



The Fundamentals of Releasing a Deed of Trust in Colorado, especially if –

We can't find the Original Promissory Note! (the private party noteholder dilemma)

In Colorado, the customary instrument for a Lender to use in securing their collateral with real estate is a Deed of Trust (it is similar, yet somewhat different than a Mortgage). A Promissory Note is used to express evidence of the debt. A Mortgage is a two party agreement whereas a Deed of Trust is a three party agreement (borrower, trustee, and lender). Unique to Colorado is the Office of the Public Trustee, an elected or appointed position depending on the particular county. The Public Trustee (PT) is most often nominated as the trustee in a Deed of Trust. When a loan is being paid off, it is also customary that the Lender issue and record a Release of Deed of Trust to discharge its collateral on that same real estate. State statute governs how a Deed of Trust can be released "of record" through the PT's office.

Below is an excerpt of a standard Release of Deed of Trust form. Please note the three conditions that call for the ability to Release a Deed of Trust without the production of the original Promissory Note:

RELEASE OF DEED OF TRUST AND RELEASE BY HOLDER OF THE EVIDENCE OF DEBT WITHOUT PRODUCTION OF EVIDENCE OF DEBT PURSUANT TO § 38-39-102 (1)(a) AND (3), COLORADO REVISED STATUTES

1. It is one of the following entities (check applicable box):
 - a. The holder of the original evidence of debt that is *a qualified holder, as specified in § 38-39-102(3)(a), Colorado Revised Statutes*, that agrees that it is obligated to indemnify the Public Trustee for any and all damages, costs, liabilities, and reasonable attorney fees incurred as a result of the action of the Public Trustee taken in accordance with this Request for Release;
 - b. The holder of the evidence of debt requesting the release of a Deed of Trust without producing or exhibiting the original evidence of Debt that delivers to the Public Trustee a Corporate Surety Bond as specified in § 38-39-102(3)(b), Colorado Revised Statutes; or
 - c. A Title Insurance Company licensed and qualified in Colorado, as specified in § 38-39-102(3)(c), Colorado Revised Statutes, that agrees that it is obligated to indemnify the Public Trustee pursuant to statute as a result of the action of the Public Trustee taken in accordance with this Request for Release and has caused the indebtedness secured by the Deed of Trust to be satisfied in full, or in the case of a Partial Release, to the extent required by the holder of the indebtedness.

Also see, § 38-39-102. When deed of trust shall be released—definitions. Effective: September 1, 2012

A "Qualified Holder" can present a Release of Deed of Trust without producing evidence of the debt (the original promissory note). The definition of a Qualified Holder is:

- (20) "**Qualified holder**" means a holder of an evidence of debt, certificate of purchase, certificate of redemption, or confirmation deed that is also one of the following:
- (a) A bank as defined in section 11-101-401 (5), C.R.S.;
 - (b) An industrial bank as defined in section 11-108-101 (1), C.R.S.;
 - (c) A federally chartered savings and loan association doing business in Colorado or a savings and loan association chartered under the "Savings and Loan Association Law," articles 40 to 46 of title 11, C.R.S.;
 - (d) A supervised lender as defined in section 5-1-301 (46), C.R.S., that is licensed to make supervised loans pursuant to section 5-2-302, C.R.S., and that is either:



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- (I) A public entity, which is an entity that has issued voting securities that are listed on a national security exchange registered under the federal "Securities Exchange Act of 1934", as amended; or
- (II) An entity in which all of the outstanding voting securities are held, directly or indirectly, by a public entity;
- (e) An entity in which all of the outstanding voting securities are held, directly or indirectly, by a public entity that also owns, directly or indirectly, all of the voting securities of a supervised lender as defined in section 5-1-301 (46), C.R.S., that is licensed to make supervised loans pursuant to section 5-2-302, C.R.S.;
- (f) A federal housing administration approved mortgagee;
- (g) A federally chartered credit union doing business in Colorado or a state-chartered credit union as described in section 11-30-101, C.R.S.;
- (h) An agency or department of the federal government;
- (i) An entity created or sponsored by the federal or state government that originates, insures, guarantees, or purchases loans or a person acting on behalf of such an entity to enforce an evidence of debt or the deed of trust securing an evidence of debt; or
- (j) Any entity listed in paragraphs (a) to (i) of this subsection (20) acting in the capacity of agent, nominee except as otherwise specified in subsection (10) of this section, or trustee for another person.

C.R.S. § 38-38-100.3; Definitions

Therefore most US Banks, similar institutions, and the federal government can submit and obtain a Release of Deed of Trust through the PT's office without the need to produce the original Promissory Note when recording the Release with the county Clerk and Recorder's Office. This is accomplished with the Qualified Holder statutorily indemnifying the PT's office for any act, error, or omission resulting in damages, liabilities, and/or attorney fees and costs occurring with the PT's office that stem from the original Promissory Note not being submitted in conjunction with the Release of Deed of Trust.

What if the Noteholder does not meet the definition of a Qualified Holder? The Lost Note Surety Bond!

A Non-Qualified Holder must produce the original Promissory Note when processing a Release of Deed of Trust. The statute calls for the "original evidence of debt" in processing a Release of the Deed of Trust (see, C.R.S. § 38-39-102). Therefore, please note a copy of the Promissory Note does not satisfy these statutory obligations!

If that is the case, then the Holder that requests the Release of a Deed of Trust without production of the evidence of debt (the original Promissory Note) "shall deliver to the public trustee a corporate surety bond in an amount equal to one and one-half times the original principal amount recited in the deed of trust, which corporate surety bond shall remain in full force and effect for the time frame expressed in C.R.S. § 38-39-102.

A Non-Qualified Holder would be well advised to safe keep the original Promissory Note needed to process the anticipated Release of its Deed of Trust. Some legal authorities have suggested that the execution of duplicate, original Promissory Notes might be a best practice to avoid this dilemma, especially by private party lenders (Non-Qualified Holders).

Note: The reference to a Title Company processing a Release of Deed of Trust only normally comes about when a paid off Lender fails to record it requisite Deed of Trust and the Title Company is certain that the Lender was satisfied in full to its sole discretion.



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Winter Park, CO 80482
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