

Analysis of architectural design processes in the interaction cycle of property, real property, and urban transformation: The example of Kocaeli

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Abstract

Property rights, which can be defined as an abstract concept that bears meanings on sharing the world we live in, differ from one social context to another. Property rights also depict a set of legal frameworks that designate mutual understanding between citizens and define responsibilities which are subject to regulation by public agencies. In today's world, key issues like "urban transformation" lead to complex property rights issues in the context of spatial intervention processes. When we look at decisions taken by the European Court of Human Rights, we see that "property right issues" rank second among the total applications. Also legal frameworks that cover issues on property rights span to more than 30 legal acts, regulations that cover thousands of pages, and legal notices of several kinds. Such an intense legal framework constitutes a huge complexity in the context of urban transformation.

Keywords

Real property regulations, Condominium law, Architectural design, Urban transformation.



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1. Introduction

The requirement to meet vital necessities, the limited amount of resources that are required to meet these, and the reliance of acquiring these on human labor has resulted in a continuous struggle between people to become dominant and possessive over the share of the world's limited resources. The literal meaning of ownership in various languages is "possession". The utilization of natural resources to meet human needs cannot be realized without using the intellect, efforts, labor, and designing skills of humans. The mandatory relationship between the person and nature forms the basis for the problem of ownership.

A person is naturally a social being. People tend to live together as a society. The ability of people to live together depends on rules, which command and force people to behave in certain ways towards each other and nature. These rules are written rules such as laws, codes, regulations etc. that are issued and implemented by authorized public bodies or unwritten rules such as traditions, common laws, religious rules, ethics, and etiquettes that define the attitudes of individuals towards each other, which are beneficial in social life, are necessary, customary, and commonly used by the society.

The purpose of this article is to analyze "Property rights" and the authority and responsibilities of space users and related people, within the context of real property legislation in Turkey.

Property rights will be analyzed for the conditions defined below, which are believed to exhibit differences in the utilization of development rights on real property:

1. Real properties that contain buildings, which are defined as detached houses within a single parcel that lies within the property borders,

2. Real properties, which have been granted the right of easement under the "Condominium Law",

3. Real properties, which contain or do not contain constructed buildings on them, within the framework of the 18th Article of the Turkish Construction Law.

These analyses will be carried out by redefining the legal processes related to

development and by reviewing examples selected from the Kocaeli province.

2. The concept of property rights

Ownership bears an abstract meaning by itself, which may vary for different individuals and their societies, and is the right to share the world on which we live; a right accepted by each shareholder who has agreed to be part of the society together, while struggling to exist and meet their vital needs. Article 35 in the Constitution of the Republic of Turkey of 1982 states: "Every person has the right of ownership of property and possession through legacy. These rights can be limited by law only and in view of public interest." With the statement, "The utilization of property rights cannot be against public interest", it is meant that the Citizens of the Turkish Republic are free to possess goods within the borders of their country, use these goods as they wish, and leave these as a legacy to whom they wish. However, this right also forbids individuals to use the goods under their possession against others and against public interest. Owning something generally brings along some responsibilities. Property rights, which have been always among of the basic rights of an individual, have been secured in Article 17 in the "Universal Declaration of Human Rights" dated 10 December 1948, where it was stated that "Everyone has the right to own property alone as well as in association with others" and that "No one shall be arbitrarily deprived of their property." When the property right was mentioned in Article 1 of the Protocol numbered as Annex 1 in the Convention for the Protection of Human Rights and Fundamental Freedoms signed in March 20 1952, it was stated that this right could be limited only in view of public interest (Bauman, 1987, p. 16). Similarly, in our regulations and mainly in the constitution, individuals are granted the property rights and this right is also regulated by other laws.

