

ORDINANCE NO. 22-1182

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF
BLACK DIAMOND, KING COUNTY WASHINGTON,
ADOPTING A NEW CHAPTER 12.04 OF THE BLACK
DIAMOND MUNICIPAL CODE RELATING TO PERMITS
FOR USE OF THE PUBLIC RIGHTS OF WAY; PROVIDING
FOR SEVERABILITY; AND ESTABLISHING AN
EFFECTIVE DATE**

WHEREAS, the City has the authority to make regulations respecting the safe use and maintenance of the City's rights-of-way to ensure the health, safety, and welfare of the traveling public; and

WHEREAS, members of the public make use of City rights-of-way for various purposes, including but not limited to: temporary construction activities, franchised utilities, sidewalk cafes, and other uses which obstruct or disturb the rights-of-way; and

WHEREAS, the City desires to enact legislation requiring such users of the rights-of-way to apply for a City permit in order to ensure proper traffic control, preserve the value and condition of the public rights-of-way, and protect the health, safety, and welfare of the public;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Adoption of BDMC Chapter 12.04 (Right-of-Way Use Permits). A new Black Diamond Municipal Code Chapter 12.04 (Right-of-Way Use Permits) is hereby adopted as set forth in Exhibit A, attached hereto and incorporated herein.

Section 2. Severability. If any portion of this Ordinance, or its application to any person or circumstance, is determined by final order of a court of competent jurisdiction to be invalid, pre-empted, or otherwise unenforceable for any reason, such determination shall not affect the validity or enforceability of the remaining provisions hereof or its application to other persons or circumstances.

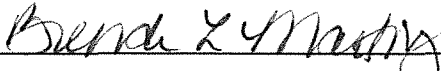
Section 3. Effective Date. This Ordinance shall be published in the official newspaper of the city and shall take effect and be in full force five (5) days after the date of publication. A summary of this Ordinance may be published in lieu of the entire Ordinance, as authorized by State law.

**ADOPTED BY THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND AT A
REGULAR MEETING THEREOF ON THE 6th DAY OF October, 2022.**



Mayor Carol Benson

ATTEST:



Brenda L. Martinez, City Clerk

APPROVED AS TO FORM:

David Linehan, City Attorney

Filed with the City Clerk: 10/7/22
Date of Publication: 10/12/22
Effective Date: 10/17/22

EXHIBIT A

CHAPTER 12.04 RIGHT-OF-WAY USE PERMITS

Sections:

- 12.04.010 Purpose – Permit required.
- 12.04.020 Definitions.
- 12.04.030 Right-of-way use permit application process and fee.
- 12.04.040 Right-of-way use permit types.
- 12.04.050 Type A right-of-way construction permit.
- 12.04.060 Type B right-of-way utility permit.
- 12.04.070 Type C right-of-way occupancy permit.
- 12.04.080 Type D right-of-way temporary use permit.
- 12.04.090 Revocation or suspension of permit.
- 12.04.100 Enforcement.

12.04.010 Purpose – Permit required.

The purpose of this chapter is to establish minimum rules and regulations for controlling and enforcing right-of-way uses to assure that proposed uses are consistent with the public health, safety, and welfare of the community, and that harm or nuisance which may result from a proposed right-of-way use is prevented.

It shall be unlawful for anyone to make private use of any public right-of-way without a right-of-way use permit issued by the city, or to use any public right-of-way without complying with all provisions of a permit issued by the city.

12.04.020 Definitions.

The following words and phrases, wherever used in this chapter, have the meanings ascribed to them in this section except where otherwise defined or unless the context clearly indicates a different meaning.

- A. "Abutting property" means and includes property bordering upon and contiguous to a public right-of-way as defined herein.
- B. "Applicant" means any person, partnership, corporation, enterprise, entity, group, or agency applying for the issuance or renewal of a right-of-way use permit or any

person, corporation, enterprise, entity, group, or agency that has been issued a right-of-way use permit.

