

Adopted January 29, 2014

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 (10) 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 (10) 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 year(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.

1. 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.