

**NJ LEAGUE OF MUNICIPALITIES
LEGISLATIVE ANALYSIS**

BILL NUMBER(S): S-1/A-2635

**SPONSOR(S): Senators Smith & Martin;
Assemblyman McKeon**

LEAGUE POSITION: Under Review.

STATUS:

Scheduled to be released by joint meeting of Senate and Assembly Environment Committees on April 22.

The bill will be then sent to the respective Budget committees for 2 additional hearings.

The next Senate voting session is scheduled for Thursday, May 20. The next Assembly voting session is scheduled for Monday, May 24, which is the earliest the bill can be sent to the Governor.

If the bill is amended on the Senate floor on May 20, which seems likely, then the bill will not be voted on until the next voting session, which is Thursday, June 17.

The Assembly is also scheduled to vote on Thursday, June 17.

Senate and Assembly voting sessions are also scheduled for Monday, June 21 and Thursday, June 24. The State Budget will likely be the focus of these voting sessions.

The above analysis, however, assumes standard legislative procedures and guidelines. Either body may, at its discretion, choose to suspend its rule or act based on an emergency resolution. For instance, the Senate could amend the bill on May 20, pass an emergency resolution and consider the bill that same day. This, however, is extremely unlikely.

LEGISLATIVE HISTORY

Legislation is intended to implement the recommendations of the Governor's Task Force Report on the Highlands.

SYNOPSIS:

Protection of the Highlands Region of New Jersey; creation of a regional board to take over planning in the "preservation" area and create a regional plan for the Highlands.

FISCAL IMPACT ON MUNICIPALITIES:

Unknown. Without funding, portions of this bill are unfunded mandates. The League has requested a fiscal note be prepared for this bill before it is scheduled for a vote by either the State Senate or the General Assembly.

Note: It is our understanding that our request for a fiscal note has been granted.

I. GENERAL COMMENTS:

1. This legislation creates a “Highlands Water Protection and Planning Council”, which would effectively become the planning board for what is later termed to be the “preservation area.” This Council would develop a regional master plan for the region as a whole. The “planning” area, that is the area outside the preservation area, has the option to conform to the regional plan.
2. The map delineating the preservation area should, at minimum, be made available for review prior to release of bills from respective legislative committees. A reasonable period of time should be allowed for review.

Note: The map of the preservation area will be released on Thursday, April 15. There will be a 30-day window commencing on April 22 for comments on the draft map.

3. The legislation should include an affirmative statement with respect to existing State Planning Commission approvals/agreements and on-going planning initiatives within the Highlands Region. While there has been a commitment to exclude approved State Plan centers from the preservation area delineated by the legislative map, the intent inherent in that commitment should be included in a narrative statement.

Note: It is our understanding that the sponsors and the Governor’s Office agree to amend the bill to do this.

4. The legislation should include an affirmative statement recognizing the ability of planning area municipalities to petition the State Planning Commission for plan endorsement with review and comment by the Highlands Council. This would provide a clear mechanism for dealing with planning issues outside the preservation area but within the Highlands planning area.
5. The legislation should include an affirmative statement that compliance outside the preservation area is voluntary. Further, the legislation should state that areas outside the preservation will not be penalized if they choose not to follow the regional plan.

Note: It is our understanding that the sponsors and the Governor’s Office agree to amend the bill to do this.

6. The TDR provision should be permissive. Since the Governor has signed A-2480/S-1287, the bill language should authorize, not mandate, the Council to implement a TDR program consistent with PL 2004, c. 2.

Note: It is our understanding that the sponsors and the Governor’s Office agree to amend the bill to make TDR permissive.

7. Without funding, portions of this bill are unfunded mandates.

Note: Our request for a fiscal note prepared by OLS has been granted.

8. Additional funding is needed for additional planning and technical assistance. The State should rededicate itself to assist municipalities, both the preservation and planning areas, in preparing downtown revitalization and growth areas and encourage municipalities to invest in their downtowns and growth centers.
9. Clarification is needed as to how the proposed regional board will interact with existing planning bodies at the municipal, county and State levels.
10. The bill required the Attorney General to provide a legal shield to the municipalities. Other benefits, such as impact fees and timed-growth ordinances are also needed.
11. Sponsors should consider the addition of a development application check list for the preservation area. This check list can included all DEP regulations to assure uniformity in the application process, but retain the authority for each municipality to review and enforce this checklist.

