

DELAYED CLOSING AND DELAYED CONDOMINIUM OCCUPANCY

This Bulletin replaces Bulletin 20, in effect as of June 3, 1988 (and cancelled as of May 1, 2004)¹ and Builder Bulletin 25, in effect as of March 1, 1991 (and replaced as of May 1, 2004).

WHAT IS NEW IN THIS BULLETIN

The following changes apply to homes with a date of possession on or after May 1, 2004

- The *Warranty Service Rules* of Builder Bulletin 42 as they apply to delayed closing/occupancy claims will not apply and claims will be processed in accordance with the rules explained in this Bulletin. A new administrative fee will be introduced and charged to any builder against whom a purchaser makes a valid delayed closing/occupancy claim to Tarion Warranty Corporation (“Tarion”, formerly the Ontario New Home Warranty Program). See details in the section entitled “Compensation for Delays in Closing and Occupancy”.
- Purchasers will be able to make claims for living expenses incurred as a result of the delay, without submitting receipts or any other proof of payment, for up to \$60 per day in 2004, \$80 per day in 2005, and \$100 per day in 2006. Claims for living expenses without receipts may be contested by builders; however, Tarion will charge builders an upfront non-refundable fee of \$350 to re-assess the claim. See details in the section entitled “Re-assessment of a Delayed Closing/Occupancy Claim”.

WHAT THIS BULLETIN IS ABOUT

Section 17 of Regulation 892 creates a one-year warranty to compensate homeowners² or purchasers³ (referred to collectively as “purchasers”) for direct costs incurred as a result of a delay in closing or a delay in occupancy which occurs without the prescribed notice to the purchaser. This bulletin explains to you, as a vendor or as a vendor/builder (referred to collectively as “builder”) of freehold homes and condominium units (referred to collectively as “homes”), the rules governing delayed closing and delayed occupancy protection; how purchasers must submit delayed closing/occupancy claims and the timelines within which builders must respond to these claims. It also introduces a new administrative fee to help pay for Tarion’s costs of processing delayed closing and delayed occupancy claims. All builders are encouraged to provide purchasers with sufficient notice of delays to avoid a claim under section 17 and, where sufficient notice is not provided, to use best efforts to resolve delayed closing/occupancy claims directly with their purchasers.

¹ For that portion of cancelled Bulletin 20 dealing with “substitutions”, please refer to sections 18 and 19 of Regulation 892 under the *Ontario New Home Warranties Plan Act*.

² A freehold purchaser can make a delayed closing claim after he or she has obtained title to the freehold home.

³ A condominium unit purchaser can make a delayed occupancy claim once he or she has obtained “interim occupancy”, prior to closing of the transaction when that purchaser obtains title to the unit.

DELAYED CLOSING AND DELAYED OCCUPANCY PROTECTION

The “delayed closing warranty” applies to freehold homes, and the “delayed occupancy warranty” applies to condominium units.

This warranty protects purchasers against closing/occupancy delays where the builder does not provide the prescribed notice of delay, and against builder delays that exceed the maximum delay permitted by the Regulations under the *Ontario New Home Warranties Plan Act* (the “Act”). In other words, a builder can unilaterally (without the purchaser’s consent and without compensation) extend closing of a freehold home, or the confirmed occupancy date⁴ of a condominium unit, only if adequate notice of the delay is given to the purchaser, and if the delay does not exceed the maximum permitted.

Adequate Notice

A total of 2 unilateral delays are permitted.

- A one-time major delay of up to 120 days, when at least 65 days notice is given in advance of the “original closing date” (or confirmed occupancy date) to the purchaser; and
- A one-time minor delay of up to 15 days, when at least 35 days notice is given in advance of the original or extended closing/occupancy date to the purchaser.

Notice of the delay must always be written. It may either be given personally or sent by mail. If sent by mail, notice of the delay is deemed to be received 5 business days after mailing. This means that if builders mail their notice, they must do so at least 35 days plus 5 business days in advance for a minor extension, and at least 65 days plus 5 business days in advance for a major extension. In the event of a postal interruption, all notices must be given personally.

A notice must always state a new closing or occupancy date, which becomes the “extended closing/occupancy date.”

