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Mr. Thomas R. Mooney, AICP
Planning Director
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

Subject: Proposed Ordinance re: Formula Restaurants

Dear Mr. Mooney:

At the request of your office, I have reviewed a proposed ordinance that would limit the ability of "formula restaurants" to locate in the Art Deco District along Ocean Drive between 5th and 15th Streets and in the Ocean Terrace/Harding Townsite Area along Ocean Terrace, which extends from 73rd Street to 75th Street. The purpose of my review was to evaluate whether adoption of the proposed ordinance would place an unfair burden on the owners of properties in the identified locations and/or adversely impact the City of Miami Beach economically or fiscally.

The purpose of this letter, which is organized as shown below, is to provide you with the conclusion of my analysis.

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Definition of a Formula Restaurant

The proposed ordinance defines the term "formula restaurant" as a restaurant with 100 or more establishments in operation or with approved development orders in the United States or a restaurant with more than five (5) establishments in operation or with approved development orders in Miami Beach. In addition to the numerical thresholds, the restaurant must also maintain two (2) or more of the following features: a standardized (formula) array of merchandise; a standardized façade; a standardized decor or color scheme; uniform apparel for service providers, food, beverages or uniforms; standardized signs, logos, trademarks or service marks. With respect to these features, the ordinance contains the following language:

- (1) *Standardized (formula) array of merchandise or food* means that 50 percent or more of in-stock merchandise or food is from a single distributor and bears uniform markings.

- (2) *Trademark* means any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if the source is unknown. A trademark may be registered with the U.S. Patent and Trademark Office and/or the Florida Department of State. However, an unregistered trademark may also be protected under common law.
- (3) *Service mark* means any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish the services of such person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. Titles, character names, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that the person or the programs may advertise the goods of the sponsor. A service mark may be registered with the U.S. Patent and Trademark Office and/or the Florida Department of State. However, an unregistered service mark may also be protected under common law.
- (4) *Decor* means the style of interior or exterior furnishings, which may include but is not limited to, style of furniture, wall coverings or permanent fixtures.
- (5) *Color scheme* means the selection of colors used throughout, such as on the furnishings, permanent fixtures, and wall coverings, or as used on the facade.
- (6) *Facade* means a face (usually the front) of a building, including awnings, that looks onto a street or an open space.
- (7) *Uniform food, beverages or apparel/uniforms* means standardized items of clothing including but not limited to standardized aprons, pants, shirts, smocks or dresses, hats, and pins (other than name tags) as well as standardized colors of clothing, food or beverages listed on the menus of such establishments or standardized uniforms worn by employees.

With respect to the above definition of formula restaurant, it is important to note that a chain with more than 100 establishments would be able to locate on Ocean Drive between 5th and 15th Streets or Ocean Terrace if it modified its operations with respect to any six of the seven features enumerated above.

Key Findings

Based on my analysis of the proposed ordinance, I do not believe that the limitation it places on the ability of formula restaurants to locate along Ocean Drive between 5th and 15th Street or Ocean Terrace will unfairly burden the property owners in those locations and/or adversely impact the City of Miami Beach economically or fiscally. This conclusion is based on the following findings:

