



Blaneys on Building

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This newsletter is designed to highlight new issues of importance to the development and construction industry. We hope you will find it interesting, and welcome your comments.

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ALERT: TARIION REVISED ADDENDUM FORMS FOR FREEHOLD AND CONDOMINIUM

Tammy A. Evans

Tarion has yet again introduced revised Tarion Addendum forms that are required to be attached to every agreement of purchase and sale for both freehold and condominium new home sales. These revisions are the result of internal review and industry consultation over the past two years. There are now revised Tarion forms for freehold and condominium sales and new forms (for both tentative and firm occupancy dates) for parcels of tied land attached to common element condominiums (POTL/CEC forms).

These new forms are available for use from July 1, 2012, and most importantly, are *required* to be used for all freehold sales **from and after October 1, 2012**, and for any new condominium project (or phase) where the first sale to an arm's length purchaser is signed on or after October 1, 2012.

There are a number of amendments in the new forms that have been made to clarify language in the existing forms as well as formatting changes. The most substantive change however, which will affect all vendor's standard form agreements, is that all adjustments to the purchase price or clos-

ing adjustments which are typically located within the body of the agreement are also to be located in a separate schedule - new Schedule B to the Tarion Addendum - to be attached to the Agreement. This new Schedule B is divided into two parts - Part I requires a list of all adjustments where there is a value specifically set out in the Agreement. Part II requires a list of all adjustments where the value of the adjustment is not determined prior to signing the agreement. Of critical importance - if the adjustment is not contained within the new Schedule B, it cannot be included as an adjustment on closing.

Tarion has issued new Builder Bulletins to assist in understanding the new forms which can be located on Tarion's website - www.tarion.com. Feel free to contact the writer should you have any questions with respect to the above. ■

UPDATE ON GLASS BALCONY GUARDS: NEW REQUIREMENTS UNDER THE ONTARIO BUILDING CODE

Marc P. Kemerer

In the summer of 2011 there were a number of instances of “glass panel failure” at Toronto condominium sites in both Regent Park and the Financial District. In these cases, glass from bal-

“...glass from balcony panels shattered onto the street below, causing immediate safety concerns for occupants, pedestrians and persons using the commercial/ retail podium terraces below.”



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cony panels shattered onto the street below, causing immediate safety concerns for occupants, pedestrians and persons using the commercial/ retail podium terraces below. These were the most highly publicized of 30 such incidents in 2010 and 2011 involving 11 high rise buildings in Toronto.

In response to this rash of panel failures, the City of Toronto retained an independent engineer to review the issue and to meet with representatives of the developers of the buildings where the failures had occurred. The result of this investigation, set out in a City Staff report dated 3 November 2011, was a determination that improvements were required in the following areas:

- design of the balcony guards incorporating glass; and
- Ontario Building Code performance load and material standards for glass panels.

The staff recommendations in that report, adopted by the City's Planning and Growth Management Committee at its meeting of November 29 and 30, 2011, were that the City:

- review levels of service undertaken in the issuance of building permits and inspections for glass balcony guards, and
- recommend that emergency amendments be made to the National and Ontario Building Codes.

It is unclear what staff mean by reviewing existing levels of service. City staff conceded to the writer that there is little more they can do provided the balcony design meets the requirement

of the Ontario Building Code (the "Code").

As a result of this limitation on their power to act, the City requested that the Province take action by amending the Code. The Province then established the Expert Panel on Glass Panels in Balcony Guards (the "Panel"). The Panel, which was comprised of 25 representatives from industry stakeholders, reported back to the Ministry of Municipal Affairs and Housing last month with a number of recommendations, including "that the [Code] be amended to provide supplementary prescriptive requirements for all glazing in interior and exterior guards in all buildings, except houses".

The Province has acted on the Panel's report by implementing amendments to the Code effective 1 July 2012 to require the use of:

- heat-strengthened laminated glass (which is less prone to shatter) when glass is close to the edge of a balcony; and
- heat-strengthened laminated glass or heat-soaked tempered glass where glass balcony guards are inset from the edge of the balcony.

