

## Q&A on COVID-19 Pandemic: Unavoidable Delay & Critical Dates\*

**\*Important Note:** *The following questions and answers are intended for general guidance and do not constitute legal or other professional advice. The reader is advised to seek legal advice from their own legal counsel to address their particular circumstances.*

### 1. Why can't Tarion simply grant a standard-length delay for everybody?

There are about 50,000 new homes built each year and although many, if not most, may be affected by the pandemic the effects may be dramatically different for different homes. Some new homes may not be affected at all and others may be greatly affected. As the pandemic raises great uncertainties, it would be unfair to move all closing dates by an arbitrary period of time. Additionally, Tarion does not have the legal authority to do so. Any extensions must be worked out between the parties to the sale contract.

The pandemic will have different impacts on the delivery dates of different homes depending on a number of factors. For example:

- The stage of construction.
- What, if any, trades, suppliers, employees, governmental approvals are affected, including government site closure orders.
- How quickly the labour, supplier and/or governmental approvals return to normal.
- Problems related to disrupted trades/supply chains.
- Potential that trade backlogs in turn cause backlogs for government inspections.
- Possible impact of trade delays and backlog delays pushing back construction into unseasonable weather.
- Whether the foregoing impacts arise, then subside and then arise again in the same or some other way.

### 2. When do I need to send out my First Notice?

The World Health Organization declared a global pandemic. However, determining the date upon which the pandemic could reasonably be viewed as affecting the construction schedule of a home must be determined on a case-by-case basis.

It is the vendor who is in the best position to make this determination.

When the vendor has made a determination that disruptions related to the pandemic (e.g., labour or supply disruptions; and/or disruptions to governmental approvals) are likely to or will have an impact upon the construction schedule of the home, then according to the terms of the Addendum, the First Notice should be sent to the purchaser within 20 days thereafter.

### **3. What if I am not sure whether the pandemic will affect the home?**

You should err on the side of caution and send out a First Notice if there is any reasonable chance the home will be affected. If the adverse effects do not materialize then you do not have to add any delay extensions to the closing. However, if the closing date is coming up soon, it is important that the purchasers not be left wondering if the original Firm Closing Date still stands even though a First Notice has been sent.

In addition – once a First Notice is sent advising of a delay, a Second Notice should be sent once you have a firm new closing date – and at minimum the new date should be at least 10 days from the Second Notice is sent --- please review **Question 11** below.

### **4. What steps do I take as the direct impacts of the pandemic are nearing an end?**

As the direct impacts of the pandemic are nearing an end, the vendor should consider what other after-effects the pandemic might have and what additional delays (apart from the direct impacts of the pandemic itself) may occur in connection with each home under construction.

In some cases, the after-effects may be minimal; in other cases, they may be significant. It may take a few weeks to assess this. As a “rule of thumb”, Tarion would see 30 days as a fair time period to work out what you see as the reasonable and likely additional overall delay associated with the pandemic and its after-effects.

### **5. How do I calculate the total Unavoidable Delay Period?**

The time period that can be added to Critical Dates is known as the *Unavoidable Delay Period*. The Unavoidable Delay Period is made up of two parts. These are:

1. The period of the direct impacts of the pandemic itself upon the time for delivery of the home; plus

2. the Remobilization Period. This relates to after-effects -- any additional delay that occurs because of the pandemic (e.g., delay in trades returning to work, having to reschedule sequence of trades).

$$\boxed{\text{Direct Impacts}} + \boxed{\text{Remobilization Period}} = \boxed{\text{Unavoidable Delay Period}}$$

## 6. When do I send out the Second Notice?

First, the vendor needs to assess the full Unavoidable Delay Period as noted in **Question 5** above.

Vendors should not send out the Second Notice until they have made an assessment of the full timing impact.

Only once you have assessed these after-effects – the Remobilization Period – are you required to send out the Second Notice.

The timing of the Second Notice should not be governed by whether the pandemic itself continues or whether the government's emergency order is still in place. As previously stated, the pandemic is the Unavoidable Delay event and it is the impacts of the pandemic on the delivery of the home (including the remobilization period) which determine when the Second Notice can go out. For example, if the vendor has made the assessment of the impacts and believes the impediments to closing are removed, it is permissible to send out the Second Notice -- even if the emergency order has not yet been lifted -- so long as the order itself does not prevent or impact the delivery of the home.

The Second Notice will advise the homeowner of the delay period being added to the construction schedule (the combined number of days covering: (i) the period of the pandemic; plus, (ii) the Remobilization Period).

