

Information Sheet for New Home Builders

COVID-19 Pandemic – Possible Effects on Construction Schedules and Delays for New Homes

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

How Unavoidable Delay Provisions May Apply

The **impacts** of the COVID-19 pandemic could possibly mean that certain 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 their 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 pandemic on your homes under construction – this may be an ongoing and evolving process

Each vendor should consider the impacts, if any, of the pandemic (e.g., labour or materials supply disruptions, governmental permits or inspections not available), whether they are affecting or will likely affect the construction and/or delivery schedule of any new homes being constructed.

Step 3 – Send Out First Notice

If you think the pandemic is or is likely to *affect timing of construction and/or time to closing 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 COVID-19 Pandemic with impacts that may or are likely to affect the delivery of the home; and
- 2) An estimate of the duration of the total delay (if practical – it is likely that at the date of this communication, making this estimate is not practical).

This First Notice should specify the event in question, (i.e., the COVID-19 Pandemic).

The estimate, if practical, 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 practical, refer to the anticipated total time period, being the aggregate of both: (i) the period of time that the direct impacts of the pandemic affects construction/completion on time to closing of the home; and (ii) vendor's estimate of the additional time needed to re-mobilize – **the Remobilization Period** (as defined below). In this instance, it is probably not possible to estimate the duration of the total delay as it probably cannot be assessed at this 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 the Pandemic is or is likely affecting construction on time to closing of the home.

A sample First Notice is attached as **Exhibit 1**.

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

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 “pandemic” and is expressly listed in section 12 of the Addendum. The pandemic has been declared by the World Health Organization, the question is determining if and when and how long it affects the construction/completion on time to closing of the home (and thus also the question of how). To be an eligible event, the pandemic must have impacts which affect the delivery of the home.

If there are impacts or are likely to be impacts from the pandemic, when those direct impacts are over, the vendor needs to reasonably 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 direct impacts of the pandemic (e.g., labour or supply disruptions, unavailability of governmental permits or approvals) of the pandemic itself (to the extent it affects the home); **plus**
- 2) **“any period of delay directly caused by the event”** (i.e., after-effects), 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 known likely impacts of the pandemic, the end of the direct impacts of the pandemic, and length of that period.

After the direct impacts of the pandemic itself for a home are over, then as a rule of thumb it is reasonable to take 30 days to assess the likely aftereffects. Even if the direct impacts of the pandemic have concluded, the timelines for construction of the home may have been set back by not only the period of the direct impacts of the pandemic 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 direct impacts of the pandemic; **plus** (ii) the **Remobilization Period**, constitutes the total delay period – called the **“Unavoidable Delay Period.”**

Note: Do not send out the Second Notice until you have clearly assessed all of the impacts on time to closing of the home.

Step 4 – Monitor the pandemic and its impacts and determine if a Remobilization Period applies

Vendors are encouraged to do the following:

- 1) Monitor the *event* – is the pandemic affecting the time to closing of the home (and do this for each home under agreement for sale). If it lasts more than 30 days, vendors are encouraged to send informational updates to purchasers.
- 2) Once the direct impacts of the pandemic 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 after-effects – the **Remobilization Period**. In other words, in addition to the period of the direct impacts of the pandemic itself, is there any additional “*period of delay directly caused by the pandemic (any after-effects)*” 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 pandemic and which accrues after the direct impacts of the pandemic itself. There may, for example, be backlogs of work to be done by trades or municipal approvals. In all events, this additional time following the end of the direct impacts 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 the direct impacts of the pandemic 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 impacts of the pandemic end and the total delay period is known (as described above), a second mandatory notice must be sent. The timing for sending the **Second Notice** is not necessarily the end of the pandemic itself. Rather, the notice is sent when the vendor has determined both: 1) the direct impacts of the pandemic causing delay have ended; and 2) the length of the **Remobilization Period**. Once the vendor can reasonably assess the **Remobilization Period** (the after-effect), the vendor must send out the Second Notice. See **Exhibit 1**. As a “rule of thumb”, if the home is affected by the pandemic, it is reasonable for the vendor to take 30 days (or more if justified) after the direct impacts have ended, to assess the **Remobilization Period**.

