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LOCAL GOVERNMENTS WEARING TWO HATS: WHAT ARE THE LEGAL ISSUES

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A HAT ON A HAT: LEGAL ISSUES ARISING WHERE LOCAL GOVERNMENTS ACT SIMULTANEOUSLY IN MULTIPLE ROLES

I. INTRODUCTION

Local governments have a vast plethora of roles, obligations, and functions to play – as anyone working in local government is all too aware. These roles may sometimes stay neatly separated. A building permit might be issued without any other power or duty exercised or delegated intersecting with that issuance. However, given the inherently multifaceted nature of local governments, inevitably there will be situations where a local government is required to act in multiple roles simultaneously in a single matter. In such circumstances, the courts have referred to the local government as wearing "two hats". The BC Court of Appeal in *Community Association of New Yaletown v. Vancouver (City)*, discussed this phenomenon, stating that:

> The statutory schemes creating municipal corporations contemplate a municipality wearing many hats. Sometimes a municipality will wear several hats in the implementation of a single plan, for example when it exercises its business functions to acquire a property and then its legislative functions when regulating the development and use of that property. The statutory schemes are such that there will be occasions when a municipality's business interests potentially conflict with its legislative interests … There is nothing wrong or sinister about such conflicts, which are inherent in the statutory scheme. What is required of a municipality in such situations is to ensure that it manages the conflict, that it not let its business interests overwhelm its duty to make good law (at 64 – 65).

As indicated by the BC Court of Appeal, two-hat scenarios are not innately impermissible or even problematic. However, they are rife with potential complication, and are often subject to greater scrutiny from the public. This paper highlights situations where different local government roles may coincide; what laws come into play when they do; and what, based on legislation and case law, is required in the circumstances.

While it is not feasible to present an exhaustive tour of two-hat scenarios, this paper will provide you with some major circumstances where local governments must act in multiple roles: where the purchase or sale of land by a local government is contingent on rezoning; when a local government must provide approval to its own development; how a local government may enter into an agreement with itself; and circumstances where attempting to wear two hats results in an impermissible fettering of a local government's power. Through consideration of these specific two-hat scenarios, we hope to provide you with a lens to consider when multiple local government roles might coincide, and what you must do when that happens.

II. BUY, SELL, ZONE – AGREEMENTS CONDITIONAL ON REZONING

A. Where Might this Circumstance Occur?

Local governments can purchase and sell land, with municipalities authorized to do so by virtue of their natural person power established by section 8(1) of the *Community Charter*, and regional districts authorized by their corporate powers under section 263 of the *Local Government Act*. There is a litany of rules and requirements which apply to local governments' purchase and sale of land that would not apply to a non-governmental party. For example, issues arise as to: what public notice must be provided, how certain land like parks and highways must be dealt with, and limits on liabilities that may be incurred. But, at a core level, local governments can buy and sell land just as any individual or corporate entity can.

Unlike any other purchaser or vendor of land, local governments are in the driver's seat with regards to many of the prerequisites and requirements that underpin the purchase and sale of land, such as the zoning that applies to the land for sale, or the issuance of development and building permits for the development that the sale is predicated on. A common circumstance – a contract for the purchase and sale of land which is conditional on the rezoning of the subject property – acquires a new dimension when the purchaser or vendor is the local government itself.

As an example, suppose you are looking to develop and manage affordable housing at a new site within your jurisdiction. You have an existing underserved property, and have determined a new site that would allow for greater surrounding access to amenities and support for affordable housing residents. A developer owns land in this preferrable area, and is willing to sell it to you in exchange for your land on which the underserved development stands. However, the developer wishes to create high density residential property on your land, which its zoning does not currently allow for. The developer will only complete the exchange on the condition that the land they receive is rezoned to allow for high density residential development. Does this present a roadblock for you, or require you to follow a different process than you traditionally would for purchasing, selling, or rezoning land?

B. What Hats are you Wearing?

In this scenario, the local government is wearing its business hat and its legislative hat. By virtue of entering into an agreement involving the purchase, sale or exchange of land, it is wearing its business hat. By initiating the rezoning process, the local government has also donned the legislative hat it wears whenever it regulates the development and use of land.