Note that the new closing date set out in the Second Notice must be at least 10 days out from the date the Second Notice is sent (unless the parties agree otherwise). See **Question 11** below.

**7. Can I simply reset my Critical Dates, (e.g., go back to a First Tentative Closing Date even though I was at a Second Tentative Closing Date)?**

No. The Unavoidable Delay provisions of the Addendum do not permit a builder to start the Critical Dates framework over again.

If you are at the point where you had set a Second Tentative Closing Date, then you cannot go back to a First Tentative Closing Date. What you can do is take the cumulative total of the delay – for example, if A is the # of days attributable to impacts during the pandemic, and B is the # of days of the Remobilization Period, then  $A + B = C$ , which is the Unavoidable Delay Period. You then can add C (# of days of the Unavoidable Delay Period) to your Second Tentative Closing Date and all remaining Critical Dates. The usual Addendum sequence will then work in the same way from those extended dates.

**8. If I underestimate the cumulative total of the delay due to a pandemic, can I simply send another set of Notices?**

The law in this circumstance is untested, but the following is Tarion's best guidance on the subject. In a circumstance where a Second Notice has already been sent, but there are new and unanticipated impacts from the pandemic, or a subsequent surge or wave of the pandemic, then it may be possible for vendors to re-engage the Unavoidable Delay provisions of the Addendum so long as the vendor meets certain requirements. More detail about these possible requirements can be found at **Question 19** below.

If the Vendor is not able to provide the necessary information, or cannot satisfy the possible requirements, then Tarion is likely to consider any purported subsequent First Notice as invalid and delay compensation may be a consequence.

In all circumstances, vendors should properly monitor the length of the impacts of the pandemic, take the time to figure out the anticipated additional delay (Remobilization Period) and then send the Second Notice once you have a reasonable level of comfort that the extra time you have added on to the construction schedule will be sufficient. Do not send out the Second Notice until you are ready. You must take this exercise seriously and act prudently but reasonably in assessing the extra time needed.

Note that the new closing date set out in the Second Notice must be at least 10 days out from the date the Second Notice is sent (unless the parties agree otherwise). See **Question 11** below.

If vendors underestimate the total delay and are not able to meet the newly set Critical Dates, a homeowner may be entitled to make a delay compensation claim.

**9. Are builders able to extend the Early Termination Condition Dates due to Unavoidable Delay?**

The Addendum allows builders to delay “*Critical Dates*” by no more than the length of the Unavoidable Delay Period if the requirements of the Addendum are met. But the date for satisfaction of Early Termination Conditions is **not** a *Critical Date*.

The mechanism for extending the date for satisfaction of Early Termination Conditions is by mutual agreement. There is no express right on the part of the vendor to unilaterally extend a date for satisfaction of an Early Termination Condition.

**10. May I request help from Tarion to complete the Second Notice and the Unavoidable Delay Calculation?**

We ask that you review the [Information Sheet for New Home Builders: COVID-19 Pandemic – Possible Effects on Construction Schedules for New Homes](#) along with the Sample Notice, Exhibit 2.

The Addendum allows the builder to extend Critical Dates by the Unavoidable Delay Period, which includes the period directly impacted by the pandemic, and any period of delay due to after-effects arising from the pandemic (Remobilization Period). The determinations for each stage of the process for extending Critical Dates due to Unavoidable Delay must be done on a case-by-case basis.

Tarion can give general guidance through advisories, postings and webinars but cannot give legal advice. Builders must assess their individual situation to determine if there is an unavoidable delay period and how long it will be. As such, it will be important that builders carefully carry out the steps for the unavoidable delay process and work with their own legal counsel to ensure each step and calculation is correct and follows the rules in the Addendum.

**11. I am a builder with a home which has a Firm Closing date set for June 30. I now anticipate that an occupancy permit will not be available for closing because certain supplies (e.g. toilets) will not be available and inspections by municipal officials will not be available, in each case these are impacts from the COVID19 pandemic beyond my reasonable control. Can you provide suggestions for how I might address this situation?**

First and foremost, stay in touch with your purchasers -- they also need to plan their affairs if the closing is to be delayed and it is best practice to keep in regular communication with them.

Second, you should try to obtain the best documentation that you can with respect to the reasons for the delay. This could include an email or message from the municipality confirming that they are not doing the inspections, and a note or document from your supplier that they are unable to provide the critical items due delays relating to the pandemic (for example, you should document that you tried but were unsuccessful in finding an alternate supplier of the toilet). This documentation will be good to have for your own records and if there is a dispute at a later date.

