

AGREEMENT FOR BICYCLE SHARING SERVICES

City of Salem and Zagster, Inc.

This agreement ("Agreement") is made and entered into by and between Zagster, Inc., an independent contractor with a place of business at 25 First Street, Suite 104, Cambridge, MA 02141 ("Zagster") and the City of Salem ("City"), an Oregon municipal corporation, collectively referred to herein as the "Parties."

RECITALS

Zagster desires to provide bicycle sharing services in Salem that allows users to access and use bicycles provided by Zagster ("Zagster Service").

The Program includes placing and operating self-service stations and bicycles (collectively Bicycle Sharing Amenities, as further defined below) on property owned or operated by the City.

The City desires to allow Zagster to place its Bicycle Sharing Amenities on City property so as to promote the health, welfare, and public safety of its residents.

This Agreement establishes the parameters and procedures for locating, installing, maintaining, and operating Bike Sharing Amenities by Zagster within City property, and for providing Zagster Service in the City (collectively, the "Program").

In consideration of the mutual promises herein and other valuable consideration, the parties agree as follows:

SPECIFIC PROVISIONS:

Section 1: Agreement Summary

- A. Bicycle Sharing Amenities. The term "Bicycle Sharing Amenities" includes stations, bicycles, signs, software, hardware, or other bicycle sharing-oriented improvements ordinarily and customarily installed by Zagster for the provision of Zagster Service.
- B. Equipment Ownership. Zagster shall own all right, title, and interest in Bicycle Sharing Amenities, including but not limited to stations, bicycles, signs, software, hardware, or other bicycle sharing-oriented improvements ordinarily and customarily installed by Zagster for the provision of Zagster Service.
- C. Service and Maintenance. Zagster shall bear all costs associated with the installation, service, security, operation, and maintenance of Bicycle Sharing Amenities, including but not limited to stations, bicycles, signs, software, hardware, or other bicycle sharing-oriented improvements ordinarily and customarily installed by Zagster for the provision of Zagster Service. This provision includes any software provided by Zagster, including Zagster's bicycle rental management software and any user information provided in connection with such software.
- D. Authorized Locations.
 - 1. Use. Zagster shall use the locations identified in Table 1 solely for Bicycle Sharing Amenities and the delivery of Zagster Service and will not use them for any other purpose without first obtaining written approval from the City.

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2. Locations. The locations in Table 1 are authorized for Bicycle Sharing Amenities. Any change in location of a station or installation of a Bicycle Sharing Amenities at a new location must first be approved in writing by the City in the form of a revocable license. The City authorizes Zagster to install, maintain, and operate Bicycle Sharing Amenities at the following locations, subject to securing revocable licenses for each location (See Exhibit A):

Table 1. Bicycle Sharing Locations

Station	Location	Coordinates
South Riverfront Park	South of Riverfront Park Playground	44.940114 -123.043552
Bush's Pasture Park	Parking Lot south of intersection of Winter St. SE & Mission St. SE	44.931196 -123.035968
Cherriots Station	SW Corner of Chemeketa St. SE & Church Street NE	44.941280 -123.034727
Union Street Bridge	Near the east entrance of the Union Street Bridge	44.946585 -123.039755

3. Installation of Bicycle Sharing Amenities. The timing and manner of installation of Bicycle Sharing Amenities shall be done in compliance with the City's reasonable requirements, which shall be provided to Zagster in writing in advance of any such installation and in coordination with the City. Zagster shall be responsible for all costs associated with construction of Bicycle Sharing Amenities on City property. Prior to installation, it shall be Zagster's responsibility to:
- Provide a mockup of installation for inspection by City Public Works Park Operations and City Public Works Engineering staff; and
 - Call utility location services and determine any underground installations of any type.
4. Quarterly Reporting. Zagster shall report on a quarterly basis the number of rentals executed and gross revenues for that quarter for the Zagster Service in Salem. Each bicycle placed in service by Zagster, regardless of where it is initially placed (on City property or elsewhere within the city limits of Salem, Oregon (collectively, "Salem")), shall have a unique number assigned to it and permanently affixed to the bicycle and Zagster shall report to the City on a quarterly basis the status of each bicycle which is part of the Program in Salem. Status shall be described as: In service; Out of Service; Lost; Newly Placed in Service; or Other with a description.
5. Information Sharing. Should information regarding rental of a particular bicycle become necessary as part of a criminal investigation, code enforcement investigation, or to implement or enforce this agreement, Zagster shall, upon written request, provide the information without the necessity of subpoena or warrant.

