#20-0626, Water Accountability and Equity Act - Modifications
Before the Taxation, Finance and Economic Development Committee

Testimony of the Baltimore Right to Water Coalition

November 12, 2020

Position: Support

Good morning, Chairwoman Middleton and members of the Committee. Thank you for holding the hearing today and for your ongoing support for addressing Baltimore's water billing issues and ensuring that all Baltimoreans have access to affordable and accountable water service through the Water Accountability and Equity Act.

The Baltimore Right to Water Coalition strongly urges you to **support** the ordinance before you today: Water Accountability and Equity Act - Modifications, 20-0626.

This bill is intended to get the city back on track to implement the comprehensive water billing solution that the city council supported with its unanimous passage of the Water Accountability and Equity Act last year. As you are aware, in July, just days before that legislation was set to go into effect, Mayor Jack Young issued an executive order to delay the law's effective date until 30 days after the end of the Covid state of emergency. We recognize the serious constraints that the pandemic has placed on DPW; however, the economic and public health consequences of the pandemic have only added urgency to the need to provide water billing relief for our communities.

Now, as Covid cases are growing exponentially, and families struggle to make ends meet, the city needs to get back on course to ensure that no family worries about affording their water bill or about struggling to correct a multi-thousand-dollar error by DPW. This legislation will give the incoming mayoral administration time to properly implement WAEA, while providing key benchmarks for DPW to stay on track, ensuring no family loses water service over unaffordable bills, and expanding existing protections to renting households. This bill will expand existing protections and support to the majority of Baltimoreans who rent their homes and are currently denied assistance from DPW when their landlords are unresponsive.

We want to express gratitude to the Committee and Council President Brandon Scott for your ongoing work to help execute this water billing solution and provide relief to Baltimore families.

Appended to this testimony is a one-page summary of the legislation and a memo outlining our responses to the amendments from the Law Department.

Water Accountability & Equity Act Modifications - CB 20-0626
Statement of Support from the Baltimore Right to Water Coalition

The proposed modifications to the Water Accountability and Equity Act, introduced by City Council President Brandon Scott, are necessary and urgent. Because of ongoing delays in implementing the bill and the ongoing pandemic, this legislation is necessary to get Baltimore back on track to address the city's widespread water affordability crisis, which has only worsened after another 10% rate hike on October 1 and Covid's economic devastation.

The WAEA, which was passed by the City Council in November 2019 and signed into law in January 2020, is groundbreaking legislation to improve the city's water billing practices by (1) setting up a comprehensive Water For All affordability program and (2) creating a new independent Office of the Customer Advocate. On July 9, four days before these programs became legally effective, Mayor Young issued an executive order to delay their effective date until 30 days after the end of the Covid-19 state of emergency.

This bill will allow the next mayor to revoke that executive order to get back on track. It will:

- **Set strong, realistic implementation timelines with benchmarks to track progress**:
    - Immediately: Renter protections and notice requirements, water shutoff moratorium until WAEA is fully effective
    - December 2020: Rules and regulations for ECB appeals
    - January 2021: Creation of the Committee for Oversight to oversee implementation, ECB hearings, collection of data, customer protections
    - April 2021: Draft rules and regulations for affordability program
    - July 2021: Water for All affordability program and Office of Customer Advocate
- **Improve protections for renting families, who make up more than half of Baltimore residents and struggle to access existing DPW assistance:**
    - Require landlords to add tenants to accounts when the tenant is responsible for paying water bills, giving tenants access to water bills, assistance and dispute remedies; and
    - Ensure tenants can access DPW assistance when landlords are unresponsive.
- **Strengthen safeguards assuring the fairer treatment of DPW customers:**
    - Clarify that DPW delays and other arbitrary actions can no longer stop customers from appealing;
    - Specify what data must be used to assess long-standing problems and track if progress is being made;
    - Prevent conflicts of interest and undue influence from hindering customer appeals and policy reforms;
    - Add transparency and public input by requiring that DPW publish rules and regulations for public comment; and
    - Avoid conflicts of interest on the Oversight Committee by replacing the DPW Director with another Mayoral appointee.

