

**GOVERNOR'S AGRICULTURE & FORESTRY INDUSTRIES DEVELOPMENT
FUND**

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** (the "Agreement") made and entered this ____ day of _____, 2019, by and among the **COUNTY OF ALBEMARLE, VIRGINIA** (the "Locality") a political subdivision of the Commonwealth of Virginia (the "Commonwealth"), and **POTTER'S CRAFT, LLC dba POTTER'S CRAFT CIDER** (the "Company"), a Virginia corporation authorized to transact business in the Commonwealth, and the **ECONOMIC DEVELOPMENT AUTHORITY OF THE COUNTY OF ALBEMARLE, VIRGINIA** (the "Authority"), a political subdivision of the Commonwealth.

WITNESSETH:

WHEREAS, the Locality has been awarded a grant of and expects to receive \$50,000 from the Governor's Agriculture & Forestry Industries Development Fund (an "AFID Grant") through the Virginia Department of Agriculture and Consumer Services ("VDACS") for the purpose of inducing the Company to construct and improve an agriculture and/or forestry processing/value-added facility using Virginia-grown products in the Locality (the "Facility"), thereby making a significant Capital Investment, as hereinafter defined; creating a significant number of New Jobs and FTEs, as hereinafter defined; and purchasing a significant amount of Virginia-grown agricultural and forestal products, as hereinafter defined.

WHEREAS, the Locality is willing to provide the funds to the Authority with the expectation that the Authority will provide the funds to or for the use of the Company, provided that the Company promises to meet certain criteria relating to Capital Investment, New Jobs and FTEs, and purchase of Virginia-grown agricultural and forestal products;

WHEREAS, the Locality, the Authority and the Company desire to set forth their understanding and agreement as to the payout of the AFID Grant, the use of the AFID Grant proceeds, the obligations of the Company regarding Capital Investment, New Job creation, purchase of Virginia-grown agricultural and forestal products, and the repayment by the Company of all or part of the AFID Grant under certain circumstances;

WHEREAS, the construction and operation of the Facility will entail a capital expenditure of approximately \$1,560,000, of which approximately \$350,000 will be invested in machinery and equipment, approximately \$120,000 will be invested in tangible personal property (FFE), approximately \$400,000 will be invested in the construction of a new building, and approximately \$690,000 will be invested to improve the site and building;

WHEREAS, the construction and operation of the Facility will further entail the creation of 5 New Jobs and 7 Full-Time Job Equivalents (FTEs) at the Facility;

WHEREAS, the construction and operation of the Facility will further lead to the purchase of Virginia-grown agricultural and forestal products in the following amount: \$519,794 or 2,572,060 pounds of Virginia-grown apples and other Virginia-grown fruits over the performance period (see Appendix A for details); and

WHEREAS, the stimulation of the additional tax revenue and economic activity to be generated by the Capital Investment, New Jobs, and purchase of Virginia-grown agricultural and forestal products constitutes a valid public purpose for the expenditure of public funds and is the animating purpose for the AFID Grant:

NOW, THEREFORE, in consideration of the foregoing, the mutual benefits, promises, and undertakings of the parties to this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows.

Section 1. Definitions.

For the purposes of this Agreement, the following terms shall have the following definitions:

“Capital Investment” means a capital expenditure by the Company in taxable real property, taxable tangible personal property, or both, at the Facility. The Capital Investment must be in addition to the capital improvements at the Facility as of January 16, 2019. The total capital expenditure of \$1,560,000 is referred to in this Agreement as the “Capital Investment.”

“Maintain” means that the New Jobs and FTEs created pursuant to the AFID Grant will continue without interruption from the date of creation through the Performance Date. Positions for the New Jobs and FTEs will be treated as Maintained during periods in which such positions are not filled due to temporary reductions in the Company’s employment levels in connection with recruitment for open positions or strikes or other work stoppages.

“New Job” means new permanent full-time employment of an indefinite duration at the Facility for which the standard fringe benefits are paid by the Company for the employee, and for which the Company pays an average annual wage of at least \$51,000. Each New Job must require a minimum of either (i) 35 hours of an employee’s time per week for the entire normal year of the Company’s operations, which “normal year” must consist of at least 48 weeks, or (ii) 1,680 hours per year. Seasonal or temporary positions, positions created when a job function is shifted from an existing location in the Commonwealth, and positions with construction contractors, vendors, suppliers, and similar multiplier or spin-off jobs shall not qualify as New Jobs. The New Jobs must be in addition to the 3 full-time jobs at the Facility as of January 16, 2019.

Full-Time Equivalent positions (FTEs) are part-time and seasonal positions created by the project on a predictable, annual basis, which do not meet the definition of New Job. For the purposes of the AFID Grant, these positions should be converted into full-time equivalent (FTE) positions based on one FTE equaling 1,680 hours per year with an average annual wage of \$33,142.86. The new FTEs must be in addition to the 3 FTEs at the Facility as of January 16, 2019.

