STATE OF NEW YORK
SUPREME COURT COUNTY OF MONTGOMERY

ANN M. THANE, in her capacity as Mayor of the City of Amsterdam on behalf of the residents of the City of Amsterdam and in her individual capacity as a taxpayer and representative of the residents of the City of Amsterdam,

Plaintiff,

– against –

DIANE HATZENBUHLER, in her capacity as Deputy Mayor of the City of Amsterdam and as a Councilmember, **MATTHEW A. AGRESTA**, in his capacity as Controller of the City of Amsterdam, **EDWARD W. RUSSO**, in his capacity as a Councilmember, **VALERIE BEEKMAN**, in her capacity as a Councilmember, **RONALD J. BARONE, SR.**, in his capacity as a Councilmember, **RICHARD LEGGIERO**, in his capacity as a Councilmember, and **JOSEPH MERENDO**,

Defendants.

COMPLAINT AND PETITION

Index No.: 2014-207

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Plaintiff, Ann M. Thane, in her capacity as Mayor of the City of Amsterdam and on behalf of the residents of the City of Amsterdam and in her individual capacity as a taxpayer and representative of the residents of the City of Amsterdam (the "Plaintiff"), by her attorneys, Goldman Attorneys PLLC, bring this combined Civil Practice Law and Rules ("CPLR") Article 78 proceeding and CPLR §3001 declaratory judgment proceeding to invalidate a certain agreement dated March 4, 2014 (the "Agreement") by and between the City of Amsterdam (the "City") and Joseph Merendo, as tenant (the "Tenant") pursuant to which the Tenant leased certain real property improvements owned by the City which are located at the Amsterdam Municipal Golf Course (the "Golf Course"). Plaintiff affirmatively alleges as follows:

1. The Agreement was executed and delivered by the Diane Hatzenbuhler in her capacity as the Deputy Mayor of the City (Ex. "A").

2. At no time during the pendency of these proceedings has the duly elected Mayor of the City, Ann M. Thane, been absent, incapacitated or otherwise unable or unwilling to carry out the duties and responsibilities of the Mayor of the City (¶5 Affidavit of Ann M. Thane sworn to March 10, 2014 (the "Thane Affidavit")).

3. Section C-35(B) of the City Charter provides the following relative to the power and authority of the Deputy Mayor of the City:

> [i]n the event of the absence or incapacity of the Mayor, the Deputy Mayor as provided in Article III of the Charter shall act as Mayor and shall exercise all of the powers and duties of the Office of the Mayor except powers to appoint and remove officers and employees and to veto acts of the Common Council (¶17 Thane Affd.).

4. Since the Mayor has not been absent, incapacitated, unable or unwilling to carry out the duties and responsibilities of the Mayor of the City at any time during the pendency of these proceedings, the passage by the Common Council of Resolution #13/14-174 (Ex. "E") appointing the Deputy Mayor to sign the Agreement, and the ensuing execution and delivery of the Agreement by the Deputy Mayor are both illegal actions that are void under the Charter of the City and General City Law of the State of New York ("GCL") such that the Agreement is a result of two separate ultra vires and illegal actions and accordingly the Agreement is null and void as a matter of law.

5. The Agreement provides for the lease of real property of the City. GCL§23(2)(b) provides that any lease of the real property of the City requires the approval of

both the Common Council of the City and the Mayor of the City. GCL §23(2)(b) provides the following:

> [a] sale or lease of real estate or a franchise shall not be valid or take effect unless made as aforesaid and subsequently approved by a resolution of the board of estimate and apportionment in a city having such a board, **and also approved by the mayor** (*emphasis added*)[1] (¶20 Thane Affd.).

6. The Plaintiff, in her capacity as the Mayor of the City, did not approve the Agreement which is a lease of the real property of the City for no monetary consideration to the City since Defendant Merendo is given exclusive use and control of both the pro shop (the "Pro Shop") and golf cart storage sheds (the "Sheds") at the Golf Course (Ex. "D") (¶21 Thane Affd.).