In Article 35 in the 12. Section of the Turkish Constitution also known as the Constitution of 1982- related to the property rights, it is stated: "Everyone has the right to own and inherit

property. These rights can be limited by law only and in view of public interest. The exercise of the right to own property shall not be in contravention of the public interest.” The property right is accepted as a limited right both internationally and in our Turkish Constitution dated 1982. The state of problematic buildings became a question of debate after the Gölcük/Kocaeli Earthquake of 1999 and is still being discussed under Law No. 6306 on “Restructuring of Areas under Risk of Natural Disasters”. In the center of the discussions are issues such as utilization of real property rights by individuals who are proprietors and the way non-proprietor individuals use their legal rights during the process of development. “Actually, as much is the right to own a property a basic right it is also a subject kept alive by social, economic, and political discussions. The problem of sharing land has been one of the main reasons for major battles throughout the history and sustaining and protecting an economic system that respects the property rights of individuals is one of the goals of our Constitution”. (Esmer, 1990, p55). Regulations on the utilization of the property rights are mainly available in the Constitution and in the first and second parts-entitled “Property” and “Immovable Property”, respectively - of the 4th Book of the Turkish Civil Code No. 4721 concerning The Law of Property.

2.1. The real property concept

While the word “menkul” (“movable” in English), which entered Turkish language from Arabic, refers to a property that can be moved from one place to another, it refers to a “movable good” in law. The prefix “gayr”, which when used together with the word “menkul” means “real property” in Turkish and has again entered Turkish from Arabic, makes the meaning of the following word negative. The word “gayrimenkul” (real property in English) refers to something that is “immovable”. On the world, the only immovable thing is the “WORLD” itself. The reason that I did not select the word earth is because excavated earth can be transferred, moved from one place to another. According to Arti-

cle 704 of the Turkish Civil Code No. 4721, immovable properties are listed as follows:

- Land,
- Independent and permanent (imprescriptible) rights that are registered on separate pages at the land register,
- Independent sections that are recorded in the condominium register.

As a space designer and an architect, it is important to recognize and define “land” that is subject to development as an immovable property within the legal framework so that designs can obtain vested rights and become legitimate. “Independent and permanent rights that are registered on separate pages at land register” and “the independent sections that are recorded in the condominium register”, which are other subjects of an immovable property, include the same rights that arise as a result of development. Space designers and architects need to be informed about the formation of “independent sections that are recorded in the condominium register” when a building is being constructed as part of the development.

2.2. The concept of real property rights

Rights draw their strength from laws. Property rights consist of rights that are provided to individuals. Real property rights involve the act of sharing and embracing the country’s land by the country’s citizens. According to Act No. 35 available in the 12th Section of the Turkish Constitution that is known as the Constitution of 1982, “Every person has the right to ownership of property and possession through legacy. These rights can be limited by law only and in view of public interest. The exercise of the right to own property shall not be in contravention of the public interest.”

Real properties are three dimensional geospatially. “Land ownership defines a full ownership of earth, from the center of the earth to the ends of the universe. However in practice, land ownership has been limited.” (Appraisal Institute, 2004). Real property has both a horizontal depth in two directions and a vertical height. For real properties, as a property right borders

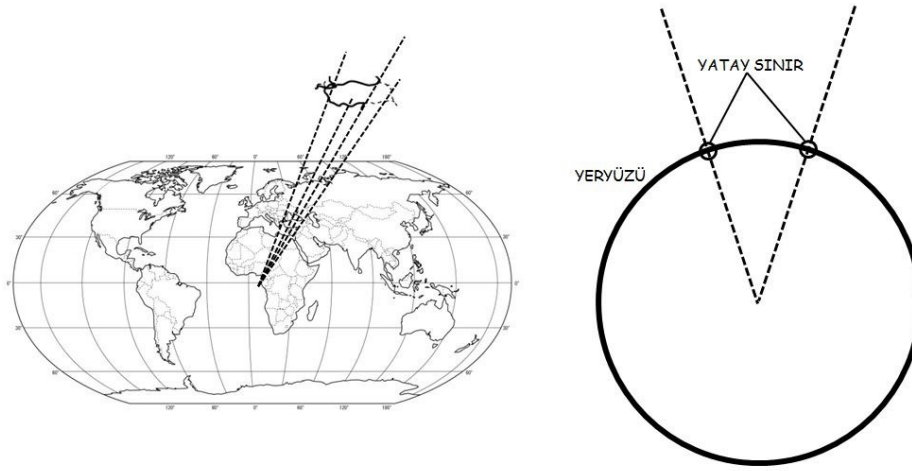


Figure 1. Real property right (Saved from World Map, “bestclipartblog.com/clipart-pics/World-map-clip-art-3.gif”). (In figure: Yeryüzü: Earth; Yatay sınır: Horizontal border).

are defined both horizontally and vertically in Figure 1.

