**Multifamily Rental HOUSING**

**Inter-creditor Agreement**

**Tool #11**

**Description:** This document is provided as a template for use by Community Development Block Grant-Disaster Recovery (CDBG-DR) grantees. Although it is designed for use in multifamily rental projects that may utilize multiple sources of funding, this document is not represented to be a complete agreement, and CDBG-DR grantees must enter the project details and must reference any grantee-specific or project-specific requirements.

**How to Adapt this Document:** Inter-creditor agreements tend to be situation-specific. Accordingly, consult local counsel, and consider adding other provisions that may be applicable to the relationship between the parties. Yellow highlight indicates a program feature to be determined by the grantee. Green highlight indicates a project-specific feature.

**Source of Document:** This document was adapted from a similar document used by the State of Louisiana in connection with gap financing loans made to multifamily rental projects using CDBG-DR funds.

This document is not an official HUD document and has not been reviewed by HUD counsel. It is provided for informational purposes only. Any binding agreement should be reviewed by attorneys for the parties to the agreement and must conform to state and local laws.

**For More Information**

This resource is part of the *Community Development Block Grant Disaster Recovery (CDBG-DR) Toolkits*. View all of the Disaster Recovery Toolkits here: <https://www.onecpd.info/resource/2853/cdbg-dr-toolkits>.

*Community Development Block Grant Disaster Recovery (CDBG-DR) Toolkits are designed to provide general guidance across all types of disasters (e.g. hurricanes, f****l****oods; tornadoes; earthquakes; etc.).  CDBG-DR Toolkits are NOT disaster specific.  CDBG-DR grant funding for a disaster or group of disasters is governed by CDBG requirements and any modifications contained in one or more Federal Register Notices (FRN) applicable to the disaster.  Grantees subject to the Disaster Relief Appropriations Act of 2013 (Public Law 113-2) should review all footnotes for additional applicable citations and guidance.  In addition to the FRN, Toolkit users should review applicable Federal cross-cutting requirements. The FRN, as well as cross-cutting requirements, are available on the Department’s website.*

For additional information about disaster recovery programs, please see your HUD representative.

U.S. Department of Housing and Urban Development

Community Planning and Development, Disaster Recovery and Special Issues Division

**MULTIFAMILY RENTAL PROGRAM**

**INTER-CREDITOR AGREEMENT**

This Inter-creditor Agreement (this “Agreement”) is made and entered into as of\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2010 by and between the name of grantee (“Grantee”); and \_\_\_name of construction lender\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_ corporation (“Construction Lender”); and consented to and acknowledged by ­­­­­­­­­­­­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ , a \_\_\_\_\_\_\_\_\_\_ (“Borrower”).

**RECITALS**

1. WHEREAS, Grantee is providing funds from the United States of America, HUD Community Development Block Grant –Disaster Recovery (CDBG-DR) Program to qualified borrowers in accordance with the CDBG-DR Multifamily Rental Program (the “Program”) under describe Grantee’s published CDBG-DR Action Plan*,*; and

1. WHEREAS, Borrower submitted an application to Grantee and has been awarded a Gap Financing Loan (the “Gap Financing Loan”) by Grantee for the development, rehabilitation, replacement, restoration, and/or construction of a multifamily residential rental project (the “Project”) located on certain immovable property more fully described on Exhibit A - Property Description attached hereto (together with the Project, the “Property”), pursuant to a CDBG-DR Gap Financing Loan Agreement dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2010 between Grantee and Borrower (the “CDBG-DR Loan Agreement”), and the related loan documents (the “CDBG-DR Loan Documents”), and secured by a certain Mortgage, Assignment of Leases and Rents and Security Agreement (the “CDBG-DR Mortgage”) securing the collateral described therein (the “Mortgaged Property”); and
2. WHEREAS, Construction Lender has agreed to provide construction financing for the Project in an aggregate principal amount not to exceed $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.00 (the “Construction Loan”), as evidenced by a loan agreement dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, between Construction Lender and Borrower (the “Construction Loan Agreement”), a promissory note (the Construction Loan Note) and secured by a certain mortgage, assignment of rents and security agreement (the “Construction Loan Mortgage”) encumbering the Mortgaged Property. The Construction Loan Note, Construction Loan Mortgage, Construction Loan Agreement or any other document or instrument evidencing or securing the Construction Loan, are hereinafter referred to as the “Construction Loan Documents”; and
3. WHEREAS, Grantee and Construction Lender have agreed to fund the Gap Financing Loan and the Construction Loan, respectively, on a *pari passu* basis, under the terms and conditions set forth herein:

