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February 20, 2017

The Honorable Joseph Simonetto
President, Munster Town Council
1005 Ridge Road
Munster, IN 46321

Dear Council President Simonetto:

The National Association of REATLORS® ("NAR"), through its Land Use Initiative consulting services and on behalf of the Greater Northwest Indiana Association of REALTORS® (the "Association"), has provided the attached Memorandum as a review of the formula business ordinance (the "Proposed FBO") for the Town of Munster, Indiana (the "Town"). As was stated in an earlier letter from 2017 GNIAR President Nathan Reeder, the Association is concerned the Proposed FBO would have a negative impact on property values and the marketability of residential and commercial property in Munster and desires to work with the Town Council and other stakeholders to develop a course of action that further enhances the status of the Town of Munster as one of the region's premier communities.

The intended use of the Memorandum is to identify specific issues with the Proposed FBO that is causing concern so they may be fully vetted prior to a Town Council decision regarding the adoption of the Proposed FBO. The Association requests that the Town Council table the Proposed FBO and to work with it and other stakeholders to either abandon the proposal or make it more business-friendly.

The analysis found in the attached Memorandum summarized below reflects a view of issues raised by the Proposed FBO from the perspective of general experience with land use planning, policies, techniques and implementation of laws and regulations. This memorandum is not a legal opinion and does not constitute legal advice.

The Memorandum is organized in the following manner:

- A **Background** section that provides a summary of the key substantive provisions of the Proposed FBO
- An **Analysis** section that is organized in two parts:
    - **Part I** - discusses various grounds on which the Proposed FBO may be susceptible to challenge;
    - **Part II** - raises a number of issues considered potentially harmful to the Town should it adopt the Proposed FBO.

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The following is a summary of **Part I** and **Part II** of the **Analysis** section:

ANALYSIS

Part I: SUSCEPTIBILITY OF PROPOSED FBO TO LEGAL CHALLENGE

Issue I(a): The Proposed FBO may be vulnerable to challenge under the Dormant Commerce Clause of the U.S. Constitution. (Pages 5 to 11)

***Recommendation Issue I(a)* (Page 11):**
It is assumed the Town has sought and received advice from its counsel as to probability the Proposed FBO may be vulnerable to constitutional challenge on Commerce Clause grounds. Given the analysis found in the Memorandum and assuming the Proposed FBO is adopted in its current form, it is recommended that the Town adequately consider potential administrative and financial costs of having to defend against such a constitutional challenge.

Issue I(b): Certain sections of the Proposed FBO contain arbitrary standards that are potentially vulnerable to challenge under the substantive due process clauses of the U.S. and Indiana Constitutions. (Pages 11 to 13)

***Recommendation Issue I(b)* (Pages 13):**
The referenced sections of the Proposed FBO in the Memorandum are considered as arbitrary and therefore vulnerable to challenge under the substantive due process clauses of the U.S. and Indiana Constitutions. It is assumed the Town has sought and received advice from its counsel as to probability the Proposed FBO may be vulnerable to a challenge under the substantive due process clauses of the U.S. and Indiana Constitutions. Given the analysis found in the Memorandum and assuming the Proposed FBO is adopted in its current form, it is recommended that the Town adequately consider potential administrative and financial costs of having to defend against such constitutional challenges.

Issue I(c): Certain of the proposed conditional use permit "findings" are vague and therefore are vulnerable to challenge under the constitutional "void for vagueness" doctrine and susceptible to inconsistent and potentially unfair interpretation and application. (Pages 13 to 15)

***Recommendation Issue I(c)* (Page 15):**
Given the analysis found in the Memorandum and if the Proposed FBO is to be adopted, it is recommended that the Town revise the Proposed FBO sections listed above (and any others that contain vague or ambiguous terminology) to include clear and definite standards that can

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be clearly interpreted and consistently applied by the Zoning Board of Appeals (or Town Council) in reviewing special use permit applications for formula retail establishments.

PART II: ISSUES CONSIDERED HARMFUL TO THE TOWN SHOULD IT ADOPT THE PROPOSED FBO

Issue II(a): The Proposed FBO could result in increased vacancies in shopping centers and restaurant and retail spaces. (Pages 16)

***Recommendation Issue II(a)* (Page 17)**:
Given the analysis found in the Memorandum, it is recommended that the Town table the Proposed FBO and work with the Association and other stakeholders to fully discuss the potential unintended consequences of the Proposed FBO, including vacant storefronts and lost or reduced rental revenue for commercial property owners and reduced property tax revenue for the Town.

Issue II(b): The Town has not defined the "unique character and aesthetics" that it seeks to preserve and has not proven that the Proposed FBO is necessary to protect it. (Page 17 to 18)

***Recommendations II(b)* (Page 18)**:
Given the analysis found in the Memorandum and if the Proposed FBO is to be adopted, it is recommended that the Town clearly define and document the "unique character and aesthetic" that the Proposed FBO ostensibly is intended to preserve. Further, based on the apparent lack of empirical evidence supporting the need for the Proposed FBO, it is recommended that the Proposed FBO be rejected as an unnecessary regulatory measure as it appears the Proposed FBO is a solution to a problem that does not exist.

Issue II(c): Proposed Sections 26-874(b) and 26-874(c) are inconsistent as to who would review and decide special use permit applications for formula retail businesses and restaurants. (Page 18)

***Recommendation II(c)* (Pages 18 to 19)**:
Given the analysis found in the Memorandum, there is a conflict in the language between Sections 26-874(b) and 26-874(c). It is recommended that if the Proposed FBO is to be adopted that the Proposed FBO be revised to resolve the conflict. Further, there does not appear to be any factual justification for designating the Board of Zoning Appeals as the decision-maker for special use applications for formula retail businesses and restaurants.

Issue II(d): The Town Council should consider adopting the "Possible Amendments" outlined in the Manager's Report that would make the Proposed FBO more business-friendly. (Page 19 to 20)

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Recommendation II(d) **(Page 20)**:
Given the analysis found in the Memorandum, if the Town Council chooses not to reject the Proposed FBO altogether, then the following "Possible Amendments" are recommended for the Town Council to consider:

1. "Amend the definition of formula business to be a business with 50 or more standardized locations."
2. "Eliminate the radius of existing businesses provision [Section 26-874((c)(2)] altogether"; and
3. "Eliminate the proportional (i.e., percentage cap) provision [Section 26-874(d)] altogether".

As Nathan Reeder, 2017 GNIAR President, stated in his earlier letter, "…our experience leads us to believe that this ordinance has many areas that need further discussion. It is not our intention to be viewed as adversaries but, once again, considered as a resource to help you determine how you can best protect, promote and represent the best interests of the citizens of the Town of Munster."

