



**MEMORANDUM**

**TO:** Deschutes County Planning Commission

**FROM:** Nick Lelack, AICP, Director  
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Tanya Saltzman, AICP, Senior Planner

**DATE:** July 15, 2021

**SUBJECT:** Senate Bill 391 / Rural Accessory Dwelling Units

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The purpose of this work session is to provide the Planning Commission with an overview of Senate Bill (SB) 391, which allows counties to allow accessory dwelling units (ADUs) in rural residential areas. Staff was scheduled to meet with the Board of County Commissioners (Board) for an initial discussion on July 14, 2021; staff anticipates scheduling a follow-up work session with the Board later in the summer to continue the discussion and seek further direction, and will update the Planning Commission as requested.

SB 391 depends on the adoption of statewide wildfire hazard maps and related wildfire provisions, including a revised definition of the wildland urban interface and the wildfire hazard zones; these wildfire provisions are outlined in the recently-passed SB 762. The complex process of adopting these maps and related provisions is governed at the state level, and it is estimated that final adoption will not occur until mid-2022 at the earliest. While the rural accessory dwelling law is effective immediately and counties may adopt ordinances to allow accessory dwelling units, local governments cannot implement the law (meaning they cannot allow or approve ADUs) until the adoption of the statewide wildfire maps. It is staff's intention to work with the Board to identify other parts of SB 391 that could be addressed in the interim so that code amendments will be ready upon adoption of the statewide wildfire maps.

**I. Background**

Rural residential zones exist throughout Oregon. By definition, rural residential zones exist outside of urban growth boundaries (UGBs) but are excluded from the state's resource land (farm and forest zone) protections. With certain exceptions, those protections allow residential uses only in conjunction with a farm or forest use. However, in rural residential zones, a dwelling can be a primary use of the land. Currently, state law allows counties to permit an additional dwelling on a property containing a house built prior to 1945.<sup>1</sup> However, unlike in urban zones, rural residential zones do not have any other by-

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<sup>1</sup> House Bill 3012 (2017).

right accessory dwelling options, making inter-generational and alternative housing options difficult to achieve.

## **II. SB 391 / Overview**

The Oregon Legislature adopted SB 391 into law on June 23, 2021 (Attachment 1). It authorizes a county to allow an owner of a lot or parcel within a rural residential zone to construct one ADU subject to certain restrictions and limitations. SB 391 does not obligate a county to allow ADUs. It also does not prohibit a county from imposing any additional restrictions, including those relating to the construction of garages and outbuildings that support an ADU. The matrix in Section 4 summarizes the new law as it pertains to Deschutes County.

Attachment 2 illustrates the potential eligible properties for rural ADUS using the *basic criteria only*—rural residential zones, parcels larger than 2 acres, containing a single-family dwelling. Using those criteria, there appears to be initial eligibility for approximately 7,950 properties. This does not take into account numerous other provisions, including wastewater/sanitation, site design, wildfire constraints, and others.

## **III. Implementation Process**

In order to implement SB 391 for Deschutes County, several steps must occur:

1. First, decide whether to allow ADUs or not. If yes, then the Board of County Commissioners (Board) must adopt an ordinance to allow ADUs in Deschutes County Code (DCC).
2. The Board must decide if they would like to adopt the text of the bill as is, or if they would like to modify certain provisions—this bill allows counties to place additional conditions (be more restrictive) than state law. The matrix below provides explanations of various conditions and potential decision points for the Board.
3. If the Board would like to develop and adopt additional local standards, they will need to decide the process to develop the local standards, including public engagement.
4. Once the Board decides whether to adopt the bill as is or with additional local standards, the public hearing process to adopt the law into DCC will begin.

As noted above, it is important to note that in addition to the provisions that Commissioners may choose to examine more closely, SB 391 depends on the adoption of statewide wildfire hazard maps and related provisions per SB 762. The complex process of adopting these maps and other provisions is governed at the state level, and it is estimated that final adoption will not occur until mid-2022 at the earliest. While this law is effective immediately and counties may adopt ordinances to allow ADUs, local governments cannot implement the law (meaning they cannot allow or approve ADUs) until the adoption of the statewide wildfire maps. It is staff's intention to work with the Board to finalize all other parts of SB 391 in the interim so that code amendments will be ready upon adoption of the statewide wildfire maps.