“Real Property Rights” are defined as a right which begins from the cross section of its horizontal borders on the earth and reaches up to the ends of the universe. In Article 718 of the Turkish Civil Code No. 4721, the following regulation has been passed: “Land encompasses the property on it and the air above it and the earth layers under it, as long as there is a benefit to their use”. In Articles 719 and 720 of the same law, it was stated that determination of the borders will be achieved through land title plans and marks over the land and that real property owners are responsible towards their neighbors to contribute in the determination of these borders. According to Article 721, unless otherwise stated, the borders on both sides belong to the real property owner.

It was stated in 5th part of the same law, concerning public law limitations that properties related to public interest are subject to special provisions of law. In practice, the real property right is limited both in its vertical and horizontal dimensions, by international as well as national laws. For a space designer and architect, the most important factor among those that define the vertical borders is the height right, which is granted as a development right by the Construction Law. Although the Real Property Right covers the integral part, Article 756 of the Turkish Civil Code No. 4721 provides an exception with the statement that groundwater is

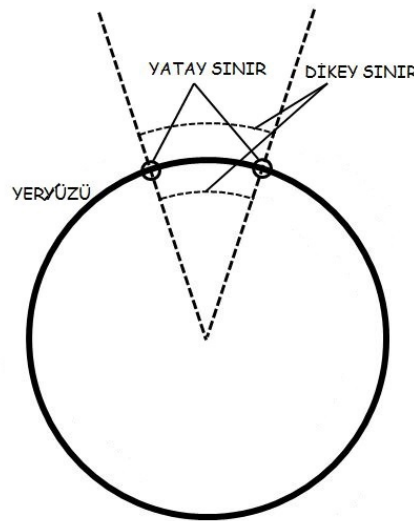


Figure 2. The horizontal and vertical borders of the real property right. (In figure: Yeryüzü: Earth; Yatay sınır: Horizontal border; Dikey sınır: Vertical border).

of public interest. With this provision, the law imposes an obligation to the real property owner not to pollute the groundwater below the property, as it is of public interest.

The horizontal borders of the independent section are formed with walls that are defined in the plans of the building, which is designed on the real property, and the vertical borders are formed with the story tiles that are defined as the floor and the ceiling. With the Condominium Law No. 634 and the Construction Law No. 3194, the authority to define these borders has been granted to the project owner architect.

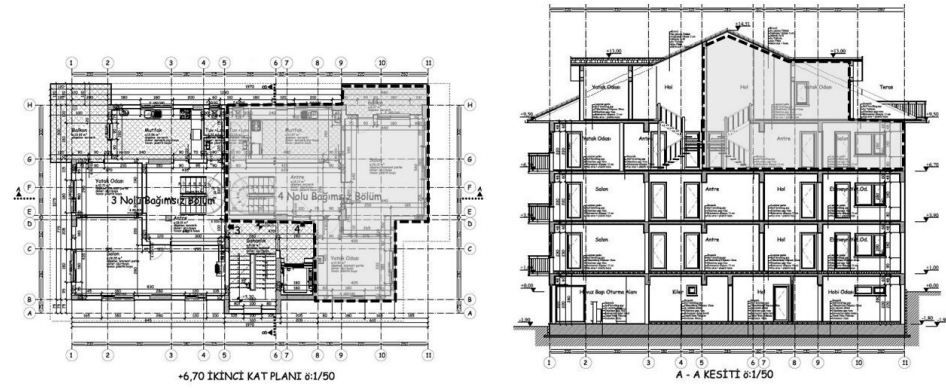


Figure 3. Horizontal and vertical borders of an independent section No. 4 in a building that has been granted a Condominium right (A. Kırıl Apartment Building Project 2013, Değirmendere-Gölcük/Kocaeli).

