February 4, 1998

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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REPORT AND DECISION ON APPEAL FROM ZONING ADJUSTOR.

SUBJECT: Department of Development and Environmental Services File No. **L95VA008**

KAREN LUNDE
Appeal of Zoning Adjustor Variance Decision

Location: East side of 73rd Avenue NE, 500 feet south of NE 190th Street (Bank Road; 18804 - 73rd Avenue NE); Parcel #011410

Appellant: Karen A. Lunde
17787 - 14th Avenue NW
Seattle, WA 98177

Represented by:
Melody McCutcheon
Attorney At Law
1221 Second Avenue, #500
Seattle, WA 98101

SUMMARY OF DECISIONS:

First Zoning Adjustor Decision:	Place application on call
Hearing Examiner:	Remand to Zoning Adjustor
Division Addendum Recommendation:	Approve, subject to conditions
Second Zoning Adjustor Decision:	Approve, subject to conditions
Hearing Examiner:	Deny appeal; approve application, subject to conditions (modified)

PRELIMINARY MATTERS:

Zoning Adjustor's Decision:	October 20, 1997
Notice of appeal received by Examiner:	November 14, 1997
Statement of appeal received by Examiner:	November 14, 1997

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	December 16, 1997
Hearing Opened:	January 23, 1998
Hearing Closed:	January 23, 1998

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES ADDRESSED:

Variance review – detrimental impact

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On October 5, 1994, Al and Karen Lunde reactivated a building permit application to construct a single-family residence on a 1.64-acre parcel located at 18804 – 73rd Avenue NE in Kenmore. The subject property comprises Lot 2 of a short plat approved by King County in 1987. The entire lot lies within the flood plain for Swamp Creek and in Swamp Creek Wetland No. 3, and the eastern portion of the property lies within the Swamp Creek floodway.

2. Because the entire property (except a 350-square-foot fragment at the northwest corner) lies within Swamp Creek Wetland No. 3, and since the corner outside the wetland boundary lies within the required 100-foot wetland buffer, no productive use of the property can be made without the issuance of a variance from the provisions of the King County Sensitive Areas Ordinance governing wetlands and their buffers. Accordingly, on March 17, 1995, the Lundes applied for such a variance to allow alteration of nearly 5,000 square feet of the wetland in order to site an 1,010-square-foot house with an access driveway and a yard. The Lundes proposed to compensate for the wetland intrusion by enhancing a portion of the low-quality wetland lying east of the house with native vegetative plantings at a 2:1 enhancement ratio.

3. A public hearing on the Lunde variance request was held before the King County Zoning Adjustor and a decision issued on February 10, 1997. The Zoning Adjustor's decision placed the application on hold pending resolution of Swamp Creek flooding conditions on a regional basis. The Adjustor also concluded that the evidence did not demonstrate that a variance would not be materially detrimental to the public welfare nor injurious to nearby property and improvements. The Adjustor was particularly concerned that no demonstration was made as to how the Applicant would compensate for lost flood storage capacity on the site from the placement of fill or how such fill would impact the existing drainage patterns in the area. The Lundes appealed the Zoning Adjustor's decision to the King County Hearing Examiner. After holding a pre-hearing conference, by order dated April 9, 1997, the Hearing Examiner remanded the application back to the Zoning Adjustor in order to allow the application to be amended and further reviewed, with findings to be made on the potential detrimental impact of the revised variance request.

4. On August 25, 1997, the Lundes submitted a revised foundation plan which greatly reduced the amount of fill proposed for the site through use of an open foundation design. The revision eliminates fill for a house pad, deletes the garage, and employs a gravel driveway. The design proposes that any fill used to construct the driveway should be balanced by soils removal elsewhere onsite. Based on this revised plan, the Zoning Adjustor held a second public hearing, and on October 20, 1997, issued a decision approving the variance and concluding that no detrimental impacts would result therefrom.

5. The Zoning Adjustor's second decision has been appealed by neighboring residents David and Beverly Sparks and Vince and Elizabeth Schmitt. The appeal alleges that the proposed Lunde residence is within the floodway for Swamp Creek, and its construction will impede drainage and aggravate flooding. Appeal arguments were received by the King County Hearing Examiner's Office at a hearing held on January 23, 1998. Because an appeal review is limited to evidence considered by the Zoning Adjustor, no new testimony was received.

6. The only technical information in the record describing the location and extent of the floodway and floodplain for Swamp Creek is contained within the FEMA Flood Insurance Rate Map dated May 16, 1995, which appears to be based on data established in September 1989. The FEMA map shows the Swamp Creek floodplain in this location extending as far as 400 feet west of 73rd Avenue NE and encompassing the entire Lunde parcel. The mapped FEMA floodway, on the other hand, occupies perhaps two-thirds of the Lunde parcel but lies east of the proposed building site. Because FEMA maps are routinely updated and comprise safety-related technical information rather than use regulations, the Applicant has no vested right to the review under the 1995 map. Therefore, if a new FEMA map has been issued at the time of building permit review for this residential proposal, such map should be used in determining the location of the Swamp Creek floodway.

7. There is no doubt that the Lundes' project as originally designed created serious potential impacts to floodplain storage and flood water movement due to its proposed use of a solid house foundation, a garage, and substantial fill for both the house pad and the driveway. The revised proposal is designed to address these issues, with an open foundation, no fill proposed for the house site, the garage eliminated, and fill for the driveway greatly reduced. A zero net loss of flood storage is expected to be accomplished by balancing driveway fill with excavation elsewhere on the site. Site drainage impacts will be addressed at building permit review. As currently configured, the Lundes' variance application does not propose wetland excavation beyond that necessary for residential construction, and onsite balancing of fill will need to occur within the proposed residential footprint.

