

## Real Estate Loan Drafting Guidance: District of Columbia

by Brian W. Thompson and Erica L. Litovitz, Jackson & Campbell, P.C., with Practical Law Real Estate

Status: Law stated as of 25 May 2023 | Jurisdiction: District of Columbia, United States

This document is published by Practical Law and can be found at: [content.next.westlaw.com/w-013-8736](https://content.next.westlaw.com/w-013-8736)

Request a free trial and demonstration at: [tr.com/practicallaw-home](https://tr.com/practicallaw-home)

A Q&A guide to real estate finance law and practice for borrowers and lenders in the District of Columbia. 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?**

#### Maximum Principal Indebtedness

The District of Columbia (DC) Code does not specify whether security instruments must state the maximum amount of indebtedness they secure, with limited exceptions. The customary practice is to include the information.

All security instruments submitted for recording in DC must include a return that specifies the principal amount of debt secured by the deed of trust (D.C. Code § 42-1103(b)(1)).

#### Accrued Interest and Protective Advances

The amount secured by a deed of trust may include not only the original loan but also any additional amounts secured according to the terms of the deed of trust (*Concord Enters., Inc. v. Binder*, 710 A.2d 219, 223 (D.C. 1998)).

**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.

A mortgage or deed of trust must be recorded with the [DC Office of Tax and Revenue, Recorder of Deeds](#) (Recorder of Deeds) within 30 days after it is executed (D.C. Code §§ 42-802 and 47-1431).

The DC Code does not specify the form and contents of a mortgage or deed of trust. To record a document, the document must include:

- A complete legal description of the property, including:
    - the lot number;
    - square number;
    - subdivision (if applicable); and
    - reference information.
- (D.C. Code § 47-1431.)

- The Assessment and Taxation (A&T) Lot number, if a number was assigned.
- The names of all grantors and all grantees.
- The notarized signatures of all grantors.
- The notary seal, signature, name, and expiration date.
- The name and address of the person the document should be returned to.
- A completed [Tax Form FP-7C](#).

(See [Recorder of Deeds: Duties of the Recorder of Deeds With Respect to General Recording Requirements](#).)

It is customary to also include the following information in a security instrument:

- A reference to the promissory note.
- The interest rate.
- The default interest rate.
- Either or both prepayment charges or late charges.
- An application of payments and proceeds.
- A provision indicating funds for escrow items.
- A provision stating the borrower's obligation to discharge any liens having priority over the security instrument (if applicable).
- A provision stating the borrower's obligation to maintain property insurance.
- Provisions regarding mortgage insurance (if applicable).
- An assignment of proceeds to lender.
- Notice requirements.
- The governing law.
- The lender's authority to either or both sell or assign promissory note.
- A prohibition against hazardous substances.
- The lender's rights on default (for example, acceleration).
- The borrower's right to cure (if any).
- The lender's right to invoke power of sale.
- The lender's agreement to cause trustee to release the security instrument on satisfaction.
- The trustee's identity.
- The trustee's fees if foreclosure occurs.

For more information on recording a document in DC, see the Recorder of Deeds [website](#).

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

The security interest must comply with the requirements of the Uniform Commercial Code (UCC) to perfect a security interest in personal property (D.C. Code §§ 28:1-101 to 28:11-108). To perfect a security interest in personal property, the lender must file a [UCC financing statement](#) with the DC mayor's office (D.C. Code §§ 28:9-310(a) and 28:9-501(a)(2)).

A security instrument must contain a description of the collateral that reasonably identifies the property it describes. A description of collateral reasonably identifies the property if the description identifies the property by:

- Specific listing.
- Sales contracts, negotiable instruments, bank deposits and collections, letters of credit, documents of title, investment securities, secured transactions, funds transfers, and leases, except for:
  - a commercial tort claim; or
  - in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account.
- Category.
- Quantity.
- A computational or allocational formula or procedure.
- Any other method if the identity of the collateral is reasonably determinable.

