

**TOWN OF  
APPLE VALLEY, CALIFORNIA**

**AGENDA MATTER**

**Subject Item:**

**AMENDED AND RESTATED INTERIM FOOD AND BEVERAGE LICENSE AGREEMENT**

**Summary Statement:**

On January 22, 2009, the Town entered into an Interim Food and Beverage License Agreement (Agreement) between the Town of Apple Valley (Town), Apple Valley Country Club (Club) and LMG Apple Valley, LLC. (Manager) specifying rights and responsibilities of the parties to the agreement as it relates to the Food and Beverage (F&B) operation at the newly acquired Apple Valley Golf Course (AVGC). The Agreement was required, in part, to permit the Manager to apply for and receive a license, in the Managers name from the Alcoholic Beverage Commission for operation of the bar. Cities and other municipal agencies are prohibited from holding this license in their own name.

Since the Town assumed the day-to-day operational responsibilities at AVGC, the F&B operation has failed to show a profit. In an effort to reduce ongoing AVGC operational expenses for F&B, manpower and maintenance, the Town, Club and Manager have negotiated terms to modify responsibility and liability included in the original Agreement for the day-to-day operation and ongoing expense of the F&B operation.

If approved by Council, this amended Agreement will, in part, do the following. It will remove F&B and Pro shop concession operation expenses from Town responsibility for the purposes of profit and loss and place this responsibility with the Manager.

(continued next page)

**Recommended Action:**

Approve amended agreement and authorize the Town Manager to execute the amended interim food and beverage license agreement.

**Proposed by:** Dennis Cron, Assistant Town Manager \_\_\_\_\_ **Item Number** \_\_\_\_\_

**T. M. Approval:** \_\_\_\_\_ **Budgeted Item**  Yes  No  N/A

Summary Statement (Continued)  
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The amended and restated Agreement requires, in consideration of the rights to the Agreement, that Manager shall pay to Town, an annual license fee between 2% and 4% based on gross profit from Managers operation of the F&B and concession operations for the prior year.

The Town will retain responsibility for capital expenditures and repairs exceeding \$1000 which are determined to be of no fault of Manager. Indemnity language for Manager and Town has been developed by Legal Counsel and provides appropriate indemnity and liability coverage requirements of each party to the agreement.

**Fiscal Impact**

The Pro Shop operated at a loss of \$117,693 during the 2010 Fiscal Year. Upon adoption of the Fiscal Year 2011 budget, it was anticipated that the Pro Shop would operate at a loss \$79,090 for the year. Through December, the Pro Shop has operated at a loss of \$54,302. At this rate of loss, the Pro Shop would lose \$108,604 during this fiscal year.

The Food & Beverage operations lost \$60,380 during Fiscal Year 2010. The Fiscal Year 2011 adopted budget anticipated that the F&B operations would operate at a profit of \$56,044. Through December, the F&B operations have operated at a loss of \$23,200 during the current fiscal year. It is estimated that the F&B operations would lose \$46,400 during this fiscal year at the current rate of loss.

By shifting responsibility for the concession operations to the Manager, it is estimated that the Town will benefit by \$77,502 in cost-avoidance for the remainder of this fiscal year. The annual cost-avoidance benefit is estimated at \$155,004 based upon the current rate of loss.

Further, the agreement specifies that the Manager shall pay the Town on an annual basis a license fee based upon a percentage of Gross Revenue derived from concession operations. Based upon revenues received during Fiscal Year 2010 from concession operations, it is anticipated that this license fee would result in revenue of \$20,858 to the Town.

A summary of all AVGC revenue and expenditures for the Second Quarter of Fiscal Year 2011 is attached for informational purposes.