“Performance Date” means April 30, 2022. If the Locality, in consultation with the Authority and the Secretary of Agriculture and Forestry, deems that good faith and reasonable efforts have been made and are being made by the Company to achieve the Targets, the Locality may agree to extend the Performance Date by up to 15 months. If the Performance Date is extended, the Locality shall send written notice of the extension to the Authority, the Company, and the Secretary of Agriculture

and Forestry. The date to which the Performance Date has been extended hereunder shall be the “Performance Date” for the purposes of this Agreement.

“Targets” means the Company’s obligations to make Capital Investments at the Facility of at least \$1,560,000, to create and Maintain at least 5 New Jobs and 7 FTEs at the Facility, and to purchase at least \$519,794 or 2,572,060 pounds of Virginia-grown agricultural and forestal products as defined in Appendix A, all as of the Performance Date.

“Virginia Code” means the Code of Virginia of 1950, as amended.

Section 2. Targets.

The Company will develop and operate the Facility in the Locality, make a Capital Investment of at least \$1,560,000, create and Maintain at least 5 New Jobs and 7 FTEs , and purchase \$519,794 or 2,572,060 pounds of Virginia-grown agricultural and forestal products (see Appendix A), at the Facility, all as of the Performance Date. If the dollar amount of new purchases of Virginia-grown agricultural and forestal products is not met, the Company can still achieve the purchase target by demonstrating they substantively achieved the same volume of Virginia-grown agricultural and forestal products they proposed in Appendix A.

The average annual wage of the New Jobs and FTEs will be at least \$40,583.

The average prevailing wage in the locality in 2019 is \$53,838.

Section 3. Disbursement of AFID Grant.

By no later than April 30, 2019, the Locality will request the disbursement to it of the AFID Grant. If not so requested by the Locality by April 30, 2019, this Agreement will terminate. The Locality and the Company will be entitled to reapply for an AFID Grant thereafter, based upon the terms, conditions, and availability of funds at that time.

The AFID Grant in the amount of \$50,000 will be paid to the Locality, upon its request. Within 30 days of its receipt of the AFID Grant proceeds, the Locality will disburse the AFID Grant proceeds to the Authority. Within 30 days of its receipt of the AFID Grant proceeds, the Authority will disburse the AFID Grant proceeds to the Company as an inducement to the Company to achieve the Targets at the Facility. The Company will use the AFID Grant proceeds to make building improvements, as permitted by Section 3.2-304(C) of the Virginia Code.

Section 4. State and Local Government Incentives.

See Appendix B for definition of “break-even point.” With regard to the Facility, the Commonwealth expects to provide incentives in the following amounts:

<u>Category of Incentive:</u>	<u>Total Amount</u>
AFID Grant	\$50,000

The Locality expects to provide the following incentives, as matching grants or otherwise, for the Facility:

<u>Category of Incentive:</u>	<u>Total Amount</u>
Local Cash Grant – Albemarle County Board of Supervisors	\$30,000
Local Cash Grant – Albemarle County Economic Development Authority	\$20,000

The proceeds of the AFID Grant shall be used for the purposes described in Section 3. The proceeds of the Locality’s Cash Grants may be used by the Company for any lawful purpose.

Section 5. Repayment Obligation.

(a) *Determination of Inability to Comply:* If the Locality or the Secretary of Agriculture and Forestry (the “Secretary”) determines at any time before the Performance Date (a “Determination Date”) that the Company is unlikely to meet and Maintain at least fifty (50) percent of its Targets by and through the Performance Date (i.e., by making a Capital Investment of at least \$780,000 in the Facility, to creating and Maintaining at least 2 New Jobs and 3.5 FTEs at the Facility, or purchasing at least \$259,897 of Virginia-grown agricultural and forestal products by the Performance Date), and if the Locality or the Secretary shall have promptly notified the Company of such determination, the entire AFID Grant and Local Cash Grants must be repaid by the Company to the Authority. Such a determination by the Locality or the Secretary will be based on such circumstances as a filing by or on behalf of the Company under Chapter 7 of the U.S. Bankruptcy Code, the liquidation of the Company, an abandonment of the Facility by the Company or other similar significant event that demonstrates the Company will be unable or is unwilling to satisfy the Targets for the AFID Grant and Local Cash Grants.

