favorable with Amendments

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, MD 21202

Re: City Council Bill 18-0307 – Water Accountability and Equity Act

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 18-0307 for form and legal sufficiency. It would make changes to the way that the City bills for water consumption by making changes to several sections of the City Code. The Law Department will address issues in the bill in order and suggest amendments as necessary.

First, the bill would modify Section 7-3 of Article 13 of the City Code to include two provisions that impact residential leases. In 7-3(A-1)(1), the bill would require an express provision in a written lease if a landlord requires a residential tenant to pay for water or wastewater. This is a bit broader than the existing state law that requires the same thing for a subset of residential tenants. Md. Code, Real Prop., § 8-205.1. Although it could be argued that state law has preempted this section of the bill, since the bill can be read in harmony with existing state laws, and because it is unclear that there is any intent by the State to occupy the field, a court would not necessarily find preemption. *See, e.g., Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 512-513 (2004).

Second, the bill would modify Section 7-3(A-1)(2) of Article 13 of the City Code to declare that a signed lease establishes, for the purpose of the lease term, the owner's "authorization" to the Department of Public Works ("DPW") to release account records to the tenant. Later in the bill, changes to Section 2-1(D)(2)(II) of Article 24 of the City Code would permit DPW to send the original of the bill directly to the tenant instead of the landlord. These sections have to be changed to comply with Maryland's Public Information Act, which prevents the government from disclosing financial records to anyone other than the person in interest. Md. Code, Gen. Prov., §4-336(b). Disclosure can occur to anyone that is the *designee* of the person in interest. Md. Code, Gen. Prov., §4-101(g)(1). Thus, the language in Sections 7-3(A-1)(2) and 2-1(D)(2)(II) of the bill should be changed to conform with this state law, as the City has no legal ability to disclose a record in a manner inconsistent with the Maryland Public Information Act. 86 Md. Op. Atty. Gen. 94, 107 (2001). In addition, the change to Section 2-1(D)(2)(II) is also required to comply with Section 8-205.1 of the Real Property Article of the Maryland Code. **Amendment language is attached to this report.**

Next, the bill creates a new definition of customer in Section 1-11(D) of Article 24 of the City Code to include *some* tenants. Similarly, the use of the phrase "who is responsible for payment of the cost of water or wastewater services at that residence" in Section 1-11(L) appears to encompass *some* tenants. The language in Section 1-11(N) also appears to try to encompass tenants that pay for water or wastewater "separate from fix periodic rent." The exclusion of some

tenants, such as those who pay for water or wastewater as part of their fixed periodic rent, must have a rational basis to comport with the Equal Protection Clause of the United States Constitution. *See, e.g., Christopher v. Montgomery County Department of Health and Human Services*, 381 Md. 188, 215-17 (2004) (holding that a law cannot be applied "so as to make unjust discriminations between persons in similar circumstances, material to their rights, such denial of equal justice is within the prohibition of the Constitution."). The City must articulate a rational basis for including residential tenants that pay for water or wastewater in one way but excluding those that pay differently. Alternatively, the bill could be modified to include all residential tenants. If a modification is desired, Section 2-7(B)(3)(IV) should also be amended to conform to the modification.

Additionally, it is important to recognize that the City provides water or wastewater services to the applicant, which is the owner of the property at which the service is requested. *Home Owners' Loan Corp. of Washington, D.C. v. Mayor and City Council of Baltimore*, 175 Md. 676, 686 (1939). In the 1970s, Maryland's highest court confirmed that the City could not put a water bill in the tenant's name alone because the water is supplied to the property owner pursuant to an application for service at a particular address. *Property Owners' Ass'n of Baltimore City, Inc. v. City of Baltimore*, 268 Md. 194, 199 (1973). It is for this reason that the proposed language for Section 2-9(B) of Article 24 of the City Code that refers to a water *account* must be changed to reflect that the credit is not applied to an account because those accounts are associated with the address of the applicant, not the person paying the bill. Similarly, the requirement in the bill that those receiving the credits be required to pay the bills issued must be modified, as that is a requirement of the owner of the property. **Amendment language is attached to this report.**