STANDING

7. At all times hereinafter mentioned, plaintiff Ann M. Thane was and still is a resident of the City.

8. At all times hereinafter mentioned, plaintiff Ann M. Thane and is the duly elected Mayor of the City.

9. As a resident of the City of Amsterdam, Ms. Thane is a taxpayer of the City and brings this proceeding as a resident of the City and on behalf of the other residents and taxpayers of the City since Ms. Thane will suffer financial harm from the total lack of revenues being paid to the City under the Agreement for the use of the Pro Shop and Shed. The Agreement in relevant part provides the following:

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[1] Even though the City does not have a board of estimate and apportionment, General City Law §23(b) requires the approval of the Common Council by a three-fourths vote (1st Sentence) and the approval of the Mayor.

> the "City" hereby agrees to and with the "Golf Pro" to permit the "Golf Pro" to use the Pro Shop at the Amsterdam Municipal Golf Course at no rental value charge for the term commencing the 1st day of April, 2014 and ending on the 30th day of November, 2016, for the sale by the "Golf Pro" at a profit, golf equipment, supplies and accessories" (Ex. "A", Witnesseth").

10. Plaintiff has standing to commence and maintain this action as the representative of the residents of the City since the Agreement provides Defendant Merendo with the free use of the Pro Shop and Sheds without rental or lease payment of any kind to the City, which is an illegal gift or loan of the City's property in violation of the New York State Constitution Article VII, Section 8 prohibition against gifts or loans of municipal property to a private citizen (¶¶32-33 Thane Affd.)

11. Plaintiff has standing to commence and maintain this action since her statutory and constitutional powers under the Charter, GCL and other applicable law has been usurped by the unauthorized and illegal execution and delivery of the Agreement by the Deputy Mayor and invalid approval thereof by the Common Council. As a result of the illegal and unauthorized usurpation of the power of the Mayor, the Plaintiff, as the Mayor of the City, has and will experience unique and special harm different from the community at large since the Deputy Mayor illegally acted as the Mayor by signing the Agreement during a period of time when the Mayor was serving as the Mayor and was not under any incapacity or inability to exercise the powers of the Mayor (¶34 Thane Affd.).

12. The Plaintiff has standing to commence and maintain this action since her statutory and constitutional powers under the Charter, the GCL and other applicable law has been usurped by the unauthorized and illegal execution and delivery of the Agreement by the Deputy Mayor and approval thereof by the Common Council of the City. As a result of the

illegal and unauthorized usurpation of the statutory power reserved to the Mayor under General City Law §23(b), the Plaintiff, as the Mayor of the City has and will experience unique and special harm different from the community at large since the Deputy Mayor signed the Agreement during a period of time when the Mayor was serving as the Mayor and was not under any incapacity or inability to exercise the powers reserved to the Mayor under GCL §23(b) (¶34 Thane Affd).

DEFENDANTS

13. Upon information and belief, at all times hereinafter mentioned, defendant Diane Hatzenbuhler (the "Deputy Mayor") was a resident of the City of Amsterdam, New York, and a member of the Common Council of the City of Amsterdam, New York and the Deputy Mayor of the City of Amsterdam, New York.

14. Upon information and belief, at all times hereinafter mentioned, defendant Matthew A. Agresta ("Controller") was a resident of the City of Amsterdam, New York and the Controller of the City of Amsterdam.

15. Upon information and belief, at all times hereinafter mentioned, defendant Edward W. Russo was a resident of Amsterdam, New York and a member of the Common Council of the City of Amsterdam, New York ("Russo").

16. Upon information and belief, at all times hereinafter mentioned, defendant Valerie Beekman was a resident of the City of Amsterdam, New York and a member of the Common Council of the City of Amsterdam, New York ("Beekman").

17. Upon information and belief, at all times hereinafter mentioned, defendant Ronald J. Barone, Sr. was a resident of the City of Amsterdam, New York and a member of the Common Council of the City of Amsterdam, New York ("Barone").

18. Upon information and belief, at all times hereinafter mentioned, defendant Richard Leggiero was a resident of the City of Amsterdam, New York and a member of the Common Council of the City of Amsterdam, New York (the "Leggiero") (the Deputy Mayor, Russo, Beekman, Barone and Leggiero are collectively referred to as the "Common Council of the City" (the "Common Council").

19. Upon information and belief, defendant Joseph Merendo is an individual and a resident of the City of Amsterdam, New York and the tenant under the Agreement.