C. Caselaw – *New Yaletown*

This two-hat scenario occurred in *Community Association of New Yaletown v. Vancouver (City)*. The City was the owner of Jubilee House, an affordable housing building it leased to the Society for Housing. Jubilee House had fallen into significant disrepair, and the City was looking for solutions to address its condition. Brenhill Developments Limited approached the City with such

a solution, offering to construct an improved replacement for Jubilee House at a nearby property Brenhill owned, and transfer ownership to the City. In exchange, the City would transfer the old Jubilee House property to Brenhill, which it would redevelop as a mixed use building containing rental units, a preschool, and retail space. The City agreed to Brenhill's proposal.

In order to put this plan into effect, a development permit needed to be issued for the new Jubilee House, and a rezoning bylaw needed to be passed for the redevelopment of the site of the old Jubilee House. The permit and bylaw were initially successfully passed and issued. However, the Community Association of New Yaletown challenged the permit and bylaw on a number of grounds, such as that the City breached procedural fairness rules by failing to disclose relevant documents, including the land exchange contract, and that the land exchange contract was an unlawful fetter of the City's discretion. The association succeeded at the BC Supreme Court level, and had the permit and bylaw quashed. The City appealed this decision.

The BC Court of Appeal held with the City, allowing the appeal, and declaring the rezoning bylaw and development permit valid. In reaching this conclusion, the Court discussed the multiplicity of hats a local government may wear, outlining three common ones germane to the case before it:

> First, the City has a legislative function. It is responsible for enacting by-laws and resolutions regulating myriad subjects ranging from land use and development to building, plumbing and fire safety standards.
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> Second, the City has many business functions in the administration of the various regulations it has put in place and, significantly, in the management of municipal assets and their purchase and sale.
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> Third, the City has what some courts have characterized as a quasi-judicial function. In many cases the City affects the rights of individuals, for example, by licencing (or declining to licence) a business or, as in the case at bar, by rezoning (or declining to zone) a specific piece of property.

The Court noted that in circumstances where a local government must engage several of these functions simultaneously in the same matter, it must ensure that the interest of one does not overwhelm the other; ensure that the separate requirements of each function is fulfilled; and that the exercise of its business power does not fetter its legislative discretion. The Court found that the City had met all of these requirements.

The Court of Appeal found that the lower court had erroneously concluded that the scope of the public hearing for the rezoning bylaw included discussion of the proposed land exchange contract. The Court of Appeal found that the public hearing had to afford interested persons an opportunity to be heard on the matters contained in the proposed rezoning bylaw, but did not have to afford such persons the opportunity to comment on the City's business dealings or

housing strategy. Similarly, the City was not required to make the land exchange contract (and other documents relating to the land deal) available to the public prior to the rezoning bylaw public hearing. The public did not need to see these documents to make informed comments on the proposed rezoning; the land exchange contract was not before council when it made the decision to rezone the land in question; and disclosing the land exchange contract would in fact have distracted from the real issue at hand, and invited public scrutiny into the City's business dealings. Furthermore, the Court stressed that while the City would have been within its right to restrict comments at the public hearing to be about the rezoning only, the City had in fact allowed numerous comments which addressed the land exchange generally.

The Court of Appeal also found that the lower court had not provided separate reasoning for the quashing of the development permit, lumping it in generally with its analysis of the rezoning bylaw process. The Court emphasized that these were separate matters with distinct requirements that required independent analysis, noting that:

> The Public Hearing in this case concerned only the 508 Rezoning By-law. Accordingly, any deficiencies in the disclosure before the Public Hearing (of which there were none) could not affect the validity of the [new Jubilee House] Development Permit.

D. The Takeaway

In circumstances where you are wearing both your business hat and legislative hat, you must ensure that the pursuit of business interests do not lead you to leave your legislative duties unfulfilled. As the Court stated in *New Yaletown*, in a two-hat scenario:

> What is required of a municipality in such situations is to ensure that it manages the conflict, that it not let its business interests overwhelm its duty to make good law. The City must carefully separate the business and legislative and ensure it complies with the statutory requirements (and any quasi-judicial duties that may arise) for the exercise of each power.

All that you are required to do is balance potentially competing business and legislative interests, and ensure that one does not subsume the other. You are not required to exercise your legislative function against a new or higher standard, or to tack on discussion and disclosure of business interests to the requirements for exercising your legislative function. You must ensure that you are following the separate procedure and requirements that go with each hat you are wearing, but you are not beholden to additional or more stringent requirements.