Such glass is more expensive than the tempered or laminated glass previously required under the Code. Accordingly, it will now cost more for developers to fashion the clean modernist look that increasingly characterizes high rise condominium buildings. This is a cost that will likely be passed on to the consumer seeking out this aesthetic. At the same time, it will mean that the purchaser will have less to worry about while using that balcony.

It is important to note that these new require-

“...vendors/builders will now be required to make an election to be partially accountable for valid MSD claims arising during years three through seven of the seven year warranty period.”



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ments are considered by the Province to be temporary, “an interim solution...while the Canadian Standards Association develops a national standards for glass panels in balcony guards”.

Of further note, compliance with these requirements is on a go-forward basis from 1 July 2012. Existing buildings are not required to retrofit to the new Code requirements, although developers who are retrofitting buildings experiencing this problem will need to pay heed to these new standards to avoid potential litigation. ■

TARION REVISED BUILDER BULLETINS 24 AND 27: GOOD AND BAD NEWS FOR DEVELOPERS

Tammy A. Evans and Anthony D. Garber

Revised Builder Bulletin 27

Effective July 1, 2012, new home enrolment fees are reduced by \$150 per enrolled home under the Tarion Revised Builder Bulletin 27. This represents a return to pre 2010 rates. Enrolment of new homes and payment of fees continue to be required, in the case of a new freehold home, on or before issuance of building permit, and for multi-unit projects, at least 30 days before commencement of construction (dig).

Revised Builder Bulletin 24

Effective July 1, 2012, Tarion has implemented a significant overhaul to the Tarion Seven Year Warranty framework. Revised Builder Bulletin 24 makes effective 3 major changes. Firstly, it extends builder/vendor accountability for Major Structural Defects (“MSD”) throughout the full seven year warranty period. Secondly, it expands on the existing definition of MSD. Thirdly, it sets

out a detailed MSD claims process.

These changes will apply to new homes where the parties have signed an agreement of purchase and sale on or after July 1, 2012, and new condominium projects where the first arm’s length purchase agreement is entered into on or after July 1, 2012.

Builder Accountability

Prior to July 1, 2012, although the Tarion warranty period covers seven years from the warranty start date, builders/vendors were directly responsible for valid MSD claims made within the first two years from the warranty start date and Tarion carried responsibility for valid MSD claims made between years three through seven. Pursuant to the Revised Builder Bulletin 24, vendors/builders will now be required to make an election to be partially accountable for valid MSD claims arising during years three through seven of the seven year warranty period. Builders/vendors must now elect to either (i) accept full responsibility for the claim, or (ii) reimburse Tarion in an amount referred to as the “co-share payment”. Builders/vendors will continue to be fully responsible for valid MSD claims made within the first two years from the warranty start date.

If a builder/vendor elects to reimburse Tarion by way of co-share payment or otherwise does not resolve a valid MSD claim where it elected to accept full responsibility, Tarion will report the MSD claim on the Tarion website. Conciliation fees may also apply.

For valid MSD claims arising in freehold homes and condominium dwelling units, the co-share payment is calculated as being the lesser of:

“[By-law 1156-2010] was the subject of 700 appeals and was repealed by Council in 2011 with instructions to staff to bring back a new improved version.”

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- a) Tarion's cost of resolving the MSD claim(s);
- b) 5% of the sale price of the home or unit; and
- c) \$300,000.

For valid MSD claims arising in condominium common elements, the co-share payment is calculated as being the lesser of:

- a) Tarion's cost of resolving the MSD claim(s);
- b) 5% of the aggregate sale price of all of the units in the condominium project; and
- c) \$750,000.

The co-share payment is calculated on a per project basis for condominium common elements claims and on a per home basis for freehold or condominium dwelling unit claims.

Both the co-share payment and website reporting will not apply to defects that are either (a) outside the builder/vendor's control and the matter of an industry wide issue (determined on a case by case basis) or (b) related to unforeseeable changes in the groundwater table.

Expanded Definition of MSD

Revised Builder Bulletin 24 clarifies three tests for determining whether the claim represents a valid MSD claim:

1. **Failure Test:** defect(s) in work or materials that result in actual structural failure of a structural load-bearing element of a building.
2. **Function Test:** a defect that materially and adversely affects the ability of a load-bearing element of the building to carry, bear and resist applicable structural loads for the usual and ordinary service life of the element.