- C. "Application" means the collection of papers or electronic data necessary to initiate a right-of-way use permit request, and includes an application in the form approved by the city and other submittals by an applicant consistent with the purposes of this chapter.
- D. "Private use" means use of the public right-of-way for the benefit of a person, partnership, corporation, enterprise, entity, group, or agency other than as a public thoroughfare for any type of vehicle, pedestrian, bicycle, or equestrian travel.
- E. "Right-of-way" or "ROW" means and includes streets, avenues, ways, boulevards, drives, places, alleys, sidewalks, landscape (parking) strips, squares, triangles, easements, and other rights-of-way open to the use of the public, including the space above or beneath the surface of the same, and further including the unopened or untraveled portions of the same. This definition specifically does not include streets, alleys, ways, landscape strips, sidewalks, easements, or other similar areas that have not been deeded, dedicated, or otherwise permanently conveyed to, or appropriated by, the city for public use.
- F. "Sidewalk café means a portion of a public sidewalk on which tables and chairs are placed for the use of patrons while consuming food and/or beverages, including liquor as defined in RCW 66.04.010, when served by a cafe, restaurant, or tavern located on abutting property.

12.04.030 Right-of-way use permit application process and fee.

- A. The Public Works Director or designee is authorized to approve, conditionally approve, or deny all right-of-way use permit applications consistent with the requirements of this chapter and may establish policies and procedures to administer the permit program.
- B. Applicants may be required to submit, in addition to the application form provided by the Public Works Department, any documents the city deems necessary for the Public Works Director or designee to complete an accurate evaluation of the right-of-way use permit application.
- C. Decisions by the Public Works Director or designee regarding issuance, renewal, denial, or termination of any permits required under this chapter shall be rendered with due consideration given to the availability of insurance; the provision of performance, restoration, and maintenance bonds; the applicability of indemnification and hold harmless agreements; the capacity of the rights-of-way to accommodate the applicant's proposed facilities or uses; an evaluation of competing public interests; and any other administrative requirements or considerations applicable to the permit.
- D. As part of a complete right-of-way use permit application, the applicant shall submit to the city, at the time of application, any applicable right-of-way use permit fees,

including a nonrefundable application fee, as set forth in the most current City of Black Diamond fee schedule.

- E. A fee for the processing of applications shall be charged. The amount of the fee shall be determined based upon the time and cost required to review, inspect, research, and coordinate the applicant's data for each permit application.
- F. Conditions of approval will be identified by the Public Works Director or designee during the city's review of the application and may include certificates of insurance, indemnification and hold harmless agreements, traffic control plans, performance bonds, restoration bonds, maintenance bonds, time and use restrictions, video data, status reports, restoration of disturbed right-of-way features, or any other requirements the Public Works Director or designee deems necessary to protect the right-of-way and public health, safety, and welfare.
- G. The city may incur extra costs of inspection for certain permits that require more than the usual number of inspections. These costs may be incurred because of situations related to observed quality of work, traffic problems, schedule problems, and cooperation of the applicant. Excess inspection fees will be charged based on the hourly rate of actual costs incurred by the city to make the excess inspections.
- H. If the city incurs any costs in repairing or replacing any property as the result of the applicant's actions, the costs of repair and replacement will be charged to the applicant. These charges will be for the actual costs to the city.

12.04.040 Right-of-way use permit types.

- A. Type A, ROW construction permit, is a permit that allows the use of the right-of-way for non-utility construction activities as described in BDMC 12.04.050.
- B. Type B, ROW utility permit, is a permit that allows for the use of the right-of-way to construct or maintain utilities as described in BDMC 12.04.060.
- C. Type C, ROW occupancy permit, is a permit that allows indefinite use or occupancy of public right-of-way for non-construction activities or placement of structures as described in BDMC 12.04.070, but does not include an initial grant or renewal of utility, cable, or telecommunications franchise, which are separately negotiated and require approval of the city council.
- D. Type D, ROW temporary use permit, is a permit that allows seasonal or other non-permanent uses of the public right-of-way for events of limited duration, as described in BDMC 12.04.080, but does not apply to special events covered by Chapter 2.59 BDMC as currently adopted or hereafter amended.

