

TOWN OF GUILDERLAND INDUSTRIAL DEVELOPMENT AGENCY

POLICY RESPECTING RECAPTURE OF PROJECT BENEFITS

SECTION 1. PURPOSE AND JUSTIFICATION. (A) The purpose of this Policy is to outline the procedures utilized by Town of Guilderland Industrial Development Agency (the “Agency”) to review compliance with (1) the requirements of the Agency relating to job creation and/or retention, other expected public benefits and reporting and (2) the requirements of the State of New York (the “State”) relating to sales tax exemptions and reporting.

(B) The Agency was created pursuant to Section 909-a of Title 2 of Article 18-A of the General Municipal Law and Title 1 of Article 18-A the General Municipal Law (collectively, the “Act”) for the purpose of promoting employment opportunities for, and the general prosperity and economic welfare of, residents of the Town of Guilderland, New York (the “Town”) and the State of New York (the “State”). Under the Act, the Agency was created in order to advance the job opportunities, health, general prosperity, and economic welfare of the residents of the Town and of the State.

(C) Chapter 59 of the Laws of 2013 (Part J), effective March 28, 2013 (the “2013 Budget Law”), enacted March 28, 2013, established ~~new~~ recordkeeping, reporting, and recapture requirements for industrial development agency projects (each a “Project”) that receive sales tax exemptions.

(D) The new sales tax recording and reporting requirements required by the 2013 Budget Law include the following: (1) a requirement to keep records of the amount of sales tax benefits provided to each ~~project~~Project and make those records available to the State upon request; (2) a requirement to report to the State, within thirty (30) days after providing financial assistance, the amount of sales tax benefits intended to be provided to a ~~project~~Project; and (3) a requirement that the Agency post on the internet and make available without charge copies of its resolutions and ~~agreements~~Project Agreements (as hereinafter defined) appointing an agent or project operator or otherwise related to any project it establishes. A project operator (each a “Project Operator”) is appointed by the Agency through the filing of form ST-60 with the New York State Department of Taxation and Finance.

(E) The 2013 Budget Law requires that the Agency recapture State sales tax benefits where: (1) ~~the project~~a Project is not entitled to receive those benefits; (2) the exemptions exceed the amount authorized, or are claimed for unauthorized property or services; or (3) the ~~project-operator~~Project Operator failed to use property or services in the manner required by its agreements with the Agency.

(F) For purposes of this Policy, with respect to a particular calendar year and a particular project, the term “financial assistance” shall include the following:

(1) Proceeds of debt obligations issued by the Agency with respect to ~~said project~~ ~~have been~~a Project disbursed during the calendar year in question.

(2) Any tax exemption or abatement (a) which may have directly or indirectly benefitted ~~the project or project operator~~a Project or Project Operator during such calendar year and (b) which resulted from (i) the Agency’s title to, possession of or, control of or other interest in said ~~project~~Project, or (ii) the designation by the Agency of said ~~project-occupant~~Project Occupant (or any sublessee, contractor, supplier or other operator of the ~~project~~Project) as an agent of the Agency.

(3) Any grant made by the Agency with respect to said ~~project or project operator~~ Project or Project Operator during such calendar year.

(4) Any loan made by the Agency with respect to said ~~project or project operator~~ Project or Project Operator during such calendar year.

(G) Chapter 563 of the Laws of 2015, effective June 15, 2016 (the "Reform Legislation"), requires each industrial development agency to develop policies (1) for the suspension, discontinuance, or modification of financial assistance provided for a ~~project~~ Project, (2) for the recapture of all or part of the financial assistance provided for a ~~project~~ Project, and (3) to annually monitor the progress of projects with respect to investment and job creation/retention goals.

(H) The Agency has been advised that a number of other industrial development agencies have adopted policies pursuant to the Reform Legislation that (1) contain provisions allowing the industrial development agency to recapture certain financial benefits provided by said agency to a ~~project applicant if said project applicant~~ Project if said Project or Project Operator does not fulfill certain job creation promises contained in its application or fails to fulfill certain other promises made to said agency and (2) allow said agency to take into account exigent circumstances in deciding whether to exercise these provisions respecting the recapture of said financial benefits.