Please support this ordinance to turn Baltimore back on the right course to resolve the city's ongoing water affordability and billing issues.

From: Baltimore Right to Water Coalition
To: Chair Middleton and other members of the Taxation, Finance and Economic Development Committee
Date: November 12, 2020

Coalition Response to Law Department Amendments (#20-0626)

Code: Coalition Accepts Amendment | Coalition Opposes Amendment | Coalition Offers Counterproposal

Below are responses from the Baltimore Right to Water Coalition to amendments proposed by the Law Department for City Council Bill #20-0626, Modifications to the Water Accountability and Equity Act (WAEA). We would accept several amendments on good faith, but we oppose one amendment and offer three counterproposals to other amendments to better reflect the intention of the legislation.

Amendment No. 1 – retaining language that allows tenants access to owner's water billing information

Law Department Proposal: On page 2, delete lines 12 through 28.

~~Article 13. Housing and Urban Renewal Subtitle 7. Residential Lease Requirements~~

~~§ 7-3. Information required.~~

~~(a-1) Payment for water and wastewater services.~~

~~(1) [Any] IF A property owner or managing operator [who] requires that a tenant pay the costs of water or wastewater services, whether directly to the Department of Public Works or as reimbursement to the owner or managing operator, THE OWNER OR OPERATOR shall:~~

~~(I) include that requirement in an express provision [of a written lease] ADOPTED BY EXECUTING:~~

~~(A) A MODIFICATION TO AN EXISTING WRITTEN LEASE; OR~~

~~(B) A NEWLY FORMED WRITTEN LEASE; and~~

~~IF THE DWELLING UNIT DESCRIBED IN THE LEASE IS DIRECTLY METERED, REGISTER THE TENANT AS AN ADDITIONAL PARTY ON THE OWNER'S ACCOUNT AT THE DEPARTMENT OF PUBLIC WORKS WITHIN 20 DAYS AFTER THE EXPRESS PROVISION DESCRIBED IN SUBUNIT (I) OF THIS PARAGRAPH IS EXECUTED.~~

Coalition Position: Counterproposal

Explanation: Proponents of the bill do not intend any removal of the provision in the enacted WAEA that require certain written lease clauses, such as a clause providing tenants the right, as

MPIA designees of the account holder, to request and access account records at DPW. That provision is set forth in paragraphs (2) and (3) of Sec. 7-3(a-1).

This bill revises paragraph (1) of Sec. 7-3(a-1). The proposed changes will improve that section of the WAEA, once that ordinance becomes effective. With the Mayor's indefinite suspension of the WAEA, proponents expect that tenants will eventually have that right to request records of the account as provided in the version of Sec. 7-3 that was enacted in January 2020.

The Law Department's amendment entirely removes this bill's requirement that property owners conform their leases to the WAEA either by modification of an existing written lease or by executing a new written lease. This requirement would strengthen the provision in the WAEA that requires written leases whenever a property owner requires a tenant to pay for water/sewer costs. The language added to the WAEA in this bill would obligate that property owners take the concrete step of modifying an existing written lease or executing a new written lease to comply with the WAEA. Without this added language, the City would find that tenants are impeded from exercising the rights and protections in the WAEA because their landlords use lease renewals to evade the new statutory requirements.

> *Example*: Mary has a written lease executed in July 2020 that requires her to pay the water/sewer bill. As written, the lease does not include provisions required by the WAEA, such as a clause that gives Mary MPIA "designee" status to require records from DPW. As July 2021 approaches, Mary decides she wants to stay at the property but would like the lease to be updated to meet the requirements of the WAEA (which, hypothetically, is effective). The landlord agrees only to renew the lease agreement on a month to month basis with no other change to the written terms. Later, when Mary requests records from DPW, her request is denied because the lease does not include language providing MPIA "designee" status.

