

Builder Bulletin 48

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POTLS – DELAYED OCCUPANCY WARRANTY

WHAT THIS BULLETIN IS ABOUT

This Bulletin¹ explains how the Delayed Occupancy Warranty applies to most agreements of purchase and sale (“purchase agreements”) dated on or after October 1, 2012, for the purchase of a freehold home (POTL) which is tied to a common elements condominium corporation.

This Bulletin introduces new forms of Addenda and a delay compensation framework specifically for POTLs.²

The word “builder” when used in this Bulletin, includes both a vendor and a builder, as applicable.

Capitalized terms in this Bulletin have the meanings given to them in the POTL/CEC Addendum forms referred to in section 2 below.

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This Bulletin also contains the following appendices:

1. Appendix “A”: Firm Occupancy Date Timeline Schematic
2. Appendix “B”: Tentative Occupancy Date Timeline Schematic

¹ Please note that if there is any conflict or inconsistency between the terms of this Bulletin and the applicable Addendum or the provisions of the ONHWP Act or regulations, then the provisions of the Addendum and ONHWP Act and regulations shall prevail, with the ONHWP Act and regulations being paramount.

² Until this change, POTLs were governed by the freehold Addendum forms.

1. OVERVIEW OF DELAYED OCCUPANCY WARRANTY FOR POTL HOMES

The Delayed Occupancy Warranty is governed by the *Ontario New Home Warranties Plan Act* and its regulations, (the “ONHWP Act”) – specifically Regulation 165/08, a copy of which is available on the Tarion website. The obligations of builders are set out in the regulation and the statutorily mandated *Addendum* which must form part of each new home purchase agreement.

Certain freehold transactions involve homes built on a freehold parcel (sometimes called a parcel of tied land or “POTL”) where the land is tied to a common elements condominium corporation (CEC). Such homes typically involve the possibility of early occupancy with title transfer occurring later once the CEC is registered. As such, delay compensation is determined by reference to a delay in providing occupancy (generally in the same way as condominiums).

The Delayed Occupancy Warranty is intended to provide some protection to purchasers from the impact of delays in the Occupancy of their new POTL home. This objective is achieved by, among other things:

- Making clear the firm or tentative nature of the Occupancy date being promised. Builders must provide a specific Occupancy date in the purchase agreement, and must expressly tell the purchaser whether the date is firm or tentative (so the purchaser knows up front that the date may be changed);
- Limiting the builder’s use of Early Termination Conditions in the purchase agreement;
- Disclosing in the purchase agreement the status of development approvals and the status of construction so the purchaser can better assess the risk that a delay may occur;
- Providing adequate notice to the purchaser when Occupancy is to be delayed;
- Compensating purchasers where a delay in excess of permitted delay has occurred; and
- Setting an Outside Occupancy Date beyond which the purchaser has a right to terminate the transaction.

The Delayed Occupancy Warranty is in addition to the basic obligation of a builder to take all reasonable steps to complete the construction of a condominium home and to close the purchase and sale transaction without delay.

These matters are addressed in the applicable Addendum form described in more detail below.

2. THE POTL CEC ADDENDUM FORMS

The Addendum forms (there are two) for new POTL homes, set out standard contract provisions relating to Delayed Occupancy that must be included in all purchase agreements for new POTL homes in Ontario. There are basically two POTL Addendum forms available – one for purchase agreements offering a Firm Occupancy Date from the outset, and a second for purchase agreements which set a Tentative Occupancy Date and allows builders to extend as of right. The builder must choose one or the other of the Addenda to include as part of the purchase agreement:

- POTL/CEC Firm Occupancy Date
- POTL/CEC Tentative Occupancy Date

A copy of each type of Addendum can be found on Tarion’s website at www.tarion.com.

The Addendum supplements the terms of the purchase agreement and sets out important obligations of a builder in respect of delays and should be read carefully.

The builder is required to complete all blanks in the applicable Addendum.

Failure to include an Addendum in a purchase agreement for a new POTL home, or to fill in all applicable blanks, is contrary to the terms and conditions of a builder’s registration. It may result in the purchaser being able to

terminate the purchase agreement, and may result in sanctions by Tarion up to and including the revocation of the builder's registration and thus revocation of the builder's right to build new homes in Ontario.

3. STATEMENT OF CRITICAL DATES

The first page of the Addendum is the *Statement of Critical Dates*. This document sets out Critical Dates related to Occupancy. The builder must complete the blanks in the Statement of Critical Dates or else the purchase agreement is not enforceable by the builder.

Tarion has provided a web-based calculator which can be found on BuilderLink (formerly the Builder Portal) and Tarion's website at www.tarion.com, to assist in calculating these dates. Tarion will also publish, from time to time, monthly paper calendars for builders and their staff without access to the Internet.

Firm Occupancy Date Option

For the Firm Occupancy Date option, the builder must specify a calendar date for each of the following:

- *Firm Occupancy Date* - the date by which the builder agrees to complete the POTL home and have it ready for occupancy.
- *Outside Occupancy Date* – the date which is 365 days after the Firm Occupancy Date. If Occupancy has not been given to the purchaser by that date, the purchaser can elect to terminate the deal, all monies paid by the purchaser are to be returned with interest and the purchaser will be entitled to Delayed Occupancy Compensation.
- *End of the Purchaser's Termination Period* – this date is the end of the 30-day period during which the purchaser may terminate the transaction if the POTL home is not ready for occupancy by the Outside Occupancy Date.

