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ASSEMBLY, No. 4221

STATE OF NEW JERSEY
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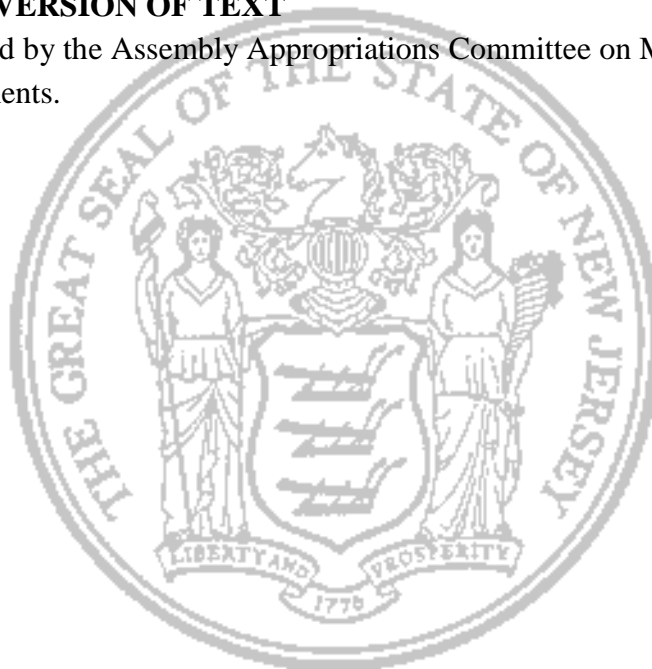
Assemblyman Freiman

SYNOPSIS

Provides for protection of public right of access to certain public trust lands.

CURRENT VERSION OF TEXT

As reported by the Assembly Appropriations Committee on March 18, 2019, with amendments.



(Sponsorship Updated As Of: 3/26/2019)

1 AN ACT concerning ¹**the**¹ public ¹**trust doctrine** access to
2 certain public trust lands¹, amending P.L.1975, c.291, and
3 supplementing Title 13 of the Revised Statutes.

4
5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7
8 1. (New section) The Legislature finds and declares that:

9 a. The public has longstanding and inviolable rights under the
10 public trust doctrine to use and enjoy the State's tidal waters and
11 adjacent shorelines for ¹navigation, commerce, and¹ recreational
12 uses, including, but not limited to, bathing, swimming, fishing, and
13 other shore-related activities;

14 b. The public trust doctrine establishes the rule that ownership
15 of ¹the State's natural resources, including, but not limited to,
16 ground waters, surface waters, and¹ land flowed or formerly flowed
17 by tidal waters is vested in the State to be held in trust for the
18 people, that the public has the right to tidal lands and waters for
19 navigation, fishing, and recreational uses, and, moreover, that even
20 land that is no longer flowed by the tide but that was artificially
21 filled is considered to be public trust land and the property of the
22 State;

23 c. This historic principle stems from Roman jurisprudence
24 declaring that the air, running water, and shores of the sea are
25 common to mankind. The concept was extended to English law so
26 that public property became classified as one of two types, either
27 property that was necessary for the state's use or property that was
28 common and available to all citizens. The common property
29 consisted of the air, tidally flowed waters, fish, and wild animals,
30 and the King did not own this common property as he owned other
31 state property, but rather held it in trust for the people. After the
32 Revolution, all royal rights in the land that was to become the State
33 of New Jersey became vested in the people of the State of New
34 Jersey. In 1821, the seminal court case of Arnold v. Mundy was
35 decided, outlining the history of the public trust doctrine and
36 applying it to tidally flowed lands in New Jersey, and from the time
37 it was decided, New Jersey courts have held that the State holds in
38 trust for the people of the State those lands flowed by tidal waters to
39 the mean high water mark ¹. The courts have also recognized that
40 the public trust doctrine is not fixed or static; rather, it is to be
41 molded and extended to meet changing conditions and the needs of
42 the public it was created to benefit¹;

43 d. ¹**The** Pursuant to the public trust doctrine, the¹ State of
44 New Jersey ¹**has a duty to** ²**shall**¹ has a duty to² promote,

EXPLANATION – Matter enclosed in bold-faced brackets **thus** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined **thus** is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Assembly AEN committee amendments adopted March 11, 2019.

²Assembly AAP committee amendments adopted March 18, 2019.

