

[Second Reprint]

SENATE, No. 1074

STATE OF NEW JERSEY
218th LEGISLATURE

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Sponsored by:

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SYNOPSIS

Provides for protection of public's rights under public trust doctrine.

CURRENT VERSION OF TEXT

As reported by the Senate Budget and Appropriations Committee on June 18, 2018, with amendments.



(Sponsorship Updated As Of: 6/22/2018)

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

3

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

6

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

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

12 b. The public trust doctrine establishes the rule that ownership
13 of land flowed or formerly flowed by tidal waters is vested in the
14 State to be held in trust for the people, that the public has the right
15 to tidal lands and waters for navigation, fishing, and recreational
16 uses, and, moreover, that even land that is no longer flowed by the
17 tide but that was artificially filled is considered to be public trust
18 land and the property of the State;

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

36 d. The State of New Jersey has a duty to promote, protect, and
37 safeguard the public's rights and to ensure reasonable and
38 meaningful public access to tidal waters and adjacent shorelines;

39 e. The Department of Environmental Protection has the
40 authority and the duty to protect the public's right of access to
41 tidally flowed waters and their adjacent shorelines under the public
42 trust doctrine and statutory law. In so doing, the department has the
43 duty to make all tidal waters and their adjacent shorelines available
44 to the public to the greatest extent possible, protect existing public

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:

¹Senate SEN committee amendments adopted February 5, 2018.

²Senate SBA committee amendments adopted June 18, 2018.

1 access, provide public access in all communities equitably,
2 maximize different experiences provided by the diversity of the
3 State's tidal waters and adjacent shorelines, ensure that the
4 expenditure of public moneys maximizes public use and access
5 where public investment is made, and remove physical and
6 institutional impediments to public access to the maximum extent
7 possible; and

8 f. Public access includes visual and physical access to, and use
9 of, tidal waters and adjacent shorelines, sufficient perpendicular
10 access from upland areas to tidal waters and adjacent shorelines,
11 and the necessary support amenities to facilitate public access for
12 all, including public parking and restrooms.

13

14 2. (New section) a. The Department of Environmental
15 Protection shall ensure that any approval, permit, administrative
16 order, or consent decree issued, or other action taken, by the
17 department pursuant to the "Coastal Area Facility Review Act,"
18 P.L.1973, c.185 (C.13:19-1 et seq.), R.S.12:5-3, "The Wetlands Act
19 of 1970," P.L.1970, c.272 (C.13:9A-1 et seq.), the "Flood Hazard
20 Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.), or the
21 State's implementation of the "Coastal Zone Management Act of
22 1972," 16 U.S.C. s.1451 et seq., or any other law, is consistent with
23 the public trust doctrine.

24 b. The Department of Environmental Protection shall ensure
25 that any public funding issued, and any action taken on a project
26 using public funding, is consistent with the public trust doctrine.

27

28 3. (New section) a. The Department of Environmental Protection
29 shall not adopt any rule or regulation pursuant to the "Coastal Area
30 Facility Review Act," P.L.1973, c.185 (C.13:19-1 et seq.), R.S.12:5-3,
31 "The Wetlands Act of 1970," P.L.1970, c.272 (C.13:9A-1 et seq.), the
32 "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et
33 seq.), or the State's implementation of the "Coastal Zone Management
34 Act of 1972," 16 U.S.C. s.1451 et seq., or any other law, that mandates
35 on-site public access to tidal waters or adjacent shorelines as a
36 condition of any approval, permit, administrative order, or consent
37 decree at any existing structure or facility that:

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

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

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

1 (4) is located at any airport, railroad yard, or nuclear power plant;
2 ²[or]²

3 (5) requires exclusion of the public for security reasons as
4 designated in accordance with rules and regulations adopted pursuant
5 to subsection b. of this section by the New Jersey Office of Homeland
6 Security and Preparedness ²; or

7 (6) is owned or operated by the New Jersey Department of Military
8 and Veterans' Affairs².

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

18
19 4. (New section) For any application for a permit or other
20 approval to be issued by the Department of Environmental
21 Protection pursuant to the "Coastal Area Facility Review Act,"
22 P.L.1973, c.185 (C.13:19-1 et seq.), R.S.12:5-3, "The Wetlands Act
23 of 1970," P.L.1970, c.272 (C.13:9A-1 et seq.), the "Flood Hazard
24 Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.), or the
25 State's implementation of the "Coastal Zone Management Act of
26 1972," 16 U.S.C. s.1451 et seq., or any other law, if the application
27 provides for a change in the existing footprint of a structure, or a
28 change in use of the property, the department shall review the
29 existing public access provided to tidal waters and adjacent
30 shorelines at the property and shall require as a condition of the
31 permit or other approval that additional public access to the tidal
32 waters and adjacent shorelines consistent with the public trust
33 doctrine be provided, in accordance with the scale of the changes to
34 the footprint or use, the demand for public access, and any adopted
35 municipal public access plan or public access element of a
36 municipal master plan.

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

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

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

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

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

40 (c) an explanation of the specific risks and hazards in the areas
41 closed to public access with a description of the areas where public
42 access is enhanced to compensate for the area closed due to
43 permanent obstructions or risks due to hazardous operations; and

44 (d) the operating hours of the marina.

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

1 If the application includes property on which there is a beach, the
2 department shall require public access to the beach and the public's
3 use of the beach as a condition of the permit or other approval, and
4 activities that have the effect of discouraging or preventing the
5 exercise of public trust rights shall be prohibited.

