



About Condo

DETERMINING AND EXTENDING THE CONFIRMED OCCUPANCY DATE

In new condominium developments, title to a new unit cannot be transferred until it actually exists as a legal division of land. Such legal divisions are not established until both the declaration and description creating the condominium are registered at the relevant Land Titles Office. (Prior to that, the unit is an indivisible part of the larger parcel of property on which the condominium is being built.)

Before registering the declaration and description, the developer (declarant) must satisfy a variety of requirements, both legal and as imposed by municipal planning approval authorities. As a result, it is typical that units are constructed and ready to be occupied some time before the condominium is ready to be registered.

The *Condominium Act, 1998* (the "Act") allows developers to insert a provision in an agreement of purchase and sale that either imposes a requirement or offers the option for the unit purchaser to take occupancy of the unit prior to registration and completion of the sale. The Act calls this occupancy period "interim occupancy." During this period, the Act allows the developer to collect a "monthly occupancy fee" from the purchaser that covers some of the developer's costs of the unit in accordance with the relevant sections of the Act. (See our memorandum on Occupancy Fees from March, 2007.)

For non residential condominiums, there are no current restrictions on setting or extending occupancy dates. Thus, in such cases the issue will be dealt with in accordance with the contractual provisions and, if necessary to resolve a dispute, common law principles. The situation is not the same for residential condominiums.

Current regulations made under *Ontario New Home Warranty Plan Act* (ONHWPA regulations)¹ require that every agreement of purchase and sale for a new or proposed residential condominium unit shall include either a "Tentative Occupancy Date" or a "Confirmed Occupancy Date," clearly identified as such. This requirement is not always strictly followed. In some agreements the date is called an "interim closing date" (harking back to sales procedures that were common prior to the coming into force of the Act) or even just a "closing date". In our view this is simply confusing for purchasers and their solicitors who may not be as familiar with the relevant legislation and is not advisable practice. We recommend that agreements refer to the commencement of occupancy simply as an "occupancy date", and, following the language of the ONHWPA regulations, specify whether the same is "tentative" or "confirmed."

¹ It has been announced that these regulations are under review. However, it is not certain whether or when these will be completed, approved and brought into effect.

Since possible delays in construction cannot always be anticipated, it is usually advisable for developers to identify only tentative occupancy date. Then the developer would be entitled, subject to a requirement for compliance with the relevant provisions of the ONHWPA regulations to set *almost* any date that it is reasonably expected the unit will be ready for occupancy as the confirmed occupancy date. Thereafter, this date can also be extended from time to time, for a limited time, without penalty to the developer, so that the developer can deal effectively with the many contingencies of construction.

Since these regulations can be complex to navigate, below we provide some simplified guidelines. These guidelines provide information about setting and extending confirmed occupancy dates. However, they should not be relied on by developers without undertaking discussion with legal counsel and marketing, planning and construction managers, to help ensure that the occupancy dates are set with due consideration of all relevant contingencies and objectives.

These guidelines can also provide information that is useful to purchasers and realtors of new condominium units who are trying to determine whether occupancy dates have been properly set or extended, or at least when the occupancy date should be treated as firm (subject to occupancy not being permitted by the municipal authority); however, reference to the actual legislation and consultation with legal counsel would be needed before making firm conclusions or taking any action based on what is written here.

Failure by the developer to observe and comply with the provisions of the ONHWPA regulations carefully could give rise to a claim by the unit purchaser for compensation of direct costs incurred as a result of delayed occupancy. The current statutory limit for such compensation is \$100 per day for living expenses, and a total of \$5,000 in total. Entitlement to compensation arises after 5 days' unwarranted delay in occupancy. In some cases, a purchaser is not required to prove all of his or her expenses in order to be entitled to receive compensation.

COMMENTS RE SERVICE

In the guidelines set out in this memo several statutory time periods are mentioned in regard to the delivery of notices. The following are some general points to be kept in mind regarding the delivery of such notices:

1. They must be in writing.
2. Service can be effected either by personal service or mail.
3. If there multiple purchasers of a unit, the notice must be sent to each of them, not to only one of them.
4. In the case of personal service, it should be considered effected on the day the service is done.
5. For service by mail, the ONHWPA regulations require that 5 business days (i.e., not including weekends and holidays) be added to the prescribed notice periods. (Therefore, for example, a 65+ days' notice period becomes at least 70+ days.)

6. In addition, usual legal practice in Ontario (as in the Rules of Practice that govern civil litigation) is to calculate the time for delivery of notice by excluding both the day on which the notice is sent and the day of the event (i.e., the confirmed occupancy date). Therefore, to be conservative, it is usually prudent to add (2) days onto the applicable minimum notice period. E.g., if there is a 10-day notice period for an event intended to occur on June 20, you would determine the appropriate date of service by excluding June 20, counting 10 days back from June 19 (i.e., June 10), then go one day further back (to June 9) and treat that as the ideal date for service of the notice.

SIMPLIFIED GUIDELINES

1. ESTABLISHING THE TENTATIVE OCCUPANCY DATE

In setting a tentative occupancy date a significant consideration is to figure out at what point it is likely a confirmed occupancy date can be determined.

As the following guidelines indicate, the confirmed occupancy date must be able to be determined at least 90 days prior to the tentative occupancy date. Additionally, the confirmed date has to be established within 30 days of completion of the roof structure (or such earlier date or event as is established in the agreement of purchase and sale).

This is because such periods and points in time determine when the developer is required to send notice to the purchaser of the confirmed occupancy date; failing which, the tentative occupancy date is deemed to be the confirmed occupancy date and therefore is the date from which compensation will be calculated if occupancy occurs more than 5 days later.