## Apple Valley Golf Course - Second Quarter Operating Revenue & Expenses

| <b>Revenue:</b>         | F.Y. 2010<br><u>Actuals</u> | F.Y. 2011<br><u>Adopted Budget</u> | 2nd Quarter<br><u>Actuals</u> | % of<br><u>Budget</u> |
|-------------------------|-----------------------------|------------------------------------|-------------------------------|-----------------------|
| Green Fees              | 534,972                     | 653,522                            | 303,047                       | 46.4%                 |
| Pro Shop                | 33,404                      | 85,658                             | 12,180                        | 14.2%                 |
| Food & Beverage         | 427,671                     | 474,080                            | 161,294                       | 34.0%                 |
| Events                  | 5,904                       | -                                  | (2,431)                       | -                     |
| Water Use Fees-Sales    | 69,440                      | -                                  | -                             | -                     |
| Other                   | 117,264                     | 62,623                             | 50,463                        | 80.6%                 |
| <b>Total</b>            | <b>\$1,188,655</b>          | <b>\$1,275,883</b>                 | <b>\$524,553</b>              | <b>41.1%</b>          |
| <br><b>Expenditures</b> |                             |                                    |                               |                       |
| Non-Departmental        | 403,493                     | 689,302                            | (431,335)                     | -61.8%                |
| Administration          | 273,445                     | -                                  | 70,168                        | -                     |
| Food & Beverage         | 488,051                     | 418,036                            | 184,494                       | 44.1%                 |
| Cart Lease and Maint.   | 60,030                      | -                                  | 33,585                        | -                     |
| Grounds                 | 848,341                     | 465,150                            | 522,939                       | 112.4%                |
| Facilities              | 206,973                     | 110,400                            | 111,388                       | 100.9%                |
| Pro Shop                | 151,097                     | 164,748                            | 66,482                        | 40.4%                 |
| <b>Sub-Total</b>        | <b>\$2,431,430</b>          | <b>\$1,847,636</b>                 | <b>\$557,721</b>              | <b>30.2%</b>          |
| Legal                   | 450,771                     | -                                  | 5,188                         | -                     |
| Debt Service            | 210,546                     | -                                  | 96,953                        | -                     |
| <b>Total</b>            | <b>\$3,092,747</b>          | <b>\$1,847,636</b>                 | <b>\$659,862</b>              | <b>35.7%</b>          |
| <b>Profit/(Loss)</b>    | <b>\$(1,904,092)</b>        | <b>\$ (571,753)</b>                | <b>\$(135,309)</b>            | <b>23.7%</b>          |

## AMENDED INTERIM FOOD AND BEVERAGE LICENSE AGREEMENT

THIS AMENDED INTERIM FOOD AND BEVERAGE LICENSE AGREEMENT (the "Agreement") is made and entered into this \_\_\_ day of January, 2011 (the "Effective Date") by and between TOWN OF APPLE VALLEY, a California municipal corporation (the "Town"), APPLE VALLEY COUNTRY CLUB, a California mutual benefit corporation ("Club") and LGM APPLE VALLEY, LLC, a California limited liability corporation (the "Manager").

### RECITALS

- A. Club and Manager are parties to that certain Management Agreement dated December 1, 2007 (the "Management Agreement"), pursuant to which Manager manages for Owner the golf course and related facilities commonly known as Apple Valley Country Club (collectively the "Golf Facilities").
- B. Town and Club have entered into a Purchase and Sale Agreement dated November 25, 2008, for the purchase of the Golf Facilities ("Purchase Agreement"). Escrow for the purchase of the Golf Facilities has been opened with First American Title Company ("Escrow").
- C. Town and Club have further provided for the Town to undertake possession and control of the Golf Facilities while Escrow remains open pursuant to that certain Interim Management Agreement dated November 25, 2008 ("Interim Agreement"). Manager, Town and Club have entered into an Interim Addendum to Management Agreement to provide for control of the Golf Facilities by Town during Escrow ("Interim Addendum"). For the purposes of this Agreement, Town shall be referred to herein as the "Owner", subject to the rights of Club under the Interim Agreement and the Interim Addendum.
- D. Concurrent with the Interim Addendum, Manager, Town and Club entered into that certain Interim Food and Beverage License Agreement attached to the Interim Addendum as Exhibit "A" ("Original License"). The purpose of the Original License was to provide the terms and conditions pursuant to which Manager would conduct the sale of Food and Beverages, including alcoholic beverages for onsite consumption (the "Food and Beverage Operation"), at the Golf Facilities.
- E. Owner and Manager have determined that certain changes need to be implemented to ensure the financial viability of the Food and Beverage Operation and have agreed to amend the terms and conditions of the Original License as set forth herein. Owner and Manager have further agreed to expand the scope of the Original License to include the operation of the pro shop at the Golf Facilities ("Pro Shop Operations"). Food and Beverage Operations and Pro Shop Operations shall be referred to collectively herein as the ("Concession Operations"). This Agreement shall be treated as a continuation of the Original License subject to the amended terms and conditions set forth herein and each party shall remain subject to the rights and obligations provided in the Original License through the Effective Date, after which time this Agreement shall prevail.
- F. This Agreement does not amend nor modify the Management Agreement except as it relates to Concession Operations. Except as provided in this Agreement, the Management Agreement and the Interim Addendum shall control the ownership, control, maintenance, and use of Golf Facilities relating to Concession Operations.
- G. The license for the sale of alcoholic beverages at the Golf Facilities (the "Liquor License") will continue to be held by Manager.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, Owner and Manager hereby agree as follows:

