

**MINUTES OF A MEETING OF THE
POLICY COMMITTEE OF THE
ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY**

- MEETING:** January 13, 2014, at Erie County Industrial Development Agency, 95 Perry Street, 4th Floor Conference Room, Buffalo, New York.
- PRESENT:** Michael Hoffert, Hon. Mary F. Holtz, Hon. Chris T. Johnston, Richard Lipsitz, Jr., Frank Mesiah, Hon. Glenn Nellis, Laura Smith and Richard M. Tobe
- ABSENT:** James J. Allen, Hon. Byron W. Brown, Hon. Mary Cooke, Hon. Thomas A. Loughran, and Brenda W. McDuffie
- OTHERS PRESENT:** Raymond Carr; Edward A. Rath, III; Steven Weathers, CEO; John Cappellino, Executive Vice President; Andrew Schoeppich, Treasurer/CFO; Karen M. Fiala, Assistant Treasurer; and Robert G. Murray, Assistant Secretary
- GUESTS:** John Anderson, General Counsel, AMS Servicing, LLC; Craig Lindauer, Executive Vice President, AMS Servicing, LLC; Kevin Thimmesch, Senior Director of Procurement, North American Salt Company; Anthony Mancinelli, attorney for North American Salt Company, Harter Secrest; David Chiazza, President Iskalo Development; and Matt Kahn, Principal, Big Ditch Brewing

There being a quorum present at 8:38 a.m., the meeting of the Policy Committee was called to order by Policy Committee Chair Tobe.

Mr. Tobe began the meeting by acknowledging the large size of the Policy Committee package and expressed concern that the Committee was not given sufficient lead time to review such a large package prior to the meeting.

Mr. Tobe then drew the Committee's attention to the twelve items listed in Section 4 of the Agenda which represent a list of issues that he would like the Policy Committee to address during the course of the year. Mr. Tobe then asked staff to group these issues into a logical framework and to develop information related to each such issue to allow the Committee to consider such issues at future meetings, and encouraged committee members to provide him with any other items that they would like to have addressed.

TERMINATION AND RECAPTURE POLICY

Mr. Tobe then reviewed the evolution and status of the current draft Policy for Termination of Agency Benefits and Recapture of Agency Benefits Previously Granted (the "Policy"), as attached hereto as Exhibit A and made a part of these minutes, noting that the Policy was created in response to the new New York State Law, passed in March of 2013, requiring IDAs to recapture state sales tax exemption benefits. Mr. Tobe noted that in April 2013 the Agency began to develop material terms and conditions as referred to in the statute, and during that same month, implemented the recapture provision for projects so induced at the Agency's April 2013 meeting. Immediately thereafter first drafts of the Policy were internally prepared and discussed at a number of Policy Committee meetings. In October of 2013, the

Policy Committee unanimously recommended that the Agency accept the draft Policy as it had been revised through discussions by the Policy Committee and that the Agency circulate the Policy for comment. At the Agency's October 21, 2013 meeting, the Agency unanimously accepted the draft Policy and directed staff to circulate the Policy and post it on its website for comment. On November 8, 2013, the Agency met with the IDA Leadership Council to review and discuss the draft Policy. To date, the Agency has received comments from the Buffalo Niagara Partnership, the Amherst Industrial Development Agency, Concord Supervisor Gary Eppolito, Lancaster Industrial Development Agency Chair Dino Fudoli, and Supervisor Mary Cooke from the Town of Grand Island, all said comments attached hereto as Exhibit B and made a part of these minutes.

Ms. Smith then reviewed comments submitted by the Buffalo Niagara Partnership (the "BNP") Developer's Advisory Council concluding that investment criteria should not be included as a material term because it is self-regulating, and stating that the term of the recapture period that runs for the length of a PILOT Agreement is too lengthy and suggesting that the recapture period term be limited to the term typically used as a New York State best practices with respect to State agencies which tend to be five years. Last, Ms. Smith expressed her support for all of the IDAs in Erie County to adopt and utilize the same recapture and termination policy.

Mr. Tobe acknowledged that the draft Policy is written in a legal manner because it is aimed at lawyers who would be familiar with the transactions, processes and documents as referred to within the Policy. As such, Mr. Tobe noted that he would be asking staff to draft a summary/layman's iteration of the Policy to be posted on the Agency's website as a more user friendly version of the Policy.

