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## Function and Features of the Modification Permit in Turkish Zoning and Building Law

### Türk İmar Hukukunda Tadilat Ruhsatının İşlevi ve Özellikleri

Taner Ayanoglu<sup>1</sup>

#### Abstract

Construction of buildings, which has a special place in social life, and the changes made to them in the form of repair, alteration and addition are not only subjects of engineering, but also subjects of legal regulations. There may be modification requirements such as repairs, alterations or additions for various reasons in the buildings whose construction process is ongoing or for which the use permit has been obtained after the construction process has been completed. Building modifications are generally subject to a modification permit. Modification permits have an extremely important function in Turkish zoning and building law in terms of their relationship with the main building permit. Some modifications are not subject to a permit. A functional criterion is needed to distinguish between modifications that are subject to a permit and those that are not. For example, in buildings with permits (especially for pergolas and porches) there have been disputes about whether additions or the closing of balconies should be subject to a permit. A criterion can be drawn from the general philosophy of the Zoning and Building Act. This criterion can be defined as: among the repairs, changes, and additions to buildings with a permit, those in accordance with the building permit and its annexes will not require a modification permit; whereas those contrary to the building permit and its annexes will.

#### Keywords

The Zoning and Building Law, Building Permit, Modification Permit, Construction, Architectural Project

#### Öz

Toplumsal yaşam içinde özel bir konumu olan binaların yapımı ve bunlarda onarım, değişiklik ve ekleme şeklinde tadilat yapılması, sadece tekniğin konusu olmayıp, aynı zamanda hukuksal düzenlemelerin de konusudur. Yapım süreci devam eden ya da yapım süreci bitirilerek yapı kullanma izni alınmış olan yapılarda çeşitli sebeplerle tamirat, değişiklik ve ilave yapma gibi tadilat gereksinimleri söz konusu olabilir. Ruhsatlı yapılardaki tadilatlar, kural olarak tadilat ruhsatına tabidir. İdari işlem kimliği taşıyan tadilat ruhsatları özellikleri ve yapı ruhsatıyla ilişkisi bakımından İmar Hukukunda son derece önemli bir işleve sahiptir. Öte yandan, ruhsatlı yapılarda gerçekleştirilecek bir kısım tadilat ise ruhsata tabi değildir. Bu noktada ruhsata tabi olan ve olmayan tadilatı birbirinden ayırmaya yarayacak işlevsel bir ölçüte ihtiyaç vardır. Örneğin yapı ruhsatı bulunan yapılarda özellikle pergola, sundurma vb. eklemeler yapmak ya da balkon kapatmak gibi işlerin ruhsata tabi olup olmadığı konusunda uygulamada çok sayıda uyumsuzluk çıkmaktadır. Ancak, İmar Kanunu'ndaki düzenlemelerin genel felsefesi ve ruhundan, ruhsatlı yapılarda yapılacak tamirat, değişiklik ve ilavelerden yapı ruhsatı ve eklerine uygun olanların tadilat ruhsatına tabi olmayacağı, fakat yapı ruhsatı ve eklerine aykırı olanların ise tadilat ruhsatına tabi olacağı yönünde bir kriter çıkarılabilir.

#### Anahtar Kelimeler

İmar Hukuku, Yapı Ruhsatı, Tadilat Ruhsatı, İnşaat, Mimari Proje

<sup>1</sup> **Corresponding Author:** Taner Ayanoglu (Assoc. Prof. Dr.), İstanbul Bilgi University, Law School, Department of Administrative Law, İstanbul, Turkey. E-mail: [taner.ayanoglu@bilgi.edu.tr](mailto:taner.ayanoglu@bilgi.edu.tr) ORCID: 0000-0001-7768-2378

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## Function and Features of the Modification Permit in Turkish Zoning and Building Law

### Introduction

Buildings have always occupied a special place in the social order of society<sup>1</sup>. The construction of buildings is not only a matter of engineering, but is also a subject to legal regulations. Zoning and building law set the minimum requirements for safe, healthy, energy efficient, and accessible buildings.<sup>2</sup> Zoning and building laws require buildings to be constructed in accordance with relevant licenses and annexes, and they must be preserved and maintained in accordance with these licenses and annexes after permission is obtained to use the building following the construction process. However, due to the personal wishes of the building owner or to ameliorate as wear, aging, and deterioration over time, “*additions, alterations, and repairs*” may be required to buildings under construction or those that have been granted a building use permit following completion of the construction process. Construction works, such as “*repairs, alterations, and additions*” to buildings can be carried out without being subject to a permit if it does not contravene the existing building permit and its annexes. However, if the “*additions, alterations, and repairs*” are not in accordance with the existing building permit and its annexes, then it will be necessary to obtain a new permit to cover them, otherwise it will not be possible to carry out the work within the framework of the existing permit and its annexes.

Building permits that need to be issued for “*additions, alterations, and repairs*” to be made to a building with an existing building permit are called modification permits. We use the term modification in a broad sense to cover all kinds of changes in the structure, including “*repairs, alterations, and additions*”. Modification permits that have an administrative decision nature have an extremely important function in terms of their features and their relationship with the main building permit. However, to eliminate the uncertainties regarding whether or not specific construction works are subject to a modification permit, there is a need to establish a theoretical framework and set out the general principles by using the provisions in available legislation and the precedent judicial decisions. Therefore, studies in which modification permits are handled in a holistic way will contribute to the development of Turkish zoning and building law by guiding administrative and judicial practices. This article, which was written within this framework, will examine the source, scope, and features of the requirement of modification permits in Turkish law.

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1 R. Sprunt, “Building Knowledge and Building Law” (1975) JAR, Vol. 4, Iss. 3, 10.

2 T. Jovanović, A. Aristovnik, and T. Rogić Lugarić “A Comparative Analysis of Building Permits Procedures in Slovenia and Croatia: Development of a Simplification Model” (2016) TERUM, Vol. 11 Iss. 2, 6.

## I. Source of the Requirement for A Modification Permit

The necessity of a modification permit is based on the provision that “*any changes in buildings with building permits are subject to re-permitting*” in article 21/2 of the Zoning and Building Act (ZBA). For any changes to be made in permitted buildings, the type of permit that must be issued is called a modification permit.

It should be noted that the modification permit necessity is essentially a continuation of the rule of building permit necessity. According to article 21/1 of ZBA, “*It is obligatory to obtain a building permit (...) for all buildings covered by this act.*” This arrangement clearly shows that the obligation for all buildings to have building permits is a fundamental rule of building law.<sup>3</sup> A building permit is not just an administrative decision that gives the building owner the right and authority to build, but it must also continue to exist as long as the building is in existence. The obligation for buildings to have a building permit covers not only buildings under construction, but also those for which the construction process has been completed and a building use permit has been granted. On the one hand, the building permit obligation includes a ruling that a building without a permit cannot be built. On the other hand it includes an obligation to ensure that the building is in compliance with its permit and annexes during the construction process, as well as a requirement to keep the building in accordance with its permit and annexes after the construction process. Therefore, as long as any building exists on the land, the existence of a legally valid building permit is also mandatory. This necessity manifests itself in several ways. The first is the requirement to obtain a building permit for the construction of a structure that has the nature of a building. The second is the obligation to obtain a building permit for the “*additions, alterations, and repairs*” of the building, the construction of which has been completed and for which a building use permit has been obtained. For this reason, structures constructed once a building permit is obtained cannot contravene the existing building permit by means of “*additions, alterations, and repairs*”.