ARTICLE I

1.1 Definitions. As used in this Agreement, the following terms shall have the respective means indicated below:

“Furnishings and Equipment” shall mean all furniture, furnishings, trade fixtures, apparatus and equipment, including without limitation cash registers, kitchen equipment, appliances, china, glassware, silverware and other personal property used in or held in storage for use in the Concession Operations at the Golf Facilities, other than operating inventory.

“Impositions” shall be defined as sales tax, license fees and permit fees imposed on the Concession Operations.

“Manager” shall mean LGM Apple Valley, LLC or any successor to its interests under this Agreement as provided hereafter in Section 8.3 of this Agreement.

“Owner” shall mean the Town of Apple Valley.

Any capitalized terms used herein and not defined shall have the same meaning ascribed to them in Management Agreement.

ARTICLE II

2.1 License. Owner hereby licenses to Manager the portion of the Golf Facilities which are used for the sale and consumption of food and beverages, including alcoholic beverages, for the Term, and upon the conditions set forth herein. Owner further licenses to Manager the pro shop located at the Golf Facilities for use in the sale of golf merchandise and apparel, for the Term, and upon the conditions set forth herein.

2.2 Term. The Term of this Agreement shall commence upon the Effective Date and shall terminate effective as of the same date of termination in accordance with Article VII.

2.3 Termination. If the Interim Addendum is terminated, then this Agreement shall automatically terminate effective as of the same date of termination of the Interim Addendum or as stated herein.

2.4 License Fees. Upon commencement of and throughout the Term, Manager shall pay Owner a license fee on an annual basis based upon the Gross Revenue collected by Manager from the Concession Operations (“License Fee”). “Gross Revenue” is defined as all revenue actually collected by Manager from the sale of food, beverages and golf merchandise and apparel at the Golf Facilities, minus the amount of any state or local sales tax or other imposition that is required to be collected on sales and remitted to any state or local authority. The License Fee shall be calculated as a percentage of Gross Revenue collected by Manager from Concession Operations in the prior fiscal year as follows:

| <u>Gross Revenue</u>   | <u>License Fee</u> |
|------------------------|--------------------|
| \$ 25,001 to \$275,000 | 2.0%               |
| \$275,001 to \$350,000 | 2.5%               |
| \$350,001 to \$425,000 | 3.0%               |
| \$425,001 to \$500,000 | 3.5%               |
| \$500,001 plus.....    | 4.0%               |

The License Fee shall be payable within thirty (30) days of the end of each fiscal year and shall be accompanied by a report setting for the Gross Revenue in detail from each sales category, including (i) food;

(ii) non-alcoholic beverages; (iii) alcoholic beverages; (iv) general golf merchandise and apparel; and (v) logo golf merchandise and apparel. Owner shall have the right to audit the License Fee on an annual basis at its own expense pursuant to Section 6.2. In the event that an audit discovers any underpayment of License Fees in excess of five percent (5%) of the amount due, then Manager shall pay all costs of Owner with respect to the audit, including a reasonable hourly allocation of Owner's staff time. Gross Revenue, as defined in this Section 2.4, shall be excluded from the calculation of "Gross Revenue" for the purposes of calculating Incentive Fees pursuant to Section 4.2 of the Management Agreement.