3. **Use Test:** any defect in work or materials that materially and adversely affects the use of a significant portion of the building (or home for freehold) for usual and ordinary purposes of a residential dwelling and having regard to any specific use provision set out in the purchase agreement for the home.

An MSD claim may arise where a defect meets one of the above tests. Even where the claim meets one of these three tests, certain exclusions may apply such as for elevating devices, heating and cooling appliances (as opposed to systems) such as furnace, air conditioner or heat pump and the standard exclusions under section 13(2) of the *Ontario New Home Warranties Plan Act*.

MSD Claims Process

Revised Builder Bulletin 24 implements a thorough procedure for MSD claims and Tarion has issued a claims schematic that helps to understand the process. We encourage readers to refer to these new procedures as needed and to contact us for any specific issues related to MSD claims. ■

A NEW AND IMPROVED CITY OF TORONTO COMPREHENSIVE BY-LAW?

Marc P. Kemerer

In 2010, City of Toronto Council adopted a City-wide comprehensive zoning by-law, By-law 1156-2010. Previous issues of Blaneys on Building have reported on that ill-fated effort: the by-law was the subject of 700 appeals and was repealed by Council in 2011 with instructions to staff to bring back a new improved version.

“The Tarion Addendum in all its new and revised forms sets out the requirements for notice delivery and time of receipt, and contemplates personal delivery, email, fax, courier or registered mail to either the purchaser directly or to his or her solicitor.”

At its meeting of 18 June 2012, the City’s Planning and Growth Management Committee (the “Committee”) reviewed the first draft of the new revised by-law. The most notable changes include: better transition (the new by-law will only apply to new applications filed with the City after it has been passed) and grandfathering provisions; improved protection for minor variances; removal of the tall building regulations (which continue to exist however as review guidelines with teeth) and restrictions on the size of retail floor area and restaurant sizes in commercial residential zones. The by-law however remains a challenging read.

In terms of the timing of approval of the new by-law, there will be a consultation period until end of September, during which time staff have been directed to attend at any community meetings sponsored by Ward Councillors. This consultation will be followed by a staff report to the 12 October 2012 meeting of the Committee reporting on the comments received from the public and recommending any changes as a result of such comments to the new by-law. A statutory public meeting on the new by-law for the purpose of considering its adoption by City Council is scheduled tentatively for a special Committee meeting in the latter half of November 2012.

As a landowner or developer, we encourage you to review the new by-law carefully to determine how your properties are impacted. To preserve your appeal rights, you are required to make oral or written submissions on the new by-law and we would be pleased to assist in this respect. ■

IS YOUR NOTICE TO PURCHASER SUFFICIENT TO AVOID DELAYED CLOSING COMPENSATION UNDER TARIION?

Tammy A. Evans

Working within the Tarion delayed closing warranty parameters, vendors are generally aware of the delayed closing compensation that may be available under Tarion to new home purchasers where the vendor has failed to meet the technical notice requirements or deliver up occupancy or possession by the applicable critical date (as defined in the Tarion Addendum).

From a practical perspective, however, notice to the purchaser of a change in critical date (eg, extension of tentative or firm occupancy date) can be tricky. We have traditionally recommended that vendors use both registered *and* regular mail for delivery of any notice required under the Tarion Addendum and/or the agreement of purchase and sale, to defend any assertion by the purchaser that the notice was not received (or often, avoided pick up). We must however consider other forms of communication in order to keep up with technology. Today’s purchasers communicate more often by email, and less often by fax transmission - which was an earlier effective means of confirming speedy delivery of notice to the purchaser or his or her lawyer.

The Tarion Addendum in all its new and revised forms sets out the requirements for notice delivery and time of receipt, and contemplates personal delivery, email, fax, courier or registered mail to either the purchaser directly or to his or her solicitor. The challenge has always been and continues to be - confirming that delivery. In a recent Licence Appeal Tribunal Decision

“the Province is pleased with the progress of the Growth Plan, reporting that 67% of new residential units built in the GGH [Greater Golden Horseshoe] between June 2009 and June 2010 were located in the existing ‘built-up area’...”