The obligation not to make the owner’s building contrary to the permit clearly shows that the building permit provisions do not cease to exist after obtaining permission to use the building, but on the contrary, continues to be in force. In this context, it can be said that in terms of public order regarding buildings, all buildings should always have permits and must always comply with such permits and annexes. Therefore, after a building that has a building permit is constructed and permission to use the building is obtained, the building must be protected in accordance with the building permit and its annexed projects. The obligation to protect the building according to its permit and annexes aims to prevent changes in the building that are

3 Any construction is subject to building permits, See, Yar.15HD, E.2005/6882, K.2007/312, T.24.1.2007; Yar.15HD, E.2002/1577, K.2002/4036, T.19.09.2002.

contrary to its permits and annexes.<sup>4</sup> However, this obligation makes it mandatory to obtain further permission so that changes to the building do not violate the permit and its annexes. Thus, not only building on a piece of land, but also modifying an existing structure is subject to a permit. In short, there is also an obligation to be granted permission for “*changes*” to be made to buildings with a building permit. According to the second paragraph of the 21<sup>st</sup> article of the ZBA, any changes in permitted buildings are expected to be subject to further permission. This ruling in this legal regulation is considered to be an obligation to acquire a modification permit.

The rule that requires any changes in buildings that have a building permit to be subject to re-permitting results in the requirement for a modification permit, and is essentially a mandatory outcome of the building permit obligation. The building permit obligation also requires the building to be constructed in accordance with the building permit and its annexes. The necessity to protect the building according to the building permit and its annexes is the primary reason for the prohibition of changes to the building. Because “*any change*” to be made in a permitted building refers to construction work that is not based on the current building permit and is not included in the scope of the existing building permit, it is likely to constitute a violation of this permit. Therefore, the legislation stipulates that any changes to be made to buildings that have been permitted usually also depend on a further building permit being obtained. Otherwise, if the changes to be made in the building would not be subject to a modification permit, the ruling of the building permit obligation would have been negated because it would not be possible to protect the building in accordance with the original permit and its annexes.

In the Zoning and Building Law, actions that violate the building permit and its annexes are considered as actions that violate the public order, and preventive and punitive administrative decisions are envisaged for these. In the case of constructing a building that is unpermitted or against the permit and its annexes, it is necessary to either make the building in compliance with the permit or obtain a permit for the existing building within the framework of the procedure regulated in article 32 of the Zoning and Building Act.

In the ZBA, actions that violate the building permit and its annexes are considered to be actions that violate public order, and preventive and punitive administrative decisions are made to prevent this occurrence. In the case of constructing a building that is unpermitted or constructed in a manner that violates the permit and its annexes, it is necessary to either make the building comply with the permit or obtain a permit for the existing building within the framework of the procedure in article 32 of the ZBA. It is not legally possible for such structures to continue to exist in this way,

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<sup>4</sup> For example, the building cannot be renovated against the architectural project. See, Dan.8D, E.2003/5647, K.2004/2571, T.02.06.2004

because buildings that are unpermitted or that are constructed in violation of the permit and its annexes disrupt the zoning and building order. According to article 32/3 of the ZBA, in the case of a violation of the building permit and its annexes, the zoning and building order should be re-established by making the building conform to the current permit or by obtaining a new building permit in accordance with the existing building. Article 32 of the ZBA is applied not only if the building is in violation of its building permit and annexes during the construction phase, but is also applied where completed modifications to buildings are made contrary to the existing building permits and annexes. When a building is constructed contrary to the permit and its annexes, the rule for obtaining a new permit for modifications to the building is violated. In the case of a violation of the obligation to re-permit, the modifications made to the building are described as construction work that is contrary to the building permit and its annexes. In accordance with article 32 of the ZBA, administrative acts and actions such as sealing the construction, stopping construction, and demolition can therefore be carried out, and according to article 42 administrative sanctions can be applied to the responsible persons. It can be clearly seen that these administrative acts, actions, and sanctions are the result of a violation of the obligation to re-permit in order to make modifications to the building. In other words, acting in accordance with the requirement to obtain a modification permit for the modifications in the structure prevents negative legal consequences arising from the fact that modifications are made against the building permit and its annexes.

## II. Scope of the Requirement for A Modification Permit

In the 21/2 article of the ZBA, the subject of the modification permit is determined as “*making any changes to buildings with building permits*”. The use of the term “*buildings with building permits*” as mentioned here refers to all kinds of permitted buildings. In other words, in terms of the implementation of this provision, it does not make any difference whether the construction process is continuing or whether the building’s usage permit has been obtained after construction is completed. During the construction process, buildings should be constructed in accordance with building permits and annexes, and buildings that have been granted permission to be used after completion of the construction process should be preserved in accordance with building permits and annexes. Therefore, in both cases, making any “*additions, alterations, and repairs*” against the existing permit and annexes will require a modification permit to be obtained. At first glance, the phrase in article 32 of the ZBA that “*the relevant administration determines that the construction has started without obtaining a permit or the building is made in violation of the permit and its annexes*” gives the impression that any issue related to “*the absence of a permit for the building under construction*” and “*construction of the building under the construction process in violation of its permit and annexes*” are regulated. However, considering the

provision of article 21/2 of the ZBA that “*any changes to buildings which have a building permit are subject to re-permitting*”, it is clear that “*modifications made without obtaining a permit in an existing building that has been granted a building use permit*” should be deemed to be “*contrary to the permit and its annexes*” within the scope of article 32.

As a result it seems that article 32 of the ZBA is applied not only if the building is constructed in violation of a permit and its annexes during the construction phase, but is also applied if modifications to the buildings that are permitted for use after the construction phase are completed are made in violation of the building permit and its annexes.

### **III. Modifications That Are Contrary to The Existing Building Permit and Its Annexes Require A Modification Permit**

There is no clear criterion in the ZBA as to which changes in the building constitute a significant alteration to the original project and its documentation. However, it should be noted that the legality of “*additions, alterations, and repairs*” in a permitted building is primarily related to whether they comply with building permits and annexes. As we have explained above, the requirement that any “*additions, alterations, and repairs*” in a building that has been issued a building permit is subject to a modification permit is due to the fact that the building will contravene the existing permit and its annexes after the modifications. In other words, it is necessary to obtain a new permit, i.e., a modification permit, so that the building does not violate the existing permit and its annexes as a result of the changes to be made. On the other hand, it is not logically possible to describe the works performed without contradicting the original project details and documents attached to the building permit when requesting permission for a modification. Therefore, if the “*additions, alterations, and repairs*” to the building are in the form of an element that is not included in the existing building permit and its annexes and does not cause the building to come into conflict with the existing permit and its annexes, then there will be no obligation to obtain a new permit for them. For example, alterations such as installing a cabinet on a wall, installing an air conditioner, or making a small niche in a non-bearing wall, will not be in conflict with the building permit and its annexes, and therefore it will not be necessary to obtain a modification permit.