20. The Thane Affidavit and the exhibits referenced therein and in this complaint and petition are attached hereto, incorporated by reference, and made a part hereof (the "Exhibits").

BACKGROUND

21. The City is the owner of a golf course located in Amsterdam, New York and known as the Amsterdam Municipal Golf Course (¶6 Thane Affd.).

22. The Golf Course contains a building which has been operated as a Pro Shop (¶7 Thane Affd.).

23. The Golf Course contains the Sheds which have been operated and used for the storage of the golf carts at the Golf Course (¶7 Thane Affd.).

24. The Golf Course has experienced a drop of memberships and revenues over the years, which impacts the income received by the City. The City formed a Golf Commission to

research the operation of the Golf Course and to make recommendation on the future operation of the Golf Course (¶8 Thane Affd.).

CURRENT DISPUTE

25. Upon information and belief, the Common Council, in secret, negotiated the Agreement with Defendant Merendo which provides him with the rent free use of the Pro Shop and the Sheds (*see* Ex. "A" Witnesseth).

26. The Mayor did not participate in the negotiation of the Agreement with Mr. Merendo (¶12 Thane Affd.).

27. On or about January 1, 2014, the Common Council passed Resolution #13/14-150 purportedly authorizing the City to enter into the Agreement with Mr. Merendo (Ex. "B").

28. On or about January 10, 2014, after reviewing several responses to the request for proposal solicited by the Golf Commission, including a proposal from Defendant Mr. Merendo, which simply consisted of his prior contract and a cover letter, the Golf Commission recommended that the City hire Richard Scott as the new Golf Pro and General Manger of the Golf Course (Ex. "C").

29. On or about January 16, 2014 the Mayor sent correspondence to the Common Council vetoing Resolution #13/14-150 because it does not protect the interest of the taxpayers and golfers of the City (Ex. "D").

30. On or about February 4, 2014, the Common Council passed Resolution #13/14-174 purportedly authorizing the Deputy Mayor to sign the Agreement with Defendant Merendo (Ex. "E").

31. On February 19, 2014 the Corporation Counsel for the City sent Opinion 2014-2 to the Common Council finding that Resolution #13/14-174 violated Municipal Home Rule Law §10 and §23(2)(f) (Ex. "F").

32. On or about February 20, 2014 the Plaintiff as the duly elected and serving Mayor of the City sent correspondence to the Common Council vetoing Resolution #13/14-174 as an illegal usurpation of executive mayoral powers assigned to Plaintiff by the City Charter (*see* Ex. "G").

33. On or about March 4, 2014, in violation of the City Charter and GCL §23(2)(b), Deputy Mayor, Diana Hatzenbuhler signed the Agreement for and on behalf of the City which purportedly bound the City to the Agreement with Defendant Merendo and gave Defendant Merendo the exclusive right to use and occupancy of City property without the payment of any consideration to the City (Ex. "A").

34. Section C-29 of the City Charter of the City does not empower the Common Council to negotiate the Agreement being a lease of municipal property.

35. Section C-35(B) of the City Charter of the City does not authorize the Deputy Mayor to sign the Agreement with the City and bind the City to the terms, covenants and conditions of the Agreement.

36. The actions of the Common Council of approving the execution and delivery of the Agreement in violation of GCL §23(2)(b) and the provisions of Section C-29 of the City Charter and the authorizing the Deputy Mayor to execute, deliver and bind the City to the Agreement have necessitated this proceeding.

37. The actions of the Deputy Mayor in executing and delivering the Agreement in violation of GCL §23(2)(b) and the provisions of Section C-35(B) of the Charter have necessitated this proceeding.

AS AND FOR A FIRST CAUSE OF ACTION
(The Agreement is a Lease of Public Property)

38. The Plaintiff repeats and realleges the allegations contained ¶¶1-37 of this Complaint and Petition.

39. The Agreement with Defendant Merendo in relevant part provides Defendant Merendo with the exclusive right to use and occupy the Pro Shop and Sheds for no consideration (¶12 Thane Affd.).