- During the course of my research, I identified 15 municipalities that have enacted ordinances limiting the ability of formula commercial establishments and/or restaurants to locate within them for the purpose of maintaining their distinctive character. As shown in Appendix 1, all of those municipalities set the numerical threshold of establishments for defining a formula commercial establishment or restaurant at 15 or fewer. The two municipalities in Florida, Sanibel and Palm Beach, set the numerical threshold for defining a formula restaurant at three establishments nationwide. According, the numerical threshold of 100 establishments nationwide in the proposed ordinance is hardly stringent by comparison.
- Based on a physical inspection of the properties along Ocean Drive between 5th and 15th Streets and along Ocean Terrace as well as a virtual tour of them utilizing Google Earth, I identified a total of 40 operating eating and drinking establishments and one closed facility. Of the establishments identified, all but three are on Ocean Drive with the overwhelming preponderance of them located in hotel or condominium hotel properties that in most cases are considered by the City's Historic Preservation Board to "contribute" to the historic character of the Art Deco District. All three establishments on Ocean Terrace are housed in structures of similar type. Of the 40 operating eating and drinking establishments that I identified, only three are formula restaurants as defined in the proposed ordinance. Included in this number are the TGIF Fridays located in Bentley condominium hotel located at 500 Ocean Drive, the Ben & Jerry's located at 760 Ocean Drive and the Pinkberry in the Victor Hotel at 1144 Ocean Drive. Six other establishments, which are listed immediately below, are parts of chains but in each case the chain of which it is part has fewer than 100 units.
 - Wet Willies, 760 Ocean Drive (1 of 17 establishments)
 - Sushi Slam, 804 Ocean Drive (1 of 8 establishments)
 - Fat Tuesday, 918 Ocean Drive (1 of 50 establishments)
 - Sugar Factory, 1144 Ocean Drive (1 of 13 establishments)
 - Havana 1957, 1410 Ocean Drive (1 of 5 establishments)
 - Madero, 1412 Ocean Drive (1 of 65 establishments¹)
- I believe that the fact that less than 25 percent of the restaurants currently operating on Ocean Drive between 5th and 15th Streets and on Ocean Terrace are chain-affiliated is in substantial part, if not totally, a function of the following factors:
 - The overwhelming preponderance of the restaurant spaces in the enumerated areas either rely entirely on outdoor setting or a mixture of both outdoor and indoor seating with the quantity of the latter generally relatively small. However, most chain-affiliated restaurants operate in portions of the United States where they cannot rely on outdoor seating on a year around basis and have modi operandi that require more indoor seating than most of the properties in which the Ocean Drive and Ocean Terrace restaurants operate can provide.
 - The portion of Ocean Drive between 5th and 15th Street and Ocean Terrace are located in historic preservation districts. As a result, modifications to the buildings in those

¹ Madero is a South American-based company with 65 total establishments, the preponderance of them outside the United States. In fact, the establishment on Ocean Drive was the only one that I identified in the United States.

areas to accommodate formula restaurants would be governed by the provisions of City code section 142-546, which states in part that if the building is a historic structure, plans to renovate "shall substantially comply with the Secretary of the Interior Standards and Guidelines for Rehabilitating Historic Structures, U.S. Department of the Interior (revised 1983), as amended". That same language is found in Code Section 142-904, which discusses accessory uses in hotels and apartment buildings, which is the category of use that applies to the preponderance of the restaurants along Ocean Drive between 5th and 15th Street and Ocean Terrace. It is also found in Code Section 118-564, which discusses the manner in which requests for certificates of appropriateness for alterations to buildings should be evaluated. Section 118-564 further states that in determining whether a particular application is compatible with surrounding properties, the historic preservation board shall consider the following:

- a. Exterior architectural features.
- b. General design, scale, massing and arrangement.
- c. Texture and material and color.
- d. The relationship of subsections a., b., c., above, to other structures and features of the district.
- e. The purpose for which the district was created.
- f. The relationship of the size, design and siting of any new or reconstructed structure to the landscape of the district.
- g. A historic resource report, containing all available data and historic documentation regarding the building, site or feature.
- h. The original architectural design or any subsequent modifications that have acquired significance.

In summary, it is probable that many operators of chain-affiliated restaurants historically decided --- and likely will frequently do so in the future --- that their prospects for success in gaining approval to make the alterations necessary to locate an establishment in a building along the relevant portion of Ocean Drive or Ocean Terrace would not be strong and/or that too much time and/or money would be required to gain such approval.

Given the issues discussed in the preceding paragraphs, I find it doubtful that there will be stampede by formula restaurant chains to locate along Ocean Drive between 5th and 15th Street or Ocean Terrace. However, the proposed ordinance would provide additional assurance that that does not occur.