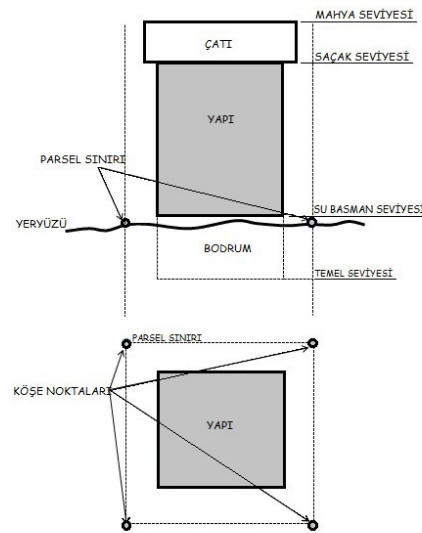


Figure 4. Development right concepts that are defined in the parcel. (In figure: Çati: Roof; Yapı: Structure; Bodrum: Basement Floor; Yeryüzü: Earth; Parsel sınırı: Parcel border; Su basman seviyesi: Sub-basement level; Temel seviyesi: Base level; Köşe noktaları: Corner points.)

All these legislative regulations are factors that influence the space designer's and especially the architect's design of the structure. The conditions that define the borders are different for independent sections, which are registered on different pages in the land register

3. The development right concept

Rights draw their strength from laws. A glass that is half full defines a border or a limitation. Some see the full part of the glass and express that the glass is half full, while others wish

that the glass was completely full, claim that the glass is still empty and are interested with the empty part of the glass although it contains some water. This example, which describes how viewpoints and sense of satisfaction of different people can be different, can be also used to describe the approach of different individuals when the discussed subject is a real property land piece. The development right on a real property refers to the full part of the glass. On the other hand the fact that the development right does not fully inclose the property right refers to the empty part of the glass.

Since the state of limitation by laws is in the interest of the public space designers and architects have to see the full part of the glass and consider the development rights of the parcel in their approach to the land/real property before developing their design.

3.1. Exercising development rights within the context of real property

Starting with the story below in order to define the real property right and the relationships between the owner and the space designer architect will help to explain the legal aspect of the subject, which everyone finds boring, in a more interesting way. "The ARCHITECT had to choose between EVERY PLACE, ONE PLACE, ANY PLACE, and NO PLACE for the design and construction of a building, which he considered to be important. There was an important building that had to be designed and constructed and the ARCHITECT thought that he could build it at ANY PLACE and was sure

that he could build it at ONE PLACE. Actually he could have built the building at ANY PLACE, but he could build it at NO PLACE. The Architect was very angry because he could not choose a place and because he could have built this building, which was very important for him, at ANY PLACE. Although EVERY PLACE seemed suitable to build this important building, the ARCHITECT was not aware that he could actually build this building at NO PLACE. In the end, the ARCHITECT is still searching the MOST SUITABLE PLACE to build this very important and special building, which he thought he could build at ANY PLACE, but could actually build at NO PLACE.”

Although this is just a story, the dream and belief of every architect is to leave a work of architecture that will last after him. Every architect is aware that in reality, in order to realize his dream he has to consider the fact that the building is related to the land underneath as was described in the story above. In real life, the story develops as follows: “The activity related to architectural design and implementation starts with the requirement that the PROPERTY OWNER, who wants to build a building over his land, chooses between EVERY ARCHITECT, ONE ARCHITECT, ANY ARCHITECT, and NO ARCHITECT. The OWNER wants that a building is built on a land that he owns and believes that this building can be built by EVERY ARCHITECT and is sure that ONE ARCHITECT can build it. Actually ANY ARCHITECT could have built the building, but NO ONE has built it. The OWNER is very angry because he could not choose ONE ARCHITECT and because ANY ARCHITECT could have built his building. Although EVERY ARCHITECT seemed suitable to build this important building, the OWNER was not aware that NO ARCHITECT could build his building. In the end, the OWNER is still searching the MOST SUITABLE ARCHITECT to build this very important and special building, which HE thought could be built by ANY ARCHITECT but was ACTUALLY built by NO ARCHITECT.”

