

Tompkins County

Industrial Development Agency

Project Recapture Policy

Adopted: June 9, 2016

Pursuant to and in accordance with Section 874 (10)-(12) of the General Municipal Law (“GML”), the Tompkins County Industrial Development Agency (the “Agency”) hereby establishes a Project Recapture and Termination Policy for the suspension, discontinuance and/or recapture of Financial Assistance (as defined herein), or for the modification of any Payment in Lieu of Tax Agreement (“PILOT Agreement”) to require increased payments under circumstances as specified herein, which may include but shall not be limited to events of material violation of the terms and conditions of any Project Agreement (as defined herein).

The Agency in its discretion reserves the right pursuant to this policy and any applicable Project Agreement to suspend, discontinue and/or recapture any financial assistance granted for a project that may include: (i) sales and use tax exemptions; (ii) mortgage recording tax exemptions; and (iii) real property tax exemptions governed by a PILOT Agreement (collectively, “Financial Assistance”). The Agency’s provision of Financial Assistance shall be administered and governed pursuant to one or more Project Agreements, which shall include (i) an Agent, Financial Assistance and Project Agreement, (ii) Leaseback Agreement, and/or (iii) PILOT Agreement, along with related documents and herein, each a “Project Agreement.”

I. Recapture of Financial Assistance

The Agency reserves the right to suspend, discontinue and/or recapture any financial assistance previously conferred to a Company where it is determined through the process specified below, that:

- i. Financial Assistance was obtained as a result of a knowing misstatement of a material fact where such misstatement occurred in the Application for Financial Assistance, in any written submission, or in any on the record verbal statement made to the Agency or Agency staff.
 - ii. A material violation of the terms and conditions of a Project Agreement which may include but not be limited to material shortfalls in job creation and retention projections or material violations of the terms and conditions of a Project Agreement.
 - iii. In accordance with GML Section 875(3), if the Agency grants any sales and use tax exemptions to any Applicant (hereinafter, the “Company”) and it is determined that: (i) the Company is not entitled to the sales and use tax exemption benefits; (ii) the sales and use tax exemption benefits are in excess of the amounts authorized by the Agency to be taken by the Company; (iii) the sales and use tax exemption benefits are for property or services not authorized by the Agency as part of the Project; or (iv) the sales and use tax exemption benefits are taken in cases where the Company fails to comply with a material term or condition to use property or services in the manner approved by the Agency in connection with the Project, then the Agency is bound and shall recapture the sales and use tax benefits from the Company and the Agency, in its sole discretion, may terminate all applicable Project Agreements. The Agency’s Project Agreements shall include provisions whereby the Company
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Tompkins County

Industrial Development Agency

will (i) cooperate with the Agency in its efforts to recover or recapture any sales and use tax exemption benefits, and (ii) promptly pay over any such amounts to the Agency that the Agency demands in connection therewith. The Agency shall cooperate with the New York State Tax Commissioner in connection with any efforts by the State of New York to assess and determine New York State and local sales and use taxes due from the Company, together with any relevant penalties and interest due on such amounts.

iv. If the company shifts production activity to a facility outside of Tompkins County and, as a result, fails to achieve the economic benefits projected, then the Agency will declare the agreement to be in default and require the value of the incentives utilized to date to be repaid, together with any relevant penalties and interest due on such amounts.

II. Due Process for Recapture of Financial Assistance

When Agency staff become aware of a potential issue with respect to a potential violation related to the provision of Financial Assistance to an Applicant and is unable to otherwise remedy the issue, staff shall notify the Agency board.

The Agency shall at least annually assess the progress of each project that continues to receive financial assistance, or project that is otherwise active, toward achieving job retention or creation or other material aspects of the terms and conditions of a Project Agreement. Such assessments shall be provided to the Agency board. The Agency board shall then make a decision to commence a recapture proceeding if any material violations have occurred.

Agency Decision to Commence a Proceeding. The Agency board shall cause a proceeding to be commenced to determine if Financial Assistance should be recaptured.

