

## Real Estate Loan Drafting Guidance: Colorado

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A Q&A guide to real estate finance law and practice for borrowers and lenders in Colorado. This guide can be used in conjunction with the Real Estate Finance State Q&A. It addresses state customs and laws relating to loan document drafting to ensure enforceability and priority of the lien of mortgage instruments. It also generally discusses mortgage recording taxes, foreclosure, and lien priority in a commercial context. Federal, local, or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see Real Estate Loan Drafting Guidance: State Q&A Tool).

### Mortgage Instruments

**1. Does a security instrument that evidences a permanent, fully-funded term loan need to state the maximum indebtedness that it secures? What about for loans contemplating future advances (such as open-end mortgages, revolving lines of credit and construction loans)? Does the lien of a security instrument automatically secure accrued interest and protective advances?**

#### Permanent, Fully-Funded Loans

Colorado law does not require a mortgage or deed of trust securing a permanent, fully-funded term loan to state the maximum indebtedness secured. However, it is customary to state the amount of the debt to:

- Perfect the lender's lien on any future advances, including protective advances (see Future Advances).
- Distinguish between:
  - a security instrument that secures a monetary debt (which can be foreclosed non-judicially); and
  - a performance obligation, such as a completion guaranty (which must be foreclosed judicially).

Deeds of trust in favor of the Public Trustee (rather than mortgages) are the favored security instrument used in most real estate loan transactions because they allow the lender to foreclose non-judicially (see [State Q&A, Real Estate Finance: Colorado: Question 1](#)).

#### Future Advances

A security instrument that states the maximum indebtedness secures all future advances, whether obligatory or optional, to the same extent and with the same effect and priority as if the total maximum principal amount had been fully disbursed on or before the date the instrument was recorded (Colo. Rev. Stat. Ann. § 38-39-106(1)).

A future advance security instrument also secures:

- Any increase in the principal amount resulting from negative amortization or deferred interest.
- Disbursements made by the lender for payment of taxes, levies, and insurance.
- Disbursements made to protect the collateral property from waste, damage, or abuse.
- Reasonable collection costs (if the mortgage expressly allows the lender to recover collection costs).
- Interest accrued on the debt (including future advances), in accordance with the terms of the security instrument.

(Colo. Rev. Stat. Ann. § 38-39-106(2).)

The above provisions do not apply to:

- Readvances under a security instrument that has been advanced to the maximum amount stated, unless the security instrument clearly states that it was made pursuant to a revolving credit arrangement.
- The priority of general mechanics' liens.

(Colo. Rev. Stat. Ann. § 38-39-106(3), (4).)

### **2. Please indicate any information statutorily required to be contained in a security instrument including:**

- The date of the document.
- The maturity date under the note.
- The obligations secured by the security instrument.
- The addresses of the parties.
- A parcel or tax identification number of the property.
- The identity of the preparer.
- Other statutory requirements.

Although not required, Colorado law prescribes a statutory form mortgage but not a form deed of trust. Practitioners presume the same form that is appropriate for mortgages is also appropriate for deeds of trust.

However, a court will not issue an order authorizing a foreclosure sale under a deed of trust unless the deed of trust contains a power of sale to the public trustee (Colo. R. Civ. P. 120(a)(1)). If a deed of trust grants a power of sale to the public trustee but contains no provision on the manner in which the power of sale is to be exercised:

- The deed of trust is not void or voidable.
- The holder of the evidence of debt may foreclose the deed of trust in accordance with Colorado law through the office of the public trustee or in the manner of a mortgage through the courts.

(Colo. Rev. Stat. Ann. § 38-38-701(4).)

### **Date, Parties, Property Description, and Obligations Secured**

Colorado law sets out a form mortgage in Colo. Rev. Stat. Ann. § 38-30-117(1) that requires the following information:

- The name and address of the mortgagor and mortgagee.
- The principal amount of the debt being secured.

- The payment terms.
- The county in Colorado where the collateral property is located.
- A description of the collateral property.
- The execution date.

(Colo. Rev. Stat. Ann. § 38-30-117(1).)

Failure to follow the statutory form is not fatal to the instrument's validity. For example:

- Failure to state the address or the state or county of residence of the mortgagor or mortgagee will not affect the validity of the mortgage (Colo. Rev. Stat. Ann. § 38-30-117(2)).
- Failure to include the county where the collateral property is located is not a fatal flaw if the mortgage contains information sufficient to clearly identify where the property is and which county it is in (*In re Beldo*, 114 B.R. 736, 736 (Bankr. D. Colo. 1990) (applying Colorado law)).

