



University of Baltimore Law Forum

Volume 48 | Number 1

Article 3

10-1-2017

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Recommended Citation

Yeoman, Virginia J. (2017) "Baltimore City Risks Violation of Due Process Clause with Water Shut-Offs and Home Foreclosures," *University of Baltimore Law Forum*: Vol. 48 : No. 1 , Article 3.
Available at: <https://scholarworks.law.ubalt.edu/lf/vol48/iss1/3>

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COMMENT

BALTIMORE CITY RISKS VIOLATION OF DUE PROCESS CLAUSE WITH WATER SHUT-OFFS AND HOME FORECLOSURES

By: Virginia J. Yeoman*

I. INTRODUCTION

Those who have lived in Baltimore in the past five or so years, and have paid attention to local news, know that the city has problems with its water billing system.¹ Some Baltimore City residents have received an erroneous bill and have tried to contact the Department of Public Works, only to be put on hold or told there is nothing wrong with their bill.²

Fortunately, Baltimore recently updated its decades-old water billing system.³ Before October 2016, residents received their water bill every quarter.⁴ The amount was based on an estimated usage until the meters were read, at which point the next quarter's bill estimate would be adjusted to reflect the last quarter's actual reading.⁵ After October 2016, the city switched to a monthly billing system with new "smart" meters that monitor hourly water consumption.⁶

This comment discusses the flaws of both the old and new water billing procedure, and the potential legal repercussions of using delinquent water accounts as a basis to put homes into tax sale and/or shut off water in

* J.D. Candidate, 2018, University of Baltimore School of Law. I would like to thank my faculty advisor, Jaime Lee, for her knowledge, guidance, and enthusiasm throughout this process. I would also like to thank the entire staff of *University of Baltimore Law Forum* for their hard work in editing this comment. Finally, a special thank you goes to Kristen Mack, 2017 University of Baltimore School of Law graduate, for first introducing me to this important topic.

¹ See discussion, *infra* Part III.

² E.g., Danielle Sweeney, *Some Still Struggle with Wildly Inaccurate Water Bills from City*, BALTIMORE BREW (July 13, 2015, 12:01 PM), <https://www.baltimorebrew.com/2015/07/13/some-still-struggle-with-wildly-inaccurate-water-bills-from-city/> ("She contacted DPW immediately and - after being placed on hold for over an hour - got some resolution . . . Robarge said she repeatedly called the water department for an explanation to no avail. During her most recent call, she was told the agency's computers were down.").

³ *New Water Billing System*, BALT. CITY DEP'T OF PUB. WORKS, <http://publicworks.baltimorecity.gov/new-water-billing-system> (last visited January 5, 2017).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

residences. Part II explains how Baltimore City handles delinquent water accounts- with tax liens and water shut-offs.⁷ Part III analyzes the city's history of erroneous water billing and the effect that inaccurate billing might have on residents' Fourteenth Amendment Due Process rights.⁸ Finally, Part IV proposes eliminating water bills from the tax sale process and prohibiting water shut-offs until the new water billing system is proven to be accurate.

II. BACKGROUND

A. *How a Delinquent Water Bill Can Lead to a Tax Sale*

After a certain point, a delinquent water account can trigger a tax sale on a person's property.⁹ In an investigative report published in 2014, Baltimore journalist Joan Jacobson outlined the life cycle of the tax sale.¹⁰ The process begins when Maryland property owners receive their bills for their annual real property tax payments.¹¹ These payments are considered delinquent by the first of October if the owner is on an annual payment plan.¹² The unpaid bills create a first lien on the property.¹³ The lien ensures that "when the property is sold or transferred to a new owner, the city or county must be paid first before any mortgage company or other lien holder."¹⁴

If the bill is still outstanding, Baltimore City mails a "Final Bill and Legal Notice" to the delinquent property owner.¹⁵ This is mailed in February, or at least thirty days before the property is advertised for auction.¹⁶ The City also sends a second "Tax Sale Notice" in April, which reminds the property owner of the deadline for paying the lien before the tax sale occurs.¹⁷

The annual tax sale takes place in May through an online auction.¹⁸ Liens that have remained unpaid are available to the highest bidder.¹⁹ Once

⁷ See discussion, *infra* Parts II.A and II.B.

