

**Erie County Industrial Development Agency (ECIDA)**

**Policy for Termination and/or Modification of Agency Financial Assistance**

**And**

**Recapture of Agency Financial Assistance Previously Granted**

**Adopted: January 29, 2014**

**Amended and Restated: May 25, 2016**

1. **Purpose.** To establish and provide a fair procedure, compliant with Sections 874 and 875 of the New York General Municipal Law and ECIDA policies, potentially resulting in the termination and/or modification of Agency Financial Assistance and/or the recapture of all or a portion of Agency Financial Assistance.
2. **Goal.** The goal of this policy is to enact a procedure for implementing the potential or actual termination and/or modification of Agency Financial Assistance and/or recapture of all or a portion of Agency Financial Assistance from Applicants resulting from the violation of certain statutory requirements and/or Material Factors, as defined herein, that were relied upon and established as consideration for the granting of Financial Assistance to Applicants.
3. **Definitions.**
  - a. ***Agency Financial Assistance*** includes any or all: (i) exemptions from New York State and local sales and use tax; (ii) an exemption from mortgage recording tax; and/or (iii) an abatement from real property tax provided by or through the ECIDA (under the terms of a Payment-in-lieu-of-Taxes Agreement or “PILOT Agreement”) to an Applicant in order to induce such Applicant to undertake a project (also referred to herein individually or collectively as “Financial Assistance”).
  - b. ***Applicant*** is a for-profit or not-for-profit entity that has applied for and received Agency Financial Assistance from ECIDA.
  - c. ***ECIDA*** is the Erie County Industrial Development Agency.
  - d. ***Material Factors*** are factors, and any related reporting requirements established to verify such factors, determined by the ECIDA Board as being so significant that without such factors at the level specified, it is unlikely that the ECIDA would have agreed to grant Agency Financial Assistance. Such factors generally include, but are not limited to, the number of net new permanent jobs retained and/or created, the dollar value of net new investment, etc... The quantity of such Material Factors (said Material Factors typically determined at the time a Project is granted ECIDA Financial Assistance) and the threshold for the termination and/or modification of Agency Financial Assistance and for the recapture of Agency Financial Assistance

shall be determined by the ECIDA Board or ECIDA staff, as appropriate (and as further identified, below), on a case by case basis.

- e. ***Recapture of Agency Financial Assistance*** is the result of an action taken by the ECIDA Board to seek to have an Applicant return all or a portion of Agency Financial Assistance that it has received.
- f. ***Termination of Agency Financial Assistance*** is the result of an action taken by the ECIDA Board or ECIDA staff, as appropriate, to cause an Applicant to cease receiving Agency Financial Assistance that it otherwise would have obtained in the future.
- g. ***Modification of Agency Financial Assistance*** is the result of an action taken by the ECIDA Board to cause a modification of the amount of Agency Financial Assistance to be received by the Applicant, for example, a modification of the abatement/increased payments under a PILOT Agreement, in the future.

4. **Termination and/or Modification of Agency Financial Assistance and/or Recapture-of Agency Financial Assistance.**

- a. Future Agency Financial Assistance may be terminated and/or modified by the ECIDA Board for a violation of any Material Factor contained in the ECIDA Application for Financial Assistance, inducement resolution (including all submissions made by the Applicant), Agent Agreement, Project Agreement, Lease/Leaseback Agreement, PILOT Agreement or any other agreement by and between the Applicant and the ECIDA (collectively, “ECIDA Transaction Documents”).
- b. In addition to the termination and/or modification of Agency Financial Assistance, the ECIDA may impose recapture of Agency Financial Assistance where it is determined through the process specified below, that:
  - i. Agency Financial Assistance were obtained as a result of a knowing, misstatement of a material fact where such misstatement occurred in the written ECIDA Application for Financial Assistance, in any written submission, or in any on the record verbal statement made to ECIDA staff, the ECIDA Board or ECIDA Policy Committee;
  - ii. An applicant failed to achieve the goals identified as Material Factors by the ECIDA Board at the time that the inducement/granting of Financial Assistance was approved. Such recapture of Agency Financial Assistance, to the extent provided by law, may consider extenuating and mitigating circumstances and may consider the extent to which the Applicant failed to achieve and maintain the Material Factors.

5. **Procedure to Terminate and/or Modify Agency Financial Assistance or to Recapture Agency Financial Assistance.**

- a. **Knowledge of Potential Termination/Modification of Financial Assistance or Recapture Issue:** When ECIDA staff becomes aware of a potential issue with respect to a Material Factor(s) related to the provision of Financial Assistance to an Applicant and is unable to otherwise remedy the issue, ECIDA staff shall notify the President/Chief Executive Officer or Chief Operating Officer of the ECIDA (note in the case where ECIDA staff is able to remedy said issue, ECIDA staff shall still notify the President/Chief Executive Officer or Chief Operating Officer of the ECIDA). The ECIDA staff shall also notify or cause to be notified, the Chair of the ECIDA, the Chair of the ECIDA Policy Committee and such other individuals as the ECIDA Board may determine. It is understood that this ECIDA Due Process Policy shall not apply to termination of Agency Financial Assistance related to the typical/standard events of default (not otherwise involving a Material Factor) as so identified within ECIDA Transaction Documents.
- b. **Decision to Commence a Proceeding:** The Chair of the ECIDA Policy Committee or the Chair of the ECIDA shall cause a proceeding to be commenced to determine if Agency Financial Assistance should be terminated and/or modified and/or recaptured.
- c. **Notice to the Applicant:** If a decision is made to commence a proceeding to terminate and/or modify Agency Financial Assistance (said termination/modification of Agency Financial Assistance being related to a Material Factor and otherwise unrelated to typical/standard events of default as so identified within ECIDA Transaction Documents) and/or to recapture Agency Financial Assistance, then the Applicant shall be provided written notice (“Notice”) of: (i) the alleged Material Factor(s) violation, (ii) the potential for termination and/or modification of Agency Financial Assistance and/or for recapture of Agency Financial Assistance as may be considered with respect to the commencement of such a proceeding, (iii) their rights to be heard and to appeal any such determination, and (iv) the date and time where a meeting will take place to consider the matter.
- d. **Sufficient Time to Prepare a Response and Opportunity to be Heard:** An Applicant shall be given ten (10) business days from the date said Notice, as described in Section 5(c), above, is received or deemed received to prepare and submit a written response to any alleged Material Factor(s) violation. The ten (10) business day response period, as described above, can be extended for good cause shown, as determined by the Chair. Thereafter, an Applicant will be provided an opportunity to make a written or written and oral presentation to the ECIDA Policy Committee.
- e. **Representation:** An Applicant shall have the right to be represented by counsel, or to appear without counsel.
- f. **Creation of Written Record:** The ECIDA Policy Committee shall take written meeting minutes that include a statement/summary of: (i) the alleged Material