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6. Signage. Signage placed at each location shall contain at least the following:
 - a. Hours of operation compatible with park location hours.
 - b. A phone number for persons to contact Zagster to report damaged, lost, or found bikes. The phone number shall also be placed on each of the bicycles.
 - c. Safety information, including but not limited to: statements regarding traffic and pedestrian safety; compliance with Oregon Revised Statute (ORS) 814.485; and necessary safety equipment, including equipment needed for safe nighttime operation.
 - d. Park rules regarding speed limit within parks.
7. Maintenance. Maintenance of all Bicycle Sharing Amenities will be performed by or on behalf of Zagster. Maintenance of bicycles shall occur as needed. Inspection of bicycles shall occur no less than on a monthly basis. Bicycles that are in disrepair or otherwise determined by Zagster or the City to be unsafe to operate shall be taken out of service, repaired, and/or replaced. Zagster will, at Zagster's sole cost and expense, at Zagster's option either replace or fully refurbish the bicycles no less frequently than every three years, from the first date of operation. Zagster, at its discretion and after notifying the City, may scale down during weather that is unfavorable for bicycle use. Zagster is responsible for providing storage for bicycles removed from service.
8. Bicycle Sharing Amenities Not to Interfere. Zagster shall install and maintain the Bicycle Sharing Amenities with such material and in such a manner as to not, at any time, be a source of danger to, or interfere with: (a) the City's present or future use of the City property; (b) the use of the City property by any utility presently franchised by the City; (c) the property's use as a public way; (d) vehicular and pedestrian traffic adjacent to the Bicycle Sharing Amenities.
9. Emergencies. If any Bike Sharing Amenity causes an emergency condition as determined by the City, and the City determines that the situation makes it unreasonable to notify Zagster or await action by Zagster, the City may take whatever actions it deems necessary to remedy the emergency situation at the sole expense of Zagster, which will reimburse City for the reasonable costs of such actions within thirty (30) days of being notified.
10. Fees. The City will waive any fees placed upon Zagster related to installing Bicycle Sharing Amenities on City-owned property.
11. Lost Bicycles. Bicycles not placed at a Zagster kiosk and not in the immediate control of the renter shall be considered lost. Retrieval of such bicycles is the responsibility of Zagster. Should the City discover bicycles not housed at a kiosk, the City shall call the phone number listed on the bicycle to arrange retrieval. Should the bicycle not be retrieved within 60 hours of the notice of discovery, the City may impound the bike. Zagster is responsible for all costs associated with retrieving any lost bicycles from City custody and restoring them to service. For purposes of this Agreement, a bicycle is "not in the immediate control of the renter" if it is left on the property of another without the consent of the party controlling the property, or if it is left in any location where it creates a risk of public nuisance.