Conceptually, the modifications that will require obtaining a modification permit in the building are changes that contain elements different from the designations indicated in the existing building permit and attached projects and documents. In other words, they are changes that will cause the building to come into conflict with the permit and its annexes. Such changes are realized by removing or replacing

the building elements in the existing building permit and its annexes or by making additions that contain elements that are not included in the existing building permit and associated project work, but should be included. Changes that will cause a building to be in violation of the building permit and its annexes appear as modifications that require a modification permit to be obtained.<sup>5</sup> The buildings referred to here are “*buildings with building permits*”.

The building permit and its annexes for buildings for which a building permit has been obtained consists of details of the project work and other documents attached to the application submitted by the building owners when applying for a building permit. Details of the project work and documents covering “architectural projects, static projects, electrical and installation projects, drawings and calculations, and sketches used as a surveying benchmark or dimensional sketches” must be attached to the application that is submitted to the competent authority to obtain a building permit.<sup>6</sup> The building must be made in accordance with the building permit and the attached documentation, and it must be ensured that this conformity is maintained. If, as a result of a proposed modification, the building loses its conformity with the elements included in the permit and its annexes and hence comes into conflict with the existing permit, then there is an obligation to obtain a new building permit, i.e., a modification permit. In this context, it can be said that the construction work will differ from the designations in the project details and documents that were attached to the building permit, and the required changes to the attached documentation will be necessary to warrant the issuing of a new building permit.

The modifications that require a new permit in a building may take many different forms, such as making changes in the physical elements of the building specified in the project details and documents (*for example, making an iron staircase instead of a wooden interior staircase, closing a window on the exterior by building a wall, or opening a new window or door on the wall*), removing an existing physical element (*for example the demolition of an interior wall*), making a physical addition to the internal volume of the building (*for example, dividing a room in two by building a wall*), making a physical addition to the outer surface of the building (*for example, adding a room above or below the building, or adding a floor above the building*), or additional construction (*for example, building a hut, garage, or swimming pool*) on the property on which the building is located even if it is not adjacent to the building. At this point, it is apparent that the changes that will be subject to the modification permit are determined according to which elements are included in the project details and documents as well as which elements should be included in the project details and documents. It should be noted that the project details and documents annexed

5 Modifications that are contrary to the architectural project details that were attached to the building permit are subject to the modification permit. See, Dan.8D, E.2003/5647, K.2004/2571, T.02.06.2004.

6 See, article 22/1 of the ZBA.

to the building permit are prepared by members of the profession who are legally authorized to prepare these materials according to their respective areas of expertise.<sup>7</sup> Therefore, the elements that must be included and shown in these project details and documents are determined within the framework of the legislation<sup>8</sup> and are based on the knowledge of the relevant professionals.<sup>9</sup>

It is not necessary to obtain a modification permit in cases where there is a change in certain elements that are not included in the building permit and its annexes and that do not need to be included or there is an addition that do not need to be included in the building permit and its annex projects. However, it is compulsory to obtain a modification permit in cases where changes are made to the elements included in the building permit and its annexes or if additions that should be included in the building permit and its annex projects are made to the building. To change building elements in the existing project details and documents annexed to the building permit or to add elements that must be shown in the project details and documents attached to the building permit, the elements should be changed in the project details and documents annexed to the building permit, and/or new elements should be added to these elements.<sup>10</sup>

A modification of the building permit in terms of the annexed project details and documents requires a building permit to be obtained again, i.e., a modification permit. To obtain the modification permit there must be modifications to the project details and documents attached to the building permit. The changes in project details to be made for the modification permit must be made by individuals with the relevant areas of expertise.<sup>11</sup> According to article 58/2 of the Planned Areas Zoning and Building By-law (PAZBB), for new constructions, additions, and substantial alterations, for which building permits have been obtained, the architectural project must be re-arranged when a change is requested later. If this change requires a change in the static and

7 It is necessary for the individuals involved to have a level of scientific competence in the fields of expertise required by the building permit and its annexes, and this scientific competency should be demonstrated by their membership of a professional body with the expertise to prepare the relevant construction projects. In a decision of the Council of State, it was decided that the case contrary to the reconstruction project is not related to the field of expertise of the mechanical installation project author. See, Dan.14D, E.2015/6006, K.2017/6759, T.06.12.2017.

8 For example see, article 57/2 of the Planned Areas Zoning and Building By-law (PAZBB): “*Architectural project; a) it is prepared by the architects in accordance with the implementation development plan, parceling plan, and the principles of this regulation. It consists of: 1) a layout plan, 2) a table showing the share of the floor easement and floor ownership, 3) the gross construction area of the independent sections and common areas and a chart showing the square meterage of the total building construction area and its accessory structures, 4) all floor plans, including basement floors, 5) roof plan, 6) at least two sections and a sufficient number of building views, one of which should pass through the common staircase for the floor and roof plans, 7) soil excavation calculations, 8) preliminary and application projects, with system sections and point details when necessary, 9) parking, shelter, and tree calculations.*”

9 See article 28 of the ZBA: “*According to the class, characteristics, and size of the area, settlement center, and building to be applied, it is obligatory to arrange the maps, plans, studies, projects, and their annexes related to architecture, engineering, and planning services within the scope of this law according to the areas of specialization of the members of the profession specified in Article 38. (...)*”

10 See, article 58 of the PAZBB.

11 See, Dan.8D, E.2003/5647, K.2004/2571, T.02.06.2004.

installation principles of the building, the necessary changes should be made clear in the requested documents. In other words, changes that require modification permit conflict with existing permit and its annexes. If exceptions to legal regulations are excluded, any changes to be made to the elements included in the project details and documents, and all kinds of additions that are not included but must be included in the project details and documents, also require changes to be made to the project details and documents attached to the building permit. This process is obligatory when a new permit is required (modification permit).

Making changes to a building that are contrary to the building permit and its annexes is a violation of the obligation to obtain a modification permit. If a change is made against the building permit and its annexes without obtaining a modification permit for the building, the procedure in article 32 of the ZBA and the administrative sanctions in Article 42 must be applied due to the need for construction activity contrary to the building permit and its annexes. This indicates that any violation of the building permit and its annexes is a result of modifications being made to the building without a modification permit being obtained. In other words, the modifications subject to the modification permit are determined according to which changes are considered to be a violation of the building permit and its annexes. Therefore, it is correct to say that the changes that require a modification permit are changes that are violations of the building permit and its annexes.

