

PRICE ESCALATIONS AND CONSUMER PROTECTIONS RELATED TO NEW HOME PURCHASE AGREEMENTS

Consultation Discussion Paper

June 29, 2023

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Introduction

The Ministry of Public and Business Service Delivery (“the ministry”) is seeking input on:

- consumers’ experiences with escalations in the price of new homes after they have already been purchased, including proposals to address price escalations;
- a legislated cooling-off period for new freehold home purchases;¹ and,
- a requirement that buyers receive legal advice on their purchase agreements for new homes.

Please submit your input **by August 13, 2023** to NewHomes@ontario.ca. Thank you for your time and for participating in this consultation.

1. Price Escalations

After a buyer has signed a purchase agreement for a new home, some builders may try to increase the price of the home in ways that are unrelated to price adjustments ordinarily associated with completing the purchase of a new home (“a price escalation”).

For example, a builder may attempt to increase the price of a purchased new home by:

- cancelling the agreement for a reason permitted in the agreement (e.g., municipal delays), then offering the home for sale again at a higher price,
- including clauses in their agreements that attempt to permit the builder to increase the price if the builder’s construction costs rise, or
- refusing to build or transfer ownership of the home to the buyer, in contravention of the agreement, unless the buyer pays the builder more.

In some cases, the additional amount that a builder demands from a buyer may be hundreds of thousands of dollars.

Builders must adhere to a Code of Ethics, which requires that they treat buyers fairly, honestly and with integrity, and that they not act (or abstain from acting) in a way that could reasonably be considered disgraceful, dishonourable or unprofessional. The Home Construction Regulatory Authority (“HCRA”), the regulator of new home builders, can take action in response to any violations of the code, including by imposing penalties for some violations of the code. The HCRA’s discipline committee can also take action in response to any violations of the code, such as by imposing financial penalties. In cases where the builder did not benefit financially from the violation, the penalty can be as high as \$50,000. In cases where the builder benefited financially

¹ In this consultation discussion paper, “new freehold home” means “a new home that is not a condominium unit”.

from the violation, the penalty can be as high as the amount of the benefit. Violations of the code also factor into the HCRA's decision making when deciding whether to renew a builder's licence to build and/or sell new homes. You can find more information about the expectations of the HCRA with respect to price escalations in the [advisory on price escalations and contract terminations](#).

To sell or build a new home, it must be enrolled with Tarion, the organization that administers new home warranties in Ontario. In response to a builder's history of price escalations, Tarion may impose conditions that must be met before it will enrol a new home. You can find more information about Tarion's enrolment process in [its registrar bulletins](#).

Discussion Questions

1. Other than the three scenarios above, are there other scenarios in which builders have increased the purchase price of new homes after a purchase agreement is signed? Please explain.
2. When do builder-imposed price increases tend to happen once a purchase agreement is signed (before construction commences, during construction, or near closing)? When do they impact buyers the most?
3. Do price escalations typically concern new condo unit purchases, new freehold home purchases, or both?
4. Is it common for builders to include clauses in purchase agreements to permit price increases to account for higher construction costs?
5. How can builders be prevented from using early termination conditions as a means to increase the price of a new home?
6. Do you have any other comments?

The ministry is seeking input on the following potential consumer protection proposals to address price escalations:

- A. Price Caps in Agreements
- B. Price Caps Outside of Agreements
- C. Measures to Facilitate Class Actions
- D. Publication Requirements for Builders of Freehold Homes

1A. Price Caps in Agreements

The ministry could consider a proposal where builders would be prohibited from including provisions in their agreements that permit them to increase the price of the home beyond a certain percentage of the home's original selling price. This cap could apply to all cost increases made by a builder when the purchase is completed (that is, on closing), or it could only apply to increases unrelated to ordinary cost increases. For example, this cap could potentially apply only to provisions that allow builders to increase a home's price to account for increases in construction costs.

Agreements often include provisions to account for adjustments to the original selling price when the transaction to sell the home closes. For example, agreements may include provisions that permit the builder to pass on the cost of realty taxes they have paid, or increases in municipal development charges.

