



Whose Responsibility Is Raising the Wall?

לעילוי נשמת
יואל אפרים בן אברהם עוזיאל זלצמן ז"ל

Question: I built my house years before the next-door property was developed, with an approximately meter-high wall between properties. My property is 2 meters higher than the next one; now they are excavating to build the other house, there will be a 5-meter drop, which I feel makes it dangerous for my children. [He seems to be building according to the permit he received.] My neighbor had agreed to pay for raising the wall, but now is unwilling to pay the significant cost. We cordially disagree whether it is his obligation. Have I misjudged the matter?

Answer: We praise you for asking sincerely. Generally, we do not comment on active monetary disagreements (see Rama, Choshen Mishpat 17:5). However, after hearing your situation, we felt this would be a case where it was proper to make an exception (see Pitchei Teshuva ad loc. 11; our column from Ki Teitzei 5776), which may be clearer at the end. We are neither interested nor able (due to a lack of information) to present clear conclusions but rather halachic ideas about this type of case.

One important question is whether the

present wall meets safety codes for the emerging situation, as these are generally legally and halachically binding to obligate and exempt from further steps (see Emunat Itecha #139, p. 87-96). This is not unlikely considering you received a *Tofes Arba* (occupancy permit) despite a significant drop and municipal plans for a future further drop. If so, if your very understandable concern for your children makes you want more, your decision will obligate you.

Most questions about paying for a wall between properties of different elevations concern its serving as a *kir teme'ch* (retaining wall). In most cases, the wall serves both homeowners, preventing collapse of parts of the ground that support the higher property from falling into the lower property. In such cases, the two owners are to pay for it jointly (see *ibid.*). The need for / benefit from a *kir teme'ch* is not always identical, which can impact on the division of payment. You have not told us how the two of you have dealt with the construction of a *kir teme'ch* and how it is connected to the wall you mention.

Regarding concern for falling, your wall was needed as a *ma'akeh*. While the formalistic *mitzva* requires a 10-*tefach* high fence for a roof (Shulchan Aruch, 427: 1,5),

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there is a broader and more fluid requirement to avoid danger (ibid. 7-8). While you seemed confident that it had been doing its job (according to most opinions, a meter is more than 10 *tefachim*), you view your neighbor's excavating as creating a dangerous situation that requires more than the existing level of caution.

Questions of damaging situations created by what neighbors do on their own property are governed by the often difficult-to-apply *halachot* of *nizkei shcheinim*. A broad question with many applications is whether the need to remove the danger/damage falls on the potential victim (*nizak*) or damager (*mazik*). Important determining factors are whether the damage comes immediately and directly (Shulchan Aruch, CM 158:32), the damage's significance (Shut HaRosh 108:10), and whether the *nizak* is capable of avoiding the damage (ibid.). We will not analyze your case's details in these regards because danger of falling has its own prototype – *bor* (a pit or cistern).

One whose *bor*'s opening is on the border of another's property must pay for damage to those who fall in (Shulchan Aruch, CM 410:6). For you, a pertinent question is the drop's proximity to your property (see S'ma 410:7). It is also possible that the fact that the drop is a result of natural topography and permitted building removes responsibility (see Shulchan Aruch ibid. 9 and commentaries). Also, a 10-*tefach* wall remedies a *bor* (Bava Kama

50a). Finally, cheaper methods might be feasible to remove the danger.

Therefore, it is unlikely that your neighbor needs to pay significantly to extend your wall. We trust that these ideas will impact your conversations with your neighbor and are optimistic you will enjoy a good relationship. ■

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