



# **Takings International**

**A Comparative Perspective on Land Use Regulations and  
Compensation Rights**

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**Chapter 7**

**PRE-PUBLICATION VERSION**

# CHAPTER 7

## GREECE

**Greek constitutional law guarantees protection of property. However, Greek law on regulatory takings does not grants compensation rights except in exceptional circumstances. Historic preservation is an exception. There is much dissatisfaction among landowners, exacerbated by poor public administration. Greece has been held in breach of the ECHR several times.**

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### H1 THE TAKING ISSUE IN THE GREEK PLANNING CONTEXT: GENERAL OVERVIEW

Greek planning law is as yet unfamiliar with the "regulatory takings issue". Landowners whose property suffered a decline in value due to planning decisions usually do not have the right to receive compensation. Several factors have contributed to this insufficiency in this area of the law: the lack of specific constitutional rules directly pertaining to regulatory takings in urban planning and zoning (despite a general protection of property rights in the Greek Constitutions); increasing acceptance by the courts of the need to protect natural areas and cultural heritage, and a grossly unresponsive land-use policy. While planning restrictions on the use of private land have become more intensive and onerous in recent decades, few statutory regimes for takings assessment and compensation have been established to date. Consequently, few individuals have brought takings lawsuits before the courts and even fewer still have been able to meet the constitutional threshold for compensation.

Where physical takings are concerned – that is, when the government, through its own agents or other authorized body, physically invades private land – the rights to compensation are clear.

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Early jurisprudence of the Court of Cassation<sup>1</sup> concerned land in a flood zone condemned for flowage easements.<sup>2</sup> In general, most instances of permanent, physical occupations are considered de facto expropriations whenever landowners have not consented to these occupations. De facto expropriations are compensable under constitutional law.<sup>3</sup> Temporary physical invasions (article 18, paragraph 3 of the Constitution) are regarded as “requisitions,” and they too give landowners direct rights to compensation.

However, physical invasions are not the major issue. A growing controversy revolves around land-use restrictions. Land use regulations that eliminate the economic uses or value of properties, though sometimes termed “*de facto*” expropriations may not entail rights to compensation because title remains with the landowner. Therefore, the task is to identify the line between normal regulations, which require landowners to bear the economic consequences, and regulatory takings, which may place obligations on public authorities to compensate landowners. This task is difficult, however, because Greek courts rarely identify which effects of planning regulations on private property constitute de facto expropriation and require compensation under constitutional provisions.

In our view, Greek law should do more to recognize the problem of regulatory takings and to provide some redress. Empirical evidence suggests that the takings issue is a widespread problem in Greek planning practice. In 2005, the Greek Ombudsman published a special report that presented instances of injurious land-uses, de facto expropriations, physical invasions, and long delays in the payment of compensation for land condemned for public open space.<sup>4</sup> According to this report, takings complaints stem from a wide range of public decisions. These include designation of sites for roads, public open spaces such as squares, public buildings such as schools and hospitals, conservation of natural areas, protection of archaeological sites and monuments, or the construction of public works.

Two factors may be contributing to the scarcity of successful takings claims in Greece. First, property owners face several hurdles in getting their claims heard and decided by the administrative authorities and the courts. Second, the case law is generally deferential to

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1. The Greek judicial system comprises of administrative, civil, and criminal courts. The Greek Supreme Court is the Court of Cassation (*Areios Pagos*), which decides all final appeals in civil or criminal cases. The Supreme Administrative Court is the Council of State (*Symboulion Epikrateias*). The Council of State’s powers are basically determined by the Constitution. The Council of State has the power to annul administrative acts that violate the law or exceed power, annul final decisions of the lower administrative courts, and hear substantive administrative disputes. In addition, the Council of State examines in advance the legality of all Presidential Decrees with a regulatory character and issues its conclusions in non-binding advisory opinions. See EPAMINONDAS SPILIOPOULOS, GREEK ADMINISTRATIVE LAW 303–431 (Bruylant 2004), for more information on the organization and the powers of Greek administrative courts.

2. Areios Pagos [AP] [Supreme Court] 79/1897; AP 183/1898; AP 25/1901. *See also* PRODROMOS DAGTOGLOU, CONSTITUTIONAL LAW: CIVIL RIGHTS-TOME B 1067 n.175 (2005).

3. Symboulion Epikrateias [SE] [Supreme Administrative Court] 1968/1974 (Greece); SE 4070/1976. *See also* KOSTAS HOROMIDIS, COMPULSORY EXPROPRIATION 102–03 (1997).

4. THE GREEK OMBUDSMAN, EXPROPRIATION, DEPRIVATION, AND RESTRICTIONS ON THE USE OF PROPERTY: PROBLEMS OF ADMINISTRATIVE ACTION (2005), available at <http://www.synigoros.gr/reports/apalotriosi.pdf>.

government actions and policies. The courts have not always secured a fair balance between community interests and the protection of individual property rights.

We open with an analysis of how the Greek Constitution relates to the takings issue and discuss the extent to which the European Court of Human Rights may be affecting domestic law. We then describe the types of potential regulatory takings in Greece according to the types of injurious planning decisions. The chapter then examines the few situations in which statutory regimes do provide compensation instruments. We conclude with some critical remarks on the current state of Greek planning law, contemporary practices, and the prospect of change.

## H1 THE CONSTITUTIONAL FRAMEWORK

We divide the discussion in this section into two: the Greek domestic constitutional context and the impact of the rulings of the European Court of Human Rights.

### *H2 The Greek Constitution*

The Greek Constitution, adopted in 1975 and revised in 1986 and 2001, establishes the boundaries within which the legislature and the administration must operate when taking specific measures concerning regional planning, urban planning, and private property.

The most important articles of the Constitution related to the takings issue are articles 24 and 17.<sup>5</sup> Article 17(1) and (2) of the Greek Constitution states:

1. Property is under the protection of the State; rights deriving there from, however, may not be exercised contrary to the public interest.