12.04.050 Type A right-of-way construction permit.

- A. Type A ROW construction permits are required before any person, partnership, corporation, enterprise, entity, group, or agency commences or permits any other person, partnership, corporation, enterprise, entity, group, or agency to commence any non-utility work within the public right-of-way. Types of work that

would fall under a Type A ROW construction permit include, but are not limited to, demolition, construction, or improvements made to driveways, curbs, stormwater infrastructure, sidewalks, or retaining walls, and further includes cutting or maintaining trees and haul routes along any public right-of-way. Construction work associated with a franchised or unfranchised utility or telecommunication provider requires a Type B ROW utility permit as described in BDMC 12.04.070.

- B. Proof of insurance shall be required, with the city listed as an additional insured, on all work within the right-of-way to address liability for injury to persons or damage to property. Insurance amounts shall be those identified in Section 1-07.18 (Public Liability and Property Damage Insurance) of the Standard Specifications for Road, Bridge and Municipal Construction (current version) published by the Washington State Department of Transportation, and city amendments thereto, or as provided in a city-approved franchise agreement, whichever is more protective of the city. These insurance requirements may be modified at the discretion of the Public Works Director or designee for good cause shown.
- C. A current city business license is required for any person performing work in city right-of-way.
- D. It is unlawful for any person to perform any work in city right-of-way unless operating under a valid state of Washington general contractor's license, or a valid state of Washington specialty contractor's license applicable to the type of work being performed.
- E. Contractors are responsible for traffic control, work area protection/security, and street maintenance to protect the life, health, and safety of the public during any permitted work within the right-of-way, and all methods and equipment used will be subject to the approval of the Public Works Director or designee.
- F. All streets, sidewalks, alleys, parkways, and other public rights-of-way disturbed in the course of work performed under any permit shall be restored in accordance with the City of Black Diamond public works standards or as required and approved by the Public Works Director or designee. Restoration and maintenance bonds may be required at the discretion of the Public Works Director or designee.
- G. All work within city right-of-way must be pursued to completion with due diligence, and if work is not completed within a reasonable length of time, as determined by the Public Works Director or designee, the city shall cause the work to be completed at the applicant's expense, including any legal costs and attorney fees.
- H. Any costs incurred by the city for right-of-way restoration will be charged to the property owner, entity, and/or developer employing the contractor that failed to complete necessary restoration work.

12.04.060 Type B right-of-way utility permit.

- A. A Type B ROW utility permit is required before any person, partnership, corporation, enterprise, entity, group, or agency commences or permits any other person, partnership, corporation, enterprise, entity, group, or agency to commence any work within the public right-of-way associated with providing or maintaining franchised utilities or telecommunication facilities within the city rights-of-way.
- B. Proof of insurance shall be required, with the city listed as an additional insured, on all work within the right-of-way to address liability for injury to persons or damage to property. Insurance amounts shall be those identified in Section 1-07.18 (Public Liability and Property Damage Insurance) of the Standard Specifications for Road, Bridge and Municipal Construction (current version) published by the Washington State Department of Transportation, and city amendments thereto, or as provided in a city-approved franchise agreement, whichever is more protective of the city. These insurance requirements may be modified at the discretion of the Public Works Director or designee for good cause shown.
- C. A current city business license is required for any person performing work in city right-of-way.
- D. It is unlawful for any person to perform any work in city right-of-way unless operating under a valid state of Washington general contractor's license, or a valid state of Washington specialty contractor's license applicable to the type of work being performed.
- E. Contractors are responsible for traffic control, work area protection/security, and street maintenance to protect the life, health, and safety of the public during any permitted work within the right-of-way, and all methods and equipment used will be subject to the approval of the Public Works Director or designee.
- F. All streets, sidewalks, alleys, parkways, and other public rights-of-way disturbed in the course of work performed under any permit shall be restored in accordance with the City of Black Diamond public works standards or as required and approved by the Public Works Director or designee. Restoration and maintenance bonds may be required at the discretion of the Public Works Director or designee.
- G. All work within city right-of-way must be pursued to completion with due diligence, and if work is not completed within a reasonable length of time, as determined by the Public Works Director or designee, the city shall cause the work to be completed at the applicant's sole expense, including legal costs and attorney fees.
- H. Any costs incurred by the city for right-of-way restoration will be charged to the person, entity, and/or developer employing the contractor that failed to complete necessary restoration work.