(I) For purposes of this Policy, with respect to a particular ~~project~~ Project, the term "Project Agreements" shall mean the project documents between the Agency and ~~an applicant a~~ Project Operator with respect to the ~~applicant's project a~~ Project. In addition to a lease agreement or installment sale agreement between the Agency and the ~~applicant~~ Project Operator, the Project Agreements may also include a payment in lieu of tax agreement, a uniform agency project agreement, and one or more recapture agreements, as well as security agreements intended to ensure compliance by the ~~applicant~~ Project Operator with the requirements of the Project Agreements.

SECTION 2. REQUIREMENTS FOR ~~APPLICANTS~~ PROJECT OPERATORS. (A) Under the Act, the Agency is required to submit certain annual reports relating to Agency projects to the New York State Office of the Comptroller. In order to satisfy its annual reporting requirements and other requirements under the Act and certain other requirements imposed by the Act, as well as the new requirements imposed upon the Agency by the 2013 Budget Law, the Agency will require that each applicant for financial assistance from the Agency agree Project Operator to satisfy the following requirements as a condition to the receipt of ~~such~~ financial assistance from the Agency:

(1) Any ~~applicant~~ Project Operator requesting a sales tax exemption from the Agency must include in the application a realistic estimate of the value of the savings anticipated to be received by the ~~applicant~~ Project Operator. Each ~~applicant~~ Project Operator is hereby ~~warned~~ cautioned to provide a realistic estimate in the application, as the 2013 Budget Law and the regulations expected to be enacted thereunder are expected to require that the Agency recapture any benefit that exceeds the greater of (a) the amount listed in said application or (b) authorized by the Agency in a separate resolution.

(2) Any ~~applicant~~ Project Operator requesting a sales tax exemption from the Agency must agree to annually file (and cause any sublessee, contractor, supplier or other operator of the ~~project~~ Project to file annually) with the State, on a form and in such manner as is prescribed by the State, a statement of the value of all sales and use tax exemptions claimed by the ~~applicant~~ Project Operator and all contractors, subcontractors, consultants and other agents of the

~~applicant~~Project Operator under the authority granted to the ~~applicant~~Project Operator by the Agency.

(3) Any ~~applicant~~Project Operator requesting a sales tax exemption from the Agency must agree to furnish to the Agency a copy of each such annual report submitted to the State by the ~~applicant~~Project Operator or any sublessee, contractor, supplier or other operator of the ~~project~~Project.

(4) As required by the 2013 Budget Law, the Project Agreements will provide that any sales tax benefits determined by the Agency to be subject to recapture pursuant to the 2013 Budget Law must be remitted by the ~~applicant~~Project Operator to the Agency within twenty (20) days of a request therefor by the Agency.

(5) ~~The applicant~~Any Project Operator agrees that, as required by the 2013 Budget Law, the resolutions of the Agency with respect to ~~the project~~a Project and the Project Agreements and will ~~now~~ be made publicly available on the Agency's website. As provided in the New York Freedom of Information Law ("FOIL"), the ~~applicant~~Project Operator may request that certain information contained therein be redacted and, if the ~~applicant~~Project Operator can demonstrate to the satisfaction of the Agency that release of said information would result in substantial harm to the ~~applicant's~~Project Operator's competitive position, the Agency may comply with such request.

(6) Except as otherwise provided by collective bargaining agreements, new employment opportunities created as a result of the Project will be listed with the New York State Department of Labor Community Services Division (the "DOC") and with the administrative entity (collectively with the DOC, the "JTPA Entities") of the service delivery area created by the federal job training partnership act (Public Law 97-300) ("JTPA"), as replaced by the Workforce Investment Act of 1998 (Public Law 105-220), in which the Project is located.

(7) Except as otherwise provided by collective bargaining agreements, where practicable, the ~~applicant~~Project Operator will first consider persons eligible to participate in JTPA programs who shall be referred by JTPA Entities for new employment opportunities created as a result of the Project.

(8) ~~The applicant~~Any Project Operator agrees, whenever requested by the Agency, to provide and certify or cause to be provided and certified such information concerning the ~~Applicant~~Project Operator, its finances and other topics as the Agency from time to time reasonably considers necessary or appropriate, including, but not limited to, such information as to enable the Agency to make any reports required by law or governmental regulation.

(9) Within sixty (60) days after the end of each calendar year, the ~~applicant~~Project Operator shall furnish to the Agency a certificate of an Authorized Representative of the ~~applicant~~Project Operator stating that no event of default under the Project Agreements has occurred or is continuing or, if any Event of Default exists, specifying the nature and period of existence thereof and what action the ~~applicant~~Project Operator has taken or proposes to take with respect thereto, and, with respect to any bonds issued by the Agency for the benefit of a Project Operator (the "Bonds"), setting forth the unpaid principal balance of the Bonds and accrued but unpaid interest thereon and that no defenses, offsets or counterclaims exist with respect to the indebtedness evidenced thereby.

