



# Encroachments in the Area Adjacent to a Sidewalk

In May of 2018, Ontario Regulations 239/02 Minimum Maintenance Standards for Municipal Highways (MMS) was amended by adding section 16.2 to the regulation, Encroachments, area adjacent to sidewalk. Since the addition of this amendment to the MMS, municipalities have had questions regarding 16.2 (4). The questions have centered around determining when an encroachment is “highly unusual given its character and location and/or constitutes a significant hazard to pedestrians”. This article provides municipalities with some guidance to determine when an encroachment may be considered highly unusual or present a significant hazard to pedestrians.

## Definitions in MMS

“encroachment” means anything that is placed, installed, constructed or planted within the highway that was not placed, installed, constructed or planted by the municipality

“sidewalk” means the part of the highway specifically set aside or commonly understood to be for pedestrian use, typically consisting of a paved surface but does not include crosswalks, medians, boulevards, shoulders or any part of the sidewalk where cleared snow has been deposited

## Requirements of MMS Section 16.2

**16.2** (1) The standard for the frequency of inspecting an area adjacent to a sidewalk to check for encroachments is once per calendar year, with each inspection taking place

not more than 16 months from the previous inspection. O. Reg. 366/18, s. 15.

(2) The area adjacent to a sidewalk that has been inspected in accordance with subsection (1) is deemed to be in a state of repair in respect of any encroachment present. O. Reg. 366/18, s. 15.

(3) For greater certainty, the area adjacent to a sidewalk begins at the outer edges of a sidewalk and ends at the lesser of the limit of the highway, the back edge of a curb if there is a curb and a maximum of 45 cm. O. Reg. 366/18, s. 15.

(4) The area adjacent to a sidewalk is deemed to be in a state of repair in respect of any encroachment present unless the encroachment is determined by a municipality to be highly unusual given its character and location or to constitute a significant hazard to pedestrians. O. Reg. 366/18, s. 15.

(5) If a municipality determines that an encroachment is highly unusual given its character and location or constitutes a significant hazard to pedestrians, the standard is to treat the encroachment within 28 days after making such a determination, and the encroachment is deemed in a state of repair for 28 days from the time of the determination by the municipality. O. Reg. 366/18, s. 15.

(6) For the purpose of subsection (4), treating an encroachment means taking reasonable measures to protect users, including making permanent or temporary repairs, alerting users' attention to the encroachment or preventing access to the area of the encroachment. O. Reg. 366/18, s. 15.

## What is a Significant Hazard to Pedestrians

Just because an encroachment exists in the area adjacent to the sidewalk, does not mean that the encroachment poses a significant hazard to pedestrians. The following questions may help a municipality determine whether the encroachment poses a significant hazard to pedestrians.

1. Is the highly unusual encroachment within the area as described in 16.2(3) of the MMS?
2. Do other municipal bylaws (e.g. property standards) allow this type of feature to be placed in the boulevard? If no, have the feature removed.
3. Is there an agreement in place with the owner of the encroachment?
4. What is the width of the sidewalk in the area of the encroachment?
  - a. Does the width of the sidewalk allow 2 pedestrians to pass without stepping off the sidewalk?
  - b. Does the width of the sidewalk allow a person in a wheelchair, scooter or using other mobility devices, and a pedestrian to pass each other without the pedestrian stepping off the sidewalk?
5. What is the condition (spalling, cracks, heaves, sags) of the sidewalk in the area of the encroachment?
  - a. Are there surface discontinuities which are less than or equal to the 2cm height allowed (Section 16.1(3) of the MMS)?
  - b. Have surface discontinuities that exceed 2cm been treated (Section 16.1(2) of the MMS)?
  - c. In the area of the encroachment is there a potential for ponding water that would require a pedestrian to step off the sidewalk and into the area adjacent to the sidewalk?

6. What is the condition of the boulevard in the area of the encroachment?
  - a. Is there a depression, excavation or hole, however caused, without any barricade or warning device of the depression, excavation or holes existence and of a specified size and depth that a person on a sidewalk may step into if said person were to step off the sidewalk and into the area adjacent to a sidewalk and the depression, excavation or hole causes said person to trip and fall?
7. Are there other circumstances which require a pedestrian to step from the sidewalk and into the area adjacent to the sidewalk?
8. If a person were to fall and strike any part of the encroachment would the person incur a more serious injury from the encroachment than they would if the person were to fall upon the sidewalk itself?
9. If a fence is being considered as a significant hazard to pedestrians:
  - a. What is the height of the fence?
  - b. What material is the fence made of?
  - c. Would the material or design of the fence be considered breakaway?
  - d. Are there pointed finials on the fence, that a person may become impaled upon should said person trip and fall?
10. Is there an object with a specified vertical height difference with the surrounding ground in the area adjacent to the sidewalk that the municipality in their discretion determines that an object that exceeds the specified height may cause injury to a person, if said person were to trip and fall?

## Best Practice

- A municipality should develop, in policy, how the municipality will determine encroachments that pose significant hazards to pedestrians (e.g. using the questions provided).
- The policy should include steps to be taken to address any highly unusual encroachments found that pose a significant hazard to pedestrians.