Tentative Occupancy Date Option

For the Tentative Occupancy Date option, the builder must specify a calendar date for each of the following:

- *First Tentative Occupancy Date* – the date by which the builder expects that the POTL home will be completed and ready for occupancy.
- *Second Tentative Occupancy Date* – the date 120 days after the First Tentative Occupancy Date, which is the outside date to which the builder can initially extend Occupancy without the purchaser's consent.
- *Firm Occupancy Date* – the date 120 days after the Second Tentative Occupancy Date, which is the outside date to which the builder can further extend Occupancy without the purchaser's consent or without setting a Delayed Occupancy Date and paying Delayed Occupancy Compensation.
- *Outside Occupancy Date* – the date which is 365 days after the earlier of the Second Tentative Occupancy Date and the Firm Occupancy Date. If Occupancy has not occurred by that date, the purchaser can elect to terminate the deal, all monies paid by the purchaser are to be returned with interest and the purchaser will be entitled to Delayed Occupancy Compensation.
- *Notice of Delay beyond the First Tentative Occupancy Date* – this date is 90 days before the First Tentative Occupancy Date and is the last day by which notice must be given if a delay beyond the First Tentative Occupancy Date is expected.
- *Notice of Delay beyond the Second Tentative Occupancy Date* – this date is 90 days before the Second Tentative Occupancy Date and is the last day by which notice must be given if a delay beyond the Second Tentative Occupancy Date is expected.
- *End of the Purchaser's Termination Period* – this date is the end of the 30-day period during which the purchaser may terminate the transaction if the POTL home is not ready for occupancy by the Outside Occupancy Date.

Schematics illustrating the timelines under each option of the POTL delayed Occupancy regimes are attached as Appendix “A” and “B”.

4. DISCLOSURE OBLIGATIONS

When the Purchase Agreement is Signed

Builders must complete the blanks in the section of the Addendum titled “Information Regarding the Property.”

Zoning Approval

The first portion of the disclosure section of the Addendum requires the builder to disclose whether it has obtained Formal Zoning Approval for the multi-unit project (the “Freehold Project”), which includes the POTL home that is to be constructed. Formal Zoning Approval occurs when the zoning by-law required in order to construct the Freehold Project has been approved by all relevant governmental authorities having jurisdiction, and the period for appealing the approvals has elapsed and any appeals have been dismissed or approval affirmed.

The builder must be given written notice to the purchaser within 10 days after the actual date of Formal Zoning Approval, if approval has not been obtained at the time the purchase agreement is signed.

Construction Status

Builders must disclose whether the Commencement of Construction of the Freehold Project has occurred, and if not, the date that Commencement of Construction of the Freehold Project is expected to occur. If construction has not yet begun at the time the purchase agreement is signed, the builder must give written notice to the purchaser within 10 days after the actual date of Commencement of Construction.

“Commencement of Construction” means the start of excavation for and/or construction of foundation components or elements (such as footings, rafts or piles) of the Building.

Other Disclosure

There are other ongoing disclosure obligations set out in the balance of each Addendum. For example, there are specified informational requirements for: extending or accelerating any Critical Dates by mutual agreement, setting a new Occupancy Date in cases of Unavoidable Delay, and setting Delayed Occupancy Dates.

5. CONDITIONS OF SALE

General

A condition is a term in a purchase agreement that sets out a situation in which the purchase agreement may terminate if a specified event either happens or does not happen.

The use of conditions of sale is regulated by the terms of the Addendum. Builders are permitted to include only certain specified types of conditions in their purchase agreement. These permissible types of conditions fall into four general categories:

- *Early Termination Conditions* – discussed in detail below;
- The usual condition regarding compliance with Planning Act subdivision control provisions (and registration of the common elements condominium corporation under the Condominium Act);
- Conditions which are rights of termination in a favour of a party due to the default of the other; and

- Purchaser conditions – conditions for the sole benefit of the purchaser.

Early Termination Conditions

Non-waivable Conditions

The builder is permitted to make a purchase agreement conditional upon receipt of approval for:

- A change to the official plan, other governmental development plan or zoning by-law (including a minor variance);
- A consent to creation of a lot(s) or part-lot(s);
- A certificate of water potability or other measure relating to domestic water supply to the home;
- A certificate of approval of septic system or other measure relating to waste disposal from the home;
- Completion of hard services for the Property or surrounding area (e.g. roads, rail crossings, water lines, sewage lines, other utilities);
- Allocation of domestic water or storm or sanitary sewage capacity;
- Easements or similar rights serving the Property or surrounding area;
- Site plan agreements, density agreements, shared facilities agreements or other development agreements with approving authorities or nearby landowners and/or any development approvals required from an approving authority; and/or
- Site plans, plans, elevations and/or specifications under architectural controls imposed by an approving authority.

These conditions are for the benefit of both the builder and the purchaser and cannot be waived by either party.

