

ISSUES OF BUILDING AND CONSTRUCTION - HALACHIC ZONING LAWS

In addition to the buying, renting and selling that goes on this time of the year, the Summer is also the perfect time for construction and home improvement projects. Most homeowners are aware of the various zoning and building code issues that must be dealt with before a major project gets underway. The city must be contacted. If necessary, inspectors must come and survey the property, a permit must be issued, etc. It is important to realize, however, that there are also a great many potential *halachic* issues that can arise from altering or adding to one's home or property that must be dealt with as well.

The focus of this week's Newsletter will be examining some of these issues and addressing what the *halachic* rights of the homeowner – and neighboring homeowners – are. **For purposes of this article, it should be assumed that all city zoning issues have been dealt with properly. The focus will only be on the *halachic* issues that exist, irrespective of city ordinances that must legally be obeyed.**

The *Halachic* Background

There is an entire body of *halacha* referred to as "*Nizkei Sh'cheinim*" - "damages" that occur between neighboring properties (or, for that matter, others who live in that town). Much of the largest *maseches* in the *Shas Bavli, Bava Basra*, deals exclusively with these matters. The basic underlying premise of this body of *halacha* addresses the possible "conflicts" between one's right to do what they wish to do on or in their own property, and how others may be adversely effected by one exercising his rights in this way. For example:

- Doing construction on one's home that causes part of the new structure to extrude over the neighbor's property. (*Siman* 153, 1-5)
- Opening a new window that will provide a view of the neighbor's private yard. (154, 3-11)
- Angling a drainage gutter that causes the water to run off into a neighboring property. (153, 6-12)

- Opening an amateur auto repair shop in the back yard when the exhaust fumes irritate neighbors. (155, 36-33)

- Playing drums until all hours of the morning when it disturbs the sleep of the neighbors. (156, 2-3)

Issues such as these, and a myriad more, are discussed extensively in *Gemara* and *Shulchan Aruch*, primarily in *Choshen Mishpat Simanim* 153-156. Because of the vast amount of issues and practical cases that arise, we will only address the very basics of this intricate area of *halacha*.

An Outline of the Basics of Property Rights

There are two fundamental, underlying principles that operate when it comes to *nizkei sh'cheinim*, one applying to the "*mazik*" (the one who is doing something that may effect his neighbor) and one applying to the "*nizak*" (the neighbor who feels his property rights are being impinged upon).

The *mazik* is not allowed to do anything that will cause any "damage" to his neighbor's property.¹ "Damage" is in quotes because what the *halacha* defines as damage is not necessarily actual physical harm to the neighbor or his property. It can also mean, in this context, physically impairing the full use of another's property or causing the neighbor to stymie his use of his own property. For example, let's assume Reuvain has a window on the side of his home overlooking Shimon's driveway (in such a way that he has a right to have such a window there). It would not be permissible for Shimon to construct a garage *on his own property* in such a way that the structure adversely effects Reuvain's use of his window.² Reuvain could force Shimon to distance Shimon's structure four *amos* from his window. Likewise, if Shimon would like to build an addition on the back of his house and open windows that will now overlook Reuvain's private yard, Reuvain can stop Shimon from doing so by claiming that he will no longer be able to perform private activities in his yard, as he is concerned that Shimon or his family will be

¹ See *Pischei Choshen* vol. 5, 13, 1 from the *Shulchan Aruch HaRav Hilchos Nizkei Mamon* 14.

² *Choshen Mishpat* 154, 21

watching him.³ [These are only basic examples of the issues – should a situation arise involving these scenarios, a *shailoh* must be asked as there are many details and potential mitigating factors.]

