



Development Planning, Environment & Management Unit Environmental Planning & Climate Protection Department

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D'MOSS AN INTEGRAL COMPONENT OF THE ETHEKWINI PLANNING SCHEMES

BACKGROUND:

For many years D'MOSS existed purely as a policy directive of Council and was implemented in terms of this directive. Due to uncertainty in some quarters on its status with respect to the existing zoning under the respective planning schemes and too often the undertaking of abortive work by some individuals proceeding purely in terms of the existing zoning and unaware of D'MOSS existence, it was decided to integrate D'MOSS into the respective planning schemes found throughout the eThekweni Municipality as a control area or overlay. This action would also immediately bring its existence to the attention of anyone inspecting a scheme map.

Accordingly following the advertising of a general scheme amendment in the press on a number of occasions in 2009, the holding of a number of public meetings throughout the city, the serving of notices by post on some 18 000 land owners and careful analysis and consideration of all the comments received, D'MOSS was finally integrated into the respective eThekweni Municipality schemes following its formal adoption by Council on 9 December 2010. D'MOSS is now depicted on the respective schemes as overlays over the zoning and in addition may be found as a green (switchable) layer on the Council's Geographic Information System (GIS).

The GIS is accessible from web site:

<http://citymaps.durban.gov.za/website/master/viewer.htm>

FREQUENTLY ASKED QUESTIONS

Q. What does the acronym D'MOSS represent?

A. The acronym D'MOSS is shorthand for the Durban Metropolitan Open Space System; this was also previously known as the eThekweni Environmental Services Management Plan or EESMP.

Q. Why is D'MOSS being incorporated into the planning scheme and not being left as a policy layer as in the past?

A The ability of the eThekweni Municipality to enforce D'MOSS while it has been purely a Council policy, albeit in a spatial layer, has been severely limited because it has not enjoyed the legislative authority it may otherwise have enjoyed as part of a town planning scheme backed by the Natal Town Planning Ordinance No 27 of 1949, as amended. Introducing it formally into the planning scheme regime will reduce these past uncertainties and should lead to far less conflicts with affected parties.

N.B. The planning legal framework for town planning schemes, i.e. the Natal Town Planning Ordinance No 27 of 1949, as amended, was replaced by the KwaZulu-Natal Planning and Development Act No 6 of 2008 from 1 May 2010 and in terms of which all new development applications must be launched. This will not materially affect the individual schemes framed under the former.

Q. Is D'MOSS a zone, and if not, what is it and its implications?

A. D'MOSS is a layer that overlies the underlying town planning scheme zoning. It is a controlled area wherein, despite the underlying zoning, development may not occur without having first obtained the necessary environmental authorisation or support from the Environmental Planning & Climate Protection Department of the eThekweni Municipality, which may or may not be given. Where it is given it is likely to be subject to significant controls to ensure that the biodiversity and/or the ecosystem goods and services of the designated land is not deleteriously affected.

Q. What exactly is the role of the Environmental Planning & Climate Protection Department in the development assessment process?

A. The Environmental Planning & Climate Protection Department through its Biodiversity Impact Assessment Branch assesses all development applications forwarded to it by other departments. These are applications that fall either within or adjacent to the D'MOSS areas and be they building plans, special consent applications, rezoning applications, subdivision/township applications or site development plans for multi-unit developments proposed to be developed by sectional title and/or by free hold. The Biodiversity Impact Assessment Branch will assess the potential impact on the environment of the development as proposed, if necessary in conjunction with the Biodiversity Branch, where after it will make its recommendations for approval, approval with conditions or refusal, as the case may be.

Q Will D'MOSS ever be changed to a zone?

A No. There is no intension to change D'MOSS from a controlled area or layer to a conventional zone. Having said that it may occur that where more definitive boundaries are established for the sensitive environmental areas, that these areas will be zoned to Environmental Conservation Reserve when it is intended that these areas are to be acquired to form part of (say) a nature reserve, or to Conservation Zone, if they are to be left in private ownership but permanently protected from development. The latter may have certain rate advantages for the owners (see below). In such cases the D'MOSS footprint is likely to be adjusted to fit the new zone.

Q How is a D'MOSS controlled area defined within the planning schemes.

A. The following is extracted from *Clause 1 - Interpretation of Terms* in the planning schemes.

"D'MOSS Controlled area" means any area demarcated upon the map by the overprinting of a green hatched pattern (or by a green layer on the GIS), where, by reasons of the natural biodiversity, flora and fauna, topography, or the environmental goods and services provided or other like reasons, development or building may be prohibited, restricted, or permitted upon such conditions as may be specified having regard to the nature of the said area;

Q. What are the development controls or limitations imposed in the D'MOSS controlled areas in terms of the town planning scheme?

A. The following controls are extracted from **Clause 10. Limitations upon Development Due to Lack of Services, Unsuitability of Land, Environmental and Other Causes** in the schemes.

N.B. The numbering may vary between schemes.