40. The Agreement is a lease of the real property of the City since the Agreement provides in relevant part that: "[a]ll damages to such fixtures, facilities and equipment shall be repaired by the Pro at his own expense" (Ex. "A", ¶21). It also specifies the hours that the Pro Shop shall be operated, that it shall be kept clean and orderly and requires the Mr. Merendo to pay for natural gas (Ex. "A", ¶11).

41. The Agreement is a lease of the real property of the City since the Agreement provides in relevant part that Mr. Merendo must:

> maintain public liability and golf cart insurance with the City of Amsterdam named as an additional insured in the amount of not less than $1,000,000 for bodily injury and property damage (Ex. "A", ¶23).

42. The Agreement is a lease of the real property of the City since the Agreement does not provide the City with the right of termination permitting the City to take immediate possession of the Pro Shop and Sheds (Ex. "A").

43. In sum, based upon its terms, the Agreement is for a lease of real property.

44. The Golf Course, including the Pro Shop and Sheds, are real property improvements owned by the City which is real property held in trust for the benefit of the residents of the City and the public at large (¶12 Thane Affd.).

45. As such, the Agreement is invalid as a matter of law because it is a lease of public property without consideration which was not approved by the Mayor as required under the City Charter and General City Law §23(2)(b).

AS AND FOR A SECOND CAUSE OF ACTION
(Common Council Lacked Authority to Approve the Agreement)

46. Plaintiff repeats and realleges each and every allegation contained in ¶¶1-45 herein.

47. According to GCL§23(2)(b):

> [a] sale or lease of real estate or franchise shall not be valid or take effect unless made as aforesaid and subsequently approved by a resolution of the board of estimate or apportionment in any city having such a board, and also approved by the mayor.

48. The GCL specifically states that approval of the Mayor is required before a lease of real estate can take effect (¶20 Thane Affd.).

49. The Common Council cannot circumvent the GCL requirements.

50. The dual approval of the Common Council and the Mayor is additional protection for the residents of municipality provided by the statutes of New York State in order to provide additional safeguards and statutory preconditions for any and all leases of municipal property

51. The Mayor has not approved the Agreement, and the lack of approval of the Agreement means that the Agreement "shall not be valid" pursuant to the requirements of

GCL§23(2)(b) and it cannot be deemed to be valid without the approval by the Plaintiff in her capacity as the Mayor.

52. Accordingly, the Agreement must be declared null and void.

AS AND FOR A THIRD CAUSE OF ACTION
(The Common Council Lacked Authority to Negotiate the Agreement)

53. Plaintiff repeats and realleges each and every allegation contained in ¶¶1-52 herein.

54. Section C-36(f) of the City Charter of the City of Amsterdam states that the Mayor has the power to:

> negotiate and grant leases, concessions, licenses and permits for use of City property and appurtenances and to execute deeds and enter into contracts on behalf of the City, as authorized by the Common Council.

55. The Mayor is exclusively vested in the City Charter with the authority to negotiate and grant leases of City property. The Common Council has no such authority to negotiate the Agreement (¶22 Thane Affd.).

56. The Agreement is not a "public contract" within the meaning of such term under City Charter Section C-29(F), which is limited to the award of a public works contracts or public bid contracts that are awarded in response to a request for bid issued by the Common Council and submitted to the City Clerk and publically opened and read at the time and place specified in the request for bids (¶24 Thane Affd.).

57. The Agreement was not a result of a public bid process initiated by the Common Council since the request for proposal process came from the City's Golf Commission (Ex. "C") (¶25 Thane Affd.).

58. Section C-29 of the City Charter does not provide the Common Council with the right to negotiate the Agreement and does not authorize the Deputy Mayor to sign the Agreement while the Mayor is acting and serving in her capacity as the Mayor (¶26 Thane Affd.).

59. The Mayor did not negotiate the Agreement with Mr. Merendo (¶12 Thane Affd/).

60. Section C-29 of the City Charter only empowers the Common Council to "award" public contracts resulting from a bid initiated by the Common Council and opened by the City Clerk (¶27 Thane Affd.).

61. The Agreement with Mr. Merendo did not come as a result of public bid process initiated by the Common Council, nor was the Agreement negotiated by the Plaintiff as the Mayor of the City, who is the only party with the statutory power to negotiate a lease. Once a lease has been negotiated by the Mayor it is subject to the approval of the Common Council. City Charter §C-36(F) (¶28 Thane Affd.).

