From: Baltimore Right to Water Coalition
To: Office of the City Council President
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 have accepted several amendments on good faith, opposed one amendment, and offered three counterproposals 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.

The Law Department's letter also states that because the WAEA is currently suspended under the Mayor's Executive Order, these amendments will not take effect until that Order is no longer in effect. This delays the timelines for phased implementation. We appreciate this concern, but we share an understanding that your incoming administration will resolve this issue to the extent necessary to make the timeline legally effective.

Thank you for your consideration.