With respect to the BNP comments related to the duration of the termination and recapture term, Mr. Tobe noted that length is not established within the Policy itself, but rather on a project by project basis when the Policy Committee and the Agency discuss the terms with the company and incorporate such terms into the related inducement resolution. Mr. Tobe then expressed his thoughts that the term of the Policy should last as long as the term of the benefits consequently offered, which usually follows the length of the PILOT. To do otherwise could result in a situation where a company was receiving benefits but no longer performing at the level promised, or had ceased or substantially changed operations yet continued to receive Agency Benefits. For example, if there are no longer jobs at the location, and the PILOT term had not lapsed, without termination, benefits would continue, despite the lack of jobs.

Mr. Tobe next reviewed the Amherst IDA draft recapture policy and expressed concern that, as drafted, if the company does not initially meet its employment target, the new recapture policy is not otherwise triggered. Under this formulation, if the company never reaches its employment target, there would never be a termination or recapture. In addition, Mr. Tobe noted that the Amherst IDA policy defines some events that would or could afford a company an opportunity to remedy a violation, including but not limited to, a natural disaster, industry dynamics and unfair competition. Mr. Tobe noted that these types of circumstances were not specifically referred to in the ECIDA Policy, but were included within broad language that reference circumstance where the Agency could waive a termination or recapture. Mr. Tobe also noted that the Amherst IDA policy has a material factor that is not provided for in the Agency's Policy, being related to the "stated use of the project." For example, if the Agency induces a project and it switches from manufacturing to retail, would that result in a breach of material factor? By way of another example, what would happen if a proposed brewery switches to a restaurant, perhaps creating more jobs but no longer operating as a brewery production facility and thus is no longer part of an agribusiness sector? Mr. Cappellino stated that standard IDA inducement resolutions and documents at a minimum require that the projects that are induced by the Agency, as a condition of receiving IDA assistance, continue to operate as the same project, as so described in the Agency's inducement resolution, for as long as it is receiving such assistance. Finally Mr. Tobe pointed out that

the AIDA recapture period was limited to only one year term after the occurrence of an event that triggered the commencement of the recapture/termination period.

Mr. Tobe next suggested that the recapture term could also be shorter than the PILOT term but he believes that the Agency should separate term issues from the Policy itself. The establishment of the appropriate term for each deal should be part of the consideration of material term consideration on a company by company basis consistent with the Agencies past precedents. In general, however, Mr. Tobe stated that he believes that the Agency should be able to recapture benefits from any year in which a company received benefits if there is a significant violation.

Mr. Mesiah expressed his support for the creation of a monitor or monitoring position to allow for the monitoring of material factors, and also stated that the monitoring process would allow the Agency to consider events that could otherwise preclude recapture like natural disaster, industry dynamics and unfair competition for example. Mr. Weathers confirmed that upon acceptance and finalization of this Policy, the Agency would consider creating a monitoring process and monitoring officer position.

Mr. Tobe then stated after the last IDA Leadership Council he does not believe that it is likely that ECIDA and other IDAs will be able to establish a uniform termination and recapture policy. In particular, Mr. Tobe stated that he perceives a substantial gulf between ECIDA and some of the Town IDAs regarding the obligation of companies to meet commitments that they have promised.

Mr. Johnston also stated his belief that obtaining uniformity across all the IDAs in Erie County would be difficult. He stated that the ECIDA should move forward in the direction that it thought best even if some IDAs did not agree. At this point in time, Mr. Johnston made a motion to approve the Policy as currently drafted and to recommend that the Agency thereafter adopt the Policy. Mr. Lipsitz seconded the motion.

Mr. Nellis then reviewed comments provided by Town of Concord Supervisor Gary Eppolito, expressed concerns that the Policy could potentially scare business away, and suggested that the IDA Leadership Council be utilized to develop a softer, web based summary piece of the Policy.

Mr. Hoffert expressed his desire that the Agency establish and install a monitoring process. Mr. Mesiah then emphasized that the roll of the monitor is to report to the public the good news that investment and job creation goals are being met such that monitoring should be looked at positively, and not as a threat. Mr. Rath concurred with Mr. Mesiah, and stated that the Agency needs good messaging that is open, transparent and accountable.

At this point in time, Mr. Tobe summarized the motion to recommend the adoption of the Policy (as attached within Exhibit A) based on (1) improved messaging; (2) continued work with the other IDAs in Erie County; and (3) agreement to consider length/term issues within the consideration of the establishment of material terms at the time of inducement. He then called for the vote and the Policy was thereafter unanimously approved and recommended for submission to the Agency for ultimate approval.