62. The Common Council does not have the unilateral right to amend or ignore the requirements of the City Charter which expressly empower only the Mayor with the power to negotiate a lease of the improvements at the Golf Course and to approve the Agreement as a lease of real property owned by the City pursuant to GCL §23(2)(b) (¶29 Thane Affd.).

63. It is undisputed that the Golf Course and the improvements thereon including the Pro Shop and the Sheds constitute City property.

64. As such, the Common Council had no authority to negotiate or approve the Agreement as lease of City property and its actions should be deemed null and void (¶23 Thane Affd.).

AS AND FOR A FOURTH CAUSE OF ACTION
(The Agreement is Null & Void)

65. Plaintiff repeats and realleges each and every allegation contained in ¶¶1-64 herein.

66. According to Section C-35 of the City Charter of the City:

> [i]n the event of absence or incapacity of the Mayor, the Deputy Mayor as provided in Article III of this Charter shall act as Mayor and shall exercise all of the powers and duties of the Office of Mayor except powers to appoint and remove officers and employees and to veto acts of the Common Council.

67. The Mayor of the Plaintiff was not absent or incapacitated at any time prior to, on or after March 4, 2014 (¶5 Thane Affd.).

68. The Deputy Mayor was fully aware that the Mayor was not absent, incapacitated or otherwise unable to perform her duties of the Mayor since at all times relevant to these proceedings the Plaintiff has acted and fulfilled the duties and responsibilities of the Mayor (¶18 Thane Affd.).

69. The Deputy Mayor was aware of the Mayor's veto of the Resolutions and that in such matters the Mayor was acting and fulfilling her official role as the Mayor of the City (*see* Exs "D" & "G"). The Deputy Mayor was aware that the Mayor refused to enter into the Agreement and that in such position the Mayor was acting and fulfilling her official role as the Mayor of the City (*see* Ex. "H").

70. The Deputy Mayor of the City had no legal authority to execute and deliver the Agreement for and on behalf of the City on March 4, 2014 (¶19 Thane Affd.).

71. The Agreement is null and void and illegal.

AS AND FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment)

72. Plaintiff repeats and realleges each and every allegation contained in ¶¶1-71 herein.

73. Plaintiff requests the Court review the actions taken by the Common Council and the Deputy Mayor which are in violation of the Charter and GCL §23(2)(b).

74. The Common Council did not have the unilateral right or statutory power to negotiate or grant a lease of the real property of the City (¶23 Thane Affd.).

75. Under the City Charter, the Deputy Mayor did not have the power to sign the Agreement since the Mayor was not absent or otherwise incapacitated and otherwise unwilling or unable to serve as the Mayor of the City (¶18 Thane Affd.).

76. The Common Council and the Deputy Mayor have exceeded their authority under the Charter and under the GCL.

77. Pursuant to CPLR §3001, Plaintiff is entitled to an order determining that the action of the Common Council in approving the Agreement was illegal and null and void.

78. Pursuant to CPLR §3001, Plaintiff is further entitled to an order determining that the action of the Deputy Mayor in actually signing and binding the City to the Agreement was illegal and null and void.

79. Pursuant to CPLR §3001, Plaintiff is further entitled to an order determining that the Agreement is null and void.

AS AND FOR A SIXTH CAUSE OF ACTION
(Article 78 Proceeding)

80. Plaintiff repeats and realleges each and every allegation contained in ¶¶1-79 herein.

81. The Common Council is without any statutory authority to negotiate the Agreement and, as such, it was prohibited from doing so on behalf of the City.

82. The Deputy Mayor had no authority to sign the Agreement on behalf of the City of Amsterdam under the City Charter since the Mayor was not absent, incapacitated or unwilling to serve and otherwise carry out her duties of the Mayor (¶18 Thane Affidavit).

83. The Plaintiff is entitled to Judgment on the CPLR Article 78 proceeding that the actions taken by the Common Council and the Deputy Mayor are illegal and in violation of the Charter and GCL §23(2)(b) and that the Agreement should be deemed null and void.

