. The City denies that such misconstruction occurred, or that a reversal is warranted. The land that Topgolf seeks for its proposed facility has been designated by the Council as "business park" zoning. Such zoning prioritize uses that have a minimum adverse impact on nearby residences. As such, "business park" zoned areas, "private recreation centers" are an allowed use while "commercial amusement" facilities are not. Code § 18-160. Radoor argues that Topgolf is the latter under the Code. But the Council determined that Topgolf is a "private recreation center" and thus an appropriate use. Radoor urges that because Topgolf facility is not a *completely* private facility, it does not fit the Council's designation. The court finds that the pivotal dispute

herein centers on the Council's determination that the proposed Topgolf facility is a "private" facility. The word "private" is not defined in the Code, but the phrase "private recreation center, club or area" is defined under Code § 18-901.[1]

Radoor's arguments track a number of language interpretative pathways, but primarily center on the fact that Topgolf allows public access to its bar, restaurant, and game room. Conversely, the City and Topgolf respond that property ownership designation is a reasonable means of determining the meaning of the word private in this context, and it is clear that Topgolf is privately owned.

When construing a land use code, courts are instructed to look first to the plain language, being mindful of the principle that courts presume that the governing body enacting the code meant what it clearly said. See *Sierra Club vs. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). If however, the code's language is ambiguous, courts give deference to the board's interpretation of the code it is charged with enforcing, and its interpretation will stand *if it has a reasonable basis in law* and is warranted by the record. See *Sierra Club,* 166 P.3d at 312 (citing *Rivera–Bottzeck v. Ortiz*, 134 P.3d 517, 521 (Colo.App.2006)). However, if the board's interpretation is inconsistent with the governing relevant articles, then that interpretation is not entitled to deference. See *Regents of University of Colorado v. City & County of Denver*, 929 P.2d 58, 61 (Colo.App.1996); *Shupe v. Boulder Cty*., 230 P.3d 1269, 1272 (Colo. App. 2010).

Colorado courts have determined that a term is ambiguous when it is reasonably susceptible to more than one meaning. *Carlisle v. Farmers Ins. Exch*., 946 P.2d 555, 556 (Colo.App.1997); *Lincoln Gen. Ins. Co. v. Bailey*, 224 P.3d 336, 339 (Colo. App. 2009), aff'd, 255 P.3d 1039 (Colo. 2011). The court finds in the context and application of this case, the word "private" is a word that is reasonably

[1] City Code Sec. § 18-901:

"Private recreation center, club or area means an area providing private recreational facilities such as playgrounds, parks, game courts, swimming pools, and playing fields for the use of members and their guests".

susceptible to more than one meaning. Indeed, both sides reasonably argue that the word carries different meaning as applied here, and the Code does not define the specific term.

Reasonable Basis in Law

The court must now address whether the Council's interpretation of the word "private" had a reasonable basis in law. The City argues that both case law and Code support the Council's interpretation that a property does not lose its "private character" merely because members of the general public are invited to use it. See, e.g., *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972). For the reasons cited below, the court is not persuaded.

In determining whether the Council committed an abuse of discretion, courts may consider whether there was a misinterpretation or misapplication of governing law. *Alward v. Golder*, 148 P.3d 424, 428 (Colo.App.2006); *Droste v. Bd. of County Comm'rs*, 85 P.3d 585, 590 (Colo.App.2003); *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). A local judicial body abuses its discretion where it has, among things, misconstrued or misapplied the applicable law. *Friends of Black forest Preservation Plan, Inc. v. Board of County Commissioners of El Paso County*, 381 P.3d 396, 400 (Colo. App. 2016). In determining whether a local body misconstrued or misapplied applicable law, the reviewing court reviews questions of law, such as the interpretation of a municipal ordinance, *de novo.* Under d*e novo* review, the reviewing court considers the question anew, as if no decision had previously been rendered. See, e.g., *People v. Williams*, 473 P.2d 982, 984 (Colo. 1970). Here, the City Council's determination that the Topgolf facility was a "private" facility was quasi-judicial in nature because it applied zoning ordinance regulations to the specific circumstances of Topgolf's Permits. See *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975) (discussing the definition of quasi-judicial decision). This court therefore concludes that the Council's

application of the appropriate legal factors to the determination of whether Topgolf is a public or private facility is an application that is subject to a *de novo* review.

