

WHAT HAPPENS IF YOUR BUILDING EXTENDS INTO, ABOVE OR BELOW A MUNICIPAL SIDEWALK?

Every property owner probably knows roughly where their property begins and ends. However, without having a survey done, they likely aren't aware of their property's exact boundaries and may be unaware that part of their building on their property is actually encroaching onto another property. This article discusses the issues that can arise where an encroachment exists above, below or within a municipal sidewalk that is open to the public, as well as how these encroachments can be brought into compliance with applicable laws.

1. What Kind of Encroachments May Arise?

The common encroachments that can occur above, below or into sidewalks are building canopies, signs, patios, walkways, staircases, below-grade parkades, and ventilation shafts.

2. What is a Sidewalk?

There is no specific legal designation for a municipal sidewalk that is open to the public. In most cases, a municipal sidewalk is simply a structure constructed for pedestrian on land dedicated as "highway" as defined in the *Land Title Act*² and therefore owned by the municipality.³ In other cases, sidewalks are constructed on private property. If a sidewalk is private property, there is likely a statutory right of way⁴ in favour of the municipality that secures the public's

right to go over the sidewalk as if it was highway in the municipality and prohibits the owner from interfering with such right. In either scenario, there can be implications for having an encroachment into the sidewalk.

3. What are the Consequences of Encroachments?

Highways

If an encroachment exists within a municipality's highway without that municipality's permission, the encroachment could be in breach of Section 46 (1) of the *Community Charter*,⁵ which states, "[e]xcept as permitted by bylaw or another enactment, a person must not excavate in, cause a nuisance on, obstruct, foul or damage any part of a highway or other public place". Municipalities typically also adopt bylaws that prohibit encroachments within highways either outright or unless the applicable property owner obtains permission from the municipality. If a property owner is in breach of a bylaw, then the municipality can enforce compliance as with any other bylaw (e.g., via a bylaw notice, prosecution, ticket or court action).⁶ And in either case, the municipality can seek an injunction under Section 274(1) of the *Community Charter* to enforce compliance with Section 46(1)

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or their bylaw, as applicable.⁷ Additionally, such an encroachment may be considered trespass, and the municipality may take action against the owner by seeking an injunction for the removal of the encroachment as well.⁸

Statutory Rights of Ways

If an encroachment exists within a statutory right of way, it is possible for the right of way area to be considered “public place”, in which case Section 46 (1) of the *Community Charter* would apply and the municipality could enforce compliance with the terms of the statutory right of way via an injunction under Section 274(1) of the *Community Charter*. Alternatively, a municipality could sue the owner for breach of contract or for nuisance⁹ and seek an injunction under those grounds; however, a municipality will typically prefer to seek an injunction under Section 274(1) of the *Community Charter* as it is considered a “statutory injunction,” which a court would only refuse to grant in “exceptional circumstances”¹⁰ once a contravention is proven.

4. How Can Encroachments Be Legally Permissible?

Highways

For an encroachment within a highway, the encroachment can be “regularized” by the municipality in several ways. Under Section 35(11) of the *Community Charter*, a municipality’s council can “grant a licence of occupation or an easement, or permit an encroachment...” For a property owner, a licence of occupation is the least secure form of right granted to a property owner as it is not an interest in land—it is not a right that is registrable in the Land Title Office—but a licence is the simplest to prepare as the area of the encroachment can be shown by a sketch plan. An easement is more secure as it is registrable in the

Land Title Office and subject to the terms of the easement itself, it exists in perpetuity, but a surveyor will be required to prepare a plan that is registrable in the Land Title Office to define the area of the easement.

Municipalities, however, may have their own standard procedure or permitting process for handling these encroachments. For example, for canopies that encroach onto highway and attach to a building within the property, the municipality may require the property owner to enter into a license agreement permitting encroachment of the canopy over sidewalk and to register a Section 219 Covenant¹¹ against title to the property to ensure proper maintenance of the canopy (or portion thereof on the property) by the owner and all subsequent owners.

A property owner may also apply to the court under Section 36 of the *Property Law Act*. The court may, if it considers appropriate, grant an easement over highway in exchange for compensation to the municipality or allow the encroaching owner to purchase a portion of the highway.¹² While these options are legally possible, courts are required to “be very cautious about making an [such an] order” as it “eliminates both a public consultation process and discretionary decisions made by elected municipal representatives about the future of public land.”¹³

While uncommon, a municipality could also choose to close that portion of the highway containing the encroachment and sell that portion to the property owner; however, (1) this would engage several issues such as whether the width of the highway, after selling that portion, meets the municipality’s design standards, (2) this is procedurally more cumbersome as it involves the

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adoption of a bylaw to close road, which has legislative requirements includes the requirement to provide public notice for the road closure,¹⁴ and the disposition of land, which has its own legislative requirements as well,¹⁵ and (3) unless the Province's right of resumption is cancelled, which requires certain conditions to be met,¹⁶ the Province can have the closed road reopened to use for a transportation, park, recreational or ecological purpose.¹⁷

Statutory Rights of Ways

If an encroachment is within a statutory right of way, the terms of the statutory right of way may allow for, or be modified to allow for, permitted encroachments. Alternatively, the statutory right of way may be granted, or modified such that it is only granted, over a volumetric area such that there are no encroachments with the volume. For example, if the encroachments comprise a canopy above a sidewalk and a parkade below, the statutory right of way could be granted over a volumetric area that is below the canopy and above the parkade.

Conclusion

An owner of property in a municipality should be cautious when structures on their property are near or within a sidewalk, as these structures could unknowingly be encroaching on either (1) highway, or (2) portions of their property that are subject to a statutory right of way in favour of the municipality. An owner would benefit from communicating with their municipality before any encroachments may occur in order to determine whether the encroachment can be permitted. In doing so, this may avoid issues with the municipality in the future, which could involve, for example, fining the owner or seeking a court order to force the owner to remove the encroachment.

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- 1 "Municipal sidewalk" refers to sidewalks that are located within a municipality as opposed to sidewalks within a rural area.
- 2 RSBC 1996, c 250.
- 3 Under Section 35(1)(a) of the *Community Charter*, "the soil and freehold of every highway in a municipality is vested in the municipality" unless the highway falls under the exceptions in Section 35(2) of the *Community Charter*. Highways outside of the boundaries of a municipality are owned by the Province as set out in Section 57 of the *Transportation Act*, SBC 2004, c 44.
- 4 See *Land Title Act*, s 218.
- 5 SBC 2003, c 26.
- 6 See *Community Charter*, ss 260(1)-260(2).
- 7 See *ibid*, ss 274(1).
- 8 See *White Rock (City of) v Kaufmann*, 1999 CanLII 6453 (BC SC) at para 27.
- 9 See e.g., *Terasen Gas Inc v Utzig Holdings (BC) Ltd*, 2010 BCSC 90 at para 382.
- 10 *North Pender Island Local Trust Committee v Conconi*, 2010 BCCA 494 at para 38.
- 11 See *Land Title Act*, s 219.
- 12 See e.g., *District of West Vancouver (Corporation of) v Liu*, 2016 BCCA 96 at para 84.
- 13 *Ibid*.
- 14 See *Community Charter*, s 40.
- 15 See *ibid*, s 26.
- 16 See *Community Charter*, s 35(10); see also, *Resumption of Highways Regulation*, BC Reg 245/2004.
- 17 See *Community Charter*, ss 35(8)(a)-35(8)(c).



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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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