
CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor



DEPARTMENT OF LAW
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BALTIMORE, MD 21202

November 5, 2020

The Honorable President and Members
of the Baltimore City Council
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 20-0626 – Water Accountability and Equity Act – Modifications

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 20-0626 for form and legal sufficiency. The bill seeks to make amendments to City Council Ordinance 20-0336, the Water Accountability and Equity Act (City Council Bill 18-0307). This law is currently not operative because it was suspended by the Mayor on July 8, 2020 for no more than 30 days after the end of the Governor's state of emergency for the current COVID pandemic pursuant to the Governor's Executive Order 20-06-19-20. Thus, any changes made by this bill to the underlying law would similarly be suspended. This includes those time and deadline provisions within uncodified Sections of this bill, as they would be covered by the Mayor's previous order.

First, this bill would amend section 7-3 of Article 13 of the City Code to require landlords to amend existing written leases or form new leases with any tenant that pays for water or wastewater. This provision would violate the Contracts Clause of the United States Constitution because it would be a law that impermissibly impairs existing contractual arrangements. *See, e.g., City of El Paso v. Simmons*, 379 U.S. 497, 510 (1965) (destroying existing contracts is not a valid government policy that would permissibly interfere with a contract). The language as written in the bill would mandate that even in existing leases where the desired provision already exists, the lease must be amended or the parties must sign a new lease. This goes far beyond simply accomplishing the goal of having the desired provision in the lease, but rather mandates that the parties re-enter into a new lease regardless of the terms of the current lease. Moreover, the Law Department notes that the requirement that the Landlord facilitate the tenant's receipt of a copy of the bill is already contained in Section 2-1(d)(2) of Article 24 of the City Code. The Law Department recommends that this legal issue be addressed by retaining Section 7-3 of Article 13 of the City Code in its current form.

Additionally, this bill seeks to add language to each lease that says that the owner will register the tenant as an additional party on the owner's account at the Department of Public Works ("DPW"). This replaces the language that by operation of local law the Tenant is deemed to be the Owner's designee under the Maryland Public Information Act. As noted in the Law Department's report on City Council Bill 18-0307, the designee language is required to comply

with Maryland's Public Information Act. 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). Simply having a lease provision that says that the owner will add the tenant to the owner's water billing account would not accomplish what is needed for the tenant to see the water billing information. Again, the Law Department recommends that this legal issue be addressed by retaining Section 7-3 of Article 13 of the City Code in its current form. An amendment to this effect is attached to this report.

Next, the bill proposes adding the following language to Subtitle 2 of Article 24 of the City Code:

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.

As written, this language 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. As written, the *only* criteria that DPW could use to grant or deny any request from a tenant-water-utility customer for any remedy would be notice to the owner or property manager. This is likely not the intent. This section needs to be reworded to provide that DPW could not use the lack of owner participation in a request by the tenant as the sole reason for denying a request that DPW would otherwise have granted. Draft amendment language is attached to this report.

Section 2-17(D) of the bill seeks to require certain data be collected about water billing disputes and customer service. In Maryland, personal data that is collected may only be kept when doing so would be needed and relevant to the accomplishment of a government purpose. Md. Code, Gen. Prov., § 4-102. This bill attempts to require DPW to collect and report on certain demographic information when it is voluntarily provided. Since the information is voluntarily provided it is not clear how it is needed for the accomplishment of the government purpose. Although it may be illuminating if it were obtained, state law prevents the retention of such data unless needed to accomplish the government purpose. Moreover, it is unclear when in the billing process such data would even be sought. An amendment to remove the language is attached.

Next, the bill seeks to add a Section 2-18(e) concerning the hiring of employees of the Office of Customer advocacy. It states that such employees cannot be "made to suffer adverse employment action without cause," may not be hired from within DPW, may not have an office in DPW, may not have their work approved by DPW and must not communicate with DPW more than necessary. The general requirement that an employee not suffer an "adverse employment action" would be interpreted in harmony with the Charter's Civil Service and Department of Human Resources provisions. City Charter, Art. VII, § 95(g). This would include that probationary employees are subject to a slightly different discharge framework. City Charter, Art. VII, § 100(a)(2). In short, these employees would have the same benefits and protections as other City employees.

However, the requirement that Customer Advocacy Office employees not be hired if they have worked for DPW would conflict with the Charter's mandate that the Department of Human Resources is to promote hiring based on merit. City Charter, Art. VII, §97 (e), (f). Additionally, there is a process for re-employment of workers discharged from service for force reductions based on classification. City Charter, Art. VII, § 100 (b). An amendment to remove this part of Section 2-18(e) that conflicts with these Charter provisions are attached.

