

**TOWN OF
APPLE VALLEY, CALIFORNIA**

AGENDA MATTER

Subject Item:

A REQUEST TO TERMINATE DEVELOPMENT AGREEMENT (DA) NO. 2004-001 BETWEEN THE TOWN OF APPLE VALLEY AND NEW CENTURY/SUMMERS, LLC, ESTABLISHING THE STANDARDS, CRITERIA AND TIME FRAME FOR DEVELOPMENT OF THE PROJECT AREA LOCATED ON THE SOUTHWEST CORNER OF JESS RANCH PARKWAY AND BEAR VALLEY ROAD WITHIN THE JESS RANCH PLANNED UNIT DEVELOPMENT (PUD) WITHIN THE TOWN OF APPLE VALLEY.

Recommended Action:

**Move to open the public hearing and take testimony.
Close the public hearing. Then:**

1. **Determine** that, pursuant to Section 15061(b)(3) of the State Guidelines to Implement the California Environmental Quality Act (CEQA), the project is exempt from environmental review, stating that the activity is covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question, the proposed Code Amendment, may have a significant effect on the environment, the activity is not subject to CEQA.
2. **Find** that the proposed Town Council Ordinance is consistent with the Goals and Objectives of the adopted Town of Apple Valley General Plan and that it is necessary to preserve the health, safety and general welfare of the citizens of Apple Valley.
3. **Move** to waive the reading of Ordinance No. 373 in its entirety and read by title only.
4. **Introduce** Ordinance No. 373, to terminate Development Agreement No. 2004-001 between the Town of Apple Valley and New Century/Summers, LLC establishing the standards, criteria and time frame for development of the project area located on the southwest corner of Jess Ranch Parkway and Bear Valley Road, within the Jess Ranch Planned Unit Development (PUD) within the Town of Apple Valley.
5. **Direct** staff to file a Notice of Exemption.

Proposed by: Planning Division

Item Number _____

Town Manager Approval: _____

Budget Item Yes No

Summary Statement:

On April 21, 2004 the Planning Commission adopted Planning Commission Resolution No. 2004-001, recommending that the Town Council adopt Development Agreement No. 2004-001 for the “Silverado at Apple Valley” project located on the southwest corner of Jess Ranch Parkway and Bear Valley Road. The Town Council adopted Ordinance No. 283 on June 8, 2004 adopting Development Agreement No. 2004-001. This agreement was between New Century Entertainment/Summers LLC and the Town of Apple Valley for the development of a 16-screen cinema megaplex, which would have served as an anchor of the “Silverado at Apple Valley” project within the Jess Ranch Market Place Planned Unit Development (PUD).

Since the adoption of Ordinance No. 283, the Developer partners were unable to agree to accept the private financing offered by East-West Bank. As a result, the performance and implementation of the Agreement did not occur, resulting in a default situation. The Developer acknowledged that situation and consented to terminate the Agreement. Currently, the property is proposed to be sold. Since approval of Development Agreement No. 2004-001, the Planning Commission has approved a different project, including Development and Special Use Permits on February 7, 2007 and the Tentative Parcel Map on November 7, 2007 for Jess Ranch Marketplace Phase III, which includes a cinema, restaurants, a fitness center and retail tenants. Therefore, the Development Agreement for the previously proposed development is no longer viable and should be terminated and cancelled by Town Council. The current owner, Apple Valley III Alliance/Riley, LLC, is also requesting termination and cancellation of the Agreement at this time.

On December 19, 2007, the Planning Commission adopted Planning Commission Resolution No. 2007-031 recommending to the Town Council that Development Agreement No. 2004-001 be terminated.

NOTICING

The termination of Development Agreement No. 2004-001 was advertised as a public hearing in the Apple Valley News newspaper on December 28, 2007 as required under Development Code Section 9.13.030 “Notice of Public Hearings”.

RECOMMENDATION

Following receipt of public input and discussion by the Council, it is recommended that the Council move to introduce Ordinance No. 373 terminating Development Agreement No. 2004-001.

Attachments:

- Ordinance No. 283
- Planning Commission Resolution No. 2007-031
- Ordinance No. 373

ORDINANCE NO. 283

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY ADOPTING DEVELOPMENT AGREEMENT No. 2004-001, A DEVELOPMENT AGREEMENT BETWEEN NEW CENTURY ENTERTAINMENT/SUMMERS, LLC, (DEVELOPER) AND THE TOWN OF APPLE VALLEY FOR THE DEVELOPMENT OF THE SILVERADO AT APPLE VALLEY DESTINATION/ENTERTAINMENT CENTER PROJECT ON PROPERTY GENERALLY LOCATED SOUTH OF BEAR VALLEY ROAD, WEST OF JESS RANCH PARKWAY, EAST OF THE MOJAVE RIVER AND NORTH OF THE LOGICAL EXTENSION OF TOWN CENTER DRIVE, ASSESSOR PARCEL NO. 434-541-31.

THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1: Recitals:

a. A public notice of intention to consider the adoption of Development Agreement with, New Century Entertainment/Summers, LLC has been provided for in accordance with state law.

b. The Town Council finds and declares that the lack of certainty associated with the approval of projects without benefit of a development agreement can result in a waste of resources, escalate the cost of project development and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public; and

c. Development Agreement No. 2004-001 assures the applicant of the development project that the applicant may proceed with the project in accordance with those existing policies, rules and regulations intended to apply under the provisions of the Development Agreement, and subject to the conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development;

SECTION 2: The Town Council of the Town of Apple Valley hereby approves Development Agreement No. 2004-001 in substantially the form attached hereto, marked Exhibit "1", and by this reference made a part hereof, a development agreement between the Town of Apple Valley and New Century Entertainment/Summers, LLC, for the development of a 16-screen cinema megaplex, which shall serve as an anchor of the Silverado At Apple Valley project, on property generally located south of Bear Valley Road, west of Jess Ranch Parkway, east of the Mojave River and north of the logical extension of Town Center Drive, Assessor Parcel No. 434-541-31. The approval of said Development Agreement is based upon the finding that the provisions of the Agreement are consistent with the Town General Plan and the Jess Ranch Specific Plan as amended.

SECTION 3: Provided all other conditions precedent to the execution thereof have been satisfied, including, without limitation, the provisions of Paragraph 9.2 of the Development Agreement, the Development Agreement may thereupon be executed on behalf of the Town after this ordinance becomes effective.

SECTION 4: Within 10 days after the Town enters into the Development Agreement the Town Clerk shall have a copy of the Agreement recorded in the office of the County Recorder for the County of San Bernardino, which shall describe the land subject thereto.

SECTION 5: This ordinance shall become effective thirty days from and after its adoption."

SECTION 6: Notice of Adoption. The Town Clerk of the Town of Apple Valley shall certify to the adoption of this ordinance and shall cause publication to occur in a newspaper of general circulation and published and circulated in the Town in a manner permitted under Section 36933 of the Government Code, including but not limited by this reference to a summary of this ordinance; publication to occur in the Apple Valley News and Daily Press."

Adopted by the Town Council and signed by the Mayor and attested by the Town Clerk this 8th day of June, 2004.



Bob Sagona, Mayor

ATTEST:



La Vonda M-Pearson, Town Clerk

Approved as to Form:



Neal Singer, Town Attorney

Approved as to content:



Bruce Williams, Town Manager

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
TOWN OF APPLE VALLEY

I, LA VONDA M-PEARSON, TOWN CLERK of the Town of Apple Valley, California, hereby certify that the foregoing Ordinance No. 283 was duly introduced on May 25, 2004 and adopted at the Town Council regular meeting on June 8, 2004, by the following vote:

AYES: Council Members Burgnon, Jasper, Shoup, and Mayor Pro Tem Nassif.

NOES: Mayor Sagona.

ABSENT: None.

ABSTAIN: None.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the Town of Apple Valley, California, this 10th day of June, 2004.

LA VONDA M-PEARSON, CMC
TOWN CLERK

by: 
Patty Heyle, Deputy

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required by law, held a public hearing to consider the Owner's application for the Agreement.

1.5 Town Council Findings. The Town Council finds that this Agreement is consistent with the Jess Ranch Specific Plan and the Town General Plan as well as all other applicable ordinances, plans, policies and regulations of the Town.

1.6 Town Ordinance. the Council adopted Ordinance No. _____ approving this Agreement. The adopted ordinance becomes effective on (Date)

2. DEFINITIONS.

2.1 "Agreement" means this Development Agreement.

2.2 "Days" mean calendar days unless otherwise specified.

2.3 "Developer" means N.C.E./Summers, LLC, a California limited liability company that has a legal or equitable interest in the Property and includes the "Developer's" successors in interest.

2.4 "Development" means the improvement of the Property for the purposes of completing structures, improvements and facilities comprising the Project including, but not limited to, grading, the construction of infrastructure and public facilities related to the Project whether located within or outside the property, the construction of buildings and structures and the installation of landscaping.