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the sufficiency and receipt whereof being hereby acknowledged, Grantee and Construction Lender agree to fund the Gap Financing Loan and Construction Loan proceeds on behalf of the Borrower into a controlled account with Construction Lender during the construction of the Project, on a *pari passu* basis, under the following terms and conditions:

1. **Payment of Draw Requests**
	1. Disbursement of loan proceeds is limited to not more than one (1) draw per month, based on the monthly draw request submitted by Borrower in accordance with the Construction Loan Documents and the CDBG-DR Loan Documents (each a “Draw Request”).
	2. The following costs are eligible to be included in Draw Requests and to be funded pursuant to this Intercreditor Agreement:
		1. Total Development Costs expected to be incurred after completion of construction; minus
		2. Any portion of the developer fee, scheduled to be incurred during construction, that exceeds 35% of the difference between (A) the total developer fee and (B) the amount of the total developer fee expected to be deferred; minus
		3. Any amounts scheduled to be incurred during construction for non-cash items including contingencies; and minus
		4. Any sources of funds to be provided during construction on a fixed schedule (i.e., rather than pari passu according to monthly construction progress).
	3. Allowable Draws of Developer Fee.
		1. Grantee and Construction Lender agree that Borrower may include in the first Draw Request a maximum developer fee amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
		2. Grantee and Construction Lender agree that Borrower may include in each subsequent Draw Request a maximum developer fee amount calculated as the percentage of construction completion multiplied by the difference between:
			1. $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_; and
			2. The developer fee amount that was included in the first Draw Request.
	4. Grantee shall fund \_\_\_\_% of each Draw Request, and Construction Lender shall fund the remaining \_\_\_\_% of each Draw Request.
	5. Pursuant to each Draw Request, to the maximum extent feasible, Grantee shall pay only costs of acquisition and hard costs of construction.
	6. Prior to payment of any Draw Request, Borrower must have satisfied each and every condition to funding under the Construction Loan Documents and the CDBG-DR Loan Documents including but not limited to the following: the Construction Lender shall have reviewed and approved the Draw Request and shall received and reviewed an inspection report from a qualified party confirming that all work has occurred in an acceptable manner and that all materials for which payment is sought in the Draw Request have been received.
	7. If all conditions precedent to Grantee's obligations hereunder and to the Draw Request have been performed or satisfied to the reasonable satisfaction of Grantee, Grantee shall, within seven (7) business days of receipt of the Draw Request, fund its share of such Draw Request in accordance with the terms of this Agreement and the CDBG-DR Loan Documents. Provided, however, notwithstanding anything to the contrary contained herein, Grantee shall not be required to fund its share of the monthly Draw Request until Construction Lender has funded its share of the monthly Draw Request.
2. **Default**
	1. Default Under the Gap Financing Loan. Grantee or its representatives shall give to Construction Lender prompt written notice of any default under the CDBG-DR Loan Documents (“CDBG-DR Loan Default”) which has not been cured within any applicable notice and/or cure period; provided however, the failure to give such notice shall not constitute a waiver of such default or limit or otherwise affect Borrower’s duties and obligations under the CDBG-DR Loan Documents.
	2. Default Under the Construction Loan. Construction Lender shall give to Grantee or its representatives prompt written notice of any default under the Construction Loan Documents (“Construction Loan Default”) which has not been cured within any applicable notice and/or cure period; provided however, the failure to give such notice shall not constitute a waiver of such default or limit or otherwise affect Borrower’s duties and obligations under the Construction Loan Documents. Notwithstanding the foregoing, Construction Lender agrees that it shall not exercise any right or remedy under the Construction Loan Documents which might in any way prejudice Grantee’s rights under the CDBG-DR Loan Documents.
	3. Subordination. Construction Lender and Grantee have entered into a Subordination Agreement defining each lender’s rights and obligations with regard to their respective liens on the Project.
3. **Notices and Other Communications**