- As part of my evaluation of the proposed ordinance, I reviewed restaurant industry publications and websites to determine whether it would make it difficult for the owners of properties along Ocean Drive between 5th and 15th Streets and Ocean Terrace to secure new tenants if one of their current tenants vacates or if they decide not to renew the leases of current tenants. My research identified a total of 348 brands operating chains of restaurants in the United States for which I could obtain accurate information on their number of establishments. That number does not include the nine chains already operating on the

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relevant portion of Ocean Drive or Ocean Terrace. Of the brands identified, 185 operate fast food restaurants and/or pizza shops that primarily provide take out and/or delivery service. A roster of these 185 brands can be found in Appendix 2.

The 185 brands enumerated in Appendix 2 typically seek locations that provide for excellent automobile access. Further, they generally occupy either single-user buildings or space in shopping centers with self-serve surface parking. Given these attributes, I do not believe that any significant number of them, regardless of their number of establishments, would seek to locate along Ocean Drive between 5th and 15th Street or along Ocean Terrace other than on an exceptional basis even if the proposed ordinance is not adopted.

- The remaining 163 brands, which are identified in Appendix 3, generally provide table service. Review of Appendix 3 will show that these 163 brands fall into a variety of categories in terms of cuisine and/or ambience. Further, a portion of them, numbering 56 in total, are part of chains that are comprised of 100 establishments or more, hence formula restaurants as that term is defined in the proposed ordinance. The remaining 107 brands operate chains comprised of fewer than 100 establishments and could in the future occupy space on Ocean Drive between 5th and 15th Street or on Ocean Terrace if it should become available and is physically able to accommodate them in terms of indoor seating capacity, among other criteria.

With respect to brands that would not be precluded from operating on Ocean Drive between 5th and 15th Street or Ocean Terrace, their distribution in terms of number of establishments is as follows:

- 39 brands have 15 or fewer establishments
- 17 brands have between 16 and 25 establishments
- 27 brands have between 26 and 50 establishments
- 24 brands have between 51 and 100 establishments

I recognize that a detailed review of Appendix 3 will show that some of the brands that would not be precluded by the proposed ordinance have historically limited their operations to geographic regions of the United States that do not include Florida or the nearby southeast. I also acknowledge that adoption of the proposed ordinance would preclude some well-recognized brands that do operate in Florida or the nearby southeast from occupying space on Ocean Drive between 5th and 15th Street or Ocean Terrace. Included among this latter group would, for example, be Ruth's Chris, Bonefish Grill, Brio Tuscan Grill, Olive Garden, P.F. Chang's, Cheesecake Factory, Applebee's and Hard Rock Café. In these regards, I wish to make the following points:

- The fact that certain brands have historically not operated in Florida or the nearby southeast should not be minimized; however, it is plausible to think that some of those brands, particular those whose bases of operations include the areas from which South Beach tourists most frequently originate, might consider establishing a unit there to continue to serve their customers while they are on vacation and/or to get new levels of exposure with a potential loyal base of business available to them when they first open. Further, others, attracted by the "South Beach buzz" and its high tourism counts might decide to enter a new territory.

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- o As discussed above, it will likely be difficult to accommodate establishments that typically operate on the scale of the precluded brands specifically named above in the restaurant spaces in the hotel and condominium hotel buildings that exist along the relevant section of Ocean Drive or on Ocean Terrace. However, if a space of appropriate size did become available, the owner of the subject property would have a number attractive alternatives among that brands that are not precluded by the proposed ordinance. Illustratively, those alternatives would might include Capital Grill, Morton's or Flemings among steak restaurants, McCormick & Schmicks, Legal Seafoods or Mitchell's among seafood restaurants, Maggiano's, Old Spaghetti Factory or Buca di Beppo among Italian restaurants, Houston's/Hillstone or J Alexanders among casual dining restaurants and Rainforest Café, Planet Hollywood or Jimmy Buffett's Margaritaville among themed restaurants. Further, as Appendix 3 shows, there are others beside those named that also could be secured.

Based on the preceding, I do not believe that the proposed ordinance will place an unfair burden on the owners of properties along Ocean Drive between 5th and 15th Street and Ocean Terrace to fill restaurant spaces that become vacant with chain-affiliated establishments as opposed independent operators if that is what they seek to do and their properties can accommodate such users. Contributing to this conclusion is the fact that at any given time, the amount of vacant space available is likely to be extremely limited.

