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**The Honorable Susan Amini**  
KING COUNTY  
**Without oral argument**  
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 18-2-16020-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

FREEDOM FOUNDATION, SUSAN	)	
GEMMEL, PETER SCHMITZ and LISA	)	No. 18-2-16020-1 SEA
AMMON,	)	
	)	
	)	Petitioner,
	)	CITY’S MOTION TO DISMISS
	)	LAND USE PETITION AS MOOT
vs.	)	
	)	
CITY OF SEATTLE, et al.,	)	
	)	
	)	Respondents.
	)	
	)	
	)	

**I. INTRODUCTION**

The Petitioners brought this action pursuant under the Land Use Petition Act, RCW ch. 36.70C (LUPA), to challenge a temporary use permit issued by the City that authorized the opening of a homeless encampment in the South Lake Union neighborhood. The permit, issued on June 6, 2018 and with an expiration date of June 28, 2018, was valid for 22 days. The LUPA petition was filed on June 27, 2018, and by its terms, the permit lapsed one day later.

The Petitioners did not seek a stay of the permit, the permit expired and, consequently this LUPA petition is moot. The permit’s expiration also eliminated the Court’s ability to grant

1 the Petitioners’ requested relief to reverse the decision. A decision that has lapsed and has no  
2 effect cannot be reversed when there is nothing left to reverse.

3 For these reasons, the LUPA petition should be dismissed.

4 **II. FACTS**

5 On May 30, 2018, the Low Income Housing Institute (the Institute) applied for a 4-week  
6 temporary use permit to “allow a transitional encampment for up to 65 people on property owned  
7 by the City of Seattle.”<sup>1</sup>

8 On June 6, 2018 the permit was approved by Seattle Department of Construction and  
9 Inspections (the Department).<sup>2</sup> The permit stated in the “Description of Work” section that the  
10 anticipated duration for the encampment is from 6/1/18 to 6/28/18.<sup>3</sup> Temporary use permits are  
11 issued by standard construction building permit software that imbeds the standard 18-month  
12 construction permit duration, which in this case would be December 6, 2019.<sup>4</sup>

13 The duration of the permit, however, is determined by the issue date of the permit, June  
14 6, 2018, and the expiration date of the permit, June 28, 2018, which conforms to the “up to 4-  
15 week period” for transient encampments established by the City’s land use code.<sup>5</sup>

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<sup>1</sup> SMC 23.42.040(B); Land Use Petition, attachment, permit 6668333-CN.

21 <sup>2</sup> *Id.*

22 <sup>3</sup> *Id.*

23 <sup>4</sup> Declaration of Bill Mills, ¶ 5.

<sup>5</sup> SMC 23.42.040(B); Declaration of Bill Mills, ¶¶ 6-9.

1 On June 27, 2018, Freedom Foundation filed the LUPA petition challenging the  
2 temporary use permit.<sup>6</sup> It did not seek a stay and, accordingly,<sup>7</sup> the permit expired the following  
3 day.<sup>8</sup>

### 4 III. ISSUE

5 An approved permit continues in effect until its expiration date unless a stay is filed. The  
6 LUPA petition challenges a permit that expired on June 28, 2018, the day after the petition was  
7 filed. Petitioners did not seek a stay. Does the permit's expiration render the land use petition  
8 moot?

### 9 IV. ARGUMENT

#### 10 A. *Approved permits expire on appeal absent a stay*

11 A claim is moot if the court can no longer provide effective relief.<sup>9</sup> LUPA petitions  
12 challenging permits that were approved and subsequently expired are moot.<sup>10</sup>

13 In *Kelly I*, an applicant proposed to develop housing on Lake Chelan's shoreline and a  
14 conditional use permit was granted by the Hearing Examiner.<sup>11</sup> On review, the Superior Court  
15 reversed the Examiner's decision and denied the permit.<sup>12</sup> The applicant appealed.

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<sup>6</sup> Land Use Petition.

19 <sup>7</sup> Pleadings on file in Land Use Petition.

20 <sup>8</sup> Declaration of Bill Mills, ¶ 9.

21 <sup>9</sup> *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 350, 932 P.2d 158,  
22 (1997) (citing *Snohomish Cty. v. State*, 69 Wn. App. 655, 660, 850 P.2d 546 (1993)).

23 <sup>10</sup> *Kelly v. Cty. of Chelan*, 167 Wn.2d 867, 872-3, 224 P.3d 769 (2010) (*Kelly II*); *Kelly v. Cty. of Chelan*,  
145 Wn. App. 166, 185 P.3d 1224 (2008) (*Kelly I*).

<sup>11</sup> *Kelly I*, 145 Wn. App. at 167-71.