1 protect, and safeguard the public's rights and ¹~~to~~ ensure
2 reasonable and meaningful public access to tidal waters and
3 adjacent shorelines;

4 e. The Department of Environmental Protection ¹~~has the~~
5 authority and the duty to ²~~shall~~ has the authority and the duty
6 to² protect the public's right of access to tidally flowed waters and
7 their adjacent shorelines under the public trust doctrine and
8 statutory law. In so doing, the department ¹~~has the duty to~~
9 ²~~shall~~ has the duty to² make all tidal waters and their adjacent
10 shorelines available to the public to the greatest extent ¹~~possible~~
11 practicable¹, protect existing public access, provide public access in
12 all communities equitably, maximize different experiences provided
13 by the diversity of the State's tidal waters and adjacent shorelines,
14 ensure that the expenditure of public moneys ¹by the department¹
15 maximizes public use and access where public investment is made,
16 and remove physical and institutional impediments to public access
17 to the maximum extent ¹~~possible~~ practicable¹; and

18 f. Public access includes visual and physical access to, and use
19 of, tidal waters and adjacent shorelines, sufficient perpendicular
20 access from upland areas to tidal waters and adjacent shorelines,
21 and the necessary support amenities to facilitate public access for
22 all, including ¹, but not limited to,¹ public parking and restrooms.

23
24 2. (New section) a. The Department of Environmental
25 Protection shall ensure that any approval, permit, administrative
26 order, or consent decree issued, or other action taken, by the
27 department pursuant to the "Coastal Area Facility Review Act,"
28 P.L.1973, c.185 (C.13:19-1 et seq.), R.S.12:5-3, "The Wetlands Act
29 of 1970," P.L.1970, c.272 (C.13:9A-1 et seq.), the "Flood Hazard
30 Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.), or the
31 State's implementation of the "Coastal Zone Management Act of
32 1972," 16 U.S.C. s.1451 et seq., or any other law, is consistent with
33 the public trust doctrine.

34 b. The Department of Environmental Protection shall ensure
35 that any public funding issued ¹by the department¹, and any action
36 taken on a project using ¹such¹ public funding, ¹and any project or
37 any aspect of a project utilizing federal funding that is regulated or
38 reviewed by the department,¹ is consistent with the public trust
39 doctrine.

40
41 3. (New section) a. The Department of Environmental
42 Protection shall not adopt any rule or regulation pursuant to the
43 "Coastal Area Facility Review Act," P.L.1973, c.185 (C.13:19-1 et
44 seq.), R.S.12:5-3, "The Wetlands Act of 1970," P.L.1970,
45 c.272 (C.13:9A-1 et seq.), the "Flood Hazard Area Control Act,"
46 P.L.1962, c.19 (C.58:16A-50 et seq.), or the State's implementation
47 of the "Coastal Zone Management Act of 1972," 16 U.S.C. s.1451

1 et seq., or any other law, that mandates on-site public access to tidal
2 waters or adjacent shorelines as a condition of any approval, permit,
3 administrative order, or consent decree at any ¹**【existing】**¹ structure
4 or facility that:

5 (1) is required to submit a facility security plan pursuant to the
6 federal "Maritime Transportation Security Act of 2002," 46 U.S.C.
7 s.70101 et seq., and 33 C.F.R. s.101.100 et seq.;

8 (2) is required to develop and adhere to a transportation security
9 plan for hazardous materials pursuant to the regulations adopted by
10 the federal Pipeline and Hazardous Materials Safety Administration
11 in the United States Department of Transportation, 49 C.F.R.
12 s.172.800 et seq.;

13 (3) is required to participate in the United States Department of
14 Homeland Security's Chemical Facility Anti-Terrorism Standards
15 program;

16 (4) is located at any airport, railroad yard, or nuclear power
17 plant;

18 (5) requires exclusion of the public for security reasons as
19 designated in accordance with rules and regulations adopted
20 pursuant to subsection b. of this section by the New Jersey Office of
21 Homeland Security and Preparedness; or

22 (6) is owned or operated by the New Jersey Department of
23 Military and Veterans' Affairs ¹and on which on-site public access
24 is deemed to pose a threat to security or public safety¹.