The builder must provide written notice not later than 5 Business Days after the date specified for satisfaction of a condition that: (i) the condition has been satisfied; or (ii) the condition has not been satisfied (together with reasonable details and backup materials), and that as a result the purchase agreement is terminated.

Also, if notice is not provided as set out above, then the condition is deemed not satisfied and the purchase agreement is terminated.

Waivable Conditions

The builder is also permitted to make the purchase agreement conditional upon:

- Receipt by the builder of confirmation that sales of POTL homes in the Freehold Project³ have exceeded a specified threshold by a specified date;
- Receipt by the builder of confirmation that financing for the Freehold Project on terms satisfactory to the builder has been arranged by a specified date;
- Receipt of approval for a basement walkout; and/or

³This type of project viability condition must be in respect of a “Freehold Project” and is subject generally to the following requirements:

- This condition will only be available for “Freehold Project” which must be described in the Addendum, and contain more than three homes constructed by the same builder in a single location (either at the same time or consecutively) as a single coordinated undertaking, (e.g. a 10 unit rowhouse project, a 30 unit townhouse project, a defined subdivision or part of a subdivision).
- Unless and until the condition is satisfied or waived, any deposit monies or monies paid for upgrades and extras, will be held in trust by the builder’s lawyer pursuant to a Deposit Trust Agreement or otherwise secured on terms that are satisfactory to Tarion.
- If this condition is included then the three business day period afforded purchasers to review conditions will be extended to 10 calendar days. If a purchaser is not satisfied, they can end the deal and receive all monies back.
- The length of time that the deal can be conditional upon such project viability conditions can be no more than up to nine months following signing of the purchase agreement.

- Confirmation the builder is satisfied that the purchaser has adequate financial resources to complete the transaction.

These conditions are for the benefit of the builder and may be waived by the builder in its sole discretion.

The builder must provide written notice on or before the date specified for satisfaction of the condition that: (i) the condition has been satisfied or waived; or (ii) the condition has not been satisfied or waived, and that as a result the purchase agreement is terminated.

Also, if notice is not provided as set out above, then the condition is deemed waived and the purchase agreement will continue to be binding on both parties.

The Non-waivable Conditions and Waivable Conditions referred to above are together called the *Early Termination Conditions*.

Set Out in the Addendum

To ensure that any Early Termination Conditions required by the builder are clearly communicated to the purchaser, all Early Termination Conditions must be listed in section 6 of the Addendum or an appendix with the heading "Early Termination Conditions." Details of the Early Termination Conditions must also be included. For example, each Early Termination Condition must be set out separately, be reasonably specific as to the type of approval which is needed, and identify generally the approving authority. The builder is required to take all commercially reasonable steps to satisfy any Early Termination Conditions included in the purchase agreement.

Date for Satisfaction

The date for satisfaction of any Early Termination Condition must be no later than 90 days before the Firm Occupancy Date (or First Tentative Occupancy Date for a tentative transaction) with two exceptions: (i) the condition regarding builder confirmation that the purchaser has the financial resources to complete the transaction must be satisfied within 60 days after signing the purchase agreement (or 60 days after a home sale condition has been satisfied or waived); and (ii) project viability conditions cannot be outstanding for more than nine months following signing of the purchase agreement.

Three Day Review Period

If the builder includes one or more Early Termination Conditions, then the purchaser has a three Business Day time period after receiving a true and complete copy of: the signed purchase agreement; or proposed purchase agreement, to review the conditions that have been listed. If project viability conditions are included, the review period for such conditions is extended to 10 calendar days. If the purchaser is not satisfied with any such condition, the purchaser has the right to terminate the purchase agreement without penalty and the builder must return to the purchaser all monies paid by the purchaser together with interest (see section 11 below).

Other Builder Conditions

A purchase agreement may also be conditional upon the compliance with the subdivision control provisions (section 50) of the Planning Act and registration of the common elements condominium corporation under the Condominium Act) which compliance shall be obtained by the builder at its sole expense, on or before closing.

A purchase agreement may also contain rights of termination where one or the other of the parties is at fault.

Prohibited Conditions of Sale

For greater certainty, the builder is not permitted to make the purchase agreement conditional upon:

- Receipt of a building permit;
- Receipt of an occupancy permit; and
- Completion of the dwelling.

Only conditions expressly permitted by the Addendum are enforceable by the builder. Any other conditions will be deemed void and unenforceable by the builder but will not affect the validity of the balance of the purchase agreement.

Purchaser Conditions

The purchase agreement may include any condition that is for the sole benefit of the purchaser which the parties may agree upon. Examples might include conditions in favour of the purchaser relating to: the sale of an existing dwelling; obtaining purchaser mortgage financing; or approval of a basement walkout.

6. FIRM OR A TENTATIVE OCCUPANCY DATE OPTION

Firm or Tentative Occupancy Transaction

Builders must elect to offer either: a Firm Occupancy Date from the outset; or a Tentative Occupancy Date, i.e., specify an anticipated Occupancy Date which is tentative and which may be extended from time to time for up to 120 days on two occasions without the purchaser's consent as long as Occupancy is not extended beyond the Outside Occupancy Date.