### **Warranties and Covenants of the Mortgagor or Grantor**

Every properly executed mortgage secures payment of the debt described and implies that the mortgagor is making the covenants contained in Colo. Rev. Stat. Ann. § 38-30-113(4)(a) unless the words "and warrants title to the same" are omitted (Colo. Rev. Stat. Ann. § 38-30-117(3)).

### **Maturity Date**

Although not required, many Colorado practitioners include the maturity date of the loan to extend the 15-year statute of repose. The statute of repose provides that the lien created by a mortgage or deed of trust "shall cease to be a lien 15 years after the date on which the final payment or performance of the obligation secured thereby is due as shown by such mortgage or deed of trust [as] recorded" (Colo. Rev. Stat. Ann. § 38-39-201(1)).

If the date of final payment or performance cannot be determined from information contained in the recorded security instrument, the statute of repose runs from the date of the recorded instrument, or if undated, the date of recording (Colo. Rev. Stat. Ann. § 38-39-201(2)).

The 15-year statute of repose, however, is widely viewed as being limited by the six-year statute of limitations on actions in contract to enforce the loan obligations under the promissory note (Colo. Rev. Stat. Ann. §§ 38-39-207 and 13-80-103.5(1)(a)).

### Recording Requirements Affecting Form and Content

Colorado recording statutes require security instruments to contain:

- The current mailing address of both lienor and lienee, which must be set out on the face of the document when recorded. Failure to do so will not affect the validity of the instrument. (Colo. Rev. Stat. Ann. § 38-35-123.)
- The street address or comparable identifying numbers, if the address or numbers are displayed on the property or any building on the property. The street address should appear immediately before or after the legal description of the property. (Colo. Rev. Stat. Ann. § 38-35-122(1)(a)). Failure to include a street address or identifying number does not render the document ineffective or render title unmarketable if the document contains a legal description of the property (Colo. Rev. Stat. Ann. § 38-35-122(3)).

Under Colorado law, the fact that a recorded document omits a legal description does not *per se* determine whether the document is valid or invalid (Colo. Rev. Stat. Ann. § 38-35-122(3.5)(b)).

#### 3. Is there any special language that the lender must include in the security instrument to create a lien on the borrower's personal property?

For a security instrument to create a lien on the borrower's personal property, the instrument must comply with Article 9 of the Colorado Uniform Commercial Code (Colo. Rev. Stat. Ann. § 4-9-109(a)(1)).

The security instrument must contain a description that reasonably identifies the collateral (Colo. Rev. Stat. Ann. §§ 4-9-108(a) and 4-9-203(b)(3)). A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral (Colo. Rev. Stat. Ann. § 4-9-108(c)).

### Reasonable Identification of the Collateral

Reasonable identification of the collateral includes identification by:

- Specific listing.
- Category.

- Type of collateral, if:
  - the type is defined in the Colorado Uniform Commercial Code; and
  - the collateral is not a commercial tort claim, a deposit account, or, in a consumer transaction, consumer goods, a security entitlement, securities account, or a commodity account.
- Quantity.
- Computational or allocational formula or procedure.
- Any other method, if the identity of the collateral is objectively determinable.

(Colo. Rev. Stat. Ann. § 4-9-108(b), (e).)

### Describing Security Entitlements, Securities Accounts, and Commodity Accounts

A description of a security entitlement, securities account, or commodity account is sufficient if it describes either:

- The collateral by those terms or as investment property.
- The underlying financial asset or commodity contract.

(Colo. Rev. Stat. Ann. § 4-9-108(d).)

### Describing Consumer Goods

Any description in the security agreement of personal property that includes consumer goods is sufficient regarding the consumer goods only if it specifically identifies and itemizes those consumer goods (Colo. Rev. Stat. Ann. § 4-9-108(f)).

Personal property may be listed on a separate schedule.

#### 4. Can the lien of a mortgage secure after-acquired property? If so, is there specific language that the security instrument must use to automatically create a lien on after-acquired property?

The lien of a mortgage may encumber after-acquired property (Colo. Rev. Stat. Ann. § 38-30-104). Colorado law does not require any specific language in a security instrument to secure after-acquired property.

The priority of the lien on the after-acquired property does not relate back to the recording of the original mortgage, but only to the recording of the instrument by which the

grantor acquired title to the after-acquired title or a third-party has actual notice (*Premier Bank v. Bd. of Cty. Comm'rs of the Cty. of Bent*, 214 P.3d 574, 579 (Colo. Ct. App. 2009)). Because the concept of after-acquired property in real estate-secured loan transactions has not been interpreted in modern cases other than *Premier Bank*, lenders should not rely on perfecting their lien on after-acquired property in a deed of trust or other security instrument.

