



Board Approval 9/2/2021	Subject: Project Recapture & Termination Policy
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Pursuant to and in accordance with Section 874 (10)-(12) of the General Municipal Law (“GML”), the County of Lewis 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 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 abatements 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. Sales and Use Tax Benefits – Mandatory Recapture

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 claimed outside the period authorized by the Agency;
- iv. the sales and use tax exemption benefits are for property or services not authorized by the Agency as part of the Project; or
- v. 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 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. Upon receipt, the Agency shall remit any recaptured sales and use tax benefits to applicable affected tax jurisdiction(s).

II. Termination of Project Agreements

The Agency reserves the right to terminate any Project Agreement if a Company incurs any uncured event of default thereunder. In such an event, all prospective Financial Assistance will be terminated by the Agency for a violation of any material term contained within an Application for Financial Assistance and/or any Project Agreement. Any such termination shall be undertaken upon prior notice delivered to the Company in accordance with the provisions hereof and of the applicable Project Agreement(s). In addition, the Agency further reserves the right to terminate any Project Agreement upon submission by a Company of any knowingly false or knowingly misleading information within any Application for Financial Assistance or within any Project Agreement. Upon termination of Project Agreements, all prospective Financial Assistance shall cease as of the date of such termination and the Agency reserves the right to undertake recapture of prior Financial Assistance conferred in accordance with this policy and the provisions of the Project Agreements.

III. Recapture and Cessation of Financial Assistance; Due Process

Recapture of Financial Assistance: The Agency reserves the right to undertake and enforce the recapture of 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. An applicant failed to achieve the goals identified as Material Factors by the Agency at the time that the Financial Assistance was approved. Such recapture of 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.

For purposes of this Policy, “*Material Factors*” are factors determined by the Agency as being so significant that without such factors at the level specified, it is unlikely that the Agency would have agreed to grant the Financial Assistance. 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 Financial Assistance) and the threshold for the termination of Financial Assistance and for the recapture thereof shall be determined by the Agency and Agency staff, as appropriate (and as further identified, below), on a case by case basis.

Cessation of Financial Assistance: The Agency further reserves the right to undertake the cessation of Financial Assistance to be conferred by the Agency to any Company without undertaking termination of a Project Agreement (including, but not limited to any PILOT Agreement), where any Material Factor is identified by the Agency as having been violated and/or not satisfied by a Company within any particular reporting period. Specifically, the Agency reserves the right and shall require within all Project Agreements that the Company acknowledge and agree that the Agency may in its unilateral discretion cease and curtail all or portions of Financial Assistance to be conferred where a Company fails to achieve or maintain job creation and retention goals as set forth within a Company's Application for Financial Assistance.

For the purposes of this Policy and any Project Agreement, "Full-Time Employee" shall mean, with respect to any specific date or period, a person directly employed on such date or during such period by the Company (inclusive of its Affiliates, and in the case of a multi-tenanted facility, all tenants of such facility), and who shall on such date or for such period have carried out the terms of such employment on a "full-time basis" at the Project. "Full-time basis" shall mean a person working at least 35-40 hours per week. The term Company Employee shall also include a part-time employee ("Part-Time Employee"), which will count as a fraction of a Full-Time Employee (an employee working 17.5-20.0 hours per week will count as .5). A seasonal employee will also count as a fraction of a Full-Time Employee based on the number of full months worked in a year (an employee hired to work only for three months in a year will count as .25).

If it is determined upon review of the Annual Report that the number of Full-Time Employees at the Facility is less than what was represented in the Application (the "Employment Target"), the Agency shall require within all PILOT Agreements that an additional PILOT Payment that represents a pro rata recapture of ad valorem taxes that would otherwise be due and owing in the absence of the PILOT Agreement.

IV. Due Process for Recapture of Prior Financial Assistance

Knowledge of Potential Termination of Benefits or Recapture Issue: When Agency staff become 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, staff shall notify the Agency board. It is understood that this due process policy shall not apply to termination of Financial Assistance related to the typical/standard events of default (not otherwise involving a Material Factor) as so identified within Project Agreements.

- a) Agency Decision to Commence a Proceeding: The Chair of the Agency shall cause a proceeding to be commenced to determine if Financial Assistance should be recaptured.
- b) 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.
- c) 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 Material Factor(s) violation.
- 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.
- iv. Creation of Written Record: The Agency 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 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 a recapture of Financial Assistance.

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 GML and Agency policies, the amount the Agency 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.

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.

All determinations by the Agency with respect to recapture shall be final. 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.

V. Flexible Application of Termination of Agency Benefits and 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, Cessation 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 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.