(D.C. Code § 28:9-108(a), (b), and (e).)

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

- The collateral as a security entitlement, securities account, commodity account, or as investment property.
- The underlying financial asset or commodity contract.

(D.C. Code § 28:9-108(d).)

This does not apply if what is described is either:

- A commercial tort claim.

- In a consumer transaction:
  - consumer goods;
  - a security entitlement;
  - a securities account; or
  - a commodity account.

(D.C. Code § 28:9-108(e).)

A generic description of the collateral as “all the debtor’s assets” or “all the debtor’s personal property” does not reasonably identify the collateral (D.C. Code § 28:9-108(c)).

#### **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?**

DC follows a notice filing system. Under a notice filing system, a party only needs to file a financing statement, which may be filed before or after the security agreement. A financing statement is effective to cover:

- Transactions under a security agreement that does not exist or has not been contemplated when the notice was filed, if the indication of collateral in the financing statement is sufficient to cover the collateral concerned.
- After-acquired property of the type indicated on the financing statement and to perfect future advances under security agreements, regardless of whether:
  - after-acquired property or future advances are mentioned in the financing statement; and
  - they were contemplated by the parties when filed.

(D.C. Code § 28:9-502, UCC cmt. 2.)

A security interest in after-acquired property is not effective against:

- Consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within ten days after the secured party gives value.
- A commercial tort claim.

(D.C. Code § 28:9-204(b).)

DC law does not provide for specific language that the lender must use in an after-acquired property clause to automatically create a lien on after-acquired property.

## 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?**

In DC, an assignment of leases and rents may be incorporated into a deed of trust or mortgage. Lenders typically also require the borrower to assign all leases and rents related to the mortgaged property under a separate instrument.

The US Court of Appeals for the DC Circuit held that in DC, a deed of trust conveying real property to secure payment of the indebtedness that gives the lender the right to receive the rents until default only grants a security interest in the rents. It does not constitute an absolute assignment where the trustee was entitled to receive rents on demand when the borrower defaulted, without having to resort to formal legal procedures. (*Democratic Cent. Comm. v. Washington M.A.T.C.*, 21 F.3d 1145, 1149-50 (D.C. Cir. 1994).)

Where rent payments are pledged only as security in a deed of trust, the lender is not entitled to receive the rent payments on the mortgaged property until it has perfected its security interest in those payments by either acquiring:

- Actual possession of mortgaged property.
- Constructive possession by appointing a receiver.

(*Democratic Cent. Comm.*, 21 F.3d at 1150.)

Unless rents are paid directly to the lender, the assignment of rents serves only as a security interest that grants the lender priority over later judgment lien creditors in the future rental payments. Until the lender directly or indirectly takes possession of the underlying mortgaged property, it cannot actually enforce the assignment of rents. (*In re 5028 Wisconsin Ave. Assocs. Ltd. P'ship*, 167 B.R. 699, 703-04 (Bankr. D.D.C. 1994); *In re 1301 Connecticut Ave. Assoc.*, 126 B.R. 1, 2-3 (D.D.C. 1991).)

#### **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?**

Courts applying DC law have held that an assignment of leases generally does not constitute an absolute assignment. The lender cannot receive the rent payments on the mortgaged property until it has perfected its security interest in those payments. (*Democratic Cent. Comm.*, 21 F.3d at 1150; see Question 5.) The assignment grants the lender priority over later lien creditors in future rental payments (*Democratic Cent. Comm.*, 21 F.3d at 1157; see Question 5).

However, courts applying DC law have recognized absolute assignments of leases and rents (*Vector Realty Grp., Inc. v. 711 Fourteenth St., Inc.*, 711 A.2d 1265, 1267-68 (D.C. 1998); *Democratic Cent. Comm.*, 21 F.3d at 1150). The parties may create an absolute assignment by devising structures in the contract to make the rents serve as the means of repayment (*In re 1301 Connecticut Ave. Assoc.*, 126 B.R. at 3). For example, in *Vector Realty Group, Inc.*, the assignment of leases provided that the assignee's written demand for rent payments on default required the tenants to make all future rent payments directly to the assignee. The court held that the rent payments were automatically assigned when the borrower defaulted since, when mortgage loan documents create a security interest in tenant rents and authorize the lender to collect those rents directly from the tenants on demand if the borrower defaults, the lender perfects that security interest by making a demand. (711 A.2d at 1268.)