25 b. The New Jersey Office of Homeland Security and
26 Preparedness shall adopt rules and regulations pursuant to the
27 "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et
28 seq.) to establish a process to designate those facilities that, for
29 homeland security reasons, require exclusion of the public from the
30 tidal waters or adjacent shorelines located at those facilities. The
31 rules and regulations shall nevertheless provide for access to tidal
32 waters and their adjacent shorelines to the maximum extent feasible
33 and as otherwise permitted by law.

34
35 4. (New section) ¹a.¹ For any application for a permit or other
36 approval to be issued by the Department of Environmental
37 Protection pursuant to the "Coastal Area Facility Review Act,"
38 P.L.1973, c.185 (C.13:19-1 et seq.), R.S.12:5-3, "The Wetlands Act
39 of 1970," P.L.1970, c.272 (C.13:9A-1 et seq.), the "Flood Hazard
40 Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.), or the
41 State's implementation of the "Coastal Zone Management Act of
42 1972," 16 U.S.C. s.1451 et seq., or any other law, if the application
43 provides for a change in the existing footprint of a structure, ¹**【or】**¹
44 a change in use of the property, ¹or involves beach replenishment or
45 beach and dune maintenance.¹ the department shall review the
46 existing public access provided to tidal waters and adjacent
47 shorelines at the property and shall require as a condition of the

1 permit or other approval that additional public access to the tidal
2 waters and adjacent shorelines consistent with the public trust
3 doctrine be provided ¹~~["~~, in accordance with~~"]~~ . In determining the
4 public access that is required at a property, the department shall
5 consider¹ the scale of the changes to the footprint or use, the
6 demand for public access, and any ¹~~["~~adopted~~"]~~ department-
7 approved¹ municipal public access plan or public access element of
8 a municipal master plan. ¹The requirements of this subsection shall
9 apply to any application for an individual permit submitted on or
10 after the effective date of P.L. , c. (C.) (pending before the
11 Legislature as this bill). No later than 18 months after the effective
12 date of P.L. , c. (C.) (pending before the Legislature as this
13 bill), the requirements of this subsection shall apply to permits-by-
14 rule, general permits, or general permits-by-certification issued by
15 the department as provided in rules and regulations adopted
16 pursuant to subsection b. of this section.

17 b. No later than 18 months after the effective date of P.L. ,
18 c. (C.) (pending before the Legislature as this bill), the
19 department shall adopt, pursuant to the "Administrative Procedure
20 Act," P.L.1968, c.410 (C.52:14B-1 et seq.), rules and regulations
21 establishing:

22 (1) those permits-by-rule, general permits, and general permits-
23 by-certification for which public access would be required, but
24 which would not require individual review pursuant to subsection a.
25 of this section;

26 (2) those permits-by-rule, general permits, and general permits-
27 by-certification for which, consistent with the public trust doctrine,
28 public access would not be required; and

29 (3) specific categories of projects which, due to the existence of
30 an emergency condition, or a condition that poses a significant and
31 immediate threat to public health and safety, shall not require
32 individual review of public access pursuant to subsection a. of this
33 section.¹

34
35 5. (New section) a. For any application for a permit or other
36 approval to be issued by the Department of Environmental
37 Protection pursuant to the "Coastal Area Facility Review Act,"
38 P.L.1973, c.185 (C.13:19-1 et seq.), R.S.12:5-3, "The Wetlands Act
39 of 1970," P.L.1970, c.272 (C.13:9A-1 et seq.), the "Flood Hazard
40 Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.), or the
41 State's implementation of the "Coastal Zone Management Act of
42 1972," 16 U.S.C. s.1451 et seq., involving a marina in existence on
43 the date of enactment of P.L. , c. (C.) (pending before the
44 Legislature as this bill), if the regulated activity that is the subject
45 of the application is on the marina property, the department shall
46 require that the existing degree of public access to the waterfront
47 and adjacent shoreline be maintained. If the regulated activity

1 affects or diminishes public access on the marina property, the
2 department shall require equivalent access as a condition of the
3 permit or other approval. Equivalent public access includes access
4 that allows the opportunity to participate in the same activities in
5 the same manner, by the same number of people as the existing
6 public access. If no public access is provided to the waterfront and
7 adjacent shoreline prior to application for a permit or other
8 approval, the department shall not impose new public access
9 requirements to the waterfront or adjacent shoreline as a condition
10 of the permit or other approval. However, if the application
11 includes property on which there is a beach, including any
12 application involving marina property that provided no public
13 access prior to the application, the department shall require public
14 access to the beach and the public's use of the beach as a condition
15 of the permit or other approval, and activities that have the effect of
16 discouraging or preventing the exercise of public trust rights shall
17 be prohibited.