Maximum Delay Permitted

Both delays (the one-time major delay of up to 120 days and/or the one-time minor delay of up to 15 days) cannot exceed a total of 120 days for freehold homes, and a total of 135 days for condominium units.

Builders also have a 5-day “grace period” to extend the closing or the confirmed occupancy date unilaterally (the original or the extended date) without compensation, and without providing written notice. For example, if a builder extends the confirmed occupancy date of a condominium unit for 135 days and the unit is occupied between day 136 and 140, the “grace period” applies, and the builder is not required to pay compensation to the purchaser. Builders are encouraged to provide purchasers with as much notice as possible if they intend to rely on this “grace period”, since last minute postponements of closing can be costly and inconvenient for purchasers and do not constitute good customer service.

⁴ To calculate compensation for delays in occupancy, Tarion will use the confirmed occupancy date, as opposed to the tentative occupancy date in the Agreement of Purchase and Sale. For details, see the section entitled “Special Provisions Related to Delayed Occupancy”.

PLEASE NOTE

By giving adequate notice, a builder can unilaterally delay the closing date on a freehold home, or the confirmed occupancy date on a condominium unit twice: a major delay of up to 120 days and a minor delay of up to 15 days, the total not to exceed 120 days for freehold homes and 135 days for condominium units.

If the purchaser agrees in writing to an amendment of the Agreement of Purchase and Sale that extends the original closing/occupancy date set out in that Agreement, then the amended closing/occupancy date becomes the original closing/occupancy date for the purposes of the delayed closing/occupancy warranty. An acknowledgement by the purchaser of a unilateral extension by the builder of the original closing/occupancy date is not an amendment to the Agreement of Purchase and Sale.

Example

1. The original closing date is Monday, August 1, 2005.
2. The builder sends notice by mail to the purchaser on Wednesday, May 18, 2005 that closing will be delayed for 61 days.
3. The notice of the delay is deemed to be received on Thursday, May 26, 2005 (the 5th business day following its mailing⁵; and 67 days before the original closing date).
4. The notice of extension sets Thursday, October 1, 2005 as the new revised extended closing date.
5. On Thursday, August 25, 2005 (37 days before the extended closing date) the builder gives written notice in person to the purchaser that the extended closing date will be delayed by an additional 11 days, and sets Wednesday, October 12, 2005 as the new extended closing date.
6. The total delay was 72 days (did not exceed 120 days).
7. On Monday, October 5, 2005, the builder advises the purchaser that there will be a further two day delay in closing to Friday, October 14, 2005. This additional 2 days is within the 5 day “grace period” permitted under the Act.
8. If by Monday, October 17, 2005 (the new extended closing date plus the 5-day grace period), closing does not occur, the purchaser may claim compensation for delayed closing following the procedure explained below under the heading “Delayed Closing/Occupancy Claims for Compensation”.

SPECIAL PROVISIONS RELATED TO DELAYED OCCUPANCY (Condominiums)

- Every Agreement of Purchase and Sale for a condominium unit must contain either a confirmed occupancy date, or a tentative occupancy date that is clearly identified as tentative.
- If the occupancy date in the Agreement of Purchase and Sale is merely “tentative”, the builder must ensure that the purchaser receives written notice of the confirmed occupancy date not more than 30 days from completion of the roof slab (or another specific stage of construction as specified in the Agreement of Purchase and Sale), or at least 90 days before the tentative occupancy date. If not, the tentative occupancy date automatically becomes the confirmed occupancy date for purposes of calculating delayed occupancy compensation under the *Act*.⁶
- Any written notice to the purchaser of the confirmed occupancy date must also be sent at least 120 days in advance of that confirmed occupancy date.

⁵ Monday, May 23, 2005 is a holiday: Victoria Day.

⁶ See Regulation 892, sections 17(5)-(13).

- Tarion will use the confirmed occupancy date to calculate compensation for delays in occupancy.
- The purchaser cannot be compelled to take occupancy of the unit before the confirmed occupancy date, unless he/she consents to it in writing.

Note that a condominium unit purchaser can file a delayed occupancy claim once he or she has obtained “interim occupancy”⁷, prior to closing of the transaction when that purchaser obtains title to the unit.