Third, you should promptly send the “First Notice” of a delay as set out in section 5 of the Addendum. The First Notice should be sent within 20 days of when you know, or ought reasonably to know, that there will be a delay. In this example, the 20-day period will end a few days before the original closing date. We believe every effort should be made to give the notice as soon as possible in these circumstances for the benefit of the purchaser.

It will be important to follow the rules in the Addendum and you should consult the [Information Sheet for Builders: COVID-19 Pandemic - Possible Effects on Construction Schedules for New Homes](#) found on Tarion’s website.

Once the impacts of the pandemic are over, and the resulting delays are known, therefore making it possible for a new date for the delivery of the home to be determined, two things should happen:

1. Contact the purchaser and work out a new Firm Closing Date that works for both parties.
  - a. Recognize that the purchaser may need some time to ramp up mortgage financing and make arrangements for moving and vacating their current accommodation.
  - b. If the builder is going to engage the unavoidable delay period provisions of the Addendum, good faith execution of the Addendum and purchase agreement would hold that the purchaser is not forced to close on short notice.
2. Send out the Second Notice required for section 5 of the Addendum.
  - a. The Second Notice must have a revised Statement of Critical Dates which also references the new Firm Closing date and if necessary, provides an extended Outside Closing Date.
  - b. The Firm Closing Date should be set either; by the vendor at a reasonable time after the Second Notice; or a new date is discussed and agreed upon by the purchaser.

- c. Note that the new Firm Closing date set out in the Second Notice must be at least 10 days out from the date the Second Notice is sent (unless the parties agree otherwise) – this is set out in section 5 (c) of the Addendum.
  - i. As a further note, Tarion considers the 10 days to be the minimum set out in the contract – but what a ‘reasonable time’ is dependent on the circumstances. For example, it is possible that 30 days’ notice could be considered reasonable in some situations in order to give a homebuyer time to organize their affairs and not be taken by surprise. ‘30 days’ is, however, not expressly mentioned in the Addendum. We encourage vendors to be flexible and work with purchasers to provide the amount of notice that is practical and fair in the circumstances bearing in mind the unique challenges created by the pandemic.

An alternative approach is to postpone the closing (set a new Firm Closing Date) by mutual agreement. It is very important that any mutual agreement to extend the Firm Closing Date comply with the requirements of section 4 of the Addendum. This approach may have a downside if the delay goes on longer than anticipated. Further extensions using the unavoidable delay provision may not be available (the window for sending a First Notice may close) and a further mutual agreement in accordance with section 4 of the Addendum may be necessary. In all events you need to work closely with your lawyer.

If the proper steps are not followed with regard to providing notice to homeowners, delay compensation may be a consequence.

**12. I am a builder with a home which has a Firm Closing Date set for June 30. I am not sure if the final inspections and occupancy permit will be available for closing. How long should I wait before taking steps to move the Firm Closing Date? And then if the inspection is able to be completed quickly thereafter, say by July 5, can I close right away without having provided a Second Notice?**

As a general consideration, determining the date upon which the impacts of the pandemic could reasonably be viewed as affecting the construction schedule of a home will have to be done on a case-by-case basis; and, it is the vendor who is in the best position to do so. Once the vendor knows, or ought reasonably to know, that delays due to disruptions related to the pandemic (e.g., labour or supply disruptions; and/or disruptions to municipal approvals) are likely to or will have an impact upon the construction schedule of the home, then according to the terms of the Addendum, the First Notice is to be sent out. The timing is 20 days after the possibility of delay is recognized OR the next Critical Date – whichever is earlier

In this example, the 20-day period will end a few days before the original closing date. We believe every effort should be made to give the notice as soon as possible in these circumstances for the benefit of the purchaser.

The Addendum does not directly speak to this situation where the closing date is so near. The Addendum does however have an underlying premise (and principles of contract interpretation and good faith execution of a contract holds) that closings should not surprise the purchaser or be re-scheduled on short notice. Purchasers must have time to arrange their affairs, including alternate accommodation, storage of belongings, and arranging mortgage financing, once a new Firm Closing Date is known.

The Addendum also does not directly deal with the possibility that the pandemic impact which is stopping the closing (the inspection) may not happen when anticipated, but then may happen quickly and without notice. The Addendum contemplates sending a Second Notice once you reasonably know when the New Firm Closing Date can be reset.

The Addendum provides that the New Firm Closing Date has to be at least 10 days from when the Second Notice is sent (in order to provide a minimum amount of time for the Purchasers to get their affairs in order). Please see **Question 11** above.