2. No one shall be deprived of his property except for public benefit which must be duly proven, when and as specified by statute and always following full compensation corresponding to the value of the expropriated property at the time of the court hearing on the provisional determination of compensation. In cases in which a request for the final determination of compensation is made, the value at the time of the court hearing of the request shall be considered.

If the court hearing for the final determination of compensation takes place after one year has elapsed from the court hearing for the provisional determination, then, for the determination of the compensation the value at the time of the court hearing for the final determination shall be taken into account. In the decision declaring an expropriation, specific justification must be made of the possibility to cover the compensation expenditure. Provided that the beneficiary consents thereto, the compensation may be also paid in kind, especially in the form of granting ownership over other property or of granting rights over other property<sup>6</sup>.

This article allows the government to expropriate private property for public benefit. Full compensation must be paid, which can take the form of either monetary compensation or in-kind

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5. 1975 Syntagma [SYN] [Constitution] 17 (Greece) as revised by the parliamentary resolution of April 6th 2001 of the VIIth Revisionary Parliament.

For an English translation of the Constitution see: <http://www.parliament.gr/english/politeuma/syntagma.pdf>

<sup>6</sup> The last sentence was introduced by the parliamentary resolution of April 6 2001 of the VIIth Revisionary Parliament to enable compensation by means of "transfer of development rights" or similar instruments. See also the final part of this chapter.

compensation, such as the replacement of land or the transfer of development rights. However, as we shall see, this right is much more limited in practice.

Article 24 places urban and regional planning as a state constitutional duty and sets obligations for landowners to contribute land for public services. Article 24 reads<sup>7</sup>:

1. The protection of the natural and cultural environment constitutes a duty of the State and a right of every person. The State is bound to adopt special preventive or repressive measures for the preservation of the environment in the context of the principle of sustainability. Matters pertaining to the protection of forests and forest expanses in general shall be regulated by law. The compilation of a forest registry constitutes an obligation of the State. Alteration of the use of forests and forest expanses is prohibited, except where agricultural development or other uses imposed for the public interest prevail for the benefit of the national economy.
2. The master plan of the country, and the arrangement, development, urbanization and expansion of towns and residential areas in general, shall be under the regulatory authority and the control of the State, in the aim of serving the functionality and the development of settlements and of securing the best possible living conditions. The relevant technical choices and considerations are conducted according to the rules of science. The compilation of a national cadastre constitutes an obligation of the State.
3. For the purpose of designating an area as residential and of activating its urbanization, properties included therein must participate, without compensation from the respective agencies, in the disposal of land necessary for the construction of roads, squares and public utility areas in general, and contribute toward the expenses for the execution of the basic public urban works, as specified by law.

The interpretation of articles 24 and 17 in the academic literature and case law is that the typical restrictions on land-use and development do not entail an obligation to compensate.<sup>8</sup> This power enables the government to limit property rights to promote broader public interests, such as the protection of safety, health, aesthetics, and welfare. Planning regulations that impact private property rights negatively are regarded as constitutional so long as they are authorized by specific legal provisions that are shown to be necessary for the public interest and take a proportional position.

Article 17 paragraph 2 of the Constitution requires that a government body that issues a decision declaring an expropriation - other than those embedded in planning procedures - must include a specific provision that suggests a possible way to cover compensation expenditures. However, based on ambiguity of this clause, the Council of State has held that article 17 does **not** apply to expropriations that are declared in accordance with planning legislation<sup>9</sup>. As a result, government bodies often declare expropriations for green or other public open spaces without having to assure that they have the means to pay for compensation.

Indeed, besides the general expropriation clause provided in article 17, paragraph 2, the Constitution does not recognize the right to compensation for reduction in property values due to planning, zoning, or development-control decisions. However, theoretically, if landowners can show that land-use regulations eliminate all economically beneficial uses of property, this may

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<sup>7</sup> 1975 SYN 24

<sup>8</sup> See J. DROSOS, CONSTITUTIONAL RESTRICTIONS OF PROPERTY AND COMPENSATION 41–83 (Nomiki Bibliothiki 1997) at 164–65. According to Dagtoglou, ordinary planning restrictions actually constitute “determinations of ownership.” DAGTOGLOU, *supra*, at 1069.

<sup>9</sup> SE 3117/2004.

be recognized, under certain conditions, as de facto expropriations subject to the compensation provisions of article 17, paragraph 2 of the Constitution.

There is a broad consensus among academics that a de facto expropriation occurs if there is a permanent interference with the property that deprives the owner of all economically beneficial use of the land.<sup>10</sup> Two criteria are used to distinguish a regulatory expropriation from a mere decrease in property rights that is a consequence of regulatory action. One is a quantitative test that looks at the severity of the regulatory measure's effect on the property. The other is the duration of the economic deprivation of the property.

Judicial practice indicates that the severity of the regulatory measures taken under planning legislation is the key criterion when it comes to deciding whether an indirect expropriation or an equivalent measure has taken place. In the earliest cases decided in the 1920s and 30s, the Council of State and the Court of Cassation recognized that the total and permanent prohibition of construction on a parcel of land constitutes a deprivation of property, if no other use is possible or economically beneficial.

However, starting in the 1980s, these same courts have been reluctant to find compensable injuries to property even when regulatory measures extinguish most of the economic uses of property. For example, in a 2005 decision the Council of State ruled that no compensation was due when the regulations completely eliminated the possibility of the applicant to build a hotel in an archeologically preserved area even though the surrounding area was tourist-oriented. Using a similar concept called "value loss," the Court of Cassation held that a diminution in land value is not sufficient to establish a "takings" claim, so long as the affected property has not been rendered "valueless."<sup>11</sup>

However, even in the cases where a potential regulatory taking is apparent, recent Greek jurisprudence has established that there is no violation of article 17 of the Constitution as long as planning legislation recognizes some prospect for compensation. Examples include cases involving nature conservation areas, archeological sites, and monuments.<sup>12</sup>

Unlike an expropriation where the payment of full compensation is a constitutional prerequisite for the taking of property, a regulatory taking can become effective and final before any compensation is paid. This situation not only circumvents the constitutional requirement of prior compensation for any substantial deprivation of property rights, but it also transfers to the owner the burden of claiming compensation and entails arduous, costly, and time-consuming administrative and judicial procedures.