⁸ U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

⁹ See generally JOAN JACOBSON, THE STEEP PRICE OF PAYING TO STAY: BALTIMORE'S TAX SALE, THE RISKS TO VULNERABLE HOMEOWNERS, AND STRATEGIES TO IMPROVE THE PROCESS (Abell Foundation 2014).

¹⁰ *Id.* at 9-12.

¹¹ *Id.* at 9.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ JACOBSON, *supra* note 9, at 10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ City of Balt., *Tax Sale Process*, TAX SALE INFORMATION, <http://taxsale.baltimorecity.gov/tax-sale-process> (last visited Feb. 9, 2017).

someone successfully bids on a certificate,²⁰ that person receives the right to recover the lien payment from the property owner.²¹ This payment includes not only the original lien amount, but also interest and legal fees.²² Within sixty days of the tax sale, the city must send notice to the original owner that a certificate for the property was sold.²³ The property owner has a period, which can last between six months and two years, when he/she can redeem the property.²⁴ To do this, the owner must repay the lien certificate at an eighteen percent interest rate.²⁵ If all of the required amounts are not paid within the redemption period, the lien-holder can petition a court to foreclose the property owner's right to redeem and take ownership of the property.²⁶ The foreclosure extinguishes all other mortgages and liens on the property, and no compensation is given to the original owner for lost equity.²⁷

In 2014, Baltimore put 8,278 properties up for tax sale, while in 2013, 9,956 properties were included in the tax sale.²⁸ According to Baltimore's Tax Certificate Auction website, liens that are eligible for auction include those on properties with delinquent real estate taxes, water bills, and other municipal liens.²⁹ If the lien is caused by a water bill, the "unpaid water bills must be delinquent at least three quarters and have a balance of at least \$350.00 for non-owner-occupied properties and at least \$750.00 for owner-

¹⁹ City of Balt., *Tax Sale Process*, TAX SALE INFORMATION, <https://taxsale.baltimorecity.gov/tax-sale-information-0> (last visited Oct. 14, 2017).

²⁰ JACOBSON, *supra* note 9, at 10 (a certificate represents the property owner's debt that the bidder has now paid).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 11.

²⁵ *See id.* at 3 (describing the redemption process, "[Property owners] must pay the liens, plus 18 percent interest and hundreds of dollars in court costs, legal fees and postage. A \$500 tax bill, for example, can climb to \$3,000 two years after the tax sale.").

²⁶ JACOBSON, *supra* note 9, at 11; City of Balt., *Tax Sale Process*, *supra* note 18 ("The successful bidder may file a lawsuit to foreclose the right of redemption nine months after the tax sale on owner occupied properties. Fees and most costs are defined by State law and are owed to bidder, not to the City.").

²⁷ JACOBSON, *supra* note 9, at 11.

²⁸ *See* Luke Broadwater, *Baltimore to Send Water Turn-Off Notices to 25,000 Delinquent Customers*, THE MD. PUB. POL'Y INST., <http://www.mdpolicy.org/research/detail/baltimore-to-send-water-turn-off-notices-to-25000-delinquent-customers> (last visited December 29, 2016).

²⁹ City of Balt., *Tax Sale 2016 Calendar of Events*, BALT. TAX CERTIFICATE AUCTION WEB SITE, <http://www.bidbaltimore.com> (follow "Auction Schedule" hyperlink) (last updated March 2016).

occupied residential properties to qualify for tax sale.”³⁰ A resident can find out if his/her property has been scheduled for a tax sale by contacting Baltimore’s Tax Sale Office.³¹

B. *Water Shut-offs in Homes*

Before an overdue water bill leads to a tax sale, Baltimore City may shut off the property’s water instead.³² As one of Baltimore City Council’s members said in 2015, “I like it better than taking people’s houses and putting them into foreclosure.”³³ The councilmember likened a water shutoff to a gas and electric company or a cable company shutting off service to its customers who fail to pay their bills.³⁴ Other city officials believe that initiating a water shutoff will help residents avoid foreclosure in the long term.³⁵

