



## **When do Additional Improvements have to be finished under the New Construction Addendum?**

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**QUESTION:** My client is under contract with a builder-seller for a spec home. We attached Form 2A3-T (New Construction Addendum) to the contract, because the builder agreed to install large custom cabinets in the living room, among other Additional Improvements. My client paid a substantial Due Diligence Fee so the builder could buy supplies for the cabinets. Everything was going fine until the builder informed me that the cabinets would not be finished before the end of the Due Diligence Period. He will not grant an extension. Can my client terminate and get their Due Diligence Fee refunded because they won't be able to inspect the cabinets during the Due Diligence Period?

**ANSWER:** No. Paragraph 1 of the New Construction Addendum provides that the builder must complete any Additional Improvements no later than Settlement. If the buyer is not comfortable with the progress being made during the Due Diligence Period, they can terminate the contract and receive a refund of their Earnest Money Deposit. However, Form 2-T states that the Due Diligence Fee is "non-refundable except in the event of a material breach of this Contract by Seller, or if this Contract is terminated under Paragraph 8(n) or as otherwise provided in any addendum hereto." It does not appear that any of these events have yet occurred in your case.

Form 2A3-T requires that Additional Improvements be completed in a "good and workmanlike manner with new, good quality materials and components." Paragraph 4 of the New Construction Addendum gives the buyer the right to inspect Additional Improvements at reasonable times throughout the process. If the builder doesn't finish the cabinets by Settlement or any applicable delay period, then your client may be entitled to the relief in paragraph 8(n) of Form 2-T for the builder's breach of contract. Note that Paragraph 3 in Form 2A3-T grants a delay period to the builder in special circumstances.

Even though the builder is using your client's Due Diligence Fee to buy materials for the cabinets, those funds are governed by the rules in Form 2-T. It is not refundable unless one of the events listed above occurs. In the future, you should suggest that your client offer a Building Deposit instead of the Due Diligence Fee in these kinds of situations. Form 2A3-T provides that the Building Deposit is due the first banking day *after* the end of the Due Diligence Period, which means the buyer is not committed to a non-refundable fee if they decide to terminate the contract during the Due Diligence Period.

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