2.5 Liquor License. Manager shall retain the Liquor License with the cooperation of Owner and Club. Upon termination or expiration of this Agreement, Manager shall not assign Liquor License to any person or entity unless assignment is first offered to Owner or a person or entity specified by Owner. Manager shall execute any and all documents implementing said assignment as determined appropriate by the parties. Such offer shall be in writing and acted upon within thirty (30) days; Owner's response to such written offer shall not be unreasonably withheld by Owner.

### ARTICLE III

3.1 Responsibility for Food and Beverage Operations. During the Term, Manager shall be responsible for conducting Food and Beverage Operations in accordance with the terms of this Agreement. Manager shall maintain an appropriate number of food and beverage service employees and an appropriate level of inventory. Subject to the License Fee, Manager will collect for its own account all revenues from Food and Beverage Operations. Manager shall further be solely responsible for costs relating to Food and Beverage Operations, including the following: (i) all labor and employment costs of employees engaged in Food and Beverage Operations, including salary, benefits, workers compensation insurance coverage and payroll taxes; (ii) all inventory and supplies; (iii) all regulatory and permitting costs; (iv) the cost of regular maintenance, repair and upkeep of the Furnishings and Equipment, provided, however, that (a) Owner shall be responsible for the capital cost to replace items of Furnishings and Equipment that can no longer be repaired or maintained through no fault of Manager or are obsolete; and (b) Owner shall be responsible for the cost of any single repair of Furnishings and Equipment in excess of \$1,000 as long as Manager gives Owner notice of such repair in advance and an opportunity to either repair or replace the item; and (v) the cost of any damage to that portion of the Golf Facilities constituting the kitchen, dining and bar areas or the Furnishings and Equipment as a result of the negligence or intentional acts or omissions of Manager, its agents and employees. The cost of insurance shall be shared as set forth in Section 5.1 herein. The terms of Section 2.8 of the Interim Addendum shall apply with respect to the obligations of Manager for the employees used in Food and Beverage Operations with the exception that the Manager, not the Owner, shall be responsible for all costs related to such employees.

3.2 Responsibility for Pro Shop Operations. During the term of this Agreement, Manager shall market and manage the pro shop and shall conduct the sale of all golf merchandise at the Golf Facilities. Manager shall maintain an appropriate level of inventory of golf merchandise and apparel, including any logo apparel displaying the name of the Club. As the pro shop employees share duties related to operation of the Golf Facilities pursuant to the Interim Addendum, the pro shop employees shall be covered under Section 2.8 of the Interim Addendum. Subject to the License Fee, Manager will collect for its own account all revenues from Pro Shop Operations. Manager shall further be solely responsible for all costs relating to Pro Shop Operations, including the following: (i) Pro Shop inventory and supplies; (ii) the cost of regular maintenance and upkeep of the Furnishings and Equipment in the Pro Shop to the same extent as set forth in Section 3.1(iv); (iii) the cost of any damage to the Furnishing and Equipment located within the Pro Shop as a result of the negligence or intentional acts or omissions of Manager, its agents and employees; (iv) all liability arising from any defective merchandise sold by the Pro Shop Operations; and (v) the cost of insurance as set forth in Section 5.1 herein.

3.3 Frustration of Purpose. If the ability of the Manager to conduct the Concession Operations is

substantially impaired as a result of conditions which are beyond its reasonable control, including without limitation, damage, destruction, condemnation of all or any portion of the Golf Facilities, acts of god, force majeure events and acts of governmental agencies (excluding enforcement actions arising as a result of non-compliance by Manager), then at Manager's sole discretion, this Agreement may be terminated on thirty (30) days written notice to Owner and neither party shall have any further rights or obligations except as otherwise set forth in this Agreement. Upon any such termination, Manager shall cooperate with Owner to transition the Liquor License to Owner or Owner's designee and the Parties shall conduct the inventory audit set forth in Section 8.2.