(Anatram, Feb 2012), the Tribunal concluded that if the vendor was made aware that a notice was not received by the purchaser, the vendor must take *reasonable steps* to resend the notice. Reasonable steps, suggests the Tribunal, include phoning or emailing the purchaser to obtain a new address, or attempting delivery by alternate method, to ensure the notice is received before the deadline. We continue to recommend that all notices to purchasers prior to occupancy are sent by registered mail (except in the case of a postal strike) or courier, and post occupancy are sent to the purchasers’ solicitors by courier or fax with transmission confirmation, and that vendors remain diligent in confirming delivery and obtaining delivery receipts for each purchaser in the event of a dispute as to delivery that could lead to a claim under Tarion. ■

REVIEWING WHAT'S NEW AT THE PROVINCE

Marc P. Kemerer

Representatives from the Province recently reported back to the Building Industry on (a) the review of the Population and Employment Forecasts contained in the Growth Plan for the Greater Golden Horseshoe (GGH), and (b) the Provincial Policy Statement (PPS) Review.

In terms of the Growth Plan, the forecasts, along with the requirement that municipalities adopt a standard of 50 persons and jobs combined per hectare in designated greenfield areas, have been among the most controversial provisions. Many consultants in the industry feel that this is “pie in the sky” economics. We are representing a number of land owners and developers who have

been caught in the cross hairs of this policy. Notwithstanding the controversy, the Province is pleased with the progress of the Growth Plan, reporting that 67% of new residential units built in the GGH between June 2009 and June 2010 were located in the existing “built-up area” and that the recent data from the 2011 federal census supports the population and employment forecasts contained in the Growth Plan(s). The Province promises to take a closer look at the census data but we do not expect any real changes to the forecasts. Thus the Ontario Municipal Board hearings on the Growth Plan conformity exercises being undertaken by regional and local municipalities will continue to rely on the existing forecasts as ground zero.

On the PPS Review, the Province continues to receive a large number of submissions from a full range of stakeholders. The focus on many of these has been on the economic impacts of growth, greater recognition of regional differences, the promotion of healthy and sustainable communities, and greater environmental protections and transportation options. The building industry has been vocal on the need for less barriers to development and intensification, more flexibility in conversion of employment lands and the need for critical infrastructure. The Province will face challenges in balancing these diverse needs and desires. Given the importance of the PPS as the most critical tool in evaluating development, we encourage you to provide your submissions on changes to the PPS to the Ministry of Municipal Affairs and Housing. We are pleased to assist you in this regard.

We will continue to monitor and keep you posted on these and other provincial developments. ■

HEADS UP - MINISTRY OF LABOUR SUMMER JOBSITE SAFETY INSPECTIONS UNDERWAY

In July and August, inspectors from the Ministry of Labour will visit construction sites across Ontario to check for hazards involving tower and mobile cranes. Inspectors will also target activities involving the transportation of stone, sand, gravel and other raw materials at mining pits and quarries. During the blitzes, inspectors will check on maintenance of equipment, worker training, the use of safety equipment and other potential health and safety hazards to help prevent workplace injuries.

We covered this topic in more detail in our June 2012 edition of Employment Update, which is available online at: www.blaney.com/newletters/employment-update-june-2012.

For further information, visit www.labour.gov.on.ca/english/news/2012/bg_consblitz20120705.php.

Blaneys on Building is a publication of the Real Estate and ACES Groups of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Kylie Aramini at 416 593.7221 ext. 3600 or by email to karamini@blaney.com. Legal questions should be addressed to the specified author.

Blaneys Working For You

On June 8, 2012, the McGuinty government announced its intention to launch a public consultation process to modernize the Condominium Act, 1998, through the Ministry of Government Services, which will start with identifying a comprehensive set of issues relating to target areas of concern such as increased consumer protection; condominium finances and reserve fund management; condominium board governance; regulation of condominium managers; dispute resolution. This review will engage the entire condominium community, including owners, residents, developers and property managers.

Further details of the public consultation process will be announced over the summer months. The Ontario Home Builders Association (OHBA) in collaboration with the BILD Condo Council have struck a Condo Act Review Committee to respond to this initiative and will be making submissions on behalf of the industry. Tammy Evans is a member of the BILD Condo Council and also a member of the OHBA/BILD Condo Act Review Committee and will continue to keep you informed of developments in this regard.

EXPECT THE BEST

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