

Information Sheet for New Home Builders

Strikes – Possible Effects on Construction Schedules for New Homes

How Unavoidable Delay Provisions May Apply

Strikes by one or more trades involved in new home construction are a real possibility in Spring 2019.

In the event of a strike by one or more trades or suppliers in the new home building industry, new home vendors **may** be able to extend home delivery timelines under the *Unavoidable Delay* provisions of the mandatory supplement to new home purchase agreements called the “Addendum”. (Note: “vendor” is used in this document as that is the term used in the Addendum forms and includes builders of new homes).

The following is a step by step explanatory note for vendors of new homes.

Step 1 – Review Your Addendum Form

Every vendor, working with his/her lawyer, should first review the Addendum that applies to each new home being constructed as the rules may be different depending on the applicable version of the Addendum.

In order to unilaterally extend critical dates, the vendor must follow the rules for “*Unavoidable Delay*” as set out in the applicable Addendum.

Step 2 – Determine the potential impact of the strikes on your homes under construction

If one or more strikes do occur, each vendor should consider whether such strikes are likely to affect the construction schedule of any new homes being constructed.

Step 3 – Send Out First Notice

If one or more strikes occur *that affect timing of construction of a new home*, then in order to be able to extend closing or occupancy dates, the vendor must send out **two** notices described below.

The **First Notice** is a written notice to each affected purchaser setting out:

- 1) A brief description of the Unavoidable Delay, namely the initiating event – the strike(s) that will affect the delivery of the home; and
- 2) An estimate of the duration of the total delay (if practicable).

This First Notice should specify the strike(s) in question. If new strikes arise after the initial notice has gone out that could affect a home construction schedule, a further notice or notices should be sent.

The estimate of the total possible delay does not need to be exact nor is the vendor bound by the estimate. It is meant as helpful information for purchasers. It should, if practicable, refer to the anticipated total time period, being the aggregate of both: (i) the period of strike(s); and (ii) vendor’s

estimate of the additional time needed to re-mobilize – **the Remobilization Period** (as defined below). In some cases, it is not possible to estimate the duration of the total delay as the duration is not known or cannot be assessed at this early stage.

Note: The vendor must provide this written First Notice to the purchaser by either: 1) the next Critical Date; or 2) 10 or 20 days (depending on which Addendum applies) after the vendor knows or ought reasonably to know that an Unavoidable Delay event (i.e., strike or strikes) has commenced – whichever is earlier.

A sample First Notice is attached as **Exhibit 2**.

Note: The definition of **Unavoidable Delay** in the Addendum (for the purposes of the second notice, discussed below) has **two** aspects.

- (a) First, the “event” giving rise to the delay must be an event listed in the Addendum. The event, which is the subject of this document, is a “strike” or strikes. The *Ontario Labour Relations Act* defines “strike” as follows:

“strike” includes a cessation of work, refusal to work, or to continue to work by employees in combination or in concert or in accordance with a common understanding or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

- (b) When the strike is over, the vendor needs to quickly determine the total period of delay which has **two parts**. The total delay period (the **Unavoidable Delay Period**) is equal to:
- 1) the period of the strike(s) itself; **plus**
 - 2) **“any period of delay directly caused by the event [i.e. strike],”** which is beyond the reasonable control of the builder and not caused or contributed to by the fault of the builder. (We will call this the **Remobilization Period**.)

Therefore: take note of the commencement date of the strike, the end of the strike, and length of the strike itself.

After the strike itself, if a home is affected then as a rule of thumb it is reasonable to take 30 days to assess the likely aftereffects. Even if the strike has concluded, the timelines for construction of the home may have been set back by not only the period of the strike but also an additional consequential delay period (the **Remobilization Period**). For example, if there are backlogs of work that must be done then the time to get the trades back to the home in light of the backlog can be included. That combined period of delay: (i) the period of the strike; **plus** (ii) the **Remobilization Period**, constitutes the total delay period – called the **“Unavoidable Delay Period.”**

A timeline schematic is attached as **Exhibit 1**.