However, not everyone agrees that water shutoffs are the best route to take. At a 2016 public hearing in Baltimore’s City Hall, Delegate Mary Washington testified, through a proxy, that disconnecting water service is a public health threat.³⁶ She also voiced her concern that shutting off water violates international standards of human rights, as well as the fundamental right to water and sanitation.³⁷ At the same hearing, University of Baltimore School of Law Professor Renee Hatcher also testified that water shutoffs violate parental rights because a parent not having water is a basis for the state to remove his/her children.³⁸

Critics have further contended that some businesses avoided water shutoffs, while individual residents have been targeted.³⁹ In 2015, city

³⁰ City of Balt., *Tax (Lien Certificate) Sale 2016 Frequently Asked Questions*, BALT. TAX CERTIFICATE AUCTION WEB SITE, <http://www.bidbaltimore.com> (follow “FAQs” hyperlink; then follow “9. What delinquent charges qualify a property for a Tax Lien Certificate Sale?” hyperlink) (last updated March 2016).

³¹ *Id.*

³² Broadwater, *supra* note 28 (“The city will move to shut off water only to customers who have unpaid bills larger than \$250 dating back at least half a year.”).

³³ *Id.* (quoting city council President Bernard C. Young).

³⁴ *Id.*

³⁵ *See id.* (“Turning off water before delinquent accounts grow too large can help people stay in their homes, officials said.”).

³⁶ *Informational Hearing – Water Affordability: Hearing on B. 16-0307R Before the Tax’n, Fin., and Econ. Dev. Comm.*, City Council (Md. 2016).

³⁷ *Id.*

³⁸ *Id.*; *see* MD. CODE ANN., FAM. LAW § 5-701 (West 2015) (defining “neglect” to include “failure to give proper care and attention to a child by any parent . . . under circumstances that indicate: (1) that the child’s health or welfare is harmed . . .”).

³⁹ *See See* Luke Broadwater, *City Assailed for Shutting Off Water to Residents, Not Businesses*, *The Balt. Sun* (June 24, 2015),

councilman Carl Stokes voiced his concern that “there were no cut-offs to the commercial properties that owed \$15 million or so,” while residential cut-offs numbered about three to four hundred per day.⁴⁰ The Baltimore Sun reported that in 2015, more than 350 commercial properties accounted for \$15 million in unpaid water bills.⁴¹ The Department of Public Works stated that it had previously not attempted water shutoffs for businesses, but that it would begin targeting businesses as well.⁴² By August of 2015, the city had collected \$3.6 million from commercial accounts of the \$15 million owed.⁴³ As of the same date, it had collected \$21.8 million from residential accounts of the \$29.5 million owed.⁴⁴

As of October 2016, the Department of Public Works was still conducting water shut-offs, and the Baltimore City Council was investigating the burden these shut-offs placed on low-income residents and senior citizens.⁴⁵ The council issued a resolution in which they recognized that “universal access to safe and affordable water and sewer service is necessary for public health, community wellbeing, and basic human dignity.”⁴⁶ The council also recognized that “without further action [from the City], more and more households will struggle to pay their water bills.”⁴⁷

Representatives from the Department of Public Works responded to the criticism about water unaffordability by explaining that their new monthly billing system, effective October 11, 2016, would help customers budget for water better.⁴⁸ The Department of Public Works also said that they had implemented new meters that provide hourly consumption reads, which will make the readings more accurate.⁴⁹

III. ISSUE

A. *Baltimore City has a History of Overbilling Its Residents*

<http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-water-hearing-20150624-story.html>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (“[Public Works Director Rudy Chow] said Mayor Stephanie Rawlings-Blake asked the agency this year to treat commercial entities the same as residents.”).

⁴³ Luke Broadwater, *City Collects \$25 Million Through Water Shut-Off Notices*, THE BALTIMORE SUN (July 27, 2015), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-shutoffs-update-20150727-story.html>.

⁴⁴ *Id.*

⁴⁵ See *Informational Hearing*, *supra* note 36.

⁴⁶ City of Balt. Council B. 16-0307R (Md. 2016).

⁴⁷ *Id.*

⁴⁸ See *Informational Hearing*, *supra* note 36 (testimony by Marcia Collins, legislative liaison for Department of Public Works).