* 1. Except as expressly otherwise provided herein, all notices, requests, demands, consents, instructions or other communications to or upon the parties to this Agreement shall be deemed to have been duly given or made only when delivered in writing or by telecopy to the party to which such notice, request, demand, consent, instruction or other communication is required or permitted to be given or made hereunder, at the addresses or telecopy numbers of the parties, and to the attention of the person, specified below, or to such other address, telecopy number or attention as any party may hereafter specify to the others in writing in accordance with this Section.

Grantee: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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with a copy to: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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Construction Lender: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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Borrower: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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* 1. All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given if mailed or transmitted by any standard form of telecommunication.
1. Representations and Warranties.
	1. Each party to this Agreement represents and warrants for the benefit of the other parties to this Agreement that this Agreement has been duly authorized, executed and delivered by it and constitutes its legal, valid, binding and enforceable obligation, enforceable against it in accordance with the terms of this Agreement, except to the extent such enforceability may be limited by the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors’ rights generally and by general principles of equity.
	2. Further Assurances. Each party to this Agreement covenants and agrees that it shall promptly execute and deliver from time to time all further instruments and documents, and take such further actions that may be necessary or desirable, or that any other party to this Agreement may reasonably request, in order to protect, exercise or enforce any right, remedy or interest granted or purported to be granted hereunder.
2. **Miscellaneous**
	1. Taking or Casualty. In the event of a taking or threatened taking by condemnation, expropriation or other exercise of the power of eminent domain of all or any portion of the Mortgaged Property (collectively, a “Taking”) or in the event of an occurrence of a fire or other casualty resulting in damage to all or any portion of the Mortgaged Property (collectively, a “Casualty”), at any time or times when any Gap Financing Loan or Construction Loan remain outstanding, the following shall apply.
		1. The Borrower hereby agrees to provide Grantee and Construction Lender (“Lenders”) with notice of any proceeding or action relating to a Taking and/or Casualty.
		2. If there is a Subordination Agreement. The Lenders each hereby agree that its rights (under its Loan Documents or otherwise) to participate in any proceeding or action related to a Taking and/or a Casualty, or to participate or join in any settlement of, or to adjust, any claims resulting from a Taking or a Casualty, shall be and remain subject to describe Subordination Agreement.
		3. Nothing contained in this subsection and/or anything contained in this Agreement shall limit the rights of any Lender to file any pleadings, documents, claims or notices with the appropriate court with jurisdiction over the proposed Taking and/or Casualty.
		4. All proceeds received or to be received on account of a Taking or a Casualty, or both, shall be applied to payment of the costs and expenses of repair and restoration in the manner determined by describe how these decisions will be made as between the Lenders and the borrower.
		5. Provided, however, that if decide who, as between the Construction Lender and Grantee, will be paid first the Senior Lender elects to apply such proceeds to payment of the principal of, inter­est on and other amounts payable under its loan, any proceeds remaining after the satisfaction in full of the principal of, interest on and other amounts payable under its loan shall be paid to, and may be applied by, the remaining lender in accordance with the applicable provisions of such Lender’s Loan Documents (to the extent of the amounts due under such Lender’s Loan); provided, however, the Senior Lender agrees to consult with the other Lender in determining the application of Casualty proceeds; and provided further, however, that in the event of any disagreement between the Senior Lender, and the other Lender, over the application of Casualty proceeds, the decision of the Senior Lender, in its sole discretion, shall prevail. A final determination shall be made by the Senior Lender within sixty (60) days of the date of the casualty.
	2. Binding Effect. This Agreement and all of the terms of this Agreement shall be binding upon, and shall inure to the benefit of and be enforceable by, the parties to this Agreement and their respective successors and permitted assigns.
	3. Amendments and Waivers. This Agreement may only be amended or waived in whole or in part by a written document signed by Grantee and Construction Lender.
	4. Termination.  This Agreement and the rights and obligations created hereby shall continue to be effective until completion of the Project as evidenced by issuance of final certificates of occupancy for all rental units in the Project and disbursement of all Construction Loan proceeds and all Gap Financing Loan proceeds.