Firm Occupancy Date Option

A builder may choose to offer a Firm Occupancy Date. Where the Firm Occupancy Date option is chosen, the builder cannot extend the Firm Occupancy Date without paying compensation to the purchaser, except in cases of *Unavoidable Delay* (see section 8 below) or where the builder and purchaser mutually agree to amend the purchase agreement (see section 7 below).

Builders who offer a Firm Occupancy Date must use the Firm Occupancy Date POTL Addendum which is simpler as it does not contain information concerning tentative dates or multiple extensions of such dates.

Tentative Occupancy Date Option

A builder may choose the Tentative Occupancy Date option. Builders who offer Tentative Occupancy Dates must use the Tentative Occupancy Date POTL Addendum. This version of Addendum contains terms relating to extensions of the Tentative Occupancy Dates, provision for notice of such extensions, and requirements for setting the Firm Occupancy Date.

Setting New Occupancy Dates under the Tentative Occupancy Date Option

With the Tentative Occupancy Date option, you start by agreeing upon a First Tentative Occupancy Date with your purchaser.⁴ If the POTL home will not be ready by this time, you can extend the Occupancy Date by up to 120 days. You can do so by either setting a Second Tentative Occupancy Date or setting a Firm Occupancy Date. If you need to exercise this right to extend, you must notify your purchaser at least 90 days before the First Tentative Occupancy Date.

If you have set a Second Tentative Occupancy Date and the POTL home will still not be ready by this date, you are entitled to extend up to an additional 120 days, by properly setting a Firm Occupancy Date. Again, at least 90 days prior written notice is required.

⁴ Set out in the Statement of Critical Dates.

These first two extensions of up to 120 days each are available to you (upon giving proper notice) and you need not pay Delayed Occupancy Compensation. However, once you have set a Firm Occupancy Date, your only right to extend⁵ is to set a Delayed Occupancy Date and Delayed Occupancy Compensation will be payable.

Notice for Setting a Second Tentative Occupancy Date

To set a Second Tentative Occupancy Date, you must:

- Give written notice to your purchaser at least 90 days before the First Tentative Occupancy Date; and
- Choose a Second Tentative Occupancy Date that is 120 days or less after the first Tentative Occupancy Date. If you are confident a full 120 days is not needed, then you can set an earlier Second Tentative Occupancy Date – for example, 30, 60 or 85 days after the First Tentative Occupancy Date – or, you can go straight to setting a Firm Occupancy Date. The Second Tentative Occupancy Date must be a Business Day provided it is prior to the Outside Occupancy Date.

Notice for Setting a Firm Occupancy Date

If you have given proper notice of a Second Tentative Occupancy Date but still cannot complete the POTL home by this date, you may further extend Occupancy by up to an additional 120 days by setting a Firm Occupancy Date.

To set a Firm Occupancy Date at this stage, you must:

- Give written notice at least 90 days before the Second Tentative Occupancy Date; and
- Choose a Firm Occupancy Date that is 120 days or less after the Second Tentative Occupancy Date.

Possible Automatic Firm Occupancy Date

A Firm Occupancy Date may also be set automatically in two circumstances:

- If you fail to give a full 90 days written notice for the first extension, then the First Tentative Occupancy Date becomes the Firm Occupancy Date; and
- If you exercise the first extension properly but fail to give a full 90 days written notice for a subsequent extension, then the Second Tentative Occupancy Date becomes the Firm Occupancy Date.

Setting a Delayed Occupancy Date

In connection with either the Firm Occupancy Date Option or the Tentative Occupancy Date Option, if you cannot complete the home for occupancy by the Firm Occupancy Date, and your purchaser does not want to extend the Firm Occupancy Date by mutual agreement, you can still set a Delayed Occupancy Date despite your purchaser's wishes. You can do this because, by the terms of the Addendum, your purchaser was made aware that this could be necessary. However, if you delay the Occupancy this way, your purchaser is entitled to Delayed Occupancy Compensation.

To achieve this further extension you are required to:

- Choose a Delayed Occupancy Date; and

⁵ You may also be able to extend if both parties mutually agree to do so (see section 7 below) or in a case where Unavoidable Delay exists (see section 8 below).

- Give at least 10 days written notice. If you do not provide 10 days prior written notice as required, Delayed Occupancy Compensation is payable for an additional 10 days (i.e., from the date the notice should have been given).

If you choose a Delayed Occupancy Date that is beyond the Outside Occupancy Date, then your written notice setting the Delayed Occupancy Date must include a statement explaining that your purchaser need not accept the full delay and will have the right to terminate the purchase agreement during the 30-day Purchaser's Termination Period after the Outside Occupancy Date. This right to terminate is further described in section 11 of this Bulletin.

As explained earlier, the Outside Occupancy Date is 365 days after:

- The Firm Occupancy Date when using the Firm Occupancy Date option for the transaction; or
- The earlier of the Second Tentative Occupancy Date or the Firm Occupancy Date when using the Tentative Occupancy Date option for the transaction.

In many cases, this date will be earlier than the "latest possible" Outside Occupancy Date given on the Statement of Critical Dates.

