

**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 **CITY OF ALEXANDRIA, VIRGINIA** (the "Locality") a political subdivision of the Commonwealth of Virginia (the "Commonwealth"), **VIRGINIA CIDERWORKS COMPANY, LLC dba LOST BOY CIDER** (the "Company"), a Virginia corporation authorized to transact business in the Commonwealth, and the **ALEXANDRIA ECONOMIC DEVELOPMENT PARTNERSHIP** (the "Partnership"), a Virginia nonstock, nonprofit corporation.

WITNESSETH:

WHEREAS, the Locality has been awarded a grant of and expects to receive \$30,000 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 improve and operate 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 Full-Time Equivalents (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 Partnership with the expectation that the Partnership 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 Partnership 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 Jobs and FTEs creation, purchase of Virginia-grown agricultural and forestal products, the repayment by the Company of all or part of the AFID Grant under certain circumstances, and reporting requirements;

WHEREAS, the improvement and operation of the Facility will entail a Capital Investment of approximately \$668,800, of which approximately \$284,500 will be invested in machinery and equipment, approximately \$88,250 will be invested in the purchase of tangible personal property (FFE) and approximately \$296,050 will be invested to improve the Facility site and building;

WHEREAS, the improvement and operation of the Facility will further entail the creation of 5 New Jobs and 2 FTEs at the Facility;

WHEREAS, the improvement and operation of the Facility will further lead to the purchase of Virginia-grown agricultural and forestal products in the following amounts: \$354,000 or 1,280,000 pounds of Virginia-grown apples 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 FTEs, 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 to be located at 317 Hooffs Run Drive in the Locality. The total capital expenditure of \$668,800 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 and 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 \$53,000. 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.

Full-Time Equivalent positions (FTEs), are a measurement of part-time and seasonal positions created by the project on a predictable, annual basis, which do not meet the definition of New Job, and for which the Company pays an average annual wage of at least \$22,555 per FTE. For the purposes of the AFID Grant, these positions should be converted into FTE positions based on one FTE equaling 1,680 hours per year.

“Performance Date” means August 31, 2022. If the Locality, in consultation with the Partnership 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 Partnership, the Company and the Secretary of Agriculture and Forestry and the date to which the Performance Date has been extended shall be the “Performance Date” for the purposes of this Agreement.

“Targets” means the Company’s obligations to make a Capital Investment at the Facility of at least \$668,800, to create and Maintain at least 5 New Jobs and 2 FTEs at the Facility, and to purchase at least \$354,000 or 1,280,000 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 agrees to develop and operate the Facility in the Locality, make a Capital Investment of at least \$668,800, create and Maintain at least 5 New Jobs and 2 FTEs, and purchase \$354,000 or 1,280,000 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 it substantively achieved the volume of Virginia-grown agricultural and forestal products described in Appendix A.

The average annual wage of the New Jobs and FTEs will be at least \$44,301.

The average prevailing wage in the locality in 2019 is \$76,409.

Section 3. Disbursement of AFID Grant.

By no later than August 31, 2019, the Locality will request the disbursement to it of the AFID Grant. If not so requested by the Locality by August 31, 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 \$30,000 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 Partnership. Within 30 days of its receipt of the AFID Grant proceeds, the Partnership 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.

- (a) 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	\$30,000

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

Category of Incentive:

Total Amount

Local Cash Grant – City of Alexandria

\$30,000

If the AFID Grant is disbursed, the Local Cash Grant (i) will be disbursed in up to two installments of \$15,000 on or before the Performance Date pursuant to Section 4(b) below, and (ii) will be subject to repayment by the Company to the Partnership, for return to the Locality upon substantially the same terms and conditions as the AFID Grant, as described in Section 5 below.

