

4 Common Questions About Mortgage Foreclosure In AZ



1. Is a Borrower Personally Liable After Foreclosure?

A borrower is generally personally liable to the lender for a loan including the shortfall, or “deficiency,” created when the unpaid loan balance is more than the bid price/value of the property at a foreclosure auction. However, Arizona has statutory exceptions—commonly called the anti-deficiency statutes—that protect borrowers from liability in certain instances.

In particular, a borrower is **not** personally liable for a deficiency following foreclosure by a non-judicial trustee’s sale if the property is: 1) 2½ acres or less *and* 2) limited to and utilized for either a single one- or two-family dwelling.

However, if the lender were to choose foreclosure by judicial action (a more involved process than a trustee’s sale), there is a third element that must be met to qualify for anti-deficiency protection: 3) the loan must be “purchase money”—that is, the money borrowed was used to pay for all or part of that property. This means that borrowers are potentially on the hook for non-purchase money loans, including not only for a post-foreclosure deficiency but also if the lender elects to sue directly on the debt instead of foreclosing. This impacts home equity, home improvement and other “second” loans which were not used to purchase the property.

SEE FORECLOSURE ON PAGE 4

Where did that artificial-looking palm tree come from?

And answers to other questions about cell phone tower placement in Arizona

If you’ve ever wondered how cell phone towers end up here or there, you have your city’s local zoning codes and federal laws to thank.

Most communities have zoning regulations governing where cell towers can be placed and the process an applicant must follow to get cell tower placement approval. City and town officials evaluate the potential impacts—from perspectives that include aesthetics and safety—a cell tower may have on surrounding properties.

Federal Law Trumps Local

Federal law then imposes rules on the review of cell tower requests to make sure

that timing requirements are followed and that local codes don’t infringe on rights granted under federal law. The Telecommunications Act of 1996 bars local governments from adopting regulations that “prohibit or have the effect of prohibiting” telecommunication services. This means that a local law that either explicitly—or in application—prohibits cell towers in certain locations could run afoul of federal law.



Interestingly, federal law also says that a city or town can’t reject a proposed wireless facility solely on the basis of fears over radio frequency (RF) emissions if the facility meets the FCC’s RF regulations. Cell tower applicants benefit from this law, in part, because public concern about the wireless signal is not allowed to be part of a local community’s consideration of a cell tower application.

SEE CELL TOWERS ON PAGE 2

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NEW FACES

Raul Abad



Raul's practice focuses on commercial real estate transactions including development, leasing, real estate financing, and acquisitions and dispositions of various real estate assets. He works with both public and private clients on complex commercial real estate matters.

Raul earned his J.D. in 2002 and his LL.M. in Employee Benefits in 2003 from The John Marshall Law School. He received his undergraduate degree in 1998 with Accounting focus and his M.B.A. in 1999 from Regis University in Colorado.

Timothy A. Stratton



Tim focuses his practice on public finance and municipal law. He represents schools, counties, cities, towns and other public entities in all matters related to issuing municipal securities. He also provides underwriter and disclosure counsel on municipal debt issues. Before joining Gust Rosenfeld, Tim was involved with hundreds of bond transactions and was a frequent speaker on public finance issues.

In 1999, Tim earned his J.D., cum laude, from the Thomas M. Cooley Law School. He received his undergraduate degree with Political Science and History focus in 1996 from Ball State University.

Gerald L. Jacobs



Jerry has focused almost his entire 47-year legal career on real estate transactions and related areas. He regularly handles all aspects of the acquisition, financing and development of commercial, multifamily residential, large land parcels and mixed-use real estate projects worldwide.

In 1963, Jerry earned his LL.B. from the University of Arizona James E. Rogers College of Law. He received his undergraduate degree from Stanford University in 1960 and attended the Institute for European Studies in Austria from 1958-1959.

Jill L. Holt



Jill practices corporate law and creditors' rights. Before joining Gust Rosenfeld, she served as a judicial law clerk for Judge Eileen Hollowell, a U.S. Bankruptcy Court judge and member of the Bankruptcy Appellate Panel of the Ninth Circuit.