7. CHANGING CRITICAL DATES BY MUTUAL AGREEMENT

The Addendum sets out a structure for setting, extending and/or accelerating⁶ Critical Dates. Critical Dates may be amended by mutual agreement but only on the following basis:

- The builder and purchaser may at any time, after signing the purchase agreement, agree in writing to extend or accelerate one or more Critical Dates, (e.g., First Tentative Occupancy Date, Second Tentative Occupancy Date, Firm Occupancy Date or Delayed Occupancy Date), in each case to a new specified calendar date.
- The amendment must provide that it is being made voluntarily; that the builder and purchaser acknowledge that the purchaser has no obligation to sign the amendment; and that the purchase transaction will still be valid if the purchaser does not sign the amendment.
- The amendment must include a new revised Statement of Critical Dates.
- Also, since any such change may affect the Delayed Occupancy Warranty, any request by the builder to extend a Critical Date to a later date must include a written statement that:
 - i. Discloses to the purchaser that the signing of the amendment may result in the loss of Delayed Occupancy Compensation, as described in section 7 of the Addendum⁷;
 - ii. Unless there is an express waiver of compensation, describes in reasonable detail the cash amount, goods, services or other consideration which the purchaser accepts as compensation; and
 - iii. Contains a statement that the purchaser waives compensation or accepts the compensation, noted in item ii above, in either case, in full satisfaction of any Delayed Occupancy compensation otherwise payable by the builder.

Sample forms of amendment can be found on Tarion's BuilderLink (formerly the Builder Portal) or upon request to Tarion.

If the purchaser for his or her own purposes requests the change(s) in date(s), the only requirements that apply are: that the amendment be in writing; that the new date(s) be calendar dates; that the amendment include a new Statement of Critical Dates; and that items i, ii and iii, immediately above, do not apply.

⁶ The rules for extending and accelerating dates are more stringent for pre-2012 Addendum forms.

⁷ Section 9 of the pre-2012 Addendum forms.

A builder is permitted to include a provision in a purchase agreement allowing the builder a one-time unilateral right to extend a Firm Occupancy Date or Delayed Occupancy Date, as the case may be, one (1) Business Day to avoid the necessity of tender where a purchaser is not ready to complete the transaction on the Firm Occupancy Date or Delayed Occupancy Date, as the case may be. Delayed Occupancy Compensation will not be payable for such period and the builder may not impose any penalty or interest charge on the purchaser.

The purchaser and builder may agree in the purchase agreement to any unilateral extension or acceleration rights that are unilaterally exercisable by the purchaser.

8. UNAVOIDABLE DELAY

The builder may extend a First Tentative Occupancy Date, a Second Tentative Occupancy Date, a Firm Occupancy Date and/or a Delayed Occupancy Date, as the case may be, without penalty, in certain circumstances if there is an Unavoidable Delay.

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.

If Unavoidable Delay occurs, the builder may extend the relevant dates by no more than the length of the Unavoidable Delay Period. The builder can implement this extension without the approval of the purchaser and without the requirement to pay Delayed Occupancy Compensation in connection with the Unavoidable Delay, provided the requirements of the Addendum are met.

When an Unavoidable Delay arises, the builder must provide the purchaser with written notice describing the delay along with an estimate of the duration of the delay. The builder must advise the purchaser as soon as possible when the delay has ended.

When the delay has ended, the builder must provide written notice to the purchaser setting out a brief description of the Unavoidable Delay, identifying the date of conclusion of the Unavoidable Delay Period, and setting new future Critical Dates, (i.e., First Tentative Occupancy Date, Second Tentative Occupancy Date, Firm Occupancy Date, Delayed Occupancy Date, Outside Occupancy Date, and the last day of the Purchaser's Termination Period, as the case may be). The new dates are calculated by adding to the existing Critical Dates the number of days of the Unavoidable Delay Period, provided that the new Firm Occupancy Date or Delayed Occupancy Date (if applicable) must be at least 10 days after the giving of notice, unless the builder and purchaser agree otherwise. The notice must set out as calendar dates all the new or confirmed Critical Dates.

In the context of an Unavoidable Delay either the builder or the purchaser may request in writing earlier new dates, and the other party's consent to the earlier dates shall not be unreasonably withheld.

If an Unavoidable Delay occurs, the builder should review carefully the sections of the Addendum to ensure that all obligations are complied with. Failure to comply with the Addendum requirements may result in the builder having to pay Delayed Occupancy Compensation for the period for which an Unavoidable Delay is claimed.

9. BUILDING CODE - CONDITIONS OF OCCUPANCY

On or before the Date of Occupancy, the builder is required to deliver to the purchaser either:

- An Occupancy Permit (as defined in the Addendum); or
- If an Occupancy Permit is not required under the Ontario Building Code (OBC), a signed written confirmation by the builder that all conditions of Occupancy under the OBC have been fulfilled and Occupancy is permitted under the Building Code.

However, if the builder and the purchaser agree that the purchaser shall be responsible for certain conditions of Occupancy, then without changing the statutory requirements for an Occupancy Permit, the purchaser may not be permitted to refuse to complete the interim occupancy closing on the basis that such conditions have not been completed. Also the builder is required to deliver a modified form of written confirmation which confirms completion of all OBC conditions of Occupancy but excluding any conditions which the purchaser agreed to complete.