12.04.070 Type C right-of-way occupancy permit.

- A. A Type C ROW occupancy permit is required before any person, partnership, corporation, enterprise, entity, group, or agency commences or permits any other person, partnership, corporation, enterprise, entity, group, or agency to (1) place any object or facility within the ROW for an indefinite period of time or (2) utilize the public ROW indefinitely for private benefit or use. Types of activities that fall under a Type C ROW occupancy permit include, but are not limited to, bus shelters and stops; special and unique structures intended for permanent or indefinite placement in the right-of-way, such as awnings, benches, clocks, flagpoles, fountains, kiosks, and lights; and recycling and solid waste facilities. Infrastructure associated with a franchised or unfranchised utility provider or a telecommunication provider requires a Type B ROW utility permit as described in BDMC 12.04.060.
- B. Proof of insurance may be required with the city listed as an additional insured to protect the public and the city against liability for injury to persons or damage to property.
- C. Issuance of a Type C ROW occupancy permit conveys no property right or title in the right-of-way to the permittee. If at any time the city determines that the area being occupied by the permittee is necessary for other public purposes or benefits, or if the object or facility occupying the ROW falls into disrepair or is not maintained in good condition, or if the city determines that the continued location of the permitted object or facility in the right-of-way is an impediment to other city projects or constitutes a risk to public health or safety, the city may terminate the right-of-way occupancy permit, and the permittee will be required, at its own expense, to remove its facilities from the public right-of-way. Private long-term use or occupancy of the public rights-of-way authorized under Type C permits shall not restrict or in any way limit future public use of the right-of-way.
- D. Type C ROW occupancy permits require approval of the city council following a written recommendation by the Public Works Director or designee. Type C ROW occupancy permits may be approved with such conditions as are necessary to protect public health, safety, and welfare or to preserve the use and value of the public rights-of-way. Such conditions may include, but are not limited to, payment of a reasonable rent and/or leasehold excise tax where required by law and execution of an appropriate lease or similar written agreement setting forth the conditions of approval.

12.04.080 Type D right-of-way temporary use permit.

- A. A Type D ROW temporary use permit is required before any person, partnership, corporation, enterprise, entity, group, or agency commences or permits any other person, partnership, corporation, enterprise, entity, group, or agency to utilize any portion of the public ROW for events of limited duration or other seasonal or

short-term activities, except for those events covered by Chapter 2.59 as currently adopted or hereafter amended. Types of activities that fall under a Type D ROW temporary use permit include, but are not limited to, sidewalk cafes or streateries; seasonal or holiday decorations; sidewalk sales; and holiday celebrations or festivals not sponsored by the city. Type D ROW seasonal permits also cover any special facilities or objects that will be located in the public right-of-way for use in connection with the permitted short-term or seasonal activity or event.

