

D'MOSS



**ENVIRONMENTAL PLANNING AND CLIMATE PROTECTION DEPARTMENT
DEVELOPMENT PLANNING ENVIRONMENT & MANAGEMENT UNIT
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**D'MOSS AS A COMPONENT OF THE LAND USE SCHEMES
FREQUENTLY ASKED QUESTIONS.**

Q1. What does the acronym D'MOSS represent?

A. The acronym D'MOSS is shorthand for the Durban Metropolitan Open Space System.

Q2. What in fact is the Durban Metropolitan Open Space System or D'MOSS?

A. D'MOSS is a series of interconnecting open spaces in private, public and tribal ownership that forms a network across the metropolitan area, often following river and stream lines and including many of the remaining natural areas of forest and grassland still to be found in the eThekweni Municipal area. It seeks to protect the biodiversity of these areas, be they vegetation or animal, for present and future generations. It is estimated that a large proportion of the total area included in the D'MOSS is in any event undevelopable due to the steep terrain, flood plains, wetlands, etc. It also includes certain disturbed areas in which the biodiversity is more limited but valuable because it provides a variety of environmental services, such as storm water attenuation and flood protection, to the citizens of eThekweni. If these environmental services are ever lost, the Council would have to annually spend vast amounts of money in an attempt to compensate for these lost services. The value of all the environmental services supplied for free by the D'MOSS in eThekweni, were estimated in 2003 as being worth some R3.1 billion per annum.

Q3. What is Biodiversity?

A. Biodiversity or '*biological diversity*' means the variability among living organisms from all sources including, among other things, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part; this includes diversity within species, between species and of ecosystems. It may be used with reference to the entire planet or to a specific geographic location.

There are variations on the definition. Greater clarification may be found at: -

http://www.wwf.org.au/our_work/saving_the_natural_world/what_is_biodiversity/

<https://www.cbd.int/convention/articles/default.shtml?a=cbd-02>

<http://en.wikipedia.org/wiki/Biodiversity>

Q4. What are Environmental Services?

- A. Environmental services are free services provided by nature or the natural environment and include gas regulation (e.g. removing carbon dioxide from the atmosphere), climate regulation, (e.g. cooling areas through shading), disturbance prevention, water regulation (storm water attenuation and flood protection), waste treatment, water supply, soil retention, soil formation, nutrient regulation, pollination, biological control, refugia function (providing living space for wild plants and animals), nursery function, food, raw materials, genetic resource, medicinal resource, ornamental resources, aesthetic information, cultural and artistic information, spiritual and historic information and science and education.

Q5. Does the Municipality have a right to make regulations within its land use schemes for the protection of the environment?

- A. Enshrined under Section 24(b) of the Constitution is the right that everyone has to an environment which is protected for the benefit of present and future generations. The Municipality has given expression to this right through the inclusion of provisions within its land use schemes by way of the D'MOSS Layer. In 2014¹, the High Court in Pietermaritzburg affirmed the Municipality's right to make such regulations within its land use schemes with particular reference to D'MOSS. This is further reinforced by the Spatial Planning and Land Use Management Act, 2013 (Act No. 6 of 2013). The Development Principles of this Act provide for the honouring of the principle of spatial sustainability by upholding "*consistency of land use measures with environmental management instruments*". Sub-section 25(1)(d) states that in giving effect to the Spatial Development Framework, the land use scheme must promote, inter alia, "*minimal impact on public health, the environment and natural resources*". It has therefore been necessary for the Municipality to make provisions, through the D'MOSS Layer, for the protection of the environment.

Q6. Why was D'MOSS being incorporated into the land use schemes and not left as a policy layer as in the past?

- A. The ability of the eThekweni Municipality to enforce D'MOSS as a Council policy is limited because it does not enjoy the same legislative authority it may otherwise have enjoyed as part of a land use scheme. When D'MOSS was applied as a policy separate to the land use schemes, land owners and other interested parties were often not aware of the environmental significance of the affected property or a portion thereof until they applied to develop and often after incurring professional fees. As a provision of the land use schemes, uncertainties and conflicts regarding D'MOSS is reduced because of the legislative protection D'MOSS enjoys under the land use schemes. The Municipality believes that this is a fairer approach.

Q7. Is D'MOSS a zone, and if not, what is it and its implications?

- A. D'MOSS is a layer that overlies the underlying land use 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 and 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 services of the designated land are not deleteriously affected.

¹ Le Sueur and Another vs eThekweni Municipality and Others. Case No 9714/11

Q8. Will D'MOSS ever be changed to a zone?

A There is no general intention to change D'MOSS from a controlled area or layer to a conventional zone. However it is intended in the future that in a small number of cases where more definitive boundaries are established for the sensitive environmental areas, these areas will be zoned to Environmental Conservation Reserve where it is intended that these areas are to be acquired to form part of (say) a nature reserve, or, where the areas are to be left in private ownership but permanently protected from development, to a Conservation Zone. In the latter case the required legal and public processes will be followed and there may be certain rate advantages for the owners (refer to Q19).

Q9. How is a D'MOSS controlled area defined within the town planning schemes?