#### IV. SB 391 Matrix

The matrix below provides a summary of criteria contained in SB 391, along with explanations and context; additionally, the matrix highlights elements that will require action, whether additional research by staff, coordination with other agencies, a decision by the Board, or similar.

#### SB 391 – Rural Accessory Dwelling Unit Legislation

Eligibility	Restrictions	Comments
1. Rural Residential Exception Areas, Minimum Lot Size, and Dwelling Requirements	<ul style="list-style-type: none"> <li>Applies to Rural Residential (RR10), Multiple Use Agricultural (MUA10), Urban Area Reserve (UAR-10) and Suburban Residential (SR 2.5) zones.</li> <li>Lot or parcel must be at least two acres in size.</li> <li>One single-family dwelling must be sited on the lot or parcel.</li> </ul>	<ul style="list-style-type: none"> <li>There are over 10,000 lots in Southern Deschutes County. The Oregon Department of Environmental Quality (DEQ), the US Geological Survey (USGS) and Deschutes County have determined that the safety of the groundwater in southern Deschutes County is threatened by nitrate contamination from traditional onsite septic wastewater treatment systems.<sup>2</sup></li> <li>Consider raising the eligible lot or parcel size in this area (South of Sunriver) to 5 to 10 acres.</li> </ul>
2. Existing Dwelling Nuisance	<ul style="list-style-type: none"> <li>The existing single-family dwelling is not subject to an order declaring it a nuisance or pending action under ORS 105.550 to 105.600.</li> </ul>	<ul style="list-style-type: none"> <li>ORS 105.550 to 105.600, Abatement of Nuisance, provide local governments specific authority to abate certain public nuisance activities that affects the health, safety and welfare of its community.</li> </ul>
3. ADU Sanitation Requirements	<ul style="list-style-type: none"> <li>The ADU must comply with all applicable laws and regulations relating to sanitization and wastewater disposal and treatment.</li> </ul>	<ul style="list-style-type: none"> <li>In Southern Deschutes County, rural residential density, even at two acres, can create physical challenges for upgrading conventional septic systems and drainfields.</li> <li>Consider raising the eligible lot or parcel size in this area (South of Sunriver) to 5 to 10 acres.</li> </ul>
4. ADU Square Footage Requirements	<ul style="list-style-type: none"> <li>The ADU cannot include more than 900 square feet of useable floor area.</li> </ul>	<ul style="list-style-type: none"> <li>Useable floor area is undefined.</li> </ul>

<sup>2</sup> <https://www.oregon.gov/deq/wq/programs/Pages/Deschutes-Klamath-Groundwater-Protection.aspx>

Eligibility	Restrictions	Comments
5. ADU Distance Requirements	<ul style="list-style-type: none"> <li>The ADU is required to be located no farther than 100 feet from the existing single-family dwelling.</li> </ul>	<ul style="list-style-type: none"> <li>It is unclear whether the ADU in its entirety must be within 100 feet of the existing single-family dwelling or just a portion.</li> </ul>
6. ADU Water Supply Requirements	<ul style="list-style-type: none"> <li>If the ADU is relying on a domestic well, no portion of the lot or parcel can be within new or existing ground water uses restricted by the Water Resource Commission.</li> </ul>	<ul style="list-style-type: none"> <li>The Water Resource Commission has not restricted new or existing domestic water use in Deschutes County for 1) watering any lawn or noncommercial garden, not exceeding one-half acre, or 2) serving a domestic use, not exceeding 15,000 gallons a day.</li> </ul>
7. ADU Water Supply Source Option	<ul style="list-style-type: none"> <li>A county may require that an ADU be served by the same water supply source or water supply system as the existing single-family dwelling, provided such is allowed by an existing water right or a use under ORS 537.545 (exempt uses).<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>This provision is optional</li> </ul>
8. ADU / Metolius Area of Critical State Concern / Limitations	<ul style="list-style-type: none"> <li>No portion of a lot or parcel can be within a designated area of critical state concern.</li> </ul>	<ul style="list-style-type: none"> <li>The Oregon legislature designated the Metolius River Basin as an "area of critical statewide concern" in 2009.</li> </ul>
9. ADU Setback Requirements	<ul style="list-style-type: none"> <li>The ADU is required to have adequate setbacks from adjacent lands zoned Exclusive Farm Use (EFU) or Forest Use.</li> </ul>	<ul style="list-style-type: none"> <li>Adequate setbacks are not defined.</li> </ul>