3.4 Specific Operating Procedures. Manager shall operate and manage Concession Operations at the Golf Facilities in accordance with the following operating procedures:

3.4.1 Hours of Operation. Concession Operations are to be operated during the scheduled hours of operation as are agreed to be reasonable between Manager and Owner. Owner shall cooperate with Manager to adjust such hours of operation to the extent that there is insufficient demand to economically operate, provided, however, that the intention of the parties is that the Concession Operations shall be generally available for guests of the Golf Facilities during operating hours, subject to normal industry practices at other golf facilities in the Victor Valley area.

3.4.2 Food and Beverage Operations. Manager shall continuously operate Food and Beverage Operations located in the Golf Facilities in accordance with Subsection 3.4.1 above, including the authority to enter into an agreement with the third party concessionaires to provide catering or other food and beverage services at the Golf Facilities with prior written approval from Owner. Additionally, with written approval by Owner, Manager shall have the right to name the Restaurant for marketing purposes. A beverage cart(s) is allowed at all times. Manager shall comply with all requirements of state and local law governing the sale and distribution of alcoholic beverages. Manager shall require and provide basic alcohol serving training to alcohol servers. Manager shall obtain and maintain all permits from the County of San Bernardino Department of Health for food and beverage services at the Golf Facilities. Manager shall comply with all regulations of the County of San Bernardino Department of Health and all other present and future health laws and regulations as may be established by the Federal, state, county, and town governmental agencies. Prices of food and beverage services at the Golf Facilities shall be comparable to prices charged at other golf facilities in the Victor Valley area.

3.4.3 Safety and Security. Food and Beverage Operations at Club shall comply with all safety regulations of Federal, state, and local governmental agencies. Manager shall take reasonable actions to protect the safety of Food and Beverage Operations' employees and customers. Manager shall operate any security systems which are in place and operational at the Golf Facilities as of the date of this Agreement. All records for the Food and Beverage Operation of Golf Facilities shall be maintained in a safe and secure manner.

3.5 Alterations to Building. Manager shall not make alterations, additions, or changes to the appearance or the structure of the Golf Facilities without the prior approval of Owner and Club.

3.6 Operating and Maintenance Standards. The parties acknowledge and agree that Concession Operations at the Golf Facilities shall be operated and maintained to the standards of other golf facilities in the Victor Valley area.

#### ARTICLE IV

4.1 Contract Administration. Owner has designated the Town Manager as the individual who is responsible for administering Agreement on behalf of Owner. The Town Manager may designate any member or members of his staff or other person to carry out Owner's responsibilities in administering this

Agreement provided that Manager is given written notice of such designation and the scope of authority of the designee. Manager designates the General Manager/Director of Golf, as the individual who is responsible for administering Agreement on behalf of Manager. The parties acknowledge that except as otherwise expressly provided herein: (a) the Town Manager has the authority to approve or consent to those matters identified in this Agreement as requiring Owner's approval or consent and to make all other decisions on behalf of Owner regarding the administration of this Agreement, and (b) the General Manager/Director of Golf or such other individual designated by Manager has the authority to approve or consent to those matters identified in Agreement as requiring Manager's approval or consent and to make other decisions on behalf of Manager regarding the administration of Agreement. The designated representative of Club for the purpose of administering this Agreement shall be \_\_\_\_\_.

All formal requests for action by Manager under this Agreement shall be delivered to Manager in writing by Town and/or Club, as appropriate.

## ARTICLE V

### **INSURANCE**

5.1 Coverage. Owner shall provide insurance that complies with the insurance requirements stated in Section 2.12 of the Interim Addendum. Manager shall either (i) procure additional primary commercial liability coverage for the Concession Operations; or (ii) Manager shall pay Owner five percent (5%) of the total premium cost paid by the Owner each year for liability coverage at the Golf Facilities.

5.2 Handling of Claims. Manager shall be responsible for reporting to Owner claims, demands, and lawsuits for any losses, damages, liability; and expenses (including without limitation personal injury and property damage claims) arising out of the operation and management of Concession Operations at the Golf Facilities ("Claims"), whether or not such claims are covered by insurance required under this Article V or as stated in Section 2.12 of the Management Agreement.