II. GENERAL PROVISION:

Page 4, lines 1—7: “...the establishment of a Highlands Water Protection and Planning Council charged with the preparation of a regional master plan with the preservation area in the New Jersey Highlands...”

A. SPECIFIC PROVISIONS OF INTEREST

- Definitions: The definition of major development is too broad. As example, the construction of a single-family residence might include a long-driveway and then qualify as a major development by this definition. At a minimum, the definition should exempt properties that cannot be further subdivided.
- Section 4 [Page 6] A new public body (“the Council”) is to be created, “the Highlands Water Protection and Planning Council.”
- Section 5 [Page 6]. The council will consist of 15 voting members:
 - a. 5 municipal elected officials from the Highlands region;
 - b. 3 county elected officials from the counties in the region, but not necessarily a resident of the Highlands
 - c. 7 residents of the State, not necessarily of the Highlands.

Comment: The “at-large” Council members are not required to be residents of the Highlands nor will necessarily represent any constituency in the Highlands.

- Section 5(j) [Page 7] requires the council to prepare minutes of every meeting. It also allows the Governor to veto the minutes.

Comment: In effect, the Council can grant an application development and the Governor can veto it.

- Section 6 (i) [Page 8] authorizes the Council to adopt a regional master plan for the Highlands region.
- Section 8 [Page 11] The Council shall prepare and adopt the regional plan within 18 months of its first meeting, and after holding at least 5 public hearings in various locations in the Highlands and 1 public hearing in Trenton. It shall be updated at least every 5 years, after public hearings.
 1. The regional plan shall include a “preservation area” (commonly referred to as the “core”), in which conformance to the regional plan will be required. The preservation area shall consist of that area described by the Highlands Task Force and shall be mapped by May 1, 2004 and described in narrative in the bill. Section 7(b) [Page 10].
 2. The regional plan shall included the “planning areas”, that is the areas not included in the preservation area, in which conformance to the regional plan is not required, but the municipality can choose to opt-in. Section 7(c) [Page 10]

- Section 6(n) [Page 9] authorizes the Council to “*prepare and transmit to the Commissioner of Environmental Protection such recommendations for water quality and water supply standards for surface and ground waters in the Highlands Region...*”
- Section 6(o) [Page 9] authorizes the Council to “*identify and designate in the regional master plan special areas in the preservation area within which development shall not occur...*”
- Section 6 (s) [Page 9] authorizes the Council to “*comment upon any application for development before a local government unit, on the adoption of any master plan, development regulation, or other regulation by a local government unit, or on the enforcement by a local government unit of any development regulation or other regulation, which power shall be in addition to any other review, oversight, or intervention powers of the council...*”
- Section 9(b) [Page 11] authorizes the Council, in conjunction with the respective municipalities, to identify areas for redevelopment within the preservation area.

Comment: This should be a requirement for the Council, not an option. Furthermore, to ensure that redevelopment areas are identified in keeping with the municipality’s plan, upon petition and consistency with the State Plan, the Highlands Council must identify the redevelopment area as delineated by the municipality.

- Section 10(b) [Page 12] defines the goals of the regional plan for the preservation area.
- Section 10(c) [Page 12] defines the goals of the regional plan for the planning area, that is the areas outside the core.
- Section 13(a) [Page 14] **requires** the implementation of a TDR program.
Comment: The League has been a TDR advocate for over 25 years. Mandating the Council, however, to implement TDR is troublesome. It should be permissive. Since the Governor has signed A-2480/S-1287, the bill language should authorize, not mandate, the Council to implement a TDR program consistent with PL 2004, c. 2.

NOTE: It is possible for a municipality to be split between the preservation area and the planning area.

II. GENERAL PROVISION: Administrative Issues for Local Governments

A. SPECIFIC PROVISIONS OF INTEREST

- Section 14(a) and (b) [Page 15] requires every municipality and county, located partially or wholly in the preservation area to submit to the Council

revisions to master plan and development regulations related to areas within the preservation area. The Council then has 60 days to approve, approve with conditions or reject these documents.

Comment: Without funding, this qualifies as an unfunded mandate. Furthermore, the 6-month window is unreasonable. A 12-month period is a fairer timeframe.

- Section 14(c) states that any approval in the preservation area granted by the local government in violation of the regional plan or revised municipal county master plan, development regulations, etc are null and void.