Sincerely,

Joseph Wszolek
Chief Operating Officer
GREATER NORTHWEST INDIANA ASSOCIATION OF REALTORS®

Cc: Councilor John Reed, Ward 1
Councilor Lee Ann Mellon, Ward 2
Councilor Dave Nellans, Ward 4
Councilor Andy Koultourides, Ward 5
Dave Shafer, Clerk-Tresurer
Dustin Anderson, Town Manager
Peter Novak, Jr, CEO, Greater Northwest Indiana Association of REALTORS®

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MEMORANDUM

Proposed Formula Business Ordinance (Ord. No. 1707)
Town of Munster, IN

February 20, 2017

The National Association of Realtors® ("NAR"), through its Land Use Initiative consulting services and on behalf of the Greater Northwest Indiana Association of Realtors® (the "Association"), has provided this memorandum as a review of the formula business ordinance (the "Proposed FBO") proposed for the Town of Munster, Indiana (the "Town"). The Proposed FBO would amend the Munster Land Development Code (the "LDC") to make formula retail businesses and formula restaurants a special use within the C-1 Highway-Oriented General Business, C-2 Restricted Retail and Office Neighborhood Business, O-1 Office Park, and SC Shopping Center zoning districts. The Proposed FBO would prohibit any formula business from locating within 15 miles of "another branch ... with effectively the same product or service offerings." The Proposed FBO would also limit the percentage of formula businesses allowed in each business category—e.g., "formula pharmacies" would be limited to 50% of all pharmacies in Town, while "formula general merchandise stores" would be capped at 33% of all general merchandise stores.

The Association is concerned the Proposed FBO would have a negative impact on property values and the marketability of residential and commercial property in Munster and desires to work with the Town Council and other stakeholders to develop a course of action that further enhances the status of the Town of Munster as one of the region's premier communities. The intended use of the memorandum is to identify specific issues with the Proposed FBO causing concern so they may be fully vetted prior to a decision about the adoption of the Proposed FBO. The Association requests that the Town Council table Proposed FBO and to work with it and other stakeholders to either abandon the proposal or make it more business-friendly. For the purpose of this memorandum, NAR was provided with a copy of the Proposed FBO titled "Ordinance No. 1707" and marked "As recommended by Plan Commission 12/13/2016," together with associated staff reports and minutes.[1]

The analysis that follows reflects a view of issues raised by the Proposed FBO from the perspective of general experience with land use planning, policies, techniques and implementation of laws and regulations. This memorandum is not a legal opinion and does not constitute legal advice.

[1] NAR was also provided a copy of the case *Island Silver & Spice v. Islamorada Village*, 475 F. Supp. 2d 1281 (S.D. Fla. 2007).

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EXECUTIVE SUMMARY

The **Background** section of this memorandum provides a summary of the key substantive provisions of the Proposed FBO.

The **Analysis** section is organized into two parts.

Part I discusses various grounds on which the Proposed FBO may be susceptible to challenge. It notes that, because formula business regulations typically apply to national retail and restaurant chains that operate in interstate commerce, formula business regulations generally may be susceptible to challenge under the Commerce Clause of the U.S. Constitution, which limits the states' authority to regulate interstate commerce. The analysis describes three ways in which an ordinance can be found to violate the Dormant Commerce Clause and discusses the Proposed FBO in relation to each of the three ways. In addition, it points out several sections of the Proposed FBO that could be considered arbitrary or vague and therefore susceptible to inconsistent and potentially unfair interpretation and application.

Part II of the analysis raises a number of issues considered potentially harmful to the Town should it adopt the Proposed FBO. They include whether the Town has considered the potential unintended consequences of the Proposed FBO, including vacant storefronts and negative impacts on commercial lease rates and property values. It also notes that the Town has not defined the "unique character and aesthetics" that it seeks to preserve and has not clearly demonstrated the need for the Proposed FBO. As a result, it can be argued that the Proposed FBO purports to solve a problem that simply does not exist. The Analysis also points out that proposed Sections 26-874(b) and 26-874(c) are inconsistent as to who—the Zoning Board of Appeals or the Town Council—would review and decide special use permit applications for formula retail businesses and restaurants. Lastly, the Analysis argues that if the Town Council chooses not to reject the Proposed FBO outright, or table it and give the Association and other stakeholders the opportunity to discuss ways to modify the Proposed FBO, then it should consider adopting certain of the "Possible Amendments" outlined in the Manager's Report. As discussed below, certain of these amendments would, in fact, help make the Proposed FBO more business-friendly.

BACKGROUND

According to a report from the Town Manager to the Town Council dated January 16, 2017 (the "Manager's Report"), Town staff and elected officials began developing a formula business ordinance in July 2016. The Manager's Report notes that the Proposed FBO "was conceived as a way to ensure a balanced mix of businesses within the Town of Munster."

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Below is a summary of the key substantive provisions of the Proposed FBO.

Purpose: The Proposed FBO does not have a "purpose" section, but it does contain some "whereas" clauses that ostensibly explain the rationale for the proposal. The clauses state that the Town "seeks to attract businesses with high-quality product and service offerings that will contribute to the *unique character and aesthetics of the Town*," and that it "desires to promote a diversity and variety of choice to assure a *balanced mix of commercial uses* available to serve both resident and visitor populations."[2] It also asserts that "an appropriate balance of local, regional or national-based businesses in the community contribute to the long term economic vitality of both the Town and Region."[3]

Definition of Formula Retail Business: Section 26-874(a)(1) would define "formula retail business" to mean:

> A retail sales establishment that uses a trademark, logo, service mark or other mutually identifying name or symbol that is *shared by fifteen or more commercial businesses* and which *maintains any standardized array* of services and/or merchandise, decor, business method, architecture, layout, uniform, or similar standardized feature.[4]

The definition also limits formula retail businesses to a specific list of business categories:

> Formula retail establishments may exist under any of the following business licensing classifications: Animal Services; Apparel & Accessory Stores; Computer, Cell phones, Electronics; Florist and Gift Shops; Food Stores; Gas Stations/Auto Repair; General Merchandise Stores; Home Furniture, Furnishings, and Equipment; Pharmacy; Retail Building Supply, Hardware, Garden Shop; or Video Stores.[5]

Definition of Formula Restaurant: Section 26-874(a)(2) would define "formula restaurant" to mean:

> A restaurant that uses a trademark, logo, service mark or other mutually identifying name or symbol that is *shared by fifteen or more commercial businesses* and which *maintains any standardized array* of services and/or merchandise, decor, business method, architecture, layout, uniform, or similar standardized feature.[6]

Special Use Permit Requirement: Formula retail businesses and formula restaurants would require a special use permit from the Board of Zoning Appeals in the C-1, C-2, 0-1, and SC zoning districts.[7]

[2] Proposed FBO (whereas clauses) (emphasis added).
[3] Proposed FBO (whereas clauses).
[4] Proposed FBO § 26-874 (a)(1) (emphasis added).
[5] Proposed FBO § 26-874 (a)(1).
[6] Proposed FBO § 26-874 (a)(2).
[7] Proposed FBO § 26-874 (b).