## ARTICLE VI BOOKS AND RECORDS

6.1 Books and Records. Manager shall maintain accurate records of account and such other records as are necessary to reflect the results of Concession Operations at Club. Such books, records, and reports shall be maintained separately from other facilities operated by Manager. Manager shall maintain financial and accounting books and records for a period of at least seven (7) years after the expiration, or earlier termination of this Agreement, and Owner shall have the right to inspect and audit such books and records during such period as provided in Section 6.2 below.

6.2 Inspection. Upon seven (7) days prior written notice to Manager, which notices shall set forth the date and time that Owner desires to inspect the books and records, Owner or its authorized agents, auditors, or representatives shall have the right during normal businesses hours to review, inspect, audit, and copy the books, records, invoices, deposit receipts, cancelled checks, and other accounting and financial information maintained by Manager in connection with Concession Operations. All such books and records shall be made available to Owner at the Golf Facilities, unless Owner and Manager agree upon another location.

6.3 Reports to Owner. Manager shall deliver to Owner the following financial statements to Owner: (a) the report concerning the calculation of License Fees on a quarterly basis; and (b) within twenty (20) days after the end of each calendar month, a profit and loss statement showing the result of Concession Operations for such month and for the calendar year to date, which statement shall include sufficient detail to reflect all gross revenues and expenses.

## ARTICLE VII

## TERMINATION RIGHTS

7.1 Termination by Owner. In addition to Owner's option to terminate this Agreement pursuant to Section 2.3, Owner shall have the right to terminate this Agreement with or without cause upon not less than thirty (30) days written notice to Manager. Notwithstanding the foregoing, if the termination is the result of a failure of Manager to observe or perform any material covenant, agreement, term or provision of Agreement, then Owner shall provide written notice of such failure and at the request of Manager, Owner shall meet and confer with Manager as to whether such failure can be adequately cured to the satisfaction of Owner, in its sole and absolute discretion, within the notice period. Owner's termination notice shall specify the effective date of such termination, which date shall not be more than sixty (60) days after the date of Owner's termination notice. Owner may immediately terminate and take possession of the Golf Facilities in the event that any failure to comply with this Agreement by Manager results in an imminent threat to public health or safety.

7.2 Termination by Manager. Manager have the right to terminate this Agreement with or without cause upon not less than thirty (30) days written notice to Owner. Notwithstanding the foregoing, if the termination is the result of a failure of Owner to observe or perform any material covenant, agreement, term or provision of Agreement, then Manager shall provide written notice of such failure and at the request of Owner, Manager shall meet and confer with Owner as to whether such failure can be adequately cured to the satisfaction of Manager, in its sole and absolute discretion, within the notice period. Manager's termination notice shall specify the effective date of such termination, which date shall not be more than sixty (60) days after the date of Manager's termination notice.

7.3 Effect of Termination. Termination of this Agreement under the provisions of this Article VII shall not affect the rights of the terminating party with respect to any damages it has suffered as a result of any breach of Agreement, nor shall it affect the rights of either party with respect to any liability or claims accrued, or arising out of events occurring, prior to the date of termination.

7.4 Remedies Cumulative. Neither the right of termination, nor the right to sue for damages, nor any other remedy available to a party under this Agreement shall be exclusive of any other remedy given under Agreement or now or hereafter existing at law or in equity.

## ARTICLE VIII TITLE MATTERS; ASSIGNMENT

8.1 Ownership of Improvements and Personal Property. All improvements to the Concession Operation at Golf Facilities made during Term of this Agreement by Owner and all Furnishings and Equipment shall be considered property owned exclusively by Club (subject to Owner's rights under the Purchase Agreement).

8.2 Levelized Inventory. The cost of the present inventory (less the cost of obsolete or unsaleable inventory) for Concession Operations shall be ascertained by an inventory on the Effective Date of this Agreement. Upon termination of this Agreement, a closing inventory audit shall be made. Any difference in the beginning and ending inventory shall be compensated by a cash payment from the appropriate party, provided, however, that in no event shall either party be obligated to pay the other party for inventory that is (i) obsolete or in excess of thirty (30) days supply with respect to Food and Beverage Operations; or (ii) inventory for Pro Shop Operations which is obsolete or unsaleable in the normal course of business or in excess of normal operating inventory based on historical practice.