III. GIVING THE GO AHEAD – APPROVING YOUR OWN DEVELOPMENTS

A. Where Might this Circumstance Occur?

The collision of a local government's business and legislative interests are not confined to circumstances in which land is bought, sold, or exchanged. If no land is changing hands, but a local government is instead electing to use its land in a different fashion, this will still almost certainly involve at least two hats. Wherever a local government has a development that necessitates a modification to an existing bylaw, or the issuance of a permit, it must consider the interplay between its pursuit of that development, and the exercising of its legislative function around land use and development.

Continuing our hypothetical above, suppose your anticipated land exchange to develop affordable housing in a more suitable location falls through. You decide instead to redevelop your existing affordable housing property, transforming it into a mixed-use space that will include a school, daycare facility, and other helpful community amenities. To do so however, you must first rezone the land to allow for this mixed use, and then issue a development permit for the new facilities. What different considerations, if any, must you factor in when you apply these processes to yourself?

B. What Hats are You Wearing?

Depending on the nature of your proposed development, several different hats may be worn in tandem. Your legislative hat may be worn where an initiative requires the passage of a new bylaw. You may wear a quasi-judicial hat when the project requires you to issue permits or licences. Your business hat will be worn where you are managing an asset, such as your land or an existing development on it. A policy or strategy hat may be involved as well where the development looks to further established goals, such as environmental conservation. In our example, all these hats may be involved to a degree: the legislative hat is worn in relation to rezoning; the quasi-judicial hat is worn in relation to issuing the development permit; the business hat is worn in relation to managing your existing development; and a policy hat is worn in seeking to further your affordable housing strategy.

C. Caselaw – *Abbcar Properties* and *Loewen*

This multi-hat scenario was considered in the recent BC Supreme Court decision *Abbcar Properties, LLC v. Vancouver (City)*. The City purchased a parcel of land in downtown Vancouver in the mid-1990s. The City built the Coal Harbour Community Centre and Park on this parcel. The initial development was completed in 2000, but the development application also contemplated future development, envisioning the eventual development of an elementary school, childcare facility, and affordable housing. This contemplated future development was pursued in 2020. The City retained an architecture firm to complete the programming, design and development phases of the project. The architecture firm applied to the City for a development permit and a rezoning enquiry for the development.

Prior to being presented to the Development Permit Board, the development permit application was considered by the City's Urban Design Panel and Development Permit Staff Committee, both of whom recommended issuing the permit. The Board and Council also held public hearings on the permit and rezoning respectively. The City subsequently issued the development permit, and passed a council motion which approved, in principle, the rezoning.

The corporate petitioner Abbcar challenged the issuance of the permit and the City's motion on several grounds, including that the City did not properly manage its two-hat conflict. Abbcar argued that by taking no "special steps" and following usual development permit issuance process, the City failed to manage the inherent conflict between its legislative/quasi-judicial roles, and its pursuit of the development. The Court disagreed, finding that no special steps were required by the City:

> In the absence of actual evidence of bias by City officials, it is not procedurally unfair for the City to adjudicate a development permit and a rezoning application sought by the City using its standard assessment and approval procedure authorized by legislation. Indeed, it seems to me that deviation from the ordinary procedure when approval is sought for a City development may actually increase the risk of unfairness to the public as an identical project may then be subject to different degrees of scrutiny simply because of the identity of the proponent.

The Court further disagreed with Abbcar's contention that the decision in *New Yaletown* requires local government to impose additional procedural safeguards when assessing and approving its own projects. The Court instead emphasized that the central requirement placed on local governments by *New Yaletown* is to take caution when in two-hat scenarios to not let business interests overwhelm legislative interests. The Court also dismissed Abbcar's other arguments, finding that the Development Permit Board had fulfilled its duty of disclosure, and that the City provided adequate opportunity for persons affected by the proposed rezoning bylaw to speak at the council meetings where it was discussed.

