

**Recommendation for Council Action – Backup  
Floodplain Variance Request – 801 Red River Street**

**SUMMARY OF FINDINGS:**

1. THE DEVELOPMENT ENCROACHES ON THE 25-YEAR AND 100-YEAR FLOODPLAINS OF WALLER CREEK. The performance stage and walkway, considered buildings, and the other miscellaneous structures encroach on the 25-year and 100-year floodplains. Portions of the property are not located in the floodplain.
2. THE DEVELOPMENT WILL NOT RESULT IN INCREASED FLOOD HEIGHTS. The owner's civil engineer has submitted information that indicates that the placement of the buildings and structures in their present locations does not cause an adverse flooding impact to other properties. Over a period of years, the owner has placed fill material in the floodplain that is considered to be an adverse flooding impact. The applicant proposes to mitigate the situation by excavating the fill material from the floodplain.
3. THE DEVELOPMENT SATISFIES THE EXCEPTIONS IN THE CENTRAL BUSINESS AREA. A building within the central business area is allowed to encroach on the 100-year floodplain if it meets certain criteria or certain criteria are waived by the Director. Since neither the performance stage nor walkway is a habitable building and since Stubb's has established evacuation procedures in times of emergency, the Director waived the finished floor and safe access requirements.
4. THE DEVELOPMENT IN THE FLOODPLAIN HAS NOT BEEN CERTIFIED TO WITHSTAND THE FORCES OF FLOOD WATERS. Despite the development satisfying the exceptions in the central business area, the design and construction of the buildings and structures in the floodplain has not been certified to withstand the forces of flood waters. During the time of a flood, materials and debris may be swept onto other lands resulting in further injury and damage.

**APPLICABLE CODE AND VARIANCES REQUESTED**

- I. LDC 25-7-92 (A) Encroachment on Floodplain Prohibited prohibits encroachment of a building on the 25-year floodplain.  
  
***VARIANCE REQUESTED:** The applicant requests a variance to allow placement of the stage and walkway within the 25-year floodplain of Waller Creek.*
- II. LDC 25-7-94 (E) Exceptions in Central Business Area requires that site plans approved under this section must comply with the flood proofing requirements of the Building Code.

***VARIANCE REQUESTED:** The applicant requests a variance to allow the stage and walkway to remain without complying with the flood proofing requirements in the Building Code.*

- III. LDC Section 25-7-152 Dedication of Easements and Rights-of-Way requires that the owner of real property proposed to be developed dedicate to the public an easement or right-of-way for a drainage facility, open or enclosed, and stormwater flow to the limits of the 100-year floodplain.

***VARIANCE REQUESTED:*** *The applicant requests a variance to eliminate the requirement for the drainage easement within the development area entirely. Typically, the City limits drainage easement variances to exclude the footprint of the building or structure involved, but requires the drainage easement over the remaining portion of the 100-year floodplain.*

- IV. LDC Section 25-12-3, (Local Amendments to the Building Code), Section G102.3 Nonconforming Uses prohibits expanding, changing, enlarging, or altering a structure or the use of a premises in a way which increases its nonconformity.

***VARIANCE REQUESTED:*** *There are non-conforming buildings that existed on this property prior to the unpermitted development. The applicant requests a variance to allow the unpermitted buildings and structures to remain, which increase the non-conformity of the premises.*

- V. LDC Section 25-12-3, (Local Amendments to the Building Code), Section 1612.4 Design and Construction requires that the design and construction of buildings and structures located in flood hazard areas shall be in accordance with ASCE 24.

***VARIANCE REQUESTED:*** *The applicant requests a variance to allow the unpermitted buildings and structures in the 100-year floodplain to remain without providing certification from a registered design professional that they are constructed in accordance with ASCE 24, which assures that they can withstand the forces of the flood waters.*

- VI. LDC Section 25-12-3, (Local Amendments to the Building Code), Section 1612.5 Flood Hazard Documentation requires that documentation from a registered design professional be submitted to the building official.

***VARIANCE REQUESTED:*** *The applicant requests a variance to allow the unpermitted buildings and structures in the 100-year floodplain to remain without submitting documents from a registered design professional that they are constructed in accordance with ASCE 24, which assures that they can withstand the forces of the flood waters.*

## PREREQUISITES FOR GRANTING VARIANCES AND FINDINGS:

Per LDC Section 25-12-3, Technical Codes, Section G105.7 Variances, variances shall only be issued upon an affirmative finding of the five conditions described below:

### PREREQUISITE

1) A technical showing of good and sufficient cause based on the unique characteristics of the size, configuration or topography of the site.

*Insufficient causes for issuing a variance may include the following:*

- *Less than a drastic depreciation of property.*
- *Convenience of property owner.*
- *Circumstances of owner not land.*
- *To obtain better financial return.*
- *Property similar to others in neighborhood.*
- *Hardship created by owner's own actions.*

2) A determination that failure to grant the variance would result in exceptional hardship by rendering the lot undevelopable;

*The location of the floodplain on the property is a characteristic of the land. Hardship refers to the effect of the floodplain status of the land on its use; it does not refer to personal or financial circumstances of the current owner of the land. In fact financial hardship, inconvenience, aesthetic considerations, physical handicaps, personal preferences or the disapproval of one's neighbors do not qualify as exceptional hardships. The applicant has the burden of proving exceptional hardship. FEMA advises that the reasons for granting floodplain management variances must be substantial and the proof compelling. The claimed hardship must be exceptional, unusual and peculiar to the property involved.*

3) A determination that granting of a variance would not result in increased flood heights, additional threats to public safety, extraordinary public expense, nor create nuisances, cause fraud on or victimization of the public or conflict with existing laws or conflict with existing laws or ordinances.

### FINDING

1) **CONDITION IS NOT MET.** The owner has not demonstrated a good and sufficient cause that justifies the placement of buildings and structures in the floodplain that are not flood proofed. In addition, the owner has not demonstrated that the presence of a drainage easement hinders their ability to use the property.

2) **CONDITION IS NOT MET.** Failure to grant the variances will not render the lot undevelopable. Prior to the construction of the buildings and structures referenced in this variance request, the property was and continues to be used as a restaurant. There are portions of the property that are not in the 100-year floodplain that could be developed. In addition, keeping some of the development activities in their current location and requiring them to be flood proofed is not an exceptional hardship.

3) **CONDITION IS NOT MET.** The proposed development will not result in increased flood heights. However, the development does cause additional threats to public safety due to the danger that materials and debris may be swept onto other lands resulting in further injury or damage.

4) A determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.

*Relief is defined as respite from unnecessary hardship. Unnecessary hardship is defined as:*

- *Loss of all beneficial or productive use.*
- *Deprivation of reasonable return on property.*
- *Deprivation of all or any reasonable use.*
- *Rendering property valueless.*
- *Inability to develop property in compliance with the regulations.*
- *Reasonable use cannot be made consistent with the regulation.*

5) Notification to the applicant in writing over the signature of the building official that the issuance of a variance to construct a structure below the base flood level will result in increased premium rates for flood insurance, and that such construction below the base flood level increases risks to life and property.

4) **CONDITION IS NOT MET.** A variance from flood proofing the buildings and structures and eliminating the drainage easement entirely is not the minimum necessary to afford relief.

5) **CONDITION IS MET.** The City will deliver a letter to the applicant stating the increased risks of developing in the floodplain.