If the price cap proposal were implemented, it could provide clarity about whether a builder's request for an increase in the price is permitted under the agreement. However, if a price cap is too restrictive, some builders may not have the funds needed to complete the homes they have committed to building. In addition, some builders may see a price cap as authorization to include provisions to increase the price of a home up to the maximum amount permitted. Finally, price caps may encourage builders to either change the design of the home they originally proposed to build, or compromise on its quality, to maintain their profit margins. However, the builder would still have to provide warranties for the home, and Tarion would still be required to compensate buyers if builders did not honour their warranties.

Discussion Questions:

1. Should a cap be imposed on the amount a new home price can increase above the original selling price?
2. Do some builders already include price caps in their agreements?
3. Should such a cap apply to any price adjustments a builder would make on closing, or only some types of increases? To which types of price increases should it not apply? For example, should caps not apply to increases to account for costs to install utilities or to account for a municipality's development charges?
4. If a cap only applies to some price increases because it excludes common closing adjustments, how could increases be prevented from shifting to other permitted adjustments?
5. How should the cap be set? For example, should the cap limit price increases to a percentage of the original selling price? Alternatively, should the cap limit price increases to the rate of inflation?
6. If a cap should limit price increases to a certain percentage of the original selling price, what should that percentage be?
7. If a cap should limit price increases to the rate of inflation, which pricing index should be used to reflect the rate of inflation?
8. Do you have any other comments on this proposal?

1B. Price Caps Outside of Agreements

Some new home purchase agreements have been terminated, and then offered for sale to the original or another buyer at a higher price.

If a builder resells the home to another buyer at a price that exceeds a cap relative to the original selling price, the ministry could consider a proposal that the builder could be required to pay the

difference to the original buyer. Under this proposal, if the builder does not pay the difference, the HCRA could impose an administrative penalty equal to the amount that the builder did not pay. The HCRA may then be able to pay to the original buyer funds it collects in payment of the penalty. Alternatively (or in addition), buyers could be provided with a right to recover, through a lawsuit, the amount at which the builder sold the home beyond the cap.

Removing the monetary benefit of price increases on a sold home could result in fewer price escalations. However, a cap could have unintended consequences such as impacting the builder's ability to complete the home, or result in changes to the design or overall quality of the home as input costs fluctuate.

Discussion Questions:

1. Should a cap be imposed on the price at which a builder may resell a home after cancelling a purchase agreement for the home?
2. How should such a cap be set? For example, should the cap limit price increases to a percentage of the original selling price? Alternatively, should the cap limit price increases to the rate of inflation?
3. If a cap should limit price increases to a certain percentage of the original selling price, what should that percentage be?
4. If a cap should limit price increases to the rate of inflation, which pricing index should be used to reflect the rate of inflation?
5. How much should a buyer be able to recover from their builder if the builder sells the home at a price that exceeds the cap above? Should it be limited to the additional amount at which the home was resold?
6. Under the proposal above, builders would be prevented from increasing the price of the home that they originally sold. What could be done to ensure a cap captures subsequent sales of a home, even in cases where the design has been changed?
7. Do you have any other comments on this proposal?

1C. Measures to Facilitate Class Actions

Some builders may attempt to receive more money from the original buyer in a way that is not permitted in the original agreement. However, the cost of a lawsuit to contest the builder's attempt may be too expensive for any individual buyer.

Buyers and builders are currently required to have their disputes about their purchase agreements resolved through arbitration. For disputes about the cancellation of a purchase agreement in particular, buyers have some advantages over a lawsuit in court. For example, the builder must pay the costs of an arbitration proceeding and the buyer's reasonable legal costs, unless the arbitrator finds that there is reason to order otherwise. Arbitrators can also resolve multiple disputes involving different buyers in a single arbitration proceeding if the same circumstances and issues are in dispute, which could lower the cost of the process.

