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## LEGAL BRIEFING – Real Estate

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### When great trees fall<sup>1</sup>

The toll of the August 2021 wildfires in Greece is truly heart-wrenching: a rough estimate is that they resulted in over 1,200,000 stremmas<sup>2</sup> of scorched land, while numerous properties turned into ashes. The major share of the land being covered with natural forest, there has been an increased social concern around the future of these precious tracts. Is our forest capital guaranteed to be restored or is there a danger of these lands being repurposed and committed to uses other than their natural destination?

So let's take a look at the Greek legislation (which is typically misread).

And the best view is from the top.

Pursuant to art. 117§3 of the Greek Constitution, “*Public or private forests or forest expanses which have been destroyed or are being destroyed by fire or have otherwise been deforested or are being deforested, shall not thereby relinquish their previous quality and shall compulsorily be proclaimed reforestable, the possibility of their disposal for other uses being excluded.*” Comparing this provision to art. 24§1 in fine, which prescribes that “*Alteration of the use of forests and forest expanses is prohibited, except where agricultural development for the benefit of the National Economy or other uses imposed for the public interest prevail*”, it follows that the Greek Constitution is greatly protective of wounded forests areas, perhaps even more so than of thriving forests. Whereas exceptions to the rule that an existing forest is only there to

<sup>1</sup> A beautiful poem by Maya Angelou: <https://poems.com/poem/when-great-trees-fall/>

<sup>2</sup> According to information published on August 22 by METEO, an operations unit of the National Observatory of Athens. See the video here: <https://www.youtube.com/watch?v=jdakkISwcCM&t=83s>

serve its natural destination are introduced in favor of other public interests, the wording surrounding destroyed forests leaves (virtually? – bear with me!) no room for negotiation: reforestation is revealed as their only legal destiny. Any other use may be imposed only after the forest has been regenerated.<sup>3</sup>

In our opinion, the reasoning behind the Constitution's increased sensitivity towards reforestable areas is quite fair. For one, the performance of alterations to a healthy forest ecosystem for reasons of public interest allows for more cautious and effective planning, since all the ecological data of the area to be affected is available and the footprint of the intended deforestation can be accurately measured and contained. In reforestable areas, however, the forest environment is no longer materially present, let alone that the success of the reforestation plan cannot always be taken for granted. The premature interference with an ecosystem which is yet to heal might impair the, in any case, uncertain, healing process, jeopardizing the purpose of the reforestation, which is to recreate the forest that once existed. Furthermore, a much stricter regime on reforestable lands serves as an effective disincentive for any intentional destructions of forest territories (e.g. through arson).<sup>4</sup>

In alignment with the Constitution, art. 38§1 of Law 998/1979 (Government Gazette A 289/29.12.1979), as in force today, repeats the public administration's obligation to designate all forests and forest expanses that have been destroyed as reforestable, regardless of which of the individual categories of the Law they fall under and irrespective of their location.<sup>5</sup> Further down, art. 45-61 are devoted to defining the allowed interferences on forest and reforestable terrains, as well as the conditions and procedure for the issuance of the relevant approvals by the competent administrative authorities. Of the different interferences (i.e., manifestations of public interests) that the Law provides for forests and forest expanses, only a fraction is allowed on reforestable areas as well. These are limited to the implementation of special forest protection works and projects, the construction of national, country and municipal roads and railways as well as large infrastructure projects like airports, artificial lakes, dams, electrical grids and renewable-energy power plants, the conduct of archaeological research and excavations, the erection of fortifications and the building of the necessary structures for the installation of antennae, transmitters and transponders.<sup>6</sup>

Obviously, our legislature has not interpreted the constitutional prohibition of disposing reforestable lands for other uses too literally. Instead, a distinction between a “common” and a

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<sup>3</sup> See, indicatively, Decisions No 2778/1988, 664/1990 of the Council of State.

<sup>4</sup> It could be argued that granting equal constitutional (and legislative) protection from alterations of use to forest and reforestable areas would be discouraging enough, as one would not legally benefit from the destruction of a forest – the conditions for the alteration of use would remain the same. Nonetheless, potential arsonists could still be tempted to pursue the practical “advantages” of a land that is no longer covered by natural forest, where the deforestation cost is lowered.

<sup>5</sup> Please note that an exception is introduced in the same paragraph for the forest areas destroyed by wildfires for which an approval for alteration of their use had already had been granted prior to their destruction.

<sup>6</sup> See the restrictive enumeration of art. 46§1 of Law 998/1979, with the references therein. On the other hand, examples of interferences which are only allowed in forests and forest expanses, while being prohibited in reforestable areas, include agriculture, tourist facilities, industrial facilities, mines, quarries and others.

“superior” public interest appears to have been drawn, and only those interferences representing the latter are allowed in reforestable areas.<sup>7</sup>

It is noteworthy that this approach has been validated by our Supreme Administrative Court). In its landmark Decision No. 2499/2012, the plenary of the Council of State ruled in favor of the constitutionality of legislative provisions allowing for the installation of renewable-energy power plants in reforestable areas, while also nodding assent to the relevant provisions about military and other infrastructure projects. According to the Court, there is indeed room for introducing, by way of exception, regulations for interferences on territories that have been designated as reforestable, provided that a) the project to be implemented is destined to fulfil a need of special social, national or economic significance; b) the implementation of the project on those specific territories is necessary and imperative (i.e. there are no suitable alternative sites); c) the lapse of the time necessary for the completion of the reforestation would result in the frustration of the envisaged public purpose.