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12. Access. Zagster may access the locations at agreed upon dates and times to perform a site survey, take pictures, and otherwise review, and inspect the location in advance of installing Bicycle Sharing Amenities. The City will grant to Zagster the right of access and use of the locations to install Bicycle Sharing Amenities. The City will grant to Zagster the right of access to perform inspections, maintenance, repairs, and upgrades to the Bicycle Sharing Amenities. The City further grants to Zagster and users the right to access the Bicycle Sharing Amenities located on City-owned property at hours and dates consistent with separately promulgated park hours and rules
13. Receipt of Shipments, Storage, and Disposal of Shipping Material. The City agrees to receive initial shipments of the Zagster bicycles and related Bicycle Sharing Amenities and will store the Zagster bicycles and related Bicycle Sharing Amenities in a secure, clean, and debris-free location until completion of installation and commencement of Zagster Service. The City will permit Zagster to dispose of shipping materials and provide access to Municipality's trash facilities in connection with the installation of Bicycle Sharing Amenities. Zagster shall be responsible for transporting bicycles and Bicycle Sharing Amenities from City storage to the locations for installation.
14. Program Funding and Implementation. For the purposes of implementing the Program, the City shall serve as the owner of the property on which Bicycle Sharing Amenities have been installed. One or more separate agreements may be implemented between Zagster and one or more third parties specific to (i) funding the procurement and installation of Bicycle Sharing Amenities, (ii) providing aspects of the Zagster Service, and/or (iii) implementing and/or managing of the Program. Each such fully-executed agreement shall be provided to the City within 30 days of its execution.
15. Exclusivity. Zagster shall be the only bicycle sharing and/or bicycle rental service with the right to operate Bicycle Sharing Amenities in Riverfront Park during the term of this Agreement.
16. Sponsorships. Advertisements for third party sponsors and Zagster may be included on the bicycles (such as on the fender or basket) as well as on signage at the Bicycle Sharing Amenities subject to prior City approval. Advertisements must not imply endorsement by the City of any sponsor or product associated with the sponsor.
17. City Publicity of Bicycle Sharing Amenities. Zagster may provide the City with advertising, publicity, or marketing materials (collectively "Marketing Materials") that may be used at the City's discretion for promotion of the Program. Use of any Marketing Materials by the City is not required, but if used, such use is subject to any terms and conditions as Zagster may specify in writing. The City may create custom communications or other publicity materials to promote the Program, subject to Zagster's prior review and approval, which will not be unreasonably withheld or delayed.
18. Point of Contact. The parties will assign a point of contact who will be responsible for interacting with the other party regarding matters covered by this Agreement. The points of contact will be reasonably accessible during normal business hours.
19. Press Release. The parties may issue a press release, either jointly or individually, announcing the parties' relationship hereunder and any updates or additional information

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related to the Program. Each party will provide the other with a copy of any proposed press release prior to issuance and the other party shall have the right to provide any comments or feedback related thereto.

20. City Image. The City grants to Zagster a nonexclusive, nontransferable (except pursuant to the assignment provision below), royalty-free license to reproduce, display, and otherwise use the City of Salem logo solely: (i) to promote the Program; (ii) on Zagster's customer lists, including on its website; and (iii) in connection with the name of the Program. All use of City of Salem logo and any resulting goodwill shall accrue solely to the benefit of the City.
21. Rights, Title, and Interest. The parties agree to the following:
 - a. Zagster owns all right, title, and interest in and to Zagster Service, the marketing materials related to Zagster Service, the Zagster software, and Zagster name, trademarks, service marks, and logos (collectively, "Zagster Marks"). This Agreement does not convey to the City any rights or proprietary interest in or to the Zagster Service, the marketing materials, the Zagster software, or the Zagster Marks other than as set forth in this Agreement and Zagster reserves all rights not expressly granted hereunder. Except as expressly permitted by Zagster, the City shall not:
 - (i) sublicense, resell, transfer, assign, distribute, or otherwise commercially exploit or make available to any third party the Zagster Service or any part thereof in any way;
 - (ii) modify or make derivative works based upon the Zagster Service or reverse engineer, decompile, or disassemble the Zagster Service; or
 - (iii) interfere with or disrupt the integrity or performance of the Zagster Service.
 - b. The City owns all right, title, and interest in and to the City's image and the City-owned property. This Agreement does not convey to Zagster any rights or proprietary interest in or to the City's image or the City-owned property other than as set forth in this Agreement and the City reserves all rights not expressly granted hereunder.
22. Feedback. The City grants Zagster an unlimited, irrevocable, perpetual, transferable, royalty-free worldwide license to use and/or incorporate into the Zagster Service any feedback, suggestions, and recommendations related thereto that the City provides to Zagster.
23. Representations and Warranties.
 - a. General. Each party represents and warrants that: (i) it has full power and authority to enter into and execute this Agreement; (ii) this Agreement is valid, binding, and enforceable in accordance with its terms; and (iii) the execution, delivery, and performance of this Agreement does not result in a violation or breach of and does not contravene, violate or conflict with any provision of applicable law, regulations, or obligations to which it is a party.
 - b. Zagster Service. Zagster represents and warrants that the Zagster Service will be provided in accordance with the terms of this Agreement. As Zagster's sole and exclusive remedy, and Zagster's sole liability, for any breach of the foregoing warranty, Zagster will re-perform the Zagster Service so that it conforms to the requirements of this Agreement.