#### **IV. Are “Any Changes In Buildings With A Building Permit” Still A “Building”?**

When the Council of State decides whether various construction works, such as a pergola,<sup>12</sup> porch,<sup>13</sup> garden wall,<sup>14</sup> siege wall,<sup>15</sup> and base station<sup>16</sup> are subject to a modification permit, it takes into account whether these works have a building characteristic according to Article 5 of ZBA. The Constitutional Court, which is affected by this jurisprudence of the Council of State, uses the definition of a building in the ZBA, “*whether fixed or mobile, not only the main building but the structures added to the main building (additions), changes made to the main building, and repairs are also accepted as a building*”.<sup>17</sup> In the doctrine, it is asserted that an ornamental pool built in an immovable location where a building with a building permit is located has the nature of a building rather than a repair and renovation.<sup>18</sup>

12 Dan. 14D, E.2011/9232, K.2012/5970, T.21.09.2012; Dan.IDDK, E.2005/400, K.2008/1801, T.17.10.2008.

13 Dan.6D, E.1992/1991, K.1993/1112, T.17.03.1993; Dan.14D, E.2014/2429, K.2017/786, T.15.02.2017.

14 Dan.14D, E.2011/8559, K.2012/5400, T.13.09.2012.

15 Dan.6D, E.1967/1407, K.1968/8, T.08.01.1968, Sadık Artukmaç, *Türk İmar Hukuku* (3rd edn, Ayyıldız 1972) 56; D6D, E.1959/5965, K.1960/95, T.20.01.1960, Artukmaç (n 15) 243.

16 Dan.6D, E.2002/2998, K.2003/3204, T.21.05.2003, DKD.3; Dan.6D, E.2011/15099, K.2013/986, T.14.02.2013.

17 AYM, E.2012/93, K.2013/8, T.10.01.2013, R.G.28.03.2013-28601.

18 See, Melikşah Yasin, *İmar Hukukunda İdarenin Yıkma Yetkisinin Kullanımının Usul ve Esasları*, (XII Levha, 2009) 82-83.

At this point, it is of great benefit to consider the approach of determining whether construction works such as “*additions, alterations, and repairs*” carried out in a building with a permit are subject to a building permit or not, according to whether they have “*building*” characteristics.

Buildings are artificial artefacts that are positioned by humans on land to fulfill certain functions and have construction characteristics. Therefore, the concept of a “*building*” expresses a “*wholeness*” that is composed of physical and functional elements. According to definition in Article 5 of the ZBA, a “*building*” consists of “*construction*” on the land and “*facilities*” that cover “*additions, alterations, and repairs*” carried out on this construction. The “*facilities*” create a functional integrity with the construction, according to the characteristics of the building.<sup>19</sup> Accordingly, for any work on a land or plot to be considered a building, it must first have a “*construction*” feature. Facilities in the form of “*additions, alterations, and repairs*” are only secondary elements that are realized during construction and integrated within the process.<sup>20</sup>

Naturally, it may be necessary or even mandatory to make use of the building definition in article 5 of the ZBA when determining whether construction works on any land are subject to permission. Despite this, it is not appropriate to consider “*additions, alterations, and repairs*” carried out in any construction as an independent building on their own. This is because “*additions, alterations, and repairs*” are not the main element within the definition of a building, but are rather elements of a secondary nature that are dependent on the “*construction*”, which is the main element. Even if they require construction work, it is not possible to evaluate facilities that are not in the form of “*additions, alterations, and repairs*” in any construction project as a building. Similarly, it is also not correct to define “*any changes*” that are made in the form of “*additions, alterations, and repairs*” in a building with a building permit as a “*building*”. Therefore, “*additions, alterations, and repairs*” in a construction or a building with a building permit should not be evaluated by considering their physical properties, but rather by evaluating their functional relationship with the main building. For this reason, although works such as “*additions, alterations, and repairs*” are physical constructions, they do not qualitatively constitute a building independently of the overall construction project

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19 The most important result of defining the concept of “*building*” as an object consisting of both “*construction*” and “*facility*” in the ZBA is that the building permit obtained for a building covers both the construction of the building and the construction of the facilities. According to the feature of the building permit, any lack of facilities that should have been built in the construction process may lead to the denial of a building use permit due to reasons such as an unfinished building or scientific inconvenience regarding its use.

20 For the elements of a building definition, see Taner Ayanoglu, *Yapı Hukukunun Genel Esasları* (Vedat, 2014) 6-28. According to the author, two fundamental elements are stipulated in the concept of building in the ZBA No. 3194. The first of these is “*construction*” and the second is “*facilities*”. There is a conceptual relationship between these two essential elements of the definition of a building. Construction is the primary element; the facilities are dependent on the construction element and therefore have a secondary position.

or the building on which they are performed, because they are always performed in a construction or building.<sup>21</sup>

At first glance, to benefit from the “*construction*” element and the definition of “*fixed and mobile facilities covering additions, alterations and repairs*” in the building definition in article 5 of ZBA can be seen as an appropriate method. However, it should be noted that, neither a “*construction*” element nor the “*fixed and mobile facilities covering additions, alterations, and repairs*” element in the definition of a building in article 5 of the ZBA are any more clear and determinative than the “*any change*” phrase in article 21/2 of the ZBA. The definition of a building in Article 5 of the ZBA is far from sufficient in terms of determining whether a construction work is a building or not. The concept of “*construction*”, which is the essential element of the building definition in this article, does not have any legal definition and criteria. The Council of State is content with only giving a definition of a building in the justification of many of its decisions. When concluding whether a work is a building or not, the Higher Court refrains from making any assessment or examination, especially for elements of the building description. .

To consider “*any changes*” that will take place in the form of “*additions, alterations, and repairs*” subject to a modification permit, there must first be a building with a building permit that has been constructed, or such a building must be under construction. A modification permit cannot be issued for an unpermitted building, and the fact that such a building could be modified by obtaining a modification permit would not make it compatible with the zoning and building legislation.<sup>22</sup> The construction of works such as a swimming pool, garden wall, or hut on an empty plot may be subject to a building permit, depending on whether or not such structures have the characteristics of a building, but they cannot be subject to a modification permit. However, if the same construction works are carried out on land that contains a building with a building permit, it may be considered as “*any change in the building*” and would therefore be subject to a modification permit. A functional relationship is therefore established between the aforementioned construction works and the existing building with a building permit.

The concept of the “*fixed and mobile facilities covering additions, alterations, and repairs*” in the definition of a building and the concept of “*any changes in the*

21 For a contrasting opinion, see Aydın Zevkliler, *İmar Kurallarına Aykırı ve Zarar Verici İnşaat* (Olgaç Matbaası 1982) 207. According to the author, in the ZBA not only the main building, but also the structures built in addition to the main building, alterations made to the main building, repairs, and fixed or mobile facilities connected to the main building are also considered as structures per se. See also Ramazan Yıldırım, *İmar Hukuku'na Aykırı Yapılar Üzerinde İdarenin Yetki ve Yaptırımları* (IUSBE Master thesis 1990) 54.