This bill, in revising Sec. 7-3(a-1)(1), would compel landlords to take the affirmative step of updating existing leases so that they conform with the WAEA. This revision does not, as the Law Department suggests, "impair" or "destroy" obligations established in existing leases. The Law Department argues, citing the 1965 SCOTUS opinion *El Paso v. Simmons*, that by requiring execution of a lease modification or new lease, the City would violate the U.S. Constitution Contract Clause because "destroying existing contracts is not a valid government policy that would permissibly interfere with a contract."

Yet, the Supreme Court has also opined that "not all laws affecting pre-existing contracts violate the [Contracts] Clause." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) (citing *El Paso* v. *Simmons*). "To determine when such a law crosses the constitutional line," the Court applies a two-step test:

> The threshold issue is whether the state law has "operated as a substantial impairment of a contractual relationship." In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." *Id*. at 1821-1822 (internal citations omitted)

The Law Department fails to explain how this bill's revision of Sec. 7-3(a-1)(1) would undermine the existing bargain between a landlord and tenant, interfere with the contracting parties expectations, or prevent one or the other from safeguarding their rights. Ultimately, the proponents disagree that the bill poses any such threat. The Law Department only hypothesizes that this bill would violate the Contract Clause by requiring a lease modification or newly executed lease even when landlord and tenant have an existing lease that complies with the WAEA. If that hypothetical is the only plausible constitutional grievance at issue, then proponents of the bill suggest that any amendment should merely add language to this Sec. 7-3(a-1)(1) to squarely address the (exceedingly rare) instance where an existing lease already conforms to the WAEA's requirements.

The Law Department's amendment also removes entirely the bill's language intended to compel certain landlords to take the affirmative step of registering the bill-paying tenant as an "additional party" in DPW's billing system. The infrastructure for additional parties already exists. Utilization of this billing feature is voluntary and at the discretion of landlords. Where tenants are registered in the billing system, DPW provides a copy of the bill to the tenant by mail and has customarily allowed these tenants to file BH2O applications directly, without needed the participation of the landlord.

This bill requires landlords to act in a reasonable time frame (20 days) to initiate registration of the tenant as an additional party to the account. This provision takes the landlord's discretion out of the equation - but it is limited to properties that are directly metered. Here, we mean a property which is not a multiple family dwelling and is serviced by a single meter.

Counterproposal: To address the Law Department's concern about existing, already-compliant written leases, and to refine the bill's provision on additional-party registration, we propose the following amending language:

§ 7-3. Information required.

(a-1) Payment for water and wastewater services.

(1) [Any] IF A property owner or managing operator [who] requires that a tenant pay the costs of water or wastewater services, whether directly to the Department of Public Works or as reimbursement to the owner or managing operator, THE OWNER OR OPERATOR shall:

(I) include that requirement in an express provision ~~[~~of a written lease~~]~~ **[**ADOPTED BY EXECUTING:**];**

(II) IF SUCH PROVISION EXISTS IN A WRITTEN LEASE BUT FAILS TO CONFORM WITH REQUIREMENTS IN THIS SECTION, INCORPORATE CONFORMING LANGUAGE INTO THE LEASE BY EXECUTING:

(A) A MODIFICATION TO **[**AN**]** **THE** EXISTING WRITTEN LEASE; OR

(B) A NEWLY FORMED WRITTEN LEASE; AND

[(ii)**]** **(III)** If the dwelling unit described in the lease is directly metered, register the tenant as an additional party on the owner's account at the Department of Public Works **at least 20 days before any act to seek the tenant's payment**

of costs for water or wastewater services. ~~within 20 days after the express provision described in subunit (i) of this paragraph is executed.~~

Amendment No. 2 – revising language concerning lack of owner participation in tenant request

Law Department Proposal: On page 3, delete lines 1 through 5 and substitute:

~~THE DEPARTMENT MAY NOT DENY A TENANT-WATER-UTILITY CUSTOMER'S REQUEST FOR A DISCOUNT, PAYMENT AGREEMENT, BILL ADJUSTMENT, OR OTHER AGENCY ACTION IF THE TENANT-WATER-UTILITY CUSTOMER DEMONSTRATES THAT THE PROPERTY OWNER OR MANAGING OPERATOR WAS NOTIFIED OF THE REQUEST AND THEREAFTER WITHHELD ITS PARTICIPATION IN THE REQUEST.~~