<sup>3</sup> [https://oregon.public.law/statutes/ors\\_537.545](https://oregon.public.law/statutes/ors_537.545)

Eligibility	Restrictions	Comments
10. ADU / Wildland-Urban Interface Requirements	<ul style="list-style-type: none"> <li>The lot or parcel must comply with the rules of the State Board of Forestry under ORS 477.015 to 477.061.<sup>4</sup></li> </ul>	<ul style="list-style-type: none"> <li>ORS 477 pertains to the wildland-urban interface (WUI), formerly known as the forestland-urban interface. SB 762, adopted in June 2021, rewrites several sections of ORS 477 cited in SB 391. Most significantly, the new provisions of ORS 477 require the State Board of Forestry to define the wildland-urban interface based on national best practices and define criteria and classes of the WUI to be included in the statewide wildfire hazard map. Until the provisions of the revised ORS 477 are met at the state level, the County will be unable to define the related criteria in SB 391.</li> </ul>
11. ADU / Outside Wildland-Urban Interface Area Requirements	<ul style="list-style-type: none"> <li>If the ADU is not subject to ORS 477.015 to 477.061 (i.e. outside of the newly-defined wildland-urban interface), it must have defensible space and fuel break standards as developed in consultation with local fire protection service providers.</li> </ul>	<ul style="list-style-type: none"> <li>See above re: ORS 477.</li> </ul>

<sup>4</sup> Provisions in ORS 477.015-061, Urban Interface Fire Protection, were established through efforts of the Oregon Department of Forestry, the Office of the State Fire Marshal, fire service agencies from across the state, and the Commissioners of Deschutes, Jefferson, and Jackson Counties. It is designed to address the expanding interface wildfire problem within Oregon Department of Forestry Fire Protection Districts. Full implementation of the statute occurred on January 1, 2002. The statute does the following:

1. Directs the State Forester to establish a system of classifying forestland-urban interface areas;
2. Defines forestland-urban interface areas;
3. Provides education to property owners about fire hazards in forestland-urban interface areas. Allows for a forestland-urban interface county committee to establish classification standards;
4. Requires maps identifying classified areas to be made public;
5. Requires public hearings and mailings to affected property owners on proposed classifications;
6. Allows property owners appeal rights;
7. Directs the Board of Forestry to promulgate rules that set minimum acceptable standards to minimize and mitigate fire hazards within forestland-urban interface areas; and
8. Creates a certification system for property owners meeting acceptable standards. Establishes a \$100,000 liability limit for cost of suppressing fires, if certification requirements are not met.

Eligibility	Restrictions	Comments
12. ADU / Statewide Wildfire Map Requirements	<ul style="list-style-type: none"> <li>Statewide wildfire risk maps must first be approved per SB 762.</li> <li>ADUs are then required to comply with the Oregon residential specialty code relating to wildfire hazard mitigation for the mapped area (R327.4).</li> </ul>	<ul style="list-style-type: none"> <li>The State of Oregon wildfire risk maps are anticipated for adoption in mid-2022.</li> </ul>
13. ADU Adequate Access and Evacuation for Firefighting Requirements	<ul style="list-style-type: none"> <li>Local regulations must ensure the ADU has adequate access for firefighting equipment, safe evacuation and staged evacuation areas</li> </ul>	<ul style="list-style-type: none"> <li>This provision will require coordination with Rural Fire Protection and Road Districts. Adequate access, safe evacuation and staged evacuation areas are not defined.</li> </ul>
14. ADU Occupancy Requirements	<ul style="list-style-type: none"> <li>ADUs cannot be allowed for vacation occupancy, as defined in ORS 90.100.</li> </ul>	<ul style="list-style-type: none"> <li>Consider requiring a restrictive covenant that is recorded, prohibiting the ADU from being used as a vacation rental.</li> </ul>
15. ADU Land Division Requirements	<ul style="list-style-type: none"> <li>If land divided, the single family dwelling and ADU cannot be situated on a different lot or parcel.</li> </ul>	<ul style="list-style-type: none"> <li>None.</li> </ul>
16. ADU / Additional Units	<ul style="list-style-type: none"> <li>A second ADU is not allowed</li> </ul>	<ul style="list-style-type: none"> <li>Legislative amendments will need to clarify that a medical hardship dwelling and/or RV are not allowed.</li> </ul>

**V. SB 391 Decision Points Necessary Prior to Drafting of Amendments**

If the Board wants to adopt SB 391 into DCC, it must first determine the desired procedural decision type in addition to deciding on a number of substantive issues contained in the bill itself.