22 See, Dan.IDDK, E.2016/2405, K.2017/4157, T.06.12.2017: “*To examine and evaluate the provisions of the said Act together; because it is clear that making changes in a building constructed with or without permission by obtaining a modification permit will not make that building compatible with the zoning and building legislation, it has been concluded that a fine may be imposed due to the unpermitted building.*”

*buildings with building permits*” included in article 21/2 of the ZBA are qualitatively different. In the ZBA, the secondary and dependent element of the definition of a “*building*”, which constitutes the main subject of the building permit, i.e., “*fixed and mobile facilities covering additions, alterations, and repairs*” is included. Works such as “*additions, alterations, and repairs*” in this definition are construction activities to be carried out on the basis of the main building permit. It is not necessary to obtain a separate building permit for “*fixed and mobile facilities covering additions, alterations, and repairs on construction*” that are included in the building definition. These are construction works to be completed within the scope of the building permit, and this is the reason why they are included in the definition of the building.<sup>23</sup> However, whether the “*changes*” that are mentioned in article 21/2 of the ZBA may also be made in the form of additions or repairs depends on whether or not the construction works are within the scope of the current building permit of the building. These construction works may also contradict the current building permit. Because the construction works referred to here include construction work related to “*additions, alterations, and repairs*” to be carried out not in accordance with the permit and annexes of a building with a building permit, these works can only be carried out by obtaining a new permit, i.e., a modification permit. The criterion of whether a change in a building with a building permit in the ZBA is subject to permission is not based on whether it is a building or not. This criterion has been determined by the provision of article 21/2 of the ZBA, with no room for further discussion. Construction works such as “*additions, alterations, and repairs*” in a building with a permit are subject to a modification permit because they will be deemed to be contrary to the existing building permit and its annexes. It is not possible to undertake these works with the building permit obtained when starting construction.<sup>24</sup>

According to article 21/2 of the ZBA “*any changes to be made in buildings with building permits*” are neither in the nature of construction, which is the main element of the building definition in article 5 of the ZBA, nor are they a fixed and mobile facility that includes “*additions, alterations, and repairs*”, which are secondary and relative elements of the building definition in article 5 of the ZBA. For this reason, because the “*additions, alterations, and repairs*” in a building with a permit do not have the nature of a building, it is wrong to determine whether these works are subject to a permit or not, according to whether they have building characteristics. Moreover, the building definition in article 5 of the ZBA does not include any suitable element for determining which changes to a building will be subject to a permit.

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<sup>23</sup> Ayanoğlu (n 20) 27.

<sup>24</sup> Celal Karavelioğlu, *Açıklamalı – Uygulamalı – İçtihatlı İmar Kanunu* (2nd edn 2007) vol 1, 966.

## V. Construction Works That Represent “Any Changes”

As we explained above, it is not correct and is not a problem-solving approach to define the changes subject to the modification permit to be made in buildings with a permit as a “*building*”. Construction works requiring re-permitting (i.e., a modification permit) are determined as “*making any changes in the buildings with building permits*” in article 21/2 of the ZBA. When considering the issuance of a modification permit, it is of great importance to determine what the term “*any change*” means and what the works that fall within its scope are.

The changes to be made in a building subject to a modification permit must be physical construction works. Works performed by changing the functions and usage patterns of the building without any physical construction work on the building do not fall within the concept of changes subject to a modification permit. The use of the whole or some areas of the building contrary to the functions foreseen in the original architectural project, as a result of functional changes without any construction activity or manufacturing work, is not subject to a modification permit. In many cases, such as the use of a farm building as a workshop,<sup>25</sup> use of a warehouse in the basement of a building as a workplace,<sup>26</sup> operating the building as a bird coop, gin factory, or olive oil factory,<sup>27</sup> use of the independent residential section as a workplace,<sup>28</sup> and the use of real estate contrary to the permit and its annexed architectural project;<sup>29</sup> the Council of State has decided that there was no violation of the building permit and its annexes in the sense of article 32 of the ZBA. In these cases, no modification permit was required due to the lack of construction activity and physical construction work.

The changes that are subject to a modification permit are construction activities and alterations carried out by undertaking work that interferes with the physical existence and elements of the building. Physical changes to a building can occur in many different forms, including renewal, replacement, and repair of building elements and materials, changing the dimensions of the building by making various additions<sup>30</sup> decreases in the outer or inner volume of the building, or changing the appearance of building elements and materials. Under this framework, work such as building a wall, removing a wall, creating a window in a wall, inserting a window into a wall, opening a door in the wall, closing a door with a wall, relocating walls and doors, column cutting or insertion, balcony closure, closing a balcony and including it in a room, creating a balcony from part of the closed area of an independent section such as a

25 Dan.6D, E.1991/3137, K.1992/5040, K.21.12.1992.

26 Dan.6D, E.1998/3254, K.1999/3159, T.09.06.1999, DD. 102.

27 Dan.6D, E.2002/4170, K.2004/883, T.18.08.20004, DKD. 5.

28 Dan.6D, E.1995/4733, K.1996/4650, T.25.10.1996.

29 Dan.14D, E.2015/8519, K.2018/5673, T.25.09.2018.

30 For any add-on to be classed as building work, it must be physically connected to the main structure and form part of it in terms of its function. Nevzat Koç, *Bina ve Yapı Eseri Maliklerinin Hukuki Sorumluluđu (BK.m.58)* (Ankara University Press 1990) 66.

room or hall, and the addition of rooms, living rooms, kitchens or a detached floor or flat to the building.<sup>31</sup> All of these works can be considered to be construction activities within a building.

While some of the physical changes made to buildings do not cause changes in volume, appearance, and function, some of them can cause a change in the volume of the building, while some change the appearance of building elements, and some change the function of the building area and its elements. Buildings are not only physical structures but also have functional characteristics as they are built to meet certain needs. It is impossible to consider buildings separately from their functions. For this reason, buildings are the result of construction work undertaken by combining various building materials for the creation of places, spaces, areas, and empty and filled volumes that have a certain function. Therefore, the qualities and properties of the buildings are evaluated not only by considering the material elements that make up the building, but also by considering the usage functions created by these material elements. In this context, the physical changes made to buildings should be evaluated by considering the physical properties and dimensions of the building elements and areas, as well as the functional changes to the usage patterns. For example, the difference between a porch built to protect the usage area of an independent section on a garden from sun and rain, and a porch built to transform the common area in front of an independent section of a garden to an independent section of floor is fully functional. Building a porch adjacent to a building for protection from sun and rain does not result in any functional change in the use of the building and the immovable areas in which it is located, and therefore it is not subject to a modification permit.<sup>32</sup> Likewise, covering the top of the terrace with corrugation in the form of an open eave to prevent water leakage is not subject to a modification permit because it does not cause a change of function in the terrace.<sup>33</sup> However, if making a porch will result in the allocation of a part of the garden to an independent section of the building, or if the closing of a terrace will create a closed area, then such modifications will naturally be subject to a modification permit. For this reason, it is necessary to consider all construction works that affect the usage functions of a building following changes made to the material elements of the building, as “*any change*” within the scope of article 21/3 of the ZBA. As a result, it becomes necessary to accept that such construction works are subject to a modification permit.