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

A recorded security instrument may act as a fixture filing if the goods are or may become fixtures related to the real property described in the instrument (D.C. Code § 28:9-502(c)(2)).

A fixture filing must:

- Include the name of:
  - the debtor; and
  - the secured party or their representative.
- Indicate the collateral covered.
- Indicate that it covers fixtures.
- Indicate that it is to be filed in the real property records.
- Provide a description of the real property to which the collateral is related.
- If the debtor does not have an interest of record in the real property, provide the name of a record owner.

(D.C. Code §§ 28:9-102(a)(40) and 28:9-502(a), (b).)

## 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?

#### General

In DC, the recordation tax on a security instrument is:

- 1.45% of the total amount of debt incurred that is secured by the interest in real property for property up to \$2 million.
- 2.5% of the total amount of debt incurred that is secured by the interest in real property, any part of which is classified as Class 2 (Commercial), where consideration is \$2 million or more.

(D.C. Code § 42-1103(a)(3)(A), (a-4), (a-5).)

If the debt is refinanced, the recordation tax only applies to the principal amount of the new debt exceeding the principal balance due on the existing debt if the existing debt was either:

- Previously taxable under the DC recording tax.
- Exempt from recordation taxes.

(D.C. Code § 42-1103(a)(3)(A).)

#### Future Advances

If the amount later advanced exceeds the maximum indebtedness stated in the deed of trust, a party must pay additional tax when the instrument evidencing those later advanced amounts is submitted for recording (D.C. Code § 42-1103(a)(3)(A)).

#### Permanent Loan Deed of Trust or Mortgage

For a permanent loan deed of trust or mortgage, a party need not pay recording tax if all the following are satisfied:

- The permanent loan deed of trust or mortgage:
  - contains a reference to a construction loan deed of trust or mortgage; and
  - states the date and instrument number where the construction loan deed of trust or mortgage is recorded.

- The recording tax on the construction loan deed of trust was timely and properly paid.

If the liability secured by the permanent loan deed of trust or mortgage is greater than that secured by the construction loan deed of trust or mortgage, a party must pay recording tax on the difference. (D.C. Code § 42-1102(11).)

A party need not pay recording tax on a permanent loan deed of trust or mortgage when a permanent loan deed of trust or mortgage replacing a construction loan deed of trust or mortgage is recorded and the tax on the construction loan deed of trust or mortgage has been paid. If the amount of the permanent loan deed of trust or mortgage amount exceeds the principal balance due on the construction loan, the party must pay recording tax on the difference. (D.C. Mun. Regs. tit. 9, § 510.)

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

The parties to a deed of trust or mortgage submitted for recordation are jointly and severally liable for payment of the recordation taxes (D.C. Code § 42-1103(c)). The parties may face:

- Criminal penalties.
- A requirement to pay the recording tax, penalties, and interest.

(D.C. Code § 42-1108.01.)

## 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.

Foreclosing lenders must pay real property transfer taxes when transferring real property. Where the purchase price for the real property is nominal, DC uses the real property's fair market value as the basis for calculating the transfer tax (D.C. Code § 47-904). DC law does not require that the transfer or recordation taxes on real

property sold in foreclosure be computed solely based on fair market value rather than the amount that was actually paid (*Askin v. District of Columbia*, Tax Docket No. 5572-93 (D.C. Super. Ct. Aug. 14, 1995)).

The current transfer and recordation tax rates are:

- 1.45% of the total amount of debt incurred that is secured by the interest in real property for all other property up to \$2 million.
- 2.5% of the total amount of debt incurred that is secured by the interest in real property, any part of which is classified as Class 2 (Commercial), where consideration is \$2 million or more.