- B. Proof of insurance may be required with the city listed as an additional insured to protect the public and the city against liability for injury to persons or damage to property.
- C. Issuance of a Type D ROW temporary use permit conveys no property right or title in the right-of-way to the permittee. If at any time the city determines that the area being used by the permittee is necessary for other public purposes or benefits, or if the city determines that the continued location of the permitted activity (and any associated objects or facilities) in the right-of-way is an impediment to other city projects or priorities or constitutes a risk to public health or safety, the city may terminate the right-of-way temporary use permit, and the permittee will be required, at its own expense, to cease its use of the public right-of-way and remove any objects or facilities therefrom. Private uses authorized under Type D permits shall not restrict or in any way limit future public use of the right-of-way.
- D. Type D ROW temporary use permits shall be processed pursuant to the following procedures:
 - 1. The Public Works Director may approve or deny Type D ROW temporary use permits for events or activities of one week or less in duration.
 - 2. Type D ROW temporary use permits for events or activities of more than one week in duration shall require approval of the city council following a written recommendation by the Public Works Director or designee.
 - 3. Type D ROW temporary use permits may be approved with such conditions as are necessary to protect public health, safety, and welfare or to preserve the use and value of the public rights-of-way. Such conditions may include, but are not limited to, payment of a reasonable rent and/or leasehold excise tax where required by law and execution of an appropriate lease or similar written agreement setting forth the conditions of approval.

12.04.090 Revocation or suspension of permit.

All permits issued pursuant to this chapter may be revoked by the city as follows:

- A. A permit may be immediately revoked by the city in the event of a violation of any of the terms or conditions of the permit or a violation of this chapter.

- B. A permit may be immediately revoked by the city in the event the permitted use of the right-of-way becomes dangerous to persons or property, or if any structure, site condition, or obstruction permitted becomes insecure or unsafe.
- C. A permit may be revoked by the city if the applicant misrepresented a material fact in applying for the permit.
- D. A permit may be revoked by the city upon 30 days' notice if the permit was not for a specified duration and neither of the preceding three subsections applies.
- E. If a permit is revoked, and if any event, use, work, or occupancy for which the permit was originally granted is not immediately discontinued, the city may (1) remove any structure, site condition, object, or obstruction associated with the permitted event, use, work, or occupancy; (2) undertake such repairs as may be necessary to render the structure, site condition, object, or obstruction secure and safe; and/or (3) take such actions as may be necessary to terminate the permitted event, use, work, or occupancy. The cost and expense of such removal, repair, and/or termination shall be assessed against the permittee, including the city's attorney fees.
- F. Rather than revoking a permit on the any of the grounds provided in this section, a permit may, at the discretion of the Public Works Director or designee, be suspended for such period of time as may be necessary to cure the violation or to render the permitted structure, site condition, object, or obstruction safe and secure, to the satisfaction of the Public Works Director or designee.
- G. Nothing in this section 12.04.090 precludes the city from invoking other applicable codes to remedy a violation of a permit issued under this chapter or imposing such penalties as may be available under other chapters of the Black Diamond Municipal Code.

12.04.100 Enforcement.

- A. The Public Works Director or designee is authorized to enforce or seek enforcement of the provisions of this chapter and any rules and regulations promulgated hereunder, pursuant to the enforcement and penalty provisions of Chapter 8.02 BDMC and any other codes adopted by the city or other applicable authorities.
- B. In addition to the remedies provided elsewhere in this chapter, any activity or object that uses or occupies any right-of-way without a permit is declared a nuisance. The city may post at the location of any such activity, and/or attach a notice to any such object, stating that if the activity and/or object is not terminated and/or removed from the right-of-way within 24 hours of the date and time stated on the notice, the object or thing may be taken into custody and stored at the owner's expense, and those participating in the unpermitted activity may be subject to civil penalties. The notice shall provide an address and phone number where additional information may be obtained. If the object is a hazard to public

safety, it may be removed summarily by the city. Notice of such removal shall be thereafter given to the owner, if known. This section does not apply to motor vehicles, which are governed by Title 10 BDMC and applicable provisions of state law.