Further, since the proposed ordinance will not make it impossible to fill vacant spaces, its adoption should not adversely impact the City of Miami Beach to any significant degree either economically in terms of loss of jobs or fiscally in terms of loss of ad valorem tax revenues. Whether there will be an adverse impact on the tax revenues that the City collects on the sale of food and alcoholic beverages will be dependent on the, whether the new tenant's revenues are less than the taxable revenues of the prior occupant of the space. However, that would be also be true if the proposed ordinance is not adopted. Further, that would be true regardless of whether the new tenant is chain-affiliated or an independent operator.

Closing

I have appreciated having the opportunity to be of assistance to the City of Miami Beach. I am prepared to discuss the contents of this letter with you and other members of the City's professional staff and, of course, with the Mayor and City Commissioners and their staffs. I am also prepared to testify with respect to my findings at City Commission proceedings regarding the proposed ordinance.

Sincerely,



Andrew Dolkart

Appendix 1

Appendix 1
Numerical Threshold
Municipalities with Formula Establishment Ordinances

Jurisdiction	Numerical Threshold
Palm Beach, FL	3 or more establishments
Sanibel, FL	3 or more establishments
Malibu, CA	10 or more establishments
San Francisco, CA	3 or more establishments
Coronado, CA	15 or more establishments
Ojai, CA	10 or more establishments
Calistoga, CA	**
San Juan Batista, CA	***
Solvang, CA	5 or more establishments
Carmel, CA	****
Pacific Grove	*****
Sausalito, CA	*****
Bristol, RI	5 or more establishments
Fredericksburg, TX	10 or more establishments
York, ME	

** Any business that has anything similar anywhere requires a special permit.

*** Bars all formula retail stores and restaurants and all stores over 5,000 SF.

**** Any establishment substantially identical to another restaurant regardless of ownership or location.

***** Any establishment with standardized menus, ingredients, food preparation, employee uniforms, interior décor, signage or exterior design.

***** Any type of retail activity, including food service, which is required to maintain any of the following: standardized ("formula") array of services or merchandise, trademark, logo, service mark, symbol, sign, décor, architecture, layout, uniform, or similar standardized feature.

Source: Individual jurisdictions; City of Miami Beach Planning Department; Miami Economic Associates, Inc.

Appendix 2

Appendix 2
Fast Food Restaurants Chains

Chick-A-Fil	Jersey Mike's	Atlanta Bread Company
Wendy's	Godfather's Pizza	Nathan's Hot Dogs
Dairy Queen	El Pollo Loco	Freebirds World Burrito
Subway	Bojangle's	Rubio's Fresh Mexican Grill
Five Guys	Sbarro	L&L Hawaiian Barbecue
KFC	Fazoli's	Gino's Pizza & Spaghetti
Taco Bell	Papa Murphy's Take N Bake Pizza	Cosi
Burger King	Jason's Deli	Eat 'n Park
McDonald's	Krystal	Taco Bueno
Arby's	Wingstop	Daphne's Greek Cafe
Chipotle	McAlister's Deli	El Chico
Sonic	Taco John's	Burgerville, USA
Popeye's	Starbuck's	Shane's Rib Shack
Cold Stone Creamery	Seattle's Best Coffee	Jerry's Subs & Pizza
In-N-Out Burger	Shoney's	Donatos Pizza
Dunkin' Donuts	Checkers/Rally	Huddle House
Auntie Anne's	Church's	Saladworks
Jimmy's Johns	Blimpie	Chicken Express
Papa John's	Baja Fresh	Corner Bakery Cafe
A & W	Del Taco	Swenson's
Cinnabon	Golden Chick	Mazzio's
White Castle	Dickey's Barbecue Pit	East of Chicago Pizza
Krispy Kreme	Backyard Burgers	Valentino's
Little Caesar's	Charlie's Grilled Subs	Pollo Campero
Waffle House	Roy Rogers	Freddy's
Tim Horton's	Shake Shack	Stewart's
Carl's Jr.	Baskin-Robbins	Farmer Boys
Jack in the Box	Penn Station	Panda Express
Hardee's	Hungry Howie's	Taco del Mar
Boston Market	Fatburger	Taco Mayo
Checkers	Skyline Chill	Taco Time
Long John Silver's	Cheeburger Cheeburger	Chicken Out Rotisserie
Firehouse Subs	Au Bon Pain	Hobee's
Noodles & Company	Domino's	Pick Up Stix
Zaxby's	Raising Cain Chicken Fingers	Wimpy
Quizno's	Braum's	Port of Subs
Whataburger	Round Table Pizza	Pizza Inn
Culver's	Pizza Ranch	Primanti Brothers
Qdoba	Portillo's	Hurricane Grill & Wings
Big Boy	Rax Roast Beef	Papa Gino's
Schlotzsky's	Smashburger	Naugles
Wienerschnitzel	Green Burrito	Sneaky Pete's
TCBY	Captain D's	Robek's
Potbelly Sandwich Works	Le Madeleine	Camille's Sidewalk Café
Which Wich?	Taco Cabana	Jack's
Breugger's	Zoe's Kitchen	Runza

