

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

**PERFORMANCE AGREEMENT**

This **PERFORMANCE AGREEMENT** (the "Agreement") made and entered this \_\_\_\_ day of \_\_\_\_\_, 2020, by and among the **CITY OF HARRISONBURG, VIRGINIA** (the "Locality") a political subdivision of the Commonwealth of Virginia (the "Commonwealth"), and **SAGE BIRD, LLC DBA SAGE BIRD CIDERWORKS** (the "Company"), a Limited Liability Corporation authorized to transact business in the Commonwealth, and the **ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF HARRISONBURG** (the "Authority"), a political subdivision of the Commonwealth.

WITNESSETH:

WHEREAS, the Locality has been awarded a grant of and expects to receive \$15,000 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 purchase 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 purchase and operation of the Facility will entail a capital expenditure of approximately \$154,852, of which approximately \$81,561 will be invested in machinery and equipment, approximately \$21,791 will be invested in tangible personal property, and approximately \$51,500 will be invested to improve the site and building;

WHEREAS, the purchase and operation of the Facility will further entail the creation of three (3) New Jobs and three (3) Full-Time Job Equivalent (FTEs) at the Facility;

WHEREAS, the purchase and operation of the Facility will further lead to the purchase of Virginia-grown agricultural and forestal products in the following amount: \$53,271 (or 193,717 pounds) 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 the date of the Grant award: December 17, 2019. The total capital expenditure of \$154,852, is referred to in this Agreement as the “Capital Investment.” A capital expenditure related to a leasehold interest in real property will be considered to be made “on behalf of the Company” if a lease between a developer and the Company is a capital lease, or is an operating lease having a term of at least ten years, and the real property would not have been constructed or improved but for the Company’s interest in leasing some or all of the real property. Only the capital expenditures allocated to the portion of the real property to be leased by the Company will count as “Capital Investment.” The purchase or lease of furniture, fixtures, machinery and equipment, including under an operating lease, and expected building up-fit and tenant improvements by or on behalf of the Company will qualify as 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 \$31,666.67. 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 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 \$6,381.67. 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.

“Performance Date” means December 31, 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 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 Capital Investments at the Facility of at least \$154,852, to create and Maintain at least three (3) New Jobs and three (3) FTEs at the Facility, and to purchase at least \$53,271 (or 173,717 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 \$154,852, create and Maintain at least three (3) New Jobs and three (3) FTEs, and purchase \$53,271 (or 193,717 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 will be at least \$31,666.67.

The average annual wage of FTEs will be at least \$6,381.67.

The average prevailing wage in the locality in 2020 is \$38,721.

## **Section 3. Disbursement of AFID Grant.**

By no later than April 30, 2020, the Locality will request the disbursement to it of the AFID Grant. If not so requested by the Locality by April 30, 2020, 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 \$15,000 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	\$15,000

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	\$15,000

The proceeds of the AFID Grant shall be used for the purposes described in Section 3. The proceeds of the Locality’s Local Cash Grant 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 \$77,426 in the Facility, to creating and Maintaining at least one New Jobs and one and a half (1.5) FTEs at the Facility, or purchasing at least \$26,635.5 (or 96,858.5 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 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.

(b) *Repayment of AFID Grant:* For purposes of repayment, the AFID Grant is to be allocated as \$5,000 (33%) for the Company’s Capital Investment Target, \$5,000 (33%) for its New Jobs and FTEs Target, and \$5,000 (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 \$116,139, only two New Jobs and two and one quarter (2.25) FTEs have been created and Maintained, and only 39,953.25 (or 145,287.75 pounds) 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 (\$1,250), twenty-five percent (25%) of the moneys allocated to the New Jobs and FTEs Target

(\$1,250), and twenty-five percent (25%) of the moneys allocated to the purchase of Virginia-grown agricultural and forestal products Target (\$1,250). Whether the New Jobs and FTEs Target has been met will be determined by comparing the anticipated payroll (three (3) New Jobs at an average annual wage of at least \$31,666.67 and three (3) FTEs at an average annual wage of \$6,381.67) to the actual number of New Jobs and FTEs and the actual average annual wage reported at the Performance Date.

(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 and shall be repaid by the Locality 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.

## **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 March 31, 2021, and at such other times as the Locality, the Authority or VDACS may reasonably require. The first progress report will cover the period from December 17, 2019 to December 31, 2020, the second progress report will cover the period from January 1, 2021 to December 31, 2021, and the third and final progress report will cover the period from January 1, 2022 to December 31, 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 Commissioner of the Revenue, the Treasurer and 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:

Zach Carlson  
19 Shenandoah Ave.  
Harrisonburg, VA 22802

with a copy to:

Sage Bird Ciderworks  
325 N Liberty St.  
Harrisonburg, VA 22802  
Attention: Zach Carlson

if to the Locality, to:

City Manager  
Harrisonburg City Hall  
409 S Main Street  
Harrisonburg, VA 22801  
Attention: Eric Campbell

with a copy to:

Economic Development Dept  
Harrisonburg City Hall  
409 S Main Street  
Harrisonburg, VA 22801  
Attention: Brian Shull

if to the Authority, to:

City Attorney  
Harrisonburg City Hall  
409 S Main Street  
Harrisonburg, VA 229801  
Attention: Chris Brown

with a copy to:

Finance Dept  
Harrisonburg City Hall  
409 S Main Street  
Harrisonburg, VA 22801  
Attention: Larry Propst, Director

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 353  
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:* 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 HARRISONBURG, VIRGINIA**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**ECONOMIC DEVELOPMENT  
AUTHORITY OF THE CITY OF  
HARRISONBURG, VIRGINIA**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**SAGE BIRD, LLC DBA SAGE BIRD  
CIDERWORKS**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_



APPENDIX A

Purchases of Virginia-grown Products:

<b>PROJECTED AGRICULTURE PURCHASES</b>								
	<b>Year 1 \$ Value</b>	<b>Year 1 Volume (pounds)</b>	<b>Year 2 \$ Value</b>	<b>Year 2 Volume (pounds)</b>	<b>Year 3 \$ Value</b>	<b>Year 3 Volume (pounds)</b>	<b>Total New \$ Value</b>	<b>Total New Volume (pounds)</b>
<b>Total of all Ag Product Purchases</b>	<b>\$11,610</b>	<b>42,538</b>	<b>\$15,161</b>	<b>54,981</b>	<b>\$26,500</b>	<b>96,198</b>	<b>\$53,271</b>	<b>193,717</b>
Apples	\$11,500	42,514	\$14,811	54,857	\$25,920	96,000	\$52,231	193,371
Honey	\$110	24	\$110	24	\$220	48	\$440	96
Misc (blueberries, pawpaws, fruits, herbs, etc.)	\$0	-	\$240	100	\$360	150	\$600	250

*\* 100% of all expected agricultural purchases are Virginia-grown*

## 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.