Step 4 – Monitor the strike and determine if a Remobilization Period applies

Vendors are encouraged to do the following:

- 1) Monitor the *event* – the strike or strikes that will affect the home. If it lasts more than 2-3 weeks, vendors are encouraged to send informational updates to purchasers.
- 2) Once the strike or strikes have concluded, then the vendor must look at the facts in connection with each of their homes and determine whether or not there is any **Remobilization Period**. In other words, in addition to the period of the strike itself, is there any additional “*period of delay directly caused by the [strike]*” which is beyond the *builder’s reasonable control*” affecting this home? For this Advisory, we call this the “**Remobilization Period**.” This is a question which the vendor, its advisors and contractors must determine. It is not always easy to estimate the additional time which is likely to be lost as a result of a strike and which accrues after the strike itself. There may, for example, be backlogs of work to be done by trades. In all events, this additional time following the strike must be estimated on a rational and reasonable basis, and the vendor may be called upon to explain its reasoning for the length of the **Remobilization Period**.
- 3) If a vendor determines that such strike or strikes have concluded and there is no **Remobilization Period**, or it is determined that there is **Remobilization Period**, (e.g., because of a backlog), then the vendor should be sending out the second notice discussed below, outlining the new Critical Dates and enclosing a new Revised Statement of Critical Dates.

Step 5 – Prepare for and then send out Second Notice

When the applicable strike(s) end and the total delay period is known, a second mandatory notice must be sent. The timing for sending the **Second Notice** is not the end of the strike(s) itself. Rather, the notice is sent when the vendor has determined: 1) the strike(s) is over; and 2) the length of the **Remobilization Period**. Once the vendor can reasonably assess the **Remobilization Period**, the vendor must send out the Second Notice. See **Exhibit 1**. As a “rule of thumb”, if the home is affected by the strike(s), it is not unreasonable for the vendor to take 30 days (or more if justified) to assess the **Remobilization Period**.

In other words, the vendor should: 1) note the length of the strike; 2) determine and write down the justification for any additional delay, i.e., **Remobilization Period** (if possible, the assessment should be done within 30 days after the strike ends); and 3) prepare to send out the Second Notice. The Second Notice to the purchaser must be in writing and include the following:

- A brief description of the Unavoidable Delay event (strike(s));
- The end date of the Unavoidable Delay Period (i.e., the number of days of the strike itself plus the **Remobilization Period**);
- The new Critical Dates.

The Second Notice must go out within 20 days (10 days for some older versions of the Addendum) after the vendor has determined the expected length of the Remobilization Period.

Note: The Second Notice is to be accompanied by a new revised Statement of Critical Dates.

The Critical Dates listed in the Addendum can only be extended by the period of Unavoidable Delay, (i.e., the strike time plus a **Remobilization Period**).

A sample Second Notice is attached as **Exhibit 3**.

Note: Failure to send out the First Notice and/or the Second Notice will mean the right to unilaterally extend dates is lost.

Consequences

If the vendor follows the rules set out in the Addendum and summarized above, then the vendor can unilaterally extend Critical Dates for affected homes (for the **Unavoidable Delay Period**) and thus gain relief from the construction delay consequences of a strike.

However, if the vendor fails to give the notices in accordance with the Addendum, the existing Critical Dates remain unchanged and any delay compensation payable in accordance with the Addendum is payable from the existing Firm Closing Date or Firm Occupancy Date.