While arbitration provides buyers with some advantages when purchase agreement cancellations are at issue, some buyers may still find the process unappealing because of the risk of paying high legal fees. Moreover, if a dispute does not concern a cancellation, builders are not required to pay for the arbitration or the buyer's legal costs.

In some cases of price escalations, the same builder may attempt to increase the price for many buyers in the same development or condominium project. A class action proceeding in those cases may help reduce the risk and cost of a lawsuit for buyers because buyers may be better able to pool their resources together in those proceedings and because lawyers may be more likely to take on these types of cases with no upfront legal costs.

But it may be difficult for consumers to begin a class action proceeding because of requirements in legislation that disputes about the purchase agreement be submitted to arbitration.

Discussion Questions:

1. Could class action proceedings make it easier for consumers to successfully contest price increases?
2. Should the requirement that disputes be submitted to arbitration be removed?
3. Should builders be prohibited from including provisions in their agreements that attempt to stop buyers from beginning a class action proceeding?
4. Should buyers be able to begin class action proceedings against builders regardless of any provision in the agreement that attempts to prevent them?
5. Do you have any other comments on this proposal?

1D. Publication Requirements for Builders of New Freehold Homes

If a purchase agreement for a condominium unit is cancelled for a reason unrelated to the fault of the buyer, the HCRA must publish the number of units the builder cancelled in this way, and the reasons for the cancellation. The HCRA publishes this information on the [Ontario Builder Directory](#). The directory is accessible to the public and can be consulted by potential buyers.

The ministry could consider a proposal to extend this publication requirement to cancellations of new freehold home purchase agreements (that is, of homes that are not condominium units). Before they purchase a new freehold home, buyers could consult the directory to review a builder's history of cancellations to assess the risk that their builder will cancel their agreement.

Discussion Questions:

1. Should cancellations of new freehold home purchase agreements for a reason unrelated to the fault of the buyer, and the reasons for the cancellation, be published on the Ontario Builder Directory?
2. Would this information be helpful for consumers?

3. What costs could builders incur to comply with this requirement?
4. Do you have any other comments on this proposal?

2. A Cooling-Off Period for Purchasers of New Freehold Homes

A new home may be the biggest purchase that a person will make in their lifetime, and one that comes with risks that are important for buyers to understand. For example, purchase agreements between a builder and buyer may have provisions that allow the builder to cancel the agreement or to increase the price. Moreover, some buyers may find that they are not provided enough time to review their agreement before signing it.

Buyers of new freehold homes could be given time (“a cooling-off period”) after they sign their purchase agreement to cancel their agreement for any reason. A cooling-off period could apply to all purchase agreements of new freehold homes regardless of whether the agreements contain conditions that allow the builder to terminate the agreement before the purchase is completed. Buyers could use this time to review their purchase agreement, to understand the risks associated with it, and to either negotiate changes to it or cancel their agreement.

Some buyers of new freehold homes may already have a period to cancel their purchase agreement, but only if the builder includes certain ‘early termination conditions’ in the agreement that allow the builder to terminate the agreement before the purchase is completed. Early termination conditions must be specified in an ‘addendum’, a document that must be attached to the purchase agreement which includes provisions about permitted early termination conditions and the termination periods. Depending on the conditions included in the purchase agreement, buyers have either 3 business days or 10 calendar days to cancel the agreement. For more information, see [the HCRA's directive on the addendum](#).

Under the [Condominium Act, 1998](#), buyers of new condominiums have a 10-day cooling-off period where they may, without any reason, cancel the purchase agreement. The cooling-off period cannot be waived. The period only begins after the buyer has received the signed and completed purchase agreement, the Condo Buyers’ Guide, and the disclosure statement, which includes important information about the unit and the condo corporation.

There are various cooling-off periods under the Consumer Protection Act (CPA), including a 10-day cooling-off period for time share agreements. The CPA does not apply to the purchase/sale of real property, except time share agreements. A consumer may, without any reason, cancel a time share agreement at any time from the date of entering into the agreement until 10 days after

receiving the written copy of the agreement. A disclosure statement about the cooling-off period and how it works must be included in time share agreements.