While no additional procedural safeguards are required in two-hat scenarios, it is imperative that the existing procedure is followed when approving your own developments. The BC Supreme Court decision *Loewen v. Coquitlam (City)*, deals with circumstances in which this requirement was not met. The decision in *Loewen* occurred partway through ongoing litigation around rezoning bylaws which would allow the redevelopment of the City's former City Hall into social housing. In separate proceedings, persons objecting to the development petitioned the court to quash the bylaws, and were unsuccessful. The petitioners filed a notice of appeal, and unsuccessfully sought to enjoin the City from moving forward with the development while the appeal was pending. While this appeal was still pending, the City elected to repeal the bylaws that were subject to this litigation, and enact identical rezoning bylaws in their places. The City maintained that the original bylaws were valid, but viewed repassing the bylaws as a less expensive and time-consuming alternative to continuing to defending the original bylaws.

The City also issued a development permit necessary for the housing development. The petitioners challenged these new bylaws and the issued development permit.

The Court held with the petitioners, quashing the new bylaws and the development permit. The new bylaws were quashed for non-compliance with the mandatory notice requirements. The City's notice framed the bylaws as rezoning the property in question; however, as the original bylaws had been passed, the Court found that the purpose of the new bylaws were not to rezone the property (as had been stated by the notice), and that the bylaws had no real purpose other than to avoid the pending appeal.

The development permit was set aside as a result of City council not adequately assessing whether the permit had met the applicable OCP guidelines. The City had received advice from its General Manager of Planning and Development, which stated that the development met "a number of the guidelines", and went on to recommend the issuance of the development permit. The Court found that the statement that "a number" of the guidelines had been met necessarily implied that not all the guidelines have been met. Council was therefore obliged to determine which guidelines had not been met and why before properly exercising its discretion to issue the permit. The Court notes that the City was beholden to follow all procedural steps in their entirety when issuing a development permit to itself, including determining what guidelines, if any, had not been met:

> There is no evidence the City council sought any explanation or advice about which Guidelines had not been met. It is perhaps unsurprising that should be so since the City council issued the initial development permit to the City, in effect to itself. In that circumstance, the City council was under a strict obligation to act judicially to ensure that citizens' legitimate expectations that no project would be exempted from the Guidelines without due consideration, would be met.

D. The Takeaway

When approving your own developments, you are not required to import additional procedural safeguards into the approval process. To the contrary, it is important to not significantly deviate from the regular procedure applied to any external party for the same approval process. While you are not required to take additional special steps when approving your own developments, it is essential that you follow and meet all steps in the approval process, and do not hold yourself to a lesser standard than would be applied to outside parties. You must undergo the process as usual, neither being required to subject yourself to a more rigorous assessment nor allowing yourself to be expedited through the procedure.

IV. SHAKE YOUR OWN HAND – FORMING AGREEMENTS WITH YOURSELF

A. Where Might this Circumstance Occur?

As a general rule, a party cannot form a contract with itself. Agreements generally require the mutual assent of two or more parties, representing a "meeting of the minds" between parties. However, there are select exceptions of which local governments can avail themselves that allow for the formation of agreements with oneself. Section 18 of the *Property Law Act* provides rules for transfer and ownership to oneself. This section authorizes the transfer of land to oneself in the same manner as that land would be transferred to any other party. It also allows local governments to make certain grants to themselves. A fee simple owner or owner of a registered lease or sublease of land may grant themselves an easement or restrictive covenant over that land. They may also grant a party wall agreement to themselves – an agreement respecting the maintenance and alteration of a supporting wall shared between two adjoining buildings that sits on a property boundary. A local government can also reserve for itself a statutory right of way over land that it owns in fee simple.

Returning once again to our hypothetical, suppose the redevelopment of your affordable housing has been completed. The shift to a mixed-used building has been a success, and you are keen to ensure the building continues to operate as affordable housing with supporting facilities, even if you elect to no longer own or operate the building. You decide to enter into a restrictive covenant with yourself which establishes that the land is to be used exclusively for affordable housing with supporting educational and childcare facilities. Is this a valid agreement, and what benefit might entering into it bring?

B. What Hats are You Wearing?

Unlike our previous two-hat scenarios, here you are not simultaneously occupying two distinct local government functions (e.g., business and legislative) *per se*. Rather, you are occupying both sides of the drafting table, acting as covenanter and covenantee; a land owner making an agreement with the relevant local government entity.