84. A justiciable controversy exists between the parties and the Plaintiff has no adequate remedy at law.

85. No previous application for the relief being requested herein has heretofore been made.

AS AND FOR A SEVENTH CAUSE OF ACTION
(Violation of NYS Constitution Article VII, Section 8)

86. Plaintiff repeats and realleges each and every allegation contained in ¶¶1-85 herein.

87. The Agreement provides Defendant Merendo with the exclusive right to use and occupation of the Pro Shop so that he conducts his business of running the Pro Shop at the Golf Course and the rental of golf carts (¶30 Thane Affd.).

88. The Agreement, in relevant part provides for the payment of no remuneration to the City for its lease of the Pro Shop and Sheds (Ex. "A" Witnesseth Clause).

89. The Agreement is an illegal and unlawful gift of the right to use municipal real property to a private citizen in violation of the New York State Constitution prohibition against the gift and/or loan of municipal assets to a private party (¶¶31-32 Thane Affd.).

AS AND FOR AN EIGHTH CAUSE OF ACTION
(Declaratory Judgment Preventing the Common Council from Enacting Ordinances which Modify the City Charter without the Passage of a Referendum)

90. Plaintiff repeats and realleges each and every allegation contained in ¶¶1-89 herein.

91. General Municipal Law ("GML") §243 provides that the governing legislative body of City has the power to determine that the power to equip, operate and maintain playgrounds and recreational centers shall be exercised by a recreation commission.

92. The Charter of the City was adopted in 1978 and contained Article XI Recreation Department which provided that it was organized pursuant to the GML (Ex. "I").

93. On or about March 17, 1981, the Common Council passed an ordinance which authorized the recreation commission to manage, maintain and operate the Municipal Golf Course (the "1981 Ordinance") (Ex. "J").

94. On July 3, 1984, the Common Council of the City enacted Local Law No. 2 entitled "A Local Law Amending the Charter of the City of Amsterdam Pertaining to the Recreation Department" ("Local Law #2") (Ex. "K"). Local Law #2 amended the City Charter to allow the Common Council to organize and operate the Golf Course through the enactment of an ordinance. This local law was passed without a public referendum.

95. On or about August 7, 1984, the Common Council rescinded the 1981 Ordinance and established the Arthur Carter Amsterdam Municipal Golf Commission which shall have the duty to "organize, manage, operate, maintain and govern the Golf Course" (the "1984 Ordinance") (Ex. "L").

96. The 1984 Ordinance provided that the membership of the Commission consisted of six members. One of the members of the Commission was required to be an Alderman appointed by the Mayor.

97. The other members of the Commission are appointed by the Mayor pursuant to GML §243(2).

98. The Municipal Home Rule ("MHR") §2(9) provides that a Local Law capable of amending a City Charter specifically does not include "an ordinance, resolution or other similar act of the legislative body or of any other board or body".

99. MHR §23(2)(f) provides that a local law shall be subject to permissive referendum if it abolishes, transfers or curtails any power of an elective officer.

100. The Mayor is an elective officer of the City.

101. On or about March 4, 2014, the Common Council introduced Ordinance 2014-F entitled "An Ordinance Amending Chapter 28 of the Code of the City of Amsterdam" (the "2014 Amendment to Chapter 28") (Ex. "M").

102. Chapter 28 in the City Code is entitled "Chapter 28. GOLF COMMISSION".

103. The 2014 Amendment to Chapter 28 of the City Code is being considered for adoption by the Common Council through the adoption of an ordinance.

104. Local Law #2 of 1984 sought to amend the City Charter and allow that the "facility may be organized and operated by ordinance." Since this amendment was not approved by a referendum it was either not intended to transfer the power of an elective official or it was improperly adopted. In either case, the proposed change of the appointing authority by ordinance is therefore inconstant with the City Charter or based upon an invalidly enacted charter amendment.

105. Local Law #2 of 1984 attempts to create a mechanism whereby the City Charter can be amended without the adoption of a local law which is not permitted under the MHR and is therefore invalid.

106. An ordinance is not a permissible method for amending the City Charter under the definition of Local Law under MHR §2(9).