Physical construction works in buildings can be carried out in three ways: repair, alteration, or addition. These concepts are included in the definition of a “*building*”

31 Artukmaç (n 15 )162.

32 Dan.14D, E.2014/2429, K.2017/786, T.15.02.2017: “*To accept that the porch should be subject to a license in accordance with the above-mentioned regulations; it must be built within the scope of the structure definition regulated in the ZBA. In other words, it must be made of a material that will create a closed area and affect the carrier system of building that it is associated with, except for the purpose of protection from sun and rain.*”

33 Dan.6D, E.1990/2078, K.1992/1469, T.10.04.1992.

in article 5 of the ZBA as “*fixed and mobile facilities covering additions, alterations, and repairs*”. The subject of a modification permit is determined as “*any change in buildings*” in article 21/2 of the ZBA, but the concepts of repair and addition are not included in this article. This does not mean that construction works such as repairs and additions cannot be subject to a modification permit. Although it is called “*change*” in article 21/3 of the ZBA, this concept is used widely and comprehensively to cover all “*additions, alterations, and repairs*” in a building because these concepts are often intertwined with each other. For example, when the repair of a defect in a building is performed by replacing damaged parts with new ones it occurs in the form of a change, and when it is performed by adding some new parts and elements to the structure it occurs as an addition. In other words, changes such as the removal of a wall in an independent section, repairs such as the replacement of roof material or the engine of a deteriorated elevator, and building additions such as porches or pergolas or the closure of a balcony are all changes made to a building in a broad sense.

On the other hand, the modification project in article 4/dddd of the PAZBB as “*the whole of the necessary implementation projects related to the alterations or additions required to be made in the approved projects of the permit annexes of the buildings*”. In the PAZBB, it is accepted that additions will also be subject to a modification permit. Accordingly, it is accepted that additions to a building with a permit also fall under the classification of “*any change in the building*” in the framework of article 21/3 of the ZBA and will also be subject to a re-permit requirement. We mentioned above that additions to a building with a permit should be evaluated within the scope of the changes to the building with a permit, not within the scope of the building definition. Additional construction can include creating a closed area in the attic,<sup>34</sup> building a new floor in the building, and making additions that create a closed area such as a room, living room, or kitchen.<sup>35</sup> Constructing a porch,<sup>36</sup> veranda, or ground terrace<sup>37</sup> adjacent to a building is a change that has features of an addition. The additional construction need not be an additional construction of the same nature as the original construction, for example the building of a Global System for Mobile Communications (GSM) base station<sup>38</sup> on the roof of a building. Also, the addition does not have to be adjacent to the building. Various additions that are not adjacent to the building but are immovable and located on the land which the building is located are also considered to be an additional construction, regardless of whether they are in a functional relationship

34 Dan.14D, E.2011/16568, K.2012/5725, T.19.09.2012.

35 Dan.14D, E.2012/7442, K.2014/2175, T.13.02.2014; Dan.14D, E.2018/2032, K.2019/25, T.15.01.2019.

36 Dan.6D, E.1991/1831, K.1992/2034, K.06.05.1992; Dan.6D, E.1992/1991, K.1993/1112, T.17.03.1993; Dan.14D, E.2014/2429, K.2017/786, T.15.02.2017.

37 Dan.14D, E.2011/16568, K.2012/5725, T.19.09.2012; Dan.14D, E.2012/7442, K.2014/2175, T.13.02.2014.

38 Dan.6D, E.2002/2998, K.2003/3204, T.21.05.2003, DKD, 3.

with the main building. Accordingly, constructions such as a hut, outbuilding, gazebo, bower, pergola, garage,<sup>39</sup> swimming pool,<sup>40</sup> garden wall,<sup>41</sup> siege wall,<sup>42</sup> and fence built in the garden of a building are not classed as buildings but are additional constructions that are not adjacent to the main building.

“*Other modifications and repairs*” are mentioned when determining construction works that will not be subject to a modification permit in article 21/3 of the ZBA. This shows that the legislator also accepts the concept of repairs within the scope of any changes that can be made to a building. The concept of “*repair*” is different from the concepts of alteration and addition. Repair activity is any work undertaken to make a damaged part of a building usable and operational. Therefore, activities performed for repairs, such as replacing broken glass in a window or repairing a broken faucet, are carried out by replacing the damaged parts of the building and bringing the building into conformity with its previous shape. Repair work in the building is generally carried out to ensure the conformity of the building with the license and its annexes, and does not contain any elements contrary to the permits and its annexes. Therefore, repairs are usually not subject to a permit requirement. On the other hand, if the repair is to be carried out by making an alteration to the building, it will be necessary to class such action as a change. During the repair work, if changes are made to the building as a result of an inconsistency in the building permit and its annexes, then the repair work will be counted as “*any changes in the buildings*” and will be subject to the obligation to obtain a modification permit.

It should be noted that if the changes, including additions and repairs, to be made to the building occur in the form of changes made to the elements that are not included in or do not need to be included in the building permit and its annexes (i.e., if the building does not come into conflict with the building permit and its annexes as a result of the changes made or to be made), the works in question will naturally not be subject to a modification permit. Under such circumstances work would not have the characteristics of making any change to the building in terms of scale, volume, and size within the meaning of article 21/2 of the ZBA. For example, when a cabinet is installed on a wall, an air conditioner is installed, or a small niche is made on a non-bearing wall in a residence, a new permit will not be required because these works will not violate the building permit and its annexes.

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39 Dan.6D, E.1959/5965, K.1960/95, T.20.01.1960, Artukmaç (n 15) 243.

40 Dan.6D, E.2004/1834, K.2004/6658, T.15.12.2004; Dan.14D, E.2012/7442, K.2014/2175, T 13.02.2014.

41 Bkz. Dan.14D, E.2011/8559, K.2012/5400, T.13.09.2012, DD 132, 189-191.

42 Dan.6D, E.1967/1407, K.1968/8, T.08.01.1968, Artukmaç (n 15) 56.

## VI. Changes Subject to Building Permits Must Be Permissible According to the Zoning And Building Legislation

If the changes to be made to a building with a permit are made without obtaining a modification permit, although they are subject to a permit, then the act of building contrary to the permit and its annexes will occur. However, it should be noted that whether the changes to be made in a building with a permit are qualitatively subject to a permit differs conceptually from whether they can be permissible according to the zoning and building legislation. A change may be qualitatively subject to a modification permit, but if making a modification constitutes a violation of the zoning and building legislation, then it is not possible to issue the modification permit. For example, building an additional floor on a two-storey building is subject to a modification permit, but if a two-storey building condition is stipulated in the relevant zoning plan, then it is not possible to issue a modification permit due to the conflict with the zoning plan.