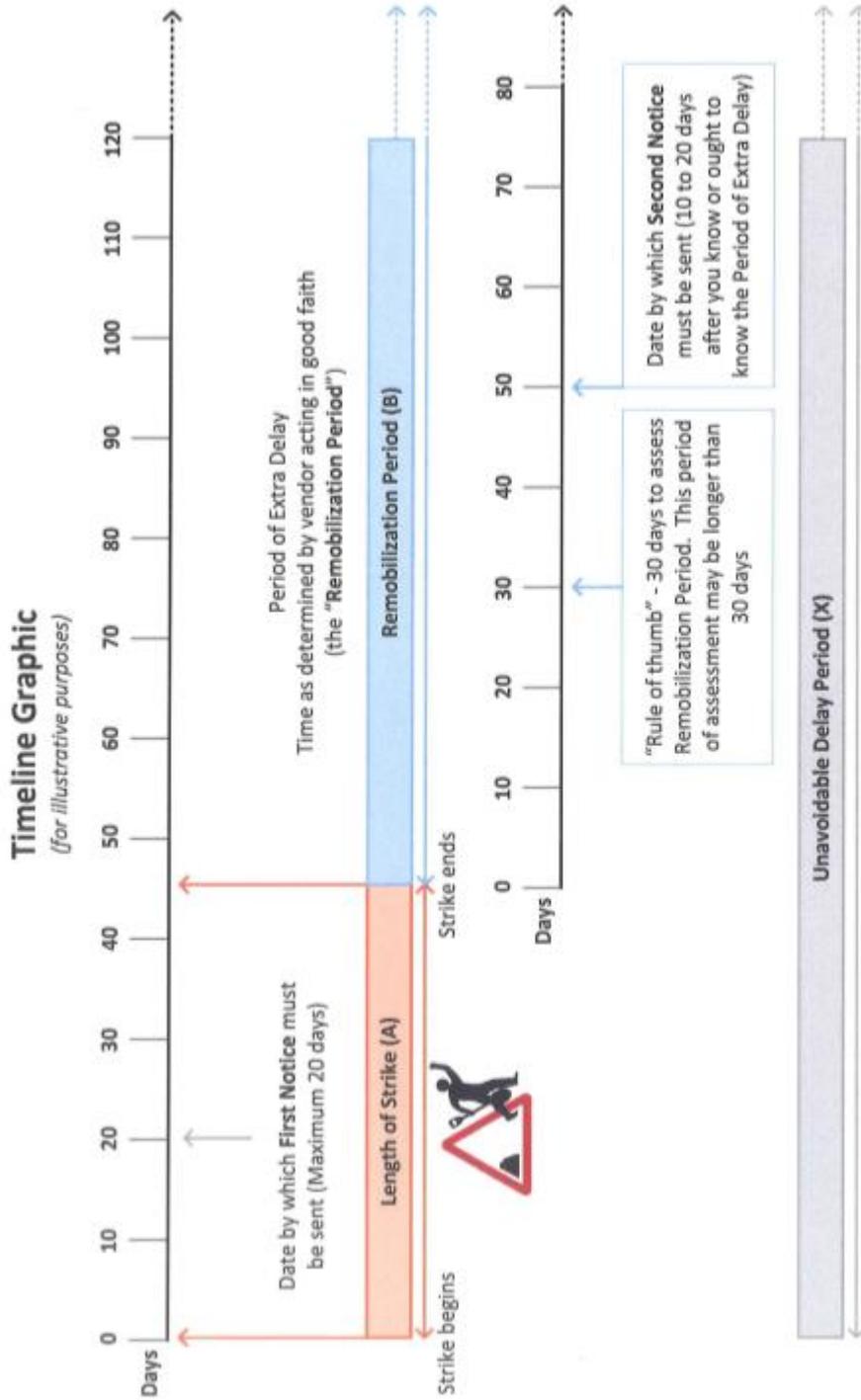
Special Notes

- The Addendum is part of a contract between vendors and purchasers. Each party should seek legal advice when these issues arise. Vendors and purchasers should also communicate with one another to minimize surprises.
- The *Unavoidable Delay* provisions are not a way to indiscriminately extend timelines. Ultimately, the vendor must be able to show for each affected home:
 - That a strike occurred and how long it lasted.
 - How the strike or strikes affected the construction schedule.
 - What is the period of extra delay, if any, caused by the strike (the **Remobilization Period**).
 - Only future Critical Dates can be extended and only by the period equal to: (i) the period of the strike, plus (ii) the reasonable estimate of **Remobilization Period**.
 - If a particular strike does not affect the home, then it cannot be included in the calculation for extensions. Only strikes that do affect, and for the period they affect, a home can be counted in arriving at the **Unavoidable Delay Period**).
- The vendor can extend the current and future Critical Dates as originally set out in the Addendum. The vendor cannot however reset the original timeline framework in the Addendum. For example, if the upcoming next critical date is the Second Tentative Closing Date or Firm Closing Date, the vendor cannot go back and reset to a First Tentative Closing Date.

Examples

An illustrative hypothetical example is set out in **Exhibit 4**.

Note: This information sheet and attachments are not legal advice and every vendor should consult their professional advisors, including legal counsel.



Critical Dates can only be adjusted by extending the remaining dates by "X" days, where "X" equals the Unavoidable Delay Period (i.e.: Length of Strike "A" plus Remobilization Period "B")

Sample Notice – Strike(s)

First Notice – (s.5(b) Addendum)

UNAVOIDABLE DELAY EVENT HAS OCCURRED

To: _____ (the Purchaser)

From: _____ (the Vendor)

Home: _____

RE: Purchase Agreement dated the _____ day of _____, 20____, including Addendum, and amendments, if any (the “Purchase Agreement”) relating to the Home

The terms of your Purchase Agreement (see the Addendum) permit the Vendor to extend the date of closing and other critical dates in certain circumstances, including where there has been an event and/or loss of construction time which amounts to an **“Unavoidable Delay.”**

PLEASE NOTE THAT:

1. An **“Unavoidable Delay”** event has occurred which will delay completion of your home. The specific “Unavoidable Delay” trigger event is as follows:

[Describe the strike(s) that may adversely affect the completion schedule of the home.]
2. The Strike(s) began on the _____ day of _____, 20____.