(10) The ~~applicant~~Project Operator shall insure that all employees and applicants for employment with regard to the Project are afforded equal employment opportunities without discrimination.

(11) The ~~applicant~~Project Operator agrees to file with the Agency, no later than sixty (60) days after the end of each calendar year, reports regarding the number of people employed at the ~~project~~Project and certain other matters.

(B) In order to ensure that ~~the project~~a Project will create the public benefits anticipated by the Agency accruing to the residents and taxpayers of the Town, the Project Agreements will require that each ~~Agency project operator~~Project Operator agree that, annually, within sixty (60) days of the end of each calendar year during which a ~~project~~Project has received any financial assistance from the Agency, such ~~Agency project operator~~Project Operator will complete and file with the Agency an annual report (the "Operator Annual Report") describing the status of the ~~project~~Project during the calendar year just completed, including such information as: jobs projected to be created/retained; estimated salary of jobs to be created/retained; current number of jobs; construction jobs created through the year; exemptions from taxes and payments in lieu of tax made; status of local labor; and status of bond financing related to the ~~project~~Project.

SECTION 3. ENFORCEMENT. (A) The Agency will use the information contained in the Operator Annual Report, and may use site visits and follow ups, to gauge the status of a ~~project~~Project in relation to the original commitment of the ~~applicant~~Project Operator as stated in the ~~project~~Project Operator's application.

(B) Should the staff or board members of the Agency find significant deficiencies in any area; the ~~project~~Project will be further reviewed. Examples of situations that may trigger review and/or action by the agency include:

(1) If the ~~project-operator~~Project Operator shifts production activity to a facility outside of the Town and, as a result, fails to achieve the economic benefits projected.

(2) If the ~~project-operator~~Project Operator moves all operations outside the Town, neglects to move operations to the Town, or the ~~project-does~~Project Operator not otherwise conform to the project described in the Project Agreements.

(3) If a significant shortfalls in economic benefits is identified, as compared with the application, such as a significant shortfall in new job creation/retention and/or expected major investments in the business.

(4) Failure to comply with annual reporting requirements or provide the Agency with requested information.

(5) Sale or closure of a project within the time period the ~~applicant~~Project Operator receives Agency financial assistance.

(C) Should the staff or board members of the Agency find significant deficiencies in the achievement of the economic benefits promised as described in the application and the Project Agreements, the ~~project-operator~~Project Operator will be asked to provide justification for said shortfalls. The board members of the Agency will compare these statements against industry standards, as well as the current market and economic conditions, to determine whether the project operator did all that it

could to meet its obligations as outlined in the Project Operator's application and the Project Agreements.

(D) The board members of the Agency will determine on a case by case basis whether a hearing is appropriate to allow a ~~project-operator~~Project Operator to be heard on the issue regarding said ~~project-operator's~~Project Operator's failure to achieve the projected economic benefits.

(E) Should the board members of the Agency find that (1) significant deficiencies in the achievement of the economic benefits promised as described in the application and the Project Agreements have occurred and (2) there appears to be no justification satisfactory to the Agency to explain these deficiencies, the Agency may determine to undertake any enforcement action available to the Agency under the ~~Agency~~Project Agreements to seek redress for these deficiencies.

(F) Enforcement action taken by the Agency under the Project Agreements may include, but shall not be limited to, the following:

- (1) Requesting cure of the deficiency by a final notice letter.
- (2) Forwarding an event of default notice under the Project Agreements.
- (3) Notifying appropriate New York State agencies of the ~~project-operator's~~Project Operator's failure to comply with such requirements.
- (4) Terminating any or all of the Project Agreements early.
- (5) Reducing the value of financial assistance moving forward.
- (6) Terminating any future financial assistance.
- (7) Requiring that the value of all the financial assistance utilized to date to be repaid in full or in part, with interest.

(G) In connection with the undertaking of a Project and/or the preparation of Project Agreements, the Agency also reserves the right to negotiate the terms and conditions of these recapture provisions.

SECTION 4. EFFECTIVE DATE. This ~~policy~~Policy shall be effective with respect to any project undertaken by the Agency after the date of approval of this Policy, including but not limited to any Project Agreements signed or amended after such date.