In 2006, the government proposed a revision of the Greek Constitution, and planned to extend the constitutional provisions of article 17, paragraph 2. The amendment would say explicitly that the expropriations declared in accordance with planning legislation for public open spaces and for public buildings or uses should include a specific explanation of how compensation costs would be covered. The Opposition defeated this proposal, arguing mainly that there is no need

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10. See, e.g., DROSOS, *supra*, at 171; DAGTOGLOU, *supra*, at 1065–71; APOSTOLOS GERONTAS, CONSTITUTIONAL PROTECTION OF PROPERTY AND EXPROPRIATION 30 (Ant. N. Sakkoulas 2003).

<sup>11</sup>AP 118/2000

12. See, respectively, article 22 of law 1650/1986 and article 19 of law 3028/2002.

for constitutional revision since even the ordinary law, by fixing deadlines for paying out compensation, can reduce the delays in the completion of expropriation procedures in cases where land is designated for public open space or for public services or buildings<sup>13</sup>. So, the proposal did not receive the necessary three-fifths majority of the total number of votes needed (180 votes) in the 2008 ballot for the revision of the Constitution.

The case law of the European Court of Human Rights could be another force to push Greek law in the desired direction.

## *H2 The impact of the European Court of Human Rights on Greek takings law*

The European Convention of Human Rights (ECHR),<sup>14</sup> as interpreted by the Strasbourg Court, seems to guarantee property owners greater protection from regulatory takings than Greek domestic law. It may call for a general “review” of relevant Greek jurisprudence. This “correcting power” of the ECHR<sup>15</sup> derives from the fact that the Greek Constitution recognizes the supremacy of the ECHR over any contrary provision of domestic law.<sup>16</sup> It obliges both the administration and the courts to take into account the jurisprudence produced within the framework of the Convention during the application of the domestic law.<sup>17</sup>

The European Court of Human Rights has developed a doctrine, which looks at the degree of interference with property rights to decide whether a deprivation of property has occurred within the meaning of Article 1 of Protocol No. 1 to the ECHR. In *Papamichalopoulos v. Greece*<sup>18</sup> the applicants’ land had been taken over by the Navy to set some facilities on it. The Court found that, although there was never any formal expropriation, the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made to remedy the situation, entailed sufficiently serious consequences to be regarded as de facto expropriated which infringes on the landowners’ right to the peaceful enjoyment of their possessions.

By contrast, the ECHR took a deferential position in *Pialopoulos v. Greece*<sup>19</sup>. There, the authorities had imposed a building freeze and announced plans for the expropriation of the applicants’ properties. Nevertheless, the Court held that, even though a reasonable balance was

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<sup>13</sup> See below, the discussion on the part on types of regulatory takings.

<sup>14</sup> For the relevant clauses of the ECHR see Chapter xx.  
*available at* <http://conventions.coe.int/treaty/en/Treaties/Html/009.htm>.

<sup>15</sup> PH.VEGLERIS, THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE CONSTITUTION 103 (1977).

<sup>16</sup> According to article 28, paragraph 1 of the Greek Constitution, an international convention, such as the European Convention of Human Rights, becomes an integral part of domestic Greek law once the convention is ratified by statute and becomes operative according to its respective conditions. A ratified and operative international convention prevails over any contrary provision of ordinary law; however, it does not prevail over the Constitution.

<sup>17</sup> See J. DROSOS, *supra*; K. Ioannou, *The Application of the European Convention on Human Rights in the Greek Legal Order*, EEEURD 223 (1996); K. HRYSOGONOS, THE INCORPORATION OF THE ECHR IN THE NATIONAL LEGAL ORDER (Ant. N. Sakkoulas 2001); J. KTISTAKIS, THE INFLUENCE OF THE ECHR ON THE INTERPRETATION AND APPLICATION OF GREEK LAW (Ant. N. Sakkoulas 2002).

<sup>18</sup> 16 Eur. H.R. Rep. 440, para. 45 (1993)

<sup>19</sup> 33 Eur. H.R. Rep. 977 (2001)

not struck between the public interest and the protection of the individual's fundamental rights, the effect of these measures did not constitute a deprivation of the use of property.

In two recent decisions, the ECHR once again did not uphold the reasoning of the Greek courts. This concerns a distinction in Greek law between land that is included in an official town plan and land that falls outside a planning area. The former is deemed to be legally designated for residential uses or other development purposes; thus, if completely deprived of its building rights so as to create a *de facto* expropriation, such land may be fully compensable under constitutional provisions.<sup>20</sup> By contrast, land outside a town plan is considered to be legally designated for agricultural use and can thus tolerate severer restrictions on development (but traditional development rights exist on the land – as explained below). Greek courts did not regard the absence of economically viable uses as indirect expropriations. Under this legal reasoning, there was no room for any reasonable "investment-backed expectations" by landowners<sup>21</sup>.

This jurisprudence of the Greek courts was not upheld by the European Court of Human Rights. In *Z.A.N.T.E.- Marathonisi A.E. v. Greece*<sup>22</sup> and *Anonymos Touristiki Etairia Xenodocheia Kritis v. Greece*<sup>23</sup>, the ECHR held unanimously that the abstract reasoning of the Greek courts that all 'out-of-plan' land is designated for agricultural use is too inflexible since it introduces an irrefutable presumption that ignores the concrete situation of each plot. The Strasbourg court noted that Greek courts should take into account the full set of planning regulations that pertains to a given plot before the court approves the planning restrictions. It further weighed the extent to which the regulatory restrictions interfered with the legitimate expectations of the applicants. In considering this factor, the Court accepted that the Greek authorities' actions conflicted with the legitimate expectations of the applicants since the latter had bought the property and had taken preliminary steps for the tourism development before the planning regulations were imposed. This conception of legitimate expectations is broader than the one applied by Greek courts. More Greek property owners may be able to win compensation claims for losses of development rights that they acquired before a regulation was amended.