THE DEPARTMENT MAY NOT DENY ANY REQUEST BY A TENANT-WATER-UTILITY CUSTOMER THAT THE DEPARTMENT DETERMINES THE TENANT-WATER-UTILITY CUSTOMER IS OTHERWISE ENTITLED TO RECEIVE SIMPLY BECAUSE THE OWNER REFUSES TO PARTICIPATE IN THE REQUEST.

Coalition Position: Counterproposal

Explanation: Sec. 2-1(e) of this bill intends to solve the problem that has existed throughout 2020 in which DPW has denied tenants' applications for discounts and payment plans because their landlords did not participate in the application. In this circumstance, when tenants have requested their landlords' participation or consent in the application process, some landlords might expressly refuse the tenant's request while others might ignore the tenant completely. The language in Sec. 2-1(e) aims to cover both scenarios. For this reason, proponents have sought language that captures not only *refusal* but also *withholding* of participation.

The Law Department amends Sec. 2-1(e) because its current wording "would allow all tenant-water-utility customers to receive any discount, payment arrangement or anything else requested of DPW simply by showing that the owner or managing operator of the property was notified of the tenant's request and withheld participation in the request." Proponents of the bill agree with this conclusion and agree that the section should be refined.

However, the Law Department's amending language limits the bill's protection to the *refusal* scenario, leaving unanswered how DPW would address instances in which landlord's ignore tenant's requests for their participation.

Counterproposal: Instead, we propose the following revision:

THE PROPERTY OWNER OR MANAGING OPERATOR'S REFUSAL OR FAILURE TO PARTICIPATE IN A TENANT-WATER-UTILITY-CUSTOMER'S REQUEST TO THE DEPARTMENT FOR A DISCOUNT, BILL ADJUSTMENT, PAYMENT PLAN, OR OTHER AGENCY ACTION MAY NOT BE GROUNDS FOR THE DEPARTMENT TO DENY THE REQUEST.

Amendment No. 3 – conforming to state law on personal information

Law Department Proposal: On page 4, delete lined 23-26.

~~(IX) CUSTOMER DEMOGRAPHICS RELEVANT TO THE MANDATE OF CUSTOMER FAIRNESS, IF VOLUNTEERED (E.G., INCOME, NEIGHBORHOOD, RACE, FAMILY STATUS, AGE, TENANT/HOMEOWNER, COMMERCIAL/RESIDENTIAL, PRIMARY LANGUAGE, ETC.);~~

Coalition Position: Accept on good faith that the City will fully pursue fairness and equity as required by law, but strongly disagree with Law Department's legal argument that fairness and equity are not governmental purposes.

Explanation: We disagree with the Law Department's position that customer demographics are "not needed and relevant" to a government purpose. The purposes already stated in law are 1) achieving fairness to customers under the Water Equity and Accountability Act and 2) achieving equity under the Equity Assessment Ordinance, Article 1 39-1. Demographic data is needed to further both government purposes. In the interest of moving this bill forward, however, we accept the change with the expectation that the City will fully pursue these legal mandates using data even if this provision is omitted.

Amendment No. 4 – removing language that conflicts with Charter

Law Department Proposal: On page 5, delete line 10. On page 6, delete line 23.

[Customer Advocacy Office employees] ~~MAY NOT BE HIRED INTO THE OFFICE FROM DPW;~~

[Appeals employees] ~~MAY NOT BE HIRED FROM DPW;~~

Coalition Position: Oppose

Explanation: The Law Department argues that existing DPW employees can be hired as Advocates, despite any real or apparent conflicts of interest. We disagree. As the Law Department states, the Charter requires hiring "on merit." It is clearly a job qualification/merit for Advocates to be "impartial" and independent, since they are agency watchdogs whose legal mandate is to advocate for customers. Advocates simply cannot be effective if customers who submit complaints simply end up dealing with the same exact employees who created the problematic situation in the first place.