If the builder cannot satisfy these requirements, the builder is required to set a Delayed Occupancy Date (or new Delayed Occupancy Date) on a date that the builder reasonably expects to have satisfied the requirements, and to comply with the provisions of the Addendum dealing with setting Delayed Occupancy Dates and paying Delayed Occupancy Compensation. Delayed Occupancy Compensation is not payable, however, if the inability to provide Occupancy is caused by the failure of a purchaser to fulfill any conditions of Occupancy for which the purchaser is contractually responsible.

10. DELAYED OCCUPANCY COMPENSATION

The builder warrants to the purchaser that, if Occupancy is delayed beyond the Firm Occupancy Date (other than by mutual agreement in writing as described in section 7 of this Bulletin or as a result of Unavoidable Delay), then the builder must compensate the purchaser up to a total amount of \$7,500, which amount includes: (i) payment to the purchaser of a set amount of \$150 a day for living expenses for each day of delay until the date of Occupancy, or the date of termination of the purchase agreement (if applicable); and (ii) any other expenses (supported by receipts) incurred by the purchaser due to the delay.

Delayed Occupancy Compensation is payable only if:

- Occupancy occurs, or the purchase agreement is terminated under specified circumstances (see section 11 below); and
- The purchaser's claim is made within one (1) year after Occupancy; or after termination of the purchase agreement, as the case may be. (See section 12 below).

If the builder gives written notice of a Delayed Occupancy Date to the purchaser less than 10 days before the Firm Occupancy Date, Delayed Occupancy Compensation is payable from 10 days before the Firm Occupancy Date.

If the builder gives written notice of a Delayed Occupancy Date to the purchaser more than 90 days before the Final Tentative Occupancy Date instead of setting a Firm Occupancy Date, Delayed Occupancy Compensation is payable from the date that is 120 days after the Final Tentative Occupancy Date.

Living expenses are direct living costs such as costs for accommodation and meals. A set daily amount of \$150 per day for living expenses is payable and receipts are not required. The purchaser must, however, provide receipts in support of any claim for other Delayed Occupancy Compensation, such as for moving and storage costs. Submission of false receipts may disentitle the purchaser to any Delayed Occupancy Compensation in connection with a claim.

11. TERMINATION OF THE PURCHASE AGREEMENT

Termination on Consent

The builder and the purchaser may terminate the purchase agreement at any time by mutual written consent.

Termination after Outside Occupancy Date

If for any reason (other than breach of contract by the Purchaser), Occupancy of the POTL home has not been given to the purchaser by the Outside Occupancy Date then the purchaser has 30 days to terminate the purchase agreement by written notice to the builder. If the purchaser does not provide written notice of termination, then the Delayed Occupancy Date is the date set by the builder in the written notice or if the builder fails to set a date, the Delayed Occupancy Date is deemed to be 90 days after the Firm Occupancy Date.

Termination for Failure to Specify Dates

The purchaser may terminate the purchase agreement by written notice to the builder if all applicable Critical Dates in the Statement of Critical Dates are not completed with calendar dates; or any Critical Date is expressed as being subject to change depending upon the happening of an event.

Termination Relating to Conditions of Sale

If the purchase agreement is subject to Early Termination Conditions, the purchase agreement may terminate if an Early Termination Condition is not satisfied (and is not waived in the limited instances where the Addendum permits a condition to be waived), by the required date. The builder is obliged to take all commercially reasonable steps within the builder's power to satisfy such Early Termination Conditions.

Return of Monies on Termination

If the purchase agreement is terminated (other than as a result of breach of contract by the purchaser), the builder must return all monies paid by the purchaser, including deposits and monies for extras and upgrades, within 10 days with interest from the date each amount was paid to the builder to the date of return of the amount.

12. 2012 CHANGES

Disclosure of any Closing Adjustments

The Addendum sets out obligations on the builder with respect to disclosure of any and all adjustments or changes to the purchase price or balance due on Closing. These include:

- There must be a Schedule B attached (in the form prescribed by the Addendum).
- Schedule B has two separate parts:
 - First, is Part I, under the heading "Stipulated Amounts/Adjustments." These are additional charges, fees or other anticipated adjustments to the final purchase price or balance due on closing, the dollar value which is stipulated in the Purchase Agreement and set out in the Addendum.
 - Secondly, is Part II, under the heading "All Other Adjustments – to be determined in accordance with the Purchase Agreement." These are additional charges, fees or other anticipated adjustments to the final purchase price or balance due on Closing which are to be determined after signing the purchase agreement and otherwise in accordance with the terms of the purchase agreement.
- Please note: Only items set out in Schedule B (or an amendment to Schedule B) can be the subject of adjustment or change to the purchase price or balance due on closing. (In other words, adjustments or changes to the purchase price or balance due on closing must be disclosed in a single schedule – Schedule B.) However, not all details must be set out in Schedule B. As long as the item is disclosed, a cross-reference to another part of the purchase agreement for more details is acceptable.