Burger Street	Mrs. Winners	J. L. Beers
Milo's Hamburger's	Einstein Brothers	California Tortilla
Erbert & Gelbert's	Sarku	Chronic Tacos
Tazaki's	Torchy Tacos	Sub Station II
Pretzelmaker	Taco Mac	Rumbi
Seasons of Japan	Mooyah	Capriotti's
Tokyo Tokyo	Pizza Patron	Garbanzo Mediterranean Grill
Sweeto Burrito	Mr. Hero	Chowking
Jollibee	Vapiano	Burweedo
Pizza Pan	Gold Star Chili	Jimboy's Tacos
Sarapino's	Tacodell	Pollo Tropical
Zankou Chicken	Arthur Treacher's Fish & Chips	Amigo/Classic King
Arctic Circle	American Incredible Pizza Co.	Blake's Lotaburger
Mrs. Fields	Manchu Wok	Qdoba
Panera	Panda Inn	Café de Coral
Chinese Gourmet Express	Chicken Express	

Source: Various Industry publications and websites; Miami Economic Associates, Inc.

Appendix 3

**Appendix 3
Table Dining Restaurants**

Formula Restaurant Chains (Number) **	Other Restaurant Chains (Number) ***
Steak	
Outback Steakhouse (900)	Lone Star Steakhouse (16)
LongHorn Steakhouse (370)	Black Angus Steakhouse (45)
Ruth's Chris Steakhouse (130+)	Ponderosa/Bonanza Steakhouses (88)
Sizzler (270)	Capital Grille (56)
Logan's Roadhouse (135)	Mastro's (15)
Texas Roadhouse (400)	Morton's (67)
	Saltgrass Steakhouse (15)
	Charlie Brown's Steakhouse (14)
	Fleming's (66)
	Montana Mike's (23)
	Shula's (15)
	Stoney River (8)
Seafood	
Red Lobster (705)	Bubba Gump Shrimp Company (44)
Bonefish Grill (215)	Landry's Seafood House (18)
Joe's Crab Shack (138)	Muer's Seafood Restaurants **** (6)
	Chart House (25)
	McCormick & Schmick's (60)
	Oceanaire (12)
	Legal Seafood (34)
	Anthony's Seafood (30)
	Mitchell's Fish Market (19)
Italian	
Olive Garden (844)	Old Spaghetti Factory (42)
Carrabba's Italian Grill (247)	Maggiano's Little Italy (49)
Romano's Macaroni Grill (205)	Buca di Beppo (92)
Brio Tuscan Grill (118)	Bravo Cucina Italiana (49)
	Spaghetti Warehouse (10)
	Grimaldi's (51)
	Carino's Italian (84)
Pizza	
California Pizza Kitchen (200)	Bertucci's (82)
GiGi's Pizza (500)	Anthony's Coal-fired (68)
Uno Chicago Grill (150+)	The Original Italian Pie (16)
Pizza Hut (5,000+)	Monical's Pizza (60)
Mellow Mushroom (150)	Harry's (4)
	Shakey's Pizza (60)