[Identify trades involved.]
3. It is expected that the strike(s) will affect the completion schedule of the above-noted home.
4. You should be aware that the delay in completion of your home will include the combination of two (2) periods of time. The total delay will include both:
 - 1) the period of time for the strike(s) itself; but also,
 - 2) any additional period of delay directly caused by the strikes which are beyond the vendor’s reasonable control (the **“Remobilization Period”**).
5. It is difficult at this stage to be certain as to how long the total delays may be and thus how the construction schedule for your Home will be affected. A very rough estimate of the Unavoidable Delay (period of time of the strike plus any consequential delay), is about _____ days. [or a meaningful estimate of the total delay is not possible at this time.]
6. As more information becomes available, we will keep you informed of developments.

- 7. Enclosed is an Information Sheet prepared by Tarion Warranty Corporation with helpful information.

DATED this _____ day of _____, 20_____.

Vendor: _____

[Signature]

*An “**Unavoidable Delay**” means a strike, fire, explosion, flood, act of God, civil insurrection, act of war, act of terrorism or pandemic, plus any period of delay directly caused by the event, which is beyond the reasonable control of the builder and is not caused or contributed to by the fault of the builder.

Sample Notice – Strike(s)

Second Notice – (s.5(c) Addendum)

**END OF UNAVOIDABLE DELAY EVENT
NOTICE OF TOTAL UNAVOIDABLE DELAY PERIOD**

To: _____ (the Purchaser)

From: _____ (the Vendor)

Home: _____

RE: Purchase Agreement dated the _____ day of _____, 20____, including Addendum, and amendments, if any (the “Purchase Agreement”) relating to the Home

PLEASE NOTE THAT:

1. The “Unavoidable Delay” initiating event referred to in our recent Notice to you has ended. The “Unavoidable Delay” was made up of:
 - (a) One or more labour strikes by _____ in which started on _____ and ended on _____, (“**Strike Period**”);
plus
 - (b) An additional period of _____ days representing additional lost time caused by the strike(s) (the “**Remobilization Period**”).
2. The total setback in time directly caused by the “Unavoidable Delay” (the **Strike Period plus the Remobilization Period**) is: (i) _____ days; plus (ii) _____ days for a total of: _____ days (“**Unavoidable Delay Period**”).
3. Your new Critical Dates taking into account the total Unavoidable Delay Period are as follows:
 - (a) Revised First Tentative Closing Date is: _____;
or
Revised Second Tentative Closing Date is: _____;
or
Revised Firm Closing Date is: _____; **and**
 - (b) Revised Outside Closing Date is: _____.

DATED this _____ day of _____, 20____.

Vendor: _____

[Signature]

Hypothetical Example

- On May 1, 2019, several trades go out on strike in the Greater Toronto Area.
- For homes affected by the strikes, the First Notice to the purchaser must be sent out by May 20th, 2019.
- The strikes last 45 days.
- The next step is for the vendor to consider for each affected home what the additional delay may be relating to remobilization. In this regard, it may help to look at the applicable “worksheet.”
- For the house in question, it turns out the concerns are twofold:
 - First, there is clear evidence that some of the trades affected by the strike, are not returning to work, causing further delay; and
 - Secondly, the schedule for trades is upset and now backlogged and a new schedule must be created.
- The vendor should collect its best (preferably written information) to support these reasons for delay. The vendor should take the time necessary to assess how long the delays may be. As a rule of thumb, a vendor should feel comfortable taking at least 30 days to collect information that allows him or her to comfortably work out the likely length of the *Remobilization Period*. It may take more than 30 days in order to collect and analyze that information. It may take 60 days or perhaps longer. However, the more time it takes to make that assessment, the more important it will be that the vendor has accurate and credible written information to support that the delays being asserted will indeed affect the construction schedule.
- In this case the vendor after 30 days determines that the Remobilization Period is expected to be 120 days.
- As a result, the total length of the *Unavoidable Delay Period* will be 45 days (the length of the strike) plus 120 days (the Remobilization Period) = 165 days.
- The Second Notice should be sent out within 20 days after the “assessment period” (30 days in this hypothetical), thus 105 days after the start of the strikes.
 - The Second Notice therefore states that the full Unavoidable Delay Period is 165 days. As a result, the then current Firm Closing Date can unilaterally be extended by 165 days. Similarly, future Critical Dates which in this case would be the Outside Closing Date can similarly be extended by 165 days (although it need not be). It is vitally important to make sure that the purchaser is given written notice of the new revised Critical Dates.