The jurisprudence of the ECHR is thus, in some cases, a force that could bring in Greece a better balance to constitutional law on the takings issue. Unfortunately, the impact is less than could be desired. Greek courts have often been reluctant to incorporate the legal reasoning of the Strasbourg Court in domestic jurisprudence.<sup>24</sup>

We now return to the details of the Greek law on regulatory takings.

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20. SE 3146/1986. In this judgment, the Council of State held that the regulatory restrictions imposed on "within-the-plan" lands may completely prohibit construction on these plots only if the restrictions are associated with compensation measures that guarantee the applicants' property rights, *id.*

21. Recently, the European Court of Human Rights pronounced that it was in favor of an adequate protection to people who bona fide possess or own real property. *Housing Ass'n of War Disabled and Victims of War of Attica v. Greece*, No. 35859/02, § 1, Eur. Ct. H.R. (2006), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>. See also *Papastavrou v. Greece*, 2003-IV Eur. Ct. H.R. 261.

22. *Z.A.N.T.E.- Marathonisi A.E. v. Greece* (no 14216/03).

23. *Anonymos Touristiki Etairia Xenodocheia Kritis v. Grèce* (no 35332/05).

24. K. Hrysogonos, *The (Non)application of the ECHR by the Greek Courts*, in *THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, GUIDE 197–206* (P. Naskou-Perrakis & A. Sgouridou eds., Ant. N. Sakkoulas 2002).

## H1 TYPES OF REGULATORY TAKINGS

Greek planning law distinguishes between two major contexts: Areas covered by a town plan, and those outside any plan. Land covered by a statutory town plan may have development rights. These plans determine street alignments, building lines, and land-use designations. They are accompanied by rules about development, such as minimum plot size, plot dimensions, maximum plot coverage and floor-area ratios.<sup>25</sup> By contrast, areas outside town plans do not have extensive development rights.

However, under Greek law, areas not covered by any plan may, and often do, have development rights. Since 1928, most private land outside town plans has had traditionally-permitted development rights for construction of a broad variety of non-agricultural land uses, including residential, commercial and industrial. Such rights are often regarded by landowners as "automatic", being embedded in land ownership rights. These traditional rights permit, in principle, the construction of a 200sq meters (about 2200 sq feet) house on any plot of land, as long as it meets two conditions: The plot is at least 4000 square meters in size (about 1 acre), and it has a road access. In some cases, the development rights are even more generous, requiring a minimum of only 750 square meters (approximately 8000 sq. feet)<sup>26</sup>. These "automatic" rights make it difficult for Greek authorities to preserve agricultural land and natural landscapes and raise special issues regarding regulatory takings.

We now turn to a more detailed analysis of the law regarding injurious planning decisions in the two types of zones.

### *H2 Regulatory Takings in Areas covered by town plans*

For areas that are included within the boundaries of a plan, Greek law makes an important distinction between land designated for public open space and land designated for public services or buildings.

### *H3 Long Delays in the Completion of the Expropriation Process for Public Open Spaces*

Wherever a town plan designates land for public open spaces (such as green areas, roads, and town squares), the very approval of the plan constitutes an act of expropriation. Yet these decisions do not lead to a direct avenue to compensation. The chances of receiving compensation within a reasonable time depend on the legal regime under which the town plan has been approved. Two such regimes exist. The old regime stems from the Law Decree of July 17, 1923<sup>27</sup> which is still partially practiced today. It requires that plans be implemented through

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25. COMM'N OF THE EUROPEAN COMMUNITIES, THE EU COMPENDIUM OF SPATIAL PLANNING SYSTEMS AND POLICIES: GREECE 51 (2000).

26. The current legislative basis for the development rights in the "out-of-plan" areas derives from the 1985 Decree. The permitted floor-space for shops and offices is 600 square meters (approx. 6500 sq. feet) while the permitted floor-space for industrial buildings is 3600 square meters (approx. 38,800 sq. feet).

27. This Law Decree constitutes the first uniform legislation established in Greece to regulate the planning of cities, towns, and communes. At the time, the Decree's provisions were quite advanced, and a large number of the

specific administrative acts (*Praxeis Analogismou-Apozimiosis*). These acts, which induce property modulations, are drawn up for one or a few blocks at a time but not for an entire area.<sup>28</sup> The land that is needed for creating green and public open spaces is acquired through a complicated mixed system of expropriations and land contributions known as “self-compensation” (*autoapozimiosi*). Under the newer regime,<sup>29</sup> town plans are implemented through “Implementation Plans” (*Praxeis Efarmogis*).<sup>30</sup> These are accompanied by tables of land and money contributions assigned to each property in proportion to its area. The purpose of these tables is to ensure that the land needed for public open spaces and public services uses is secured.

Once these schemes are approved, local governments are expected to pay for property taken other than by contribution. In actual practice for both types of procedures, there are serious delays in the implementation of the plans and the payment of compensation due, but delays tend to be worse under the old system. They sometimes last many decades.<sup>31</sup> The new system is as yet far from solving the problem. Empirical data presented by the Central Union of Municipalities and Communes of Greece in November 2005 show that the average time for the approval of these instruments was between six to eight years; only twenty-eight percent of the roughly 2,000 Implementation Plans that should have been elaborated in the last twenty years has actually been finalized.<sup>32</sup>

There are two reasons why such delays persevere. First, local Greek authorities often lack the financial resources to fulfil their legal obligation to pay compensation for land designated for expropriation. Second, local authorities are not really bound by official deadlines for paying out compensation (there are no sanctions). During these long periods of time, landowners cannot obtain permission to develop their land, while land designated for expropriation loses most of its market value.