Vendors should consider the following when faced with this scenario:

1. As soon as you are aware that the final inspection may occur, you can send a Second Notice with new Critical Dates by following the rules set out in the Addendum (for example, you send your First Notice of delay on October 8; then on November 15 you learn the inspection will happen in the first week of December; so you send the Second Notice with a new Firm Closing Date in mid- November – note the new closing date needs to be at least 10 days after the Second Notice).

When the inspection occurs and the home can be legally occupied, you could work out a mutual agreement with the homeowner to move the Firm Closing Date forward if that makes sense for both parties. It is very important, however, that any mutual agreement to move the Firm Closing Date forward comply with the requirements of section 4 of the Addendum; and legal advice should be sought.

Note that the Addendum does provide that consent to move a closing date earlier is a unilateral right of either party. But if one party asks the other party must not unreasonably withhold their consent. We strongly encourage both vendors and purchasers to work together in these situations to achieve a fair and reasonable outcome recognizing the unusual circumstances of the pandemic.



2. It is also important for vendors to follow through with both the First and Second Notice to properly fulfill the unavoidable delay provisions. Simply sending a First Notice as a pre-emptive step, and then not sending a Second Notice to a purchaser because, for example, they manage to obtain a permit or resolve a dispute with a trade etc. may leave purchasers in an unfair state of uncertainty depending on the timing and content of communications. This approach by a vendor may mismanage the purchaser's expectations and may not be a reasonable approach during the pandemic. In our view, sending a second notice is best practice once the first notice has been sent (to the close the loop effectively), and in any event an effort should be made to give at least 10 days advance notice of closing. Please also review the answer to **Question 20** below which raises similar issues.

**13. In the current circumstances of the ongoing COVID-19 pandemic, can you provide guidance as to how the Statement of Critical Dates would be addressed for new sales?**

At the outset, a vendor of a new home is required to complete the Statement of Critical Dates and include dates in required fields which are a good faith estimate of the anticipated dates. In the current circumstances, there will be difficulty knowing with precision how long COVID-19 related delays may last and to what extent they may impact closing dates for new sales.

In the circumstances of the COVID-19 pandemic, vendors should consider using the "tentative" forms of addendum which provide more flexibility for moving Critical Dates.

Ultimately, vendors must consider all of the information available to them in setting the proposed closing dates, including the current pandemic. This may result in setting the Critical Dates much further out than they previously would have.

**For condominiums,**

Vendors are expected to include a good faith estimate of the First Tentative Occupancy Date, which is the date the vendor anticipates the home will be completed and ready to move-in. In the present circumstances, that date may need to be evaluated carefully by the vendor and set at a time which is much further out than would otherwise be the case.

The Outside Occupancy Date should be set further out than might otherwise be the case, as the purchaser will have a 30-day period in which they can terminate the purchase agreement.

If the project has not started construction, then vendors should consider setting the First Tentative Occupancy Date and the Outside Occupancy Date later than might otherwise be

the case, to take into account delays that may occur as a result of both direct and indirect impacts, of the pandemic assuming the worst case scenario.

Vendors thereafter will be entitled to set subsequent Tentative Occupancy dates with no restriction other than the Outside Occupancy Date and the Roof Assembly Date (after which a Final Tentative Occupancy Date or Firm Occupancy Date is to be provided).

One approach could be to set the dates in good faith using your best judgement as noted above, but to send a First Notice under section 5 of the Addendum (Extending dates due to Unavoidable Delay) simultaneously -- pointing out that the pandemic may adversely affect delivery of the home by the First Tentative Occupancy Date. The First Notice must be supported by reasonable evidence that there are impacts which are expected to delay the completion of the project. It will be important to follow the rules in the Addendum for unavoidable delay and the vendor should consult the [Information Sheet for Builders: COVID-19 Pandemic-Possible Effects on Construction Schedules for New Homes](#) found on Tarion's website.

Please note, however, best practice would be to explain to the purchaser prior to signing of the purchase agreement that this notice will be forthcoming. In other words, explain as plainly as you can to the prospective purchaser the difficulties and challenges around setting the closing date, and explain the reason why you are providing the First Notice of delay at the same time as the agreement is being provided.

#### **For freehold homes,**

Vendors are expected to include a good faith estimate of the First Tentative Closing Date, which is the date the vendor anticipates the home will be completed and ready to move-in. In the present circumstances, that date may need to be evaluated carefully by the vendor and a time set that is much further out than would otherwise be the case.

The Outside Closing Date should be set at a date further out than might otherwise be the case, as the purchaser will have a 30 period in which they can terminate the purchase agreement.

