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AFTER RECORDING RETURN TO:  
SKAGIT COUNTY HEARING EXAMINER  
302 SOUTH FIRST STREET  
MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER ON APPEAL OF ADMINISTRATIVE DECISION - AA 99 0195

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANT: LES FRANCIS

ASSESSOR PARCEL NO: P36621

ABBREVIATED LEGAL DESCRIPTION: located at 8787 F & S Grade Road, Sedro Woolley, WA; within Section 14, Township 35 North, Range 4 East, W.M., Skagit County, Washington.

**SKAGIT COUNTY HEARING EXAMINER**  
**STATE OF WASHINGTON**

In The Matter of	)	
Administrative Appeal	)	No. AA 99 0195
of LES FRANCIS	)	
	)	
Of an Administrative Determination by the	)	FINDINGS OF FACT,
Skagit Count Planning Director	)	CONCLUSION OF LAW
Concerning a Short CaRD Proposal	)	AND DECISION
	)	

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**PROCEDURE**

This matter involves the appeal of an administrative decision regarding a Short CaRD subdivision proposal. The appellants are the proponents of the subdivision.

The administrative decision being appealed was issued on March 2, 1999, by the Planning and Permit Center. A letter from the Permit Center, dated March 16, 1999, clarified appeal procedures and extended the appeal deadline. A timely appeal was filed.

The appeal was initially brought on for hearing before Hearing Examiner Robert Schofield on April 28, 1999. Following Mr. Schofield's death, the matter was rescheduled and heard again on June 16, 1999, before Wick Dufford, Hearing Examiner Pro Tempore.

On June 23, 1999, Examiner Dufford conducted a site tour in the company of representatives of the parties. He has listened to the tapes of the initial hearing and has reviewed the exhibits entered therein, as well as the subsequent written submissions that were authorized. Additional testimony, exhibits and arguments were offered at the second hearing. The entire record has been reviewed and considered. On the basis thereof, the following is entered:

**FINDINGS OF FACT**

1. Les Francis (applicant) is the owner of 11 plus acres of real property which abuts the F&S Grade Road on the south. The address is 8787 F & S Grade Road. The location is within one mile of the Sedro Woolley urban growth area.
2. The applicant seeks to subdivide the property using the Short CaRD (Conservation and Reserve Development) process.
3. There is an existing single family residence on the property, located on the westerly portion of the frontage along the F&S Grade Road, a major collector. The residence is served by a typical driveway from the County road. Immediately east of the residence is a pasture area. North of the residence is a flat low-lying open area, used for many years for agriculture. It is presently planted in beets. Behind the beet field is a recently-built horse barn and pasture for the horses. Further north is Willard (or

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Wollard) Creek which flows toward the west through this property. The Creek runs along the foot of a hill which slopes up from its northern bank. North of the creek on the higher ground, the land is heavily forested.

4. The applicant has cleared over an acre of this forested area on the hillside and built an access road along the western edge of his property from the F&S Grade Road to the clearing. He has constructed a substantial bridge for this road across Willard Creek.

5. Willard Creek and the area around it are a critical area, a Type III stream with a required 100 foot buffer.

6. The majority of the applicant's parcel is located within an Agriculture Reserve zoning district. The northerly portion (across Willard Creek) is zoned Rural Intermediate. The Comprehensive Plan designation for the area is Rural Reserve.

7. On January 29, 1999, the applicant applied for two administrative decisions in connection with his Short CaRD proposal. Under this application, four lots were contemplated. The existing house by the F&S Road was to be Lot 1, one acre in size. The pasture east of the present house was to be Lot 2, open space of about 1.09 acres. The cultivated land and pasture behind the house was to be Lot 3, open space comprising approximately 6.95 acres. The clearing on the hillside to the north and the surrounding forest was to be Lot 4, a separate lot of 2.28 acres for the applicant to use to build his own residence on. The proposed boundary between Lots 3 and 4 was Willard Creek. The building lot on the north would be accessed by the driveway built to it along the western edge of the property.

8. The version of the Short CaRD subdivision ordinance in effect at the time that this application became vested is Ordinance No. 17098. It states a preference for the clustering of buildable lots. Any other placement of parcels requires an administrative decision that clustering is "unreasonable." SCC 14.08.118(7)(a). The Ordinance also establishes a maximum lot size of one acre for building lots, unless a larger lot is needed for one of several specified reasons. SCC 14.08.118.(6)(c). Accordingly, the applicant sought administrative decisions to allow his building lots to be separated rather than clustered and to allow one of the building lots to exceed one acre in size.

9. After conferring with County staff, the applicant and his consultants revised their initial plan and proposed a three lot configuration. Under this approach Lots 1 and 2 would be the same as initially proposed. Lot 3, however, would comprise the rest of the property. Within Lot 3 various use designations would be made. The cleared area north of the stream and the barn would be designated as buildable. The remainder would be allocated to protected area open space (the stream and its buffer) and recreation/amenity open space (everything else).