Some modest redress has come from the Council of State. It has held that, if the pre-expropriation status exceeds a reasonable time limit (set at 8 years), the planning authority

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provisions are still in force. See A. Grammaticaki-Alexiou, *Regional and Urban Planning and Zoning, in* INTRODUCTION TO GREEK LAW 135-42 (Konstantinos D. Kerameus & Phaedon J. Kozyris eds., Kluwer Law and Taxation Publishers, 2d rev'd ed. 1993).

28. This system of gradual adjustments remained dominant for several decades in Greece. This system is still valid in the “urban core” of the existing cities, even though it proved to be insufficient and problematic and in many instances where significant parts of approved statutory town plans were not implemented.

29. Law 1337/1983 gave priority to the extension of existing town plans in areas that were on the urban fringe, had unauthorized development, and lacked basic urban infrastructure. The basic innovation of this law was that land and money contribution rates would be calculated on a proportional basis with regard to the original area of the plot and not on a uniform percentage as established by Law 947/1979. This proportional method is considered to be more socially fair because the majority of the existing plots in Greece are small in size.

30. The Implementation Plan is drawn on a land registration map, which includes minor property adjustments. This instrument today constitutes the principal legal mode for the implementation of the town plans. But the system of the Implementation Acts of 1923 (*Praxeis Analogismou-Apozimiosis*) is still in force and applied when implementing old town plans that were approved under the provisions of the Law Decree of 1923.

31. SE 385/1997.

32. See *Proceedings of Polis Conference*, CENTRAL UNION OF THE MUNICIPALITIES AND COMMUNES OF GREECE & TECHNICAL CHAMBER OF GREECE (Nov. 25–26, 2005), <http://www.kedke.gr/horos/html/polis.html>.

responsible is obligated to modify the plan and lift the existing burden on the property.<sup>33</sup> Nevertheless, the Supreme Court has never endorsed the notion of a de facto expropriation that could offer to the owners a constitutional right to claim compensation for the time their properties had been effectively neutralized.

### *H3 Long Delays in the Declaration of Expropriation for Land Designated for Public- Service Buildings or Uses*

Different rules apply to land designated for public services or buildings (schools, municipal buildings, hospitals, etc.). Unlike open spaces, where designations for public buildings are concerned, the approval of a statutory town plan does not constitute *ipso jure* an expropriation. A separate decision declaring the expropriation needs to be issued after the approval of the town plan. This additional procedure should indicate which government body is responsible for paying the compensation (national, local, or special). Until such a decision is issued and the entire expropriation process is completed, the title remains with the owners and they are theoretically entitled to use, sell, donate, or mortgage their properties – so long as it is in conformity with the use designated by the plan. Of course, the property’s market value will be greatly reduced.

The law does not specify a time-limit within which the authorities must initiate the expropriation process for land designated as public services. Without this additional procedure, there is no determination of which public agency is responsible for payment of compensation. The result is that many properties across Greece remain under the public-service designation for a long time – often decades. Not only does this situation encourage excessive regulation by planning authorities, but it further creates confusion regarding which public agency is responsible for the payment of compensation.<sup>34</sup>

As in the case of public open space, the jurisprudence of the Council of State has attempted to alleviate this situation. The Court ruled that the length of time for completion of the expropriation procedures cannot exceed a reasonable time limit, also set at 8 years. After this time limit has been exceeded, if the owner submits a petition, the relevant planning authority is obliged to amend the plan and lift the burden imposed on the property. If the planning authority refuses to amend the plan, the planning authority could be subjected to a judicial process to annul the refusal. Although the courts usually do decide in favor of such petitions, the owners still cannot get permission to use their properties for development until the official town plan has been amended. The problem is aggravated because, in many cases, the planning authorities refuse to comply with the courts’ decision and do not amend the plans. Planning authorities often invoke public-interest reasons to hold on to the public-service designation.

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33. SE 2177/1994. The facts of this case involved an applicant’s plot that was condemned as green space for more than twenty years. In that period of time, the land was never expropriated, and the property owner was never compensated in another way. *See also* SE 642/1998 (holding that the condemnation of a plot as a square and as a pedestrian street for more than nine years, without payment of compensation, obligated the planning authority to lift the imposed burden through the amendment of the relevant town plan).

34. *See* THE GREEK OMBUDSMAN, *supra*, at 20 (presenting examples of conflict between public authorities as to the liability for the payment of compensation in the cases of lands designated by a town plan for social benefit uses).

Another aspect of bad administrative practice in Greece is that the planning authorities often obey court decisions only nominally, but soon re-designate the same injured plots for the same public-services use by re-amending the plan. However, following the relevant case law of the Council of State and a circular<sup>35</sup> issued by Ministry of the Environment, Planning and Public Works in 1998, this practice has been significantly reduced. Repeated designation of the land is now only permitted under two conditions: (1) the competent body is able to immediately compensate the landowners, and (2) there must be important planning reasons<sup>36</sup> that justify the re-designation.

Finally, it should be pointed out that in these cases of long delays in exercising expropriation, the law does not provide for any compensation for the period during which the injured landowners were unable to enjoy their properties.

### *H3 Temporary Freeze of Development Rights*

Greek planning and building law authorizes relevant government bodies to issue an order to freeze existing development rights or suspend the issuance of building permits. This is intended to ensure that new town plans can be prepared and implemented without any obstructions. Examples are where there are existing development rights over sites of historic value, and the planning bodies wish to revise the plan to protect these sites. There are several types of development freeze orders.