Factor(s) violation, (ii) the response, (iii) all evidence that has been submitted, and (iv) a summary of any oral presentations that have been made. The meeting minutes shall also include the vote, if any, taken by the ECIDA Policy Committee.

- g. Executive Session: To the extent allowed by the New York State Open Meetings Law, at the request of an Applicant, the ECIDA Policy Committee may go into executive session to receive certain confidential information that pertains to the considerations being made by the ECIDA Policy Committee.
- h. ECIDA Policy Committee Recommendation: The ECIDA Policy Committee shall vote on a resolution recommending a termination and/or a modification of Agency Financial Assistance and/or a recapture of Agency Financial Assistance, or no action.
  - i. If a determination is made to recapture New York State and local sales and use tax exemptions and/or mortgage recording tax exemptions, in accordance with New York General Municipal Law and ECIDA policies, the amount the ECIDA shall recapture may be equal to up to 100% of the amount of New York State and local sales and use tax exemption and/or mortgage recording tax exemption benefit so obtained and utilized.
  - ii. If a determination is made to recapture an abated amount of real property tax payment or payments provided by and through the ECIDA to an Applicant under the terms of a PILOT Agreement, the maximum amount that may be recaptured is equal to, but may be less than, the sum total of real property tax abatement received by the Applicant in the year or years that the violation(s) of Material Factors occurred as so determined by the ECIDA Policy Committee in consultation with ECIDA staff and as provided in the related inducement resolution authorizing the provision of Financial Assistance to the Applicant. If the Policy Committee recommends that an Applicant be subject to a real property tax abatement recapture event with respect to a particular year or year(s), it need not also simultaneously recommend, although it may do so, termination of real property tax abatements going forward.
  - iii. If a determination is made to modify Agency Financial Assistance, the Policy Committee, in consultation with ECIDA staff, may modify the amount of Financial Assistance, for example, to require a modification of any PILOT Agreement to require increased payments.

Such ECIDA Policy Committee resolution, to be effective, shall require a majority vote of the entire membership of the ECIDA Policy Committee. Any resolution shall be in writing and contain a statement of the reasons for the decision. The resolution shall be presented to the Applicant and submitted to the ECIDA Board for its consideration. If a resolution does not have sufficient votes to be enacted by the ECIDA Policy Committee, the matter, including a full record, shall be submitted to the ECIDA Board without recommendation.

- i. Flexible Application of Termination and/or Modification of Agency Financial Assistance and Recapture of Agency Financial Assistance: To the extent permitted by law and ECIDA policies, the ECIDA Policy Committee shall have broad discretion in recommending how to implement the termination and/or modification of Agency Financial Assistance and the recapture of Agency Financial Assistance. Such recommendation related thereto shall be based upon the circumstances that trigger such action. The ECIDA Policy Committee shall consider the extent of the violation of a Material Factor, the duration of such violation, the cause of such violation and the extent to which there was a creation of net new jobs and new investment and adherence to such other Material Factors as may have been considered at the time of the inducement.
  - j. Appeal to ECIDA Board: An Applicant shall have the right to submit a written appeal to the ECIDA Board prior to the date upon which the ECIDA Board would otherwise consider taking action on a recommendation from the ECIDA Policy Committee. In addition, the Chair of the ECIDA Board may, in his or her discretion, grant an Applicant an opportunity to address the ECIDA Board prior to its action on a recommendation from the ECIDA Policy Committee.
  - k. Final Decision by ECIDA Board: The ECIDA Policy Committee recommendation, if any, shall be promptly forwarded to the ECIDA Board for its consideration. No recommendation to terminate and/or modify Agency Financial Assistance and/or to recapture Agency Financial Assistance will become effective until and unless it is adopted by a majority vote of the entire ECIDA Board. The ECIDA Board may reject a recommendation, modify a recommendation or approve a recommendation in whole or in part, if any such recommendation was made by the ECIDA Policy Committee, or make any decision provided for in this paragraph.
6. **Other Remedies Available to ECIDA.** Notwithstanding the foregoing, the ECIDA, acting through its staff, retains the right to terminate Agency Financial Assistance as otherwise provided within the ECIDA Transaction Documents (for non-Material Factor(s) issues). Cause for such termination of Agency Financial Assistance include, but are not limited to, failure of the Applicant to make PILOT payments on a timely basis, failure to make reports as required by the ECIDA Transaction Documents, or other uncured breaches of the ECIDA Transaction Documents.
7. **Distribution of Recaptured Financial Assistance.** Any and all such returned/recaptured amounts of Agency Financial Assistance shall be redistributed to the appropriate affected tax jurisdiction, unless agreed to otherwise by any local taxing jurisdiction.