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Required Findings for Special Use Permit: In determining whether to grant a special use permit for a formula retail business or restaurant, Section 26-874(c) states that the "town council shall consider and be guided by the following" factors and criteria:

(1) The appearance of the formula retail business meets or exceeds building material, landscape design, and other aesthetic standards as established by the Munster Town Code and Munster Plan Commission;

(2) The formula retail business does not already have another branch within 15 miles with effectively the same product or service offerings of the proposed location;

(3) The formula retail business will be mutually beneficial to and will enhance the economic health of surrounding uses in the district;

(4) Required criteria for approval of a special use permit as listed in Sec. 26-854, specifically that the special use:

a. Is necessary for the public convenience at the location;

b. Is so designed, located and proposed to be operated that public health, safety and welfare will be protected;

c. Will not cause substantial injury to the value of other property in the neighborhood in which it is located; and

d. Except in the case of planned developments, conforms to the applicable regulations of the district in which it is to be located.[8]

Note: As discussed in the Analysis section, the Proposed FBO is internally inconsistent in that Section 26-874(b) states that a special use permit for a formula retail business or restaurant must be granted by the Board of Zoning Appeals, while Section 26-874(c) indicates that the permit would be granted by the Town Council.

Caps on Formula Businesses: The Proposed FBO would limit the percentage of formula businesses that would be allowed within each business category. For example, proposed Section 26-874(d) states, in part:

A formula retail business may only be established or relocated:

(1) Where it would not result in *Formula Restaurants* existing as more than 50% of the total number of restaurants operating within the Town of Munster, as determined by active business licenses.[9]

[8] Proposed FBO § 26-874 (c).
[9] Proposed FBO § 26-874 (d)(1).

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A similar restriction would apply to each of the business categories listed in the definition of formula retail business. The following table summarizes the proposed percentage cap on formula businesses within each business category.

Proposed Caps on Percentage of Formula Businesses[10]

Business Category	Cap on Percentage of Formula Businesses in Munster
Restaurants	50%
Food Stores	50%
Gas Stations and Auto Repair Establishments	50%
Home Furniture, Furnishings, and Equipment Establishments	50%
Pharmacies	50%
Video Stores	50%
Animal Services	33%
Apparel and Accessory Stores	33%
Computer, Cell Phone, and Electronics Shops	33%
Florist and Gift Shops	33%
General Merchandise	33%
Building Supply, Hardware, and Garden Shops	33%

ANALYSIS

PART I: SUSCEPTIBILITY OF PROPOSED FBO TO LEGAL CHALLENGE

The following analysis discusses various grounds on which the Proposed FBO may be susceptible to challenge.

Issue I(a): The Proposed FBO may be vulnerable to challenge under the Dormant Commerce Clause of the U.S. Constitution.

[10] Based on active business licenses. *See* Proposed FBO § 26-874 (c).

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Overview of Dormant Commerce Clause Implications for Formula Business Ordinances

Because they typically apply to national retail and restaurant chains and other businesses that operate in interstate commerce, formula business regulations may be susceptible to scrutiny under the Commerce Clause of the U.S. Constitution, which limits the states' authority to regulate interstate commerce.[11] Commonly referred to as the "Dormant Commerce Clause," U.S. Const. Art. I, § 8, cl. 3 "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[12] In general, there are three ways that an ordinance can violate the Dormant Commerce Clause.

First, an ordinance violates the Dormant Commerce Clause if it is "facially discriminatory," meaning that it explicitly imposes different regulations on interstate businesses than it does on intrastate businesses.[13] An example of a facially discriminatory ordinance would be where the ordinance applies only to businesses that are owned by out-of-state interests.

Second, an ordinance that is facially neutral may be found unconstitutional if it is enacted for the purpose of discriminating against interstate commerce.[14] The U.S. Supreme Court's decision in *Bacchus Imports, Ltd. vs. Dias*[15] provides a good example of this approach. The *Bacchus* case involved an exemption to the State of Hawaii's generally applicable wholesale liquor excise tax on okolehao and pineapple wine.[16] The *Bacchus* court invalidated the statute on Dormant Commerce Clause grounds, noting that the "purpose of the exemption was to aid Hawaiian industry" and that the motivation of the legislature was the desire to aid the makers of locally produced product."[17]

Third, the Dormant Commerce Clause also may be violated by an ordinance that is facially neutral but has a discriminatory effect on interstate commerce.[18] Commentators have pointed out that discriminatory effects can take many forms, including but not limited to the following:

> (1) using facially neutral criteria merely as a proxy for geographic origin; (2) effectively barring the import of out-of-state goods, or barring their sale once imported; (3) acting to raise the cost of doing business in a state for out-of-state competitors, which costs are not also borne by in-state actors; (4) stripping competitive advantages from out-of-state competitors; (5) otherwise leveling the playing field to the benefit of in-state

[11] *See* Blaesser & Twardowski, *Retail Space for Lease? Chain Stores Need Not Apply – Part 2* at 5, RETAIL LAW STRATEGIST (January 2007) (hereinafter "*Retail Space for Lease*").
[12] *Fulton Corporation v. Faulkner*, 516 U.S. 325, 330 (1996).
[13] *Retail Space for Lease* at 5.
[14] *See id*.
[15] *Bacchus Imports, Ltd. vs. Dias*, 468 U.S. 268 (1984).
[16] *See* Denning & Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URBAN LAWYER 907, 920 (Fall 2005) (hereinafter "Denning & Lary") (citing *Bacchus Imports*, 468 U.S. at 270)).
[17] Denning & Lary at 921 (quoting *Bacchus Imports*, 468 U.S. at 273).
[18] *Retail Space for Lease* at 5.