⁴⁹ *Id.*

Baltimore City has a history of overbilling its residents through the Department of Public Works' erroneous water billing system.⁵⁰ Local news sources have chronicled these mistakes throughout the years. For example, The Baltimore Sun extensively covered the many billing errors in 2012, which included city schools.⁵¹ At the time, former Baltimore Mayor Stephanie Rawlings-Blake admitted that erroneous water billing was a "long-standing problem," and that the billing had been "messed up for a long time."⁵² Baltimore City Councilwoman Mary-Pat Clarke was also outspoken about the erroneous water billing, and praised certain schools for withholding payments until their bills were settled.⁵³ She noted, however, that everyday residents did not have this option due to the threat of liens turning into foreclosures.⁵⁴ In fact, one court clerk even went so far as to file a lawsuit against the city for failing to "collect water bills owed by businesses while some residents were forced out of their homes for overdue bills."⁵⁵

Evidently, that lawsuit did not go through, as the city ended up refunding \$4.2 million to city residents in 2012 for erroneous water billing.⁵⁶ This refund was based on an audit that examined water bills from 2009 to 2012.⁵⁷ The audit also found that "57 homes that were included in the city's tax sale

⁵⁰ See, e.g., Sweeney, *supra* note 2.

⁵¹ See Luke Broadwater and Erica L. Green, *City Schools Overcharged on Water Bills*, THE BALT. SUN (Oct. 18, 2012), <http://www.baltimoresun.com/news/maryland/education/bs-md-ci-schools-water-bills-20121018-story.html> ("City Public Works officials say they are adjusting water bills for Baltimore public schools after several were overbilled this year by thousands of dollars – including one school whose bill rose nearly \$200,000.").

⁵² *Id.* (quoting Mayor Rawlings-Blake's statement regarding water billing problems: "We're working very hard to correct a long-standing problem," she said. "I want people to understand that this has been messed up for a long time. . . . When something's been messed up so long, it takes a lot of hours and human capital to change it.").

⁵³ *Id.*

⁵⁴ *Id.* ("[Clarke] lamented that residents of . . . her district who have been overbilled [] face liens on their homes if they don't pay up.").

⁵⁵ See *Court Clerk to Sue Baltimore Over Water Bills*, WBALTV11 (Oct. 17, 2012), <http://www.wbalvtv.com/article/court-clerk-to-sue-baltimore-over-water-bills/7077179>.

⁵⁶ See Julie Sharper and Luke Broadwater, *City Issuing \$4.2 Million in Refunds for Faulty Water Bills*, THE BALT. SUN (Feb. 22, 2012), http://articles.baltimoresun.com/2012-02-22/news/bs-md-ci-water-audit-20120222_1_new-meters-celeste-amato-baltimore-county.

⁵⁷ *Id.* (describing city auditor Robert L. McCarty's report: "The audit examined water bills for 70,000 households over the past three years and found that 65,000 were likely overcharged and 53,000 of those showed no record of any adjustment.").

due to unpaid water bills had bills that were based on estimates,”⁵⁸ meaning that the city deemed the account delinquent based only off their estimated water consumption and not hard data.⁵⁹

More recently, another audit of the city’s water billing system for the year 2014 revealed that the problems were not over.⁶⁰ The audit noted that while the city had adjusted bills for the fiscal year 2011, there were “systemic errors and limitations” that still existed as of the end of fiscal year 2014.⁶¹ 70,000 accounts were affected by these errors, but this audit “will not trigger more refunds because it did not identify specific accounts that were overbilled.”⁶² The Department of Public Works has told residents who are concerned about their bill to call their customer support line.⁶³

B. *Due Process Conflict – Notice*

If some of these residents have been overcharged without getting refunded, the City of Baltimore may run into a due process problem. The Fourteenth Amendment of the Constitution requires that a state shall not “deprive any person of life, liberty, or property, without due process of law.”⁶⁴ This applies to municipal utilities like the Department of Public Works, an agent of Baltimore City,⁶⁵ for “receipt of utility service has been held to constitute a constitutionally significant property interest.”⁶⁶

The Supreme Court, in *Memphis Light, Gas, and Water Division v. Craft*, held that customers must be given adequate notice of their procedural rights

⁵⁸ *Id.*

⁵⁹ *Id.* (“McCarty recommended that the water and wastewater employees take actual meter readings at the homes before sending them to the tax sale.”).