PROJECT PRESENTATIONS

North American Salt Company

Mr. Cappellino described this proposed sales tax and real property tax abatement benefits project in connection with the construction and equipping of two structures for facilitating the import, packaging and distribution of bulk salt. This project will allow for the offloading of bulk salt material to be housed in a storage facility where after the bulk salt material will be transferred into an adjacent packaging and

warehousing and distribution facility. Mr. Cappellino noted that the project is located in a designated Empire Zone and, as such, is located within a highly distressed area as defined by the New York General Municipal Law. Mr. Cappellino noted that in exchange for providing the sales and real property tax abatement benefits, the approval of this project is recommended to be conditioned upon adherence to certain material terms and conditions with respect to potential recapture of financial assistance as follows:

Material Terms and Conditions

Condition	Term	Recapture Provision
Total Investment	At project completion	Investment amount equal to or greater than 85% of project amount. Total Project Costs = \$7,300,000 85% = \$6,205,000
Employment	To coincide with PILOT	100% of base (FTE) and 85% of projected (8) = 6
Local Labor	Construction period	Adherence to policy including quarterly reporting
PILOT	PILOT Term = 7 years	Up to 100% recapture at Agency discretion
Recapture Period	Coincides with PILOT term	Recapture of PILOT and all sales taxes

Mr. John Anderson, general counsel of the Company, and Mr. Craig Lindauer, Executive Vice President, provided additional information on the project to the Committee.

Upon motion made by Mr. Johnston and seconded by Mr. Nellis, with the inclusion of the material terms and conditions, the Policy Committee unanimously approved the North American Salt Company Project.

337 Ellicott Street/Big Ditch Brewery

Mr. Cappellino described this proposed sales tax, mortgage recording tax and real property tax abatement benefits project in connection with the renovation of the existing facility located at 337 Ellicott Street in Buffalo, New York, into a production brewery. It was noted that Big Ditch Brewery will be the tenant occupying the facility and it is a new start-up craft microbrewery that may produce up to 60,000 barrels per year. Mr. Cappellino noted that the project is located within a highly distressed area as defined by the New York General Municipal Law. In addition, Mr. Cappellino stated that the recommendation is to establish the real property tax abatement, or PILOT Agreement, in such a manner so that it only affects that portion of the facility so occupied by Big Ditch Brewery operations and does not otherwise include the adjacent parking facility components of the building. In addition, it is recommended that the sales tax benefit only be authorized with respect to the brewery production based operation components of the project and the facility and is not otherwise permitted to be utilized to build out the tasting room which is to be established by the brewery to allow it to rollout new products and brands. Mr. Cappellino then noted that in exchange for providing the sales tax, mortgage recording tax and the real property tax abatement benefits, the approval of this project is conditioned on adherence to certain material terms and conditions with respect to potential recapture of financial assistance as follows:

Material Terms and Conditions

Condition	Term	Recapture Provision
Total Investment	At project completion	Investment amount equal to or greater than 85% of project amount. Total Project Costs = \$2,560,000 85% = \$2,176,000
Employment	To coincide with PILOT	85% of projected of 13 = 11
Local Labor	Construction period	Adherence to policy including quarterly reporting
PILOT	PILOT Term = 7 years	Up to 100% recapture at Agency discretion
Recapture Period	Coincides with PILOT term	Recapture of state and local sales taxes, mortgage recording tax and PILOT.

At this point in time, Mr. Hoffert left the meeting. Mr. David Chiazza, on behalf of Iskalo Development, and Matt Kahn, on behalf of Big Ditch Brewing, then provided a brief presentation on the project to the Committee.

Mr. Tobe spoke in favor of the project and noted that brewery production is an agribusiness and, as such, any agribusiness is consistent with the regional policies of Erie County and the Regional Economic Development Council.

Upon motion made by Ms. Holtz, and seconded by Mr. Nellis, with the inclusion of the material terms and conditions and the restrictions on the use of the real property tax abatement and sales tax benefit as so described, the Policy Committee unanimously approved the 337 Ellicott Street, LLC/Big Ditch Brewery Project.

AMS Servicing, LLC

Mr. Cappellino described this proposed sales tax benefit project in connection with the equipping of a call center to be established within the former Motorola plant in Elma, New York. The project entails capital expenditures associated with the equipping of the Motorola facility to establish a turnkey build out of such space to include new furniture, fixtures, equipment, and telephone and computer equipment along with a backup generator. Mr. Cappellino noted that the project involves the relocation of AMS Servicing, LLC, from Depew to Elma, and, as such, all intermunicipal movement procedures as required by the Countywide IDA Uniform Tax Exemption Policy have been followed and a determination that the move is necessary to preserve the competitive position of the Company has been made. Mr. Cappellino then noted that in exchange for providing the sales tax benefits, the approval of this project is conditioned upon adherence to certain material terms and conditions with respect to potential recapture of financial assistance as follows:

Material Terms and Conditions

Condition	Term	Recapture Provision
Total Investment	At project completion	Investment amount equal to or greater than 85% of project amount. Total Project Costs = \$2,504,300 85% = \$2,128,655
Employment	Two years following the later of (i) construction completion date, or (ii) the termination of the Agent Agreement	100% of base (270 FTE) and 85% of projected of 195 (165) = 435
Recapture Period	Two years following the later of (i) construction completion date, or (ii) the termination of the Agent Agreement	Recapture of state and local sales taxes

Mr. Tobe noted that use of local labor is not being established as a material term because the project does not involve construction per se and only involves purchases of machinery and equipment and installation thereof. Ms. Holtz stated general concerns with respect to the movement of the Company from Depew to Elma but confirmed her understanding that the Company has outgrown its existing space and will be significantly increasing its employment and, as such, requires new and larger space.

At this point in time, Mr. John Anderson, general counsel for the Company, and Mr. Craig Lindauer, Executive Vice President of Operations for the Company, addressed the Committee and provided some brief history with respect to the Company’s operations in Western New York, noting that in 2008 it had 35 employees, and that it now has 270 employees and that it anticipates creating approximately 195 new jobs. The Company is expanding in Western New York due to the good local employee base and that its jobs initially begin at or around \$13 to \$18 per hour up to \$55,000 to \$75,000 per year with management making \$100,000 or more per year. It was also noted that the Company is in the process of being sold to new owners. Upon motion made by Mr. Johnston and seconded by Mr. Nellis, with the inclusion of the material terms and conditions, the Policy Committee unanimously approved the AMS Servicing, LLC Project.

Mr. Tobe then noted that the Elm/Michigan Holdings and 500 Seneca Street Projects are not going to be considered at the meeting today at the request of the project applicants.

MINUTES

The Minutes of the December 2, 2013 meeting were presented, and upon motion made by Mr. Lipsitz, and seconded by Mr. Mesiah, the Minutes of the December 2, 2013 Policy Committee were unanimously approved.

There be in further business to come before the Policy Committee, the meeting was adjourned at 9:58 a.m.

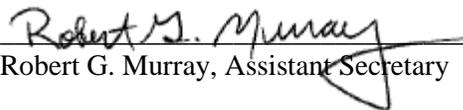

 Robert G. Murray, Assistant Secretary

Exhibit A

October 21, 2013 version of the draft ECIDA Policy for Termination of Agency Benefits and
Recapture of Agency Benefits Previously Granted with Attachment A, Memorandum from ECIDA Policy
Committee Chair Richard Tobe to ECIDA Board of Directors

[See Attached]

Draft

October 21, 2013

Erie County Industrial Development Agency (ECIDA)

Policy for Termination of Agency Benefits

And

Recapture of Agency Benefits Previously Granted

1. **Purpose:** To establish and provide a fair procedure, compliant with newly enacted state law, particularly Section 875 of the New York General Municipal Law and ECIDA policies, potentially resulting in the termination of Agency Benefits and/or the recapture of Agency Benefits.
2. **Goal:** The goal of this policy is to enact a new ECIDA procedure for implementing the potential or actual termination of Agency Benefits and/or recapture of Agency Benefits 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 Benefits** include 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 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 Benefits from ECIDA.
 - c. **ECIDA** is the Erie County Industrial Development Agency.
 - d. **Material Factors** are 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 Benefits. Such factors generally include, but are not limited to, the number of net new permanent jobs, the dollar value of net new investment, the use of local labor and in some circumstances the number of construction jobs. 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 of Agency Benefits and for the recapture of Agency Benefits 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 Benefits** is the result of an action taken by the ECIDA Board to seek to have an Applicant return Agency Benefits that it received in the past.

