



SUKKOT

FROM THE VIRTUAL DESK OF THE
OU VEBBE REBBE
RAV DANIEL MANN



Building a Sukkah on Public Property

לעילוי נשמת
יואל אפרים בן אברהם עוזיאל ז"ל

Question: May one build a *sukkah* in front of his house but on public property?

Answer: Most of our discussion will focus on the ability to fulfill the *mitzvah*, but civic considerations are crucial regarding the *mitzvah* as well as on their own.

Rabbanan rule that one does not need to own the *sukkah* he uses, but that it must not be stolen (Sukka 27b). The *gemara* (ibid. 31a) says that Rabbanan hold that not every *sukkah* connected to an element of theft is disqualified. For example, a *sukkah* on another's property, including public property, is not disqualified as stolen because "land cannot be stolen," meaning that land is seen as remaining in possession of its owner even if someone else is occupying it.

However, the Rama (Orach Chayim 637:3 and citing a Yerushalmi in Darchei Moshe, OC 637:1) forbids building a *sukkah* in the public domain or on a counterpart's property without consent, saying that only *b'di'aved* one fulfills the *mitzvah* in those circumstances. The Magen Avraham (637:3) posits that although land is not "stolen enough" for the *aveira* to disqualify the *mitzvah* (*mitzvah haba'ah ba'aveira*),

that concept does preclude making a *beracha* on such an unauthorized *sukkah* (see Machatzit Hashekel ad loc.). We find a precedent regarding *arba minim* that were stolen and acquired by the thief – the *mitzva* can be fulfilled, but it is disgraceful to make a *beracha* in such a case (Shulchan Aruch, OC 649:1) The Eliya Rabba (637:4) distinguishes between the cases – theft caused switched ownership for the *arba minim*, whereas here the *sukka's* ownership is unchanged. He also claims that even if one should not make the *beracha*, it would not be *lvatala* since the *mitzvah* is valid. The Mishna Berura (637:10; Be'ur Halacha ad loc.) prefers the Eliya Rabba's ruling when there are no good alternative places for a *sukkah*.

There are grounds to distinguish between public ground and a neighbor's property. There is a greater chance the public implicitly agrees to such use of their land, as it belongs to and is used in some ways by all residents. This logic explains why *poskim* do not usually require permission from neighbors to use part of the joint property for a *sukkah* (Chut Shani, Sukkot, p. 223). While a neighbor may be happy for someone to use his *sukkah* while he is away (Mishna Berura 637:9), this is not true of building a

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sukkah on his property without permission (Pri Megadim, EA 637:7). *Poskim* are unhappy about using a *sukkah* (see Dirshu 637:12) on an illegally built a *mirpeset* (balcony), although seemingly after years of quiet on the matter, we can probably assume permission to use the *mirpeset* as one wants, at least in the meantime. In a Jewish community or even many friendly non-Jewish ones, it can often be assumed that people understand the use of the area near one's house for his *sukkah* (Chut Shani ibid). Eshel Avraham (Butchach, *siman* 637) says that even in non-Jewish countries, lack of opposition is equivalent to permission. Rav S.Z. Auerbach is cited (Halichot Shlomo, Sukkot 7:11) as being more provisional in allowing such a *sukkah* – there should be general permission from the locale and it should be done in a way that it does not impinge on use of the street/sidewalk. It is worthwhile for a rabbi to ascertain if (and perhaps influence that) the appropriate powers-that-be generally allow people to use the relevant public property.

When to assume permission depends on different things. Regarding place, attitude to religious Jews is a factor, as is socio-economics. Fancier neighborhoods are often more particular about nuisances and eyesores; how much space people have on their own property is also a factor. The size and positioning of the *sukkah* are also important, as one should not take advantage even when there is general

permission. Choosing between a smaller *sukkah* on one's own property and a bigger one on a public area can be difficult, and both the *kashrut* of the *sukkah* and *mentchlichkeit* are important factors. An important rule is – you can be *machmir* on yourself but must judge others (i.e., those who are using public land) favorably. ■

Having a dispute?



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