Maryland's Highest Court has recognized that "dispute about water arises out of the conflicting interests of natural adversaries, the landlord and the tenant" and held that the City is often "caught between Scylla and Charybdis or, to use the vulgate, between a rock and a hard place." *Id.* at 195. The Court explained, however, that whether the tenant or landlord is paying for water consumption, it is illegal for a landlord to let a tenant live in a dwelling that does not have running water. *Id.* at 201. That remains the law in Maryland. Md. Code, Real Prop., § 8-211; Baltimore City Code of Public Local Laws, § 9-9(b). Thus, failure of a tenant to pay for water, even when required under a lease, will not release the property owner from the duty to insure that there is water at the premises, although that owner may have a subsequent cause of action against the tenant for reimbursement under the terms of the lease. Nor will the tenant's payment to the City directly be a clear a bar to eviction if the lease characterizes that utility payment as additional rent. *See, e.g., Smith v. Wakefield, LP*, 462 Md. 713, 735 (2019). As noted above, defining "tenant-water-utility-customer" as those that pay for water and wastewater separate from fixed periodic rent, may not capture all tenants. *See, e.g., Lockett v. Blue Ocean Bristol*, 446 Md. 397 (2016).

The bill's modification of the language in Section 2-3(d) of Article 24 would change the existing mandate that requires DPW to turn off water that is not authorized to be connected to the water system, to a permission that DPW may but need not turn off that water. This turn-off provision is not related to payment, but has to do with contamination of the City's water supply by those hooking up to it without permission. While the change is legally permissible, it is unclear why it would behoove the City to give the DPW director permission to have unauthorized water

connections. If this change is desired, the language in Sections 21-4 (Wrongful use after cut-off) and 21-6 (Interference with equipment; Illegal Use of Water) of Article 24 the City Code should be reviewed to determine if there is a desire to conform the language.

The bill's proposed change to Section 2-6(A)(1) of Article 24 would give the DPW Director power to create the rules and regulations to implement this program. However, the DPW Director does not collect the bills or manage the lien process, as the Charter gives those functions to the Department of Finance. Baltimore City Charter, Art. VII, §§10-13. Thus, if the goal of the bill is to mandate anything with respect to water billing or liens for unpaid water bills, the language in Section 2-6 should be modified to include the Director of Finance. Similarly, Section 2-6(C) requires the DPW Director to place a certain notice in each bill, which is, in fact, done by the Department of Finance. Comparable changes are also required to the bill's proposed language for Sections 2-9(B)(1), 2-11(C), 2-20(C)(1)(I), 2-20(D)(2) and 4-5(a)(1) of Article 24. This includes changes to the Office of Water Customer Advocacy and Appeal's equitable adjustment process so that it has the power to change the amount due on a bill, which would thus result in a refund or reduction of the bill. **Amendment language is attached to this report.**

The bill's language for Sections 2-7(B)(1) and (B)(3)(III) of Article 24 of the City Code must be amended to comply with Section 4-102 of the General Provisions Article of the Maryland Code that prevents any government in Maryland from keeping any information about a person that is not needed and relevant to the accomplishment of the purpose set forth in the statue at issue. Md. Code, Gen. Prov., § 4-102. Here, there is no clear need on an application for the Water-for-All program for the ages of the members of a household or the amount of rent paid, as neither have any bearing on eligibility for the program. **Amendment language is attached to this report.**

For the same reason, the bill's proposed language in Section 2-7(C)(2) that requires an applicant to submit photocopies of tax documents must be changed so that it is clear that the City is not keeping copies of such documents, but rather viewing them and recording the income amount and returning to them to the applicant so that the City is not retaining records of exemptions, credits or other tax information that is not needed by the City to accomplish the purpose of the program. This will also help the City comply with Section 13-202 of the Tax-General Article of the Maryland Code that mandates government keep certain tax information in strict confidence. **Amendment language is attached to this report.**

The proposed language in Section 2-7 of Article 24 should be modified to clarify if the applicant is a person or an entire household. Thought should be given to what will happen to the credit if a member of the household whose income was part of the credit is no longer in that household. The language in Sections 2-7(B)(4) should be modified to include all members of the household whose income will be part of the application. **Amendment language is attached to this report.**