C. Caselaw – *Burmont Holdings Ltd. v. Chilliwack (District)*

A local government's agreement with itself was considered in the BC Supreme Court decision *Burmont Holdings Ltd. v. Chilliwack (District)*. The District owned land which contained a golf course. The District removed the existing golf course from the land as part of a redevelopment. Subsequently, in response to public requests, the District called for tenders for the operation of a new golf course on the property, eventually entering into an agreement with the successful proponent, and leasing the property for this purpose. Burmont Holdings, the petitioner in this case, later sought to take over the golf course business and continue the lease. However, after further consideration the petitioner determined they would prefer to purchase the property outright. The District advised that they would have to go through the public tender process before selling the land.

Seeking to keep the price of the land low and the pool of prospective purchasers small, the District and the petitioner agreed that a restrictive covenant would be placed on the land prior to the tendering process. This restrictive covenant, entered into by the District with itself, stated that the owner covenanted and agreed that the lands would be used exclusively as a golf course, per section 215 (now section 219) of the *Land Title Act*. The covenant further stated that an owner seeking to discharge the restrictive covenant must pay an amount equal to the increase in land value that would result from that discharge.

The petitioner was the successful proponent at tender, and took ownership of the land. They attempted to operate the golf course for several years, but were unable to turn a profit, in part due to several competing golf courses opening in the same area after the sale. The petitioner took the matter to court, asking the Court either to find the covenant invalid and unenforceable due to being between the District and itself, or that the Court use its statutory authority to discharge the covenant on one of several grounds.

The Court dismissed the petition, finding that the restrictive covenant was valid and enforceable. The Court held that section 18 of the *Property Law Act* and section 215 (now section 219) of the *Land Title Act* made it clear that the District had the statutory authority to lawfully grant a restrictive covenant to itself. The Court also declined to exercise its discretion to discharge the restrictive covenant under section 31 (now section 35) of the *Property Law Act*. The Court noted that the appropriate avenue for discharging the restrictive covenant was to do so by the terms set out in the covenant itself. The Court was of the opinion that an order cancelling the restrictive covenant would be inequitable, as it would allow the petitioner to take the benefit of the agreement (the reduced price and competition during the public tender) while avoiding the *quid pro quo* that the benefit was predicated on.

D. The Takeaway

It is possible to make specific agreements with yourself. However, it is important to know what types of agreements you have the statutory authority to enter into with yourself. As discussed above, section 18 of the *Property Law Act* allows you to transfer land to yourself, or grant yourself an easement, restrictive covenant, party wall agreement, or statutory right of way over land you own in fee simple. It does not authorize you to enter into a plethora of other contracts with yourself, such as an agreement of sale, mortgage, lease, rent charge, or equitable charge.

It is also important to be mindful of the court's discretion under section 35 of the *Property Law Act* to modify or cancel certain charges and interests against land, including easements, statutory rights of way, and restrictive covenants. Section 35(2) grants the BC Supreme Court the discretionary authority to modify or cancel these charges in specific circumstances, such as where the charge impedes the reasonable use of land without practical benefit to others, or where modifying or cancelling the charge will not injure the person entitled to the charge's benefit. If you are seeking to form an agreement with yourself with the intention that agreement carries forward to a future owner, it is important to consider whether that future owner would succeed in having that charge or interest removed.

V. DON'T TIE YOUR HANDS BEHIND YOUR BACK – FETTERING

A. Where Might this Circumstance Occur?

Fettering is distinct from the other two-hat scenarios discussed thus far. These other scenarios – entering into a contract conditional on rezoning, approving your own agreement, or entering into an agreement with yourself – are all things that a local government may validly do, so long as it is mindful of the requirements and procedures outlined above. Fettering, in contrast, refers to an impermissible two-hat scenario, in which a local government has unduly restricted the exercise of its legislative powers in relation to a matter affecting the public at large while in pursuit of another of its interests, such as its business or proprietary functions. In essence, as stated in *Re Galt-Canadian Woodworking Machinery Ltd. and City of Cambridge*, "[a] municipality cannot bargain away its legislative powers in advance". Local governments cannot divest or restrict successor councils' exercise of their legislative powers, unless there is express legislative authority allowing this fettering.

The courts are very explicit that this prohibition against fettering should not be construed as a prohibition on local governments' ability to enter into business and proprietary contracts. Rather, once a local government elects to enter into such contracts, they must be certain to avoid any terms that would have the effect of restricting the future exercise of their legislative powers.