### Assignments of Leases and Rents and Fixture Filings

#### 5. Is it sufficient to incorporate an assignment of leases and rents into the mortgage, or is a separate instrument required? Can an assignment of leases be enforced without foreclosing the mortgage?

There is no Colorado statutory or case authority that requires an assignment of leases and rents to be a separate instrument from a mortgage or deed of trust in order to be enforceable. Most deeds of trust in Colorado contain provisions assigning the lender the property leases and rents. In practice, real estate commercial loan transactions also routinely use a separate document for an assignment of leases and rents.

#### Enforcement

Enforcing an assignment of leases and rents depends on whether the language of the assignment is an absolute and present assignment or whether it is merely given to create a security interest in the leases and rents. If the assignment is absolute, then after default, the lender is entitled without further action to all rents as they become due. If the assignment is given as a collateral assignment (granting only a security interest in the leases and rents), then the assignment does not become operative until the assignee does one of the following:

- Files a foreclosure action.
- Obtains possession of the property.
- Impounds the rents.
- Secures appointment of a receiver.
- Takes some other "effectual step" toward subjecting the rents to payment of the debt.

(*Great-West Life Assur. Co. v. Raintree Inn*, 837 P.2d 267, 271 (Colo. Ct. App. 1992).)

#### 6. Does your jurisdiction generally recognize an absolute assignment of leases and rents or is assignment deemed a collateral assignment given to further secure the mortgage?

Under Colorado law, an assignment of rents can either be an absolute assignment or a security interest, depending on the language of the assignment (*Great-West Life Assur. Co.*, 837 P.2d at 271-72).

In one case, the Colorado Court of Appeals held that an assignment of rents clause in a lease was absolute in nature because rentals would be applied to reduce the balance due on an underlying note and, accordingly, that the assignee did not have to be in possession of the property before it could enforce the assigned rental (*Wynn v. Adams Cty. Bank*, 761 P.2d 234, 236 (Colo. Ct. App. 1988)).

For more on the difference between absolute assignments and assignments as security interests, see Question 5.

#### 7. Can a recorded security instrument act as a fixture filing? If so, please indicate any special language or legend needed.

In Colorado, a recorded security instrument may act as a fixture filing (Colo. Rev. Stat. Ann. § 4-9-334).

The recording of a security instrument is effective from the date of recording as a financing statement filed as a fixture filing (or as a financing statement covering as-extracted collateral or timber to be cut) only if all of the following apply:

- The record indicates the goods or accounts that it covers.
- The goods are or will become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut.
- The record provides:
  - the name of the debtor;
  - the name of the secured party (or a representative);
  - a description of the collateral, goods, or accounts;
  - a description of the real property; and
  - the name of the record owner, if the debtor does not have an interest of record in the real property.
- The record is duly recorded.

(Colo. Rev. Stat. Ann. § 4-9-502.)

A record of a mortgage that is effective as a financing statement filed as a fixture filing is effective until the mortgage is released, satisfied of record, or its effectiveness otherwise terminates regarding the real property (Colo. Rev. Stat. Ann. § 4-9-515(g)).

### Mortgage Recording Tax

#### 8. If a security instrument contemplates future advances or re-advances, when and to what extent is mortgage recording tax (or similar tax) payable in connection with the future advance or re-advance?

Colorado does not impose a mortgage recording tax.

#### 9. What are the consequences for failure to pay mortgage recording tax (or similar tax) in full when due?

Colorado does not impose a mortgage recording tax.

### Foreclosure

#### 10. Are real property transfer taxes or controlling interest transfer taxes imposed on foreclosing lenders in connection with the transfer of real property? Describe the difference, if applicable, between transfer taxes assessed in a mortgage loan foreclosure versus a mezzanine loan foreclosure.

Colorado charges a conveyance fee (called a “documentary fee”) on the granting or transfer of real property, in the amount of \$0.01 per \$100.00 of consideration (Colo. Rev. Stat. Ann. § 39-13-102). No documentary fee is due in certain situations, including where:

- The total consideration paid by the purchaser is \$500 or less (Colo. Rev. Stat. Ann. § 39-13-102(2)(a)).
- The deed in question is:
  - a public trustee’s deed in connection with a public trustee foreclosure; or
  - a sheriff’s deed following a judicial foreclosure.(Colo. Rev. Stat. Ann. § 39-13-104(1)(c), (e).)