CONCLUSIONS:

1. KCC 21.58.020.A requires that for a variance to be granted the Applicant must demonstrate special circumstances apply to the property, such as size, shape, topography, location or surroundings, resulting in deprivation of such property of the rights and privileges enjoyed by similar parcels in the vicinity after zoning code provisions are strictly applied.
KCC 21.58.020.B requires a finding that the variance will not be materially detrimental to the public welfare or injurious to property or improvements in its vicinity, or contrary to the goals

and purposes of the Sensitive Areas Code. Where sensitive areas are involved, KCC 21.58.020.C also requires that the variance granted be the minimum necessary to accommodate the permitted uses.

2. With respect to the Lunde application, it is uncontested that a special circumstance comprising the total occupancy of the property by a Class 1 wetland prevents the construction of a normal residence as permitted by the zoning. As revised to provide an open foundation and to eliminate fill, it is clear that the modest house proposed by the Lundes would be the minimum necessary to achieve a reasonable permitted use of the site.

3. The matter at issue is whether granting a variance to the Lundes for their proposed single-family residence will cause injury to offsite properties and fail to protect members of the public from injury and damage contrary to the purposes of the Sensitive Areas Ordinance. In the instant case, while it is certainly clear that leaving this floodplain and wetland property undeveloped would be a preferable option, in 1987 when the County allowed this lot to be short-platted it also implicitly undertook to allow some beneficial use of the property to occur. If the County is not willing to approve some development for the property, it will be constitutionally obligated to condemn it for public use.

4. Viewing the matter in this context, the Lundes' residential proposal, while not an optimal use, meets the essential legal requirements for a variance. By reducing onsite filling to the point where it offers no net loss of floodplain storage, the proposed development of the site should not cause adverse flooding impacts to offsite properties. While there can be no assurance that some future property owner may not attempt to improve the site in a manner which threatens flooding impacts, the construction that is currently contemplated is adequately responsive to floodplain impacts and meets applicable legal standards for variance approval. It must be emphasized that variance review is largely conceptual in nature, and a more detailed review of actual project feasibility occurs within the building permit framework.

5. The variance decision of the Zoning Adjustor was not arbitrary or capricious, nor was it based on an erroneous conclusion. The Zoning Adjustor's decision therefore must be upheld. The Zoning Adjustor's conditions of approval have been modified to assure compatibility with the environment and compliance with County policies and regulations.

DECISION:

The appeal is DENIED. A variance from wetlands requirements sufficient to allow construction of a single-family residence consistent with revised plans submitted August 25, 1997, is APPROVED, subject to the following conditions:

1. Building permit #B94R2624 shall be issued within one year from the approval of the subject variance application (including the exhaustion of appeals therefrom). Otherwise, this action shall become null and void.

2. The building permit shall be in substantial conformance with the revised plans submitted August 25, 1997.

3. Before issuance of the building permit, the applicant shall obtain approval of a detailed wetland mitigation plan indicating: a) planting location, size, quantity, and type; b) costs for planting material and installation; and c) a three-year monitoring plan. The amount of wetland impact associated with the installation of the driveway shall be recalculated. A performance/maintenance bond will be required prior to issuance of a building permit.

4. Prior to building permit issuance, the owner of the property shall submit proof that a Notice on Title has been filed for recording with Records and Election Division, to run with the land containing sensitive areas. The Notice shall be approved by DDES and inform the public record of the presence of the wetland area and buffer, and that limitations on actions in or affecting such areas or buffer exist.

5. The driveway shall not have fill brought into the site without providing compensating storage per KCC 21.54.190A. This may require the driveway to be excavated to an amount equal to the gravel base, etc., added for the driveway. No compensatory excavation shall occur within wetland areas not otherwise subject to residential development activity, as identified within the building permit application.

6. The building shall be elevated, as shown on the revised plans, with an open foundation per KCC 21.54.190.E and the lowest floor elevated to one foot above the Base Flood Elevation (BFE). All the electrical, heating, ventilation, plumbing, air conditioning equipment, and other utility and service facilities shall be flood-proofed or elevated above the flood protection elevation. The foundation shall be reviewed during the building permit for structural requirements and the elevation of the lowest floor. During the construction of the building, it shall be demonstrated that the lowest floor meets King County Codes, through a Federal Emergency Management Agency (FEMA) elevation certificate that will need to be completed by a licensed surveyor and submitted to the inspector for review for compliance with code.

7. The building's roof area runoff shall be taken to gutters and downspouts and discharged to splash blocks, not sheet flowing from the roof area, as proposed.

8. All development shall be outside the floodway for Swamp Creek, as evidenced by the most current FEMA maps available at the time of building permit review.

ORDERED this 4th day of February, 1998.

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Stafford L. Smith, Deputy
King County Hearing Examiner

TRANSMITTED this 4th day of February, 1998, to the parties and interested persons shown on the attached list.

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding zoning variance decisions. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE JANUARY 23, 1998 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L95VA008 – LUNDE:

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Don Gauthier, Sherie Sabour, Nick Gillen, Melody McCutcheon, David Sparks, Bev Sparks, and Vince Schmitt.

No new exhibits were entered into the record.

SLS:gb
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