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> economic actors; or (6) subsidizing in-state actors through mechanisms that are funded entirely (or largely) by out-of-state economic actors.[19]

Potential Application of the Dormant Commerce Clause to the Proposed FBO

Facially Neutral or "Facially Discriminatory": Under the Proposed FBO, a "formula retail business" or "formula restaurant" that is based solely in Indiana would be treated the same as a nation-wide or out-of-state retail or restaurant chain. As a result, the Proposed FBO appears to be facially neutral and unlikely to fail under the first Dormant Commerce test.

Discriminatory Purpose: The next question is whether the Proposed FBO, if approved by the Town Council, was enacted for the purpose of discriminating against interstate commerce. In determining whether a statute or ordinance was enacted for a discriminatory purpose, the courts will examine both direct and indirect evidence, including, for example:

> (1) evidence of a "consistent pattern" of actions by the decision making body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decision making body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decision makers on the record or in minutes of their meetings.[20]

A good example of this type of analysis in the context of a formula business ordinance is the case *Island Silver & Spice, Inc. v. Islamorada*, in which the U.S. District Court for the Southern District of Florida invalidated the formula retail ordinance adopted by the Village of Islamorada on Dormant Commerce Clause grounds.[21] In concluding that the ordinance was "tailored to serve local interests by preventing competition from local chains," the court relied, in part, on testimony from a member of the Village Council that the ordinance "was inspired by the Council's desire for 'none of those darn chain stores' to come to town."[22]

Although the text of the Proposed FBO does not explicitly state that its purpose is to protect local businesses against out-of-state competitors, one of the "whereas" clauses states that "an appropriate balance of *local, regional or national-based businesses* in the community contribute to the long term economic vitality of both the Town and Region."[23] Also, while explaining the Proposed FBO during the December 13, 2016 Plan Commission hearing, the Town Manager noted that the proposal "would not allow a formula business within the Town of

[19] Denning & Lary at 933.
[20] Denning & Lary at 923 (quoting *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004) (citations omitted)).
[21] *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281 (Dist. So. Fla. 2007), aff'd *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008).
[22] *Island Silver & Spice, Inc.*, 475 F. Supp. 2d at 1291-1292.
[23] Proposed FBO (6th whereas clause) (emphasis added).

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Munster ... *if the Town had already met its quota of formula vs. locally owned businesses*."[24] It can be argued that each of these statements is evidence that the Proposed FBO is intended to regulate out-of-state (i.e., "national-based") businesses differently than "locally owned businesses."

Note: The Manager's Report states that the proposed definition of formula businesses "was based on [the definition] used successfully in other municipalities, specifically Coronado, California." This reference to the Coronado definition suggests that the Town is confident in the Proposed FBO is because the formula business ordinance that was adopted by the City of Coronado and was upheld against a Dormant Commerce Clause challenge in 2003. However, it is questionable whether the Town should rely on the Coronado case.

In that case, *Coronadans Organized for Retail Enhancement v. City of Coronado*, a group of property owners and an unincorporated association challenged Coronado's formula business ordinance on the grounds that it violated the Dormant Commerce Clause.[25] The Coronado ordinance imposed a citywide cap of ten on "formula fast food restaurants," required "formula businesses" to obtain a special use permit, and limited formula businesses to a maximum of 50 linear feet of street frontage. Like the Proposed FBO, the Coronado ordinance was accompanied by legislative findings (i.e., "whereas" clauses), including the following:

> WHEREAS, the addition of formula retail businesses in the commercial areas, if not monitored and regulated, will serve to frustrate the Business Areas Development Plan goal of a diverse retail base with a unique retailing personality comprised of a mix of businesses ranging from small to medium to large and from *local to regional to national*. Specifically the unregulated and unmonitored establishment of additional formula retail uses will unduly limit or eliminate business establishment opportunities for smaller or medium sized businesses, many of which tend to be non-traditional or unique, and *unduly skew the mix of businesses towards national retailers in lieu of local or regional retailers*, thereby decreasing the likelihood of a diversity of retail activity of the type contemplated by the Business Areas Development Plan.[26]

Despite this arguably clear evidence of an intent to ward off national retailers, the California Court of Appeal, Fourth District upheld the Coronado formula business ordinance, ruling that it "was not facially discriminatory or discriminatory in purpose: 'its regulations are even-handed—any business that meets the definition of Formula Retail is required to obtain a permit before it opens ....' and the definition "is not limited to interstate businesses as opposed to intrastate or locally owned businesses."[27] The court also rejected the argument that the whereas clause quoted above evidenced a discriminatory purpose.[28]

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[24] Munster Plan Commission – Minutes of Regular Business Meeting, December 13, 2016 (emphasis added).
[25] *See* Mark Bobrowski, *The Regulation of Formula Businesses and the Dormant Commerce Clause Doctrine*, 44 URBAN LAWYER 227, 253-54 (Winter 2012) (hereinafter "*The Regulation of Formula Businesses*") (citing *Coronadans Organized for Retail Enhancement v. City of Coronado*, 2003 WL 21363665 (Cal. App. 4th Dist.).
[26] *Id*. at 254 (emphasis added).
[27] *Id*.
[28] *See id*.

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Although the *Coronado* decision upheld Coronado's formula business ordinance, it has been heavily criticized by commentators. For example, a critical commentator in *The Urban Lawyer* argued:

> The California appeals court made a number of errors in its analysis of the discriminatory purpose claim. First, the court, on scant authority, upheld the exclusion of the ordinance's legislative history when members of the city council evinced a need to protect local stores from competition with national chains....
>
> Second, the court's dismissal of the legislative history it held to be irrelevant presumed that there is a de minimis exception to the [Dormant Commerce Clause]. Whether or not protectionism was the primary purpose, if it was a purpose for the statute's passage, the ordinance itself should be subjected to strict scrutiny. The Supreme Court has rejected arguments that a little discrimination or a little protectionism is acceptable.
>
> Third, the court's treatment of the ordinance's preamble recalls the State of Hawaii's argument that the purpose behind its exemption of the locally produced liquor in *Bacchus Imports* was to benefit a struggling industry, not to discriminate against out-of-state goods or their producers. The Court correctly rejected that argument, noting that it could always be employed to defeat a [Dormant Commerce Clause] claim. Here the California appeals court's focus on the asserted aims of preventing a take-over of downtown Coronado by generic chain stores and providing for economic viability and commercial diversity is similarly misdirected. Those may be laudable goals, but they could also be mere euphemisms for impermissible discrimination. If the ordinance effectively operates to confer those benefits by forcing out or raising costs to out-of-state retailers, they are impermissible, regardless of the benevolent intentions.
>
> Finally, the court's observation that the ordinance's purposes cannot be discriminatory because it treats interstate and local businesses "the same," as well as its comment about the lack of evidence that small stores are either owned by locals or do not also engage in interstate commerce are irrelevant to the question of constitutionality under the [Dormant Commerce Clause]. Evenhandedness might prevent a finding of facial discrimination, but it does not resolve questions about discriminatory purpose or effects.[29]

Given the level of criticism aimed at the *Coronado* decision, the Town should not have confidence that the Proposed FBO rests on solid legal ground simply because its definition of formula business is modeled after Coronado's.