2.5 "Development Approvals" means all permits and entitlements issued or approved by Town for the development and/or use of the Property in conformance with the Jess Ranch Specific Plan and Development Plan including, but not limited to:

- (a) Specific plans and specific plan amendments.
- (b) Tentative and final subdivisions.
- (c) Conditional use permits.
- (d) Design review approvals
- (e) Grading and building permits.

"Development Approvals" specifically do not include this Agreement.

2.6 "Development Plan" means the Jess Ranch Specific Plan, together with the Jess Ranch Environmental Impact Report, Mitigation Monitoring Program and the Scope of Development as more particularly described in Exhibit "C".

2.7 "Effective Date" means the 31st day after the second reading of the Town Council ordinance which adopts and approves this agreement, unless timely referendum proceedings to set aside the ordinance adopting this agreement are commenced, in which case the occurrence of the Effective Date shall be postponed

until the final disposition of the referendum, including the disposition of any judicial proceedings commenced with respect thereto.

2.8 "Jess Ranch Specific Plan" means that specific plan entitled Jess Ranch Specific Plan adopted by the County of San Bernardino in 1984 and as amended by the Town up to and including the Effective Date.

2.9 "Land Use Regulations" means all ordinances, resolutions, codes, rules, regulations and official policies of the Jess Ranch Specific Plan legally adopted in accordance with all applicable laws governing the development and use of land, including, without limitation, the permitted use of the land, the density or intensity of use, subdivision requirements, the maximum height and size of proposed buildings, the phasing or timing of development, and the design, improvement and construction and initial occupancy standards and specifications applicable to the Development of the Property as they may be modified by the development approvals.

2.10 "Owner" means New Century/Summers, LLC, of California, a California limited liability company, and its permitted successors in interest to all or a part of the property.

2.11 "Processing Fees" means the normal and customary application, filing, plan check, and permit fees for the land use approvals, design review, tree removal permits, building permits, and other similar permits and entitlements, inspection fees which fees are charged to reimburse Town expenses attributable to such applications, processing, permitting, review and inspections and which are in force and effect on a general basis at such time as said approvals, permits, review, inspections or entitlements are granted or conducted by Town or as otherwise established by this Agreement

2.12 "Project" is the development of the property as set forth in Exhibits "A, B, C and D, which include the following:

<u>Exhibit Designation</u>	<u>Description</u>
A.	Property Legal Description
B.	Scope of Development
C.	Development Standards for the Silverado At Apple Valley
D.	Fee Estimates – Phase 1

All of the above listed Exhibits are hereby incorporated in this Agreement and made a part hereof.

2.13 ("Property" means the real property described in Exhibit "A".)

2.14 "Subsequent Development Approvals" means all Development Approvals required subsequent to the Effective Date in connection with development of the Property including, without limitation, subdivision improvement agreements which require the provision of bonds or other securities.

Subsequent Development Approvals include, without limitation, all excavation, grading, building construction, encroachment or street improvement permits, occupancy certificates, utility connection authorizations, or other non-discretionary permits or approvals necessary, convenient, or appropriate for the grading, construction, marketing, use and occupancy of the Project within the Property at such times and in such sequences Owner may choose consistent with the Development Plan and this Agreement.

2.15 "Theater Operator" means The Movie Experience, Inc., and permitted successors in interest.

3. GENERAL PROVISIONS.

3.1 Property Subject to the Agreement. Until released pursuant to the provisions of Section 8.3 below, no property shall be released from this Agreement until "Developer" has fully performed its obligations arising out of the Agreement.

3.2 Duration of Agreement. The term of the Agreement shall commence on, and the Effective Date of the Agreement shall be, the Effective Date of Town Ordinance No. 283 as set forth in Section 1.6 above and the term shall extend through December 31, 2010 following the Effective Date unless the Agreement is earlier terminated or its term modified in the manner provided in this Agreement. In order to extend the term of the Agreement beyond December 31, 2010, all of the following shall apply:

- (i) Owner shall give written notice to Town no later than one-hundred, twenty (120) days before the expiration of the initial, approximately five and one-half year term that Owner desires to extend this Agreement for the additional five (5) year period; and
- (ii) Owner shall have applied for, and obtained building permits for and obtained certificates of occupancy for at least the 16-screen cinema megaplex and three (3) full-service sit-down restaurants described by the Development Plan which can be developed as determined in accordance with Sections 2.5 and 2.9; and
- (iii) There exists no uncured default of which Owner has received notice as to this Agreement or any other agreement or condition of approval relative to the Development of this Property.

3.3 Assignment. Owner shall have the right to transfer or assign the Property, in whole or in part, to any person, partnership, joint venture, firm or corporation at any time during the term of this Agreement provided, however, the rights of Owner under this Agreement may not be transferred or assigned unless the written consent of the Town is first obtained and any transfer or assignment of the rights under this

Agreement shall include in writing the assumption of the duties, obligations and liabilities arising from this Agreement if the Town grants written consent to transfer the rights. Such transfer or assignment does not relieve Owner of any duty, obligation or liability to Town unless by the prior written consent of the Town. Town shall not unreasonably withhold its consent to Owner's request to transfer or assign the Property in furtherance of this Agreement, provided (i) Owner notifies Town at least fifteen (15) business days prior to the date of such assignment, (ii) the transferee (including and Owner Affiliate) expressly assumes the Owner's obligations under this Agreement, and (iii) prior to the date of such assignment the transferee (including Owner's Affiliate) posts cash, surety bonds, letters of credit or other collateral reasonably acceptable to Town to secure the transferee's performance of its obligations with respect to the portion of the Project being acquired by such transferee. It is understood and agreed that, until all of the conditions set forth in clauses (i), (ii) and (iii) immediately hereinabove have been performed, Owner shall not be relieved of and from liability or responsibility for compliance with the obligations arising under this Agreement with respect to the portion of the Project being transferred. In order to permit Town to determine the amount and type of collateral that will be reasonably acceptable, Town may, as part of its rights under this Section 3.3 above, reasonably require the proposed transferee, including Owner Affiliates, to submit financial statements and evidence of its fitness, experience and ability (or that of its senior managerial personnel) to comply with the obligations being assumed.

During the term of this Agreement, any approved assignee or transferee of the rights under this Agreement shall observe and perform all of the duties and obligations of Developer contained in this Agreement as such duties and obligations pertain to the portion of the Property transferred or assigned. Any and all approved successors and assignees of Owner shall have all of the same rights, benefits, duties, obligations and liabilities of Developer under this Agreement. Upon assignment or transfer of the rights of Developer under this Agreement, the obligations of Owner and the transferee or assignee shall be joint and several.

3.4 Amendment or Cancellation of Agreement. This Agreement may be amended from time to time or canceled by the mutual consent of the parties but only in the same manner as its adoption by an ordinance as set forth in Government Code Section 65868. The term "Agreement" or "Development Agreement" shall include any amendment properly approved and executed.

3.5 Enforcement. Notwithstanding Government Code Section 65865.4, this Agreement is enforceable by any party to the Agreement in any manner provided by law. The remedies provided in Section 7.4 of this Agreement shall not include, and Town shall not be liable for, any action in damages or any costs or attorney's fees resulting from any dispute, controversy, action or inaction, or any legal proceeding arising out of this Agreement.

3.6 Hold Harmless. Developer agrees to and shall indemnify, defend with attorneys approved by Town, and hold Town, its officers, agents, employees, consultants, general and special counsel and representatives harmless from liability: (1) for damages, just compensation, restitution, judicial or equitable relief arising out of claims for personal injury, including health, and claims for property damage which may arise from the direct or indirect operations of the Developer or Developer's

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contractors, subcontractors, agents, employees or other persons acting on Developer's behalf which relates to the Project and (2) from any claim that damages, just compensation, restitution, judicial or equitable relief is due by reason of the terms of or effects arising from this Agreement. Developer agrees to pay all costs for the defense of the Town and its officers, agents, employees, consultants, general and special counsel and representatives regarding any action for damages, just compensation, restitution, judicial or equitable relief caused or alleged to have been caused by reason of Developer's actions in connection with the Project or any claims arising out of this Agreement. This hold harmless Agreement applies to all claims for damages, just compensation, restitution, judicial or equitable relief suffered or alleged to have been suffered by reason of the events referred to in this paragraph or due by reason of the terms of, or effects, arising from this Agreement regardless of whether or not the Town prepared, supplied or approved this Agreement, plans or specifications, or both, for the Project. The Developer further agrees to indemnify, hold harmless, and pay all costs for the defense of the Town, and its officers, agents, employees, consultants, general and special counsel and its representatives, including fees and costs for counsel to be selected by the Town, regarding any action by a third party challenging the validity of this Agreement or asserting that damages, just compensation, restitution, judicial or equitable relief is due to or for claimed personal or property rights by reason of the terms of, or effects arising from or any acts or omissions relating to, this Agreement or in any action or proceeding challenging the project or its validity. Town may make all reasonable decisions with respect to its representation in any legal proceeding.