- f. **Termination of Agency Benefits** is the result of an action taken by the ECIDA Board or ECIDA staff, as appropriate, to cause an Applicant to cease receiving Agency Benefits that it otherwise would have obtained in the future.
4. **Termination of Agency Benefits and/or Recapture of Agency Benefits**
- a. Future Agency Benefits may be terminated by the ECIDA Board for a violation of any material term contained in the ECIDA Application for Financial Assistance, inducement resolution (including all submissions made by the Applicant), Agent 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 of Agency Benefits, ECIDA may impose recapture of Agency Benefits where it is determined through the process specified below, that:
 - i. Agency Benefits 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 Benefits, 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 Agency Benefits or to Recapture Agency Benefits.**
- a. **Knowledge of Potential Termination of Benefits 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 (note in the case where ECIDA staff is able to remedy said issue, ECIDA staff shall still notify the Chief Executive Officer or Chief Operating officer of the ECIDA), ECIDA staff shall notify the Chief Executive Officer or Chief Operating Officer of the ECIDA. 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 Benefits 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, in conjunction with the Chair of the ECIDA, shall cause a proceeding to be commenced to determine if Agency Benefits should be terminated and or recaptured.
 - c. **Notice to the Applicant**- if a decision is made to commence a proceeding to terminate Agency Benefits (said termination of Agency Benefits 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 Benefits, then the Applicant shall be provided written notice ("Notice") of: (i) the alleged Material Factor(s) violation, (ii) the potential for termination of Agency Benefits and/or for recapture of Agency Benefits 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**- An Applicant shall be given ten business days from the date said Notice is received or deemed received to prepare and submit a written response to any alleged Material Factor(s) violation.
 - e. **Opportunity to be heard**-- An Applicant will be provided an opportunity to make a written or written and oral presentation to the ECIDA Policy Committee following the ten day Notice period.
 - f. **Representation**- An Applicant shall have the right to be represented by counsel, or to appear without counsel.
 - g. **Creation of Written Record**-The ECIDA Policy Committee shall create a full written or electronic record that includes a statement of the alleged Material Factor(s) violation, the response, all evidence that has been submitted and a transcript or summary of any oral presentations that have been made. The record shall also include the vote, if any, taken by the ECIDA Policy Committee.
 - h. **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
 - i. **ECIDA Policy Committee Recommendation**-The ECIDA Policy Committee shall vote on a resolution recommending a termination of Agency Benefits, a recapture of Agency Benefits, both a termination and a recapture of Agency Benefits, or no action.
 - i. If a determination is made to recapture New York State and local sales and use tax exemptions and mortgage recording tax exemptions, in accordance with New York General Municipal Law and ECIDA policies, the amount the ECIDA shall recapture shall be equal 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 an ECIDA payment in lieu of tax 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 years(s), it need not also simultaneously recommend, although it may do so, termination of real property tax abatements going forward.

Such 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.

- j. **Flexible Application of Termination of Agency Benefits and Recapture of Agency Benefits**- To the extent permitted by law and ECIDA policies, the ECIDA Policy Committee shall have broad discretion in recommending how to implement the termination of Agency Benefits and the recapture of Agency Benefits. 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, new investment, the use of local labor and such other Material Factors as may have been considered at the time of the inducement.
 - 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 Agency Benefits and/or to recapture Agency Benefits 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. In the event the ECIDA Policy Committee does not have sufficient votes to enact a resolution and forwards the matter to the ECIDA Board, the ECIDA Board may make any decision provided for in this paragraph.
 - l. **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.
6. **Other Remedies Available to ECIDA**- Notwithstanding the foregoing, the ECIDA, acting through its staff, retains the right to terminate Agency Benefits as otherwise provided within the ECIDA Transaction Documents (for non- Material Factor(s) issues). Cause for such termination of Agency Benefits 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.

Attachment A

ECIDA Board Meeting October 21, 2013

To: ECIDA Board of Directors

From: Richard Tobe, Chair, ECIDA Policy Committee
Deputy County Executive

Date: October 21, 2013

Re: Draft ECIDA Policy for Termination of Agency Benefits and Recapture of Agency Benefits Previously Granted

Attached with this Memorandum is a draft Policy for Termination of Agency Benefits and Recapture of Agency Benefits Previously Granted dated October 21, 2013 ("Termination and Recapture Policy") that the Policy Committee unanimously approved on October 7, 2013 and amended in accordance with the direction of the Policy Committee. The Policy is herewith forwarded to the ECIDA Board for its consideration.

The Policy Committee recommends that the ECIDA Board accepted this policy and circulate it for comment to the IDA Leadership Council, to local governments in Erie County, to the Association of Erie County Governments and representatives of the business community. It is also recommended that the draft policy be posted on the ECIDA website. It is recommended that the comment period last approximately 30 days. Thereafter, after consideration of such comments, the Policy Committee recommends that the Board vote to approve the policy as submitted or as it may be amended.

Background

In March 2013 the State Legislature amended Section 875(b) of the General Municipal Law to provide that:

"The IDA shall recover...from a...project operator...state sales and use exemption benefits...where such...project operator...failed to comply with a material term or condition to use the property or services in the manner required by the person's agreement with the IDA."

The state law provides very little guidance on the methods to be used in implementing the above clause. It does not define "material term", does not establish a time line for such recovery, and does not indicate the method to be used to make a determination that a recovery of benefits should occur. Nor does the law indicate what steps, if any, an IDA should take with regard to the local portion of the sales tax or with regard to other benefits such as a real property tax or mortgage recording tax benefit.