*Procedural Issues – Ministerial Decision versus Limited Land Use Decision*

1. Ministerial Decision. This type of decision entails that the amendments are structured with clear and objective standards for ADU applications, require no discretion from staff, and as such would not be subject to public notice or public hearings requirements.
2. Limited Land Use Decision. Limited land use decisions can, if desired, be structured so notice of application is sent to neighboring property owners. Regardless, these types of decisions require a

mailed notice of decision to neighbors and those who have standing by commenting on an application. The land use decision can be appealed to a Hearings Officer and/or the Board.

Three provisions of SB 391 help illustrate the comparison between a ministerial decision and a limited land use decision:

- ADU / Wildland-Urban Interface Requirements. SB 391 requires applications to demonstrate if applicable that the subject property complies with the rules of the Department of Forestry (DOF) for mitigating fire hazards, as defined in ORS 477.015 to ORS 477.061. Legislative amendments structured for a ministerial decision can specify DOF standards as part of a complete application.

Alternatively, for a limited land use decision, amendments can require that an applicant demonstrate (forester fuel thinning contract, etc.) the subject property will mitigate fire hazards consistent with DOF standards. DOF certification would then be a condition of land use approval prior to issuing a building permit.

- ADU / Outside Wildland-Urban Interface Requirements. SB 391 requires for those ADUs not subject to ORS 477.015 to ORS 477.061 (i.e., outside a DOF Wildlife-Urban Interface designation), to demonstrate that the subject property has implemented defensible space and fuel break standards as developed in consultation with local fire protection service providers. Legislative amendments structured for a ministerial decision can specify documentation by a local fire protection service provider as part of a complete application.

Alternatively, for a limited land use decision, amendments can require that an applicant demonstrate (forester fuel thinning contract, etc.) the subject property will mitigate defensible space and fuel break standards consistent with local fire protection service providers. Local fire protection service provider documentation would then be a condition of land use approval prior to issuing a building permit.

- ADU / Access & Evacuation Requirements. SB 391 requires that each ADU have adequate access for firefighting equipment, safe evacuation and staged evacuation areas. Legislative amendments structured for a ministerial decision will require clearly and objectively defining adequate access, safe evacuation and staged evacuation areas. Based on those definitions, an applicant could then submit the requisite documentation as part of a complete application.

Alternatively, for a limited land use decision, amendments can require that an applicant demonstrate subject to discretionary criteria that adequate access, safe evacuation and staged evacuation areas are provided. Fulfilling this obligation would then be a condition of land use approval prior to issuing a building permit.

### *Substantive Issues*

As noted in the above matrix, if the Board wants to adopt SB 391 into DCC, the following items require clarification by the County prior to drafting legislative amendments. These items are separate from wildfire-related provisions that will be determined at the state level.

3. Parcel Size. Consider raising the eligible lot or parcel size in Southern Deschutes County (South of Sunriver) to 5 acres.
4. Floor Area. Define “useable floor area” for the ADU.
5. Distance Requirements. Clarify whether the ADU in its entirety must be within 100 feet of the existing single-family dwelling or just a portion.
6. Setbacks. Define adequate ADU setbacks from adjacent lands zoned EFU or Forest Use.
7. Restrictive Covenant. Consider requiring a restrictive covenant that is recorded, prohibiting the ADU from being used as a vacation rental.
8. Water Supply Source. Clarify whether to require that an ADU be served by the same water supply source or water supply system as the existing single-family dwelling.

## **VI. Next Steps**

Staff can schedule a follow-up work session with the Planning Commission later in the summer to continue the discussion and provide any updates.

### Attachment:

1. SB 391
2. SB 391 Initial Criteria Map