If the project has not started construction then vendors should consider setting the First Tentative Closing Date and the Outside Closing Date much later than might otherwise be the case, to take into account delays that may occur as a result of direct and indirect impacts of the pandemic assuming the worst case scenario.

Vendors thereafter will be entitled to set a Second Tentative Closing Date giving a 120-day extension and, if necessary, a Firm Closing Date allowing for another up to 120-day extension. Given that the vendor can only extend closing dates by a maximum of 240 days, there is a greater risk of setting the First Tentative Closing Date too early. Therefore,

consider the possible or likely delays due to the pandemic carefully before setting the First Tentative Closing Date

One approach could be to set the dates in good faith using your best judgement as noted above, but to send a First Notice under section 5 of the Addendum (Extending dates due to Unavoidable Delay) simultaneously -- pointing out that the pandemic may adversely affect delivery of the home by the First Tentative Closing Date. The First Notice must be supported by reasonable evidence that there are impacts which are expected to delay the completion of the project. It will be important to follow the rules in the Addendum for unavoidable delay and the reader should consult the [Information Sheet for Builders: COVID-19 Pandemic- Possible Effects on Construction Schedules for New Homes](#) found on Tarion's website.

Please note, however, best practice would be to explain to the purchaser prior to signing of the purchase agreement that this notice will be forthcoming. In other words, explain as plainly as you can to the prospective purchaser the difficulties and challenges around setting the closing date, and explain the reason why you are providing the First Notice of delay at the same time as the agreement is being provided.

- 14. I am a builder of a townhouse condominium project. At present, I have set a Tentative Occupancy Date. I have also sent out a First Notice under section 5 (Extending Dates due to Unavoidable Delay) under the Addendum arising from expected delays due to impacts of the COVID-19 pandemic. I have now reached Roof Assembly Date as defined in the Addendum. In these circumstances, when would I need to send the notice setting the Final Tentative Occupancy Date?**

Having sent the First Notice, you should send out the Second Notice under the unavoidable delay provisions when appropriate to do so. It will be important to follow the rules in the Addendum for unavoidable delay and the reader should consult the [Information Sheet for Builders: COVID-19 Pandemic -- Possible Effects on Construction Schedules for New Homes](#) found on Tarion's website. You would set the Final Tentative Occupancy Date and communicate it to your purchasers in the Second Notice as well as in the Revised Statement of Critical Dates accompanying the Second Notice.

- 15. A home was originally set to close on the Firm Closing Date of June 30<sup>th</sup> and the builder sent the First Notice of unavoidable delay on March 30<sup>th</sup>. If the builder plans to keep the June 30<sup>th</sup> closing date, when do they need to provide the Second Notice to the purchaser in order to close on June 30<sup>th</sup>?**

First, it is Tarion's view that having given the First Notice advising of a delay, the builder should provide a Second Notice advising when closing will happen. 10-days' notice must be

given after the Second Notice (This is set out in s. 5 (c) of the Addendum.). So, in the example, the Second Notice should be sent by November 20<sup>th</sup> or before.

Tarion's guidance is that providing at least 10-days' notice to the purchaser in this situation is the best way to proceed, or else working to obtain a mutual agreement with the purchaser to the new date. **See Question 20 below.**

**16. With all the uncertainties, what happens if a builder sends a Second Notice with a revised Firm Closing Date, and there's an additional change in, for example the COVID-19 governmental mandates for construction? E.g. city inspectors decide to cease operations, changes to essential service list related to construction. Can a builder send another First Notice?**

The law in this circumstance is untested, but the following is Tarion's best guidance on the subject. In a circumstance where a Second Notice has already been sent, but there are new and unanticipated impacts from the pandemic, or a subsequent surge or wave of the pandemic, then it may be possible for vendors to re-engage the Unavoidable Delay provisions of the Addendum so long as the vendor meets certain requirements. These possible requirements are discussed at **Question 19** below.

If the Vendor is not able to provide the necessary information, or cannot satisfy the possible requirements, all as described at **Question 19** then Tarion is likely to consider any purported subsequent First Notice as invalid and delay compensation may be a consequence.

Alternatively, the builder may be able to extend under the regular requirements if they still have 90 days to provide the notice to the purchaser and if the current critical date is a First Tentative or Second Tentative. It is vitally important that builders are certain that they have fully assessed the direct and indirect impacts of the pandemic as well as the aftereffects, sometimes called the additional Remobilization Period before sending out the Second Notice and do not send it too soon.

If vendors underestimate the total delay and are not able to meet the newly set Firm Closing Date, a homeowner may be entitled to make a delay compensation claim.