(D.C. Code §§ 47-903 (a)(1), (a-4), (a-6) and 42-1103(a)(3)(A), (a-4), (a-5).)

If the debt is refinanced, the recordation tax only applies to the principal amount of the new debt exceeding the principal balance due on the existing debt if the existing debt was either:

- Previously taxable under the DC recording tax.
- Exempt from recordation taxes.

(D.C. Code § 42-1103(a)(3)(A).)

DC imposes an economic interest tax when there has been a transfer of a controlling economic interest in real property within a 12-month period where the transferor either:

- Derives more than 50% of its gross receipts from the ownership or disposition of real property in DC.
- Holds real property in DC that has a value of 80% or more of the value of its entire tangible asset holdings.

(D.C. Code § 42-1102.02(a).)

The economic interest tax is:

- 2.9% of the consideration allocable to the real property.
- 2.2% of the consideration allocable to the real property under certain limited exceptions relating to interests in cooperative housing associations.
- 5% of the consideration allocable to the real property, any part of which is classified as Class 2 (Commercial), where consideration is \$2 million or more.

(D.C. Code § 42-1103(a)(2).)

For tax purposes, consideration is the amount that must be paid or provided in exchange for the execution and delivery of the deed. If the amount that must be paid is nominal or non-existent, the tax is based on the fair

market value of the economic interest being conveyed. (D.C. Code § 42-1104(a).) If the submission does not contain sufficient information to determine the fair market value of the economic interest being conveyed, the DC government may determine the amount from information available (D.C. Code § 42-1104(c)).

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

Under DC law, a foreclosure sale of real property extinguishes any subordinate leases with the borrower. Tenants remaining on the property are tenants-at-will in relation to the new owner. (*Banks v. E. Sav. Bank*, 8 A.3d 1239, 1243 (D.C. 2010).) This does not apply to tenants holding under an unexpired, written lease for a term of years, if the lease predates the deed of trust (D.C. Code § 42-522).

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

#### Appointing a Receiver

Any person may petition the DC Superior Court to appoint a receiver over attached property (D.C. Code § 16-518). The decision to appoint a receiver is generally within the court's discretion (see *District of Columbia v. Jerry M.*, 738 A.2d 1206, 1214 (D.C. 1999)). DC does not have a general receivership statute, but courts consider several factors when determining whether to appoint a receiver, including whether:

- There were repeated failures to comply with the court's orders.
- Further efforts to secure compliance are likely to only lead to confrontation and delay.
- Leadership is available that can turn the tide within a reasonable time period.
- There was bad faith.
- Resources are being wasted.
- A receiver can provide a quick and efficient remedy.

(*Jerry M.*, 738 A.2d at 1213.)

Regarding attached property, a court may appoint a qualified receiver to take possession of the property "when it seems expedient" (D.C. Code § 16-518).

Courts have a great deal of discretion in selecting and appointing receivers (see *Jenkins v. Purcell*, 1907 WL 19783, at \*2 (D.C. March 5, 1907)). There is no case law or statutory guidance on the qualifications of receivers.

The receivership commences after the plaintiff pays a bond to the court, in an amount determined by the court, as security for the property over which the receiver has authority (D.C. Code § 16-501).

#### Discharging a Receiver

DC law does not specify the process for discharging a receivership over attached property. A party generally must file a motion with the court to terminate the receivership (see *Mearns v. Sullivan*, 262 F. 633 (D.C. 1920)).

### 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?).

#### Homestead Exemption

The head of a family or a householder residing in DC is free from attachment, levy, or seizure and sale of their interest in real property used as a residence. This does not impair a deed of trust or mortgage on the property. (D.C. Code § 15-501(a)(14); RML-SRATL DC § 2:21.)

A debtor that is the head of a family or a householder residing in DC can also exempt up to:

- \$850 in value of their aggregate interest in any property.
- \$8,075 of any unused amount of the homestead exemption.