Repairs and modifications that are subject to a modification permit can only be made in accordance with the zoning plan, administrative regulations, and other legislative provisions.<sup>43</sup> For this reason, when a modification permit is requested for a change that is subject to a permit, it is necessary to investigate whether this change is permissible.<sup>44</sup> Changes subject to a modification permit in a building with a permit that affect the base area coefficient (TAKS), floor area coefficient (KAKS), building height, front line, approach distance, and skylights must comply with the zoning plan, and zoning and building legislation principles. Therefore, if the modifications that require a permit are contrary to these principles, a building modification permit cannot be issued for these modifications. For example, the Council of State decided that adding ventilation shafts to lower floors that pass through an apartment by closing rooms<sup>45</sup> and adding illumination to the kitchen of a ground floor flat<sup>46</sup> would violate the scientific principles of health and safety rules. Adding a restaurant by closing an area of 109.04 m,<sup>47</sup> closing an open cantilever balcony,<sup>48</sup> and constructing a coal storage facility in a garden<sup>49</sup> were considered to be zoning violations that would intrude on neighbors. Creating a closed volume in a common garden, exclusively for use as an independent section<sup>50</sup> would constitute an infringement of the right of all

43 Halil Kalabalık, *İmar Hukuku Dersleri* (2nd edn, Seçkin 2009) 367.

44 Bkz. Dan.14D, E.2011/14915, K.2013/2058, T.21.03.2013: “*In this case, to determine whether the additions found to be made later were subject to the permit according to the provisions of the existing zoning plan, it was necessary to make a new decision regarding the dispute by conducting an on-site investigation and expert examination by the Administrative Court.*”

45 Dan.6D, E.1987/415, K.1987/1049, T.12.11.1987.

46 Dan.6D, E.1989/3211, K.1990/37, T.29.01.1990.

47 Dan.IDDK, E.2004/2156, K.2007/2334, T.22.11.2007.

48 Dan.6D, E.1993/2362, K.1993/5151, T.06.12.1993; Dan.6D, E.2004/1411, K.2006/1358, T.22.03.2006.

49 Dan.6D, E.2009/7078, K.2012/7731, T.17.12.2012.

50 Dan.6D, E.1996/5807, K.1997/5378, T.27.11.1997.

property owners to use the common space, and constructing a swimming pool<sup>51</sup> would violate the building conditions in the zoning plan. Therefore, no modification license can be issued for these modifications. Similarly, if the exterior color and appearance of a building are included in the architectural project details, changing this color or adding cladding for thermal insulation is subject to a modification permit, which will require changes to the project details. However, in accordance with article 21/4 of the ZBA, if a determination has been made by the municipality to harmonize the exterior of buildings with the characteristics of the location and the environment, and to achieve a beautiful appearance (for example, the whitewash rule for houses in Bodrum), no modification permit can be granted to any exterior coating that is contrary to this determination.

It should be noted that the right of building owners to make modifications to their buildings with a permit is one of the rights arising from the building permit. However, the right to make modifications to the building is in some cases limited by zoning and building legislation. It is extremely important to strike a fair balance between the right to make modifications and the restrictions arising from the zoning and building legislation. As a rule, as long as the modifications to be made do not contradict the scientific principles that are used to establish the health and safety conditions and the building conditions set by the zoning and building legislation,<sup>52</sup> permit requests for modifications such as “*additions, alterations, and repairs*” should be met. In this context, even if a construction ban is imposed on real estate where the building with a permit is located, it is necessary to issue a modification permit for repairs and modifications other than major renovations. For example, a modification permit requested for repairs in an old building cannot be rejected on the grounds that the property is allocated as a garage and parking lot in the new zoning plan.<sup>53</sup> Whereas, a modification permit requested for the addition of an attic to a building on the parcel of land within a zone where all kinds of construction, repair, and modification are prohibited by the Ministry of Reconstruction and Settlement will not be granted.<sup>54</sup>

## **VII. Relationship Between the Modification Permit and Main Building Permit**

According to article 21/1 of the ZBA, it is necessary to obtain a permit again to make changes to a building with a permit. As explained above, this modification permit is required for construction works that comprise “*additions, alterations, and repairs*” that would contradict the existing permit and its annexes. It is not a renewal of the existing building permit and its annexes. For example, in accordance

<sup>51</sup> Dan.6D, E.2004/1834, K.2004/6658, T.15.12.2004.

<sup>52</sup> Jovanović, Aristovnik, and Rogić Lugiarić (n 2) 6.

<sup>53</sup> Dan.6D, E.1966/4304, K.1970/1490, T.06.06.1970, DKD 1971, 221.

<sup>54</sup> Dan.6D, E.1979/95, K.1982/760, T.29.03.1982.

with article 29 of the ZBA, if the building permit is invalid due to the expiration of the permit period, it is necessary to obtain a new building permit. As a rule, the situation covered by article 29 of the ZBA is the renewal of the previous building permit. However, because the building to be modified already has a building permit, essentially the permit required to make changes and its annexes is a change to the existing building permit and its annexes. In accordance with article 21/2 of the ZBA, the building permit acquired by making changes to the project details annexed to the existing building permit is not a renewal of the previous building permit, but a different permit that changes the previous permit and its annexes.<sup>55</sup> For this reason, the permit required to make any changes to a building with a permit is called a modification permit.

It is compulsory to obtain a modification permit to carry out works such as “*additions, alterations, and repairs*” in a building that has a building permit in the Turkish zoning and building law. To obtain a modification permit, the architectural project must be rearranged and other projects must be changed where necessary.<sup>56</sup> It is necessary to have a scientific responsible person in every field of expertise required by the permit and annexes of the buildings, and the preparation of the project details for the buildings should be carried out by members of a professional body with the necessary expertise.<sup>57</sup> In this context, for the modification permit, changes to the project details should also be made by professionals in the relevant field of expertise.<sup>58</sup>

The validity of the modification permit depends on the continuation of the effectivity and validity of the main building permit. In a lawsuit filed to request the cancellation of a modification project, the Council of State stated that the first permit and the annexed project details were not valid because the construction was not completed within the permission period, and it was decided that a modification project for an invalid project was not a decision that should be subject to an administrative lawsuit.<sup>59</sup> In another decision of the Higher Court, it was concluded that “*upon the court decision on the cancellation of the first building permit, the modification permits*

55 See, art. 4/ddd of the PAZBB.

56 See, art. 58 of the PAZBB: “(...) (2) *In new construction, additions and substantial alterations, for which a building permit has been obtained, the architectural project must be re-arranged when later changes are requested. If this change requires a change in the building’s static and facility principles, the necessary changes are made in the requested documents also. (...)*”