Jill earned her J.D. in 2008 from the University of Arizona James E. Rogers College of Law, where she earned the Award for Excellence in Legal Writing in 2006 and a Writing Fellow in 2007. She received her undergraduate degree in Journalism, summa cum laude, from the University of Arizona in 2004.

Cell Towers

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So, you also may have noticed that some cell towers are now appearing in "stealth mode"—disguised as palm trees, crosses or other architectural features. This is an effort to make the cell tower "invisible" to help mitigate aesthetic objections to cell tower placement.

How You Can Get Involved

If cell towers and their placement are of interest to you, here's what you can do to get more information about any proposed towers in your area.

- If you see a sign or receive a letter about a proposed tower, call the phone number cited in the notice and request more information from your local planning department.
- Attend scheduled meetings about the proposed tower. By speaking directly to cell tower applicants, your local government rep and decision makers, you will likely get answers to your questions and have the opportunity to express any concerns.
- Provide input. Reasonable, constructive input on design or

placement is always more productive than a strict "not in my backyard" approach.

- Ask about colocation, which refers to the placement of multiple wireless antennae on a single tower in a single location. Some local regulations require colocation unless it is not reasonable or technically feasible from an engineering or system perspective.

Keep in mind that these federal laws are intended, at least in part, to encourage providers to "fill the gaps" in cell phone coverage. This means your community's cell tower placement process directly impacts the quality of the signal you receive on your cell phone. Even so, local governments still have a lot of control and flexibility in the location and aesthetic quality of a proposed cell tower. If you participate in that process, you can play a key role in where the next artificial-looking palm tree is planted in your community.

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Chris practices government law.

Tax-Exempt Bonds and Post-Issuance Compliance: What You Need to Know

The Internal Revenue Service (IRS) requires that records of tax-exempt bond financings be maintained for as long as the bonds are outstanding, plus three years. In a typical financing of 20 years or more, these records may span the careers of multiple legal counsel, administrators and other members of the finance team. Therefore, issuers of tax-exempt bonds may benefit from having a written post-issuance compliance policy.

Policy Components

It is important that issuers have a written post-issuance compliance policy and procedure in place to demonstrate compliance in the event the IRS conducts an examination. The policy should:

- Designate a single person to have overall compliance responsibility;
- Track how bond proceeds are invested and expended;
- Track the use of bond-financed facilities;
- Provide for the calculation and payment of any required arbitrage rebate;
- State the types of records that should be

retained, who is responsible for maintaining the records and for how long.

In addition to the above policy requirements, issuers of Build America Bonds and/or Qualified School Construction Bonds will have other requirements unique to such bonds.



Public v. Private Use

As a general rule, tax-exempt bond proceeds must be used to finance governmental activities. There are limited circumstances where tax-exempt bond proceeds can be used in a way that benefits private entities such as businesses, individuals and organizations. It is important that the use and future use of facilities financed with tax-exempt bonds be closely monitored to ensure no inadvertent private use is taking place.

A well-crafted records retention and post-closing compliance policy will assist officials in complying with these rules. Please contact any Gust Rosenfeld Public Finance attorney for assistance preparing such a policy.

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Tim practices in the areas of public finance and municipal law.

S.E.C. Adopts Changes to Continuing Disclosure Requirements

In May, the United States Securities and Exchange Commission approved changes to the continuing disclosure provisions of Rule 15c2-12 (the "Rule") that will affect new agreements executed on or after December 1, 2010.

Under the current Rule, an Event Notice must be filed in a timely manner if any of 11 events occur, if those events are material. The amended Rule:

- Requires notices be filed within 10 business days of the occurrence of the applicable material event;
- Adds 4 new events;

- Modifies 7 of the original 11 events;
- Changes the standard for materiality with respect to 7 of the original 11 events.

Please email Doris Harris at dharris@gustlaw.com to request a free handout outlining these changes. If you have any questions regarding continuing disclosure requirements, please contact any Gust Rosenfeld Public Finance attorney.

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Jim practices in the area of public finance.

Foreclosure

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2. Does a “Short Sale” Wipe Out the Loan?