3.7 Binding Effect of Agreement. To the extent not otherwise provided in Section 3.3 of this Agreement, the burdens of the Agreement bind and the benefits of the Agreement inure to the parties' successors in interest.

3.8 Amendment or Cancellation of Agreement. This Agreement may be amended or canceled in whole or in part only by written consent of all parties in the manner provided for in the Government Code Section 65868. This provision shall not limit any remedy of Town or Owner as provided by this Agreement. Within the limits of the authority granted to him or her, the Town's Director of Economic and Community Development, or designee, may make and approve minor modifications to this Agreement requested by Owner, provided, however, that such modifications and amendments shall be limited to the following:

- (a) Minor modifications as are specified in the Jess Ranch Specific Plan; and
- (b) Minor modifications of schematic plans as previously approved by Town; and
- (c) Minor modifications or amendments to the terms of this Agreement that do not affect the term of the Agreement, the permitted uses, density or intensity of uses, maximum height or size of buildings, provisions for reservation and dedication of land, conditions, terms, restrictions and requirements relating to the Subsequent Development Approvals and monetary contributions of Owner.



3.9 Termination. This Agreement shall be deemed terminated and of no further effect upon the occurrence of any of the following events:

- (a) Expiration of the stated term of this Agreement as set forth in Section 3.2.
- (b) Entry of a final judgment setting aside, voiding or annulling the adoption of the ordinance approving this Agreement.
- (c) The adoption of a referendum measure pursuant to Section 65867.5 overriding or repealing the ordinance approving this Agreement.
- (d) Completion of the Project in accordance with the terms of this Agreement, including issuance of all required occupancy permits and acceptance by Town or applicable public agency of all required dedications and improvements.
- (e) Upon default of Owner or Town to the extent provided by Sections 7.1 and 7.2, respectively.

3.10 Relationship of the Parties. The contractual relationship between Town and Developer arising out of the Agreement is one of independent developer and Town. Developer is not hereby made an agent of the Town and the Town is not hereby made an agent of Developer or Owner. Further, this Agreement does not create any third party beneficiary rights.

3.11 Notices. All notices, demands and correspondence required or permitted by the Agreement shall be in writing and delivered in person or mailed by first class or certified mail, postage prepaid, addressed as follows:

If to Town, to:

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

If to Owner:

N.C.E./Summers, LLC
1125 Linda Vista Drive, Suite 107
San Marcos, CA 92069
Attn: David Cipranic/Jim and Dottie Summers

A party may change its address by giving notice in writing to the other party. Thereafter, notices, demands and correspondence shall be addressed and transmitted to the new address. Notice shall be deemed given upon personal delivery or, if mailed, two (2) business days following deposit in the United States

4. DEVELOPMENT OF THE PROPERTY.

4.1 Rules, Regulations and Policies. The rules, regulations and official policies governing the permitted use(s) of the Property, with respect to and only with respect to the permitted uses, density, and intensity of use of the Property shall be those rules, regulations and policies of the Jess Ranch Specific Plan, as amended, applicable to the Property as of the Effective Date of this Agreement.

4.2 In connection with this Agreement, and pursuant to the requirements of California Environmental Quality Act (CEQA), the County of San Bernardino prepared an Environmental Impact Report approved in 1984 and certified that this document is adequate, that it satisfies the requirements of CEQA, the CEQA Guidelines and applicable local ordinances and regulations, and that it fully and adequately analyzes the scope and impact of this Agreement. Subsequent to its incorporation, the Town has approved three (3) amendments to the Jess Ranch Specific Plan, and related tiered Environmental Impact Reports and Mitigation Monitoring Programs, and certified that these documents are adequate, satisfy the requirements of CEQA, the CEQA Guidelines and applicable local ordinances and regulations, and that these documents fully and adequately analyze the scope and impact of this Agreement.

4.3 Permitted Use, Density and Intensity of Use; Rate and Amount of Growth. This Agreement shall vest with respect to the subject Property only the permitted use(s) of land, density and intensity of use set forth in the Jess Ranch Specific Plan, as amended, applicable provisions of the Town of Apple Valley General Plan and Development Code and Exhibits "B", "C", and "D" hereto.

The right to regulate the rate and amount of growth is not abrogated by the Town. The Town hereby retains the police power to provide for change in regulations, ordinances, policies and plans relating to moratoria, building permit allocations, timing and sequencing of development and the financing and provision of adequate public facilities at the time of development. No vested rights as to any requirements in this subparagraph either as to existing or future regulations, ordinances, policies and plans are hereby conferred. The Town may exercise all further and future police power rights not otherwise specifically vested under this Agreement.

4.4 Design and Construction Standards and Specifications. The design and construction standards and specifications for buildings and structures in the Project shall be subject to the Jess Ranch Specific Plan and Exhibit "C" design standards and guidelines, and the Conditions of Approval in effect at the time that any development approval shall be sought for the Project or any unit or structure contained within the Project. They shall also be subject to the restrictions set forth in Exhibits "B" and "C" hereof.

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4.5 Future Discretionary Approvals. This Agreement shall, except as provided herein, not prevent the Town when considering requests for discretionary approvals subsequent to the Effective Date of this Agreement, from applying new rules, regulations, and policies which are applicable to the Property, including but not limited to, changes in the general plans, specific plan, community plan, subdivision and/or building regulations, nor shall this Agreement prevent the Town from denying or conditionally approving any subsequent applications for land use entitlements based on such existing or new rules, regulations and/or policies, provided however, that such new rules, regulations, and official policies are approved to all developments, or to similar developments, within the Town. It is the expressed intent of the parties to this Agreement to process and approve plans in conformance with the Jess Ranch Specific Plan, as amended, and Exhibits "B" through "D", as appropriate. In addition, this Agreement shall not prevent the Town from exercising its police power to protect the health, safety and welfare of the public.

4.6 Processing Fees and Additional Fees. All processing fees and charges intended to cover Town costs associated with processing development of the Property, including but not limited to fees and charges for applications, processing, inspections, plan review, plan processing and/or environmental review existing prior to the Effective Date of this Agreement shall apply to the development of the Property. Anything contained herein to the contrary notwithstanding, no fees adopted by the Town, and which become applicable to development projects at the discretion of the Town, subsequent to the Effective Date of this Agreement shall apply to the Project. Fees that shall be charged to the project are listed and detailed in Exhibit "D" herein.

This section shall not be construed to limit the authority of Town to charge normal and customary application, processing, and permit fees for land use approvals, building permits, and other similar entitlements which fees are designed to reimburse Town expenses attributable to such application, processing and permitting and are in force and effect on a Town-wide basis at such time as said approvals, permits, or entitlements are granted by the Town. In recognition of the vagaries associated with theater financing, it is expressly understood that Exhibit "D" will serve as a limit on the amount of any fee that is applicable to the Project hereunder.

4.7 Moratoriums. Moratoriums enacted by the Town for the public health, safety and welfare, which are imposed on the Property or Project, shall toll the time periods set forth in this Agreement.

4.8 Town to Receive Construction Contract Documents. Developer shall furnish Town, upon written request, copies of any public facilities construction contracts and supporting documents relating to the Project.

4.9 Conditions of any Discretionary Approval to the Property. The requirements imposed as conditions of any discretionary approval received through the Town's existing regulatory process shall be governed by the term of those approvals except to the extent this Agreement modifies such conditions, but in no event shall such conditions be affected by the termination, cancellation, rescission, revocation, default or expiration of this Agreement. Specific reference is made to the California Environmental Quality Act ("CEQA") and nothing contained herein shall be construed as abrogating any of the City's obligations for environmental review of the Project under CEQA, or, from requiring Developer to provide such environmental mitigation as may be required for the Project.

5. DEVELOPMENT PROGRAM.

5.1 Extraordinary and Significant Benefits.

- (1) Notwithstanding any Provision of this Agreement, or of law, to the contrary and as partial consideration for the parties entering into this Agreement, the parties agree that Developer is obligated to provide to the Town the following enumerated extraordinary and significant benefits: A first-run, all-stadium style seating, state-of-the-art 16-screen cinema megaplex, at least three (3) full-service sit-down restaurants, recapture of sales tax currently leaking to outlying communities, significant job creation focused upon the youth and senior citizens of Apple Valley, a significant increase in Town property tax revenues and substantial accomplishment of economic development-related goals contained in Vision 2010 of the Town.
 - (a) To develop the Project in compliance with plans, specifications and conditions as stated in the Jess Ranch Specific Plan pursuant to the design and construction standards set forth in Exhibits "B", "C", and "D" and the other exhibits incorporated herein.