This very pragmatic reasoning of the Council of State is essentially an application of the “balancing of interests” doctrine which, primarily known from the teachings of human rights law, is also intrinsic to the constitutional review of laws that regulate conflicting public interests. Apparently, this balancing is a welcome practice even when the interpreter finds themselves before an “unequivocal wording”<sup>8</sup> such as that of art. 117§3 of the Greek Constitution. At the same time, in our view, Decision No. 2499/2012 of the Council of State is a good example of the Court utilizing the tools of teleological<sup>9</sup> and systematic<sup>10</sup> interpretation to perform a minor yet vital surgical incision into a constitutional provision which, if construed as literal and absolute, might save the forests while at the same time neglect the overall public good. Ironically, focusing on the wording of art. 117§3 of the Constitution would be like not seeing the forest for the trees.

All things considered, I would conclude that the compromises that have been made are few, exceptional and quite convincing and there is no real risk of our burnt forests being senselessly sacrificed for opportunistic uses. And I would hope that the public authorities showcase the necessary reflexes and rise not only to the challenging occasion, but also to our demanding forest legislation, which was recently enriched in respect of the reforestation process.<sup>11</sup>

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<sup>7</sup> In addition, the administrative act granting approval for an interference on reforestable terrain “*must be specifically reasoned, using criteria referring both to the special importance of the project, regardless of the operator’s pursuit of an efficient exploitation, and to the absolute necessity of its implementation in the reforestable area before the completion of the reforestation, guided on the one hand by the need to protect the forest ecosystem and on the other by the service of the public purpose at which the project aims*” (art. 46§3 of Law 998/1979).

<sup>8</sup> This is the phrase used by the nine supreme judges who expressed a dissenting opinion in the aforementioned case. This minority of judges used a combination of an unbending grammatical interpretation and references to the minutes of the Constituent Assembly of the 1975 Constitution (historical interpretation) to declare the contested provisions of the law unconstitutional.

<sup>9</sup> “*It cannot be deemed that the constitutional legislator had the intention to prohibit the use of reforestable areas even for purposes of special significance for the public interest...*” (§14 of the Decision).

<sup>10</sup> “*(the provision of art. 117§3)... is to be interpreted within the purpose of art. 24§1*” (§14 of the Decision).

<sup>11</sup> By virtue of the Act of Legislative Content dated 13.08.2021 (Government Gazette A 143/13.08.2021), inter alia, the time for the issuance of a reforestation act has been abbreviated to 30 days after the occurrence of the deforestation event (with the exceptional possibility of an extension for 30 more days) and the concept of a “reforestation concessionaire” has been introduced.



I know not everything is about climate change, but this most definitely is. Deforestation and forest fires are more significant in terms of carbon output than all of trucks and cars of the world combined<sup>12</sup>. I will now leave you with a quote from “The Overstory”<sup>13</sup>, one of my favorite books of all time:

*“Billions of years ago, a single, fluke, self-copying cell learned how to turn a barren ball of poison gas and volcanic slag into this peopled garden. And everything you hope, fear, and love became possible.*

*[...]*

*We all travel the Milky Way together, trees and men... In every walk with nature one receives far more than one seeks. The clearest way into the universe is through a forest wilderness”.*



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<sup>12</sup> Source: [https://d1wqtxts1xzle7.cloudfront.net/66165028/A1103020104-with-cover-page-v2.pdf?Expires=1636029467&Signature=Eif8KroHP~zgqMIPw~Ep4Fl1BXe-FpMvVjyQFLy-a9DK5VpQUtgqNM-K5BwA5CGG42TTw5RNjUhnpodFE9~1koMBLhZsDm-5ls7xXGV9W~XaBLiR3YFQhZMbBoxKRyTKCcuyYL-PfttjJV7WxVnHVZvKICowID~sVSd7qIW52T5dRxJk7ZOGBxa9N2Qism5OCmdrTqmof55Tg5yktwp~v1JV3Q4I7j9rnZP2xKmgFK40h3ZgaooF4FAw8InJkROdhRJTbYTPPo-3toRgMEfvQcHVv1WyNT16boglrihAZVgM4P8e-zTy4L6qqc8x3V1spiyghmu9XE1skxReg\\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA](https://d1wqtxts1xzle7.cloudfront.net/66165028/A1103020104-with-cover-page-v2.pdf?Expires=1636029467&Signature=Eif8KroHP~zgqMIPw~Ep4Fl1BXe-FpMvVjyQFLy-a9DK5VpQUtgqNM-K5BwA5CGG42TTw5RNjUhnpodFE9~1koMBLhZsDm-5ls7xXGV9W~XaBLiR3YFQhZMbBoxKRyTKCcuyYL-PfttjJV7WxVnHVZvKICowID~sVSd7qIW52T5dRxJk7ZOGBxa9N2Qism5OCmdrTqmof55Tg5yktwp~v1JV3Q4I7j9rnZP2xKmgFK40h3ZgaooF4FAw8InJkROdhRJTbYTPPo-3toRgMEfvQcHVv1WyNT16boglrihAZVgM4P8e-zTy4L6qqc8x3V1spiyghmu9XE1skxReg_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA)

<sup>13</sup> The Overstory, Richard Powers.