- (3) (a) *No person shall, within a D'MOSS controlled area (as defined in clause 1) develop any land, or excavate or level any site, or remove any natural vegetation from, or erect any structure of any nature whatsoever, dump on or in or carry out any work upon such site without having first obtained the prior approval of the Council in terms of this sub-clause.*
- (b) *No such approval shall be given unless the Head: Development Planning Environment and Management, after due examination, and subject to such conditions as he/she may specify, is satisfied that any such development, erection or other work referred to in paragraph (a) hereof can be carried out without materially and/or temporarily degrading, destroying, or negatively impacting on the integrity of the biodiversity and/or environmental goods and services found or generated within the said area.*
- (c) *For the purpose of any examination referred to in paragraph (b), the applicant shall, where required by the Head: Development Planning Environment and Management submit such plans or other supporting documentation as the Head: Development Planning Environment and Management may require. Without affecting the generality of the foregoing, such plans and supporting documentation may be required by the Head: Development Planning Environment and Management to be certified as being correct by an appropriately recognised/registered Environmental Consultant.*
- (d) *The conditions referred to in paragraph (b) hereof may be such as to: -*
- (i) restrict the form or nature of the building or structure;*
 - (ii) limit the size and/or shape of the building or structure;*
 - (iii) prescribe or restrict the materials of which the building or structure is to be constructed;*
 - (iv) determine the siting of any building or structure and of any soakpits or other drainage works;*

- (vi) *prohibit or control any excavation on the site, the construction of any roadways, paths and other garden features;*
 - (vii) *prohibit or control the removal of any natural vegetation;*
 - (viii) *control any other aspects which the Head: Development Planning Environment and Management considers to be desirable.*
- (e) *In any approval or any conditions as may be specified by the Head: Development Planning Environment and Management above, the applicant shall enjoy a right of appeal to the KwaZulu-Natal Planning and Development Appeal Tribunal¹ as established in terms of Section 100(1) of the KwaZulu-Natal Planning and Development Act No 6 of 2008.*

Q What is a conservation servitude?

A A conservation servitude (sometimes called a non-user conservation servitudes or NUCS) is a servitude registered over a property, normally in favour of the local authority, expressly for the purpose of protecting the biodiversity and/or environmental goods and services found on that property. The servitude diagram would normally be prepared by a land surveyor.

Q Do D'MOSS controlled areas have to have conservation servitudes registered over them or will the title deed of the property need to be endorsed?

A. D'MOSS areas will not as a matter of course be defined by non-user conservation servitudes (NUCS), nor otherwise entrenched into the respective title deeds. Such a requirement could however be requested in terms of (say) a development plan submitted to Council for a particular development that Council may then require as part of the conditions of approval. Such development approval may also require the management of the area in terms of an approved environmental management plan.

Q What is an environmental management plan?

A An environmental management plan is a detailed plan prepared by an environmental specialist that stipulates management activities that must be followed in minimizing any impact on the environment and, if necessary, in seeking to reverse past degradation. It may in the case of a proposed development cover action to be taken prior to any construction activities, during construction and post construction, i.e. for the ongoing management of an area. A standard or basic environmental management plan may be obtained on request from the Environmental Planning & Climate Protection Department.

¹ Section 103(2)(iv) of the KwaZulu-Natal Planning and Development Act No 6 of 2008, provides for a member with practical experience and expertise in environmental management to be appointed to KwaZulu-Natal Development Appeal Tribunal.

Q Do D'MOSS controlled areas have to be fenced off?

A. D'MOSS areas will not necessarily be fenced off from the unaffected portion of the property, if this is the case. Such a requirement could however be requested in terms of (say) a development plan submitted to Council for a particular development that Council may then require as part of the conditions of approval. Such development approval may also require the management of the area in terms of an approved environmental management plan. It should be noted that when there is construction involved it is likely that the erection of a temporary fence/screen during the construction part of the environmental management plan will be a requirement. This is so as to ensure that the construction workers do not enter the sensitive environmental areas or deposit or leave behind building rubble within it.

Q Are D'MOSS areas subject to nil rates or a rates rebate?

A. In normal circumstances D'MOSS designated areas are not automatically subjected to a rates rebate. In order to obtain a rates rebate it will be necessary to apply for an Environmental Certificate in terms of Section 7.9 of the eThekweni Municipality Rates Policy. The rates policy has to be set each year by Council and may accordingly vary from time to time. Currently in terms of this policy an application form would have to be submitted to the Environmental Planning & Climate Protection Department describing the significance of the property in terms of its biological and landscape features, how it is used by people, e.g. for recreation or education, its broader value to society as a supplier of environmental goods and services (e.g. wetlands reduce water run-off and flooding), whether the property has been recognized by others for its conservation value, whether it currently enjoys any legal protection, and if not whether the owner would be prepared to register an environmental servitude or alternatively zone the affected portion of the property for conservation purposes. It is also necessary to describe the threats that the environmental conservation area currently experiences, the management activities currently undertaken on the land and if so whether these occur as part of an environmental management plan. It is highly unlikely that a rates rebate will be granted unless there is an environmental management plan in place and the area is actively managed in terms of that plan.