5.2 Public Improvements, Facilities and Services. Town agrees to implement its portion of the Bear Valley Road Enhancement Project without cost to the Developer. The Bear Valley Road Enhancement project is a joint project of the Town of Apple Valley and the cities of Victorville and Hesperia. The portion of the Bear Valley Road Enhancement Project directly attributable to the Project, and for which the Town is responsible, is that portion of the project commencing at Apple Valley Road, heading west, and ending at the Town limits (Mojave River). Such improvements include widening of Bear Valley Road, from the Mojave River bridge to Jess Ranch Parkway, surface enhancement, traffic signal interconnects which will work in conjunction with the existing traffic signal at Jess Ranch Parkway and Bear Valley Road, anticipated to be the main entrance into the Project, additional turn lanes onto Bear Valley Road and related improvements. The immediate hereinabove improvements to be funded or caused to be constructed by the Town and related to the Project are valued at \$1.1 million, with the entire project from Kiowa Road to the Town limits valued at \$2.3 million. Given the time it has taken the Project to come to fruition, it is understood that the Town commenced its portion of the Bear Valley Road Enhancement Project in anticipation of the Project to realize economies of scale with the cities of Victorville and Hesperia.

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Town further agrees, at no cost to Developer, to improve, fund or cause to be improved Jess Ranch Parkway to Town standards and, upon acceptance of the Jess Ranch Parkway street dedication, and at a future date to be determined, install, fund or cause to be installed, a drainage facility in the Jess Ranch Parkway and Bear Valley Road rights of way. If required, Developer hereby agrees to dedicate additional rights of way on Jess Ranch Parkway and Bear Valley Road for installation of the Jess Ranch Parkway/Bear Valley Road drainage facility, and along the southern boundary of the Property for the proposed sewer Flow Equalization facility, all at no cost to Town.

In addition to the Bear Valley Road Enhancement Project, the improvement of Jess Ranch Parkway and the installation of the Jess Ranch Parkway/Bear Valley Road drainage facility as described hereinabove, Town agrees, at no cost to developer, to install, fund or cause to be installed, curb, gutter and sidewalk on the south side of Bear Valley Road from approximately the east end of the Mojave River bridge to Jess Ranch Parkway. Town further agrees to use its best efforts to elicit and bring about, from current and future property owners and users, the installation of curb, gutter and sidewalk on the south side of Bear Valley Road from Jess Ranch Parkway to Apple Valley Road where such improvements are already not installed.

Town agrees to employ its best efforts in acquiring the special funds necessary to install fund or cause installation of, the off-site public improvements for which it is responsible, and as is more particularly described in this section. Town will take all reasonable steps to install, fund or cause to be installed, the necessary and required off-site public improvements in conformance with Developer's adopted schedule of performance, when it obtains the special funds necessary therefore. In the event Town has not acquired said funds in an amount sufficient to install or cause to be installed the off-site public improvements for which it is responsible, and in conformance with Developer's schedule of performance, Developer will loan, provide or cooperate in a manner acceptable to the Town to enable Town to obtain said funds in an amount sufficient to finance or cover the cost of the off-site improvements to be installed, funded or caused to be installed by the Town, subject to and in compliance with any applicable laws, regulations, requirements, actions or proceedings required by or consistent with applicable laws and regulations. Such funds to bear simple interest at a rate not to exceed five percent per annum, unless otherwise approved by the parties hereto, with the term of any loan or advance or other form of lease or payment obligation(s), not to exceed ten years from the effective date of any and all applicable loan agreement and/or note, lease or other required document(s) in form and substance reasonably acceptable to the Town, unless otherwise agreed to by the parties.

The Town's obligations under this Section 5.2 are expressly conditioned upon entry by Town and Developer and/or any other related or other parties deemed necessary by Town into a more detailed agreement or agreements and any other or related lease(s) and documents deemed necessary by Town, relating to or covering the means of providing, administering, paying or repaying funds or financing needed to implement the financing of public improvements/infrastructure as set forth herein, all in form and content acceptable to Town, including (without limitation by this reference) payment or repayment of any loan or advance or other obligations described in this Section 5.2; and so as to comply with all applicable constitutional,

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statutory or other applicable legislative enactments, laws, ordinances and regulations.

Provided, further, that any loan, lease or other payment obligation by Town or any related entity to Developer or any entity or person related to Developer for funds which may have been advanced or loaned to Town or any related entity shall not commence prior to the time that the certificate of occupancy is issued for the 16-screen cinema megaplex described in the Development Plan, and provided there exists no uncured default of which Owner has received notice as to this Agreement or any other agreement or condition of approval relative to the Development of the Property.

6. ANNUAL REVIEW.

This Agreement shall be subject to automatic annual review.

Consistent with this Agreement, Developer, or its successor in interest, shall annually on the date hereof, submit a report documenting its good faith compliance with this Agreement. Such review shall thereafter be processed as required by this Agreement, including a noticed public hearing before the Planning Commission.

6.1 Review Letter. If Developer is found to be in compliance with the Agreement after annual review, Town shall, upon written request by Owner issue a Review Letter to Developer (the "Letter") stating that based upon information known or made known to the Town Council, the Town Planning Commission and/or the Town Director of Economic and Community Development, the Agreement remains in effect and Owner is not in default. Owner may record the Letter in the Official Records of the County of San Bernardino.

7. DEFAULT.

7.1 Events of Default. Developer is in default under this Agreement upon the happening of one or more of the following events or conditions:

- (a) If a warranty, representation or statement made or furnished by Developer to the Town is false or proves to have been false in any material respect when it was made.
- (b) A finding and determination made by the Town, following a periodic review under the procedure provided for in Government Code Section 65865.1, that, upon the basis of substantial evidence, the Developer has not complied in good faith with one or more of the terms or conditions of this Agreement, or any other agreement existing between Developer and Town.
- (c) Any other event, condition, act or omission which materially interferes with the intent and objectives of this Agreement.

7.2 Procedure upon Default.

- (a) Upon the occurrence of default, Town shall give Developer (the "defaulting party") thirty (30) days written notice specifying the nature of the alleged default and, when appropriate, the manner in which said default may be satisfactorily cured. After proper notice and expiration of said thirty (30) day cure period without cure, Town may terminate or amend this Agreement in accordance with the procedure adopted by the Town. Failure or delay in giving notice of default shall not constitute a waiver of any default, nor shall it change the time of default.
- (b) Town does not waive any claim of defect in performance by Developer, if on periodic review the Town does not propose to modify or terminate this Agreement.
- (c) Non-performance shall not be excused because of a failure of a third person.
- (d) An express repudiation, refusal or renunciation of the contract, if the same is in writing and signed by the Developer, shall be sufficient to terminate this Agreement and a hearing on the matter shall be held as required by Government Code section 65868 or its successor statute. Developer is required to provide the extraordinary and significant benefits specified in Section 5.1 (1) including (a), regardless of any such termination.
- (e) Adoption of a law or other governmental activity making performance by the applicant unprofitable or more difficult or more expensive does not excuse the performance of the obligation by the Developer.
- (f) All other remedies at law or in equity, which are not inconsistent with the provisions of this Agreement are available to the parties to pursue in the event there is a breach.

7.3 Damages. In no event shall Developer be entitled to any contractual damages against Town. Developer is otherwise limited to an action for specific performance of any lawful obligations of Town specifically set forth herein.

7.4 Institution of Legal Action. In addition to, but without waiving any other rights or remedies, either party may institute legal action to seek to cure, correct, or remedy any default or breach, to specifically enforce any covenants or agreements set forth in the Agreement or to enjoin any threatened or attempted violation of the Agreement, or to obtain any remedies consistent with the purpose of the Agreement. Legal actions shall be instituted in the Superior Court of the County of San Bernardino, State of California, as appropriate, or in the Federal District Court in the Central District of California.

7.5 Arbitration Procedures. Prior to commencement of any legal or equitable action hereunder, if an alleged breach of this Agreement is not resolved in writing within thirty (30) days of the receipt of the Notice of Non-Breach, or if a dispute among the parties shall arise and not be resolved to the satisfaction of the concerned parties within a reasonable period of time (not to exceed 30 days), the matter shall be submitted to non-binding arbitration, upon the request of either Party. The party

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requesting the arbitration shall present a list of 5 arbitrators from a recognized arbitration\mediation organization to the other party. The parties shall thereafter have ten days within which to meet and select an arbitrator from the list. Failing to agree on an arbitrator, each party shall take turns striking arbitrators from the list until one arbitrator remains. The parties agree that such arbitration shall be conducted pursuant to the American Arbitration Association's Commercial Arbitration Rules. The provisions of California Code of Civil Procedure section 1283.05 are deemed incorporated therein. Each party shall bear one-half the initial outlay for the arbitration fee. If the arbitration or legal action is brought because of a breach of this Agreement, The prevailing party shall be entitled to reasonable attorneys' fees and costs of action.

8. ENCUMBRANCES AND RELEASES ON PROPERTY.

8.1 Discretion to Encumber. This Agreement shall not prevent or limit Developer, in any manner, at Developer's sole discretion, from encumbering the Property or any improvement on the Property by any mortgage, deed of trust or other security device securing financing with respect to the Property or its improvement.