The *nizak* is not allowed to be unreasonable in his demand that his neighbor stop his construction or activities. There is a concept in *halacha* referred to as “*kofin al midas S’dom*.” We can force someone to *not* act in the way of the people of *S’dom* who, for no good reason at all, would prevent others from using their property.⁴ What this means on a practical level is the following. Even though technically speaking, one would have a legal right to prevent others from using his property or airspace simply because it belongs to him and he does not have to let others use it, we in effect force him not to be stingy in this way. For example, let’s say that Reuvain and Shimon are neighbors, and unfortunately, they do not get along so well. The property line runs right along the edge of Reuvain’s front yard and the edge of Shimon’s driveway. Whenever Shimon gets out of his car, he must open the door over Reuvain’s yard, in essence making use of airspace that belongs exclusively to Reuvain. Assuming that there is enough room for Shimon to disembark from his car without ever treading on Reuvain’s manicured lawn, and that he in no other way adversely effects Reuvain’s yard, Reuvain would have no right to disallow Shimon from opening his car door over Reuvain’s property.⁵ This claim would be baseless and would be indicative of the traits of the people of *S’dom*. *Beis Din* would rule in favor of Shimon. If, however, for whatever legitimate reason, Reuvain could show that he was being adversely effected by the situation, he may have a right to stop Shimon’s use of his airspace. Likewise, Reuvain would certainly be able to build a fence or park his own car on his lawn right up to the property line. Shimon would not be able to claim that Reuvain is impinging on his use of Reuvain’s airspace, as it was never *his* to use to begin with.⁶ Having said this, there still exist many scenarios that are not easily subsumed under one of the two

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principles discussed. Very often the “*mazik*” does not feel he is doing anything that effects his neighbor negatively and the “*nizak*” does not feel he is being unreasonable in objecting to his neighbor’s activities. It is in these situations that a competent Rav or *posek* must be consulted. The possible consequences for not dealing with issues such as these up front can often be difficult and costly. Windows may have to be sealed, structures torn down and removed or money paid to placate upset neighbors.

Using City Zoning Laws to Stop a Neighbor’s Construction Plans

For any project of substantial size, often city zoning law will require the prospective builder to get his neighbors to sign a document stating that they do not mind his going forward with his building plans. The question that arises is as follows: if the plans are permissible according to the dictates of *halacha*, is the

neighbor compelled “*al pi din*” to sign off on the construction, or is he allowed to use this opportunity to prevent the building that he feels will bother him? This is a question that is discussed in the *poskim* and the following *very rough* guidelines are set forth.⁷ If there is absolutely no actual “damage” that will be done and the neighbor does not want to sign simply because he does not want this construction to take place, it may be that he must sign based on the idea mentioned above of “*kofin al midas S’dom*,” If, however, there will be some nuisance or difficulty caused by this construction (albeit not enough to allow him to *halachically* stop his neighbor from building), he may be permitted to hold off signing, or even to ask for some compensation in exchange for his allowing the construction to take place.

As with all issues of this nature, a *halachic* inquiry must be made by both parties before taking any action that may be in violation of the *halacha*.

To reach Dayan Wolfson, on this or any *halachic* issue, please call the Kollel *Halacha Shailoh* Hotline at 973-614-0053 between 3:00-6:00 PM Sunday to Thursday. Call as well for back issues of the Newsletter, for more information on the kollel or to sponsor a future edition of the Newsletter. The Kollel *davens Mincha* daily (Sunday-Thursday) at 4:15 PM.

³ 154, 3

⁴ *Bava Basra* 12b. See *Rabbeinu Gershom* who explains that this refers to the *midah* of *S’dom* mentioned in *Pirkei Avos* 5, 13 of “*Sheli sheli, vishel’cha shel’cha*.” See *Rashi* and *Rabbeinu Yonah* in their *pei nush* on *Avos* who refer us to *Yechezkel* el 16, 49.

⁵ Similar to 153, 2. See also *Pischei Choshen* vol. 5, chap. 15 note 1 where he extends this ruling of the *Shulchan Aruch* regarding a *ziz* to any similar situation. See there also where he cites the *Me’iri* as placing limitations to this rule if the item extending over Reuvain’s airspace is of a permanent nature.

⁶ As for why Shimon’s ongoing use of the airspace would not constitute a *chazakah*, see *Nesivos* 153, s.k. 12.

⁷ *Pischei Choshen* vol. 5, 13 note 1.