Many Colorado municipalities have adopted real estate transfer tax ordinances with rates of up to 2%, but the vast majority of the ordinances exempt transfers in connection with foreclosures. Counsel should research local ordinances to determine whether transfer taxes are due.

In addition, certain projects impose private real estate transfer taxes, the provisions of which are set out in community homeowners’ declarations. Although any new private real estate transfer taxes have been invalidated effective May 23, 2011, taxes established before that date may still be valid (Colo. Rev. Stat. Ann. § 38-35-127).

Although the local ordinances imposing municipal real estate transfer taxes differ from jurisdiction to jurisdiction, most ordinances exempt certain types of conveyances from transfer taxes, including:

- A deed of conveyance under execution, sale, or foreclosure sale under a power of sale or court decree of lien foreclosure.
- A sheriff’s deed.
- A public trustee deed or treasurer’s deed.
- A deed in lieu of foreclosure.

(See, for example, [Aspen Municipal Code § 23.48.040](#).)

Some local ordinances also require the foreclosing lender to sell the property within a certain period of time after the foreclosure or else the municipality may consider the transfer to be an artifice or device intended to avoid taxes, and may therefore impose a tax.

Some ordinances have anti-abuse provisions that will apply a tax if any real estate transfer seems to be an artifice or device designed to evade transfer taxes. Accordingly, it is best practice to carefully analyze a mezzanine loan foreclosure in light of the local ordinance to determine if a transfer tax may be payable.

#### 11. How are leases affected by foreclosure if there is no separate non-disturbance agreement between the lender and tenant?

Colorado is a race-notice state (Colo. Rev. Stat. Ann. § 38-35-109). In the absence of a non-disturbance or similar agreement between a secured mortgage or deed of trust lender and a tenant, a lease survives foreclosure if either:

- The lease is recorded prior to the recording of the mortgage or deed of trust, making it senior to the lien being foreclosed.

- The lender had knowledge of the lease at the time the mortgage or deed of trust was recorded.

Leases that are junior to a mortgage or deed of trust lien being foreclosed are extinguished by the foreclosure sale, subject to any right of redemption the lessee may possess (Colo. Rev. Stat. Ann. §§ 38-38-302(1), 38-38-305, and 38-38-501(1)).

Foreclosing lienors can prevent junior priority leases from being extinguished by filing a document affirming the lessee's interest with the public trustee or sheriff conducting the foreclosure sale (Colo. Rev. Stat. Ann. § 38-38-506(3)).

### 12. Describe the process for both the appointment and discharge of a rent receiver.

In Colorado, a party may request a court to appoint a receiver:

- After foreclosure proceedings have commenced and before a foreclosure sale (Colo. Rev. Stat. Ann. § 38-38-601(1)).
- After a foreclosure sale (Colo. Rev. Stat. Ann. § 38-38-602(1)).
- During any pending action (Colo. R. Civ. P. 66).

### Appointing a Receiver

After foreclosure proceedings have commenced, a court may appoint a receiver on application if it appears that:

- The security is clearly inadequate.
- The premises are in danger of being materially injured or reduced in value as security by removal, destruction, deterioration, accumulation of prior liens or otherwise so as to render the security inadequate.

(Colo. Rev. Stat. Ann. § 38-38-601(1).)

A court may appoint a receiver at any time after the foreclosure sale if:

- Waste has been committed.
- There is danger of waste.
- There is an actual probability of the security being rendered inadequate.

(Colo. Rev. Stat. Ann. § 38-38-602(1).)

The court may also appoint a receiver pursuant to a prior agreement between parties (Colo. Rev. Stat. Ann.

§ 38-38-602(3); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Denver Hotel Ass'n Ltd. P'ship*, 830 P.2d 1138, 1139-40 (Colo. Ct. App. 1992)).

At any time, a court may appoint a receiver to protect a property if the property or its rents, issues, and profits are in danger of being lost, removed beyond the jurisdiction of the court, or materially injured or impaired (Colo. R. Civ. P. 66(a)).

### Receiver Qualifications

The secured lender typically submits the proposed receiver's resume and credentials to the court for approval. After approval, the receiver must:

- Submit a written oath to perform the receiver's duties in accordance with law and the receivership order.
- Post a bond with the court in an amount the court determines.

(Colo. R. Civ. P. 66(b).)

There is no requirement that a receiver have any particular qualifications.