The origin of the authority to freeze development temporarily dates back to the Law Decree of July 17, 1923 which provides that, once the decision to prepare or to amend a statutory town plan has been made, the municipality (or another authority) may declare a development freeze in order to safeguard the planning process. The freeze can be imposed for up to one year and can be extended for another two years. A more recent law authorizes the relevant bodies to impose a temporary freeze during the preparation process of a General Urban Plan.<sup>37</sup> In this situation, the freeze may last either a maximum of six months or until the general plan is approved, and can be extended for another six months afterwards.<sup>38</sup> Finally, according to a 1985 law,<sup>39</sup> a building freeze can be imposed by the Minister of the Environment and Planning for a time limit of two to three years in order to protect cultural heritage during the preparation stage of development regulation or a town planning study.

According to judicial interpretation, the above mentioned measures are not considered, in principle, to interfere with the use of property. As long as a development freeze does not exceed a reasonable time limit, it is regarded as a temporary, permissible restriction on property that

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35. Ministry of the Environment, Planning and Public Works (YPECHODE), Circular 29454/21.07.2003.

36. Empirical data reveal that, in many cases, there is an absence of adequate investigation and substantiation before injurious planning decisions are made. *See THE GREEK OMBUDSMAN, supra*, at 20.

37. The General Urban Plan is a plan of general guidance that gives the basic guidelines of a settlement's future development and defines land uses, average floor-area ratios, general standards for green spaces, and basic infrastructure needs.

38. Article 4 of Law 1337/1983.

39. Law 1577/1985, article 4, paragraph 6 amended and supplemented by Law 1772/1988 and Law 2831/2000.

serves public interest purposes and is deemed consistent with article 17, paragraph 1 of the Constitution and article 1 of the First Protocol of the European Convention of Human Rights.<sup>40</sup>

Moreover, the Council of State has allowed consecutive freezes on the same property based on different statutory bases. In that case, temporary freezes of development rights were based on different legal provisions and imposed by different authorities, lasting from 1990 to 1996 and from 1998 to 2000. The court ruled that a development freeze may be extended to the cumulative time limit, even if this exceeds the eight-year time limit. This approach of the Council of State is consistent with the jurisprudence developed since the 1980s for the protection of the built environment and for historic preservation. However, it is questionable from a constitutional perspective. Successive freezes should be regarded as violating the fair balance between environmental protection and property rights.<sup>41</sup>

## *H2 Regulatory Takings in Areas not covered by town plans*

In areas not covered by town plans, the important distinction is between property located in Zones of Urban Development Control (ZUDC) and Zones of Nature Conservation (ZNC). Only landowners in the ZNCs have a statutory right to compensation.

## *H3 Restrictions on the Use of Property Located in Zones of Urban Development Control*

Development in out-of-plan areas is mainly regulated through the establishment of ZUDCs. Introduced in 1983 by article 29 of Law 1337/1983, these zones aim to control land development in the urban fringe and to prevent the peripheral areas around towns and cities from further urban sprawl. They can be used to protect high-quality agricultural land, environmentally vulnerable areas, and land designated for economic development such as manufacturing, mining, and tourism. Each ZUDC must be approved by a Presidential Decree and may contain land use designations and conditions for development. A ZUDC can also impose restrictions on the subdivision of private land.

Although less than five to ten percent of the countryside is covered by ZUDCs, there is a growing debate on whether the restrictions and limitations imposed by them are consistent with the constitutional protection of property. The major clash is with the traditional development rights that normally exist in Greece in most out-of-plan regions, and are viewed as part of landownership rights.

In 1983, the entire out-of-plan region of Attica – the surroundings of Athens - was declared a ZUDC<sup>42</sup>. Under the new regulations, the minimum plot size was increased to 20,000 square meters – about 5 acres - instead of 4000 sq. m according to the traditional rights. The Council of State has held that this subdivision limit is not unconstitutional.<sup>43</sup> In the case of the Laureotiki Peninsula ZUDC (greater Athens area), the Court rejected a petition from a landowner whose

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40. SE 2544/2005.

41. See the notes of A. Papakonstantinou in SE 2202/2004, *available at* <http://www.nomosphysis.org.gr>.

42. Presidential Decree 22.6/7.7.1983.

43. SE 1029/1985.

property had been included in an area of the ZUDC where the only permissible uses were for marine sports and swimming facilities. The applicant alleged that the development potential of her property was substantially reduced in view of the fact that, previously, there was no limitation on the use of the land. The Council of State held that these limitations are not unconstitutional because they are justified by a broader public interest, such as prevention of urban sprawl and environmental protection. The Court also held that the new limitations do not extinguish the economically beneficial use of the property, and that in non-urban areas, development rights are not a substantial component of property rights<sup>44</sup>.

In 2003, on Tinos Island, a ZUDC totally prohibited construction on parcels of land with slopes greater than thirty-five degrees.<sup>45</sup> The affected owners petitioned the Council of State to annul the ZUDC. The owners claimed that, under article 17 of the Constitution and article 1 of the First Protocol of the European Convention of Human Rights, they had been deprived of their property rights. However, the Court rejected this argument in this case too, stating that the prohibition on development in this case, did not lead to a substantial deprivation of property because the out-of-plan land was legally destined for agricultural uses and not for development.

The conclusion from the jurisprudence is that only a total or radical deprivation of an economic use of property would be viewed by the courts as a taking. Partial declines in value, such as "downzoning" to a less lucrative use, or even total eliminations of development rights recognized under the previous legal status, are not regarded as takings under constitutional provisions and thus remain non-compensable.

### *H3 Restrictions on the Use of Property for Land Located within Zones of Nature Conservation*

Similar to the ZUDCs are the Zones of Nature Conservation, established under the provisions of article 21 of Law 1650/1986 in the out-of-plan areas. These zones comprise the "areas for the protection of the physical environment" determined in articles 18 and 19 of this same law. The zones are classified under five categories according to the degree of importance of their preservation – natural habitats, national parks, natural landscape, isolated valuable elements, and areas for economic development. A Presidential Decree designates the zone and defines a set of restrictions on development. In this case the law in Article 22 does indicate a right to compensation for the owners whose lands may be substantially affected. However, the necessary regulations to implement this statute have not yet been enacted; therefore, the compensation rights provided by this law remain inactive. The Council of State was petitioned on this matter. The majority did support the view that the compensation rights do hold even though the regulations have not been issued. However, the decision was inconclusive.<sup>46</sup>

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<sup>44</sup> SE 278/2005. In a similar case, the Council of State rejected a petition for the annulment of the same ZUDC from a landowner who, under the new regulations, could build only 200 square meters (2200 sq. feet) instead of 400 square meters under the traditional rights. See SE 277/2005.