18 b. (1) For any application for a permit or other approval to be
19 issued by the Department of Environmental Protection pursuant to
20 the "Coastal Area Facility Review Act," P.L.1973, c.185 (C.13:19-1
21 et seq.), R.S.12:5-3, "The Wetlands Act of 1970," P.L.1970, c.272
22 (C.13:9A-1 et seq.), the "Flood Hazard Area Control Act,"
23 P.L.1962, c.19 (C.58:16A-50 et seq.), or the State's implementation
24 of the "Coastal Zone Management Act of 1972," 16 U.S.C.
25 s.1451 et seq., for the development of any marina property that
26 proposes to increase the existing developed area, which includes
27 buildings and areas covered by asphalt or other paving, by at least
28 50 percent, or that proposes the development of property that is not
29 within the parcel containing the existing marina development, the
30 applicant shall provide to the department a public access plan that
31 identifies:

32 (a) a site plan with the location and type of public access to be
33 provided;

34 (b) any areas to be closed to public access because of permanent
35 obstructions or risks due to hazardous operations where no
36 reasonable measures can be taken to avert those risks;

37 (c) an explanation of the specific risks and hazards in the areas
38 closed to public access with a description of the areas where public
39 access is enhanced ¹, or where public access is to be provided
40 offsite,¹ to compensate for the area closed due to permanent
41 obstructions or risks due to hazardous operations; and

42 (d) the operating hours of the marina.

43 The department shall require, as a condition of the permit or
44 other approval, public access to the waterfront and adjacent
45 shoreline, as identified in the public access plan and approved by
46 the department, during the marina's operating hours.

47 If the application includes property on which there is a beach, the
48 department shall require public access to the beach and the public's

1 use of the beach as a condition of the permit or other approval, and
2 activities that have the effect of discouraging or preventing the
3 exercise of public trust rights shall be prohibited.

4 (2) After a public access plan has been approved by the
5 department pursuant to this subsection, any changes to the public
6 access plan shall be submitted to the department for review and
7 approval, even if a modification to the existing permit or other
8 approval is not otherwise required. The applicant shall submit to
9 the department a copy of the approved plan, the proposed changes
10 to the plan, and information that details how the proposed changes
11 affect the approved plan. If the proposed changes reduce the public
12 access already provided pursuant to the public access plan, the
13 applicant shall be required to demonstrate that the proposed public
14 access reduction is offset by other changes to the public access plan.

15 c. For the purposes of this section, public access includes
16 visual and physical access and includes the following in any
17 combination, as appropriate:

18 (1) a public accessway designed in accordance with rules and
19 regulations adopted by the department, located parallel to the
20 shoreline with perpendicular access to it;

21 (2) a boat ramp, pier, fishing pier, other facilities, or other direct
22 access to the waterway;

23 (3) a waterfront pocket park;

24 (4) public restrooms to accommodate those using the public
25 access; and

26 (5) additional public parking to accommodate those using the
27 public access.

28 d. The department shall consider, when determining if public
29 access is sufficient or appropriate, the type of public access
30 available or needed within the area, the compatibility of the
31 proposed public access with the applicant's proposed use of the site,
32 the square footage of the public access area, and the environmental
33 impact or benefit of the proposed development.

34

35 6. (New section) The Department of Environmental Protection
36 may restrict public access to tidal waters and adjacent shorelines to
37 protect critical habitat areas from injurious uses, or threatened or
38 endangered species or their habitat areas from injury or injurious
39 uses, but only to the extent necessary according to the needs of the
40 habitat areas or species.

41

42 7. Section 19 of P.L.1975, c.291 (C.40:55D-28) is amended to
43 read as follows:

44 19. Preparation; contents; modification.

45 a. The planning board may prepare and, after public hearing,
46 adopt or amend a master plan or component parts thereof, to guide
47 the use of lands within the municipality in a manner which protects
48 public health and safety and promotes the general welfare.