**17. Can I send unavoidable delay notices via an email bulk messaging service? What are the rules surrounding how an email notice should be sent?**

If you are contemplating whether to use a bulk email service to send unavoidable delay notices, there are a few things to consider. First, you must make sure that you and the Purchaser have agreed to send/receive notices by email and that you have a valid email address for the purchaser. Review the Addendum to find the methods for which you have both agreed to send/receive notices.

You must also ensure the email is properly sent, and document that it was received. Consider that it is common for email providers to recognize bulk email messages as junk mail and either block or filter them out, so there is a heightened risk that using a bulk email service will mean your purchasers don't receive the notice.

In general, when using email, consider using delivery receipts and/or read receipts to document that the email was sent AND received. You must follow up on any bounce back, 'unable to deliver', or other potentially undelivered messages to ensure the Purchaser does in fact receive the email notice. Be sure to keep records of the email sent to each purchaser and any confirmation that it was received.

Vendors and Purchasers should also review the sections of the Addendum on 'time periods and how notices must be sent' to properly comply with its provisions. For example, notices (however sent) in all events must be sent to the Purchaser. Notices may also be sent to the Purchaser's lawyer if permitted in the purchase agreement and contact information for the lawyer is provided.

**18. What happens to the Critical Dates between the time the First Notice is sent out, and the time before I send out my Second Notice?**

As stated in **Question 7**, the Unavoidable Delay provisions of the Addendum do not permit the Builder to start the Critical Dates framework over again. When a First Notice is sent out, the builder should look at the next Critical Date. It is that next Critical Date, and further subsequent Critical Dates, that have been temporarily delayed through a properly delivered and complete First Notice.

When a Second Notice is sent out, it should only reset the Critical Dates that followed the date when the First Notice went out e.g. the Outside Closing date. The dates before the First Notice was sent cannot be revised. The extensions to critical dates cannot exceed the total period of the *Unavoidable Delay Period*.

**19. What should I do if I already sent out a Second Notice and new impacts arise as a result of the pandemic or a further surge or wave of the pandemic and these impacts will cause additional delay in delivery of the home?**

In a circumstance where a Second Notice has already been sent, but there are new and unanticipated impacts from the pandemic, or a subsequent surge or wave of the pandemic, then it may be possible for vendors to re-engage the Unavoidable Delay provisions of the

Addendum so long as the vendor meets certain requirements. The law in this circumstance is untested, but the following is Tarion's best guidance on the subject.

Vendors may be able to re-engage the Unavoidable Delay provisions in connection with delays caused by new impacts of the pandemic or a subsequent surge or wave of the pandemic, but the requirements to permit re-engagement may well include:

- i. The vendor must have taken all reasonable mitigation measures to avoid delay (the delays must be beyond the reasonable control of the vendor);
- ii. The vendor must not have contributed in any way to the delay; and
- iii. The vendor is claiming "delay" in respect of the new impacts and no other collateral purpose e.g. the vendor is trying to avoid paying more to complete the home on time.

Re-engaging the Unavoidable Delay provisions will require the vendor to provide the purchaser and Tarion with detailed information/evidence addressing specifically why the delay was not reasonably foreseeable/avoidable. For example, it will be difficult to argue that it is beyond the reasonable control of the Vendor to have run short on kitchen cabinets if the shortage was foreseeable and could have been addressed by sourcing from elsewhere. If pressure treated wood is scarce, but available at a higher price, that is not a delay due to an impact beyond the vendors control - the Vendor, we expect, would have to bear the burden of the higher price. By now, all vendors know that the pandemic may last for months or years, and they should be and should have been taking appropriate steps to avoid or mitigate any further delays.

If the Vendor is not able to provide this level of detailed information, or cannot satisfy the considerations mentioned above, then Tarion is likely to consider any purported subsequent First Notice as invalid and delay compensation may be consequence.

An alternative approach to sending a subsequent First and Second Notice, is to postpone the closing (set a new Firm Closing Date) by mutual agreement. It is very important that any mutual agreement to extend the Firm Closing Date comply with the requirements of section 4 of the Addendum. This approach may have a downside if the delay goes on longer than anticipated. Further extensions using the Unavoidable Delay provisions may not be available (the circumstances for sending a First Notice at that time may not exist) and a further mutual agreement in accordance with section 4 of the Addendum may be necessary. In all events you need to work closely with your lawyer.