Once more turning to our hypothetical scenario, suppose you have decided that the time has come for you to turn over the ownership and management of the affordable housing complex to another organization. You meet with an interested housing society, and begin to draft a contract for the purchase and sale of the land. The housing society insists that as part of the contract, you must agree that the zoning which currently applies to the land will remain permanently unchanged. Would such a term be enforceable, or would it be considered a fetter on your legislative power?

B. What Hats are You Wearing?

As was the case in our first scenario (a land exchange agreement conditional on the rezoning of a property), the local government is wearing its business hat and legislative hat in this circumstance. The fundamental difference between these scenarios is the weight being given to each role, and whether the pursuit of the local government's business interests causes it to fetter its legislative interests.

C. Caselaw – *Pacific National Investments Ltd.* and *Ocean Wise Conservation Association*

The leading case on fettering is the Supreme Court of Canada's decision in *Pacific National Investments Ltd. v. Victoria (City)* [PNI 1]. The decision in PNI 1 concerned an agreement between the City, BCEC (a Crown corporation), and the plaintiff company, for the redevelopment of a portion of the City's inner harbour. This agreement provided for two phases on development: in the first phase, BCEC would develop parts of the land itself, and in

the second phase it would sell a portion of the land to a private developer for further development. The plaintiff company successfully negotiated with BCEC to take on the development, which included taking on BCEC's commitments to construct certain improvements such as roads, parkland, a seawall and walking paths. The plaintiff's agreement to purchase the lands was subject to the City subdividing and rezoning the lands so that the plaintiff could construct residential and commercial buildings.

The deal moved forward, and in the first phase the plaintiff company fulfilled its commitments to construct the required improvements. The deal entered its second phase, and the plaintiff began to move forward with its plan to construct three-storey buildings. However, during this period objections to the development were raised by members of the public, and the City elected to down-zone the property, limiting the maximum building height to one storey. In response to this down-zoning, the plaintiff sued the City for breach of contract, arguing that the agreement contained an implied term that the City would keep the zoning in place for the duration of the contract, or pay damages to the plaintiff if it changed the zoning.

The Court held that there was no implied term that the zoning would remain unchanged, as such an implied term would be an improper fetter on the City's legislative power. The Court also held that the suggestion that the City pay damages in the event it rezoned the property was an indirect fetter on the City's legislative authority. The Court emphasized that at no point was the legality of the downzoning called into question, and observed that demanding compensation in response to the valid exercise of municipal legislative authority was still fettering, just one step removed:

> All of PNI's attempts to transform its case into a claim for compensation cannot hide the fact that it is demanding compensation precisely because the City exercised its legislative powers in a particular way. A municipality's choice to use its legislative powers to rezone land so that the municipality's zoning continues to reflect its best wisdom is a legitimate choice and a choice that is very much part of its legislative power … Indeed, it must be remembered that the new zoning by-law was never attacked as illegal. A duty to compensate for a particular legislative choice along these lines would necessarily make that legislative choice subject to considerations other than an objective examination of what is best for the community of which the developer is undoubtedly also a part.

In a notable epilogue to this case, the plaintiff company and the City returned to the Supreme Court of Canada four years later in relation to this same matter from PNI 1 in *Pacific National Investments Ltd. v. Victoria (City)* [PNI 2]. In PNI 2, the plaintiff company advanced a claim of unjust enrichment against the City, arguing that the improvements constructed as part of the agreement (the roads, parkland, walkways and seawall) represented an enrichment to the City to the tune of $1.08 million, wholly at the plaintiff company's expense.

The Court held in favour of the plaintiff company, finding that the City had obtained the waterfront upgrades solely at the plaintiff's expense, and that the plaintiff had suffered a corresponding deprivation through investing in the improvements without recouping the promised benefits. The City sought to rely on the existence of the agreement to demonstrate that the enrichment had not been unjust, as traditionally the existence of a contract providing for the enrichment in question would be considered a complete answer to an unjust enrichment claim. However, the Court found that the City, having argued in PNI 1 that the exchange of assured zoning for improvements was outside of its authority, could not return in PNI 2 and seek to rely on that contractual arrangement it previously denied to defeat the claim of unjust enrichment.