1 b. The master plan shall generally comprise a report or
2 statement and land use and development proposals, with maps,
3 diagrams and text, presenting, at least the following elements (1)
4 and (2) and, where appropriate, the following elements (3) through
5 **[(16)] (17):**

6 (1) A statement of objectives, principles, assumptions, policies
7 and standards upon which the constituent proposals for the physical,
8 economic and social development of the municipality are based;

9 (2) A land use plan element

10 (a) taking into account and stating its relationship to the
11 statement provided for in paragraph (1) hereof, and other master
12 plan elements provided for in paragraphs (3) through (14) hereof
13 and natural conditions, including, but not necessarily limited to,
14 topography, soil conditions, water supply, drainage, flood plain
15 areas, marshes, and woodlands;

16 (b) showing the existing and proposed location, extent and
17 intensity of development of land to be used in the future for varying
18 types of residential, commercial, industrial, agricultural,
19 recreational, open space, educational and other public and private
20 purposes or combination of purposes including any provisions for
21 cluster development; and stating the relationship thereof to the
22 existing and any proposed zone plan and zoning ordinance;

23 (c) showing the existing and proposed location of any airports
24 and the boundaries of any airport safety zones delineated pursuant
25 to the "Air Safety and Zoning Act of 1983," P.L.1983, c.260 (C.6:1-
26 80 et al.);

27 (d) including a statement of the standards of population density
28 and development intensity recommended for the municipality;

29 (e) showing the existing and proposed location of military
30 facilities and incorporating strategies to minimize undue
31 encroachment upon, and conflicts with, military facilities, including
32 but not limited to: limiting heights of buildings and structures
33 nearby flight paths or sight lines of aircraft; buffering residential
34 areas from noise associated with a military facility; and allowing for
35 the potential expansion of military facilities; and

36 (f) including, for any land use element adopted after the
37 effective date of P.L.2017, c.275, a statement of strategy
38 concerning:

39 (i) smart growth which, in part, shall consider potential
40 locations for the installation of electric vehicle charging stations,

41 (ii) storm resiliency with respect to energy supply, flood-prone
42 areas, and environmental infrastructure, and

43 (iii) environmental sustainability;

44 (3) A housing plan element pursuant to section 10 of P.L.1985,
45 c.222 (C.52:27D-310), including, but not limited to, residential
46 standards and proposals for the construction and improvement of
47 housing;

1 (4) A circulation plan element showing the location and types of
2 facilities for all modes of transportation required for the efficient
3 movement of people and goods into, about, and through the
4 municipality, taking into account the functional highway
5 classification system of the Federal Highway Administration and
6 the types, locations, conditions and availability of existing and
7 proposed transportation facilities, including air, water, road and rail;

8 (5) A utility service plan element analyzing the need for and
9 showing the future general location of water supply and distribution
10 facilities, drainage and flood control facilities, sewerage and waste
11 treatment, solid waste disposal and provision for other related
12 utilities, and including any storm water management plan required
13 pursuant to the provisions of P.L.1981, c.32 (C.40:55D-93 et al.). If
14 a municipality prepares a utility service plan element as a condition
15 for adopting a development transfer ordinance pursuant to
16 subsection c. of section 4 of P.L.2004, c.2 (C.40:55D-140), the plan
17 element shall address the provision of utilities in the receiving zone
18 as provided thereunder;

19 (6) A community facilities plan element showing the existing
20 and proposed location and type of educational or cultural facilities,
21 historic sites, libraries, hospitals, firehouses, police stations and
22 other related facilities, including their relation to the surrounding
23 areas;

24 (7) A recreation plan element showing a comprehensive system
25 of areas and public sites for recreation;

26 (8) A conservation plan element providing for the preservation,
27 conservation, and utilization of natural resources, including, to the
28 extent appropriate, energy, open space, water supply, forests, soil,
29 marshes, wetlands, harbors, rivers and other waters, fisheries,
30 endangered or threatened species wildlife and other resources, and
31 which systemically analyzes the impact of each other component
32 and element of the master plan on the present and future
33 preservation, conservation and utilization of those resources;

34 (9) An economic plan element considering all aspects of
35 economic development and sustained economic vitality, including
36 (a) a comparison of the types of employment expected to be
37 provided by the economic development to be promoted with the
38 characteristics of the labor pool resident in the municipality and
39 nearby areas and (b) an analysis of the stability and diversity of the
40 economic development to be promoted;