* 1. Third-Party Beneficiaries. There shall be no third-party beneficiaries of the obligations of the parties hereunder.
	2. Headings Descriptive.  The headings of the several Sections of this Agreement are inserted for convenience only and shall not in any way affect the meaning or construction of any provision of this Agreement.

* 1. Counterparts. This Agreement may be executed in any number of counterparts and by the different parties to this Agreement on separate counterparts, each of which when so executed and delivered shall be an original, but all of which shall together constitute one and the same instrument.
	2. Fees. Grantee shall have no liability for any costs, fees, or expenses to Borrower or Construction Lender under this Agreement.
	3. Governing Law; Submission to Jurisdiction, etc.
		1. THIS AGREEMENT AND ALL ISSUES HEREUNDER SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE INTERNAL LAWS OF THE STATE OF \_\_\_\_\_\_\_\_\_\_\_.
		2. TO THE FULLEST EXTENT IT MAY EFFECTIVELY DO SO UNDER APPLICABLE LAW, EACH OF THE PARTIES TO THIS AGREEMENT HEREBY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF ANYSTATE COURT SITTING IN THE COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ OR ANY FEDERAL COURT SITTING IN THE COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ IN RESPECT TO ANY SUIT, ACTION OR PROCEEDING, WHETHER IN TORT, CONTRACT OR OTHERWISE, ARISING OUT OF OR RELATING TO THIS AGREEMENT.
		3. EACH OF THE PARTIES TO THIS AGREEMENT IRREVOCABLY WAIVES, TO THE FULLEST EXTENT IT MAY EFFECTIVELY DO SO UNDER APPLICABLE LAW, TRIAL BY JURY AND ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF THE VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT AND ANY CLAIM THAT ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.
		4. NOTHING HEREIN SHALL AFFECT THE RIGHT OF ANY LENDER OR ITS AGENTS TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR TO COMMENCE LEGAL PROCEEDINGS OR OTHERWISE PROCEED AGAINST ANY PARTY IN ANY COLLATERAL ACTION IN ANY OTHER JURISDICTION.

[Remainder of this Page Intentionally Blank – Signature Pages Follow]

IN WITNESS WHEREOF, Grantee has executed this Intercreditor Agreement on this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_, 2010, at \_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, in the presence of the undersigned witnesses and Notary Public after due reading of the whole.

WITNESSES: Grantee:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By:\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Print Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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NOTARY PUBLIC

Print Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

My Commission Expires:\_\_\_\_\_\_\_\_\_\_

 IN WITNESS WHEREOF, Construction Lender has executed this Intercreditor Agreement on this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_, 2010, at \_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_\_, in the presence of the undersigned witnesses and Notary Public after due reading of the whole.

WITNESSES: CONSTRUCTION LENDER:

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NOTARY PUBLIC

Print Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

My Commission Expires:\_\_\_\_\_\_\_\_\_\_

IN WITNESS WHEREOF, Borrower has executed this Intercreditor Agreement on this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, in the presence of the undersigned witnesses and Notary Public after due reading of the whole.

WITNESSES: BORROWER:

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NOTARY PUBLIC

Print Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

My Commission Expires:\_\_\_\_\_\_\_\_\_\_

EXHIBIT A

Property Description