(b) *Repayment of AFID Grant and Local Cash Grants:* For purposes of repayment, the AFID Grant is to be allocated as \$16,666.67 (33%) for the Company’s Capital Investment Target, \$16,666.67 (33%) for its New Jobs and FTEs Target, and \$16,666.66 (33%) for its purchase of Virginia-grown agricultural and forestal products. If the Company has met at least ninety percent (90%) of each of the three Targets at the Performance Date, then and thereafter the Company is no longer obligated to repay any portion of the AFID Grant. If the Company has not met at least ninety percent (90%) of each of the three of its Targets at the Performance Date, the Company shall repay to the Authority that part of the AFID Grant that is proportional to the Target or Targets for which there is a shortfall. For example, if at the Performance Date, the Capital Investment is only \$1,170,000, only 2 New Jobs and 5.25 FTEs have been created and Maintained, and only \$389,845.50 or 1,929,045 of Virginia-grown agricultural and forestal products have been purchased, the Company shall repay to the Authority twenty-five percent (25%) of the moneys allocated to the Capital Investment Target (\$4,166.67), twenty-five percent (25%) of the moneys allocated to the New Jobs and FTEs Target (\$4,166.67), and twenty-five percent (25%) of the moneys allocated to the purchase of Virginia-grown agricultural and forestal products Target (\$4,166.66). Whether the New Jobs and FTEs Target has been met will be determined by comparing the anticipated payroll (5 New Jobs and 7 FTEs at an average annual wage of at least \$40,583) to the actual number of New Jobs and FTEs and the actual

average annual wage reported at the Performance Date. Repayment of the Local Cash Grants, which also shall be made to the Authority, shall be allocated and calculated in the same manner.

(c) *Repayment Dates:* ***Such repayment shall be due from the Company to the Authority within thirty days of the Performance Date or the Determination Date, as applicable.*** Any moneys repaid by the Company to the Authority hereunder shall be repaid by the Authority to the Locality (repayments of AFID Grant proceeds and Local Cash Grant proceeds attributable to the Locality) and shall be repaid by the Locality (AFID Grant proceeds) promptly to VDACS for redeposit into the AFID fund. The Locality and the Authority shall use their best efforts to recover all such funds, including legal action for breach of this Agreement. The Locality shall assume primary responsibility for filing and prosecuting any such legal action, and the Authority shall cooperate with the Locality's efforts. Neither the Locality nor the Authority shall have any responsibility for the repayment of any sums hereunder unless said sums have been received by the Authority from the Company. Repaid or recovered funds shall be distributed as follows: 50% to VDACS, 30% to the Locality, and 20% to the Authority.

Section 6. Company Reporting.

The Company shall provide, at the Company's expense, detailed verification reasonably satisfactory to the Locality, the Authority, and VDACS of the Company's progress on the Targets. Such progress reports will be provided annually, starting May 31, 2020, and at such other times as the Locality, the Authority, or VDACS may reasonably require. The first progress report will cover the period from January 16, 2019 to April 30, 2020, the second progress report will cover the period from May 1, 2020 to April 30, 2021, and the third and final progress report will cover the period from May 1, 2021 to April 30, 2022.

With each such progress report, the Company shall report to VDACS the amount paid by the Company in the prior calendar year in Virginia corporate income tax. The Company hereby authorizes the Director of Finance for the Locality to release to the Authority and the Locality the Company's confidential tax information and data so that the Authority may verify the payments made. VDACS has represented to the Company that it considers such information to be confidential proprietary information that is exempt from public disclosure under the Virginia Freedom of Information Act and that such information will be used by VDACS solely in calculating aggregate return on invested capital analyses for purposes of gauging the overall effectiveness of economic development incentives.

With each progress report, the Company shall report to VDACS the number of New Jobs and FTEs created and Maintained during the reporting period. The information provided will be verified by VDACS with the Virginia Employment Commission. For FTEs, the Company is responsible for assembling and distributing the documentation necessary to verify such positions, including individuals' names, hours worked, and salaries. If requested by VDACS, the Company shall provide to VDACS copies of the Company's quarterly filings with the Virginia Employment Commission covering the period from the date of this Agreement through the Performance Date. In accordance with the Virginia Code Section 60.2-114, VDACS is entitled to receive the Company's employment level and wage from the Virginia Employment Commission.

With each progress report, the Company shall also report to VDACS the amount purchased and the purchase price paid by the Company, or the fair market value of the Virginia-Grown Agricultural or Forestal Products utilized, through the prior year.

The Locality and Company agree to retain all books, records, data and other documents relative to this agreement for a period of three (3) years after the end of this agreement, or until audited by the Commonwealth of Virginia, whichever is sooner. VDACS and its authorized agents, and/or state auditors (both the Auditor of Public Accounts and/or VDACS Internal Auditor) shall have full access to and the right to examine any of said materials and records relating to this agreement during this period.

Section 7. Notices.