Example

1. The Agreement of Purchase and Sale establishes Friday, September 1, 2006 as the tentative occupancy date.
2. The builder sends written notice by mail to the purchaser on Monday, May 15, 2006 that the confirmed occupancy date will be Friday, December 1, 2006.
3. The notice is deemed to be received on Tuesday, May 23, 2006, the fifth business day thereafter⁸; 101 days before the tentative occupancy date (more than the minimum required, which is 90 days) and 192 days in advance of the confirmed occupancy date (more than the minimum required, which is 120 days).
4. The builder sends written notice by mail to the purchaser on Tuesday, October 10, 2006 that occupancy will be delayed for 14 days.
5. The notice of the (minor) delay is deemed to be received on Tuesday, October 17, 2006 (5 business days after mailing and 45 days before original confirmed occupancy date).
6. The notice of extension sets December 15, 2006 as the new revised extended occupancy date.
7. The total delay was 14 days, and written notice was given not less than 35 days before the confirmed occupancy date.
8. If by December 20, 2006 (the new extended occupancy date plus the 5-day grace period), the unit is not ready for occupancy, the purchaser may claim for compensation for delayed occupancy for each day of delay thereafter, following the procedure explained below under the heading “Warranty Service Rules for Delayed Closing/Occupancy Claims”.

EXCEPTION

No compensation will be paid if the delay is the result of strike, fire, flood, acts of God or civil insurrection. Strikes may result in delays longer than the actual duration of the strike, in the event that supplies are affected because of the strike. At the end of a delay occasioned by a strike, the builder is required to establish a new closing/occupancy date.

WARRANTY SERVICE RULES FOR DELAYED CLOSING/OCCUPANCY CLAIMS

The *Warranty Service Rules* of Builder Bulletin 42 as they apply to delayed closing/occupancy claims have been amended and will only apply to homes with dates of possession between October 1, 2003 and April 30, 2004, inclusive. Please refer to Builder Bulletin 42 (Revised, March 15, 2004) for delayed closing/occupancy claims related to homes with a date of possession between October 1, 2003 and April 30, 2004.

⁷ “Interim Occupancy” and “Interim Closing” refer to the occupancy of a proposed unit before a purchaser receives title to it. Generally, condominium purchasers will be required to occupy their unit before the developer is able to transfer legal ownership to it, and the warranties under the *Act* commence at the date of occupancy.

⁸ Monday, May 22, 2006 is a holiday: Victoria Day.

For homes with a date of possession on or after May 1, 2004, the following Warranty Service Rules apply:

- The purchaser will have one year from the date of possession, or from the date of “occupancy closing” in condominium units, to make a delayed closing/occupancy claim.
- Builders who have not provided the proper notice of a delay (or where the delay exceeds the maximum permitted) should contact their affected purchasers and try to resolve their claims directly.
- If the builder fails to resolve the delayed closing/occupancy claim, the purchaser may submit⁹, to both Tarion and the builder, a completed *Delayed Closing/Occupancy Form* with copies of all documents required in that Form. A *Delayed Closing/Occupancy Form* can be obtained by calling Tarion at 1-800-668-0124 or online at www.tarion.com
- Only one complete *Delayed Closing/Occupancy Form* will be accepted.
- The builder has 30 days from the date the purchaser submits a *Delayed Closing/Occupancy Form* to compensate the purchaser or otherwise settle the claim.
- If by day 30 following submission of a *Delayed Closing/Occupancy Form* the builder has not compensated the purchaser, or otherwise resolved the claim, the purchaser may contact Tarion to request an assessment of the claim (conciliation) between day 31 and 60 following submission of the Form. The purchaser will be charged a \$50 conciliation fee when the assessment is requested, but the fee will be refunded if the delayed closing/occupancy claim is determined to be valid.
- If the purchaser does not request an assessment during this period, the claim will be considered resolved and the matter closed.
- The builder has a further 30 days from the date the purchaser requests an assessment of the claim to compensate the purchaser, or otherwise resolve the claim. If the purchaser notifies Tarion that the claim has not been resolved by the end of the 30 days, Tarion will conduct an assessment (conciliation) and issue a Warranty Assessment Report¹⁰ (“Report”) to the purchaser and to the builder within 10 days of the receipt of notice after the expiry of the 30-day period.
- An administrative fee of \$600 payable by cheque, money order, or other approved payment method, will be charged to the builder if Tarion determines, after conducting an assessment, that the claim is valid. The administrative fee will increase to \$1200 for homes with a date of possession on or after January 1, 2005, and will be \$600 for all homes with a date of possession on or after January 1, 2006. This fee will serve to offset the administrative costs incurred by Tarion in processing delayed closing/occupancy claims.
- If Tarion determines that the claim is valid, the conciliation (assessment) will be considered to be “chargeable” to the builder, and will be noted against the builder’s record with Tarion.
- Tarion will settle directly with the purchaser if the builder does not resolve the claim within 30 days from the date when Tarion issues the Warranty Assessment Report.

