

EXHIBIT 1

**MEMORANDUM OF AGREEMENT
FOR AN AFFORDABLE HOUSING DEVELOPMENT
TRACT A, LYONS VALLEY PARK – FILING NO. 8**

**MEMORANDUM OF AGREEMENT
FOR AN AFFORDABLE HOUSING DEVELOPMENT
TRACT A, LYONS VALLEY PARK – FILING NO. 8**

This Memorandum of Agreement for an affordable housing development on Tract A, Lyons Valley Park – Filing No. 8 (“Agreement”) is entered into by and between the **TOWN OF LYONS, COLORADO**, a municipal corporation of the State of Colorado having an address of 432 5th Avenue, Lyons, Colorado 80540 (“Town”) and **Summit Housing Group, Inc.**, a Montana corporation having a principal office address of 283 West Front Street, Suite 1, Missoula, Montana 59802 (“Developer”) (collectively, the “Parties”). This Agreement shall be effective as of the date of mutual execution of the Parties (“Effective Date”).

RECITALS

- A. Due to the catastrophic flood that the Town experienced in September 2013 (“Flood”), the Town lost numerous residential units, many of which were the most affordable within the Town. Pursuant to Resolution 2016-43, the Town’s Board of Trustees authorized Town staff to examine opportunities and propose lawful means for implementing affordable housing measures in the Town.
- B. The Boulder County Collaborative allocated Four Million Dollars of United States Department of Housing and Urban Development (“HUD”) Community Development Block Grant - Disaster Recovery funds (“CDBG-DR funds”) to the Town via the Round III sub-allocation to support the replacement of 100 residential units lost in the Flood (“Lyons Affordable Housing Allocation”).
- C. Pursuant to Resolution 2018-16, the Town has entered into a Purchase and Sale Agreement with Lyons Valley Park, Inc. (“Purchase and Sale Agreement”) for Tract A, Lyons Valley Park – Filing No. 8 (“Property”) for facilitating the construction of replacement housing on the Property using the Lyons Affordable Housing Allocation (“Replacement Housing Project” or “Project”).
- D. The Purchase Agreement expressly provides that the Town may assign the Purchase and Sale Agreement.
- E. Based on Developer’s representations, the Town believes that Developer is capable or can reasonably be expected to become capable of completing the Replacement Housing Project.
- F. Pursuant to a proposal submitted by Developer on March 5, 2018, the Parties desire to enter into this Agreement regarding their respective obligations and rights concerning the Replacement Housing Project.
- G. The Parties are duly authorized to enter into this Agreement and to undertake all actions required herein.

Accordingly, in consideration of the mutual promises and agreements made herein, the Parties agree as follows:

1. **PURPOSE AND GOAL OF AGREEMENT.** The Parties desire to facilitate the construction of replacement housing on the Property using the Lyons Affordable Housing Allocation as more specifically described in **Exhibit A** and **Exhibit B**, which are attached hereto and incorporated herein by reference, subject to the terms of this Agreement. Developer expressly agrees and acknowledges that in pursuit of this goal and of the Project, it shall seek CDBG-DR funds from the Affordable Housing Allocation in conjunction with an application for nine percent (9%) Low Income Housing Tax Credits ("LIHTC") or, if directed by the Town, with an application for four percent (4%) LIHTC. Developer expressly acknowledges and agrees that if it is awarded CDBG-DR funds from the Lyons Affordable Housing Allocation, the expenditure deadline for those funds shall be August 30, 2019 unless otherwise extended by HUD.
2. **TERM.** The term of this Agreement begins on the Effective Date and ends on the date that the Lyons Affordable Housing Allocation is spent, or September 30, 2019, whichever occurs first. However, if HUD extends the expenditure deadline for the Lyons Affordable Housing Allocation, this Agreement shall end on the date that the Lyons Affordable Housing Allocation is spent, or the extended expenditure deadline, whichever occurs first.
3. **TOWN OBLIGATIONS AND RIGHTS.**
 - 3.1 The Town shall execute a written assignment of the Purchase and Sale Agreement for the Property to Developer in substantially the form set forth in **Exhibit C** ("Assignment"), which is attached hereto and incorporated herein by reference. The Town shall execute such assignment within ten (10) business days of the Effective Date.
 - 3.2 The Town shall, in consultation with the State of Colorado Department of Local Affairs, Division of Housing ("DOH" or "Division of Housing") work in good faith with the Developer to ensure the successful completion of the Replacement Housing Project.
 - 3.3 The Town shall have the right to monitor and evaluate the progress and performance of Developer to assure that the terms of this Agreement are being satisfactorily fulfilled.
4. **DEVELOPER OBLIGATIONS.**
 - 4.1 Developer shall accept, sign, and return to the Town a fully executed copy of the Assignment within five (5) business days of receiving the Assignment signed by the Mayor of the Town.
 - 4.2 Within thirty (30) days of mutual execution of the Assignment, Developer shall reimburse the Town for all expenditures the Town has incurred toward acquiring the Property and preparing the Replacement Housing Project or related applications and documents, including but not limited to, earnest money, costs of any all appraisals and evaluation of title, and associated legal fees (collectively, "Town Costs"). The Town estimates that the Town Costs will not exceed **Twenty Thousand Dollars and No Cents (\$20,000.00)**.
 - 4.3 Time is of the essence in this Agreement. Developer agrees that it shall meet the following deadlines concerning the Project:

- a. Developer shall, with technical assistance from the DOH as needed, timely apply for and obtain an allocation of LIHTC from the Colorado Housing and Finance Authority ("CHFA") for the 2018 application cycle for a nine percent (9%) LIHTC if the zoning is in place prior to June 1, 2018 or, if mutually agreed by both parties, a four percent (4%) LIHTC.
- b. Developer shall obtain satisfactory evidence that it has the financial ability to undertake and construct the Project, including proof that it has secured approval for tax credits, obtained loan commitments for a construction loan and the primary loan permanent financing for the Project, and furnish such evidence to the Town, on or before December 31, 2018.
- c. Developer shall obtain commitments or letters of intent for commitments for all required loans within sixty (60) days of receipt of a LIHTC award from CHFA.
- d. Developer shall commence construction of the Project not later than June 1, 2019.
- e. Developer shall substantially complete construction of the Project no later than eighteen (18) months after closing on Developer's tax credit partnership.

4.4 To comply with the terms and obligations set forth in Section 4.3, Developer shall:

- a. with technical assistance from the DOH as needed, develop a preliminary site schematic, obtain a market study, and perform any and all other due diligence as required by such Purchase and Sale Agreement, in preparation for the development of the Replacement Housing Project.
- b. with technical assistance from the DOH as needed, complete a feasible and fundable application to the DOH for CDBG-DR funds allocated for the Replacement Housing Project. Developer expressly acknowledges and agrees that if awarded, such CDBG-DR funds will be limited to an amount necessary to meet an unfunded deficiency in the financing budget for the Project after Developer has secured financing from all other available sources.
- c. directly or indirectly, in accordance with all applicable federal, state, and local laws and regulations, and, with technical assistance from the DOH as needed, take all steps necessary to ensure the successful completion of the Replacement Housing Project, including:
 - 4.4.c.1 Facilitating the use of CDBG-DR funds for those eligible costs incurred earliest in the Project development process;
 - 4.4.c.2 Work with the Town, the DOH, and other potential partners regarding the funding application, contracting, and payment process required by the CDBG-DR Action Plan and General Accounting Principles to which the CDBG-DR funds are held;
 - 4.4.c.3 Work with the Town, the DOH, and other potential partners regarding the financing of preliminary, pre-development, due

diligence, and Project development costs, including but not limited to:

- 1) costs related to determining the suitability of a parcel while it is governed by a purchase and sale agreement (including, but not limited to, appraisals, geotechnical borings, environmental reviews required by federal or state law or regulations, and other similar costs);
- 2) closing and other transactional costs associated with a purchase transaction(s);
- 3) costs for materials, labor, or construction of a Replacement Housing Project;
- 4) tap fees, permit fees, and other costs associated with obtaining necessary infrastructure and connections thereto for the Replacement Housing Project, provided that Developer may apply for waivers of fees in accordance with the provisions of the Lyons Municipal Code to fill a financing gap in Developer's budget for the Replacement Housing Project;
- 5) any other CDBG-DR eligible Project development costs that the Parties may determine are appropriate pursuant to the terms, goals, and purposes of this Agreement.