8.3 Assignments. Neither party to Agreement shall be permitted to assign this Agreement without the prior written consent of the other party. It is understood and agreed that any consent granted by a party to

any such assignment shall not be deemed a waiver of any consent required under this Section 8.3 as to any future assignment. Any assignment by either party of Agreement in violation of the provisions of this Section 8.3 shall be null and void and shall result in the termination of Agreement. In addition to any other remedies available to the parties, the provisions of this Section 8.3 shall be enforceable by injunctive proceeding or by suit for specific performance.

8.4 Successors and Assigns. Subject to the foregoing, Agreement shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns.

## ARTICLE IX INDEMNITIES

### 9.1 Indemnity.

9.1.1 Manager's Indemnity of Town. Manager agrees to indemnify, defend and hold harmless Town, its officers, elected officials, agents and employees, from and against any and all claims, demands, actions, lawsuits, proceedings, damages liabilities, judgments, penalties, fines, attorneys' fees, costs, and expenses which result from (a) any material breach of this Agreement by Manager; (b) any act or omission constituting active or passive negligence, gross negligence, fraud or willful misconduct by Manager or any agent of employee of Manager; (c) any third party claims, liabilities or damages or regulatory penalties or fines arising from the Concession Operations; or (d) any action that is not within the scope of Manager's duties under this Agreement. Manager's indemnity obligations under this Section 9.1.1 shall not apply to the extent that any claim, liability or damage results from the negligent or willful acts or omissions of Town, its agents or employees.

9.1.2 Town's Indemnity of Manager. The Town agrees to indemnify, defend and hold harmless Manager and its owners, officers, directors, agents and employees from and against any and all claims, demands, actions, lawsuits, proceedings, damages, liabilities, judgments, penalties, fines, attorneys' fees, costs, and expenses which result from (a) any material breach of its obligations under this Agreement; or (b) any act or omission constituting gross negligence or willful misconduct by the Town or any officer, employee or agent of the Town.

9.1.3 Nature of Indemnity. The indemnity obligations of Manager and Town set forth in this Section 2.11 shall be offset to the extent of any applicable insurance proceeds paid to the indemnified party or on its behalf.

9.1.4 Legal Costs. The legal costs and expenses of defending an indemnity claim shall be borne by the party who has the indemnity obligation until such time as there is a judgment or other decision by the arbitrator or court which allocates liability for such legal costs and expenses, at which time the legal costs and expenses shall be awarded as set forth in such judgment or decision.

## ARTICLE X MISCELLANEOUS

10.1 Golf Facilities Names. Club shall be known by such name, trade name and trademark or logo to be determined by Owner no later than execution of this Agreement. The parties acknowledge and understand that the names, logos, and designs used in the Concession Operations, together with appurtenant goodwill, are the exclusive property of Club (subject to Owner's rights under the Purchase Agreement). Manager may identify Concession Operations at the Golf Facilities as managed and operated by Manager.

10.2 Notices. All notices shall be given in accordance with Section 9 of the Interim Addendum.

10.3 Independent Contractor. Manager shall at all times be considered an independent contractor under Agreement. Nothing contained in Agreement shall be construed to be or create a partnership or joint venture between Owner and/or Club and its successors and assigns, on the one part, and Manager and its successors and assigns, on the other part.

10.4 Modification and Changes. Agreement may be amended or modified only by a writing signed by both parties.

10.5 Understandings and Agreements. This Agreement, the Interim Addendum and the Management Agreement constitutes all of the understandings and agreements of whatever nature or kind existing between the parties with respect to Manager's management and operation of Concession Operations at the Golf Facilities, and this Agreement supersedes all prior understandings and agreements, whether written or oral, between Owner and/or Club and Manager pertaining to the Concession Operations.

10.6 Headings. The Article, Section and Subsection headings contained in Agreement are for convenience and reference only and are not intended to define, limit or describe the scope or intent of any provision of Agreement.

10.7 [Intentionally Omitted].

10.8 Survival of Covenants. Any covenant, term or provision of Agreement which in order to be effective must survive the termination of Agreement shall survive any such termination.