⁹ A *Delayed Closing/Occupancy Form* may be submitted by hand, courier or facsimile transmission or, except during a general interruption of postal service, by regular mail or registered mail. In the case of regular mail, submission is effective on the post-mark date if received by Tarion within 5 days of the expiry of the first year warranty period. In the case of registered mail, submission is effective on the day the *Form* is mailed as indicated by the postmark date or the registered mail receipt. Submission by facsimile transmission is effective on the day sent regardless of whether or not the day is a business day. Submission by hand or courier is effective on the business day received, if received by Tarion before 5:00 p.m., and otherwise on the next business day.

¹⁰ A Warranty Assessment Report is a written report issued by Tarion, detailing its assessment of a delayed closing/occupancy claim.

COMPENSATION FOR DELAYS IN CLOSING AND OCCUPANCY

If the builder breaches the delayed closing/occupancy warranty, compensation must be paid to the purchaser for living expenses, plus other direct costs, to a total maximum of \$5,000.

Living Expenses

Living expenses are direct living costs such as accommodation, meals (when kitchen facilities are not available), laundry and transportation (may include mileage and parking), incurred by purchasers as a result of the delay. The living expenses portion of the delayed closing/occupancy compensation cap (\$5000) has a maximum of \$100 per day.

The maximum amount a purchaser may claim for living expenses incurred as a result of the delay will vary depending on whether supporting receipts or other proof of direct costs has been provided:

- Without supporting receipts or other proof of expenses, the purchaser may claim \$60 per day for homes with a date of possession between May 1, 2004 and December 31, 2004, inclusive, increasing to \$80 per day for homes with a date of possession on or after January 1, 2005.
- With supporting receipts or other proof of expenses, the purchaser may continue to claim up to \$100 per day for homes with a date of possession between May 1, 2004 and December 31, 2005, both inclusive.
- For homes with a date of possession on or after January 1, 2006, the purchaser will be allowed to claim up to \$100 per day without receipts or other proof of expenses incurred.

Note that to submit a claim without supporting receipts, purchasers must first prove that they did not receive adequate notice of the delay, or that the delay exceeded the maximum allowed. Purchasers will be advised to keep a copy of their receipts or any other proof of claim as these may be required to support a claim if the builder requests a re-assessment following the procedure explained below under the heading “Re-Assessment of a Delayed Closing/Occupancy Claim”.

Other Direct Costs

In addition to living expenses, a purchaser may also claim other direct costs caused by the delay, such as:

- moving costs, including moving company costs or vehicle rental and packing materials for do-it-yourself moves;
- storage costs for storage of furniture, clothing and personal belongings;
- kennel costs for pets; and
- Canada Post charges to hold mail.

Such other direct costs must be additional costs over and above what the purchaser would have otherwise incurred if the closing had not been delayed. The onus is on the purchaser to prove that other direct costs are directly related to the delay. A claim for “other direct costs” must always be substantiated with receipts, or other acceptable form of proof. A delayed closing/occupancy claim may only be made after closing, or after “occupancy closing” (in the case of condominium units) of the purchase transaction.

The maximum claim amount, including both living expenses and other direct costs is \$5000.

The delayed closing warranty will apply to contract homes only if there is a specific occupancy date stated in writing between the owner and the contractor in the original agreement, and the home is substantially completed by the same contractor.