The credit calculation in the bill's proposed Section 2-8(B) needs to be clarified so that it is clear what income is to be used in the calculation. The language refers to the recipient of a credit, but it is unclear if that recipient is meant to be the applicant or the entire household. While the entire household may be captured in the "B" variable for water bill (assuming the same people lived in the household in the past during the time utilized for the average calculation), the entire

household is not necessarily captured in the variable "I" for income. Additionally, the term "average annual water usage" is vague as there are at least three different ways to calculate average: mean, median and mode. Failure to clarify the method to calculate this credit would make the bill void for vagueness. *See., e.g., A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-39 (1925) (civil laws can be void for vagueness if "it required that transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was."). It could also make the administration of the program susceptible to a Constitutional challenge that it treats similarly situated people differently. *See, id.* at 215-17 (a law cannot be applied "so as to make unjust discriminations between persons in similar circumstances, material to their rights, such denial of equal justice is within the prohibition of the Constitution.").

Similarly, the arrearage provisions in Sections 2-12(5), 2-13 and 4-5 need to be clarified so that it is clear whether the arrearages at issue are those associated with the property at which the customer currently resides or prior locations. It is unclear if the intent is to allow a customer currently residing at one location to stay the pre-enrollment arrears at another location. For example, the phrase "satisfies all of a recipient's current water liabilities" in Section 2-13(c) is a non-sequitur as the arrearage is currently tied to an account, which is based on a particular property.

The language proposed in the bill for Section 2-9(B)(4) must be modified to return unused credit money to the water and wastewater self-sustaining fund, and not to the Director of Finance in accordance with Section 18(a) Article VI of the City Charter. **Amendment language is attached to this report.**

Next, the Office of Water Customer and Advocacy proposed in the bill must be housed within DPW, the same custodian of the water billing records, so that employees of that Office will be legally able to view water bills without violating state law. Md. Code, Gen. Prov., §4-336(b); *Montgomery v. Shropshire*, 420 Md. 362, 365-66 (2011). That state law will also have the same impact on the Office as it would on any other City agency when responding to requests for information like those referenced in Section 2-20(B)(2). Placing the Office inside DPW is also required so that the Office can perform water bill adjustments and make the final decision on them, as those are functions that the City Charter mandates be carried out by DPW. City Charter, Art. VII, §§ 33, 34. This also then allows the Office to facilitate leak investigation as proposed in Section 2-20(B)(1)(V) of the bill since that is also a function that the Charter mandates be performed by DPW. City Charter, Art. VII, § 31. **Amendment language is attached to this report.**

Additionally, the mandate in Section 2-17(C)(1)(IV) that requires the Office of Water Customer and Advocacy to investigate whether notices should be in other languages is subject to the existing federal law mandating certain types of access to government services to those of limited English proficiency. See Civil Rights Act of 1964, PL 88-352, 78 Stat. 241 (1964); 65 FR 50121 (2000 Federal Executive Order 13166).

The appeals process contemplated in the bill's proposed Section 2-21 of Article 24 must be read to be in accordance with the holding in the case of *Mayor and City Council of Baltimore v. ISG Sparrows Point, LLC*, No. 980, Sept. Term. 2009 (Md. Ct. of Special Appeals, November 4, 2011)(unreported). That case evaluated DPW's informal conference process for water billing

disputes and the Court wrote that once the City established "a system of adjudicatory hearings, the DPW was obligated to operate it in accordance with principles of fundamental fairness, including procedural due process." *Id.* at 24. The Court was clear that any hearing process- informal or created by law as proposed in this bill- is a quasi-judicial hearing requiring that both the customer and the agency make a record of the process, be given ample time to present the case and allow cross-examination. These requirements cannot be met if the Appeals Officer is able to hold conferences before or during the hearing. The bill must be amended to remove this option. For the same reason, during any continuance the Appeals Officer may not take any additional evidence, by way of investigations, communications, or otherwise, as that information would also not be on the record or subject to cross-examination. **Amendment language is attached to this report.**