The second story explains today's conditions in architecture better than

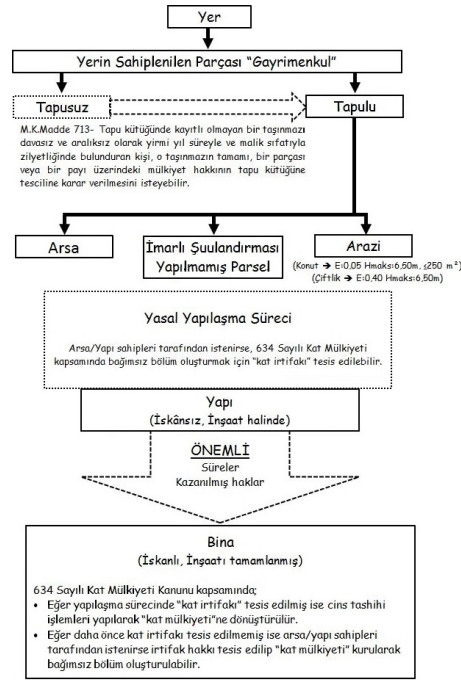


Figure 5. Development and condominium implementation processes in the utilization of the real property right (Translation of the terms in the figure is given in Appendix 1).

the first story. The main actors during the development stage of a building are the owner, architect, and the development regulating and authorizing body. The rights defined in the legislation also define the roles of those involved in the process. One of the most remarkable examples is the definition of “project owner architect” in the Condominium Law No. 634 and the Article 12 that was amended with the “Law for the Amendment in the Condominium Law” No. 5711 dated November 14, 2007 and the effect of this definition on the profession of architecture. This new condition, which is defined within the context of “Ownership and Space Relationship”, gives the architect the authority to organize the ownership and the related stakeholdership (land share) of the space, structure or building that he designs. Actually the task of the architect and the planner space designer is to use data in order to interpret both “the laws of nature” and the “laws that organize human relationships” before starting the designing process and to define the conditions for the designed space, object or part of town, during the design process. This brings the architect or the planner designer to a legislator status.



Figure 6. The triangle of relationships and influences (In figure: Gayrimenkul: Real Property; Toprak/Bağımsız bölüm: Earth/Independent parcel; Kişi: Person; Toplum: Society).

3.2. Relationships between real property, society, and the persons that form the society

I believe that dividing the subject that is currently being analyzed into its components, defining every component one by one, and defining the relationships between these will facilitate understanding the whole subject. “It is not possible to think of a society that is not composed of individuals and of an individual who lives outside the society. It is possible to demonstrate this state and relationship between the owner (individual), society, and the good to a triangle. One corner of the triangle is occupied by the owner, the other by the good, and the final by society (third parties). Therefore, while on one side the owner has a relationship with the good and the third parties (society) as a result of property rights, on the other side the society (third parties) also have a relationship with the good.” (Eren, F. p. 4). The relationships and influences triangle that shows this situation is given in Figure 6. Our subject consists of the following components: “Society, Person, and the Real Property”.

In relationships, the influence of one of the parties to another as a reflection leads to the formation of a reaction in the party which is subject to the influence. This reaction is on the other hand reflected as an influence on the other party. This new influence then leads to a new reaction from the party that is influenced as a result of being subject

to the reaction. The reflection of this new reaction as an influence to the other party results in the continuation of this relationship. After the removal of one of the parties, the influence-reaction relationship continues with the replacement of the removed party with a new party that has similar characteristics. The parties in this triangle:

- **Real Property:** Is defined as an immovable good, earth, piece of land with defined borders, a parcel, plot, territory, a land that is subject to Article 704 of the Turkish Civil Code No. 4721 as an immovable property, independent and permanent rights that are registered on separate pages at land register, and the independent sections that are recorded in the condominium register.

- **Society:** Is defined as people, individuals, shareholders who live together and have a common purpose, common language, culture, values, and goals. The smallest family of two members, the occupants in residences and workplaces that are organized together in buildings, the neighbors in a neighborhood, the townsmen in a town or province, and the citizens of a country can be given as an example.

- **Person:** Is defined as a right holder entity in the legal system that is accepted by the society. There are two types of persons:

1. The real person, each man or woman that forms the society, the individual. Humans acquire certain rights in the society from the moment they are born and their relationships are defined in the legal system.

2. Legal entities are people and collection of goods that have a purpose, which is established under the conditions defined by the legal system.