ECIDA Policy committee has been working to implement the law since early April 2013. The committee has established a method to determine "material factors" for each applicant, established time limits for the recapture of agency benefits, applied these policies uniformly for state and local benefits and developed this draft policy.

Purpose of Termination and Recapture Policy

New York State law requires that IDAs recapture agency benefits. The purpose of this ECIDA policy is to:

- establish the procedures for considering the termination of agency benefits or the recapture of benefits previously granted,
- guarantee due process protections to companies, and
- establish an upper limit on the amount of real property tax (PILOT) benefits that may be recaptured.

Discussion

This Termination and Recapture policy has been developed to provide applicants with clear guidance on the steps that will be taken if a termination of agency benefits or a recapture of agency benefits for failure to comply with a material term or condition¹ is considered. This policy establishes a uniform approach, provides an applicant the right to know the alleged violation, provides an applicant an opportunity to be heard, a right to counsel, the right to an open hearing, the right to a written record and a right to appeal. Decisions will be made by a majority vote of the ECIDA Board of Directors.

In addition, the policy establishes, to the extent allowed by state law, the maximum amount that may be recaptured. The policy provides, in general, with regard to real property tax benefits the maximum amount that might be recaptured is equal to, but may be less than, the real property tax benefit received by the applicant in the year or years that the violation(s) occurred.

This policy should provide applicants with assurances that they will be treated fairly by ECIDA, that potential recapture of agency benefits will be related to violations in the year in which they occur, that the extent of agency benefits might be recaptured can be readily calculated, and that applicants will have a number of important rights when dealing with ECIDA.

¹ in certain circumstances agency benefits might be terminated through actions of the ECIDA staff as a result of an applicant's failure to comply with the terms and conditions of the applicable deal documents including but not limited to the failure to make required reports, the failure to make PILOT payments as scheduled and for other similar breaches of the terms of the deal. Only the ECIDA Board may recapture agency benefits previously granted.

Exhibit B

Comments submitted to ECIDA responding to draft Policy for Termination of Agency Benefits
and Recapture of Agency Benefits Previously Granted as provided by:

1. Buffalo Niagara Partnership
2. Amherst Industrial Development Agency
3. Town of Concord Supervisor Gary Eppolito
4. Town of Grant Island Supervisor Mary Cooke
5. Town of Lancaster Industrial Development Agency Chair Dino J. Fudoli

[See Attached]



Buffalo Niagara Partnership response to the Erie County Industrial Development Agency's (ECIDA) Material Factors for Termination of Agency Benefits and Recapture of Agency Benefits Previously Granted and Process:

The new State requirement calls for "the IDA to recover 100% of State Sales tax should the applicant fail to comply with a material term or condition to use the property or services as agreed to in the IDA agreement." The State does not, however, define "material term", a method or process to determine if a violation occurred, or identify over what time period this recapture should extend. The Partnership believes the State's efforts to add a level of accountability to those receiving the incentive is reasonable, but to leave such ambiguity on implementing the policy is troublesome. The current lack of specificity leaves the door open for personalities, politics and perceptions to rule when decision making should be based on facts and a set of factors the applicant (employer) has had an opportunity to negotiate and agree to. ECIDA's Recapture Policy is an attempt to put parameters around the State's ambiguity and is a step in the right direction. That said; the Partnership has a few items for the ECIDA to consider regarding this policy:

- The policy should be clear and leave no ambiguity. Incentives should be designed to attract the types of projects the region (Erie County in this case) is trying to grow and attract. This will also help eliminate/minimize the perception of politics in the process.
- The program should be communicated in a way that is specific about those goals and how the customer, the employer, gets through the process.
- Scaling the recapture amount to the year in which the trigger occurred is reasonable. However, an employer's business plan rarely extends beyond a 5 year timeframe and changing market forces have a significant impact on those projections. Extending the recapture period for the term of the Pilot, 7 or 10 years, is burdensome. The ECIDA should consider a shorter timeframe for recapture.
- The scope of the project should be commensurate with the level of incentive. In that regard, the material factor of investment is self regulating and should not be listed as a material factor.
- The ECIDA should encourage the other IDA's to adopt the policy and maintain the consistency in IDA applications across Erie County.

Draft

Amherst Industrial Development Agency (AIDA) Policy for Recapture and/or Termination of Benefits

Purpose:

State law enacted in 2013-2014 amended Section 875 of General Municipal Law requires that the AIDA recapture state sales taxes exempted for projects that do not its material factors. Material factors may include, but not be limited to, employment (both new and retained), investment, and stated use of project, and are determined by the AIDA Board of Directors in the Inducement resolution.

