

# Shechainim

## PART III ZONING BOARDS

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

One of the common practical applications of *nizkei shecheinim* today pertains to zoning laws as they relate to *shuls* and *yeshivas*. In this shiur, we will address this issue by using an actual case that was brought to the Bais Din.

### PETITIONING A ZONING BOARD AGAINST CONSTRUCTING A YESHIVA:

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A certain individual wanted to open a yeshiva in an established frum community. He purchased two adjacent lots in a residential area on which to construct his institution, including a Bais Medrash, a dormitory, a *simcha* hall, and a number of other things. The neighbors were not happy with this initiative and wished to protest his opening a yeshiva in proximity to their homes. After the individual received several municipal fines (which are often the result of complaints about building without a permit), he took the neighbors to a *din torah*, claiming that a. they were responsible for the fines they caused him, and b. they should desist from preventing him executing his plans for construction. Are the neighbors obligated to pay for the fines and are they forbidden from protesting his plans to the zoning board?

The administrator acknowledged that according to the Mishna (Bava Basra 20b), one may generally not open a store in a residential courtyard which will cause an increase in noisy foot traffic. However, he noted that the Mishnah states that one may not prevent the opening of a place where noise from “*tinokos*” (children) is heard, which the Gemara explains is referring to *tinokos shel beis rabban* (children studying Torah with their teacher), i.e. a Talmud Torah. The reason for this exception is that *chazal* instituted a *takanah* that every district must hire *melamdin* (Torah teachers) to teach children Torah beginning at age 6. Therefore, the neighbors in residential areas may not object to the opening of a yeshiva or Talmud Torah nearby. The Beis Yosef cites a *machlokes rishonim* whether this halacha applies to other *tzorchei mitzvah* (mitzvah purposes) as well, and the Shulchan Aruch (C.M. 156:3) rules that any *tzorech mitzvah* is included. Thus, the administrator claimed, the neighbors should not be permitted to protest his establishment of the yeshiva.

In this particular case, there were two other important factors present as well that need to be addressed. The first was that an individual who was chronically ill lived next door, and the additional noise and activity of a yeshiva could potentially

cause his condition to deteriorate. Second, the plot that had been purchased for the construction had already been subdivided into two lots many years earlier, and at that time had been approved strictly for residential purposes.

Although, as mentioned above, according to the rules of Choshen Mishpat one cannot prevent the opening of a *cheder* or *Talmud Torah* in residential areas; nowadays, there are zoning boards that must approve cases like this for the construction to be permitted. If someone petitions the zoning board to approve such a variance, is it permitted for the neighbors to petition the zoning board to oppose it?

### THE CASE OF THE MAHARIK AND THE GHETTO:

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There is a teshuvah of the *Maharik* about a somewhat similar case of a Jew who did not have a place to live and wished to move into a Jewish ghetto and place a tent in one small area, but the residents claimed it was already too crowded and there was no space for anyone else to live there. The Jew who wished to move in petitioned the local squire for permission to live there, so the residents asked the *Maharik* whether they were permitted to counter petition not to grant him permission.

The *Maharik* resolves the question based upon a Gemara (Bava Metzia 10a) that if an *ani* (poor person) tries to acquire *pe'ah* (produce left in the corners of a field for the poor) by jumping on it rather than performing the normal *kinyan* of lifting it, the other paupers are permitted to remove him from the *pe'ah* and acquire it for themselves, since he did not perform a proper *kinyan*.

The *Maharik* infers that if the pauper who was already lying upon the produce in the field may be removed by others who did not attempt to acquire it for themselves beforehand, then certainly in the case of the ghetto, where the original residents already lived there (even if they did not perform an official *kinyan* in every spot) and the other Jew is attempting to take some of their space, the residents may petition the ruler not to grant him permission to move there. Although the Bais Yosef vehemently disagrees with the *Maharik* and rules that a Jew may not petition a non-Jewish ruler against another Jew, the Rema upholds the ruling of the *Maharik*, and this is the position of many other *acharonim* as well.