RE-ASSESSMENT OF A DELAYED CLOSING/OCCUPANCY CLAIM

Option 1: Claim with supporting receipts or other proof of expenses

If a purchaser chooses to claim the living expenses portion of his/her delayed closing/occupancy claim with supporting receipts, and Tarion determines that the claim is valid, the builder will be charged the applicable administration fee (e.g. \$600¹¹), and the conciliation will be “chargeable” to the builder. The builder may contest the validity of the claim by using the Builder Arbitration Forum (BAF).¹²

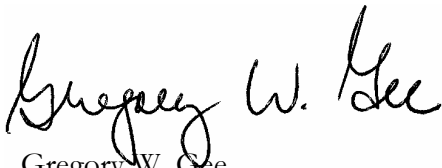
Option 2: Claim without supporting receipts or other proof of expenses

- If a purchaser chooses to claim the living expenses portion of his/her delayed closing/occupancy claim without receipts or other supporting documentation, and Tarion determines that the claim is valid, the builder may contest the amount of living expenses claimed without receipts by requesting a re-assessment of the claim within 30 days after Tarion issues the Warranty Assessment Report.
- Tarion will charge the builder an upfront non-refundable fee of \$350 to re-assess the amount of living expenses claimed without receipts.
- If the builder chooses to request a re-assessment, the burden of proving that the purchaser incurred lower costs, and that the difference between costs claimed and costs incurred is material (i.e. at least 25% lower than the claim amount), will rest on the builder. The builder must provide Tarion, when filing the request for re-assessment, evidence that the purchaser incurred materially lower living expenses and/or evidence of any direct benefit received by the purchaser. For example:
 - (a) Builders may rely on their own information concerning any direct benefits given to purchasers, such as provision of alternate accommodation by the builder or a credit on the statement of adjustments;
 - (b) Builders may also rely upon information provided directly to them by purchasers during initial negotiations surrounding a delayed closing/occupancy claim. Tarion expects in all cases that the builder will first attempt to resolve delayed closing/occupancy disputes directly with a purchaser before a claim is filed. During this initial attempt at resolution, the builder should request information and documentation concerning the amounts claimed by the purchaser if the builder has doubts concerning the amounts in issue;
 - (c) Builders may rely upon third party information. For example, where a purchaser claims amounts relating to a hotel stay, the builder could obtain actual rate information from the hotel; and

¹¹ See applicable administration fee under the section entitled “Warranty Service Rules for Delayed Closing/Occupancy Claims”.

¹² For details on eligibility and timelines to access the Builder Arbitration Forum, please refer to Builder Bulletin 41, available at www.tarion.com.

- (d) Finally, in rare cases, the builder may seek a negative inference to be drawn by Tarion based on the failure of a purchaser to co-operate. In such a situation, the builder would have to provide documented evidence of reasonable efforts on its part to obtain information from the purchaser as well as evidence of the purchaser's refusal to co-operate.
- If Tarion determines, based on the information submitted by the builder, that there is enough evidence to justify a re-assessment, the purchaser will be notified that he/she has 30 days to back-up the amount of living expenses claimed without receipts, and provide their responding position to both the builder and Tarion. Note that a request for re-assessment will not be processed until the builder pays any outstanding delayed closing/occupancy administration fees.
 - Based on the evidence submitted by both the purchaser and the builder, Tarion will re-issue a Warranty Assessment Report, which may be further contested by the builder at the Builder Arbitration Forum.¹³
 - The initial administration fee will be reimbursed to the builder, and the conciliation will be “not chargeable” to the builder, if the delayed closing/occupancy claim consisted solely of living expenses, and Tarion determines after re-assessing the claim, that there is insufficient evidence of at least 75% of the amount of living expenses claimed without receipts.
 - Tarion will settle directly with the purchaser if the builder does not resolve the claim within 30 days from the date when Tarion re-issues the Warranty Assessment Report, and will invoice the builder for the amount of the compensation, plus an administration fee of 15 per cent and applicable taxes.
 - If the builder chooses not to request a re-assessment under Option 2, the portion of the Warranty Assessment Report dealing with living expenses will be considered accurate and final, and may not be contested by the builder at the Builder Arbitration Forum.



Gregory W. Gee
Registrar

¹³ See footnote 10 above.

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