Amendment No. 5 – removing language that conflicts with the Mayor's executive power

Law Department Proposal: On page 5, delete line 8. On page 6, delete line 21.

[Consumer Advocacy Office employees] ~~SHALL HAVE OFFICES PHYSICALLY SEPARATED FROM DPW;~~

[Hearing officers] ~~SHALL HAVE OFFICES PHYSICALLY SEPARATED FROM DPW;~~

Coalition Position: Accept on good faith the City's promises to ensure the impartiality that is both required by law and necessary to restore the public trust, although we disagree with the Law Department's argument.

Explanation: There is nothing vague about the Advocate's offices being "physically separated" from other DPW offices, and an office wall does not threaten the constitutional separation of powers. It merely implements the law requiring Advocates to be "impartial", as Advocates cannot be impartial watchdogs if the people that they are scrutinizing are sitting at the next desk over. Nevertheless, we accept on good faith that the City's promises to ensure the impartiality that is both required by law and necessary to restore the public trust.

Amendment No. 6 – amending appeal timeline language

Law Department Proposal: On page 6, delete lines 2 through 6. On page 6, in line 29, insert: (b) Customer's right to appeal.

~~CUSTOMERS MAY SEEK OFFICE ASSISTANCE OR APPEAL TO THE ECB AT ANY TIME. A LACK OF DPW DETERMINATION AS TO A CUSTOMER DISPUTE DOES NOT PREVENT THE CUSTOMER FROM SEEKING OFFICE ASSISTANCE. A LACK OF DPW DETERMINATION OR OF OFFICE ASSISTANCE AS TO A CUSTOMER DISPUTE DOES NOT PREVENT THE CUSTOMER FROM APPEALING TO THE ECB.~~

(1) A customer is entitled to file an appeal with the Environmental Control Board within 30 calendar days of receipt of a Customer Advocate's investigative report OR WITHIN 45 CALENDAR DAYS OF ASKING FOR ASSISTANCE FROM THE CUSTOMER ADVOCATE.

Coalition Position: Counterproposal.

Explanation: We agree with making this language more consistent, although the Law Department's proposed language does not properly capture our intent.

Counterproposal: The more appropriate solution is to: add at the beginning of the existing Section 2-19, "Subject to Section 2-19(C)," and to retain the proposed Section 2-19(C).

Amendment No. 7 – removing vague language

Law Department Proposal: On page 5, in line 25, delete "OR IN CASE OF AN ABUSE OF PROCESS"

THE RIGHT TO DISPUTE A DETERMINATION BY THE DEPARTMENT BEFORE THE DEPARTMENT, THE OFFICE, OR THE ECB MAY NOT BE LIMITED, EXCEPT AS OTHERWISE STATED IN THIS ARTICLE ~~OR IN CASE OF AN ABUSE OF PROCESS~~. THUS, A CUSTOMERS MAY NOT BE REQUIRED BY THE DEPARTMENT, THE OFFICE, OR THE ECB TO DO ANY OF THE FOLLOWING AS A PREREQUISITE TO HAVING THE CUSTOMER'S APPEAL HEARD:

Coalition Position: Accept.

Additional Concerns

The Law Department's letter raises additional concerns that have no corresponding proposed change to the text of the bill. We assume that these concerns are not intended to affect the final form of the bill. If that is not the case and further proposed amendments by the Law Department are anticipated, we state our objections to both the delayed timing and to the substance. Specifically, the Law Department argues that proposed 2-19(b), forbidding DPW from requiring customers to pay costs in order to appeal a bill, is "unnecessary". We strongly disagree, based on DPW's own Regulations on Customer Service and Support for Water, Wastewater, and Stormwater Billing effective 12/12/19, https://publicworks.baltimorecity.gov/water-and-sewer-adjustment-request-form, and based on the experiences of our clients.

Thank you for your consideration.