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February 18, 2015

To: Jeanne Hoffman, Facilities and Sustainability Manager

Re: Possible State Law Limitations on a Benchmarking Ordinance

Jeanne,

On behalf of the Benchmarking Collaboration Ad-Hoc Committee you asked me what the possible limitations are upon the City in creating a benchmarking ordinance. As was discussed when Legislative File No. 32255 was being considered, portions of 2013 Wis. Act. 76 do limit what sort of information the City may require to be communicated to tenants and what sort of information the City may require landlords to communicate to the City. These limitations, codified at Wis. Stat. Sec. 66.0104(2)(d), are as follows:

> **66.0104 Prohibiting ordinances that place certain limits or requirements on a landlord.**
> (2) (d) 1. a. No city, village, town, or county may enact an ordinance that requires a landlord to communicate to tenants any information that is not required to be communicated to tenants under federal or state law.
> b. Subdivision 1. a. does not apply to an ordinance that has a reasonable and clearly defined objective of regulating the manufacture of illegal narcotics.
> 2. No city, village, town, or county may enact an ordinance that requires a landlord to communicate to the city, village, town, or county any information concerning the landlord or a tenant, unless any of the following applies:
> a. The information is required under federal or state law.
> b. The information is required of all residential real property owners.
> c. The information is solely information that will enable a person to contact the owner or, at the option of the owner, an agent of the owner.

As a benchmarking program would not fall under any of the exceptions set forth in the statute, care must be exercised in drafting any benchmarking ordinance that the following precautions are taken:

- The City cannot require a landlord to communicate to tenants any information; and,
- The City cannot require landlords to communicate to the City "any information concerning the landlord or tenant".

It was my opinion that the previous legislative draft avoided these issues. As to subdivision 1.a., the draft did not actually require landlords to "communicate" any information to their tenants. It merely required that when landlords did make an inquiry to their tenants for benchmarking information that the tenants respond within 30 days. As to subdivision 2., it was my opinion that the benchmarking information being sought was not "information concerning the landlord or tenant", rather it was information concerning the building or property.

In any event, given the vague and undefined statutory language, the legislature has certainly left it open to interpretation as to what is prohibited—particularly regarding subdivision 2. While the City cannot foreclose an interested party bringing suit challenging our authority to enact this ordinance, with careful drafting I do think that we can certainly draft an ordinance that most judges would feel is consistent with the statue. However, we cannot dismiss the possibility that a judge would take a more expansive view of "information concerning the landlord or tenant" than I have expressed herein, or that the legislature itself won't weigh in on the issue to expand the prohibition.

Please let me know if you have any other questions.

/s/ Doran Viste

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Doran Viste
Assistant City Attorney