(D.C. Code § 15-501(a)(3).)

If the head of family or householder debtor exempts \$8,075 or more of the equity in their residence under D.C. Code § 15-501(a)(14), the debtor may exempt an additional amount of only \$850 under D.C. Code § 15-501(a)(3) (*In re McDonald*, 279 B.R. 382, 386-87 (Bankr. D.D.C. 2002)).

A decedent's surviving spouse or domestic partner is entitled to a homestead allowance of \$15,000. If there is no surviving spouse or domestic partner, the decedent's minor and dependent children share in a \$15,000 exemption. (D.C. Code § 19-101.02; RML-SRATL DC § 2:21.)

**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

#### Foreign Entity

If a lender is a national bank, no permissions, approvals, or licenses are necessary before making a commercial loan secured by real property located in DC.

A foreign lender, or a lender incorporated under the law of another state, territory, or country, must register as a foreign entity with the [DC Department of Consumer and Regulatory Affairs \(DCRA\)](#). A foreign lender that conducts business in DC without having registered with the DCRA does not:

- Invalidate the lender's contracts.
- Preclude it from defending an action or proceeding.

However, the foreign lender cannot maintain an action or proceeding in DC until it registers to do business in DC. (D.C. Code § 29-105.02(b), (c).)

#### Qualifications for a Lender's Attorney

For a judicial foreclosure, an attorney must be admitted to practice in DC to bring a foreclosure action (D.C. App. R. 49(a)).

### 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?**

A lender perfects future advances by recording a credit line deed of trust. From the date when a credit line deed of trust is recorded in DC, it has priority over:

- All advances made after it is recorded, including outstanding amounts and interest.
- All other deeds, conveyances, instruments, or written contracts:
  - that have not been recorded; and
  - of which the holder of the credit line deed of trust is unaware.
- Judgment liens that are later recorded.

(D.C. Code § 42-2303(a), (c).)

The credit line deed of trust **does not** have priority over:

- A judgment creditor that gives notice of the judgment to the holder of the credit line deed of trust for advances that:
  - are made after the judgment creditor provides notice; and
  - that were not irrevocably committed before that date.
- Mechanic's liens if the advance made under the credit line deed of trust was made after the notice of the mechanic's lien was filed.

(D.C. Code § 42-2303(a)(2), (b).)

When determining the priority among conflicting security interests in the same collateral, perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that is:

- Made while the security interest is perfected only under D.C. Code § 28:9-309 when it attaches or temporarily under D.C. Code § 28:9-312(e), (f), or (g).
- Not made under a commitment entered into before or while the security interest is perfected by a method other than under D.C. Code §§ 28:9-309 or 28:9-312(e), (f), or (g).

(D.C. Code § 28:9-323(a).)

A security interest is also subordinate to the rights of a party that becomes a lien creditor if the security interest secures an advance made more than 45 days after the person becomes a lien creditor. This does not apply if the advance is made either:

- Without knowledge of the lien.
- Under a commitment entered into without knowledge of the lien.

(D.C. Code § 28:9-323(b).)

**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?**

DC does not recognize the obligatory advance rule. In DC, a deed of trust or mortgage that is recorded before

construction begins has priority over mechanics' liens. Construction loan advances made after the filing of a mechanic's lien are subordinate to the mechanic's lien. (D.C. Code § 40-303.07; *Elec. Equip. Co. v. Sec. Nat'l. Bank*, 606 F.2d 1357, 1360-61 (D.C. Cir. 1979); *Waco Scaffold & Shoring Co. v. 425 Eye St. Assocs.*, 355 A.2d 780, 782 (D.C. 1976).)

### About Practical Law

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at [legalsolutions.com/practical-law](https://legalsolutions.com/practical-law). For more information or to schedule training, call 1-800-733-2889 or e-mail [referenceattorneys@tr.com](mailto:referenceattorneys@tr.com).