8.2 Entitlement to Written Notice of Default. This Development Agreement shall be superior and senior to any mortgage or trust deed subsequently placed upon the property, or any portion thereof, or any improvement thereon, including the lien of any mortgage or deed of trust. Despite the foregoing, breach of any provision of this Development Agreement shall not defeat, nor render invalid, the lien of any mortgage or trust Deed made in good faith and for value. The mortgagee of a mortgage or beneficiary of a deed of trust encumbering the Property or any part thereof, and their successors and assigns shall, upon written request to Town, be entitled to receive from Town written notification of any default by Developer of the performance of Developer's obligations under the Agreement which has not been cured within thirty (30) days following the date of default. Foreclosure proceedings, whether or not resulting in a forced sale shall not excuse, or eliminate, Developer's performance obligations under this Agreement.

8.3 Releases. Town agrees that upon written request of Developer and payment of all fees and performance of the requirements and conditions required of Owner by this Agreement to the Property, of any portion thereof, Town may execute and deliver to Owner appropriate release(s) of further obligation imposed by this Agreement in form and substance acceptable to the San Bernardino County Recorder or as may otherwise be necessary to effect the release.

9. MISCELLANEOUS PROVISIONS.

9.1 Rules of Construction. The singular includes the plural, the masculine gender includes the feminine, "shall" is mandatory "may" is permissive. If there is more than one signer of this Agreement, their obligations are joint and several.

9.2 Entire Agreement, Waivers and Amendments. This Agreement constitutes the entire understanding and agreement of the parties with respect to the matters set forth in this Agreement. This Agreement supersedes all negotiations or previous agreements between the parties respecting this Agreement. All waivers of the provision of this Agreement must be in writing and signed by the appropriate

authorities of Town or of Developer. All amendments to this Agreement must be in writing signed by the appropriate authorities of Town and Developer, in a form suitable for recording in the Official Records of San Bernardino County, California. After the ordinance adopting this Development Agreement becomes effective, Owner shall immediately provide Town with a title report showing legal or equitable title to the property described in Exhibit "A" vested in Owner prior to execution of this Development Agreement by Town.

9.3 Project as a Private Undertaking. It is specifically understood by the Parties that:

- (a) The Project is a private development,
- (b) Town has no interest in or responsibilities for or duty to third parties concerning any of the off-site public improvements to the Property described in Section 5.2 until Town accepts the improvements pursuant to the provisions of this Agreement or in connection with subdivision map approvals, and
- (c) Developer shall have the full power and exclusive control of the Property subject to the obligations of Owner set forth in this Agreement.

9.4 Incorporation of Recitals. The Recitals set forth in Section I of this Agreement are part of this Agreement.

9.5 Captions. The captions of this Agreement are for convenience and reference only and shall not define, explain, modify, construe, limit, amplify or aid in the interpretation, construction or meaning of any of the provisions of this Agreement.

9.6 Consent. Where the consent or approval of a party is required in or necessary under this Agreement, unless the context indicates otherwise, the consent or approval shall not be unreasonably withheld.

9.7 Covenant of Cooperation. The parties shall cooperate with and deal with each other in good faith, in the performance of the provisions of this Agreement.

9.8 Recording. The Town Clerk shall cause a copy of this Agreement to be recorded with the Office of the County Recorder of San Bernardino County, California, within ten (10) days following execution of this Agreement by all parties.

IN WITNESS WHEREOF, the parties have executed and entered into this Agreement as of the date stated below for execution.

TOWN OF APPLE VALLEY

By:

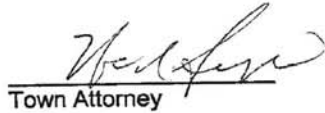

Mayor

ATTEST:


Town Clerk

(Seal)

APPROVED AS TO FORM:


Town Attorney

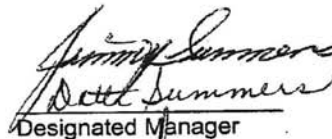
APPROVED AS TO CONTENT:


Town Manager

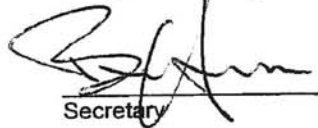
Developer:

N.C.E./Summers, LLC
1125 Linda Vista Drive, Suite 107
San Marcos, CA 92069
Attn: David Cipranic/Jim and Dottie Summers


Designated Manager


Designated Manager


President
New Century Entertainment, Inc.


Secretary

LEGAL DESCRIPTION

Parcel 1 of Parcel Map No. 8633, in the Town of Apple Valley, County of San Bernardino, State of California, as per plat recorded in book 88 pages 92 to 97 inclusive of parcel maps, in the office of the County Recorder of said County.

Excepting therefrom the following described portion of said Parcel 1:

Beginning at the southwest corner of said Parcel 1;
Thence north 00° 02' 14" west along the westerly line of said Parcel 1 1176.36 feet to the north line of said Parcel 1;
Thence along said north line, north 89° 59' 30" east, 1025.27 feet to the beginning of a non-tangent curve concave westerly and having a radius of 4875.00 feet, a radial line of said curve to said point having a bearing of south 86° 39' 31" east;
Thence southerly along said curve 517.84 feet through a central angle of 06° 05' 10", said curve also being on the easterly line of the easement in favor of the San Bernardino County Flood Control District as shown by said map;
Thence continuing along said easterly line south 09° 25' 39" west, 1186.29 feet to the beginning of a tangent curve concave easterly and having a radius of 2975.00 feet;
Thence, continuing along said easterly line, southerly along said curve 92.77 feet through a central angle of 01° 47' 12" to the south line of said Parcel 1;
Thence south 89° 59' 30" west, 758.48 feet to the point of beginning.

Said description is pursuant to Certificate of Compliance for a lot line adjustment dated February 5, 1996, and recorded February 9, 1996 as Instrument No. 96-046292, official records.

Excepting therefrom the interest, if any in and to all rights to water located in, on, or under said land, including without limitation any and all overlying water rights, prescriptive water rights, water rights arising out of any adjudication of that certain action entitled City of Barstow, Et al, vs. City of Adelanto, Et al, Riverside Superior Court Case No. 208568, and any and all other inchoate water rights; also granting to grantee an easement for rights of access to and egress from all sites currently or in the future used by Grantee in connection with the drilling for pumping of, storage of or distribution of water from said real property, together with rights to install, replace, repair and maintain said sites and any and all improvements, pipelines, personal property, fixtures or equipment used by Grantee in connection therewith, as granted to Jess Ranch Water Company, a corporation organized and existing under the laws of the State of California, by deeds recorded May 25, 1994, as Instrument Nos. 94-239284, 94-239285, 94-239286 and 94-239287, all of official records.

Reserving unto Jess Ranch Development Company, Inc. an exclusive easement for the existing directional and promotional signage at the corner of Jess Ranch Parkway and Bear Valley Road. The sign shall remain at the same location unless its presence interferes with the development of a proposed building that may be planned in the future. In the event that any such occurrence should require the sign to be moved, a suitable alternate site on the subject property along Bear Valley Road shall be provided and all costs associated with such relocation shall be borne by the owner of the subject property.

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SCOPE OF DEVELOPMENT

DEVELOPER IMPROVEMENTS

The following are general requirements for construction of the Developer Improvements on the Disposition Site. Detailed requirements will be addressed in required planning approvals, specific construction plans and documents, and the development of the Developer Improvements. In the event of any inconsistency between this Scope of Development and the subsequently approved Construction Drawings, plans, or building permits, the approved plans or permits shall govern.

The Site shall be designed and developed as a high quality destination entertainment center. The Site is located so as to serve as a regional commercial center for the Victor Valley and, as such, the development and design of the Developer Improvements are of particular concern to the Town. The Developer Improvements shall consist of the following elements: (1) A first-run, all stadium style seating, cinema megaplex of approximately 60,000 square feet and consisting of approximately 3,000 stadium style seats and 16 screens, (2) A food court, (3) Additional full service sit-down restaurants totaling approximately 20,000 square feet of space. The above square footages and description of developer improvements are the overriding goal of this Agreement. Developer and Town recognize that the cinema square footage and number of seats, and the food court and full sit-down restaurant square footages will be derived from market analyses commissioned by Town, Developer and tenants.

The Developer and the Town will cooperate and direct their consultants, architects and engineers to cooperate so as to ensure the continuity and coordination necessary for the proper and timely completion of the Developer Improvements. The Developer shall be responsible for filing and processing all applications and obtaining all permits necessary for the construction of the Developer Improvements. The Town shall cooperate with and provide reasonable assistance to the Developer to obtain permits from other governmental agencies consistent with this Agreement, provided that nothing herein is intended to increase the Town's financial obligations hereunder.

The Developer shall apply to and receive approvals from the Town for the project's site design and elevations as required by any and all applicable Town codes and regulations and the Agreement and shall submit all the required documents therefore, including, without limitation, a 32" x 40" colored rendering of the Developer Improvements to be constructed on the Site.