Comment: Due process is not established for the voiding of these approvals.

- Section 14(d) empowers the Council to adopt rules and regulations to implement the minimum standards of the regional plan when a “municipality or county fails to adopt or enforce an approved revised master plan, development regulations, development regulation, or other regulations...”

Comment: This is a broad and reaching enabling provision. Exactly what qualifies as the local governments’ failure to act is apparently at the discretion of the Council. Thus, the Council becomes both a regulatory and enforcement agency.

- Section 15 (Page 16) details the process for a municipality outside wholly the preservation area.

Comment: Language should be included that clarifies that conformance is only required for lands within the preservation area and that no penalties will be imposed upon municipalities or counties choosing not to bring their land use documents into conformance for areas in the Highlands planning area but outside the preservation area. Specific incentives, however, may still accrue to municipalities and counties that conform both in and out of the preservation area. Failure to include such language may leave open to interpretation the voluntary nature of compliance outside the preservation area.

- Section 16(b)(1) reads, “*Any final approval of a major development which is outstanding upon the adoption by a municipality of amendments to its development regulations pursuant to this act to conform those development regulations to the regional master plan, shall be reviewed by the municipality for consistency with the regional master plan. In the event that the final approval is not consistent with the regional master plan, any rights otherwise conferred by the final approval shall expire. The provisions of this subsection shall apply whether the final approval involves a site plan, major subdivision, or general development plan pursuant to P.L.1975, c.291 (C.40:55D-1 et seq.).*

This paragraph shall not apply to any major development which is a residential development that requires an environmental land use or water permit but which does not result in the ultimate disturbance of one acre or more of land or an increase in impervious surface by one-quarter acre or more.

Comment: It seems that the intent of this section is to potentially void municipal approvals, after the fact, that are not consistent with the Regional

Master Plan. If that is the case, what is the time limit after which a municipal approval is no longer subject to this review? There does not appear to be due process established or method of appeal.

- Section 17 [Page 18] authorizes the Council to distribute suggested guidelines for the location and construction of capital projects within the region as a whole.
- Section 17(b) states that within the preservation area, any capital project that involves the ultimate disturbance of 2 or more acres of land or an increase in impervious surface by one acre or more shall be submitted to the Council for review.

Comment: There needs to be a provision to expedite processing for infrastructure repair so as not to add time and cost to road resurfacing programs (where shoulder work might exceed the threshold established) and other infrastructure projects. A distinction could be made that the provision would not apply to disturbances of existing impervious surfaces thereby exempting water/sewer repair/replacement projects.

Furthermore, this section gives the Highlands Council the authority to review and approve or disapprove the construction of State and local government capital projects within the Preservation Area. If it is a State project, the head of the State Agency has the power to override the Highlands Council disapproval if the State Agency has made a determination that the project is necessary of public health, safety or welfare. There is no such provision for local government, so if the county or municipality wants to make safety improvements to a bridge and roadway in the Preservation Area and the Highlands Council disapproves the project, then the project can not be constructed.

- Section 17(c) [Page 19] states that any project that provides for the ultimate disturbance of 2 or more acres of land or an increase in impervious surface by one acre or more shall be submitted to the Council for nonbinding review and comment.
- Section 18(a) [Page 19] provides the Council 15 days to review any application for development in the preservation area.
- Section 19(a) Page 20 states that any municipality or county in the Highlands Region whose master plan and development regulations to be in conformance with the regional plan shall be entitled to the same benefits as municipalities who have achieved plan endorsement from the State Planning Commission.

Comment: This should be clarified to mean clarify the benefits and the distinction between “initial plan endorsement” and “advanced plan endorsement.” The new State planning regulation tier the plan endorsement process. Municipalities achieve “initial plan endorsement” then have the option to continue for “advanced endorsement.”

- Section 20 provides to municipalities in the preservation area compensation, in the form of State aid, for the decrease in property tax revenues.