Although there need not be formal rules of evidence in this administrative appeal process, the use of the term "prima facie evidence" in Section 2-21(E) is problematic because it is not clear that it meets the legal standard in Maryland. In Maryland, a legislature, "in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact shall be prima facie evidence of another fact, when there is some rational connection between the fact proved and the ultimate fact presumed; but the legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense." *See Maryland Unemployment Compensation Board v. Albrecht*, 183 Md. 87, 95 (1944). Here, the fact that a meter reading is unreasonably high is not logically a predictor of whether the "meter is incorrect" but could reflect an incorrect meter size or a malfunctioning meter. As written, the language in the statute could allow the Appeals Officer to preclude DPW from presenting evidence that the meter is functioning properly. Thus, an amendment is needed to clarify the use of this term. **Amendment language is attached to this report.**

The judicial review process in Section 2-21(G) and Section 2-22 must be amended to conform with the process set forth in the referenced Maryland Rules. Md. Rule 7-201, *et. seq.* **Amendment language is attached to this report.**

The language in Section 2-22(B) must be removed as it is impermissibly vague. *See., e.g., A.B. Small Co.* 267 U.S. at 238-39. It is not possible for a delinquency or arrearage be reduced to a judgment in a civil action unless the City sues the property owner for the unpaid water bills directly, as the City provides water pursuant to an application by the property owner. *See, e.g., Property Owners' Ass'n of Baltimore City, Inc.*, 268 Md. at 199. This would not relate to the tenant's occupation of the property, nor have any impact on a Summary Ejectment case. Md. Code, Real Prop., § 8-402.2. Moreover, the City has no ability to legislate over the actions of the Sheriff's Department, nor stay the execution of a judgment as those are areas exclusively controlled by state law. Md. Code, Cts & Jud. Proc., §2-301, *et. seq.*; *see, e.g., Worton Creek Marina, LLC*, 381 Md. at 512-513 (discussing preemption). Moreover, failure by a sheriff to execute a warrant or other attachment can subject that sheriff to contempt of court or result in punishment by fine, called amercement. Md. Code, Cts & Jud. Proc., § 2-304. **Amendment language is attached to this report.**

The bill's language in proposed Section 2-23 conflicts with Section (19) of Article II of the City Charter, which is state law. That state laws defines any unpaid municipal charge as a lien

against the real property at issue. City Charter, Art. II, § (19). The tax sale process is also a creature of state law, and the City is unable to provide that disputed bills stay the tax sale process. Md. Code, Tax-Prop., § 14-849.1. Evidence of this clear preemption is House Bill 161 from the 2109 General Assembly Session enacting the Baltimore City Water Taxpayer Protection Act. These same laws are also evidence that Section 8-4 of the bill preempted. *see, e.g., Worton Creek Marina, LLC*, 381 Md. at 512-513. **Amendment language is attached to this report.**

The language in Section 4-3(F)(4) and (5) should be reviewed because as written a turn-off can be avoided entirely by repeatedly entering into installment payment agreements or merely submitting repeated applications for the Water-for-All-Discount Program. Although on its face both provisions are legally sufficient, the program cannot be operated in such a way as to make the water fund no longer self-sustaining as required by Section 18(a) Article VI of the City Charter. For the same reason, the reduction of the interest rate in Section 8-1 may be problematic in practice if there is simply little incentive for the liens to be sold to recoup costs.

The language in Section 4-3(F)(6) should be clarified so that it is clear what medical conditions would warrant water service remaining on at a property because state law already deems a lack of water at a property as a habitability issue for healthy individuals. Md. Code, Real Prop., §8-211; Baltimore City Code of Public Local Laws, §9-9(b). Thus, this Section needs to be modified or removed so that it is not void for vagueness by failing to provide guidance to DPW as to when water turn-offs for medical issues are required. *See., e.g., A.B. Small Co.*, 267 U.S. at 238-39 (1925).

Subject to the required amendments, the Law Department can approve the bill for form and legal sufficiency.