Discriminatory Effect: Under the Dormant Commerce Clause a "discriminatory effect" is said to occur when a law or ordinance "affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests."[30] Although "not every exercise of state authority

[29] Denning & Lary at 945-946 (citations omitted) (emphasis added). *See also The Regulation of Formula Businesses* at 255 (stating: "*Coronado* is a slim reed on which to place the hopes of community character. Its lessons are few because the decision is so deeply flawed.").
[30] *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 13 (1st Cir. 2007).

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imposing some burden on the free flow of commerce is invalid,"[31] discrimination does occur where "the effect of a state regulation is to cause local goods to constitute a larger share, and [the] goods of an out-of-state source to constitute a smaller share, of the total sales in the market."[32] As noted by the U.S. Supreme Court: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has generally struck down the statute without further inquiry."[33]

In order to prove that an ordinance has a discriminatory effect on interstate commerce, a plaintiff "must present evidence as to why the law discriminates in practice. If [a] plaintiff successfully meets this burden, the statute is 'virtually per se invalid ... and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'"[34]

In determining whether an ordinance has a discriminatory effect, the courts place a premium on the statistical impact of a challenged regulation.[35] The First Circuit Court of Appeals decision in *Family Winemakers of California v. Jenkins*[36] provides a good example. *Family Winemakers* involved a Dormant Commerce Clause challenge to a Massachusetts statute that classified wineries into two groups—those producing 30,000 gallons or less per year ("small" wineries) and those producing more ("large" wineries).[37] Small wineries were given a competitive advantage in that they were allowed to sell wine in Massachusetts in three different ways—by relying on wholesalers, by selling directly to retailers, or by selling directly to consumers. By contrast, the statute forced "large" wineries to choose between wholesaling and selling directly to consumers—they could not do both, nor could they sell directly to retailers.[38] The court pointed out that when the statute was enacted, there were 5,350 registered wineries in the United States, producing 646,395,818 gallons of wine.[39] It further noted that the country's thirty largest wineries comprised approximately 92% of the market, with each of those wineries producing between 680,000 and 150 million gallons per year.[40] By contrast, there were 31 wineries in Massachusetts, and all of them were classified as "small wineries," meaning every large winery doing business in Massachusetts was from out-of-state.[41] The court concluded that the statute was discriminatory in effect,

[31] *The Regulation of Formula Businesses* at 245 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 349 (1977)).
[32] *The Regulation of Formula Businesses* at 245 (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 n.16 (1978)).
[33] *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986).
[34] *The Regulation of Formula Businesses* at 245 (quoting *Family Winemakers of California*, 592 F.3d at 9, 11).
[35] *See id.* at 259.
[36] *Family Winemakers of California v. Jenkins*, 592 F.3d *1 (1st Cir. 2010).
[37] *See Family Winemakers*, 592 F.3d at *4.
[38] *See id.*
[39] *See id.* at *6.
[40] *See id.* at *6.
[41] *See id.* at *8.

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stating that the statute's effect was to "significantly alter the terms of competition between in-state and out-of-state wineries to the detriment of the out-of-state wineries that produce 98 percent of the country's wine."[42]

Based on the analysis undertaken by the court of appeals in *Family Winemakers*, a track record of conditional use permit denials and statistical evidence showing that the FBO's effect is to artificially limit the Town's commercial uses in the C-1, C-2, O-1, and SC zoning districts to favor local businesses would be helpful in proving that the Proposed FBO has a discriminatory effect on interstate commerce.[43]

Recommendation Issue I(a): It is assumed the Town has sought and received advice from its counsel as to probability the Proposed FBO may be vulnerable to constitutional challenge on Commerce Clause grounds. Given the above analysis and assuming the Proposed FBO is adopted in its current form, it is recommended that the Town adequately consider potential administrative and financial costs of having to defend against such a constitutional challenge.

Issue I(b): Certain sections of the Proposed FBO contain arbitrary standards that are potentially vulnerable to challenge under the substantive due process clauses of the U.S. and Indiana Constitutions.

The Indiana Supreme Court has stated that the Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Indiana Constitution "ensure that state action is not arbitrary or capricious regardless of the procedures used" and that "the state and federal substantive due process analysis is identical."[44] In reviewing an arbitrary and capricious challenge to a law or ordinance, it appears that Indiana the courts generally "will not intervene in a local legislative process if it is supported by some rational basis" and will find such action "arbitrary or capricious only if it is patently unreasonable."[45]

As currently written, the following sections of the Proposed FBO arguably are arbitrary and therefore susceptible to challenge under the substantive due process clauses of the U.S. and Indiana Constitutions.

- Definition of "Formula Retail Business": Section 26-874(a)(1) would define "formula retail business" as a "retail sales establishment that uses a trademark, logo, service mark or other mutually identifying name or symbol that is *shared by fifteen or more commercial businesses* and which *maintains any standardized array* of services and/or merchandise, decor, business method, architecture, layout, uniform, or similar standardized feature. Formula retail establishments may exist under any of the following business licensing classifications:

[42] *Id*. at *11.
[43] The fact that the proposed 15-mile radius of Section 26-874(c)(2) would extend into Illinois might also be helpful in making a Dormant Commerce Clause argument.
[44] *N.B. v. Sybinski*, 724 N.E.2d 1103, 1112 (In. 2000). The Due Course of Law Provision of the Indiana Constitution, also referred to as the substantive due process clause, states in relevant part that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. 1, § 12.
[45] *Yankee Park Homeowners Ass'n v. LaGrange County Sewer Dist.*, 891 N.E.2d *128, *130 (Ind. Ct. App. 2008).

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Comment: There is no apparent rationale for the quantitative threshold of 15 or more businesses. The following questions can be asked to demonstrate the arbitrariness of this threshold: Why does a retail store that shares common features with 15 other establishments constitute a formula retail business when another that shares common features with twelve others does not? Why not set the threshold at ten, twenty, or another number? Similarly, what is the rationale for declaring that a business that maintains "any" single standardized feature is considered formula retail? Also, what is the rationale for limiting the definition of formula retail to the listed business licensing classifications? Why are other types of businesses—e.g., banks, office supply stores, book stores, and offices—not counted as formula businesses?