Notice to the Applicant. If a decision is made to commence a proceeding to recapture Financial Assistance, then the Applicant shall be provided written notice (“Notice”) of: (i) the alleged Material Factor(s) violation, (ii) the potential for recapture of 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.

Due Process Provisions.

- (i) **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 violation(s).
 - (ii) **Opportunity to be Heard:** An Applicant will be provided an opportunity to make a written or written and oral presentation to the Agency following the ten (10) day Notice period.
 - (iii) **Representation:** An Applicant shall have the right to be represented by counsel, or to appear without counsel.
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Tompkins County

Industrial Development Agency

- (iv) **Creation of Written Record:** The Agency shall create a full written or electronic record that includes a statement of the alleged violation(s), 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 Agency.
- (v) **Executive Session:** To the extent allowed by the New York State Open Meetings Law, at the request of an Applicant, the Agency may go into executive session to receive certain confidential information that pertains to the considerations being made by the Agency.
- (vi) **Agency Recommendation:** The Agency shall vote on a resolution recommending whether to recapture Financial Assistance.

III. Flexible Application of Recapture of Agency Benefits

To the extent permitted by law and Agency policies, the Agency board shall have broad discretion in recommending how to implement the termination of Project Agreements, suspension or discontinuance of Financial Assistance and recapture of Financial Assistance. Such recommendation related thereto shall be based upon the circumstances that trigger such action.

The Agency Board shall consider the extent of the violation, 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.

The following criteria will be used to determine if a valid explanation exists for failure to achieve the economic benefits projected by the Company:

- a. Natural Disaster: if a natural disaster such as a fire, flood, or tornado disrupts the business
- b. Industry Trends: An evaluation of industry trends will be made relevant to the company, and a determination reached as to whether the company is in a market that is declining. International and national data will be used in the evaluation. An industry is considered in decline when, measured by the appropriate SIC code, it experiences employment or revenue declines--beyond its control--of 10% or more over 3 years.
- c. Loss of Major Supplier or Customer: if the loss of a customer or supplier represents 15% or more of the sales of the company
- d. Productivity Improvements: if new technology, equipment or general productivity improvements result in the need for less than projected employees or investment

IV. Recapture Payments

Sales Tax and Mortgage Recording Tax Recapture. 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 General Municipal Law and Agency policies, the maximum amount that may be recaptured is equal to, but may be less than, the sum total of New York State and local sales and use tax exemption and/or mortgage recording tax exemption benefit so obtained and utilized.

Tompkins County

Industrial Development Agency

PILOT Payment Recapture. If a determination is made to recapture an abated amount of real property tax payment or payments provided by and through the Agency 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 Agency and as provided in the related inducement resolution authorizing the provision of Financial Assistance to the Applicant.

Interest and Recapture Payment Amount and Distribution. Interest shall be due from the date when the Company failed to achieve the economic benefits projected by the Company to the date of payment, at the rate of interest for judgments set forth in New York Civil Practice Law and Rules §5004 and any future amendments thereof. The taxing jurisdictions will receive the recaptured property tax, sales and use tax, and/or mortgage recording tax, plus the estimated interest income the taxing jurisdictions would have earned if they had collected the taxes when due, as calculated and determined by the Finance Director of Tompkins County, unless the taxing jurisdiction specifically waives receipt of the recapture payments in advance. The remainder of the interest shall constitute an Administrative Fee of the Agency and shall be retained by the Agency and used for future economic development activities.

V. Right to Appeal

All determinations by the Agency with respect to recapture shall be final. Such determination may be contested by commencing a proceeding under Article 78 of the Civil Practice Law and Rules (CPLR) in the Tompkins County Supreme Court.

VI. Rights and Remedies of the Agency

The Agency reserves all rights and remedies pursuant to applicable law, including the right to enforce payment of all recaptured sums through applicable provisions of the Project Agreement(s) and to institute legal actions to recover any recaptured sums.