- (b) *First and Possible Final Payment of Local Cash Grant from Locality:* The Company will provide notice and evidence reasonably satisfactory to the Locality and the Partnership when it has made or caused to be made a Capital Investment of at least \$334,400 (the “First Payment Notice”) or the Company may provide notice and evidence reasonably satisfactory to the Locality and the Partnership that it has made or caused to be made the full Target Capital Investment of \$668,800. Such evidence will be subject to verification by the Locality. Within 30 days of the applicable verification, the Locality will disburse \$15,000 or \$30,000, depending on whether \$334,400 or \$668,800 of the Capital Investment has been made, of Local Cash Grant funds to the Partnership. The Locality has appropriated the necessary funds for the disbursement(s). Within 10 days of its receipt of such funds, the Partnership will disburse the applicable Local Cash Grant payment to the Company.

Second and Final Payment: If the Company has not received the full \$30,000 payment of the Local Cash Grant as described in the previous paragraph, the Company will provide notice and evidence reasonably satisfactory to the Locality and the Partnership when it has made or caused to be made an additional Capital Investment of at least \$334,400 (for an aggregate of an at least \$668,800 Capital Investment). Such evidence will be subject to verification by the Locality. Within 30 days of the verification, the Locality will disburse the remaining \$15,000 of the Local Cash Grant to the Partnership. Within 10 days of its receipt of such funds, the Partnership will disburse the Local Cash Grant payment to the Company.

IF THE LOCALITY’S FUNDS ARE BEING PROVIDED OVER TIME: If, by the Performance Date, the funds disbursed or committed to be disbursed by the Locality to the Company total less than the \$30,000 AFID Grant local match requirement, the Locality, subject to appropriation, will make an additional grant to the Partnership, for transfer to the Company, of the difference at the Performance Date, so long as the Company has met its Targets.

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

Section 5. Repayment Obligation.

(a) *Repayment of AFID Grant and Disbursed Local Cash Grant upon 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 approximately fifty (50) percent of each of its Targets by and through the Performance Date (specifically, by making a Capital Investment of at least \$334,400 in the Facility, to

creating and Maintaining at least 2 New Jobs and 1 FTEs at the Facility, and purchasing at least \$177,000 or 640,000 pounds 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 Grant (to the extent previously disbursed) must be repaid by the Company to the Partnership as described in (c) below. 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 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 at least approximately fifty (50) percent of the Targets as described above.

(b) *Repayment of AFID Grant and Disbursed Local Cash Grant on Performance Date:* For purposes of repayment on the Performance Date, the AFID Grant and the Local Cash Grant (or disbursed portion thereof) is to be allocated as \$10,000 (33 1/3%) for the Company's Capital Investment Target, \$10,000 (33 1/3%) for its New Jobs and FTEs Target, and \$10,000 (33 1/3%) for its purchase of Virginia-grown agricultural and forestal products Target. If the Company has met at least approximately 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 or the disbursed Local Cash 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 Partnership that part of the AFID Grant and the disbursed Local Cash 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 \$501,600, only 3 New Jobs and 1.5 FTEs have been created and Maintained, and only \$265,500 or 960,000 pounds of Virginia-grown agricultural and forestal products have been purchased, the Company shall repay to the Partnership twenty-five percent (25%) of the AFID Grant moneys allocated to the Capital Investment Target (\$2,500), twenty-five percent (25%) of the AFID Grant moneys allocated to the New Jobs and FTEs Target (\$2,500), and twenty-five percent (25%) of the AFID Grant moneys allocated to the purchase of Virginia-grown agricultural and forestal products Target (\$2,500) and similar percentages of the disbursed Local Cash Grant funds allocated to each Target as described above. Whether the New Jobs and FTEs Target has been met will be determined by comparing the anticipated payroll (5 New Jobs and 2 FTEs at an average annual wage of at least \$44,301) to the actual number of New Jobs and FTEs and the actual average annual wage reported at the Performance Date.

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

Section 6. Company Reporting.

The Company shall provide, at the Company's expense, detailed verification reasonably satisfactory to the Locality, the Partnership and VDACS of the Company's progress on the Targets. Such progress reports will be provided annually, starting September 30, 2020, and at such other times as the Locality, the Partnership or VDACS may reasonably require. The first progress report will cover the period from May 15, 2019 to August 31, 2020, the second progress report will cover the period from September 1, 2020 to August 31, 2021, and the third and final progress report will cover the period from September 1, 2021 to August 31, 2022; provided, however, that additional progress reports may be required in connection with any extension of the Performance Date.