- Definition of "Formula Restaurant": Section 26-874(a)(2) would define "formula restaurant" to mean business" as a "restaurant that uses a trademark, logo, service mark or other mutually identifying name or symbol that is *shared by fifteen or more commercial businesses* and which *maintains any standardized array* of services and/or merchandise, decor, business method, architecture, layout, uniform, or similar standardized feature."[47]

Comment: Just as in the case of the definition of formula business, in this case, what is the rationale for the quantitative threshold of 15 or more restaurants? Why does a restaurant that shares common features with 15 other restaurants constitute a formula restaurant when another that shares common features with fewer others does not? Also, what is the rationale for declaring that a restaurant that maintains "any" standardized feature is considered formula restaurant?

- Fifteen-Mile Radius: Section 26-874(c) appears to prohibit any formula retail business from locating in Munster if there is another "branch within 15 miles with effectively the same product or service offerings of the proposed location."

Comment: There is no factual basis for this 15-mile radius. Moreover, it is unclear from what point the 15 mile radius would be measured. Would it be measured from the exact location of the proposed formula business, from the Munster town boundaries, or from some other location? If the radius is measured from Town boundaries, the proposed 15-mile radius would encompass numerous jurisdictions in Indiana and Illinois and would even extend into Lake Michigan.

[46] Proposed FBO § 26-874 (a)(1) (emphasis added).
[47] Proposed FBO § 26-874 (a)(2).

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- Percent Caps on Formula Retail Businesses and Restaurants: Proposed Section 26-874(d) would establish a cap of 50% on formula restaurants in Munster and a cap of either 50% or 33% for each type of formula retail business.

Comment: The proposed percentage caps have no factual foundation. If the intent is to "contribute to the unique character and aesthetics of the Town" and to ensure an "appropriate balance of local, regional [and] national-based businesses" in Munster, then presumably the Proposed FBO in general and the proposed percentage caps should apply to all commercial uses rather than to formula retail and restaurants alone. **Note**: The Manager's Report contains a table (titled "Formula Businesses in Munster") that shows the total number and percentage of formula retail businesses and restaurants in Munster, based on active business registrations in 2016. For example, the table shows that 33% (2 of 6) of the food stores in Munster are formula food stores, while 48% of the restaurants are formula restaurants. Notably, the Manager's Report does not take the position that these existing percentages represent "an appropriate balance of local, regional or national-based businesses" or an appropriate "diversity and variety of choice." Rather, the Manager's Report states that the data in this table is presented "for demonstration purposes."

Recommendation Issue I(b): The above-referenced sections of the Proposed FBO are considered as arbitrary and therefore vulnerable to challenge under the substantive due process clauses of the U.S. and Indiana Constitutions. It is assumed the Town has sought and received advice from its counsel as to probability the Proposed FBO may be vulnerable to a challenge under the substantive due process clauses of the U.S. and Indiana Constitutions. Given the above analysis and assuming the Proposed FBO is adopted in its current form, it is recommended that the Town adequately consider potential administrative and financial costs of having to defend against such constitutional challenges.

Issue I(c): Certain of the proposed conditional use permit "findings" are vague and therefore are vulnerable to challenge under the constitutional "void for vagueness" doctrine and susceptible to inconsistent and potentially unfair interpretation and application.

A land use ordinance can be held invalid under the "void for vagueness" doctrine if its language lacks sufficient clarity or certainty and therefore is subject to arbitrary and discretionary interpretation, application, and enforcement. The "void for vagueness" doctrine is a constitutional doctrine rooted in the procedural due process clause of the Fourteenth Amendment to the U.S. Constitution. In a frequently cited explanation of the concept, the U.S. Supreme Court has stated that "[a]n ordinance is unconstitutionally vague when men of common intelligence must necessarily guess at its meaning."[48]

[48] *See* BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:19 (Thomson-Reuters 2016) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 868 (1973) (hereinafter "DISCRETIONARY LAND USE CONTROLS").

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In general, a lack of precision and clarity in a zoning ordinance leads to uncertainty on the part of property owners as to what is required or desired, and can make it difficult for the locality to provide guidance and apply the provisions consistently. As currently written, some of the "findings" that must be made by the Zoning Board of Appeals (or the Town Council[49]) are vague and could lead to inconsistent and unfair administration of the Proposed FBO. The text of these vague "Findings for a Special Use Permit" of proposed Section 26-874(c) is copied below, with the vague terms highlighted in *italics*:

> (1) The *appearance* of the formula retail business meets or exceeds the *building material, landscape design, or other aesthetic standards as established by the Munster Town Code and Munster Plan Commission*;

Comment: This provision fails to specify what material, design, and aesthetic standards formula businesses would have to meet or exceed, leaving potential applicants (and Town officials) to guess at precisely what is required. It is not clear, for example, whether "landscape design" standards refers to Chapter 26, Article X ("Landscape Regulations") of the City Code, or some other set of landscape design standards. Moreover, the wording of this provision raises the concern that the Town might adopt building material, landscape design, and aesthetic standards that would apply only to formula businesses and restaurants.

> (2) The formula retail business does not already have another branch *within 15 miles* with *effectively the same product or service offerings* of the proposed location;

Comment: What does it mean to have "effectively the same product or service offerings"? If the branches need not have exactly the same product or service offerings, how much variation in a business's products or services can there be before the product and service offerings are no longer "effectively the same"? Also, it is unclear from what point the 15 mile radius would be measured. Would it be measured from the exact location of the proposed formula business, from the Munster town boundaries, or from some other location?

> (3) The formula retail business *will be mutually beneficial to and will enhance the economic health of surrounding uses in the district*;[50]

Comment: This provision raises numerous questions of interpretation and implementation.

(1) How would the Town determine whether a proposed formula retail business would be "mutually beneficial" and would "enhance the economic health of surrounding uses"? Is there a mathematical formula to be applied in making that determination? If not, then on what basis would that determination be made? Moreover, it is not clear precisely what "surrounding uses" are contemplated by this finding.

[49] As discussed below, the Proposed FBO is internally inconsistent as to whether the Zoning Board of Appeals or the Town Council would review and decide formula business special use permit applications.
[50] Proposed FBO § 26-874(c).

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(2) Does "surrounding" refer only to adjacent lots, or does it also encompass uses more distant from the proposed formula retail use, and if so, how far away?

(3) Would the "surrounding uses" determination must be made by examining the full spectrum of surrounding uses, or by considering a narrower class of businesses? For example, would the Town make a negative finding on the ground that a proposed formula gas station would have a negative impact on an existing gas station, even if the *overall* mix of surrounding uses would benefit from the proposed formula gas station?