It would therefore be advisable for the tentative occupancy date to be a date that is no earlier than 120 days later than the developer's most realistic estimate (i.e., to the extent possible taking into account both typical and unknowable delays) as to when completion of the roof structure (or such earlier date or event) will occur.

2. ESTABLISHING THE CONFIRMED OCCUPANCY DATE

The confirmed occupancy date can be virtually any date the developer desires, provided that notice of the date can be sent out within the time frame determined by the following requirements:

1. at least 90 days before the tentative occupancy date;
and
2. at least 120 days before the proposed confirmed occupancy date;
and
3. no later than 30 days after completion of the unit's roof structure (or such earlier date or event as is set out in the Agreement of Purchase and Sale).

If timing for the notice to the purchaser meets those three requirements, then the developer has properly established the confirmed occupancy date. Otherwise, the tentative occupancy date shall be the Confirmed Occupancy Date.

It is advisable for developers to institute reminder systems that will help avoid the risk of missing the deadline for establishing and notifying the purchaser of the confirmed occupancy date. The system should alert the developer's staff at least 120 days before the tentative occupancy date so that there is at least 30 days to decide on a confirmed occupancy date and send notice to the purchaser on time.

3. EXTENDING THE CONFIRMED OCCUPANCY DATE

Once the confirmed occupancy date is set, it is still possible to extend it without penalty or any requirement to compensate the purchaser. However, again, this can only be done in conformity with the ONHWPA regulations.

The first opportunity available to the developer to extend the confirmed occupancy date permits extending the date by either *up to 15 days* or *up to 120 days*, depending on the timing of notice to the purchaser.

Whether the developer can extend 15 or 120 days depends on when notice of the extension can be provided to the purchaser:

1. If notice can be delivered at least 65 days earlier than the already established confirmed occupancy date, then the developer can extend the confirmed occupancy date by up to 120 days.
2. If the notice date is later than 65 days prior to the already established confirmed occupancy date, but at least 35 days before it, then the developer can extend the confirmed occupancy date by only up to 15 days.

Note that the difference in the maximum permitted extension created by whether 65+ days' notice or 35-64 days' notice to the purchaser is given is significant. Here is another example of the importance for developers to have an effective reminder system in place so that they can take advantage of the longest available period if it is available.

Also note that the developer does not have the option of extending the date several times up to the 15-day or 120-maximum. The ONHWPA regulations provide only a one-time opportunity to extend the date for up to the applicable maximum.

The second opportunity to extend the confirmed occupancy date arises only after a first extension has been made on 65+ days' notice.

In other words, if in the first instance the developer was only able to give 35 to 64 days' notice, this second opportunity does not exist.

As in other cases, the right to extend the confirmed occupancy date is tied to the date on which notice of the extension can be given to the Purchaser. If notice can be given at least 35 days earlier than the date to which the confirmed occupancy was first extended then the developer can extend the date for up to another 15 days without penalty.

An example might be in order.

This example is illustrative only and presumes delivery of notices by personal service.

- Assume the developer's agreement of purchase and sale for a proposed condominium unit indicates for an occupancy date of July 1, expressly stated to be tentative. Therefore, the developer is entitled to establish a confirmed occupancy date.
- Assume the developer wishes to set a confirmed occupancy date of October 1.
- Also assume that the roof structure of the unit is completed on February 1 (in not a leap year).

Therefore:

- if the confirmed occupancy date is to be October 1, notice to the purchaser must be sent:
 - a. at least 90 days before July 1;
 - b. at least 120 days before October 1; and
 - c. no more than 30 days after February 1;

In this example, satisfying 'a' will satisfy 'b', since there are more than 30 days between July 1 and October 1. 90 days before July 1 is April 2. However, if we exclude the date of the event and the date of service, then delivery should occur no later than March 31.

Since the roof structure was completed on February 1, 'c' will be satisfied if the notice is sent no later than March 3 (30 days after February 1, presumed not to be a leap year). Therefore, although the other triggers indicate that notice would be effective if delivered by March 31, in fact it would need to be delivered sometime between February 1 and March 3. This will satisfy all three criteria. If all three criteria could not be satisfied (i.e., if the roof structure was not completed until March 3), then the tentative occupancy date (July 1) would become the confirmed occupancy date.

So, having set the confirmed occupancy date for October 1, the developer now wishes to extend the date to December 31. This is an extension of less than 120 days, but more than 15. Therefore, notice of the extension will need to be sent to the purchaser at least 65 days before the established confirmed occupancy date, October 1, not including October 1 or the date of delivery. Therefore, delivery of the notice should occur by no later than August 24.

Presuming the developer is successful in this timing, the developer would then have one last option to extend up to another 15 days – to, at maximum, January 15 – if notice can be sent to the purchaser by no later than November 24 (35 days prior to December 31, excluding that date and the date of delivery).

Thus, the occupancy date of July 1 that was set out in the agreement of purchase and sale could be changed to an occupancy date of January 15 in the following year (or later, if the developer had chosen to extend up to the full 120 days at the first extension opportunity, or had selected an even later confirmed occupancy date in the first place).

Finally, there is yet a further right of the developer to extend the occupancy date.

4. EXTENDING THE OCCUPANCY DATE ON SHORTER NOTICE

If the home is not substantially complete and ready for occupancy at the time of the ultimately determined occupancy date, the developer is still entitled to extend the date until the unit is complete and ready for occupancy provided the agreement allows for this. (If it does not, then a purchaser might successfully claim that the delays in occupancy go to the heart of the deal and seek to nullify the contract.)

However, as noted above, the purchaser can demand compensation (up to \$5000 in total) in accordance with the ONHWPA regulations for any additional delay (over and above the permitted extensions discussed above) that is greater than 5 days, as is the purchaser's right as well if the requirements set out in the above guidelines are not duly observed.

Michael H. Clifton (April 2007)