Very Truly Yours,

Hilary Ruley
Chief Solicitor

Cc: Andre M. Davis, City Solicitor
Jeffrey Amoros, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervala, Chief Solicitor
Ashlea Brown, Assistant Solicitor

Amendments:

Amendment for Sections 7-3(A-1)(2) and 2-1(D)(2)(II):

On page 3, delete lines 8 through 11 and substitute, "THE LEASE SHALL INCLUDE A PROVISION THAT THE LANDLORD MAKES THE TENANT A DESIGNEE UNDER MARYLAND'S PUBLIC INFORMATION ACT TO RECEIVE COPIES OF THE BILLS FOR THE WATER AND/OR WASTEWATER ACCOUNT AT ISSUE."

On page 6, in line 9, strike the second "THE" and substitute "A COPY OF THE".

Amendment for Sections 2-9(B) and 2-12(6):

On page 11, in line 35, and on page 12 in lines 1, 6 and 8, delete "ACCOUNT" and substitute "BILL".

On page 13, in line 8, delete "THE CUSTOMER PAY" and in that same line add "BE PAID" before the semi-colon.

Amendment for Sections 2-6(A)(1), 2-6(C), 2-9(B)(1) 2-11(C), 2-20(C)(1)(I), 2-20(D)(2) and 4-5(a)(1):

On page 7, in line 14, after "DIRECTOR" insert "AND THE DIRECTOR OF FINANCE".

On page 7, in line 29, and on page 11, in line 34, after "DIRECTOR" insert "OR THE DIRECTOR OF FINANCE, AS THE CASE MAY BE".

On page 12, in line 29, and on page 19, in line 26, and on page 28, in line 9, after "DEPARTMENT" insert "OF FINANCE".

On page 19, strike lines 1 through 6 and insert "CHANGE THE AMOUNT DUE ON A BILL FOR WATER OR WASTEWATER"; and renumber the Section accordingly.

On page 29, in line 9, after "DIRECTOR" insert "OF FINANCE".

Amendment for Sections 2-7(B)(1) and 2-7(B)(3)(III):

On page 8, in line 9, strike "AND AGES" and strike line 17.

Amendment for Section 2-7(C)(2):

On page 9, in line 9, delete "PHOTOCOPIES OF HIS OR HER" and substitute "FOR REVIEW THE RELEVANT."

Amendment for Section 2-7(B)(4):

On page 8, in lines 21 and 22 and, again, in lines 24 and 25, delete "THE APPLICANT OR THE APPLICANT'S AUTHORIZED REPRESENTATIVE" and substitute "ALL MEMBERS OF THE HOUSEHOLD WHOSE INCOME WILL BE EVALUATED FOR THE PROGRAM."

Amendment for Section 2-9(B)(4):
On page 12, in lines 11 and 12, strike "THE DPW DIRECTOR SHALL RETURN TO THE FINANCE DIRECTOR" and in line 13 before the period insert "SHALL BE RETURNED TO THE SELF-SUSTAINING WATER FUND".

Amendment to Section 2-17:

On page 15, in line 9, add "IN THE DEPARTMENT OF PUBLIC WORKS" after "APPEALS."
On page 15, delete lines 22 and 23.

Amendment to Section 2-21(E):

On page 21, strike line 19. In the same page, in line 22, before the period, insert "BUT THE APPEALS OFFICER MAY NOT RECEIVE ANY ADDITIONAL EVIDENCE OR COMMUNICATIONS PERTAINING TO THAT MATTER DURING THE CONTINUANCE."

Amendment to Section 2-21(E)(1)(VI):

On page 21 in line 18, strike "incorrect" and substitute "IS NOT FUNCTIONING PROPERLY OR IS THE WRONG SIZE"

Amendment to Sections 2-21(G) and 2-22:

On page 22, in line 12 and on the same page in lines 15 and 16, strike "OF PROCEDURE".
On page 22, in line 14, insert "CIRCUIT" before "THE" and strike the second "TO".
On page 22, in line 15, strike "THE COURT OF SPECIAL APPEALS".
On page 22, strike lines 25 through 31.

Amendment to Sections 2-23 and 8-4:

Delete Sections 2-23 and 8-4.