N.B. If a non user conservation servitude (NUCS) is registered and/or if a Conservation Zone is put in place and it negatively affects the property value it could lead to a decrease in rates payable following a revaluation of the property.

Q. If the area affected by D'MOSS is small and does not warrant the setting up of an environmental management plan in order to seek a rates rebate, can I still apply for a rates rebate?

A A number of adjacent land owners may set up a collective environmental management plan for their land holdings and jointly seek a rates rebate. Unless this is done, it is unlikely that a rates rebate will be granted to the individual parties. Alternatively, they could consider putting in place suitable non user conservation servitudes (NUCSs) and then seeking a revaluation. The Environmental Planning & Climate Protection Department should be consulted prior to proceeding with this route.

Q. Is my property being expropriated by Council and will I be compensated at market value?

A No. The property remains in the ownership of the current land owner. The council does not take ownership; it does however restrict what may be done on the land. Accordingly there is no financial compensation paid.

Q Surely, this is in violation of Section 25 of the South African Constitution relating to property rights and specifically that no one may be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property?

A. No. As stated above, the property remains in the ownership of the current owner and is not taken over by the Council. The property as a whole may still be developed, albeit that certain very restrictive conditions may be imposed on such development. It should be noted that Section 24. of the South African Constitution specifically relating to Environment has relevance whereby everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations; through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Flowing from this particular Section, the National Environmental Management Act No 107 of 1998 (NEMA) was framed and which is a law of general application. Any restriction of rights imposed via D'MOSS or via a Conservation Zone is not arbitrary but is for the public good. Furthermore legal opinion has been obtained confirming that there is no conflict with the South African Constitution even when land is zoned or designated for conservation purposes.

Q What occurs if no development is allowed at all on the property, is there still no financial compensation paid?

A If it so happened that a development application is lodged and at the end of the assessment process it emerged that no development is possible at all on the land that is otherwise zoned for (say) residential purposes, compensation would be paid at market value after taking into account the otherwise restricted development potential of the land.

Q Is the Council responsible for managing the D'MOSS designated areas?

A No, the Council does not have the human or financial resources to undertake such management and which has not been budgeted for in the annual budget. Nor is it legally entitled to manage private land without being recompensed by the owner of the land. The property is required to be managed by the land owner, as was the position in the past.

Q. Individual land owners do not have the necessary knowledge and/or the expertise to manage the D'MOSS areas particularly where invasive alien plants (IAPs) have to be removed, periodic burns carried out to remove moribund vegetation or annual fire breaks burnt; is there assistance that may be expected from Council in managing these areas?

A The Environmental Planning & Climate Protection Department and the Natural Resources Section of the Parks, Recreation and Cemetery Department may offer limited extension assistance. In this regard the Environmental Planning & Climate Protection Department has prepared “Fact Sheets” which may be obtained on request. There are also a number of private sector service providers that could also be contacted by land owners to assist.

Q My property has D'MOSS over it yet most (or all) of this area is infested with invasive alien vegetation. What is the purpose of D'MOSS here?

A The purpose of D'MOSS is to protect both biodiversity and ecosystem goods and services. While most of the biodiversity value in the city is found in more pristine, indigenous habitats, many of the ecosystem goods and services can originate from both pristine and disturbed areas. In the latter case, examples can include buffering the effects of flooding to residents downstream, purifying water through natural filtration processes, or facilitating important nutrient cycles through the landscape. In many instances these areas act as conduits, linking better condition areas into a larger more viable system. The benefits of larger systems to biodiversity have been well documented and include reducing the genetic risks associated with inbreeding depression in animal and plant species as well as decreasing the threats associated with smaller fragmented habitats, known as 'edge effects'.

Q Can joint owners alternatively set up a Special Rating Area and thereby through it employ outside parties to manage the environmentally sensitive area on their behalf?

A. A Special Rating Area could in theory be approved by Council that could then through its management body be tasked with managing the area. It is of course not necessary that a Special Rating Area be set up and tasked with the management of an area, equally a group of residents could jointly between themselves appoint a skilled service provider to assist in managing a particular area.

Q What are the requirements for setting up a Special Rating Area and how does it function?

A Prior to setting up a Special Rating Area there are a number of policy caveats or requirements of Council that have first to be met: -

- The outside boundary of the Special Rating Area has to be clearly defined.
- The area must contain a minimum of two hundred properties or a minimum combined total market value of R100 000 000 for all the contained properties.
- 66 per cent of all the owners in the area and 51 per cent by property value must agree to the proposal.
- The application to launch the Special Rating Area must be accompanied by a budget and business plan on the management by no later than 31 January preceding the start of the new municipal year for which the application is made.
- There has to be a proven commitment from a dedicated core of the residents to manage the Special Rating Area on an ongoing basis.

Even then, this is not generally an easy process and may take a considerable time to achieve. If a Special Rating Area is eventually so approved a small precept or addition is then added to the respective property rates. These monies are then on receipt transferred by Council to a Section 21 (not for profit) company specifically set up for the purpose for managing the Special Rating Area. Further advice on this option may be obtained from the Environmental Planning and Climate Protection Department.