### Discharging a Receiver

During the course of a receivership, the receiver provides written reports to the court on a regular basis. Once the receivership ends, the receiver submits its final accounting and report to the appointing court and requests discharge. The court must issue an order discharging the receiver (Colo. R. Civ. P. 66(c); see *Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414, 417 (Colo. Ct. App. 1992)).

### 13. Please list any limitations to the exercise or election of lender's remedies (for example, does the jurisdiction have a one-action rule, a homestead exemption, or is the jurisdiction a community property state?).

Every homestead in Colorado is exempt from execution and attachment arising from any debt the amount of which is less than the owner's equity in the homestead (the actual cash value of the homestead reduced by any liens or encumbrances on the homesteaded property in existence at the time of any levy of execution on the property), up to the amount of:

- \$250,000 if the homestead is occupied as a home by an owner or an owner's family.



- \$350,000 if the homestead is occupied as a home by:
  - an owner who is elderly or disabled;
  - an owner’s spouse who is elderly or disabled; or
  - an owner’s elderly or disabled dependent.

(Colo. Rev. Stat. Ann. § 38-41-201.)

The exemption attaches automatically on occupancy of real property as a home by the owner or the owner’s family (Colo. Rev. Stat. Ann. § 38-41-202(1)).

Deeds of trust and mortgages may contain provisions allowing the borrower to waive or subordinate the homestead exemption. It is best practice to have a non-signing spouse execute a homestead waiver of subordination separately. Alternatively, a lender may request the non-signing spouse to execute the deed of trust or mortgage. (See *Janicek v. Obsideo, LLC*, 271 P.3d 1133 (Colo. App. 2011).)

**14. Are there any qualifications imposed on a lender to enforce its mortgage? For example, does a lender need to qualify to do business in the jurisdiction or satisfy other statutory requirements? Are any qualifications imposed on the foreclosing lender’s attorney? For example, must counsel be admitted to practice in the jurisdiction to bring a foreclosure action?**

### Qualifications for a Lender

There are no permissions, approvals, or licenses specifically required for foreign banks to enforce a mortgage secured by real property as long as the foreign bank or lender has no other established business presence in Colorado. Foreign lenders are not required to qualify to conduct business in Colorado. (Colo. Rev. Stat. Ann. § 7-90-801(2)(a), (g), and (h).)

### Qualifications for a Lender’s Attorney

A lawyer may not practice law in Colorado without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by:

- Colo. R. Civ. P. 204.1 to 204.6 (certifications and limited admissions to practice law).
- Colo. R. Civ. P. 205.1 to 205.8 (*pro hac vice* admission).

- Federal law.
- Tribal law.

(CO ST RPC Rule 5.5.)

Lawyers should be admitted in Colorado before pursuing foreclosures in Colorado.

## Lien Priority

**15. How does a lender perfect future advances (including re-advances under revolving lines of credit)? Does priority date back to the original recording date of the security instrument or the date of the advance?**

Under Colorado law, a secured real estate lender perfects its lien on real property securing future advances by:

- Providing in the security instrument that the instrument secures payment of future advances.
- Providing a maximum principal amount of the secured debt.

(Colo. Rev. Stat. Ann. § 38-39-106.)

A security instrument that meets these requirements secures future advances up to the stated maximum principal amount and with the same priority as if the total maximum principal amount had been fully disbursed on or before the date the underlying mortgage was recorded (Colo. Rev. Stat. Ann. § 38-39-106).

This also applies to re-advances under revolving lines of credit if the deed of trust or mortgage clearly states that the subsequent advance was made pursuant to a revolving credit arrangement (Colo. Rev. Stat. Ann. § 38-39-106(3)).

For more on future advances and readvances, see Question 4.

**16. In the context of construction lending, does the jurisdiction recognize the “obligatory advance rule”? If so, what are the criteria for determining if an advance is obligatory or non-obligatory?**

Colorado no longer recognizes the obligatory advance rule. A valid future advance deed of trust or mortgage secures all future advances, whether obligatory or

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optional, up to the stated maximum principal amount (Colo. Rev. Stat. Ann. § 38-39-106(1)).

A future advance deed of trust or mortgage also secures:

- All increases in the principal amount resulting from negative amortization and deferred interest.
- Disbursements made to pay taxes, levies, or insurance.
- Disbursements made to protect property from waste, damage, or abuse.

- Collection and foreclosure expenses, if the deed of trust or mortgage so provides.

- Interest on any of the above-listed items.

(Colo. Rev. Stat. Ann. § 38-39-106(2).)

However, this statute by its terms has no application to issues involving the perfection and priority of general mechanics' liens (Colo. Rev. Stat. Ann. § 38-39-106(4)).

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