The case of *Maharik* is similar to that of zoning boards,

since in both cases, one individual is attempting to obtain new rights that he did not previously have. If so, one could argue that the *Maharik* would allow petitioning the zoning board against approving the permit for the yeshiva. The cases differ, though, in that the owner of the yeshiva already possesses regular usage rights to the property, as opposed to the case of the *Maharik*, where the Jew looking for a place to live did not have any rights at all to the land in the ghetto. Accordingly, perhaps even the *Maharik* would agree that the neighbors are not permitted to petition the zoning board against approving the yeshiva.

#### PETITIONING IN A CASE OF TZORECH MITZVAH:

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Another relevant question with regard to the *Maharik* is whether his ruling applies in a case of a *tzorech mitzvah*. As mentioned above, founding a Yeshiva or other *tzorech mitzvah* overrides the halachic rights of neighbors in Choshen Mishpat. Would the *Maharik* then concede that the neighbors may not protest in such a case? The *Yad Shaul* (cited in the *Pischei Teshuvah*) posits that we cannot rely on the *Maharik* in a case of a *cheder* and one may not petition the ruler in that case.

However, the *Avnei Nezer* argues with the *Yad Shaul* on this point, in a case that is nearly identical to that of a zoning board. He was asked about someone who asked for approval from the local ruler to open a second shul when one shul already existed nearby. The owner of the first shul wished to petition the local ruler to deny approval for the second shul. The *Avnei Nezer* ruled that this case was similar to that of the *Maharik* (despite the fact that the case was one of a *tzorech mitzvah*) and concluded that the owner of the first shul had the right to petition the ruler to deny approval of the second shul. Here too, the individual who wished to open the second shul already owned the property and was merely seeking approval to use it for a shul, and still the *Avnei Nezer* ruled that they may petition against it. It would seem that according to the *Avnei Nezer*, it is permitted to petition a zoning board even against the approval of a yeshiva, unlike the opinion of the *Yad Shaul*.

Returning to our particular case, it is important to note that building a shul or yeshiva in that particular community is considered a permitted usage of property (though in many other locations, it is either never allowed, or only allowed

with a special exception or variance). Accordingly, the *Maharik* should agree that the neighbors may not protest the yeshiva, since such construction has approval in any case.

However, in this particular case, we mentioned that the property had already undergone a previous subdivision with restrictions that indicated that it must be used in a residential manner. If so, the owner of the yeshiva did in fact need a variance to permit him to construct a yeshiva there, in which case we would allow the neighbors to petition the zoning board not to approve the permit. If, however, the zoning board determined that the restrictions of the subdivision still allow the construction of a yeshiva on the property, then the neighbors would not be permitted to appeal the ruling. The reason is that the owner of the property would already be treated as owning the right to build a yeshiva there, in which case even the *Maharik* would not allow restricting him from doing so.

#### THE CHOLEH FACTOR:

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With regard to the issue that one of the neighbors is chronically ill, *Achronim* dispute whether *Chazal* granted permission to have a *Talmud Torah* or other *tzorech mitzvah* in such a case. The lead Dayan in this particular case ruled that, in principle, (aside from any other technical issues) we cannot definitively take a side on this *machlokes*. Therefore, both sides are permitted to take the steps they feel are necessary to further their case. The owner of the yeshiva may petition to receive a permit or variance for construction, and if he receives it, the *bais din* would not have the ability to stop him, since some *Achronim* hold that we disregard the issue of the *choleh*. However, the neighbors may petition the zoning board against it, since other *Achronim* say that the *choleh* does play a role here. Even if the variance is granted, the neighbors would still have a halachic right to attempt to repeal the decision, since they can argue that it is presumed that they are allowed to do so unless it is proven that they are not allowed (*hamotzi me'chaveiro alav hara'ayah*).

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