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February 27, 2014

The Honorable Paul R. Soglin
Mayor
City of Madison
210 Martin Luther King Jr. Blvd, Room 403
Madison, WI 53703

Chris Schmidt, President
City of Madison Common Council
210 Martin Luther King Jr. Blvd, Room 417
Madison, WI 53703

Re: Energy Benchmarking Ordinance; Legistar #32255

Dear Mayor Soglin, President Schmidt and Members of the Common Council:

Our firm represents the Apartment Association of South Central Wisconsin, Inc. ("AASCW"). Like many others across the city, the AASCW and its members are concerned with various aspects of the proposed benchmarking ordinance. The purpose of this letter is to call your attention to an important issue that has received almost no discussion to date. For the reasons explained below, we believe state law prohibits the City from seeking to apply the benchmarking ordinance to owners of rental property.

With limited exception, state law prohibits municipalities from enacting ordinances that compel landlords to disclose certain types of information to the municipality. More specifically, section 66.0104 of the statutes, titled "Prohibiting ordinances that place certain limits or requirements on a landlord," provides, in relevant part:¹

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.

¹ See Wis. Stat. § 66.0104(2)(d)2, eff. 3/1/2014.

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The same section of the statutes also prohibits municipalities from enacting ordinances that compel landlords to relay communications to their tenants unless the information is otherwise required under state or federal law.²

The proposed ordinance creates a benchmarking requirement that applies to city-owned buildings, the owners of any commercial buildings over 25,000 square feet and residential rental properties containing 35 or more dwelling units.³ Under the ordinance, each building owner would be required to annually report to the city certain energy consumption data.⁴ The proposed ordinance also requires that building owners send annual requests to their tenants seeking monthly electric and natural gas usage data.⁵

Owners of rental properties are, by definition, landlords. The proposed benchmarking ordinance seeks to compel these landlords to disclose their buildings' energy consumption information to the City. Since this information is undoubtedly "information concerning the landlord," and since none of the statutory exceptions apply, Wis. Stat. § 66.0104(2)(d)2 prohibits the City from enacting the ordinance as conceived. Likewise, the portion of the ordinance requiring that landlords communicate annual requests to their tenants for energy usage data runs afoul of the statutory prohibition in Wis. Stat. § 66.0104(2)(d)1.a.

Finally, because the statute makes no distinction between residential and commercial landlords, we believe state law prohibits the City from seeking to apply the ordinance to the owners of *any* buildings that are subject to leases. In other words, the benchmarking ordinance could only be applied to owner-occupied buildings and city-owned buildings.

While the AASCW supports the broad energy conservation goals outlined in the City's 2011 Sustainability Plan, the AASCW believes that the proposed benchmarking ordinance would violate state law if applied to rental property. For this reason, the AASCW cannot support the current proposal. More importantly, the AASCW believes there are alternatives to a compulsory top-down approach that stand a better chance of achieving the desired goals.

We note that the Sustainability Plan does not call for the adoption of mandatory benchmarking ordinances. To the contrary, the plan discusses the importance of educating building owners; calls for actions that "promote and incentivize upgrading existing commercial and residential building stock to improve energy efficiency"; and urges the creation of "policy with incentives and energy performance targets to foster upgrades of existing buildings."⁶ In other words, education,

² See Wis. Stat. § 66.0104(2)(d)1.a.

³ See Legistar #32255 ver. 2, drafter's analysis.

⁴ MGO 29.047(5)(a).

⁵ MGO 29.047(5)(b).

⁶ The Madison Sustainability Plan, p. 35, adopted June 12, 2012. Also refer to the Common Council resolution approving the plan, which provides, in part, "the goals and associated actions in the Plan are not meant to be prescriptive, but rather an attempt to lay out a series of priorities and directions that will help Madison become more sustainable"

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incentives and policies that promote best practices are all consistent with the plan. Adoption of an ordinance with compulsory reporting requirements and penalties for noncompliance is the opposite of that.

In lieu of the benchmarking ordinance, the AASCW urges the City to pursue the type of public-private collaboration contemplated in the Sustainability Plan. Thank you in advance for your careful attention to this important matter.

Respectfully submitted,

MICHAEL BEST & FRIEDRICH LLP



Daniel A. O'Callaghan

cc: Nancy Jensen, Executive Director
AASCW Board of Directors

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