“Short sale” has come to mean a real estate sales transaction in which the lender agrees to release its secured lien against the property upon payment of less than what the borrower owes on the loan. Such a sale may make sense if the lender could not sell the property for a better price after foreclosure, because it could save all parties time and money and help avoid the stigma of a foreclosure against the property.

However, borrowers should never assume that a short sale alone will fully satisfy the loan obligation. As noted above, if the property doesn’t qualify for anti-deficiency protection, the lender could pursue the borrower for the unpaid balance of the loan after the short sale. And there is also the issue of past-due homeowner’s assessments, which are typically a personal obligation of the then-owner. This is why the borrower and lender should document the short sale arrangement, including addressing any continuing liability for the loan balance.



3. Are There Tax Consequences Resulting from a Foreclosure or Short Sale?

Cancellation of indebtedness (COI) income is phantom income realized by a taxpayer from a transaction where loan monies are forgiven. For example, if a borrower secured a \$250,000 loan on a property and later that property is sold for \$200,000 in a short sale or at a foreclosure auction, the borrower could have phantom income of \$50,000—assuming the lender “forgave” this debt. This \$50,000 is money that could count as “income” on the borrower’s tax return.

The IRS takes the position, however, that there is no debt forgiveness on non-recourse debt. This means that if a borrower is protected by Arizona’s anti-deficiency statutes, the loan is non-recourse debt and the borrower is **not** required to realize any COI income resulting from a short sale or foreclosure.

Conversely, if the property doesn’t qualify for anti-deficiency protection, the loan debt would be recourse (i.e., the borrower is personally liable) and the borrower may have to pay taxes on the phantom income. If, however, the property is the borrower’s primary residence, the borrower may be insulated from COI income realized from the short sale or foreclosure up to the IRS limits (\$2 million for married couples and \$1 million for single filers or married couples

filing separately). It is important to consult a tax professional to determine if this exclusion could apply.

4. How are Residential Tenants Affected by Foreclosure?

In an effort to blunt how unsuspecting residential tenants are treated after a foreclosure, a federal law enacted in 2009 provides that for federally related loans a bona fide tenant is entitled to stay in the residence after foreclosure for the balance of the lease term at the specified rental rate. One key exception, however, is that a tenant’s lease may be terminated with 90 days’ notice if the property is sold to a purchaser who will occupy it as a primary residence.

Also, a new Arizona state law requires the landlord to give notice to any residential tenant if foreclosure action is pending against the leased property. If notice is not given, the tenant has certain rights against the landlord.

Complexities, qualifications, exceptions and nuances abound with all of these issues. Please consult with a qualified legal advisor to get the complete picture.

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Chris practices real estate and is a co-author of Ins and Outs of Foreclosure.

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Kent practices real estate litigation and is a co-author of Ins and Outs of Foreclosure.

ET·Y·MOL·O·GY COR·NER

Death of the Deal

The word “mortgage” is from the Old French and is the combination of “mort” meaning dead and “gaige” meaning pledge. In other words, the deal is done, or dies, when the debt is paid or there is a default. Unfortunately, there have been too many mort gaiges lately.

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Rick, our etymologist, practices commercial law and litigation.



PERSONAL NOTES

Kent E. Cammack, Christopher M. McNichol and Barbara U. Rodriguez-Pashkowski presented on real estate and environmental issues at the CLE by the Sea in San Diego.

Peter Collins, Jr. served as a faculty presenter at the 2010 Arizona College of Trial Lawyers. He is also a member of the State Bar of Arizona's Military Committee.

James T. Giel spoke to school business officers about legal issues surrounding leases for energy savings equipment and guarantees of such savings from equipment vendors.

Robert D. Haws presented on cyber bullying during a training session for school administrators and on student searches at the ASBA Law Conference.

John L. Hay and Christina M. Noyes gave a seminar on Trademark Issues for Municipalities to the firm's government clients.

Marty T. Jones served as the keynote lunch speaker at the 2010 Southwest Regional Environmental Conference, where he discussed the benefits and trade-offs of "going green."