**20. I have an upcoming closing with a Firm Closing Date of June 30, 2021. Because of the pandemic, I sent out a First Notice under the unavoidable delay provisions of the Addendum on February 15, 2021. My concern is that there are only a few weeks left to closing and I have reason to believe my municipal occupancy inspection may be delayed due to the impacts of the pandemic. Do I have to give the purchaser a Second Notice in order to close on the original Firm Closing Date? And in all events, how much prior notice do I need to give to the purchaser that I propose to close on the original Firm Closing Date?**

The current pandemic is an unprecedented circumstance and we recognize that the unavoidable delay framework under the Addendum does not always give simple clear answers to every possible scenario. Tarion attempts to provide context and guidance on how those provisions might be interpreted but cannot give legal advice. To the extent that you and your legal counsel believe the rights and obligations under the Addendum are different, you are free to act on that advice. That being said, our best guidance is as follows:

- In Tarion's view, the Addendum requires two notices to be provided in this situation: the first informs the purchaser of the delay, the second informs them of the new closing date. The second notice is required in our view because the Addendum says in section 5(c) that after sending the first notice "As soon as reasonably possible, and no later than 20 days after the vendor knows or ought reasonably to know that an Unavoidable Delay has occurred, the vendor shall provide written notice to the purchaser setting out... [the Second Notice]". We see the use of the word 'shall' in this context as making the sending of a Second Notice mandatory.
- The Addendum does speak to the minimum notice to be given when setting the new closing date in the Second Notice – it cannot be less than 10 days from when the Second Notice is given. This is also set out in s. 5 (c) of the Addendum.
- The idea here is straightforward in our view: the vendor should tell the purchaser that there may be a delay as soon as possible after they learn of that situation – this is the First Notice. Then as soon as the vendor knows when they can close again, they should tell the purchaser so – and when they do that, they should set a new closing date but give the purchaser a minimum of 10 days to re-organize. In our view, this is consistent with the intention of the Addendum and its consumer protection context.



In some situations, purchasers may want to close with less than 10 days' notice. In this case, the closing can be moved forward by mutual agreement (the vendor needs to document this properly and should consult a lawyer). The language of the Addendum provides that either party (the vendor or the purchaser) may request that the closing date be moved earlier and that the parties should not "unreasonably" withhold their consent to such a request. We strongly encourage both vendors and purchasers to work together in these situations to achieve a fair and reasonable outcome recognizing the unusual circumstances of the pandemic.

In Tarion's view, the best way for a vendor to ensure they are in compliance with the intention of the addendum and are acting in good faith in respect to the transaction is to follow the above process. In summary, that is to:

- 1) Issue a First Notice
- 2) Issue a Second Notice, providing at least 10 days' time before the new closing; and
- 3) if the parties wish to move the closing earlier, they can do so by written mutual agreement.

### **Potential consequences to not providing proper notice**

Tarion considers both the following circumstances to be contrary to the words and intention of the addendum: (i) not issuing a Second Notice and then closing on the original closing date without clear written agreement with the purchaser; or (ii) issuing a Second Notice but failing to give 10 days' notice. As the addendum does not expressly speak to any financial consequences for such actions, Tarion would not require payment of delay compensation in these circumstances. Such non-compliance would, however, raise vendor/builder conduct or compliance issue in scenarios where there are concerns that a purchaser has been treated unfairly or did not receive reasonable notice to get prepared for closing. Therefore, vendors should always provide their purchasers with at least 10 days' notice, or clearly document the communication to the purchaser, demonstrating the purchaser was aware of and in agreement with the reinstatement of the original closing date or alternate closing date.

Each closing scenario is unique and there is unfortunately no blanket answer to how each could be looked upon, which is why we strongly recommend that at least 10 days are provided and you work closely with your lawyer.



**21. The home I am constructing has been adversely impacted by the pandemic and as a result I have sent out a first notice to the purchaser that there will be delays due to the pandemic. Those impacts are continuing and as such I have not yet sent out a second notice.**

**In addition to delay caused by the pandemic, there is now a strike which is also going to have effects that will delay completion and delivery of the home. How should I handle this (i.e., do I sent out another first notice for delays caused by the strike)?**

Tarion's best guidance is that you should treat each of the unavoidable delay events (pandemic, strike) separately.

For example, do not try to claim delays that are due to the strike as being delays due to the pandemic. Continue to treat the unavoidable delay due to the impacts of the pandemic on its own and continue to monitor and catalog the delays due to the impacts of the pandemic. Follow guidance available on the [COVID-19 builder resource page](#) on Tarion's website and in particular this [advisory on unavoidable delays](#).