4.5 Developer may fulfill its obligations under this Agreement as the Project sponsor, with ownership of the Project to be held by either the Developer or by a limited liability partnership, limited liability limited partnership in which Developer acts as the partner, a limited liability company in which Developer is the managing member, or by another corporate structure acceptable to the Town, the Division of Housing, and CHFA. Developer, or a LIHTC partnership affiliated with Developer as authorized by this Section 4.5, shall satisfactorily perform and complete, or cause to be performed and completed, all services and items of work, and the furnishing of all labor and materials encompassed within or reasonably necessary to construct all of the improvements for the Project, and accomplish the tasks and functions described in **Exhibit A** and **Exhibit B**, in full compliance with all of the provisions of this Agreement.

4.6 Developer shall furnish to the Town reports of its activities in such form and manner as may be requested by the Town, and shall fully cooperate with the Town regarding the Town's monitoring and evaluation of the progress and performance of Developer.

5. TERMINATION FOR NON-PERFORMANCE.

If a Party fails to perform materially in accordance with the terms and conditions of this Agreement, the performing party may terminate this Agreement if the performing party first provides written notice to the non-performing party, which notice shall specify the non-performance, provide both a demand to cure the non-performance and reasonable time to cure the non-performance, and state a date upon which the Agreement shall be terminated if there is a failure to timely cure the non-performance. For purpose of this Section 5.0, "reasonable time" shall be not less than five (5) business days. In the event of a failure to timely cure a non-

performance and upon the date of the resulting termination for non-performance, each Party shall bear the costs it has incurred in performance of this Agreement through and including the date of termination, and neither Party shall seek reimbursement of such costs from the other.

Any notice of termination permitted by this Section 5.0 and its subsections shall be addressed to the person signing this Agreement on behalf of the Developer at the address shown below or such other address as Developer may provide to the Town and shall be deemed given upon delivery if personally delivered, or forty-eight (48) hours after deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested. Provided that notice of non-performance is provided in accordance with this Section 5.0, nothing in this Section 5.0 shall prevent, preclude, or limit any claim or action for default or breach of contract resulting from non-performance by a Party.

Additionally, at Town's sole option, upon termination of this Agreement all real property acquired by Developer with CDBG-DR funds or the Lyons Affordable Housing Allocation or by payments therefrom shall immediately become the sole and separate property of the Town, and Developer shall perform all acts and execute all instruments necessary to transfer and assign such property to the Town within thirty (30) days of termination. If Developer has not acquired such real property, the Town reserves all rights and options that it may have had on real property that the Town or its agents or assignees obtained for purposes of spending the Lyons Affordable Housing Allocation. All finished or unfinished documents, data, studies, reports and work product prepared by Developer or its agents and assigns under this Agreement or with CDBG-DR funds or the Lyons Affordable Housing Allocation or by payments therefrom shall, at the option of the Town, become the Town's property.

6. FORCE MAJEURE

Neither the Developer nor the Town shall be liable for any delay in, or failure of performance of, any covenant or promise contained in this Agreement, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to extent that, such delay or failure is caused by "*force majeure*." As used in this Agreement, "*force majeure*" means acts of God, acts of the public enemy, acts of terrorism, unusually severe weather, fires, floods, epidemics, quarantines, strikes, labor disputes and freight embargoes, to the extent such events were not the result of, or were not aggravated by, the acts or omissions of the non-performing or delayed party. The Parties agree that the Town shall, in its sole discretion, determine whether an event constitutes a *force majeure*.