(4) Because this finding would require that a proposed formula retail business "*enhance* the economic health of surrounding uses," it presumably would allow the Town to deny a special use permit for a formula business that would neither harm nor benefit surrounding uses. Such an outcome would plainly be unfair.

Note: In addition to the special use permit findings quoted above, the proposed definition of "formula retail business" arguably is also vague. Section 26-874(a)(1) states:

> A "formula retail business" is defined as a retail sales establishment that uses a trademark, logo, service mark or other mutually identifying name or symbol that is shared by fifteen or more commercial businesses and which maintains any standardized array of services and/or merchandise, decor, business method, architecture, layout, uniform, or similar standardized feature. *Formula retail establishments may exist under any of the following business licensing classifications*: Animal Services; Apparel & Accessory Stores; Computer, Cell phones, Electronics; Florist and Gift Shops; Food Stores; Gas Stations/Auto Repair; General Merchandise Stores; Home Furniture, Furnishings, and Equipment; Pharmacy; Retail Building Supply, Hardware, Garden Shop; or Video Stores.[51]

Comment: The use of the word "may" in this definition makes it unclear whether formula retail businesses are limited only to those business license classifications that are listed in the definition or could exist under other business license classifications. If the intent is to limit formula retail businesses to the listed classifications, then this provision should be revised to clearly establish that limitation.

Recommendation Issue I(c): Given the above analysis and if the Proposed FBO is to be adopted, it is recommended that the Town revise the Proposed FBO sections listed above (and any others that contain vague or ambiguous terminology) to include clear and definite standards that can be clearly interpreted and consistently applied by the Zoning Board of Appeals (or Town Council) in reviewing special use permit applications for formula retail establishments.

[51] Proposed FBO § 26-874 (a)(1) (emphasis added).

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PART II: ISSUES CONSIDERED HARMFUL TO THE TOWN SHOULD IT ADOPT THE PROPOSED FBO

The analysis that follows raises a number of policy issues that cause concern should the Town Council adopt the Proposed FBO. The Association desires to work with the Town Council and other stakeholders to develop a course of action that further enhances the status of the Town of Munster as one of the region's premier communities.

Issue II(a): The Proposed FBO could result in increased vacancies in shopping centers and restaurant and retail spaces.

The Proposed FBO would make it more difficult, and potentially impossible, for formula retail businesses and formula restaurants to locate in Munster. In particular, Sections 26-874(b)-(c) would make it more difficult to establish a formula retail business or restaurant by requiring that the developer obtain a special use permit in the C-1, C-2, O-1, and SC zoning districts, even if retail stores and restaurants generally are allowed by-right under the Zoning Code. Several provisions of the Proposed FBO could make it impossible for a formula retail business or restaurant to locate in Munster. The most notable of these are the 15-mile radius of Section 26-874(c)(2) and the percentage caps that would be established by Section 26-874(d). For example, once Munster reaches the 50% threshold for formula restaurants, proposed Section 26-874(d)(1) would prevent any additional formula restaurants from being established in the Town.

It is not clear whether the Town adequately considered the consequences of the Proposed FBO on the commercial real estate market and the community in general. Retail and restaurant businesses and franchises that would qualify as a formula retail business or restaurant under the Proposed FBO are likely to view the Proposed FBO as an anti-business measure and may elect not to pursue potential opportunities in Munster. For the owners of vacant commercial properties, the Proposed FBO would narrow the field of potential retail and restaurant tenants to the extent that it causes national or regional retailers and restaurants that would be subject to the requirements of the ordinance to avoid leasing or purchasing properties in Munster.

A lack of interest from national and regional retail stores and restaurants attributable to the Proposed FBO could harm commercial property owners in two ways. First, narrowing the field of potential tenants would make it more difficult for commercial property owners to fill vacant store fronts, leading to extended vacancy periods and loss of rental revenue. Second, under the principle of supply and demand, reduced competition for retail and restaurant space in Town would have a negative impact on commercial rental rates, resulting in reduced rental revenue for affected property owners who are fortunate enough to find tenants.

The Proposed FBO could also have a negative impact on neighboring properties and the community to the extent that it results in vacant storefronts and a decline in property values. In addition, to the extent that vacant storefronts and reduced property values translate to reduced property tax revenue for the Town, the Proposed FBO could ultimately harm Munster financially.

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Recommendation Issue II(a): Given the above analysis, it is recommended that the Town table the Proposed FBO and work with the Association and other stakeholders to fully discuss the potential unintended consequences of the Proposed FBO, including vacant storefronts and lost or reduced rental revenue for commercial property owners and reduced property tax revenue for the Town.

Issue II(b): The Town has not defined the "unique character and aesthetics" that it seeks to preserve and has not proven that the Proposed FBO is necessary to protect it.

The fourth "whereas" clause to the Proposed FBO states that "the Town of Munster seeks to attract businesses with high-quality product and service offerings that will contribute to the unique character and aesthetics of the Town." The fifth and sixth "whereas" clauses further highlight the Town's stated desire to "promote a diversity and variety of choice to assure a balanced mix of commercial uses" and an "appropriate balance of local, regional and national-based businesses."

Additionally, in order to grant a special use permit for a formula retail business or restaurant, Section 26-874(c)(1) of the Proposed FBO would require a finding that the "*appearance* of the formula retail business meets or exceeds the building material, landscape design, or other aesthetic standards as established by the Munster Town Code and Munster Plan Commission."[52]

In general, before pursuing any regulation for the purpose of preserving "community character," a community needs to carefully consider whether it has satisfied the prerequisites for establishing an effective and legally defensible program, including studies to define the basic characteristics of the community that it desires to preserve.[53] Despite assertions in the Proposed FBO about "unique character and aesthetics," there is no indication that the Town has undertaken any effort to define the "unique character and aesthetics" and diversity of retail uses that the Town ostensibly seeks to preserve.

The Manager's Report contains data on the total number and percentage of formula retail businesses and restaurants in Munster. There is no indication that the Town has determined that these existing percentages represent "an appropriate balance of local, regional or national-based businesses" or an appropriate "diversity and variety of choice." The Manager's Report itself merely refers to this data as being provided "for demonstration purposes."

The lack of documentation of the "unique character and aesthetic" and diversity of retail uses that the City desires to preserve raises the question whether the Proposed FBO is even necessary. There is no indication that the percentage of formula retail businesses and restaurants is rising, or that the growth of formula businesses is having any negative impacts on the Town. There is no documented basis for the Town to conclude that the Proposed

[52] Proposed FBO § 26-874(c)(1) (emphasis added).
[53] *See* DISCRETIONARY LAND USE CONTROLS §§ 8:19-8:20.

