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September 24, 2005

Know the facts about extension provisions

I recently received this interesting question from *Star* reader Laura C. Cicchelli:

I understand that if the builder of a new home extends the closing date by more than 120 days, either through a single notice or by repeated notices, the purchaser may terminate the agreement within the ten days after the 120 days delay has elapsed by giving notice to the builder in writing. If the purchaser does not terminate the agreement in this time, but the closing is delayed by a further 120 days, the contract will be deemed to be at an end unless the vendor and purchaser both agree to continue it.

My builder has extended my contract twice, both times by 120 days. The original closing date was scheduled for February of this year, it was then extended to July, and then further extended to early October. I was given proper notice for both extensions. After visiting the site in August, I noticed that my home was still in the initial stages of being built. When I approached the sales office, I was verbally told that another delay of three to six months is expected, and I would get a phone call to sign another contract in the coming weeks.

I still want the home however, I don't feel that less than six weeks notice of another three to six month delay is kosher. Since I feel that proper notice was not given, is the builder liable for my costs of up to \$100 per day for delays beyond five days to a maximum of \$5,000.00? As well, if I ask for compensation because of this, does the builder have the right not to extend the contract and sell the home to someone else?

In short, Cicchelli wanted to know:

- Does the obligatory contract addendum that allows for two 120-day extensions give the builder the right not to extend the contract and sell to someone else?
- If a homebuyer signs an agreement to amend the original closing date, is she still entitled to compensation for delayed closing costs?

To verify the answers to Cicchelli's questions, I went straight to the top, and enlisted the help of Janice Mandel, vice-president of corporate affairs at Tarion Warranty Corporation.

Every builder agreement must contain an addendum which says that either the builder or purchaser can terminate the deal without penalty if construction of the home has not been completed by 240 days after the originally scheduled closing date, and the parties have not otherwise agreed to an extension.

In that case the builder must return all deposits to the purchaser with interest and may proceed to sell the home to another party at market value.

The builder cannot, however, kill the deal if it has not taken all reasonable steps to construct the dwelling without delay. Whether a vendor has met this requirement turns on the facts of each case, but I don't yet know what reasonable steps means.

On the second question, if the purchaser agrees in writing to amend the original closing date, she is disqualified from obtaining compensation for delayed closing costs. The rationale here is that the revised closing date supersedes the original closing date, and wipes out the period of delay.

In other words the clock for the purpose of calculating a delay for which a purchaser is entitled to compensation is restarted from the amended date.

Builders are not required to inform purchasers before they sign an agreement extending closing that the delayed closing warranty applies only to unilateral delays by the builder and not to delays which have been agreed to by a purchaser.

As well, there is no minimum notice period. If the house isn't ready on the final closing day, a builder has a right to ask for a written extension without giving any notice. The purchaser's only options then are either to back out of the deal or agree to an extension.

Whether a purchaser having amended the closing date may still be entitled to his or her delayed closing costs depends on the negotiations (if any) between the parties in revising the closing date. A purchaser may, for example, specify that he or she will agree to the amended closing date, but reserve his or her entitlement to costs for the delay - if, and it's a big if, the builder agrees to that provision.

If the house has increased in value, a purchaser may have little option at that point but to sign the extension agreement.

My own recommendation is that buyers should negotiate extension provisions at the time an agreement is signed, and not during construction. A clause can be inserted into the original agreement of purchase and sale stating that in the event it becomes necessary to extend closing for more than 240 days beyond the scheduled date, the builder will pay compensation at the statutory rate of \$100 a day to a maximum of \$5,000.

A builder who is confident that he or she can complete the house within 240 days of the scheduled date will have no trouble signing the clause. A builder who is iffy about his or her ability to finish the house within eight months of the scheduled closing date may refuse to sign the clause, but at least the purchaser will have some idea of how firm the target date is.