10.9 Third Parties. None of the obligations under Agreement of either party shall run to or be enforceable by any party other than the parties of Agreement or by a party deriving rights under Agreement as a result of an assignment permitted pursuant to the terms of Agreement.

10.10 Waiver. No failure by Manager or Owner and/or Club to insist upon the strict performance of any covenant, agreement, term or condition of Agreement or to exercise any right or remedy consequent upon the breach of Agreement shall constitute a waiver of any such breach or any subsequent breach of the same covenant, agreement, term or condition. No covenant, agreement, term or condition of Agreement and no breach of Agreement shall be waived, altered or modified except by a written instrument. A waiver of any breach of Agreement shall only affect Agreement to the extent of the specific waiver, and all covenants, agreements, terms and conditions of Agreement shall continue in full force and effect.

10.11 Applicable Law. Agreement shall be construed and interpreted in accordance with, and shall be governed by, the internal laws of the State of California. Subject to Section 10.21 of this Agreement, the parties agree that the Superior court of the State of California, County of San Bernardino shall have jurisdiction of any litigation between the parties relating to this Agreement.

10.12 No Presumption Regarding Drafter. Owner, Club and Manager acknowledge and agree that the terms and provision of Agreement have been negotiated and discussed between Owner, Club and Manager, and that Agreement reflects their mutual agreement regarding the subject matter of Agreement. Because of the nature of such negotiations and discussions, it would be inappropriate to deem either Owner, Club or Manager to be the drafter of Agreement, and therefore no presumption for or against the drafter shall be applicable in interpreting or enforcing Agreement.

10.13 Enforceability of Any Provision. If any term, condition, covenant, or obligation of Agreement shall be determined to be unenforceable, invalid or void, such determination shall not affect, impair, invalidate, or render unenforceable any other term, condition, covenant, or obligation of Agreement.

10.14 United States Currency. All amounts payable pursuant to Agreement shall be paid in lawful money of the United States of America.

10.15 Counterparts. Agreement and any amendment may be executed in counterparts by fax, and upon all counterparts being so executed each such counterpart shall be considered as an original of Agreement or any amendment and all counterparts shall be considered together as one (1) agreement.

10.16 Attorneys' Fees. In the event of a dispute involving the nonperformance by a party hereto of its obligations under Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and all other expenses (including fees and costs related to discovery) reasonably incurred in connection with such dispute, whether or not litigation is commenced, in addition to all other relief to which the party is entitled. If the successful party recovers judgment in any legal action or proceeding, the attorneys' fees and all other expenses of litigation shall be included in and made a party of any such judgment.

10.17 Covenants Against Discrimination. Manager agrees that in connection with its performance under Agreement, there shall be no discrimination by Manager against any person on account of race, color, creed, religion, sex, marital status, national origin, or ancestry.

10.18 Time of the Essence. Time is of the essence in Agreement. The parties understand that the time for performance of each obligation has been the subject of negotiation by the parties.

10.19 Authority. The parties represent for themselves that (a) such party is duly organized and validly existing, (b) the person or persons executing Agreement on behalf of such party is/are duly authorized to execute and deliver Agreement on behalf of such party, (c) by so executing Agreement, and (d) the execution of Agreement does not violate any provision of any other agreement to which such party is bound.

10.20 Possessory Interest. The parties agree that to the extent that possessory interest property taxes are levied against Manager in connection with the Concession Operations, such taxes shall be the responsibility of Owner.

10.21 Arbitration. Any dispute arising pursuant to this Agreement shall be subject to resolution by arbitration as set forth in Section 6 of the Interim Addendum.

*Signature Page Follows*

IN WITNESS WHEREOF, the parties have executed or caused Agreement to be executed as of the day and year first written above.

TOWN/OWNER

Town of Apple Valley  
BY:  
14955 Dale Evans Parkway Apple  
Valley, CA 92307

Date: \_\_\_\_\_

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

MANAGER

LGM Apple Valley, LLC  
a California limited liability company 74-947  
Highway 111, Suite 200 Indian Wells, CA  
92210

Date: \_\_\_\_\_

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

CLUB

Apple Valley Country Club  
15200 Rancheros Road  
Apple Valley, CA 92307

Date: \_\_\_\_\_

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