Prior to the issuance of a Certificate of Occupancy, a Common Area Maintenance Agreement shall be entered into with the Town of Apple Valley to maintain all landscaping, parking lot, drainage, lighting and paved areas within the project in accordance with the standards of repair, maintenance and cleanliness specified in the plans submitted and approved by the Town. If such landscaping, parking lot, drainage, lighting and paved areas are not maintained, such Agreement grants to the Town such rights of access, ingress and egress upon and across the project site as deemed necessary to undertake and complete corrective action and assess actual Town costs against the applicant/owner/tenant and against the property. The Agreement shall also be incorporated by reference into the Covenants, Conditions and Restrictions (CC&Rs) recorded against the property, if any, and recorded with the San Bernardino County Recorder's Office.

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DEVELOPMENT STANDARDS FOR THE SILVERADO AT APPLE VALLEY

Applicability

The provisions of this Attachment shall apply to all new development within the Silverado at Apple Valley to facilitate the greatest flexibility, while maintaining high development standards and criteria, and promoting quality development within the affected area.

Underlying Zoning District

The properties affected by this Attachment shall conform to the requirements and specifications of the Jess Ranch Planned Unit Development (PUD), except as modified herein.

Definitions

For the purposes of this Attachment, certain terms, phrases, words and their derivatives shall be construed as specific within Chapter 9 "Development Code" of the Town of Apple Valley Municipal Code where specific definitions are provided. Where terms, phrases and words are not defined, they shall have their ordinary accepted meanings within the context with which they are used. *Webster's Third New International Dictionary of the English Language, Unabridged*, copyright 1986, shall be considered as providing ordinarily accepted meanings.

Administration

- A. The site development standards below are intended to provide standards for the development of land within the Silverado at Apple Valley. All submissions to the Town of Apple Valley for a permit, whether for Planning Commission, Town Council, or Plan Check and Building Permit review, may be required to provide public right-of-way or other appropriate dedication(s) and off-site and/or street and other related public improvement(s) consistent with the Circulation Element of the adopted General Plan and/or applicable standards established by the Town Engineer, as determined by the Town of Apple Valley Town Engineer, to mitigate and/or contribute toward mitigation of impacts, to promote the public health, safety and welfare, and as not otherwise restricted by law.
- B. The site development standards below are intended to promote continued economic benefit to the community by promoting high quality development and a wide mixture and variety of commercial and office land uses within the affected area.

Uses not listed as permitted, or permitted by a CUP/SUP process, within the Jess Ranch Planned Unit Development, shall be expressly prohibited. When a use is requested that is not listed, but is like and/or similar to other listed uses, the provisions and allowance of Sections 9.02.0230 "Similar Uses" and 9.02.0235 "Conflicts and Clarifications" of Chapter 9 "Development Code" of the Town of Apple Valley Municipal Code, shall prevail.

Standards

- A. All new commercial development constructed within the Silverado at Apple Valley shall comply with all applicable standards contained within the Jess Ranch Planned Unit Development, and as specified within this Attachment.

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- B. All exterior lighting shall have sharp cut-off reflectors in which virtually no light leaves the fixture above an angle of about 70 degrees, as measured from straight down.
- C. Parking for all uses within the Silverado at Apple Valley shall conform to the parking and loading standards of Chapter 9 "Development Code" of the Town of Apple Valley Municipal Code, Section 9.08.0800 "Off-Street Parking and Loading Regulations".
- D. The maximum Floor Area Ratio (FAR) for any retail commercial development shall not exceed 0.5. The maximum Floor Area Ratio (FAR) for any office development shall not exceed 1.0.

Revisions

- A. No structure or land shall hereafter be constructed, located, extended, converted or altered without full compliance with the terms of this Attachment and all other applicable regulations from Chapter 9 "Development Code" of the Town of Apple Valley Municipal Code.
- B. This Attachment is not intended to repeal, abrogate or impair any existing easements, covenants or deed restrictions.
- C. In the interpretation and application of this Attachment, all provisions shall be:
 - 1. Considered as minimum requirements;
 - 2. Liberally construed in favor of the Town of Apple Valley, and
 - 3. Deemed neither to limit nor repeal any other powers granted under state statutes.

Site Development Standards

The following development standards shall apply to all development within the Silverado at Apple Valley.

- A. The minimum lot area for any integrated project or development shall be ten (10) acres. Individual lots within an integrated project shall have a minimum size of 18,000 square feet.
- B. Lot coverage shall not exceed fifty (50) percent.
- C. Building height shall not exceed fifty (50) feet for any habitable portion of a structure, as defined by the Uniform Building Code, and no architectural feature or non-habitable portion of the structure shall exceed seventy-five (75) feet in total overall height.
- D. The following setbacks shall apply:
 - 1. Front or street side setbacks shall be fifty (50) feet.
 - 2. Interior side or rear setbacks shall be twenty-five (25) feet.

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- E. The overall project, and each and every part thereof, by its form and function, massing of buildings, use of building materials and design, shall be consistent and complementary to the surrounding land uses and existing development. The development will have a visual appeal that due to the use of color(s), building materials, massing/size, screening of mechanical equipment, pedestrian orientation, roofline(s), architectural features and details to the exterior façade-related characteristics like eaves, columns, pilasters, cornices, windows and doors, creates a positive statement about the Town of Apple Valley.

Land Use Buffering

The siting and design of a project shall recognize that conflicts between abutting or nearby land uses can arise due to such factors as the operating characteristics of an existing use, hazards posed by a use, or the physical orientation of a building. On a town-wide scale, the Town of Apple Valley General Plan Land Use Policy map establishes a pattern of land use designation to minimize land use conflicts. At the project level, the following features should be incorporated into the Silverado at Apple Valley, as appropriate, to assure the compatibility of different land uses.

- A. **Open Space Buffer.** Landscaped parkways and similar open space features will be used, as appropriate, to separate public facility uses from potentially incompatible uses. The width and treatment of the open space buffer will vary depending upon the types of potential land use conflicts to be resolved. To soften visual impacts, the open space buffer should include landscaping. The Jess Ranch Planned Unit Development minimum of twenty foot (20) bermed landscaped buffer along major and secondary highways and minimum ten (10) foot bermed landscaped buffer along all other frontages shall apply.
- B. **Topography.** Grading plans will incorporate natural earth forms and graded earthen berms, as appropriate, to create visual screens and to buffer noise.
- C. **Streets.** Street design and site access will be configured to prevent through traffic from using adjacent residential streets. Features such as medians which restrict turning movements can discourage such through traffic.
- D. **Landscaping.** Landscaping shall be used alone or in conjunction with other features (e.g., open space buffer, topography, etc.) to reduce potential light and glare visual conflicts.
- E. **Physical Barriers.** Physical barriers such as masonry walls shall be provided as specified within the Jess Ranch Planned Unit Development and within Chapter 9 "Development Code" of the Town of Apple Valley Municipal Code, to reduce noise, visual, and light and glare impacts. These features may also be used to prevent trespass between abutting land uses.
- F. **Building Orientation.** All buildings shall be sites and oriented to reduce noise, light and glare, visual and other impacts between adjoining uses. For example, loading areas should be located in areas where noise from such operations will not adversely impact adjacent or nearby residential uses.

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Signs

The provisions, limitations and requirements of Chapter 9 of the Town of Apple Valley Municipal Code, Section 9.08.1000 "Signs", shall apply within the Silverado at Apple Valley. A "Sign Program" applicable to all development within the affected area, and to encompass all properties designated with the Silverado at Apple Valley, shall be reviewed by the Planning Commission and adopted by the Town Council prior to any new signs being established within the Silverado at Apple Valley."

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FEE ESTIMATES – PHASE I

SILVERADO PROJECT

Fee Estimates are based upon the following assumptions:

Size of Facility: 60,000 s.f. on 8 acres (23.10 acres at build-out of Phase II)
Type of Use: Regional Commercial Retail
Type of Construction: Type V non-rated (may require area separation walls.
Cut and fill estimated at _____
Valuation: \$ 3,978,000

Building Fees

Permit	\$ 18,869.80
Plan Check	\$ 16,982.82
Strong Motion	N/A
Instrumentation Program	\$ 835.38 (pass through)
School Fees	\$ 26,520.00 (pass through)
Electrical	\$ 5,910.00
Plumbing	\$ 609.65 (60 fixtures)
Mechanical	\$ 790.25 (34 units, 25 exh. fans)
Grading Plan Review	\$ paid
Grading - Plan Check	\$ paid
Grading Permit	\$ paid
Planning Plan Review	\$ 2,830.47

Fire District Fees – (pass through)

New Construction	\$ 693.00
Fire Sprinklers	\$ 1,340.00
Fire Service Underground	\$ 120.00
Fire Alarm	\$ 200.00
Special Extinguishing Sys.	\$ 425.00
Fire Sprinkler Standpipe Sys.	\$ 1,110.00

Planning Fees

Development Permit	\$ 1,625.00
Landscape Review Fee	\$ 220.00
Tentative Parcel Map	975.00 (based upon 10 parcels)
Environmental Review	N/A
Negative Declaration Fee	N/A