In the relationship between the person and the real property, the influence exerted by the person to the real property may consist of activities such as cultivation, growing crops, making morphological changes in order to meet the need for shelter, and collection and utilization of natural products. Within the same relationship, the real property's influence on the person is to create an attraction through its resources and create of a desire to make use of its benefits with respect to its location. In the relationship between

society and the real property, the society's influence on the real property is to define its utilization status, define its borders, and define the means of utilizing its natural resources. Within the same relationship, the real property's influence on the society is to create an attraction through its resources and create a desire to make use of its locational and geopolitical advantages. I believe that the magnitudes of the influences that are labeled as number 3 and 4 in the triangle on the person or a society are similar depending on the size of the real property. In the relationship between society and the person, the society's influence on the person and the governing status of written and unwritten rules in the legal system results in the formation of social roles. The person's influence on the society is concerned with personal characteristics such as the way people perform their roles in the society and the way they implement unwritten rules. I believe that the real property right is a single-sided relationship, which influences the relationships between the individuals who form the society and the real property. This influence affects the means by which the real property right is obtained, used, and ended by individuals. This influence is determined based on the size of the society and the real property. The influence of the relationship between the person and the real property on the society cannot be legitimate unless it is not of public interest. This is so because both in international as well as in national laws it is stated that the real property right cannot be used against public interest.

4. Examples from Kocaeli province

The purpose of this article is to analyze the "Property Rights" and the redefinition processes of the authority and responsibilities of space users and related people within the context of real property legislation in Turkey. A part of an ongoing master's thesis study on real property ownership and architectural design has been presented.

1st: As an example to a parcel, that has not undergone land subdivision:

The aerial photograph of the area between the borders of Arif Hoca and Hüseyin Hoca neighborhoods in the



Figure 7. Aerial photograph obtained from <http://rehber.kocaeli.bel.tr>.

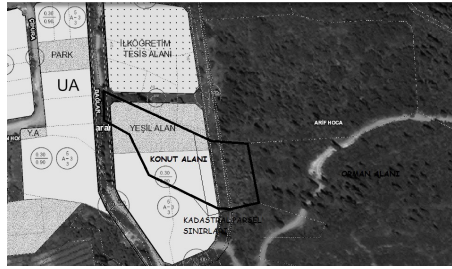


Figure 8. Aerial photograph with an added implementary development plan obtained from <http://rehber.kocaeli.bel.tr>. (In figure: Park: Park; İlköğretim tesis alanı: Primary education facility area; Yeşil alan: Green area; Konut alanı: Housing zone; Kadastral parsel sınırları: Cadastral parcel borders)

Kocaeli province, Karamürsel County, Ereğli town. It can be seen that currently there are cadastral roads, several residences and many trees.

It can be seen in the 1/1000 scaled implementary development plan of the same area obtained from <http://rehber.kocaeli.bel.tr> that the land subdivision has not been carried out yet and that part of the cadastral parcel area, which was selected as an example, is in the housing zone that has detached building order, 3 floors, Lot coverage ratio: 0.30, Floor area ratio: 0.90 as development conditions; one part lays on the roads that have either 10 or 12 meter width and the remaining part lays in the forest area.

1. The conditions that were determined during the exploration carried out for the report that I will prepare with the purpose of real property appraisal:

The exterior photograph, which I took during the exploration, showing the building where the subject independent section is situated. The building was under construction during the exploration. It is situated within the borders of Kocaeli province, İzmit County, Orhan Neighborhood. The



Figure 9. The photograph that was taken during the exploration. (Hürkan Topuz Archive, 2008).

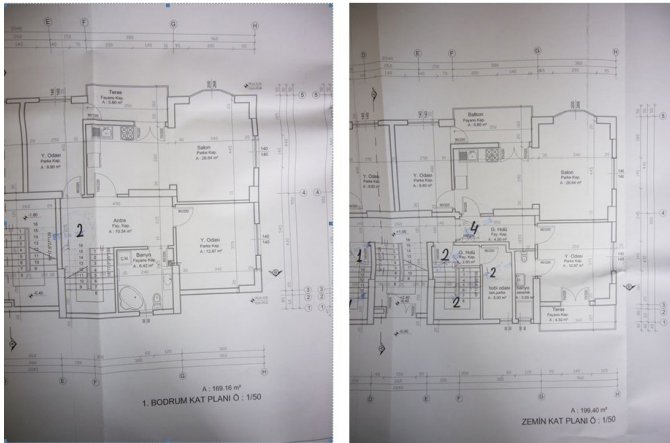


Figure 10. Approved architectural project photographs prepared for the construction servitude of the same building. Taken from the İzmit Real Estate Registration Office, Hürkan Topuz Archive. 2008. (In Figure: Bodrum kat planı: Basement floor plan; Zemin kat planı: 1st floor plan)