A more recent case of fettering legislative powers can be found in *Ocean Wise Conservation Association v. Vancouver Board of Parks and Recreation*. In 2017, the Vancouver Board of Parks and Recreation passed a bylaw amendment prohibiting the keeping of cetaceans in City parks, in response to two Beluga whales which had recently died at the Vancouver Aquarium. The Aquarium challenged this bylaw on several grounds, including that the bylaw amendment ran afoul of the 1999 licence agreement between the Aquarium and the Park Board. The licence agreement allowed the Aquarium to keep cetaceans in specific circumstances, namely if they were already at the Aquarium as of 1996; if they were a member of an endangered species; or if they were taken to the Aquarium for the purposes of rehabilitation from injury to preventing their death due to stranding. The BC Supreme Court held that this licensing agreement precluded the Park Board from making a bylaw amendment prohibiting the keeping of cetaceans entirely. The Park Board appealed this decision.

The BC Court of Appeal held with the Park Board, overturning the lower court's decision. The Court of Appeal found that to the extent that the 1999 licencing agreement restricted the Park Board from making the bylaw amendment, the licencing agreement was a fetter on the Park Board's legislative powers. The BC Supreme Court had argued that nothing in the *Vancouver Charter* (the governing legislation in this case) indicated that the Park Board's bylaw powers were superior to its licencing powers. The Supreme Court therefore reasoned that unless the *Vancouver Charter* expressly indicated that the Park Board's bylaw powers superseded its licencing powers, it should not be assumed the bylaw amendment would oust the operation of the licencing agreement. The BC Court of Appeal found that this was a reversal of what was required by PNI, as fettering of legislative powers is only permissible if the legislation expressly authorizes that fettering:

> Rather than starting with the general proposition from *Pacific National* that the Park Board was not generally able to fetter its legislative powers in a contract and then reviewing the *Vancouver Charter* to ascertain whether it expressly permitted such fettering, the [BC Supreme Court] judge engaged in an analysis of determining which of the Park Board's by-law making power and licensing power should be considered superior. He erred when he held that, if the Legislature had intended the by-law making power to be superior, it would have said so. In the words of the Park Board's submissions, he reversed the presumption confirmed

> by *Pacific National* that municipal bodies are generally not able to fetter their legislative powers (with the presumption being rebuttable by express permission to fetter those powers).
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> In making his holding, the judge erred by failing to identify express wording in the *Vancouver Charter* authorizing the fettering of the by-law making power. He effectively held that the Park Board could fetter its legislative powers in a licence unless the Vancouver Charter specifically provided that it could not do so. If one were to take the judge's reasoning to its logical conclusion, it would mean that whenever municipal legislation gives a municipal body the power to make by-laws and the power to enter into contracts, the municipality can fetter its legislative powers in a contract unless the legislation prevents it from doing so. This is contrary to the principle set out in Pacific National.

D. The Takeaway

Local governments are permitted to wear their business hat and legislative hat together when entering into agreements. However, they must do so with extreme caution to not enter into terms which would restrict their legislative powers. Any such contractual terms are liable to be found invalid and unenforceable. PNI 2 shows us that although a short term effect of this may be that local governments can avoid certain contractual terms they were technically incapable of entering into in the first place, alternate remedies may be sought by parties who have fulfilled their side of the agreement. Fettering may make itself apparent on several different timescales. It may become evident immediately over the course of a contract, as was the case in PNI, or wind up at issue several decades later, as was the case in *Ocean Wise Conservation Association*.

VI. CONCLUSION

It is inherent to the nature of local governments that they must act in a variety of different roles. While these varying roles often act in isolation from one and another, local governments will unavoidably find themselves in circumstances that require them wearing several of their many hats at once. These two-hat scenarios are not to be feared or avoided, but they should be approached with a generous helping of caution and attention. While wearing two hats is permissible in many circumstances, it is imperative that you have clear authority to act in each role you are in, and that you have fulfilled the requirements of each role as well. Wearing two hats is also a balancing act, as certain interests must not overwhelm others.

This paper does not purport to cover all possible scenarios where a local government may find itself stepping into multiple roles at once. However, we hope that these highlighted two-hat scenarios help familiarize yourself with the variety of hats in your wardrobe, and makes you mindful of which ones have the potential to clash when worn together.

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