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24. Assignments. Neither party may assign performance of this Agreement or any of its rights under this Agreement. Zagster may not delegate any of its duties under this Agreement without the prior written consent of the other, except as contemplated by Section 1.D.14. Zagster may assign this Agreement without the City's prior written consent in the case of a merger, acquisition, or other change of control, and in such event this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

Section 2: Breach and Termination

- A. If either party breaches any of the provisions hereof, or is in default in the performance of any obligation imposed hereunder, the other party may give no less than thirty (30) days written notice of the breach ("Notice Period"). If the breach or default is not cured before the end of the Notice Period, then this Agreement will terminate. Upon termination of this Agreement, Zagster shall abandon the use of City property and shall remove all Bicycle Sharing Amenities at Zagster's sole expense.
- B. If, after termination and within thirty (30) days after being directed to do so by the City, Zagster fails to remove the Bicycle Sharing Amenities, the City may perform the work and Zagster shall reimburse the City for the reasonable costs of such work within thirty (30) days after the City submits a bill to Zagster.
- C. Termination of this Agreement, for any reason, shall not release Zagster from any liability or obligation relating to the installation, operation, maintenance, or removal of the Bicycle Sharing Amenities, or any other term of this Agreement.
- D. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right. Any waiver by either party of a particular provision or right shall be in writing; shall be to a particular matter and, if applicable, for a particular period of time; and shall be signed by such by the authorized representatives of that party. A waiver of either party of a breach or a violation of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach or violation of any provision of this Agreement.
- E. Unless otherwise provided in this Agreement, all claims, counterclaims, disputes, and other matters in question between Zagster and the City arising out of, or relating to this Agreement or the default or breach of it, will be decided, if the parties agree, by mediation, or if they fail to agree, by arbitration. Arbitration will be conducted according to rules and procedures set out by a mutually agreed upon arbitrator. The award of the arbitrators shall be accompanied by a reasoned opinion.

Section 3: Amendments

Any amendment to this Agreement shall be in writing and signed by the authorized representatives of both parties. There are no understandings, agreements, or representations, oral or written, regarding this Agreement except as specified or referenced herein.

Section 4: Insurance

- A. During the term of this Agreement Zagster, Inc., will maintain the following insurance:

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1. General Liability Insurance with coverage limits of \$1,000,000.00 per occurrence and \$2,000,000.00 in the aggregate the City of Salem, its officers, agents, employees, and volunteers to be named as additional insureds in the policy;
 2. Worker's Compensation Insurance in accordance with statutory requirements; and
 3. Umbrella coverage in the amount of at least \$2,000,000.00.
- B. Any cancellation provision must provide that if the policy is cancelled prior to the expiration date of this Agreement, is materially changed, or is not renewed, the issuing company will mail written notice to the City within thirty (30) calendar days.
- C. A certificate of insurance in compliance with the above must be furnished to the City with the execution of this Agreement and prior to commencement of construction.

Section 5: Disclaimer

To the maximum extent permitted by law, except as otherwise set forth in this Agreement, neither party makes any representations or warranties to the other, including with respect to its products and services or the subject matter of this Agreement, and each party hereby disclaims any express, implied or statutory warranties, including the implied warranties of fitness for a particular purpose, title, merchantability, and non-infringement.