A. The following is extracted from the definitions in the land use schemes operating within the eThekweni Municipal Area:

***"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, the existence of 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".*

Q10. What are the development controls or limitations imposed in the D'MOSS controlled areas in terms of the town planning scheme?

A The following is an extract from the land use schemes indicating the controls and limitations relating to the use and development of land protected under the D'MOSS provisions:

- "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 nature 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 afore going, such plans and supporting documentation/ registered may be required by the Head: Development Planning Environment and Management to be certified as being correct by an appropriately recognized / 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 sitting of any building or structure and of any soak pits or other drainage works;*
- v) *prohibit or control any excavation on the site, the construction of any roadways, paths and other garden features;*
- vi) *prohibit or control the removal of any natural vegetation;*
- vii) *control any other aspects which the Head : Development Planning Environment and Management considers to be desirable.*

Q11. 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, have the right and responsibility to restrict what may be done on the land as is generally prescribed by a land use scheme. Accordingly there is no financial compensation paid.

Q12. 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 in the response to Q11 above, the property remains in the ownership of the current owner. The property owner is therefore not deprived of their property. The property as a whole may still be developed, albeit certain 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 the Constitution, the National Environmental Management Act No 107 of 1998 (NEMA) was framed and is a law of general application. Any restriction of rights imposed via D'MOSS or via a Conservation Zone, if carefully considered and motivated, is not arbitrary but is for the public good. The application of D'MOSS within the land use schemes was confirmed by the High Court in 2014 in the matter of *Le Sueur and Another vs eThekweni Municipality and Others* (Case No 9714/11). The Court was satisfied that Municipalities are authorized to legislate *“in respect of environmental matters to protect the environment at the local level and that the D'MOSS Amendments in no way transgress or intrude upon the exclusive purview of the National and Provincial governance in respect of environmental legislation”*.

Q13. 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 emerges that no development is possible on the land that is otherwise zoned for (say) residential purposes, the Environmental Planning and Climate Protection Department will enter into discussion with the owner to indicate possible resolutions to the matter. This may include the possible acquisition of the land where a market value price may be paid. There are legislated processes and procedures which need to be followed before a price can be agreed on.

Q14. What is the role of the Environmental Planning and Climate Protection Department in the development assessment process?

A. The Environmental Planning and Climate Protection Department through its Biodiversity Impact Assessment (BIA) Branch assesses all development applications forwarded to it by the Land Use Management Branch. These are applications that fall either within or adjacent to the D'MOSS areas.

They include 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 freehold. The BIA Branch will assess the potential impact on the environment of the development as proposed. This assessment is primarily a desktop review of the anticipated biodiversity related impacts of the proposed development, but also highlights any noticeable environmental legal requirements. These legal requirements may include the need for a formal environmental impact assessment under the National Environmental Management Act, 1998 (Act No. 107 of 1998), or a water use license application under the National Water Act, 1998 (Act NO. 36 of 1998), amongst others. Where necessary, the biodiversity assessment is undertaken in conjunction with the Biodiversity Planning Branch. Thereafter, the BIA Branch will make a recommendation for approval, approval with conditions or refusal, as the case may be. This will then be relayed back to the Land Use Management Branch which will notify the applicant of the recommendation.

Q15. Is the Council responsible for managing the D'MOSS designated areas?

A In the majority of cases the answer is no as the Municipality is generally not 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. In a few special cases, the Municipality may undertake some management of the affected property. The Municipality will however, as far as possible, provide support and advice to land owners. This may include guidance on the preparation of an environmental management plan (EMP) and the removal of invasive alien species, amongst others.

Q16. 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 Management Department and the Natural Resources Section of the Parks, Recreation and Cemetery Department may offer limited extension assistance. In this regard the Restoration Ecology Branch of the Environmental Planning and Climate Protection Department has prepared "Fact Sheets", posters and "Flash Cards" 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.

Q17. 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 services. While most of the biodiversity value in the city is found in more pristine, indigenous habitats, many of the ecosystem 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'.

Q18. 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. 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 (EMP). 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 required to ensure that the construction workers do not enter the sensitive environmental areas or deposit or leave behind building rubble within it.

It is generally preferred that where there is a continuous belt of D'MOSS, the area is not fenced because fencing will impede the free flow of ecosystem services and the movement of fauna and flora.

Q19. 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. However, the Municipality has applied a nominal value to the D'MOSS affected areas, which means that rates due on these portions will be nominal. 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 and Climate Protection Department describing the significance of the property in terms of its biological and landscape features, whether it currently enjoys any legal protection, and if not, whether the owner would be prepared to register a non-user conservation servitude (NUCS) or alternatively zone the affected portion of the property for conservation purposes. It is also necessary to describe the management activities currently undertaken on the land and if so whether these occur as part of an environmental management plan (EMP). It should be noted that most rates relief comes from the nominal value applied to D'MOSS designated land. A successful environmental rates certificate application may lead to a further, but reduced reduction.

Q20. 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 (EMP) 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 where the area affected by D'MOSS is small.

These Frequently Asked Questions are also available in isiZulu on the following website:

www.durban.gov.za/dmoss_tp_amendments

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