Figure 11. The photograph taken during the exploration (Hürkan Topuz Archive, 2008).

status of the independent section No. 2, which was qualified as a residence and situated in the basement according to the construction plan, during the exploration:

According to the approved architectural project, in the first floor there should have been a 2 m² entrance hall, 5 m² hobby room and interior stairs; in the 1st basement floor there should have been 2 bedrooms, 1 saloon with an open kitchen, and 1 bathroom, as well as a hall. However, contrary to the approved architectural project, it was observed that the hobby room in the first floor was incorporated into the independent section No. 4, the entrance of the independent section No. 2 was organized in the 1st basement floor, and after receiving the occupancy permit the interior stairs were transformed into a room and utilized within the independent section No. 2. This practice is actually illicit according to the provision in the construction plan regulations, which states that basement floors cannot be occupied as independent sections and the entrance of the independent section cannot be situated in the basement floor. The desire to construct a higher number of independent sections on the available parcel with the purpose of gaining more profit is a major motivation for building contractors. The part in the regulations provision, which previously stated that entrance through the basement floor is not allowed, was reorganized to state that areas occupied in basement floors cannot be larger than independent areas in the 1st floor.

1. The conditions that were determined during the exploration carried out for the report that I will prepare with the purpose of real property appraisal:

The exterior photograph taken during the exploration phase of the research shows the building where the subject independent sections are situated. The building was under construction during the exploration. It is situated within the borders of Kocaeli province, Kartepe County, Orta Neighborhood. In the building that was shown to us on-site, it was observed that one part of the 1st floor was used as an industrial kitchen by a company

that prepared meals for businesses; the rest was being organized to be used as a dormitory for higher education students and also the upper floors were being organized for use by the dormitory. We were informed that although the construction process was still continuing, a residence permit license had been already obtained from the local municipality and that construction servitude with a total of 5 independent sections -1 per each floor-, which were used as workplaces, was established despite 2 different utilization applications. When information on the zoning status of the real property in question was demanded, it was stated that the parcel was situated in the housing zone and had detached building, 3 floors, Lot coverage ratio: 0.35, Floor area ratio: 0.75 as development conditions. Although it was both against development conditions and the Condominium Law and thus not legal, the utilization of this large sized building, which was built as an investment property, was allowed. Therefore, more than 30 codes available on real properties that are effective in our country and the associated rules, statements, and regulations lead to a complete chaos in fulfilling responsibilities and exercising power by individuals.

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Appendix

Translation of the text in Figure 5.

Earth (Part of earth that is owned "Real Property"),

With Deed/Without Deed / Civil Code Article 713. "Persons who hold in their possession an unregistered immovable property without interruption or legal challenge for a minimum period of twenty years, are entitled to request the registration of the whole of the immovable, a part of it or the property right over a share of it in their names.

Plot / Parcel that had not undergone land subdivision / Land

(Residence: E: 0.05 Hmax: 6.50 m, $\leq 250 \text{ m}^2$) / (Farm: E: 0.40 Hmax: 6.50 m)

The Legal Development Process If requested by the plot/building owners, construction servitude can be established under the Condominium Law No. 634

Structure (Without occupancy permit, under construction)

IMPORTANT (Time, Vested rights)

Building (With occupancy permit, construction completed)

Under the Condominium Law No. 634:

- If an "occupancy permit" has been obtained during the development process, conversion to "condominium" is possible after type classification is carried out.

- If an "occupancy permit" has not been obtained before, an independent section can be formed if requested by the plot/structure owners after obtaining "occupancy permit" and establishing "condominium".