Any notices required or permitted under this Agreement shall be given in writing, and shall be deemed to be received upon receipt or refusal after mailing of the same in the United States Mail by certified mail, postage fully pre-paid or by overnight courier (refusal shall mean return of certified mail or overnight courier package not accepted by the addressee):

if to the Company, to:

Attention: _____

with a copy to:

Attention: _____

if to the Locality, to:

Roger Johnson
Economic Development Office
401 McIntire Road
Charlottesville, VA 22902

with a copy to:

Attention: _____

if to the Authority, to:

Rod Gentry, Chairman
Economic Development Authority
401 McIntire Road
Charlottesville, VA 22902
Attention: J.T. Newberry

with a copy to:

Elton Oliver, Secretary-Treasurer
Economic Development Authority
401 McIntire Road
Charlottesville, VA 22902
Attention: J.T. Newberry

if to VDACS, to:

Secretary of Agriculture and Forestry
Office of Governor
Commonwealth of Virginia
1111 East Broad Street
Richmond, Virginia 23219
Attention: AFID

with a copy to:

Chauntele D. Taylor
AFID Compliance Coordinator
Va Dept. of Agriculture & Consumer Services
102 Governor St., Room 317
Richmond, Virginia 23219
Attention: AFID

Section 8. Miscellaneous.

(a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement among the parties hereto as to the AFID Grant and may not be amended or modified, except in writing, signed by each of the parties hereto. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Company may not assign its rights and obligations under this Agreement without the prior written consent of the Locality, the Authority, and the Secretary of Agriculture and Forestry.

(b) *Governing Law; Venue; Attorney's Fees and Costs:* This Agreement is made, and is intended to be performed, in the Commonwealth and shall be construed and enforced by the laws of the Commonwealth. Jurisdiction and venue for any litigation arising out of or involving this Agreement shall lie in the Albemarle County Circuit Court and such litigation shall be brought only in such court. If the Locality files suit against the Company for any reason arising out of this Performance Agreement, the Company shall be liable for attorney's fees and costs.

(c) *Counterparts:* This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

(d) *Severability:* If any provision of this Agreement is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

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IN WITNESS WHEREOF, the parties hereto have executed this Performance Agreement as of the date first written above.

COUNTY OF ALBEMARLE, VIRGINIA

By _____
Name: Jeffrey Richardson_____
Title: County Executive_____
Date: _____

**ECONOMIC DEVELOPMENT
AUTHORITY OF THE COUNTY OF
ALBEMARLE, VIRGINIA**

By _____
Name: W. Rod Gentry_____
Title: Chairman_____
Date: _____

**POTTER'S CRAFT, LLC dba
POTTER'S CRAFT CIDER**

By _____
Name: _____
Title: _____
Date: _____

APPENDIX A

Purchases of Virginia-grown Products:

	Current \$ Value	Current Volume (pounds)	Year 1 \$ Value	Year 1 Volume (pounds)	Year 2 \$ Value	Year 2 Volume (pounds)	Year 3 \$ Value	Year 3 Volume (pounds)	Net New \$ Value	Net New Volume (pounds)
Total of all Ag Products Purchase	\$90,272	436,780	\$149,456	727,944	\$247,424	1,213,184	\$396,380	1,941,708	\$522,444	2,572,496
Apples	\$87,272	436,360	\$145,456	727,280	\$242,424	1,212,120	\$387,880	1,939,400	\$513,944	2,569,720
Non-Apple Fruit**	\$500	200	\$1,000	400	\$2,000	800	\$5,000	2,000	\$6,500	2,600
Hops	\$2,500	220	\$3,000	264	\$3,000	264	\$3,500	308	\$2,000	176
Total Virginia Ag Products Purchase	\$87,722	436,540	\$146,356	727,640	\$244,224	1,212,840	\$392,380	1,941,200	\$519,794	2,572,060
Apples	\$87,272	436,360	\$145,456	727,280	\$242,424	1,212,120	\$387,880	1,939,400	\$513,944	2,569,720
Non-Apple Fruit**	\$450	180	\$900	360	\$1,800	720	\$4,500	1,800	\$5,850	2,340
Hops	\$0	-	\$0	-	\$0	-	\$0	-	\$0	-
Percentage that is Virginia- Grown	97%	99%	97%	99%	98%	99%	98%	99%	99%	99%

*Apples purchases were calculated at \$.20 per pound, all other fruits at an average of \$2.50 per pound, and hops at \$11.36 per pound, noting that market fluctuations may cause these prices to vary slightly in any given year

**Non-apple fruit represents raspberries, blackberries, peaches, grapes and plums

APPENDIX B

Break-Even Point Definition:

VDACS has estimated that the Commonwealth will reach its “break-even point” by the Performance Date. The break-even point compares new revenues realized as a result of the Capital Investment and New Jobs at the Facility with the Commonwealth’s expenditures on incentives, including but not limited to the AFID Grant.

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