James W. Kaucher wrote an article discussing the controversial bill SB1070 for *The Writ*, the Pima County Bar Association newsletter.

Scott A. Malm presented on title and escrow issues at the Arizona Land Title Association's annual convention.

Christopher M. McNichol and Kent E. Cammack spoke on foreclosure issues at the Arizona Trustee Association's annual conference. McNichol also presented on receiverships and leases at the Arizona Real Estate School.

Christina M. Noyes was invited to serve on the Technology Committee of the American Bar Association's Forum on Franchising.

David A. Pennartz is a board member and pro bono legal counsel for the Purple Ribbon Council to Cut Out Domestic Abuse, Inc.

Barbara U. Rodriguez-Pashkowski spoke on CERCLA liability updates at the 2010 Southwest Regional Environmental Conference and on regulatory compliance at the MCBA's Fundamentals of Environmental Law program. She also serves on the Board of Aid to Adoption of Special Kids (AASK).

Scott W. Ruby and Sarah C. Smith presented on various municipal finance topics at a conference for the Government Finance Officers Association of Arizona.

Sarah C. Smith volunteered with Wills for Heroes, an organization that provides essential legal documents free of charge to our nation's first responders.

Madeleine C. Wanslee was named the 2010-2011 Chair of the Ninth Circuit Lawyer Representatives for the District of Arizona. She also spoke on multiple panels concerning litigation and bankruptcy issues at the Arizona State Bar Convention.

Charles W. Wirken serves as a delegate in the American Bar Association House of Delegates.

County Recorder Leads Nation on Information Superhighway

Maricopa County Recorder Helen Purcell pioneered making digital images of recorded documents available to the public over the internet. This saves everyone time and money by not having to go to downtown Phoenix to sift through dusty papers or squint at microfiche (do kids nowadays know that word?). Materials dating back to 1871 are accessible with just the click of a mouse; this includes documents from many famous Arizonans for those voyeurs among us.

In 2002, our county was among the first in the nation to accept off-site electronic recording of documents from "trusted" sources such as lenders, title companies and law firms. For several

years now, Gust Rosenfeld's clients have benefited from our ability to electronically record documents.

Earlier this year, Recorder Purcell continued the trailblazing by unveiling the first public kiosk that allows electronic recording of documents by anyone through an interactive touch

screen. These kiosks will soon be placed in a number of locations throughout the county to make recording documents easier for people who don't live or work near downtown Phoenix—without the cost of building new facilities and hiring more staff.

Gust Rosenfeld is especially proud of our County Recorder and her accomplishments. Her late husband, Joe Purcell, was an attorney with Gust Rosenfeld for many years.

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Scott served by appointment of the Governor on the statutorily created Electronic Recording Commission. He helps clients resolve real estate disputes.



2010: Year of the Taxable Gift Bonanza

This year may be the best opportunity in years for wealthy individuals to make taxable gifts to loved ones.

This is especially true given that it is unlikely Congress will vote this year for a retroactive reinstatement of the estate tax, gift tax and generation-skipping transfer tax (GSTT) to pre-2010 levels.

Double Tax Savings

The federal gift tax rate is 35 percent this year only. Next year the rate returns to 55 percent, plus a 5 percent surtax on very large gifts. There's even greater savings if you want to make a gift to your grandchildren and/or those two or more generations below your own. These gifts are usually subject to the GSTT at a rate of 55 percent. But this tax also has been suspended for 2010. This means that next year, you'll have to factor in 55 percent for the GSTT on top of the 20-percentage point increase in the gift tax.



More Savings Possible

The potential tax savings don't stop there. The gift tax is determined on a "tax exclusive" basis, while the estate tax is "tax inclusive." This means that the tax paid on a gift is not included in the donor's estate if the donor survives the gift by three years.

If you want to take advantage of these tax-savings opportunities this year, please contact your Gust Rosenfeld tax or estate planning attorney.

This article discusses gifts to non-charitable donees only. Further, it does not address the annual federal gift tax exclusion of \$13,000 per year per donee or the \$1 million per donor lifetime gift exemption. The tax "breaks" associated with these should remain intact after 2010. Arizona has no gift or estate tax.

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