In other words, the vendor must note both: 1) the length of the period where there are direct impacts of the pandemic upon the home in question; and 2) determine and document the justification for any additional delay, i.e., **Remobilization Period** (if possible, the assessment should be done within 30 days after the period when the direct impacts of the pandemic end); and 3) prepare to send out the Second Notice. But as mentioned, do not send out the Second Notice too soon – make sure you have clearly assessed the full affects on timing. The Second Notice to the purchaser must be in writing and include the following:

- A brief description of the Unavoidable Delay event (the pandemic);
- The end date of the Unavoidable Delay Period (i.e., the number of days of the direct impacts of the pandemic 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 period of the direct impacts of the pandemic itself plus a **Remobilization Period**).

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

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 possible delay compensation consequences of delay due to the pandemic.

However, if the vendor fails to properly give the First and Second 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 pandemic occurred and how long any direct impacts (e.g., labour or supply disruptions) lasted.
 - How the pandemic affected the construction schedule.
 - What is the period of extra delay, after-effects, if any, caused by the pandemic (the **Remobilization Period**).
- Only future Critical Dates can be extended and only by the period equal to: (i) the period of the direct impacts of the pandemic, plus (ii) the reasonable estimate of **Remobilization Period**.

Period of Direct Impacts of Pandemic + **Remobilization Period** = **Unavoidable Delay Period**

- If the pandemic does not affect the home, then it cannot be included in the calculation for extensions. Only a pandemic and impacts 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 3**.

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Sample Notice – COVID-19 Pandemic

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 may delay completion of your home. The specific “Unavoidable Delay” trigger event is as follows: COVID-19 Pandemic

The Pandemic was declared on the 11th day of March, 2020 and is ongoing.

The impacts of the pandemic may affect timing of delivery of your home in this way:

3. It is possible that the impacts of the pandemic may affect the completion and/or delivery 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 direct impacts of the pandemic; but also,
- 2) any additional period of delay due to after-effects caused by the pandemic which are beyond the vendor’s reasonable control (the **“Remobilization Period”**).

5. It is difficult at this stage to be certain if or how long the total delays may be and thus how the construction schedule for your Home will be affected.

- 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 – COVID-19 Pandemic

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 First Notice to you re pandemic delays has ended. The “Unavoidable Delay” was made up of:
 - (a) These disruptions _____ which started on _____ and ended on _____, (“**First Period**”); **plus**
 - (b) An additional period of _____ days representing additional lost time caused by the pandemic (the “**Remobilization Period**”).
- 2. The total setback in time directly caused by the “Unavoidable Delay” (the **First 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 March 11, 2020, a global pandemic is declared by the World Health Organization in relation to COVID-19 Coronavirus.
- A determination is made on March 18, 2021, that a home under construction will be delayed because of delays due to impacts of the pandemic e. g.:
 - unavailability of materials for the home; and/or
 - issuance building permits were delayed; and/or
 - municipal inspections were delayed; and/or
 - labour disruptions
- Within 10 or 20 days of March 18 (depending on the Addendum), the First Notice must be sent out.
- The vendor determines that for the home in question the labour and supply disruptions or other disruptions have ended. The direct impacts lasted 120 days (the *First Period*).
- The vendor next considers for each affected home what, if any, after-effects may be – what the additional delay may be relating to remobilization. In this regard, the vendor has maintained a work sheet of the disruptions and delays documenting how and why delivery of the home is delayed.
- For the home in question, it turns out the continuing concerns are twofold:
 - First, materials and supplies necessary to complete the home are seriously backed up; and
 - Secondly, the schedule for trades or suppliers is upset and now backlogged and a new schedule must be created.
- The vendor is careful to 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 from the end of the *First Period* to collect information that allows them 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 another 60 days for a total Remobilization Period of 90 days.

- As a result, the total length of the *Unavoidable Delay Period* will be 100 days (the length of the time of direct impacts of the pandemic – the *First Period*) plus 90 days (the *Remobilization Period*) = 200 days.
- The Second Notice should be sent out within 20 days after the “assessment period” (30 days in this hypothetical), thus within 50 days after the vendor’s determination that the direct impacts of the pandemic.
- The Second Notice therefore states that the full Unavoidable Delay Period is 190 days. As a result, the then current Firm Closing Date can unilaterally be extended by 190 days. Similarly, future Critical Dates which in this case would be the Outside Closing Date can similarly be extended by 190 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.