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Engineering Fees

Tentative Parcel Map	\$ 500.00
Final Parcel Map Plan Check	\$ 1,893.00 (based on 10 parcels)
Site Plan Review	\$ 250.00
Street Improv. Plan Check	\$ 4% (maximum)
Inspection Fee	\$ 1% (maximum)

Development Fees

Traffic Impact Fee	\$193,923.60 (based on trip generation rate for Phase I only)
Traffic Impact Analysis Review	\$ N/A

Sewer Fees

Sewer Connection Fee	\$147,000.00 (estimate based on # of seats, actual based on #/type of plumbing fixtures)
Total Fees:	<u>\$423,622.97</u>

PLANNING COMMISSION RESOLUTION No. 2007-031

A RESOLUTION OF THE PLANNING COMMISSION OF THE TOWN OF APPLE VALLEY, CALIFORNIA, MAKING FINDINGS AND DETERMINATIONS AND RECOMMENDING THAT THE TOWN COUNCIL TERMINATE DEVELOPMENT AGREEMENT No. 2004-001, A DEVELOPMENT AGREEMENT BETWEEN NEW CENTURY ENTERTAINMENT/SUMMERS, LLC (DEVELOPER) AND THE TOWN OF APPLE VALLEY FOR THE DEVELOPMENT OF THE SILVERADO AT APPLE VALLEY DESTINATION/ENTERTAINMENT CENTER PROJECT ON PROPERTY GENERALLY LOCATED SOUTH OF BEAR VALLEY ROAD, WEST OF JESS RANCH PARKWAY, EAST OF THE MOJAVE RIVER AND NORTH OF THE LOGICAL EXTENSION OF TOWN CENTER DRIVE (APN 434-541-31).

WHEREAS, Title 9 “Development Code” of the Municipal Code of the Town of Apple Valley was adopted by the Town Council on October 24, 2000; and

WHEREAS, Chapter 9.04 “Development Agreements” of Title 9 (Development Code) of the Municipal Code of the Town of Apple Valley delineates the requirements and specifications for the adoption and cancellation of a Development Agreement; and

WHEREAS, Development Agreement No. 2004-001, adopted by the Town Council on June 8, 2004, is an agreement between the Town of Apple Valley and New Century/Summers, LLC, for the development of a 16-screen cinema megaplex, to anchor of the “Silverado At Apple Valley” project, on property generally located south of Bear Valley Road, west of Jess Ranch Parkway, east of the Mojave River and north of the logical extension of Town Center Drive, known as the project site (Assessor Parcel No. 434-541-31); and

WHEREAS, the Director of Community Development determined that the Development Agreement was in default in that the initial Developer was unable to obtain adequate financing to allow the timely performance of the Agreement by Developer to occur, and it is hereby found and determined the Agreement was and remains in default; and said initial Developer agreed to the termination and cancellation of said Agreement; and

WHEREAS, The project site has been sold, the project contemplated by the Development Agreement and known as “Silverado at Apple Valley” was terminated and development thereof did not proceed; instead, the current property owner submitted to the Planning Commission for approval and the Planning Commission based thereon approved a different project not contemplated by said Development Agreement, namely the Development Permit and Special Use Permit on February 7, 2007, and a Tentative Parcel Map on November 7, 2007, for Jess Ranch Marketplace Phase III, including a cinema, restaurants, a fitness center and retail tenants; and said current owner, Apple

Valley III Alliance/Riley, LLC, has requested termination and cancellation of said Development Agreement; and

WHEREAS, it is the duty and responsibility of the Planning Commission, as established by the Town Council and detailed in the Municipal Code, to address development and the land uses identified and permitted within the various zoning districts which includes, in part, under Chapter 9.04 "Development Agreements" of Title 9 (Development Code), the review and recommendation of Development Agreements and any amendments or termination thereof; and

WHEREAS, on December 7, 2007, the termination of Development Agreement No. 2004-001 was duly noticed in the Apple Valley News, a newspaper of general circulation within the Town of Apple Valley, consistent with Chapter 9.13 "Public Hearings and Notice" of Title 9 (Development Code) and in accordance with state law, noting the Planning Commission's intention to consider recommending to the Town Council termination of a Development Agreement between the Town and New Century/Summers, LLC; and

WHEREAS, the Planning Commission must consider, and forward its recommendation to the Town Council; and

WHEREAS, pursuant to Section 15061(b)(3) of the State Guidelines to implement the California Environmental Quality Act (CEQA), there is no possibility the proposed cancellation will have a significant effect upon the environment and, therefore, it is exempt from CEQA; and

WHEREAS, there is no evidence before the Town that the proposed project will have any potential for adverse effect on wildlife resources and the impacts of the Amendment are found to be De Minimis pursuant to Section 711.4 of the Fish and Game Code; and

WHEREAS, on December 19, 2007, the Planning Commission of the Town of Apple Valley conducted a duly noticed and advertised public hearing on Development Agreement No. 2004-001, receiving testimony from the public.

NOW, THEREFORE, BE IT RESOLVED that in consideration of the evidence presented at the public hearing, and for the reasons discussed by the Commissioners at said hearing, the Planning Commission of the Town of Apple Valley, California, adopts the above recitals and makes the following further findings and determinations:

Section 1. Find that, in light of the whole record presented before the Commission, it can be seen with certainty there is no possibility that the termination and cancellation of Development Agreement No. 2004-001 may have a significant effect on the environment and, therefore, is Exempt from further environmental review.

Section 2. Determine that there is no evidence before the Town that the proposed termination of Development Agreement No. 2004-001 will have any potential

for adverse effect on wildlife resources and the impacts of the Agreement are found to be De Minimis pursuant to Section 711.4 of the Fish and Game Code.

Section 3. Find that the termination and cancellation of Development Agreement No. 2004-001 is consistent with the objectives, policies, land uses and programs specified in the General Plan and the Jess ranch Planned Unit Development, and complies with the other standards and criteria required in Chapter 9.04 "Development Agreements" relating to the review and recommendation by the Planning Commission to the Town Council, including a determination that the proposed termination and cancellation is compatible with the uses authorized in, and the regulations prescribed for, the land use district in which the property is located, and is beneficial to the public health, safety and welfare.

Section 4. Find that Development Agreement No. 2004-001 between the Town and New Century/Summers, LLC, has been in default for a long period of time, is no longer valid or effective, its cancellation has been requested by the original property owner and party thereto and by the current owner, and should be terminated.

Section 5. Justification exists for adoption of an ordinance to formally cancel and terminate Development Agreement No. 2004-001, which was adopted by Ordinance No. 283, finding that the Developer of the project referenced in the Development Agreement, "Silverado at Apple Valley" did not timely occur, that the Development Agreement was and is in default, that both the original owner and the current owner have concurred in cancellation and termination of said Development Agreement, that said original proposed project will not be developed at the southwest corner of Jess Ranch Parkway and Bear Valley Road.

BE IT FURTHER RESOLVED that the Planning Commission recommends the Town Council hold a public hearing, adopt the herein findings and determinations, and adopt an ordinance terminating and canceling Development Agreement No. 2004-001.

Approved and Adopted by the Planning Commission of the Town of Apple Valley this 19th day of December, 2007.

David Hernandez, Chairman

ATTEST:

I, Patty Hevle, Secretary to the Planning Commission of the Town of Apple Valley, California, do hereby certify that the foregoing resolution was duly and regularly adopted by the Planning Commission at a regular meeting thereof, held on the 19th day of December, 2007, by the following vote, to-wit:

AYES:
NOES:
ABSENT:

*Termination of Development Agreement No. 2004-001
Town Council Meeting of January 8, 2008*

ABSTAIN:

Patty Hevle, Planning Commission Secretary

ORDINANCE No. 373

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY, CALIFORNIA, MAKING FINDINGS AND DETERMINATIONS TERMINATING AND CANCELLING DEVELOPMENT AGREEMENT NO. 2004-001, A DEVELOPMENT AGREEMENT BETWEEN NEW CENTURY ENTERTAINMENT/SUMMERS, LLC (DEVELOPER) AND THE TOWN OF APPLE VALLEY FOR THE DEVELOPMENT OF THE SILVERADO AT APPLE VALLEY DESTINATION/ENTERTAINMENT CENTER PROJECT ON PROPERTY GENERALLY LOCATED SOUTH OF BEAR VALLEY ROAD, WEST OF JESS RANCH PARKWAY, EAST OF THE MOJAVE RIVER AND NORTH OF THE LOGICAL EXTENSION OF TOWN CENTER DRIVE (APN 434-541-31).

The Town Council of the Town of Apple Valley, State of California, does ordain as follows:

Section 1. Recitals.