Case law that mirrors the unique factual and legal issues present in any particular case can often be difficult to find. Here, neither the Parties, nor the court has found case law exactly on point. But the determination as to whether a business is a private or a public business has been the subject of a Colorado Court of Appeals case. In the court's research, a 'private vs. public' judicial determination surfaces at times in the context of taxation and discrimination cases. A multi-factor 'private vs public' test was set forth in *United States v. Lansdowne Swim Club*, 713 F.Supp. 785 (E.D.Pa.1989), aff'd, 894 F.2d 83 (3rd Cir.1990). These factors were recognized and approved by our Court of Appeals in *People v. Bus. or Businesses Located at 2896 W. 64th Ave*., 989 P.2d 235, 239 (Colo. App. 1999). The 2*896 W. 64th Ave* case involved an Adams County pursuit of a public nuisance action concerning a local "spa house". The Defendant in *2896 W. 64th Ave*, claimed exemption from County massage parlor ordinances arguing that it was a "private" club and thus not "open to the public." In affirming the Adams County trial court, the Court of Appeals approved the consideration of certain factors to aid courts in determining whether a business was a public or a private entity. Among the pertinent factors reviewed were: (1) the genuine selectivity of the group in the admission of its members; (2) the membership's control over the operation of the establishment; (3) the history of the organization; (4) the use of the facilities by non-members; (5) the purpose of the club's existence; (6) whether the club advertises for members; (7) whether the club is a profit or non-profit organization; and (8) the formalities observed by the club. *People v. Bus. or Businesses Located at 2896 W. 64th Ave*., 989 P.2d 235, 239 (Colo. App. 1999).

Courts around the country have accepted the *Lansdowne* framework as sound in a variety of legal/factual settings, but circumstances may dictate

consideration of other factors as well. See, e.g., E*agles v. Grand Aerie of Fraternal Order*, 148 Wash.2d 224, 59 P.3d 655, 669 (2002), cert. denied, 538 U.S. 1057 (2003) (considering specific recruitment practices). Certain jurisdictions place the greatest weight upon whether membership is truly selective in discerning whether a membership organization is actually private or public. E.g., *United States v. Trustees of Fraternal Order of Eagles*, 472 F.Supp. 1174, 1175 (E.D.Wis.1979). "The essence of privacy is selectivity. If there is little or no selectivity, there is no basis to claim privacy." *Rogers v. International Ass'n of Lions Clubs*, 636 F.Supp. 1476, 1480 (E.D.Mich.1986). Thus, the genuine selectivity factor alone can be conclusive when an organization wholly lacks exclusivity. See *Concord Rod and Gun Club, Inc. v. MCAD*, 402 Mass. 716, 524 N.E.2d 1364, 1367 (1988); *Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 587, 825 A.2d 480, 485–86 (2003).

The consideration of these factors appears the most relevant that the court has discovered. In weighing these factors in the context of the record provided herein, the court finds that the record does not support the Council's determination that Topgolf is a "private" facility. Indeed, the court finds that upon review of the submitted record, that no factor appears to clearly support a determination that the proposed Topgolf facility is a "private" facility.

In conclusion, the court finds that the word "private" as considered here is an ambiguous term in that it is reasonably subject different interpretations. However, on a *de novo* review, the court finds that the Council's interpretation and application of the word lacks a reasonable basis in law because the relevant factors appear to weigh against the Council's determination that Topgolf is a "private" facility. The court therefore finds that the Council's determination that Topgolf is a "private" facility was an abuse of their discretion. Given the business park zoning designation, the finding that Topgolf was a "private" facility was a condition precedent to permit approval. For these reasons, the court grants Radoor's request

to overturn the corresponding City Council resolutions granting Topgolf's permit.

Request for Oral Argument

Finally, Radoor asks the court to present oral argument. "[T]he purpose of oral argument is to clarify and emphasize what has been written." Louis J. Sirico, Jr., A Proposal for Improving Argument Before the United States Supreme Court, 42 Pepp. L. Rev. 195, 210 (2015). Generally, the trial court is granted discretion to allow or refuse oral argument. See e.g., *Brandt v. MacLellan*, 495 P.2d 250 (Colo. App. 1972). The court finds that the contested matters herein have been extensively and particularly well briefed by the Parties. Indeed, the briefs submitted for court consideration exceed 100 pages. Because the court finds that the briefs filed sufficiently clarify and emphasize the Parties respective positions, the Court denies Radoor's request for oral argument**.**

Order

The Court **GRANTS** Radoor's C.R.C.P. 106 action, and **DENIES** Radoor's Request for Oral Argument.

SO ORDERED this 30th day of June, 2017.

BY THE COURT:

DISTRICT COURT JUDGE

Certificate of Service via ICCES on June 30, 2017 to all parties