<sup>45</sup> Presidential Decree 13/27.2.2003.

<sup>46</sup> The majority of the five-member panel of Section A of the Council of State pronounced in SE 1746/2005 that the obligation of the state to grant compensation to the affected landowners is not associated with the issuance of the Presidential Decree provided in article 22, paragraph 4 of Law 1650/1986. According to the majority, a different approach would contravene the constitutional principles of equality in public charges and of proportionality and article 1 of Protocol No. 1 of the ECHR. However, one member of the Court thought that the issuance of the

The restrictions and limitations imposed in the ZNCs often affect real property and trigger regulatory takings claims against the State. Similarly to the case with ZUDCs, the claims against the nature conservation zones also usually revolve around the traditional development rights.

Representative of the impact of a ZNCs are the regulations of the natural biotope of the loggerhead “Caretta-Caretta” in the island of Zakynthos. A Presidential Decree issued in 1990, divided the out-of-plan land of several municipalities in Zakynthos into eight different zones with special land use regulations and development conditions. In area “I,” a subdivision limit of 4000 square meters (approximately 1 acre) was imposed, and the maximum permitted floor space was sixty square meters (approximately 650 sq. feet) for residential use or research stations only. An owner who possessed ten hectares of land submitted an application to the Council of State to annul the Decree. Invoking article 17 of the Constitution, the landowner claimed that the ZNC rendered her property almost worthless. A majority of the Court held that the regulatory measures did not constitute a substantial deprivation of property rights because the area concerned was located in an out-of-plan zone which is basically designated for agricultural uses.<sup>47</sup> The majority also held that the constitutionality of the ZNC is not contingent on the fact that a statutory right to compensation is provided in article 22. However, eight members of the Court said that the measures under dispute did cause a substantial limitation to the use of property and therefore could be considered as constitutional only thanks to the compensation provided in article 22. Finally, one member of the Court believed that the disputed regulatory measures entailed a substantial deprivation of property without prior compensation, thus violating article 17 of the Constitution and article 1 of the First Protocol of the European Convention of Human Rights.

With the same reasoning, the Council of State rejected similar applications submitted by affected owners in the island of Zakynthos or in other protected areas of the country<sup>48</sup>. Two of these cases were brought to the European Court of Human Rights. In two recent judgments already mentioned above<sup>49</sup>, the Court held unanimously that the reasoning of the Greek courts accepting *in abstracto* that all ‘out-of-plan’ land is designated to agricultural use is too general. The Greek courts should take into account the concrete planning restrictions that apply in each case and the legitimate expectations of the landowners, as well.

The issues raised in the above case are not rare. The Council of State is frequently approached on such issues.<sup>50</sup> These issues become critical if one considers that 296 areas of conservation in

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Presidential Decree is a necessary prerequisite for the activation of the State’s relevant obligation, since there are several procedural and substantive details that must be regulated through this act before compensation can be granted. The case was referred to the seven-member panel of the first section of the Court, which, by upholding the appeal, implicitly accepted the majority opinion. *See* SE 1611/2006, *available at* <http://www.nomosphysis.org.gr> (with notes by M. Haidarlis).

47. SE 4950/1995 (full bench).

48 *See, e.g.*, for the island of Zakynthos SE 695-696/1986 (full bench); SE 3135/2002 (full bench); SE 2601/2005.

49 Z.A.N.T.E.- Marathonisi A.E. v. Greece (no 14216/03); Anonymos Touristiki Etairia Xenodocheia Kritis v. Grèce (no 35332/05).

50. *See, e.g.*, SE 695/1986 (full bench); SE 1184/1996; SE 3135/2002 (full bench); SE 3067/2001; SE 2601/2005.

Greece declared under the EU Community Directives 79/409/CEC<sup>51</sup> and 92/43/EC,<sup>52</sup> are included in the national catalogue of the “Natura Community Network.”<sup>53</sup> They cover about seventeen percent of the Greek territory. There is therefore an urgent need for the implementation of the anticipated provisions of article 22 of Law 1650/1986 concerning the compensation rights of injured landowners.

## HI JUDICIAL REMEDIES AND STATUTORY REGIMES FOR COMPENSATION

The above review of the law indicates that even though current planning and zoning regulations in Greece do cause widespread interferences with the use of property, neither partial nor temporary regulatory takings are subjected to the protection of article 17 of the Constitution.

Moreover, empirical evidence suggests that, even when a taking is present, the judicial remedy is unsatisfactory. One reason for this inadequacy is that takings litigation takes too long - often more than a decade - before the courts reach a final and irrevocable judgment. A further complication is that the property owner cannot challenge the legality of the injurious action and claim compensation in a single court. Separate appeals must be filed. The application for annulment of the planning regulation should be brought before the Council of State, while compensation claims should be brought before the administrative court of first instance. Finally, in some cases the procedural and ripeness requirements are overly complex before a court will hear the merits of a takings claim.<sup>54</sup> It is therefore not surprising that a rather small number of compensation claims is brought before the courts by affected landowners.