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

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

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

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

25 (3) a waterfront pocket park;

26 (4) public restrooms to accommodate those using the public
27 access; and

28 (5) additional public parking to accommodate those using the
29 public access.

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

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

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

46 19. Preparation; contents; modification.

47 a. The planning board may prepare and, after public hearing,
48 adopt or amend a master plan or component parts thereof, to guide the

- 1 use of lands within the municipality in a manner which protects public
2 health and safety and promotes the general welfare.
- 3 b. The master plan shall generally comprise a report or statement
4 and land use and development proposals, with maps, diagrams and
5 text, presenting, at least the following elements (1) and (2) and, where
6 appropriate, the following elements (3) through ~~[(16)]~~ (17):
- 7 (1) A statement of objectives, principles, assumptions, policies and
8 standards upon which the constituent proposals for the physical,
9 economic and social development of the municipality are based;
- 10 (2) A land use plan element
- 11 (a) taking into account and stating its relationship to the statement
12 provided for in paragraph (1) hereof, and other master plan elements
13 provided for in paragraphs (3) through (14) hereof and natural
14 conditions, including, but not necessarily limited to, topography, soil
15 conditions, water supply, drainage, flood plain areas, marshes, and
16 woodlands;
- 17 (b) showing the existing and proposed location, extent and
18 intensity of development of land to be used in the future for varying
19 types of residential, commercial, industrial, agricultural, recreational,
20 open space, educational and other public and private purposes or
21 combination of purposes including any provisions for cluster
22 development; and stating the relationship thereof to the existing and
23 any proposed zone plan and zoning ordinance;
- 24 (c) showing the existing and proposed location of any airports and
25 the boundaries of any airport safety zones delineated pursuant to the
26 "Air Safety and Zoning Act of 1983," P.L.1983, c.260 (C.6:1-80 et
27 al.);
- 28 (d) including a statement of the standards of population density
29 and development intensity recommended for the municipality; ²~~[and]~~²
- 30 (e) showing the existing and proposed location of military
31 facilities and incorporating strategies to minimize undue encroachment
32 upon, and conflicts with, military facilities, including but not limited
33 to: limiting heights of buildings and structures nearby flight paths or
34 sight lines of aircraft; buffering residential areas from noise associated
35 with a military facility; and allowing for the potential expansion of
36 military facilities; ²~~and~~
- 37 (f) including, for any land use element adopted after the effective
38 date of P.L.2017, c.275, a statement of strategy concerning:
- 39 (i) smart growth which, in part, shall consider potential locations
40 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;²
- 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 classification
5 system of the Federal Highway Administration and the types,
6 locations, conditions and availability of existing and proposed
7 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 utilities,
12 and including any storm water management plan required pursuant to
13 the provisions of P.L.1981, c.32 (C.40:55D-93 et al.). If a
14 municipality prepares a utility service plan element as a condition for
15 adopting a development transfer ordinance pursuant to subsection c. of
16 section 4 of P.L.2004, c.2 (C.40:55D-140), the plan element shall
17 address the provision of utilities in the receiving zone as provided
18 thereunder;
- 19 (6) A community facilities plan element showing the existing and
20 proposed location and type of educational or cultural facilities, historic
21 sites, libraries, hospitals, firehouses, police stations and other related
22 facilities, including their relation to the surrounding areas;
- 23 (7) A recreation plan element showing a comprehensive system of
24 areas and public sites for recreation;
- 25 (8) A conservation plan element providing for the preservation,
26 conservation, and utilization of natural resources, including, to the
27 extent appropriate, energy, open space, water supply, forests, soil,
28 marshes, wetlands, harbors, rivers and other waters, fisheries,
29 endangered or threatened species wildlife and other resources, and
30 which systemically analyzes the impact of each other component and
31 element of the master plan on the present and future preservation,
32 conservation and utilization of those resources;
- 33 (9) An economic plan element considering all aspects of economic
34 development and sustained economic vitality, including (a) a
35 comparison of the types of employment expected to be provided by the
36 economic development to be promoted with the characteristics of the
37 labor pool resident in the municipality and nearby areas and (b) an
38 analysis of the stability and diversity of the economic development to
39 be promoted;
- 40 (10) An historic preservation plan element: (a) indicating the
41 location and significance of historic sites and historic districts; (b)
42 identifying the standards used to assess worthiness for historic site or
43 district identification; and (c) analyzing the impact of each component
44 and element of the master plan on the preservation of historic sites and
45 districts;
- 46 (11) Appendices or separate reports containing the technical
47 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 and
5 recycling of recyclable materials within any development proposal for
6 the construction of 50 or more units of single-family residential
7 housing or 25 or more units of multi-family residential housing and
8 any commercial or industrial development proposal for the utilization
9 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 areas
12 of agricultural land; a statement showing that municipal ordinances
13 support and promote agriculture as a business; and a plan for
14 preserving as much farmland as possible in the short term by
15 leveraging moneys made available by P.L.1999, c.152 (C.13:8C-1 et
16 al.) through a variety of mechanisms including, but not limited to,
17 utilizing option agreements, installment purchases, and encouraging
18 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 the
21 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 the
24 purposes and goals of the "long-range facilities plan" required to be
25 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 efficient
29 use of natural resources and the installation and usage of renewable
30 energy systems; consider the impact of buildings on the local, regional
31 and global environment; allow ecosystems to function naturally;
32 conserve and reuse water; treat storm water on-site; and optimize
33 climatic conditions through site orientation and design; and

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

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

47 d. The master plan shall include a specific policy statement
48 indicating the relationship of the proposed development of the

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

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

16

17 8. This act shall take effect on the 60th day after the date of
18 enactment.