- You as the builder also agree that you will not charge as an adjustment or readjustment to the purchase price, any reimbursement for a sum paid or payable by you to a third party unless the sum is ultimately paid to the third party either before or after Closing.⁸ If you as the builder charge an amount in contravention of this requirement, you must forthwith readjust with the purchaser. (This requirement however is subject to the express qualification that it will not restrict or prohibit payment for items disclosed in Part I of Schedule B which have a fixed fee; nor shall it restrict or prohibit the builder and purchaser from agreeing on how to allocate as between them, any rebates, refunds, or incentives provided by the federal government, a provincial and municipal government or an agency of any such government, before or after Closing. Therefore, if you are adjusting for an item, e.g., development charges which may result in rebates because of a government incentive program, you need to state expressly how rebates will be allocated. Otherwise the rebates will be subject to readjustment.)

Other 2012 Changes

Other noteworthy changes to the 2012 Addendum form include:

- The 2008 rules placed several restrictions on what Critical Dates could be extended or accelerated and if so, on what basis. The new rules remove the restrictions as to what dates can be changed and lessen the restrictions on how the changes are accomplished (see section 7).
- If a builder neglects to set a Delayed Occupancy Date when required, then the form deems the Delayed Occupancy Date to be 90 days after the Firm Occupancy Date.
- The new form provides standard occupancy licence language (see section 13 below).
- To correspond with 2012 changes to the OBC, the builder now needs to simply provide the Occupancy Permit required by the OBC or, but only if no such permit is required, provide the purchaser a certificate from the builder that all conditions of occupancy under the OBC have been satisfied.
- If Delayed Occupancy Compensation is payable, it need not be paid until Closing of the sale transaction – although interest will be payable on such amount (see s.7(g) of the Addendum).

13. OCCUPANCY LICENCE

If the purchaser accepts or is required to accept Occupancy in advance of receiving a title transfer of the home, then the occupancy licence provisions of Schedule C shall apply. Schedule C sets out terms of an occupancy licence much like the occupancy provisions which apply for interim occupancy under the *Condominium Act*. These terms are automatically incorporated by reference, although the builder and purchaser may agree upon additional provisions relating to Occupancy, provided such provisions do not derogate from, do not conflict with, and are not inconsistent with the provisions of Schedule C.

⁸ This is already a term and condition of registration as set out in Regulation 894.

14. HOW A HOMEOWNER MAKES A CLAIM

Compensation where there is Mutual Agreement

Delayed Occupancy Compensation may be payable in at least two circumstances. First, if a builder knows the Firm Occupancy Date cannot be met, the builder may speak to the purchaser and mutually agree upon a new Firm Occupancy Date. In this scenario compensation may be waived or payable in accordance with the amending agreement referred to in section 7 above.

Second, the builder may miss the Firm Occupancy Date, without amending the purchase agreement. Occupancy would occur on a Delayed Occupancy Date set by the builder (or deemed set if the builder fails to do so). In this scenario, the purchaser is asked to make a claim to the builder for compensation as soon as practicable after Occupancy and must include any receipts which evidence any part of the purchaser's claim except daily living expenses for which receipts are unnecessary and should not be submitted. The builder is required to assess the purchaser's claim by determining the amount of Delayed Occupancy Compensation payable based on the rules set out in the Addendum and the receipts provided by the purchaser, and the builder must promptly provide that assessment to the purchaser. The purchaser and the builder are required to use reasonable efforts to settle the claim and when the claim is settled, the builder must complete an acknowledgement provided by Tarion and signed by both parties which:

- Includes the builder's calculation of the Delayed Occupancy Compensation payable;
- Describes in reasonable detail the cash amount, goods, services, or other consideration which the purchaser accepts as compensation (the "Compensation"), if any; and
- Contains a statement by the purchaser that the purchaser accepts the Compensation in full satisfaction of any Delayed Occupancy Compensation payable by the builder.

A true copy of the signed acknowledgement must be provided by the builder to Tarion, if Tarion so requests.

When the Parties Cannot Agree

If the builder and purchaser cannot come to terms, the purchaser may submit a claim to Tarion, up to one (1) year after Occupancy (or termination of the purchase agreement, if applicable). Tarion will process the claim in accordance with the rules and regulations relating to Delayed Occupancy Compensation set out in the Regulations and the Addendum and generally described as follows.

Upon receipt of Delayed Occupancy claim from a purchaser, Tarion will advise the builder of the claim and ask for the builder's input. Tarion will also ask the builder to resolve the claim within 30 days. If the claim is not resolved within such 30-day period Tarion will conduct a conciliation (usually a desk assessment) to assess the claim and thereafter issue a Warranty Assessment Report to the builder and the purchaser. If the claim is valid, Tarion will pay the compensation due to the purchaser. Tarion will then invoice the builder for such amount plus an administrative fee of \$500 and applicable taxes. If applicable, the conciliation will be assessed as a "chargeable conciliation" and if so, will be noted on the builder's record and Tarion's website.

Chargeable Conciliations

A conciliation will be deemed "chargeable" if Delayed Occupancy Compensation is payable and was not paid within the above-noted 30-day period.

A conciliation may be assessed as "not chargeable" if one of the following applies:

- The builder offers proper compensation in a timely manner but the purchaser rejects the offer.
- The builder and purchaser make an agreement for compensation but the purchaser refuses to sign an acknowledgement.

Appeal Rights

If a purchaser does not agree with a Delayed Occupancy Warranty Assessment Report, he or she may request a Decision Letter and a right of appeal to the Licence Appeal Tribunal is available thereafter.