Section 2-18(e) also attempts to require those that work for the Office of Customer Advocacy have offices "physically separated from" the DPW. This provision is impermissibly vague as it does not explain what "physically separated from" means. *See, e.g., A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-239 (1925) (courts have held a civil "provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was") (citations omitted). It is also unclear how a part of DPW, namely the Office of Customer Advocacy, can be separate from DPW since it is a part of it. Anywhere that the Office of Customer Advocacy is located will be a physical presence of DPW; it cannot be separated from itself.

Additionally, this provision is outside of the City Council's legislative scope. Article II of the City's Charter, which is enacted by the General Assembly, contains all the topics over which the City has the ability to legislate. *Kimball-Tyler Co. v. Baltimore*, 214 Md. 86, 94 (1957) (General Assembly gives the City its express powers). Section (27) of Article II allows the City to exercise police power, which courts have defined as "regulations necessary to preserve the public order, health, safety, or morals." *Tighe v. Osborne*, 149 Md. 349, 131 A. 801, 803 (1925). It is unclear that a location of a City office would be an exercise of police power. Assuming it is, however, the Charter is clear that the City Council's legislative power is not absolute, but that it is subject to other provisions of the Charter. Charter, Art. III, § 11. The location of particular offices is the kind of day-to-day administration of the executive branch that has been reserved to the Mayor under the Charter as the Mayor is the Chief Executive Officer. City Charter, Art. IV, § 4 (b). "Except as committed to the Board of Estimates, the executive power of the City is vested in the Mayor, the departments, commissions and boards provided for in this article and the special officers, departments, commissions and boards that may be created by law." Charter, Art. VII, §1 (a). It is those executive entities than can then create rules or regulations to execute their powers. Charter, Art. VII, §1 (b). While Section 2(a) of Article VII of the Charter allows for ordinances to give additional duties to "a department, officer, commission, board or other municipal agency" those duties must be "consistent with the Charter and subject to the supervision of a superior municipal officer or agency." Charter, Art. VII, §2(a). Here, the direction of the location of the offices for certain DPW employees is not a *duty* of the DPW agency. Rather, it is an aspect of the *operation* of a department which is expressly reserved in the Charter to the head of that department. Therefore, an amendment to remove this requirement is attached to this report.

Section 2-19(b) of the bill provides that 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." In the current law, a Customer can seek assistance from the Office of Customer Advocacy upon request. City Code, Art. 24, § 2-19. Thus, it is unclear what the phrase "in case of an abuse of process" is intended to mean. *See, e.g., A.B.*

Small Co., 267 U.S. at 238-239; *see also Johnson v. U.S.*, 135 S.Ct. 2551, 2570 (2015) (Thomas, J., concurring) (discussing how the Supreme “Court’s application of its vagueness doctrine has largely mirrored its application of substantive due process.”). This vague provision needs clarification. An amendment to this effect is attached. The remainder of the language in proposed Section 2-19(b) is unnecessary because currently the law does not provide for the requirement to pay for a bill, a plumber or prove that equipment is faulty before filing an appeal. City Code, Art. 24, §§ 2-19; 2-21(b); 2-21(f); 4-3 (f)(1), (5).

Finally, Section 2-19(c) providing that a customer can seek office assistance or appeal to the Environmental Control Board (“ECB”) at any time conflicts with the existing law in Section 2-19 of Article 24 of the City Code that provides that requests for help from the Office of Customer Advocacy must be taken within 90 days of the disputed determination, action or decision. It also conflicts with the language in existing Section 2-21(b) that provides for appeals within thirty days of receipt of the Customer Advocate’s investigative report. Thus, Section 2-19(c) of this bill should be deleted or the existing language in Sections 2-19 and 2-21(b) should be changed to create the desired appellate timeline. A draft amendment for the approach that appears to be intended is attached. It keeps the existing timelines but provides that an appeal to the ECB is also proper within 45 days of seeking that office’s help regardless of whether there is a Customer Advocate’s investigative report.

Assuming amendments are adopted to address the above legal issues, the Law Department can approve the bill for form and legal sufficiency.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Hilary Ruley".

Hilary Ruley
Chief Solicitor

cc: Dana P. Moore, Acting City Solicitor
Matthew Stegman, Mayor’s Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Ashlea Brown, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 20-0626
(1st Reader Copy)

Proposed by: Law Dep't

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

On page 2, delete lines 12 through 28.

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

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

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.

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

On page 4, delete lined 23-26.

Amendment No. 4 – removing language that conflicts with Charter

On page 5, delete line 10.

On page 6, delete line 23.

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

On page 5, delete line 8.

On page 6, delete line 21.

Amendment No. 6 – amending appeal timeline language

On page 6, delete lines 2 through 6. On page 6, in line 29, insert:

(b) Customer's right to appeal.

(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.

Amendment No. 7 – removing vague language

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