7. INDEPENDENCE OF DEVELOPER.

Nothing herein nor the relationship of Developer to the Town, which relationship is expressly declared to be that of an independent contractor, shall make or be construed to make Developer or any of Developer's agents or employees the agents or employees of the Town. Developer shall be solely and entirely responsible for its acts and the acts of its agents, employees and subcontractors.

8. DISPUTE RESOLUTION.

In the event of any dispute between the Parties concerning this Agreement, court jurisdiction shall exclusively be in the appropriate court for Boulder County, Colorado. No provision of this Agreement shall be deemed or construed to be a relinquishment or waiver of any kind of the

applicable limitations of liability provided to the Town by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.* and Article XI of the Colorado Constitution.

9. LIABILITY; INDEMNIFICATION.

As to the Town, Developer agrees to assume the risk of all personal injury, including death and bodily injury, and damage to and destruction of property, including loss of use therefrom, caused by or sustained, in whole or in part, in conjunction with or arising out of the performance or nonperformance of this Agreement by Developer or by the conditions created thereby.

Developer expressly agrees to indemnify and hold harmless the Town, and any of its board members, commissioners, officials, officers, agents, contractors, attorneys, or employees from any and all damages, liability, expenses, or court awards, including costs and attorney's fees that are or may be awarded as a result of any loss, injury or damage sustained or claimed to have been sustained by any third party, including but not limited to, any person, firm, partnership, or corporation, in connection with or arising out of any intentional, reckless, negligent or tortious conduct, error, omission, or act of commission by Developer or any of its employees, agents, or others acting on Developer's behalf in performance of this Agreement.

Nothing in this Agreement shall be construed as constituting a covenant, promise, or agreement by the Developer to indemnify or hold the Town, its elected officials, board members, commissioners, officials, officers, agents, Developers, attorneys, or employees harmless for any negligence solely attributable to the Town, its elected officials, boards, commissions, officials, officers, agents, Developers, attorneys, or employees. The Developer's obligation to indemnify pursuant to this Section shall survive the termination of this Agreement.

If a party initiates any suit or action under or in relation to this Agreement, including without limitation to enforce any provision in this Agreement, and prevails in such suit or action, the prevailing party shall be entitled to recover from the other party all fees, costs and expenses of enforcing any right under or with respect to this Agreement, including without limitation, such reasonable fees and expenses of attorneys, accountants, and expert witnesses, which shall include, without limitation, all fees, costs and expenses of appeals.

10. MISCELLANEOUS PROVISIONS.

10.1 COUNTERPARTS. This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which shall constitute one and the same document. In addition, the Parties specifically acknowledge and agree that electronic signatures shall be effective for all purposes, in accordance with the provisions of the Uniform Electronic Transactions Act, Title 24, Article 71.3 of the Colorado Revised Statutes.

10.2 ADDITIONAL DOCUMENTS OR ACTION. The Parties agree to execute any additional documents and to take any additional action necessary to carry out this Agreement.

10.3 INTEGRATION AND AMENDMENT. This Agreement represents the entire agreement between the Parties and there are no oral or collateral agreements or understandings. This Agreement may be amended only by an instrument in writing signed by the Parties.

