



1 decision under review; and

2 "b) That the petitioner will suffer irreparable  
3 injury if the stay is not granted."

4 We find petitioners have demonstrated satisfaction of these  
5 criteria as set forth below and grant the stay.

6 COLORABLE CLAIM OF ERROR

7 In order to establish a colorable claim of error,  
8 petitioners must allege error which, if sustained, would be  
9 sufficient to result in reversal or remand of the decision.  
10 Dames v. City of Medford, 9 Or LUBA 433, 438 (1984); and See  
11 Von Weidlin Int'l v. Young, 16 Or App 81, 514 P2d 560, 515 P2d  
12 936, 517 P2d 295, rev den (1973).

13 Petitioners allege error on several grounds: violation of  
14 statewide planning Goals 5 and 6, violation of Section 1.040 of  
15 the county ordinance, inadequate findings, and findings not  
16 supported by substantial evidence. We find the Goal 5  
17 allegations and supporting argument to be sufficient under ORS  
18 197.845(a).

19 Petitioners say Mill Creek is designated in the county's  
20 comprehensive plan as a sensitive area for fish production,  
21 i.e., a Goal 5 protected resource. In addition to the  
22 designation of Mill Creek as a sensitive fish stream, the  
23 petition for the stay and attached affidavits recite the  
24 importance of Mill Creek for fishing and fish propagation.  
25 Petitioners allege construction activity without adequate  
26 control measures can harm fish and the value of the stream as a

1 spawning area. Petitioners also contended in the county  
2 proceedings below that the proposed construction conflicts with  
3 Mill Creeks's resource value. Support for this allegation is  
4 in the county's finding that "construction and operation of the  
5 replacement pipeline is a potential conflict with this  
6 Goal...." Record at 89. Petitioners contend that  
7 notwithstanding recognition by the county that the pipeline  
8 construction conflicts with Goal 5, the county failed to  
9 analyze the economic, social, environmental, and energy (ESEE)  
10 consequences as required by Goal 5 and OAR 660-16-005, and to  
11 resolve the conflicts in accordance with OAR 660-16-010.

12 These allegations assert a colorable claim that the  
13 decision does not comply with Goal 5 and OAR 660-16-005 and  
14 660-16-010. The allegations are not frivolous and would  
15 warrant reversal or remand if found to be correct.

16 Since petitioners have demonstrated colorable claim of  
17 error, further discussion of petitioners' other allegations of  
18 error is unnecessary.

19 IRREPARABLE INJURY

20 Petitioners claim Mill Creek has substantial recreational  
21 value for them and others, primarily as a fishing stream.  
22 Petitioners point to a joint statement in the record by the  
23 Confederated Tribes of the Umatilla Reservation and the Oregon  
24 Department of Fish and Wildlife. The statement recites the  
25 risk to fish resulting from suspended silt in the water and the  
26 harm to spawning areas caused by sedimentary deposits. The

1 injury to gravel spawning beds may be permanent in some  
2 circumstances.

3 Petitioners advance two arguments supporting their claim  
4 that irreparable injury to Mill Creek is likely to occur.  
5 First, petitioners say the order is not conditioned upon use of  
6 construction methods and erosion control practices recommended  
7 by DEQ and other agencies. Second, the contractor has  
8 constructed about one mile of the pipeline since the order  
9 became final, and significant erosion has already occurred with  
10 consequent harm to Mill Creek and its protective wetlands.

11 The affidavits submitted by petitioners allege one-foot  
12 deep silt deposits in a pond on the Rittenhouse property, and  
13 two-feet deep in a pond on the Finch property resulting from  
14 construction activity. Testimony also demonstrated a large  
15 quantity of fill material from construction was deposited in an  
16 area characterized as a wetland. In addition, petitioners  
17 allege construction began prior to installation of silt fences  
18 required by the county's order to control erosion.<sup>3</sup>

19 The city counters these charges by alleging the deviations  
20 from the contract specifications were temporary only, and were  
21 done only in response to unexpected events or conditions.  
22 Construction commenced without installation of silt fences  
23 because the fencing material had not arrived. The contractor  
24 deposited fill material in the wetland area when pipe was laid  
25 on the downhill side of the adjacent road in order to bypass an  
26 obstruction on the uphill side. The city contends these were

1 unexpected events having no relevance to the likelihood of harm  
2 in the future.

3 The contract between the city and the contractor has  
4 detailed provisions regarding the construction of silt fences.  
5 The contractor also performs daily tests of the water in Mill  
6 Creek to detect changes in turbidity resulting from  
7 construction. Notwithstanding these steps by the city to  
8 prevent injury to Mill Creek, on at least two occasions the  
9 contractor acted without adequate protection of Mill Creek or  
10 its associated wetlands. Given these circumstances, we believe  
11 there is reasonable basis for concluding continuation of  
12 construction will cause irreparable injury to Mill Creek. For  
13 these reasons we grant the requested stay.

14 This appeal proceeding has been delayed pending resolution  
15 of an objection to the record. An accelerated briefing  
16 schedule will mitigate the effects of any further delay.  
17 Therefore, the petition for review shall be filed on or before  
18 January 24, 1986. Respondents shall have 10 days thereafter to  
19 file respondent's answering brief. Oral argument will be held  
20 within 7 days thereafter.

21 Pursuant to ORS 197.845, petitioners shall give an  
22 undertaking in the amount of \$5,000. The undertaking shall be  
23 accompanied by proof the surety thereon is qualified by law to  
24 issue surety insurance as defined in ORS 731.186. The  
25 principal and surety shall undertake to pay all reasonable  
26 attorney's fees and actual damages which may be awarded by the

1 Land Use Board of Appeals in the event the land use decision  
2 under appeal shall be affirmed.

3 The county's permit approval, dated October 2, 1985, is  
4 stayed pending resolution of this appeal.

5 The stay shall be effective from the date the undertaking  
6 above described is filed with the Board.

7 Dated this 21st day of January, 1986.

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11 John L. DuBay  
12 Referee  
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