Comment: While the Highlands Council is required to produce a calculation annually, no time line is established for the initial calculation, despite the five year sunset provision in subsection e. Additionally, eligibility for aid under this section is tied directly to compliance with the Regional Master Plan. Adoption of the Master Plan by the Highlands Council will consume approximately 18 months of time with an additional 6 months required for local governing entities to bring their land use documents into compliance (in the preservation area). During this two year period municipalities experiencing tax losses attributable to Highlands initiatives would not be eligible for aid. Given the two year period prior to compliance and given the sunset provision of subsection e. municipalities would be eligible for a maximum of three years of aid under Section 20. Since tax losses related to Highlands initiatives will be permanent, the aid under section 20 should be permanent. Subsection e. should therefore be deleted. Additionally, if compliance outside the preservation area is truly voluntary, eligibility for aid under section 20 should be limited to compliance with preservation area standards. The aid established in this section should not be viewed as incentive funding (in which case compliance with standards outside the preservation area would be acceptable) but, rather, as an entitlement to replace revenues lost as a direct result of a State action.

- Section 21 [Page 21] provides that municipalities in the preservation area and municipalities in the planning area who opt-in to the regional plan shall receive the “legal shield” benefit.

Comment: The bill needs to be clarified to state that no municipality shall be required to bear any of these costs.

- Section 22 [Page 21] directs the Department of Community Affairs, in consultation with the Department of Environmental Protection, to “*provide guidelines and instructions to all local government units located wholly or partially within the preservation area with respect to the processing, review, and enforcement of applications for development after the date of enactment of this act and before adoption of the regional master plan.*”

Comment: There needs to be an affirmative statement that previous State commitments, such as existing State Planning Commission center approvals and on-going planning initiatives, that is applications filed before the effective date of this legislation, must be honored. Local governments that have invested time and money in planning initiatives should not be expected to start the whole process all over again.

- Section 23 [Page 22] states that courts shall give a strong presumption of validity to the master plan and development regulations of any municipality and county in conformance with the regional plan.
- Section 24(a) [Page 22] states that the Council on Affordable Housing shall take into account the regional plan before making any determination regarding a municipality’s prospective fair share.

- Section 24(b) [Page 22] states any municipality in the preservation area and any municipality in the planning area but in conformance with the regional plan may petition COAH for reconsideration to have its first and second round COAH obligations reconsidered.
- Section 25 [Page 23] authorizes DCA and DEP to modify and make more stringent the residential site improvement standards for the Highlands region.

- Section 26 [Page 23] authorizes the right of first refusal” for the DEP.
Comment: The right of first refusal should not apply to lands constrained by a farmland preservation easement. It may not be in the best interest of the farmland preservation program to add this additional requirement since the land is already protected.

- Section 30 [Page 25] requires the Council to make an annual report to the Governor and the Legislature.

Comment: Highlands Council annual report should, in addition to the Governor and Legislature, be submitted to the mayors and governing bodies of all municipalities and counties in the Highlands Region.

- Section 31(a) [Page 25] directs that “*all major development in the preservation area shall require a Highlands Preservation Area approval*” from the Department of Environmental Protection.

In the definition section of the bill, major development is defined as “*any non-residential development, whether or not it also qualifies as a development as defined in the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.); any residential development, whether or not it also qualifies as a development as defined in the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.), that provides for the ultimate disturbance of one acre or more of land or an increase in impervious surface of one-quarter acre or more; or any residential development, whether or not it also qualifies as a development as defined in the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.), that requires an environmental land use or water permit issued by the Department of Environmental Protection but which does not result in the ultimate disturbance of one acre or more of land or an increase in impervious surface by one-quarter acre or more;*”

Comment: This authority should be vested in the Council, and not in the State Capital.

- Section 31(b) [Page 26] prohibits major development within 300 feet of any Highlands open water and a 300-foot buffer adjacent to all Highlands open water.

Comment: The 300 foot buffer required in the preservation area may extend beyond the preservation area boundaries and thus affect projects outside preservation area (“core creep”). Unless specifically required by other State or Federal regulation, the buffer required under this section should extend no further than the boundary of the preservation area.

- Section 31(c) [Page 27] authorizes the Department of Environmental Protection to do a “limited review” of applications for single-family homes under certain circumstances.

Comment: This authority should be vested in the Council, and not in the State Capital.

- Section 59 (13)(d) requires municipalities in the preservation and planning areas that have a farmland preservation element in its master plan to include “a specific policy statement indicating the relations of the proposed development of the municipality, as developed in the master plan, to the Highlands regional master plan...”

Comment: The farmland preservation element remains optional.

- Section 65 (b) exempts municipalities whose master plans have been approved by the Council from the cross-acceptance process.
- Section 80 [Page 93] provides \$35 per acre in Watershed moratorium offset aid.

Note: This will be increased to \$40 per acre.