- 10.4 INTERPRETATION AND MUTUAL NEGOTIATION.** The Parties agree that this Agreement is the result of mutual negotiation between the Parties and that the Agreement shall not be construed against the Town on grounds relating to drafting, revision, review, or recommendation by any agent or representative of the Town.
- 10.5 BINDING EFFECT.** The Parties agree that this Agreement, by its terms, shall be binding upon the successors, heirs, legal representatives, and assigns; provided that this Section 10.5 shall not authorize assignment.
- 10.6 ASSIGNMENT AND RELEASE.** Developer shall not assign all or part of the rights, duties, obligations, responsibilities, or benefits set forth in this Agreement to any entity other than a LIHTC partnership affiliated with Developer as authorized by Section 4.5 of this Agreement without the express prior written consent of the Town. Any written assignment shall expressly refer to this Agreement, and shall specify the particular rights, duties, obligations, responsibilities, or benefits so assigned. An assignment to any entity other than a LIHTC partnership affiliated with Developer as authorized by Section 4.5 of this Agreement shall not be effective unless approved by the Town Board of Trustees. No assignment shall release the Developer from performance of any duty, obligation, or responsibility unless such release is clearly expressed in such written document of assignment. Any assignment or attempted assignment made in violation of this provision shall, at the Town's election, be deemed void and of no effect whatsoever.
- 10.7 PARAGRAPH CAPTIONS.** The captions of the paragraphs and sections are set forth only for the convenience and reference of the Parties and are not intended in any way to define, limit, or describe the scope or intent of this Agreement.
- 10.8 INCORPORATION OF EXHIBITS; AGREEMENT CONTROLS.** Unless otherwise stated in this Agreement, exhibits, applications, or documents referenced in this Agreement shall be incorporated into this Agreement for all purposes. In the event a conflict exists between this Agreement and any term in the Request for Proposals for Lyons Valley Park (Filing 8 Tract Affordable Housing Development) or any exhibit attached or incorporated into this Agreement, the terms in this Agreement shall supersede the terms in such Request for Proposals or exhibit.
- 10.9 GOVERNING LAW, VENUE, AND ENFORCEMENT.** This Agreement shall be governed by and interpreted according to the law of the State of Colorado. Venue for any action arising under this Agreement shall be in the appropriate court for Boulder County, Colorado.
- 10.10 NO THIRD-PARTY BENEFICIARIES.** None of the terms, conditions, or covenants in this Agreement shall give or allow any claim, benefit, or right of action by any third party not a party hereto. Any third party other than the Town or Developer that receives services or benefits under this Agreement shall be considered incidental and not the basis for further benefit.

10.11 FINANCIAL OBLIGATIONS. This Agreement shall not be deemed a pledge of the credit of the Town. Nothing in this Agreement shall be construed to create a multiple-fiscal year direct or indirect municipal debt or municipal financial obligation.

10.12 WAIVER OF BREACH. The waiver by any Party to this Agreement of a breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by any Party.

10.13 NO WAIVER OF GOVERNMENTAL IMMUNITY. Nothing in this Agreement shall be construed to waive, limit, or otherwise modify any governmental immunity that may be available by law to the Town, its officials, employees, Developers, or agents, or any other person acting on behalf of the Town and, in particular, governmental immunity afforded or available pursuant to the Colorado Governmental Immunity Act, Title 24, Article 10 of the Colorado Revised Statutes.

10.14 SURVIVAL OF TERMS AND CONDITIONS. The Parties understand and agree that all terms and conditions of the Agreement that require continued performance, compliance, or effect beyond the termination date of the Agreement shall survive such termination date and shall be enforceable in the event of a failure to perform or comply.

10.15 NOTICES. Unless otherwise specifically required by a provision of this Agreement, any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by certified mail or registered mail, postage and fees prepaid, addressed to the Party to whom such notice is to be given at the address set forth below or at such other address as has been previously furnished in writing, to the other Party. Such notice shall be deemed to have been given when deposited in the United States Mail properly addressed to the intended recipient.

If to the Town:

If to Developer:

Town Administrator Lyons Town Hall PO Box 49 432 5th Ave, Lyons, CO 80540	Summit Housing Group, Inc. Attn: Rusty Snow 283 West Front Street, Suite 1 Missoula, MT 59802
With Copy to: Lyons Town Attorney Michow Cox & McAskin LLP 6530 S. Yosemite Street, Suite 200 Greenwood Village, Colorado 80111	With Copy to:

10.16 SEVERABILITY. If any provision of this Agreement is declared by a court of competent jurisdiction to be invalid, void or unenforceable, such provision

shall be deemed to be severable, and all other provisions of this Agreement shall remain fully enforceable, and this Agreement shall be interpreted in all respects as if such provision were omitted.

IN WITNESS WHEREOF, the Town and Summit Housing Group, Inc., have signed this Agreement to be effective on the date last written below.

[Remainder of Page Left Blank Intentionally, Signature Page Follows]