Other jurisdictions have implemented cooling-off periods with various durations and parameters. On January 3, 2023, British Columbia implemented a 3-day cooling-off period for buyers of residential properties, which includes a cancellation fee of \$250 for every \$100,000 of the purchase price. British Columbia also has a 7-day cooling-off period for sales of homes in multi-unit development properties, like condominiums, that are under construction. Multiple Australian states require that purchases of residential properties involve a cooling-off period, ranging from 2 to 10 days depending on the state.

Discussion Questions:

1. Should there be a cooling-off period for buyers of new freehold homes?
2. How many days should the cooling-off period for buyers of new freehold homes be?
3. What is the best way to inform buyers about the cooling-off period for new freehold homes, how it works, and other important information about buying a new freehold home? For consideration, see the [Condo Information Sheet](#), which contains important information for buyers of new condos.
 - a. For example, should sellers be required to provide buyers of new freehold homes with an information document? If yes, what information about the cooling-off period for new freehold homes should the document contain to help buyers make an informed purchase? If buyers are provided with an information document, what other information about their purchase should be disclosed to them in this format?
 - b. Alternatively, should sellers be required to include a statement in purchase agreements about the cooling-off period for new freehold homes?
 - c. What other way should buyers be informed about the cooling-off period and how it works?
4. What costs could builders incur if buyers of new freehold homes are provided with a cooling-off period and if builders were required to disclose the cooling-off period to buyers?
5. Should builders be entitled to charge buyers who cancel the purchase agreement during the cooling-off period? If yes, what would be a suitable fee?
6. Should some new freehold home purchases be excluded from the cooling-off period? If so, which ones?
7. What are the advantages of a cooling-off period for new freehold homes?
 - a. For example, would it help buyers understand the potential risks of purchasing a new home, including those risks associated with price escalation after the purchase

- agreement is signed? (See the section on [Price Escalations](#) for background on price escalations.)
- b. Should builders have to provide information about price escalations in any document that informs buyers about the cooling-off period?
 - c. What information about price escalations should builders have to provide?
8. What risks or undesirable consequences could arise from a cooling-off period for buyers of new freehold homes? How could they be addressed?
- a. Have there been any undesirable consequences that have occurred from the existing 10-day cooling-off period for buyers of new condominiums, or the existing 3 business-day or 10 calendar-day termination period in the addenda for buyers of new freehold homes?
9. Do you have any other comments on this proposal?

3. Mandatory Legal Review for New Home Buyers

New home purchase agreements are complex legal contracts and may expose the buyer to certain risks, as mentioned in section 2. For example, there are often provisions that allow the builder to cancel the agreement under certain conditions, increase the price, or change the closing date. Some purchasers may not fully understand the contract they have signed and are surprised to learn that if they fail to close the transaction when the builder is ready, they could be sued for hundreds of thousands of dollars. The ministry could consider proposals to ensure that buyers of new homes receive legal review about their purchase agreement as a mandatory step in the new home buying process. A legal review could help the buyer understand the risks associated with the purchase agreement and how a buyer may wish to negotiate changes to it.

The ministry is seeking input on whether to make it mandatory for new home buyers to receive a legal review during a new home purchase. In addition, the ministry is seeking input on two distinct approaches to ensuring buyers receive a legal review:

- A. A post-purchase legal review period (section 3A)
- B. A pre-purchase legal review requirement (section 3B)

Discussion Questions:

1. Should it be mandatory for buyers of new homes to obtain a legal review of their purchase agreement?
2. If it were mandatory for buyers to receive a legal review when buying a new home, should they be able to waive this requirement?

3. What is the range of hourly rates that lawyers charge to review and provide advice about a purchase agreement? How long would it typically take for a lawyer to review and provide advice about an agreement?
4. Would a mandatory legal review period for buyers help them understand the potential risks of purchasing a new home, including those risks associated with price escalations after the purchase agreement is signed? (See the section on [Price Escalations](#) for background on price escalations.)
5. Do you have any other comments?