A builder who disputes a Delayed Occupancy Warranty Assessment Report and/or the chargeability of the conciliation may request an arbitration according to the rules and criteria relating to Tarion's "Builder Arbitration Forum" (see Builder Bulletin 41).

15. WHICH DELAYED OCCUPANCY WARRANTY APPLIES

Timing Transition Rules

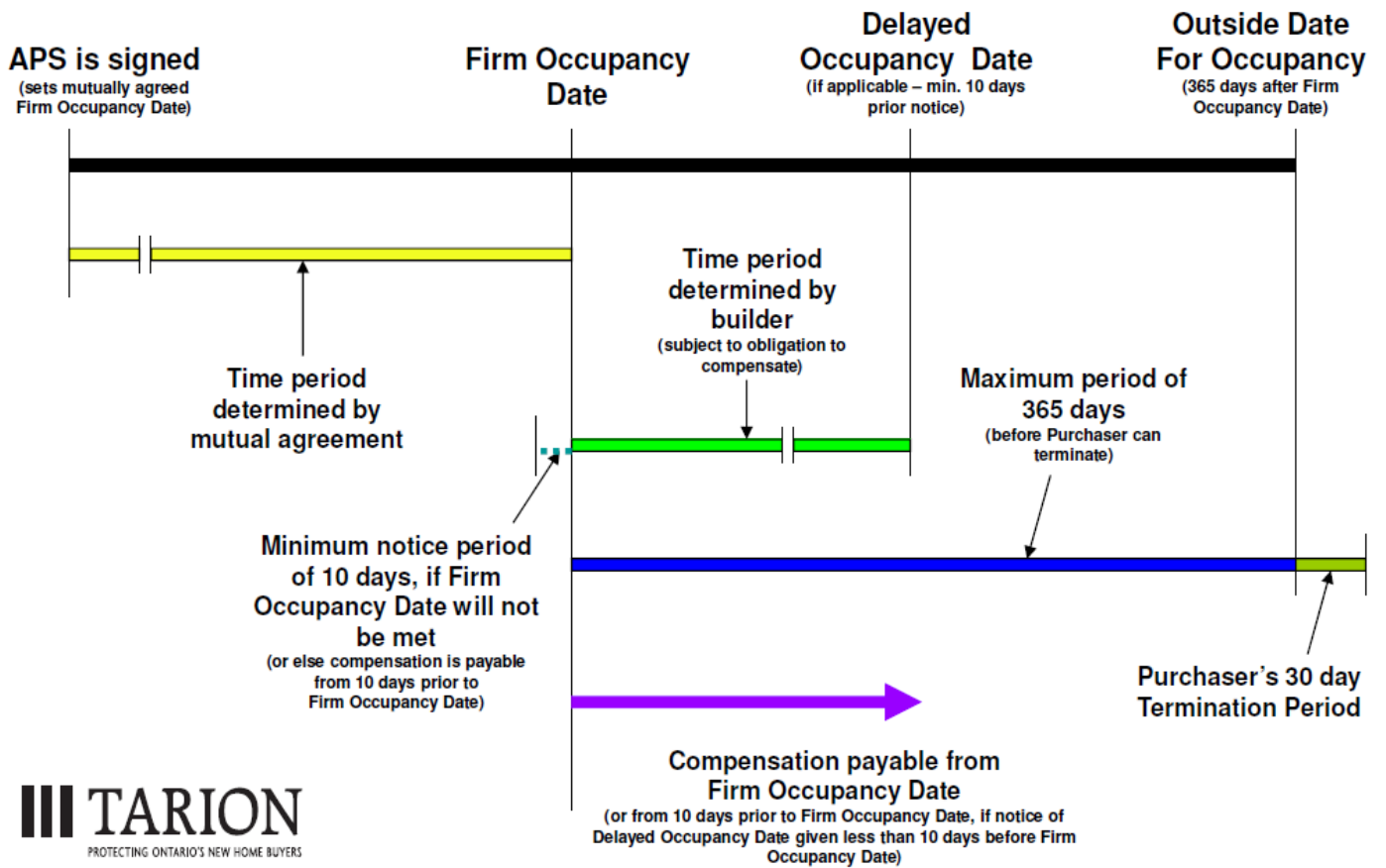
The Delayed Occupancy Warranty described in this Bulletin in general applies to all purchase agreements for POTL homes that are entered into on or after October 1, 2012 but subject to the following transition rules:

- As a general rule all POTL homes for which the first arm's length purchase agreement is signed before October 1, 2012, are governed by the 2008 freehold Addendum forms.
- If the first arm's length purchase agreement in a POTL Freehold Project is signed after July 1, 2008 and before October 1, 2012, then (unless the builder elects otherwise) the whole project is subject to the pre-2012 Delayed Closing rules.
- If the first arm's length purchase agreement in the POTL Freehold Project is signed on or after October 1, 2012, then the new POTL/CEC Addendum forms must be used.
- However, a builder may elect to use the new POTL/CEC Addendum forms for any POTL home transaction signed on or after July 1, 2012.

signed
"Howard Bogach"
Registrar

Appendix A

POTL/CEC Firm Occupancy Date Timeline Schematic



Appendix B

POTL/CEC Tentative Occupancy Date Timeline Schematic