107. The proposed 2014 Amendment to Chapter 28 of the City Code in effect makes many substantive changes to the City Charter by abolishing, transferring or curtailing the power of the Mayor. The proposed 2014 Amendment to Chapter 28 is being attempted without the safeguards contained in the MHR which specifically require voter approval of such an action. MHR §23(2)(f)

108. Specifically, the 2014 Amendment to Chapter 28 eliminates the Mayor's power to appoint the members of the Golf Commission (Ex. "M", §28-1(B)). The non-voting Alderman was previously appointed by the Mayor and that appointment is being changed to a Common Council appointment. The 2014 Amendment to Chapter 28 provides that all of the other members of the Golf Commission are appointed by the Common Council.

109. The proposed 2014 Amendment to Chapter 28 clearly violates MHR §23(2)(f) and should be declared to be null and void and without any further force and effect.

AS AND FOR AN NINTH CAUSE OF ACTION
(A Temporary Restraining Order and Preliminary Injunction Prohibiting and Restraining the Common Council from Executing and Delivering Agreement or Contracts on behalf of the City or Enacting the Proposed 2014 Amendment to Chapter 28 of the City Code)

110. Plaintiff repeats and realleges each and every allegation contained in ¶¶1-109 herein.

111. Plaintiff seek, during the pendency of this action, a temporary restraining order against the Common Council Defendants preventing them from: (a) executing and delivering any agreements or contracts on behalf of the City unless the provisions of Section C-35(B) relating to absence or incapacity of the Mayor are invoked; and (b) enacting the proposed 2014 Amendment to Chapter 28 of the City Code.

(Liklihood of Success on the Merits)

112. In this Complaint and Petition, the Plaintiff has demonstrated likelihood of success on the merits since the Deputy Mayor does not have the power to execute and deliver any agreements or contracts on behalf of the City unless the Mayor is incapacitated or unable to serve.

113. The Plaintiff has set forth in ¶18 of the certain Affidavit dated March 13, 2014 which accompanies this Complaint and Petition that at all times relevant to these proceedings she has been the Mayor and there has been no absence or incapacity.

114. Therefore, the Common Council Defendants have no legal right to execute and deliver contracts and/or agreements which bind the City only the Mayor has that authority.

115. The Common Council Defendants have no legal right to enact the proposed 2014 Amendment to Chapter 28 of the City Code since that enactment eliminates the power expressly reserved to the Mayor to appoint members to the Common Council.

(Irreparable Harm)

116. If the Common Council Defendants are allowed to execute and deliver agreements or contracts on behalf of the City which purportedly bind the City to a contractual agreement, then the City will be exposed to claims and litigation from parties that improperly rely upon invalidly executed agreements signed by the Deputy Mayor during a period when the Mayor was acting as the Mayor and was unavailable or unable to act.

117. Additional irreparable harm will be experienced by the City when it is faced with repeated claims from conflicting appointments to the Golf Commission since the 2014 Amendment to Chapter 28 of the City Code would allow the Common Council to have the right to make all the appointments to the Common Council when the Charter and the GML expressly reserve the right to make appointments to the Mayor.

(Balance of the Equities)

118. The balance of the equities rests with the Mayor whose power and authority is being usurped by the Common Council in violation of the requirements of the City Charter and the applicable laws of the State.

WHEREFORE, Plaintiff demands judgment:

1. on the first through fifth causes of action and the seventh through the eighth causes of action, a judgment and order declaring the Agreement null and void and prohibiting the Controller of the City from making any payments to

Defendant Merendo under the Agreement and declaring the 2014 Amendment to Chapter 28 to be null and void;

2. on the sixth cause of action, issuing a order under CPLR Article 78 that the actions of the Deputy Mayor and the other Defendant members of the Common Council are invalid and illegal and not permissible and prohibiting the Controller of the City from making any payments to Defendant Merendo under the Agreement;
3. on the ninth cause of action, a temporary restraining order and preliminary injunction during the pendency of these proceedings in which the Common Council Defendants are restrained and prohibited from: (a) executing and delivering any agreements or contracts on behalf of the City unless the provisions of Section C-35(B) relating to absence or incapacity of the Mayor are invoked; and (b) enacting the proposed 2014 Amendment to Chapter 28 of the City Code;
4. awarding the costs and disbursements of this action to the Plaintiff; and
5. granting such other and further relief as may be just and proper.

Dated: March 13, 2014

GOLDMAN ATTORNEYS PLLC

By: _____

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