<sup>12</sup> *Id.*

1 During the appeal, the two-year permit expired.<sup>13</sup> Because the applicant did not seek a  
2 stay, the Court of Appeals found that the permit had expired and dismissed the appeal as moot.<sup>14</sup>  
3 The Court of Appeals relied on *Gold*, where a Hearing Examiner’s decision to grant a permit was  
4 affirmed in Superior Court.<sup>15</sup> On appeal, the *Gold* applicants failed to seek a stay and the permit  
5 expired after 18 months.<sup>16</sup> The *Gold* court dismissed the claim as moot.<sup>17</sup>

6 *Kelly I* was then appealed to the Washington State Supreme Court. In *Kelly II*, the  
7 Supreme Court pointed to the Superior Court’s decision reversing the Hearing Examiner’s  
8 approval as effectively staying the permit’s expiration date.<sup>18</sup> The Supreme Court reasoned that a  
9 permit does not expire when a permit has been reversed and denied by the superior court and  
10 overturned the Court of Appeals’ dismissal.<sup>19</sup>

11 Although upholding the permit denial, the Supreme Court did not overrule *Kelly I*’s  
12 application of mootness doctrine to expired permits.<sup>20</sup> Instead, the Supreme Court disagreed with  
13 the Court of Appeals’ reliance on *Gold*.<sup>21</sup> Unlike *Gold* where a permit was affirmed, and a stay  
14 not obtained, the *Kelly* superior court decision reversed the examiner’s approval, denied the  
15 permit, and effectively stayed the permit’s time limits.<sup>22</sup>

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17 <sup>13</sup> *Id.* at 171.

18 <sup>14</sup> *Id.* at 174-77.

19 <sup>15</sup> *Kelly I*, 145 Wn. App. at 174-76 (citing *Gold v. Kamin*, 170 Ill.App.3d 312, 120 Ill.Dec. 595, 524  
20 N.E.2d 625 (1988)).

21 <sup>16</sup> *Gold*, 170 Ill.App.3d at 314.

22 <sup>17</sup> *Gold*, 170 Ill.App.3d at 316.

23 <sup>18</sup> *Kelly II*, 167 Wn.2d at 871-73.

<sup>19</sup> *Id.* at 873.

<sup>20</sup> *Id.* at 871-73.

<sup>21</sup> *Id.* at 872-73.

<sup>22</sup> *Id.*

1 In contrast, the Supreme Court used *Gold* to illustrate the standard to be applied when a  
2 permit is “not denied, the permit and its corresponding time limit remain in effect absent a  
3 stay.”<sup>23</sup> While the denied *Kelly* permit was not bound by an expiration date, the Supreme Court  
4 acknowledged that an approved permit is subject to expiration during appeal if not stayed.

5 The Supreme Court’s analysis of *Gold* applies here. The Institute’s 22-day temporary use  
6 permit was approved, this petition was filed, no stay was requested as provided for by LUPA,<sup>24</sup>  
7 and the permit expired on June 28, 2018, the day after the LUPA petition was filed. Following  
8 *Kelly II*, an approved permit that is not stayed is subject to its expiration date and in this case,  
9 rendered the LUPA petition moot.

10 ***B. The Court cannot provide relief when the permit has expired***

11 LUPA provides that the “court may affirm or reverse the land use decision under review  
12 or remand it for modification or further proceedings.”<sup>25</sup> This Court cannot, however, provide any  
13 relief when the permit has expired and has no effect. Further, the Petitioners’ request for relief is  
14 that the permit be reversed.<sup>26</sup> An expired permit cannot be reversed when the effect of the permit  
15 ended on June 28, 2018.

16 **V. CONCLUSION**

17 An approved permit is subject to expiration during a LUPA appeal unless a stay is requested  
18 as LUPA provides for. The permit expired on June 28, the day after this petition was filed. This  
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21 <sup>23</sup> *Id.* at 872.

22 <sup>24</sup> RCW 36.70C.100(1).

23 <sup>25</sup> RCW 35.70C.140.

<sup>26</sup> Land Use Petition at 7:11-13.

1 Court can provide no relief to the Petitioners and the City respectfully requests the petition be  
2 dismissed.

3 Dated this 5<sup>th</sup> day of October 2018.

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14 I certify that MS Word 2013 calculates that all portions of this motion required by Local Civil  
15 Rules to be counted contain 931 words, which in compliance with the Local Civil Rules.  
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1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of the City’s Motion to Dismiss  
3 with the Clerk of the Court using the ECR system.

4 I also certify that on this date, I sent a copy of this document to the following parties via  
5 e-mail and U.S. Mail:

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19 Dated this 5<sup>th</sup> day of October, at Seattle, Washington.

20 *s/Kim Fabel*  
21 \_\_\_\_\_  
22 Kim Fabel, Legal Assistant