One way to respond to the delays and the ripeness requirements arising in the field of takings litigation is to encourage out-of-court settlements and other forms of dispute resolution. Another way is to establish statutory regimes for compensation. For example, article 19, paragraph 1 of the new Archaeological Law 3028/2002 provides for the payment of compensation to owners who are deprived or restricted in the use of property in order to protect monuments and archaeological sites or to conduct excavations. The compensation can be either full or partial and depends on the nature of the imposed restrictions and on the land-use designation of the affected land. The compensation claims are lodged with special advisory committees, which evaluate the validity of the claims under a set of eligibility criteria. These criteria are the use, the market value, the income from the property, and the existing land use. However, neither these

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51. Conservation of Wild Birds, Council Directive 79/409/EEC, 1997 O.J. (L. 103).

52. Natural Habitats, Council Directive 92/43/EEC, 1992 O.J. (L. 206).

53. Both Council Directives have been included in the national network “Natura 2000.” Hellenic Ministry for the Environment, Physical Planning & Public Works, <http://www.minenv.gr> (last visited Apr. 2, 2006).

54. A key question is whether the owners are obligated, before they seek recourse through the courts, to exhaust all avenues for administrative compensation, such as the formidable articles 22 and 19 of Law 1650/1986 and Law 3028/2002. In judgment number 1746/2005 of the Council of State, the majority held that exhaustion of the remedies under article 22 of Law 1650/1986 is necessary before a compensation claim can be lodged before the Court. However, two members of the Court stated that article 22 of Law 1650/1986 gives landowners the right to directly introduce a claim of compensation before the Court. The case was referred to a seven-member panel of the first section of the Court, which, by accepting the appeal, implicitly pronounced itself in favor of the minority opinion. See SE 1611/2006, available at <http://www.nomosphysis.org.gr> (with notes by M. Haidarlis).

committees nor the law set any threshold standards for reduction of value that merits compensation.

As stated in the previous section, there is also a statutory right to compensation in the case of ZNCs, but this right has as yet not been activated by a necessary Presidential Decree. This right is grounded in article 22 of Law 1650/1986. According to this statute, the owners of the affected lands would be able to claim compensation directly from the State whenever the restrictions imposed by the zoning regulation effectively eliminate most of their property rights. The form of compensation can be either monetary or in-kind. Compensation can include, among other things, an exchange of affected land for public land, a concession of public land that is adjacent to the injured property, a transfer of development rights or other forms of financial aids to the affected farmland. But, in the absence of the necessary Decree, this whole compensation process provided has never been implemented.<sup>55</sup>

In addition to these special statutes, a statute enacted in 2002 (Law 3044) authorizes government to transfer the floor-area ratio that cannot be realized on a particular plot onto another plot. The TDR instrument was initially introduced in Greek planning legislation as early as 1979. However, its implementation raised serious problems of constitutionality that led to successive amendments of the relevant statutes. Finally, in 2001, article 17 of the Constitution was revised, recognizing TDR as an alternative to monetary compensation when land is expropriated for public open space or other reasons of public interest<sup>56</sup>. However, this holds only for areas included within a town plan. TDR is not authorized for use in areas designated as ZUDCs or ZNCs<sup>57</sup>.

TDR is a promising tool because it is built on market mechanisms that enable land preservation for public purposes on a cost-free basis. The TDR tool has already attracted considerable interest in Greece as an alternate compensation mechanism to facilitative plan implementation and preservation of the cultural heritage.

## H1 CONCLUSION: EVALUATING CURRENT LAWS AND PRACTICES

The takings issue has not been a priority for the Greek legislature. Existing planning law gives the government considerable latitude to regulate without causing a taking. Very few statutory regimes offer compensation to landowners injured by planning regulations or development-control measures. This is especially true in the cases where a partial or temporary claim is apparent. The courts usually find that the development restrictions do not constitute a taking unless they entirely eliminate the economic use of property.

Planning practice is part of the problem. Excessive regulation and the absence of financial and temporal constraints contribute to the rise in injurious decisions. Indeed, as the 2005 special

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55. In Greece, there are no legal grounds whereby interested landowners can oblige the relevant government body to issue the decree.

<sup>56</sup> For the wording of Section 17 of the Greek Constitution see the discussion above on the Greek Constitution. Also see in this respect SE 2366/2007 (full bench), *available at* <http://www.nomosphysis.org.gr> (with notes by Ch. Xrisanthakis). The possibility to use TDR as a compensation instrument for historic preservation derives from a different constitutional basis, article 24, paragraph 6.

57. Though, in the latter case, this possibility is in principle provided by Law 1650/1986.

report of the Greek Ombudsman indicates, even in cases where a statutory regime for compensation does exist, the lack of the necessary financial resources undermines the prospects of compensation awards.<sup>58</sup> One way to respond to this problem is to require prior analysis of the potential effect of regulations on private property in the form of a “takings impact assessment.” This assessment could help planning authorities estimate the impact of their regulatory actions on property, so as to avoid excessive measures and to examine alternatives to monetary compensation, such as TDR or planning tools that could minimize the infringement on property rights.

Although neither the legislature nor government is currently in favor of a more responsive takings policy in the field of planning regulation, public awareness seems to be somewhat on the rise. The recently published report of the Greek Ombudsman and the increasing number of takings claims brought before the national courts and the European Court of Human Rights indicate that “takings” may become a larger public issue than it is today.

As mentioned earlier, in 2006 the government proposed a rather modest revision of article 17 of the Constitution<sup>59</sup> that could help to release landowners from the administrative hurdles that currently bar them from receiving compensation even where a property is designated for expropriation by a planning regulation.<sup>60</sup> Even if defeated, this initiative shows that the takings issue has been introduced in the Greek political agenda.

In view of these developments, the Greek courts and moreover the European Court of Human Rights become key players in the Greek takings debate. Their decisions may provide guidelines on how Greek public services may avoid actions that infringe on property rights and may learn how to balance potentially disproportionate harms. This could lead to a more principled approach to the takings issue in the Greek planning system and perhaps to a more just level of protection for private property rights.

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58. THE GREEK OMBUDSMAN, *supra*.

<sup>59</sup> See the discusses of the Greek constitution above.

60. See the discussion above on types of regulatory takings.