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10. The administrative decision, issued on March 2, 1999, in effect denied the applicant's proposal to place his home in the area north of the stream. As relevant here, the decision stated the following conditions:

1. Only one access will be allowed to the parent parcel. Lot 1 will need to gain access along the west property line.
2. Lot 1 shall be no greater than one (1) acre in size.
3. Lot 2 shall be a separate open space lot (future development) and labeled as such.
4. Lot 3 shall include the remainder of the parcel (open space recreation as designated) and shall have a building site not to exceed one (1) acre in size unless a larger lot is needed to incorporate the existing horse barn and then only large enough to include that structure.
5. The building right associated with Lot 3 shall be located south of the critical area and clustered to the maximum extent possible if the area is to include the existing barn structure located on site.
6. If the existing barn is not to be included within the overall area for Lot 3, a special use permit will be required for the structure. . . .

11. The appeal of this decision argued for approval of the three lot configuration that had been applied for. It asked that the separate building site north of the stream be permitted and that the existing home be allowed to continue to use its well-established driveway.

12. The placement of a home on the hillside north of the stream would be consistent with existing development in the area. To the west along this same hillside several homes have been built on other properties.

13. A home built on the northerly site that the applicant proposes would be barely visible, if visible at all, from the County road. Trees and vegetation form a visual screen. Requirements for maintaining the protected area adjacent to the stream would prevent the removal of this screen.

14. The portion of the property lying south of Willard Creek is not identified by FEMA or the County as an area particularly prone to floods. However, substantial evidence was presented at the hearing from long-time residents and observers of the neighborhood that the pasture and crop-growing areas on the property have for many years been subject to significant periodic flooding. Indeed, one witness testified that a lawsuit arose on neighboring property when a seller neglected to disclose this risk.

15. The source of the flooding is Willard Creek, not the Skagit River. The problem is a local one. But, regardless of the source, the first-hand testimonial evidence that the property has been flooded on a number of occasions was not convincingly controverted.

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16. The applicant bought the subject property with the existing house on it. That house is old – built in about 1905 – and is elevated, probably in recognition of the flooding potential.

17. The work the applicant has done on the property – building the westerly access road and bridge, building the horse barn, clearing a portion of the hillside – has all been carried out with the full knowledge of the County and with the appropriate approvals from the County and the State.

18. In connection with the access road, the applicant at the outset explicitly stated that his purpose was to build a home on the site north of the creek. In his initial environmental checklist submitted to the County, he gave as the name for his project: “new home site for Les and Lorrie Francis.” He described the project as “approx. 1,500 lin. ft. of gravel rd. access via F&S grade Rd. crossing Wollard Creek to new home site.”

19. The County granted him an access permit for the road as well as a fill and grade permit to build it. However, for reasons that do not appear in the record, the MDNS for the fill and grade permit redescribed the purpose, as follows: “The proposed driveway will be used to access the back portion of the parcel with a future proposal to construct a barn.”

20. For the creek corridor, the applicant received a critical area determination and recorded a critical area agreement.

21. At the hearing the applicant presented expert opinion that the construction of a house on the north side of the stream outside of the regulated buffer would not be likely to impact the critical area adversely and that any drainage of concern could readily be handled by conventional stormwater management structures. Nothing in the record convincingly undermines this opinion.

22. Any adverse critical area impacts have already been imposed through construction of the access road and bridge as previously permitted by the County. For the future, the use of land north of the stream outside of the regulated buffer would represent a transfer of development potential from the critical portion of the site to a non-critical portion of the site.

23. Although the portion of the subject property south of the stream is not designated as Agricultural Natural Resource Land, it is in an agricultural zoning classification and its use for growing crops and pasture is, unquestionably, consistent with its basic land use designation.

24. Because this portion of the property is subject to recurrent flooding, retaining it in agricultural uses and open space is preferable to obstructing it with buildings, particularly residential structures. Under the circumstances here, the location

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of the applicant's residence on higher ground to the north would be a more environmentally sound use of the land than would clustering.

25. Moreover, placing the applicant's new house on the hillside at the back of his property, largely concealed by trees, would be compatible with the established pattern of development in the immediate neighborhood. Indeed, by leaving the largely treeless area open and available for agriculture, the rural character of the property would remain undisturbed.

26. The retention of open space on the lower elevation here preserves flexibility for future development in an area which is close to the boundary of land currently marked for urban growth.

27. The recurrent flooding of the property south of the creek is a special condition peculiar to this tract and is not a circumstance that is the result of the actions or omissions of the applicant. Because of this special condition, to allow a departure from clustering here would not confer special privilege on the applicant.

28. The Public Works Department testified that it is their policy to allow one access per 900 feet of frontage on a major collector. In this case the subject property has about 400 feet of frontage along the F&S Grade Road. The policy would presumably preclude the new access road along the west side on the applicant's property. The approval of this road was apparently a decision that slipped through the net.