3A. Post-Purchase Legal Review Period

After an agreement to buy a new home is signed (whether a freehold or condo unit), a buyer could be provided with time to obtain a legal review of their purchase agreement. If the buyer does not obtain the legal review within that time, the agreement would not become binding. If the buyer provides the builder with a statement, signed by a lawyer, stating that the lawyer has given the buyer the required review, the agreement would become binding.

Discussion Questions:

1. Should a post-purchase review period be in addition to, or be concurrent with, any cooling off period?
2. How much time should buyers be provided to obtain the legal review after signing a purchase agreement?
3. What costs could builders incur if buyers were provided with a post-purchase review period to obtain legal advice?
4. Do you have any other comments on this proposal?

3B. Pre-Purchase Legal Review Requirement

As an alternative approach to the proposal above, builders of new homes could be prohibited from entering into a purchase agreement for a new home with a buyer unless the builder has evidence that the buyer received a legal review of their agreement. Evidence could take the form of a statement, signed by a lawyer, stating that the lawyer has given the buyer the review about the agreement.

Discussion Questions:

1. Should builders be prohibited from entering into purchase agreements for new homes if the buyer has not received a legal review of the agreement?
2. How could the requirement ensure that the buyer is able to buy the specific home referenced in the purchase agreement about which they have received a legal review? In

other words, how could the requirement ensure that a builder will not sell a home to another buyer after the first potential buyer has paid for a legal review?

3. Should vendors be permitted to enter into an agreement with buyers who do not receive a legal review if the buyer agrees to buy without the review? A buyer could do this by indicating in their agreement that they wish to buy the home without the review, despite the risks involved.
4. If vendors were permitted to enter into agreements with buyers who do not receive a legal review of the agreement, if the buyer agrees to proceed without it, what could be done to protect the buyer from being asked to agree to buy the home without the review in a high-pressure setting, such as at a sales centre?
5. What costs could builders incur if they were prohibited from selling new homes to buyers who have not received a legal review of their agreements?
6. Do you have any other comments on this proposal?

Collection of Information

The collection of personal information is consistent with section 38(2) of the [Freedom of Information and Protection of Privacy Act](#) as necessary for the proper administration of the New Home Construction Licensing Act, 2017 and the Ontario New Home Warranties Plan Act.

All feedback received in response to this consultation from organizations and individuals participating in a professional capacity will generally be considered to be public information. Information from these parties may be used, disclosed and published by the ministry to help the ministry in evaluating and revising its proposal. This may involve releasing any response received to other interested parties.

Despite the above, any information shared by representatives of an organization or individual professionals that is of a personal nature would not be considered public information. Information of this nature would not be disclosed, published or released by the ministry.

All feedback received in response to this consultation from individuals participating in a personal capacity who do not indicate or do not have a known affiliation with an organization, or are not considered to be acting in a professional capacity, will not be considered public information. The ministry may use and disclose responses from these individuals to help evaluate and revise the proposal. The ministry may also publish responses received from individuals. Should the ministry use, disclose, or publish individual responses, the ministry will not disclose any personal information such as an individual's name and contact details without the individual's prior consent, unless required by law.

All submissions received as part of this consultation are also subject to the [Freedom of Information and Protection of Privacy Act](#). The public has the right of access to information under the custody and control of the ministry.

The ministry may use your provided contact information to follow up with you if we need to clarify your responses.

If you have any questions about the collection of this information, please contact Mike McRae, Director, Policy and Governance Branch via email (NewHomes@ontario.ca) or mail (mailing address: 6th Floor, 56 Wellesley Street West, Toronto, Ontario, M7A 1C1).

We Value Your Input

Thank you for taking the time to provide your input. If you have any questions about this consultation, please email NewHomes@ontario.ca.

Please provide your name and/or the name of the organization you represent.

Name and/or organization:

To help us understand your perspective, please check a box below to indicate whether you are providing input primarily as a:

- Consumer
- Consumer group or advocate
- Builder, vendor or developer
- Lawyer
- Real estate professional
- Land use expert or academic
- Municipality, building official, or municipal organization
- Other (please specify): _____