Other financial assistance provided to a project, such as the local portion of sales tax, an abatement of real property taxes (PILOT) and/or mortgage recording tax, are also subject to the recapture provisions and procedures explained herein.

Annual Review:

The AIDA will review annual reports it receives from companies to determine compliance with the material terms set forth in the inducement resolution. If a company is found to be in violation of a material term, AIDA staff will contact the company seeking additional information on why it could not be achieved. AIDA staff will consult with the Board Chairman on all projects not in compliance including written correspondence with the company.

A company will be afforded an opportunity to remedy the violation by providing a valid explanation for not achieving the breach in material factor, including economic or natural factors that led to the default including but not limited to:

- **Natural Disaster:** defined as a fire, flood, or other natural occurrence that directly affected the business
- **Industry Dynamics:** defined as factors in its industry sector that are affecting the overall demand for its products and services and are not necessarily limited to lost off major customer or supplier
- **Unfair Competition:** defined as international competitor utilizing an unfair competitive advantage to acquire market share

Compliance Period:

Unless otherwise noted in the project's inducement resolution, material factors will need to be maintained one full calendar year after which those material factors are achieved. By way of illustration, if a project involves new construction, new equipment, and the creation and retention of employment, once construction is complete, and the company has met its employment targets, it must maintain those material factors for the next calendar year.

Adaptive reuse projects, or projects that do not involve a PILOT, would be subject to maintaining its material terms one calendar year after a certificate of occupancy is issued or the expiration of a sales tax exemption.

Recapture/Termination Proceedings:

If a company cannot remedy its breach of a material term during the compliance period, the AIDA executive committee, in consultation with Agency staff, will afford the affected business an opportunity to present information to avoid recapture or termination of its benefits. Upon hearing the company's position, the AIDA Executive Committee will make a decision on whether to forward the matter for consideration by the entire AIDA Board of Directors. In either case, a written record will occur clearly stating the reason to, or not to, recapture tax incentives.

Notwithstanding the forgoing, the AIDA, acting through its staff, retains the right to terminate Agency benefits for non-material factors. Cause for such termination of Agency benefits include, but not limited to, failure to make PILOT payments, failure to make reports to the AIDA as detailed in transaction documents, failure to maintain insurance requirements, or other uncured breaches of AIDA transaction documents.

From: Gary Eppolito [<mailto:concordsupervisor@gmail.com>]
Sent: Friday, November 22, 2013 12:26 PM
To: Tobe, Richard
Subject: Clawbacks

You asked for an opinion so here it is

As an old English teacher and as I used to tell my students, there are many ways to say the same thing.

I am the smallest IDA and most of what has been done in the immediate past has been in the area of adaptive re-use and/or job retention. I agree--there needs to be a mechanism that allows us to recapture benefits in the rare instances of outright fraud or deception. However, as an IDA Chairman I am a promoter of growth and development. There comes a point where an IDA project just isn't worth the effort. We have to keep in mind we compete with areas of the country where the business climate is much better than ours. That being said, let's have a clawback policy or any policy for that matter that doesn't scare potential development away. I suggest we keep working as a leadership group perhaps to refine and condense what the ECIDA is proposing. Then let's adopt and enforce it.

I feel the leadership council needs to meet on a regular basis and continue to evaluate and revise our policies. It's time to put politics and petty disagreements aside. I like to learn from past mistakes and then move forward.

If I don't see you, have a happy and healthy holiday season.

Gary Eppolito
Town of Concord Supervisor

Cappellino, John

From: Dave Mingoia [DMingoia@amherstida.com]
Sent: Friday, December 20, 2013 12:31 PM
To: Cappellino, John
Subject: FW: `Comment Form Submission` Submission [692636809b9962f2819ff2f8a807da34]

From: Cappellino, John [mailto:jcappell@ecidany.com]
Sent: Wednesday, November 27, 2013 1:38 PM
To: Dave Mingoia
Subject: FW: `Comment Form Submission` Submission [692636809b9962f2819ff2f8a807da34]

FYI

From: Web Form [mailto:no-reply@phpfission.com]
Sent: Monday, November 25, 2013 4:19 PM
To: Cappellino, John
Subject: `Comment Form Submission` Submission [692636809b9962f2819ff2f8a807da34]

www.ecidany.com

`Comment Form Submission` Submission

Comment Form

Name : Town Board, Town of Grand Island
Email Address : mcooke@grand-island.ny.us
Phone Number : 716-773-9600 x616

Comment :