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FBO is necessary to address any problems attributable to formula retail businesses and restaurants. Without evidence of negative impacts caused by formula retail businesses and restaurants, it can reasonably be argued that the Proposed FBO is a solution to a problem that simply does not exist.

Recommendations II(b): Given the above analysis and if the Proposed FBO is to be adopted, it is recommended that the Town clearly define and document the "unique character and aesthetic" that the Proposed FBO ostensibly is intended to preserve. Further, based on the apparent lack of empirical evidence supporting the need for the Proposed FBO, it is recommended that the Proposed FBO be rejected as an unnecessary regulatory measure as it appears the Proposed FBO is a solution to a problem that does not exist.

Issue II(c): Proposed Sections 26-874(b) and 26-874(c) are inconsistent as to who would review and decide special use permit applications for formula retail businesses and restaurants.

Proposed Section 26-874(b) ("Special Use Required"), states: In order for a formula retail business or restaurant to locate within the Town of Munster, the developer must obtain a Special Use Permit from the Board of Zoning Appeals." By contrast, proposed Section 26-874(c) ("Findings for a Special Use Permit") would establish a set of findings that the "town council shall consider and be guided by" before granting a special use permit for the location of a formula retail business or restaurant. These provisions plainly are inconsistent as to who would review and decide special use permit applications for formula retail businesses and restaurants – the Board of Zoning Appeals or the Town Council.

Under Division VI ("Special Uses and Uses Allowed with Special Permission") of the Munster Zoning Code, it appears that special use applications are subject to a two-step review process. In the first step, the Board of Zoning Appeals holds a public hearing on the application and forwards a recommendation to the Town Council.[54] In step two, the Town Council decides whether to grant, grant with conditions, or deny a special use permit application.[55]

There is no indication that the Town is aware of the conflict between Sections 26-874(b) and 26-874(c) or that it has determined that the Board of Zoning Appeals should review and decide special use permit applications for formula businesses and restaurants, rather than the Town Council. There is no apparent factual justification for designating a different decision-making body (i.e., the Board of Zoning Appeals) for the review of special use applications for formula retail businesses and restaurants.

Recommendation II(c): Given the analysis above, there is a conflict in the language between Sections 26-874(b) and 26-874(c). It is recommended that if the Proposed FBO is to be adopted that the Proposed FBO be revised

[54] *See* Munster Zoning Code § 26-853.
[55] *See* Munster Zoning Code § 26-856.

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to resolve the conflict. Further, there does not appear to be any factual justification for designating the Board of Zoning Appeals as the decision-maker for special use applications for formula retail businesses and restaurants.

Issue II(d): The Town Council should consider adopting the "Possible Amendments" outlined in the Manager's Report that would make the Proposed FBO more business-friendly.

The Manager's Report contains a brief discussion of "Possible Amendments for Consideration" (the "Possible Amendments") by the Town Council. The Manager's Report states that the Possible Amendments, which are based on feedback after the December 13th Plan Commission meeting, "may make the [Proposed FBO] more palatable to the business and development community." The Possible Amendments pertain to three provisions of the Proposed FBO: (1) the definition of formula retail business; (2) the proposed 15-mile radius; and (3) the proposed percentage caps on formula retail businesses and restaurants.

Below is a discussion of the Possible Amendments—organized by the Proposed FBO provision that they would amend—from the real estate industry perspective.

Possible Amendment Pertaining to the Definition of Formula Business

- "Amend the definition of formula business to be a business with 50 or more standardized locations."

Comment: This Possible Amendment would make the Proposed FBO more business-friendly by making the Proposed FBO apply to fewer retail businesses and restaurants. As currently written, the definition of formula retail business would apply to retailers that have as few as 15 establishments with a standardized array of features. It stands to reason that there are fewer retail or restaurant businesses with 50 locations than there are with 15 locations.

Possible Amendment Pertaining to the Proposed 15-Mile Radius

- "Amend the radius of existing businesses to 7 miles."
- "Eliminate the radius of existing businesses altogether."

Comment: Reducing the radius of existing businesses from 15 miles to 7 miles would reduce the impact of the radius requirement, which would prohibit any formula retail business or restaurant from locating in Munster if another branch exists within the established radius. In order to measure the benefit of reducing the radius from 15 miles to 7 miles, one would have to draw both radii around a particular location and determine how many different formula retail businesses and restaurants exist within each radius. Nevertheless, eliminating the radius of existing businesses altogether is the more business-friendly of these Possible Amendments because doing so would ensure that no formula retail business or restaurant is prevented from locating in Munster solely on the basis of another branch within a certain proximity.

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Possible Amendment Pertaining to the Percentage Caps on Formula Businesses

- "Increase the maximum proportions of Formula Businesses in each category."
- "Add an exception for the proportions that would allow a site currently occupied by a Formula Business to be replaced by another Formula Business, as long as the Formula Business does not already have a location within the Town of Munster."
- "Eliminate the proportional section altogether."

Comment: Of these Possible Amendments, eliminating the proportional section altogether is the most beneficial from the real estate industry perspective—eliminating the percentage caps would render the Proposed FBO an ordinance that makes formula retail businesses and restaurants a special use in Munster. While increasing the maximum proportions would allow more formula retail businesses and restaurants to locate in Munster, it is impossible to measure the benefit without knowing how much the maximum proportions would be increased. For example, increasing the maximum percentage of formula restaurants in Town from 50% to 70% would be more beneficial than an increase from 50% to 55%. It is not clear how the proposed "exception" would work. Would it apply only within a specific class of formula businesses (i.e., an existing formula restaurant could only be replaced by another formula restaurant)? Or would it apply to *any* class of formula business, thereby allowing a formula restaurant to be replaced by a formula pharmacy, even if the percentage cap on formula pharmacies has already been met? An exception that would apply to *any* class of formula business would be broader in scope and therefore would be more beneficial than one that would apply only within a particular class of formula businesses.

Recommendation II(d): Given the above analysis, if the Town Council chooses not to reject the Proposed FBO altogether, then the following "Possible Amendments" are recommended for the Town Council to consider:

1. "Amend the definition of formula business to be a business with 50 or more standardized locations."
2. "Eliminate the radius of existing businesses provision [Section 26-874((c)(2)] altogether"; and
3. "Eliminate the proportional (i.e., percentage cap) provision [Section 26-874(d)] altogether".