If a strike has occurred which will also cause delays, you should send out a separate First Notice to the purchaser which will reference the strike as a separate reason for further delays. For a strike it is important to send out the First Notice in accordance with the rules set out in the Addendum, catalogue the delays and why they are due to the strike.

Monitor and document separately the delays due to the pandemic versus those due to the strike. You should consider any pandemic and strike-related delays as being on a separate track. The next step is to determine when you should send out a Second Notice for each track. As each notice is tied to its own unavoidable delay event, each second notice does not need to go out at the same time. You may for example find the strike delays end earlier than the pandemic-related delays, and that you can set revised critical dates due to the strike delay. However, those revised dates would be provisional dates as they are still subject to the delays that you can show are continuing due to the pandemic. As a best practice, the provisional nature of the revised dates should be communicated to the purchaser. Alternately, it may be the pandemic delays cease before the strike delays and a similar approach would apply.

When all the delays are over, you can set new revised Critical Dates that reflect both the impacts of the pandemic and of the strike.

**22. When I send out my Second Notice, can I send a revised Statement of Critical Dates that moves the Critical Dates by an amount less than the total Unavoidable Delay Period?**

The Addendum has an underlying premise (and the principles of contract interpretation and good faith execution of a contract holds) that closings should not surprise the purchaser or

be re-scheduled on short notice. Purchasers must have time to arrange their affairs, including alternate accommodation, storage of belongings, and arranging mortgage financing once a new Firm Closing Date is known.

In Tarion's view, the Addendum requires two notices to be provided in respect of an Unavoidable Delay: the first informs the purchaser of the delay, the second informs them of the new critical dates as extended by the delay. The Second Notice is required in our view because the Addendum says in section 5(c) that after sending the First Notice "As soon as reasonably possible, and no later than 20 days after the vendor knows or ought reasonably to know that an Unavoidable Delay has occurred, the vendor shall provide written notice to the purchaser setting out... [the Second Notice]". We see the use of the word 'shall' in this context as making the sending of a Second Notice mandatory.

The Addendum references extending Critical Dates by both the amount of the Unavoidable Delay Period, but also by an amount that is no more than the length of Unavoidable Delay Period. Extending Critical Dates by less than the Unavoidable Delay Period has not been judicially considered. With that in mind, the answer to this question depends on the interpretation of the Addendum. Tarion's best guidance is as follows recognizing that an interpretation of the Addendum that reflects consumer protection is to be favoured:

- a. The first scenario is where the relevant Critical Date that was paused at the time the First Notice was sent is an earlier Critical Date (e.g., First/Second Tentative Closing/Occupancy Dates). If a shorter extension period does not prejudice the purchaser (e.g., unreasonably short notice of closing), then Tarion would expect that earlier delivery of the home would be seen as advantageous by both the purchaser and vendor. This could come up in a situation where the vendor wishes to make no changes to the original Statement of Critical Dates when sending out a Second Notice. However, making no change to the Original Statement of Critical Dates would only be applicable in circumstances where the next Critical Date is e.g. a First or Second Tentative/Occupancy Date. When these specific instances arise, the builder should be clear in their communications that they are not revising the original Statement of Critical Dates.

- b. A second scenario is where the relevant Critical Date that was paused at the time the First Notice was sent is the Firm Closing/Occupancy Date. In that case the guidance in paragraph a. above applies but there is an added element. Namely, the Addendum is clear – the revised Firm Closing/Occupancy Date cannot be less than 10 days from when the Second Notice is given. This is also set out in s. 5 (c) of the Addendum.
  - i. In some situations, purchasers may want to close with less than 10 days' notice. In this case, the closing can be moved forward by mutual agreement (the vendor needs to document this properly and should consult a lawyer). The language of the Addendum provides that either party (the vendor or the purchaser) may request that the closing date be moved earlier and that the parties should not “unreasonably” withhold their consent to such a request. We strongly encourage both vendors and purchasers to work together in these situations to achieve a fair and reasonable outcome recognizing the unusual circumstances of the pandemic.
  - ii. In Tarion's view, the best way for a vendor to ensure they are following the intention of the Addendum and are acting in good faith in respect to the transaction is to follow the above process.
  - iii. In summary:
    - 1) Issue a First Notice
    - 2) Issue a Second Notice, which provides at least 10 days' time before the new closing; and
    - 3) If the parties wish to move the Firm Closing Date, then a mutual agreement in accordance with the Addendum is available.

**\*Important Note:** *The questions and answers in this document are intended for general guidance and do not constitute legal or other professional advice. The reader is advised to seek legal advice from their own legal counsel to address their particular circumstances.*