57 Dan.14D, E.2015/6006, K.2017/6759, T.06.12.2017.

58 Dan.6D, E.2014/5795, K.2019/1265, T.11.03.2019: “(...) *without obtaining the approval of the architectural project author upon the request of the new owner, and as a result of the application made for the project approved by the civil engineer, a building modification permit dated 08/06/2012 and numbered 8763 was issued. It was stated by the defendant administration that the project modification was requested from the civil engineer on the grounds that there was a change in the carrier system of the building in question. (...) In this case, after the modification permit was examined by the Administrative Court and the scope of the modification was determined, there was a need to determine whether there was a need for changes in the architectural project and whether the signature of the civil engineer in the modification permit was sufficient; but there was no legal propriety in the decision because it was based on an incomplete examination.*”

59 Dan.6D, E. 1993/4593, K.1994/1594, T.25.04.1994.

*obtained after this building permit should also lose their legal basis*".<sup>60</sup> Again, the Council of State, in another decision, did not find it unlawful to suspend construction due to the withdrawal of a modification permit that was issued incorrectly by the administration.<sup>61</sup> Within the framework of these judicial decisions a modification permit is a second permit that changes, but does not completely eliminate the main building permit. If a modification permit is canceled, the changes made in the main building permit and its annex will also be canceled.

### VIII. Changes Not Subject to A Modification Permit

The absolute application of the rule that any change to be made to a building is subject to a modification permit is incompatible with natural patterns of human activity. There is often a need to make changes that are not subject to a modification permit in buildings with a permit. Legislators have taken this into consideration and made exceptions to the ruling requiring a modification permit, and proclaimed that various "*additions, alterations, and repairs*" will not be subject to a modification permit. As a rule, all types of modifications are subject to permission, but some limited and simple operations are excluded from this obligation.<sup>62</sup>

While a new permit is required for any changes to be made in buildings with a permit, changes that are not subject to permission are exceptions. For this reason, it is important not to determine what the changes subject to permission are, but rather what changes are not subject to permission. Construction works that are not subject to a modification permit are classified into two categories in article 21/3 of the ZBA:

- a) *Joints, interior and exterior plastering, painting, whitewashes, gutters and, streams, joinery, floor and ceiling coverings, electrical and plumbing repairs, roof repairs, and tile transfers.*
- b) *In accordance with the by-laws according to the characteristics of the location, modifications and repairs that do not affect the carrier element specified in the zoning and building by-laws as prepared by the municipalities.*

In the Unplanned Areas Zoning and Building By-law,<sup>63</sup> which was issued to ensure the implementation of the ZBA in unplanned areas, a distinction has been made regarding "*essential repair and modification - ordinary repair*". It has been proclaimed that "*repairs to joints, interior and exterior plastering, whitewashes, painting, gutters and streams, joinery, floor and ceiling coverings, electricity, sanitary installation, balustrades, lightning rods, pergolas and similar structures; as well as repairs to partitioning walls, garden walls, and chimneys, eaves, and similar*

<sup>60</sup> Dan.6D, E.2007/1012, K.2008/2047, T.01.04.2008, DD 120.

<sup>61</sup> Dan.6D, E.1992/3289, K.1993/1969, T.20.05.1993.

<sup>62</sup> Artukmaç (n 15) 63.

<sup>63</sup> R.G.02.11.1985-18916 Duplicate.

*elements; and the construction of small and simple coops that are not visible from the road*”, which are defined as ordinary repairs in this by-law are not subject to a permit.

In the PAZBB,<sup>64</sup> which was enacted to ensure the implementation of the ZBA in planned areas, a distinction is made between “*essential modification - simple repair and modification*”. Accordingly, in article of 4/y of the PAZBB, essential modification works are defined as “*operations affecting the bearing element in the buildings; changing the building construction area, the area included in the precedent (floor area coefficient) account, the building base area, the number of independent sections, the area and purpose of use of common places, the area and purpose of use of independent sections, or changing the permit annex projects*”. Such modifications are likely to be subject to a permit (art. of 4/y and 58/1 of the PAZBB).

On the other hand, “*simple repair and modification*” works, which are defined as “*all kinds of repair and modification operations in buildings, such as joints, interior and exterior plastering, painting, whitewashes, gutters and streams, joinery, floor and ceiling coverings, electrical and plumbing repairs, garden walls, wall coverings, chimneys, eaves, roof repairs and tile transfer, all of which are outside the scope of essential modification and do not change the carrier system, exterior of the independent section of the building, the location, and the number of wet floor*” are not subject to a modification permit (art. 4/i of the PAZBB). In addition to simple repairs and modifications, it is also prescribed in the PAZBB that the construction of folding glass panel applications in balconies, balustrades, pergolas, and gazebos/arbors and similar features; the repair of partition walls, garden walls, wall coverings, chimneys, eaves, roofs, and similar features, and window replacement works (art. 59/1 of the PAZBB); thermal insulation applications that do not affect the carrier system and the establishment of solar-based renewable energy systems for the building’s own needs (art. 59/ of the PAZBB 59/2); and certain electronic communication stations and equipment (art. 62 of the PAZBB 62) installed in buildings and the land are not subject to a permit.

## **Conclusion**

A functional criterion is needed to distinguish which “*additions, alterations, and repairs*” to buildings with a permit are subject to a modification permit and which are not. However, in the ZBA, there is no definite criterion in this regard. For this reason, the issue of which “*additions, alterations, and repairs*” to buildings are subject to a building permit is still an ongoing issue in the field of zoning and building law. For example, in buildings with building permits, especially pergolas and porches, there have been disputes about whether works such as building additions or the closing of balconies are subject to permits in practice.

<sup>64</sup> R.G.03.07.2017-30113.

The resolution of such disputes is dependent on the determination of the changes made or to be made in buildings with a permit during or after the construction phase, with clear and precise criteria required to determine which are subject to a modification permit and which are not. However, it has been observed that despite the existence of the provisions of the ZBA and related regulations, as well as numerous judicial decisions, the uncertainties about the distinction whether any construction works in buildings are subject to a permit have not been resolved satisfactorily. The reason for this is that the Council of State determines whether the “*additions, alterations, and repairs*” in buildings with building permits are subject to a modification permit by considering whether the construction works have the quality of a “*building*”. Unfortunately, the elements of the building definition in the ZBA are not sufficient. In addition, the Council of State’s opinion and approach does not meet the need for clear, precise, and specific criteria.

However, it is possible that a criterion can be drawn from the general philosophy and spirit of the regulations in the ZBA. This criterion can be defined as: among the repairs, changes, and additions to buildings with a permit, those in accordance with the building permit and its annexes will not require a modification permit; whereas those contrary to the building permit and its annexes will. At this point, there is a problem of how to determine compliance and non-compliance with the permit and its annexes and how to distinguish them from each other in a clear, specific, and precise way. There is no clear criterion in the ZBA for this issue and reference has therefore been made to the by-laws. Therefore, the distinction between modifications subject to a modification permit and those that are not should be made according to the principles determined by analyzing and systematically interpreting the regulations in the ZBA and related zoning and building by-laws.

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