29. Any conclusion herein which may be deemed a finding is hereby adopted as such.

### CONCLUSIONS OF LAW

1. The Short CaRD approach is required here because the property is designated Rural Reserve under the Comprehensive Plan and is within one mile of an Urban Growth Area (UGA). SCC 14.08.118(5).

2. The three lot proposal includes a buildable area of one acre within Lot 3. This buildable area takes in both the proposed house north of the creek and the existing barn south of it, connecting the two via a narrow strip along the access road (See Exhibit 12.) It avoids the critical area. This revised plan, in effect, eliminates the original request for a building lot exceeding one acre.

3. The remaining request for administrative decision is for a determination that in this case clustering is unreasonable.

4. SCC 14.08.118(7)(a) is the relevant Code provision. It reads:

Within a Short CaRD Subdivision, clustering of buildable lots

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shall be the preferred placement of parcels, Any other placement shall require an Administrative decision that clustering is unreasonable which shall be based on the criteria set forth in the Comprehensive Plan or based on consideration of Best Management Practices and showing that special conditions, circumstances and topography exist which are peculiar to the land, buildings or structures; that the special conditions and circumstances are not a result of the actions or omissions of the applicant; and that such placement will not confer onto the applicant any special privilege that is denied by this section to other lands, buildings and structures in the same designation.

5. The most pertinent Comprehensive Plan provisions are from the Land Division portion of the Land Use Element. Five objectives are stated as underpinnings for the CaRD policies:

1. To buffer and protect natural resource lands.
2. To reserve lands that may be appropriate for future urban growth areas.
3. To help retain the rural landscape, character and lifestyle.
4. To protect critical areas by transferring development potential from the critical area portion of a site to a non-critical area portion of a site.
5. To create development patterns that provide for greater efficiency and flexibility for current and future land use; housing diversity; natural resource land and critical area conservation and protection; retention of open space; and provide incentives for utilizing CaRD land divisions.

The relevant policy regarding intent for CaRD land divisions is set forth in paragraph 1.2.1 on page 4-37:

The intent of a CaRD land division is to achieve some or all of the following benefits:

- 1.2.1 Flexibility in site development which may result in more compact clustered lots or environmentally sound use of the land, while assuring compatible development and maintaining the county's rural character.

6. Under the findings above, the three lot configuration, as proposed by the applicant, would be consistent with all of the objectives quoted and with the cited policy. Under the Comprehensive Plan, clustering does not appear to be mandatory, but rather one means for achieving the basic objectives. The applicant's proposal is environmentally sound, is compatible with its surroundings and does not alter rural character.

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7. On the other hand, because of the flooding potential, the clustering arrangement insisted upon by the County would not be the more environmentally sound approach in this instance.

8. Best Management Practices are not relevant to the administrative decision under appeal.

9. The remainder of the Ordinance's criteria for a determination that clustering is unreasonable are akin to the standard criteria for a land use variance. The findings above support a conclusion that these criteria are met in this case. There is a special condition relating to the property which is not of the applicant's making and which justifies a departure from the norm. This is the fact that the land where the County wants him to build his house is land that floods.

10. Although not requested by the applicant, the County made an additional administrative decision in connection with this application. That decision limits the applicant to only one access on the parent parcel (the original 11 plus acres).

11. The Comprehensive Plan does not provide any clear guidance on this matter. However, the Short CaRD Ordinance addresses the subject. It requires that building lots not be "substantially aligned along a public road" and then states that "[b]uilding lots without an existing residence should be limited to a single shared private access to a public road." (emphasis added). SCC 14.08.118(7)(b).

12. The County staff perhaps interprets the Ordinance as meaning that there may be only one shared access in any CaRD subdivision. On its face, however, the provision appears to apply the one shared access requirement only to those building lots that do not already have a residence. The implication is that where there is an existing residence with a separate access, that access may be retained.

13. However, the Short CaRD provisions are an amendment to the overall Short Subdivision Ordinance which provides that "individual lot accesses to county roads shall be combined when required by the Public Works Director." SCC 14.08.090(3)(ix). No standards are spelled out to guide the discretion of the Director, but the Skagit County Public Works Department Road Standards include a section governing driveways. Section 7.02(E)(1) states that for major collectors access points generally will not exceed one per 900 feet of frontage.

14. From the photographic evidence presented it does not appear that it would be difficult to reroute access for the old original house to the new access driveway along the west side of the property. To do so would be consistent with the policy evident in the Road Standards and a condition to that effect would therefore be a reasonable condition in any Short CaRD approval that the County may issue to the applicant.

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15. Any finding herein which may be deemed a conclusion is hereby adopted as such.

### DECISION

The clustering requirement imposed by the administrative decision appealed is unreasonable. The decision should be reversed, with instructions that the placement of building areas substantially as shown on Exhibit 12 herein be approved. With respect to the limitation of one access only for the parent parcel, the decision is affirmed.

SKAGIT COUNTY HEARING EXAMINER

Wick Dufford  
WICK DUFFORD, PRO TEM

Date of Action: July 26, 1999

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