(i) Title 9 “Development Code” of the Municipal Code of the Town of Apple Valley was adopted by the Town Council on October 24, 2000; and

(ii) Chapter 9.04 “Development Agreements” of Title 9 (Development Code) of the Municipal Code of the Town of Apple Valley delineates the requirements and specifications for the adoption and cancellation of a Development Agreement; and

(iii) Development Agreement No. 2004-001, adopted by the Town Council on June 8, 2004, is an agreement between the Town of Apple Valley and New Century/Summers, LLC, for the development of a 16-screen cinema megaplex, to anchor of the “Silverado At Apple Valley” project, on property generally located south of Bear Valley Road, west of Jess Ranch Parkway, east of the Mojave River and north of the logical extension of Town Center Drive, known as the project site (Assessor Parcel No. 434-541-31), which property is more specifically described in Exhibit “A” attached hereto, entitled “LEGAL DESCRIPTION”, a copy of which Agreement (including said “LEGAL DESCRIPTION”) was recorded on August 6, 2004 as Document No. 2004-0569034, in the office of the County Recorder of the County of San Bernardino, State of California; and

(iv) The Director of Community Development determined that the Development Agreement was in default in that the initial Developer was unable to obtain adequate financing to allow the timely performance of the Agreement by Developer to occur, and it is hereby found and determined the Agreement was and remains in default; and said initial Developer agreed to the termination and cancellation of said Agreement; and

(v) The project site has been sold, the project contemplated by the Development Agreement and known as “Silverado at Apple Valley” was terminated and

development thereof did not proceed; instead, the current property owner submitted to the Planning Commission for approval and the Planning Commission based thereon approved a different project not contemplated by said Development Agreement, namely the Development Permit and Special Use Permit on February 7, 2007, and a Tentative Parcel Map on November 7, 2007, for Jess Ranch Marketplace Phase III, including a cinema, restaurants, a fitness center and retail tenants; and said current owner, Apple Valley III Alliance/Riley, LLC, has requested termination and cancellation of said Development Agreement; and

(vi) Pursuant to its duty and responsibility to address development and the land uses identified and permitted within various zoning districts, which includes, in part, under Chapter 9.04 "Development Agreements of Title 9 (Development Code), the review and recommendation of Development Agreements and any amendments or termination thereof, pursuant to Section 9.04.040, following a duly noticed public hearing on December 19, 2007, the Planning Commission, adopted Resolution No. 2007-031, making its findings and determinations and recommending to the Town Council the termination and cancellation of said Development Agreement; and

(vii) On December 28, 2007, the termination of Development Agreement No. 2004-001 was duly noticed in the Apple Valley News, a newspaper of general circulation within the Town of Apple Valley, consistent with Chapter 9.13 "Public Hearings and Notice" of Title 9 (Development Code) and in accordance with state law, noting the Planning Commission's intention to consider recommending to the Town Council termination of a Development Agreement between the Town and New Century/Summers, LLC; and

(viii) Pursuant to Section 15061(b)(3) of the State Guidelines to implement the California Environmental Quality Act (CEQA), there is no possibility the proposed cancellation will have a significant effect upon the environment and, therefore, it is exempt from CEQA; and

(ix) There is no evidence before the Town that the proposed project will have any potential for adverse effect on wildlife resources and the impacts of the Amendment are found to be De Minimis pursuant to Section 711.4 of the Fish and Game Code; and

Section 2. Findings.

(i) The Town Council finds that, in light of the whole record presented before the Commission, it can be seen with certainty there is no possibility that the termination and cancellation of Development Agreement No. 2004-001 may have a significant effect on the environment and, therefore, is Exempt from further environmental review.

(ii) The Town Council determines that there is no evidence before the Town that the proposed termination of Development Agreement No. 2004-001 will have any potential for adverse effect on wildlife resources and the impacts of the Agreement are found to be De Minimis pursuant to Section 711.4 of the Fish and Game Code.

(iii) The Town Council finds that the termination and cancellation of Development Agreement No. 2004-001 is consistent with the objectives, policies, land uses and programs specified in the General Plan and the Jess ranch Planned Unit Development, and complies with the other standards and criteria required in Chapter 9.04 "Development Agreements" relating to the review and recommendation by the Planning Commission to the Town Council, including a determination that the proposed termination and cancellation is compatible with the uses authorized in, and the regulations prescribed for, the land use district in which the property is located, and is beneficial to the public health, safety and welfare.

(iv) The Town Council finds that Development Agreement No. 2004-001 between the Town and New Century/Summers, LLC, has been in default for a long period of time, is no longer valid or effective, its cancellation has been requested by the original property owner and party thereto and by the current owner, and should be terminated.

(v) The Town Council further finds and determines that justification exists for adoption of an ordinance to formally cancel and terminate Development Agreement No. 2004-001, which was adopted by Ordinance No. 283, finding that the Developer of the project referenced in the Development Agreement, "Silverado at Apple Valley" did not timely occur, that the Development Agreement was and is in default, that both the original owner and the current owner have concurred in cancellation and termination of said Development Agreement, that said original proposed project will not be developed at the southwest corner of Jess Ranch Parkway and Bear Valley Road.

Section 3. Termination and Cancellation of Development Agreement No. 2004-001. Based upon the above findings and determinations, the Town Council by adoption of this Ordinance does hereby terminate and cancel said Development Agreement No. 2004-001, which Development Agreement was originally approved by Ordinance No. 283, adopted on June 8, 2004, and which affects the property identified in Recital (iii), above.

Section 4. Notice of Adoption. The Town Clerk of the Town of Apple Valley shall certify to the adoption of this ordinance and cause publication to occur in a newspaper of general circulation and published and circulated in the Town in a manner permitted under Section 36933 of the Government Code of the State of California, including but not limited by this reference to a summary of this ordinance in the manner permitted thereunder.

Section 5. Effective Date. This Ordinance shall become effective thirty days after the date of its adoption.

Section 6. Severability. If any portion of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications and, to this end, the provisions of this Ordinance are intended and declared to be severable.

Section 7. Recordation. Following the effective date hereof, the Town Clerk shall cause a certified copy of this Ordinance and/or notification thereof in suitable form for recording to be recorded in the office of the County Recorder of the County of San Bernardino, California, including Exhibit "A" hereto which describes the land which was subject to said Development Agreement.

Adopted by the Town Council and signed by the Mayor and attested by the Town Clerk this _____ day of _____, 2008.

Honorable Timothy Jasper, Mayor

ATTEST:

La Vonda M-Pearson, Town Clerk

Approved as to form:

Approved as to content:

Mr. Neal Singer, Town Attorney

Mr. James L. Cox, Town Manager

LEGAL DESCRIPTION

Parcel 1 of Parcel Map No. 8633, in the Town of Apple Valley, County of San Bernardino, State of California, as per plat recorded in book 88 pages 92 to 97 inclusive of parcel maps, in the office of the County Recorder of said County.

Excepting therefrom the following described portion of said Parcel 1:

Beginning at the southwest corner of said Parcel 1;
Thence north 00° 02' 14" west along the westerly line of said Parcel 1 1176.36 feet to the north line of said Parcel 1;
Thence along said north line, north 89° 59' 30" east, 1025.27 feet to the beginning of a non-tangent curve concave westerly and having a radius of 4875.00 feet, a radial line of said curve to said point having a bearing of south 86° 39' 31" east;
Thence southerly along said curve 517.84 feet through a central angle of 06° 05' 10", said curve also being on the easterly line of the easement in favor of the San Bernardino County Flood Control District as shown by said map;
Thence continuing along said easterly line south 09° 25' 39" west, 1186.29 feet to the beginning of a tangent curve concave easterly and having a radius of 2975.00 feet;
Thence, continuing along said easterly line, southerly along said curve 92.77 feet through a central angle of 01° 47' 12" to the south line of said Parcel 1;
Thence south 89° 59' 30" west, 758.48 feet to the point of beginning.

Said description is pursuant to Certificate of Compliance for a lot line adjustment dated February 5, 1996, and recorded February 9, 1996 as Instrument No. 96-046292, official records.

Excepting therefrom the interest, if any in and to all rights to water located in, on, or under said land, including without limitation any and all overlying water rights, prescriptive water rights, water rights arising out of any adjudication of that certain action entitled City of Barstow, Et al, vs. City of Adelanto, Et al, Riverside Superior Court Case No. 208568, and any and all other inchoate water rights; also granting to grantee an easement for rights of access to and egress from all sites currently or in the future used by Grantee in connection with the drilling for pumping of, storage of or distribution of water from said real property, together with rights to install, replace, repair and maintain said sites and any and all improvements, pipelines, personal property, fixtures or equipment used by Grantee in connection therewith, as granted to Jess Ranch Water Company, a corporation organized and existing under the laws of the State of California, by deeds recorded May 25, 1994, as Instrument Nos. 94-239284, 94-239285, 94-239286 and 94-239287, all of official records.

Reserving unto Jess Ranch Development Company, Inc. an exclusive easement for the existing directional and promotional signage at the corner of Jess Ranch Parkway and Bear Valley Road. The sign shall remain at the same location unless its presence interferes with the development of a proposed building that may be planned in the future. In the event that any such occurrence should require the sign to be moved, a suitable alternate site on the subject property along Bear Valley Road shall be provided and all costs associated with such relocation shall be borne by the owner of the subject property.

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