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 Commissioner of the Revenue, the Treasurer and the Director of Finance for the Locality to release to the Partnership and the Locality the Company's confidential tax information and data so that the Partnership 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.

Additionally, 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 levels and wages from the Virginia Employment Commission.

Finally, 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 the 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:

with a copy to:

Virginia Ciderworks Company, LLC dba Lost
Boy Cider
317 Hooffs Run Drive
Alexandria, VA 22314
Attention: Tristan Wright
email: tristan@lostboycider.com

Miles & Stockbridge
19886 Ashburn Road
Ashburn, VA 20147
Attention: Jeff Wright
email: jvw@telos.com

if to the Locality, to:

with a copy to:

City of Alexandria, Virginia
Alexandria City Hall
301 King Street
Alexandria, VA 22314
Attention: Mark B. Jinks, City Manager
email: Mark.Jinks@alexandriava.gov

City of Alexandria, Virginia
Alexandria City Hall
301 King Street
Alexandria, VA 22314
Attention: Joanna Anderson, City Attorney
email: Joanna.Anderson@alexandriava.gov

if to the Partnership, to:

with a copy to:

Alexandria Economic Development
Partnership
625 N. Washington Street, Suite 400
Alexandria, VA 22314
Attention: Stephanie Landrum, President &
CEO
email: landrum@alexecon.org

McGuire Woods LLP
1750 Tysons Boulevard, Suite 1800
McLean, VA 22102
Attention: Michael W. Graff, Jr., Partner
email: mgraff@mcguirewoods.com

if to VDACS, to:

with a copy to:

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

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 the Local Cash 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 Partnership and the Secretary of Agriculture and Forestry.

(b) *Governing Law; Venue.* 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 Circuit Court of the Locality and such litigation shall be brought only in such court.

(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.

CITY OF ALEXANDRIA, VIRGINIA

By _____
Name: _____
Title: _____
Date: _____

**ALEXANDRIA ECONOMIC
DEVELOPMENT PARTNERSHIP**

By _____
Name: _____
Title: _____
Date: _____

**VIRGINIA CIDERWORKS COMPANY,
LLC dba LOST BOY CIDER**

By _____
Name: _____
Title: _____
Date: _____

APPENDIX A

Purchases of Virginia Grown Agriculture and Forestry Products*

	YEAR 1 - \$ Value	YEAR 1 - Volume	YEAR 2 - \$ Value	YEAR 2 - Volume	YEAR 3 - \$ Value	YEAR 3 - Volume	TOTAL - \$ Value	TOTAL - Volume
Total of all Ag & Forest Products Purchase	\$ 41,500	200,100	\$ 112,000	400,133	\$ 206,500	680,167	\$ 360,000	1,280,400
Apples (pounds)	\$ 40,000	200,000	\$ 110,000	400,000	\$ 204,000	680,000	\$ 354,000	1,280,000
Hops (pounds)	\$ 1,500	100	\$ 2,000	133	\$ 2,500	167	\$ 6,000	400
Total Virginia Ag & Forest Products Purchase	\$ 40,000	200,000	\$ 110,000	400,000	\$ 204,000	680,000	\$ 354,000	1,280,000
Apples (pounds)	\$ 40,000	200,000	\$ 110,000	400,000	\$ 204,000	680,000	\$ 354,000	1,280,000
Hops (pounds)	\$ -	-	\$ -	-	\$ -	-	\$ -	-
Percentage that is Virginia Grown	96.39%	99.95%	98.21%	99.97%	98.79%	99.98%	98.33%	99.97%

*This means the full value and volume of the anticipated total, new, additional purchases of agriculture and forestry products (above the company's existing levels, if an expansion) that are going to be made as a direct result of the project for which assistance through the AFID grant is being requested.

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, New Jobs and FTEs and Virginia agricultural product purchases at the Facility with the Commonwealth’s expenditures on incentives, including but not limited to the AFID Grant.

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