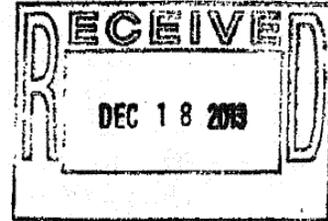
The Town of Grand Island Economic Development Advisory Board, after reviewing and discussing the ECIDA Policy for Termination of Agency Benefits, has these comments: NYS requires IDAs to recapture the state's portion of sales tax (4%) on projects that violate a material term. What is meant as a material term is not defined, nor is the timeframe by which a company must maintain compliance set forth in the statute. The ECIDA policy seeks to define a process that provides certainty to a company in the event of a default of a material term, which would be defined by the ECIDA Board when it formally approves a project and would include job commitments, investment and possibly other items specific to that project. The policy does provide a mechanism for a company to either cure the default or state its case why it could not meet a material term. Ultimately it would be up to the ECIDA to determine if recapturing tax benefits is warranted and does not leave that decision up to some outside political influence. In concept this policy works, but the manner in which it is presented does not reflect the overall mission of promoting economic development. Taken in its current state, the document comes across as heavy handed and reads as foreboding to a business to invest in Erie County. Other IDAs in NYS have implemented similar documents that are written in a way that provide a level of comfort to a prospective company looking to invest that we are in fact seeking to help them with state regulations, and that in the event that something happens outside of that company's control like a recession, that there is a process where they will not automatically be

penalized. One area of the document that is lacking that most other recapture policies incorporate is the length of time that a company must remain compliant. With business cycles and the volatility of some industries, leaving this open ended is not the right direction to go in. It also should not be overly onerous in length either, requiring companies to maintain commitments 10 years out. 5 years after an investment is made looks to be the standard in economic development practice, sometimes shorter depending on the scope of the project. To require 100% recapture in Year 5 or 8 or whatever of all benefits puts the IDA at a disadvantage with our economic competitors. Even NYS provides a graduated scale where if a project fails to meet a material term (often jobs) in later years, then only a portion of the benefits are subject to recapture. The ECIDA policy is essentially a 100% pay everything back document and it does not need to be outside of the mandated 4% NYS portion of the sales tax. The local IDAs in Erie County believe we need to define a process, but we should not be piling on more regulations and what is construed as not a business friendly policy on companies. We have enough of that in NYS already.

TOWN OF LANCASTER
INDUSTRIAL DEVELOPMENT AGENCY
21 Central Avenue
Lancaster, NY 14086
(716) 683-1610

web: www.lancasterny.com
e-mail: lookatus@lancasterny.com

December 17, 2013



Erie County Industrial Development Agency
Attn: Policy Committee
95 Perry Street, Suite 403
Buffalo, NY 14203

Re: Proposed ECIDA Policy for Recapture or Termination of Approved Benefits

Gentlemen:

In the last session of the New York State Legislature, a new law amending Section 875 of the New York State General Municipal Law was passed which, in the opinion of the Lancaster IDA, is an improved, and less cumbersome method of dealing with businesses which have been granted IDA incentives and have fallen short of meeting the business and employment goals stated when application was made for the benefits/incentives than the "clawback" proposal currently being considered by the ECIDA Policy Committee.

It is my understanding of the law that if a company fails to meet its "material factors" (employment, investment, etc.) that were understood by the IDA granting incentives, the IDA is required to review the situation to determine if a "clawback" of incentives is justified.

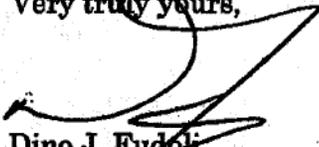
If the review process were to uncover a shortfall on the part of a business in meeting its "material factors", a local IDA, under the legislation, would:

- Contact the company to seek additional information on the nature of its failure to meet the "material factors".
- Afford the company the opportunity to remedy the situation and explain the nature of the factors that prevented the goals from being achieved (such as natural disaster, industry dynamics, unfair competition).

- Determine if, under the legislation, a company has maintained adherence to the “material factors” for a one year period after which it has achieved the goals of those “material factors”.
- If a company fails to remedy the shortfall in achieving its “material factors” during the one year compliance period, the local IDA must afford the company the opportunity to present information to the local IDA board to show why termination and clawback of incentives should not occur. Only after this process should a local IDA move to recapture benefits/incentives.

This procedure is far and away superior in addressing companies that fall short of meeting “material factors” than the proposal that is currently before the ECIDA Policy Committee. State law protects the public investment made by incentive packages, gives businesses a fair “due process” to address extenuating circumstances and affords local IDA’s a much simpler procedure for obtaining all of the relevant information before deciding if termination and recapture of benefits and incentives are justified.

Very truly yours,



Dino J. Fudoli
Chairman
Lancaster Industrial Development Agency

Cc: LIDA Board
Magavern, Magavern & Grimm