41 (10) An historic preservation plan element: (a) indicating the
42 location and significance of historic sites and historic districts; (b)
43 identifying the standards used to assess worthiness for historic site
44 or district identification; and (c) analyzing the impact of each
45 component and element of the master plan on the preservation of
46 historic sites and districts;

47 (11) Appendices or separate reports containing the technical
48 foundation for the master plan and its constituent elements;

1 (12) A recycling plan element which incorporates the State
2 Recycling Plan goals, including provisions for the collection,
3 disposition and recycling of recyclable materials designated in the
4 municipal recycling ordinance, and for the collection, disposition
5 and recycling of recyclable materials within any development
6 proposal for the construction of 50 or more units of single-family
7 residential housing or 25 or more units of multi-family residential
8 housing and any commercial or industrial development proposal for
9 the utilization of 1,000 square feet or more of land;

10 (13) A farmland preservation plan element, which shall include:
11 an inventory of farm properties and a map illustrating significant
12 areas of agricultural land; a statement showing that municipal
13 ordinances support and promote agriculture as a business; and a
14 plan for preserving as much farmland as possible in the short term
15 by leveraging moneys made available by P.L.1999, c.152 (C.13:8C-
16 1 et al.) through a variety of mechanisms including, but not limited
17 to, utilizing option agreements, installment purchases, and
18 encouraging donations of permanent development easements;

19 (14) A development transfer plan element which sets forth the
20 public purposes, the locations of sending and receiving zones and
21 the technical details of a development transfer program based on the
22 provisions of section 5 of P.L.2004, c.2 (C.40:55D-141);

23 (15) An educational facilities plan element which incorporates
24 the purposes and goals of the "long-range facilities plan" required to
25 be submitted to the Commissioner of Education by a school district
26 pursuant to section 4 of P.L.2000, c.72 (C.18A:7G-4); and

27 (16) A green buildings and environmental sustainability plan
28 element, which shall provide for, encourage, and promote the
29 efficient use of natural resources and the installation and usage of
30 renewable energy systems; consider the impact of buildings on the
31 local, regional and global environment; allow ecosystems to
32 function naturally; conserve and reuse water; treat storm water on-
33 site; and optimize climatic conditions through site orientation and
34 design; and

35 (17) A public access plan element that provides for, encourages,
36 and promotes permanently protected public access to all tidal waters
37 and adjacent shorelines consistent with the public trust doctrine, and
38 which shall include a map and inventory of public access points,
39 public facilities that support access, parking, boat ramps, and
40 marinas; an assessment of the need for additional public access; a
41 statement of goals and administrative mechanisms to ensure that
42 access will be permanently protected; and a strategy that describes
43 the forms of access to satisfy the need for such access with an
44 implementation schedule and tools for implementation .

45 c. The master plan and its plan elements may be divided into
46 subplans and subplan elements projected according to periods of
47 time or staging sequences.

1 d. The master plan shall include a specific policy statement
2 indicating the relationship of the proposed development of the
3 municipality, as developed in the master plan to (1) the master plans
4 of contiguous municipalities, (2) the master plan of the county in
5 which the municipality is located, (3) the State Development and
6 Redevelopment Plan adopted pursuant to the "State Planning Act,"
7 sections 1 through 12 of P.L.1985, c.398 (C.52:18A-196 et seq.)
8 and (4) the district solid waste management plan required pursuant
9 to the provisions of the "Solid Waste Management Act," P.L.1970,
10 c.39 (C.13:1E-1 et seq.) of the county in which the municipality is
11 located.

12 In the case of a municipality situated within the Highlands
13 Region, as defined in section 3 of P.L.2004, c.120 (C.13:20-3), the
14 master plan shall include a specific policy statement indicating the
15 relationship of the proposed development of the municipality, as
16 developed in the master plan, to the Highlands regional master plan
17 adopted pursuant to section 8 of P.L.2004, c.120 (C.13:20-8).
18 (cf: P.L.2017, c.275, s.1)

19

20 ¹8. (New section) The department may adopt, pursuant to the
21 "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et
22 seq.), rules and regulations necessary to implement the provisions
23 of P.L. , c. (C.) (pending before the Legislature as this
24 bill).¹

25

26 ¹[8.] 9.¹ This act shall take effect on the 60th day after the
27 date of enactment.