Section 6: Indemnity/Liability/Limitation of Liability

Subject to the limitations and conditions of the Oregon Tort Claims Act ORS 30.260 to 30.300 and the Oregon Constitution, Article XI, Section 7, Zagster agrees to defend, indemnify, and hold harmless the City and its affiliates, its officers, directors, shareholders, members, employees, volunteers, or agents from all liabilities, claims, suits, damages, losses, actions, or expenses, including reasonable attorney's fees and costs for bodily injury or personal injury including death, or loss, or damage to property to the extent caused by the negligent or willful acts or omissions of Zagster, its officers, contractors, employees, volunteers, or agents, arising out of or related to the activities of Zagster, its officers, contractors, employees, volunteers, or agents under this Agreement. It is the specific intention of the parties that City shall, in all instances, except for claims arising from the negligent or willful acts, criminal acts, or omissions of the City, its officers, board members, employees, volunteers, and agents, be indemnified by Zagster from and against all such claims provided above.

The City shall provide Zagster with written notice within 60 days of its receipt of a claim; however, that failure by the City to provide notice to Zagster shall not relieve Zagster of its obligations under this Section unless such failure prejudices Zagster's defense or settlement of the claim. Zagster may elect to control the defense of the claim. Zagster may not settle the claim without the City's prior written consent. The City may (at its own cost) engage its own counsel to participate in the defense and settlement of the claim, but the City will not settle any claim without Zagster's prior written consent.

To the maximum extent permitted by law, other than as set forth above in this Section 6, in no event will either party be liable to the other party for any indirect, incidental, special, exemplary or consequential damages, including lost profits or loss of goodwill, even if such party has been advised of the possibility of such loss. For the avoidance of doubt, the foregoing limitation of liability is not intended to limit either party's liability for gross negligence or willful misconduct.

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Section 7: Entire Agreement

This Agreement contains the entire agreement of the parties regarding Zagster, Zagster Service, and the Program, and supersedes any and all other agreements or understandings, oral or written, whether previous to the execution hereof or contemporaneous herewith.

Section 8: Binding Effects and Assignment

- A. This Agreement is binding upon signature of both parties and inures to the benefit of the successors and/or assigns of the parties.
- B. This Agreement is for the exclusive benefits of the parties hereto. It shall not be assigned, transferred, or pledged by either party without the prior consent of all the remaining parties.

Section 9: Severability

If any part of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement will remain valid and enforceable if the remainder of the Agreement is reasonably capable of completion.

Section 10. Notice

Whenever notice is required or permitted to be given under this Agreement, such notice shall be given in writing to the other party by personal delivery; by sending via a reputable commercial overnight courier; or by mailing using registered or certified United States mail, return receipt requested and postage prepaid, at the addresses set forth below:

If to the City:	City of Salem Attn: Peter Fernandez, PE, Public Works Director 555 Liberty Street SE, Room #325 Salem, OR 97301-3503
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If to Zagster:	Zagster, Inc. Attn: Nicholas Malone, CFO 50 Milk Street, 16th Floor Boston, MA 02109
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Notice delivered by personal delivery shall be deemed to be given upon actual receipt. Notice sent by overnight courier shall be deemed to be given five (5) days after dispatch. Notice sent by United States mail shall be deemed to be given five (5) days after mailing.


Section 11. Effective Date, Term of Agreement, and Signatures

This Agreement shall be effective on the latest date of signature. The City and Zagster, by their signatures, acknowledge having read this Agreement, understand it, and agree to be bound by its terms and conditions. The term of this Agreement shall be for a period of one (1) year from the effective date . Following the term of this Agreement, this Agreement shall remain in effect until replaced by a new agreement or terminated in writing by either party that has given notice to the other of least 60 days. The individual signing this Agreement on behalf of his or her respective party hereby certifies that such signature has been authorized by his or her party and that the individual has the authority to act on behalf of and to bind his or her party.

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IN WITNESS WHEREOF, Zagster and the City hereto have caused this Agreement to be executed in their respective names by their authorized representatives as of the dates set forth below:

Zagster, Inc.



Adrian Altobelli

VP of Growth Strategy

Date: 9/28/18

City of Salem, Oregon (City)

Steven D. Powers
City Manager

Date: _____

APPROVED

Peter Fernandez, PE
Public Works Director

Date

Legal Counsel for the City

Date