⁶⁰ See Audit of City Spending by City Auditor Robert L. McCarty, Balt. City Board of Estimates (2014); see also Luke Broadwater, *Audit of Baltimore Finances Shows ‘Significant Deficiencies’ in Water Billing, Handling of Grant Money*, THE BALTIMORE SUN (Sept. 23, 2016), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-sun-investigates-audit-20160923-story.html>.

⁶¹ Audit at 6 (“Controls were not adequately designed and operating effectively . . . Without proper controls in place over the water and waste water billing process, misstatements to revenue and accounts receivable may occur and go undetected.”).

⁶² Luke Broadwater, *Audit of Baltimore Finances Shows ‘Significant Deficiencies’ in Water Billing, Handling of Grant Money*, THE BALTIMORE SUN (Sept. 23, 2016), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-sun-investigates-audit-20160923-story.html>.

⁶³ *Id.*

⁶⁴ U.S. CONST. amend. XIV, § 1.

⁶⁵ NAT’L CONSUMER LAW CTR., ACCESS TO UTILITY SERVICE (5th ed. 2011), www.nclc.org/library (“Municipal utilities are cities and towns, or their agencies or departments, which sell utility services to retail customers.”).

⁶⁶ *Id.* at 15.1.2.

before the utility service is shut off.⁶⁷ In this case, the Craft family had been repeatedly double-billed for their gas and electricity usage by the Tennessee municipal utility company Memphis Light, Gas, and Water Division (MLG&W).⁶⁸ The Court concluded that MLG&W's notice to the Crafts, before terminating their service, was not adequate to comply with due process requirements.⁶⁹ Here, the company had mailed a final notice bill warning that service would be shut off if payment was not received, in addition to a flyer that directed customers who had trouble paying the bill to call the office or go to a credit counseling station.⁷⁰ The Court noted that there was no assurance that the Crafts were even mailed that flyer, and that the final bill only warned customers to pay or face termination and did not explain any procedures for contesting a bill.⁷¹ These measures were thus insufficient to justify shutting off the Crafts' utilities for nonpayment and violated due process of law.⁷²

Therefore, it is not enough that the utility service simply gives notice prior to terminating service, but that it gives adequate notice.⁷³ In *Palmer v. Columbia Gas of Ohio*, the Court of Appeals for the Sixth Circuit differentiated between having a hearing process, and having a hearing process that is made known to residents.⁷⁴ In this case, while the gas company did provide notice that service would be terminated if payment was not received, the notice did not mention the steps a customer could take to dispute the bill, nor did it mention special payment programs available.⁷⁵ The court explained that "the mere theoretical possibility of informal resolution cannot serve as a substitute for a mandatory procedural

⁶⁷ *Id.*; see also *Memphis Light, Gas, and Water Div. v. Craft*, 436 U.S. 1 (1978).

⁶⁸ *Craft*, 436 U.S. at 4.

⁶⁹ *Id.* at 14-15 ("Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.")

⁷⁰ *Id.* at 14.

⁷¹ *Id.* at 13-14.

⁷² See *id.* at 15 ("As no [sufficient] notice was given to respondents—despite 'good faith efforts' on their part—they were deprived of the notice which was their due.")

⁷³ See *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 165-66 (6th Cir. 1973) ("The due process clause requires, as a minimum, that parties whose rights are to be affected are entitled to be notified of the proposed action, and they are entitled to be heard. It is equally fundamental that the right to notice and to the opportunity to be heard must be granted at a meaningful time and in a meaningful manner."); see also *Iardi, The Right to a Hearing Prior to Termination of Utility Services*, 22 BUFF. L. REV. 1057, 1067-68 (1973) ("Essentially, the demand in the principal cases has been for adequate notice of termination coupled with a right to an impartial hearing where there is a dispute as to the propriety of the charge.")

⁷⁴ *Id.* at 167-68.

⁷⁵ *Id.* at 166 (stating "The company's shut-off notice does not provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service.")

mechanism designed to prevent unjust deprivations of important property interests.”⁷⁶ This court thus upheld the District Court’s order that before terminating service, an employee of Columbia Gas must personally speak to the resident, and if that is not possible, then the company must send notice via certified mail with return receipt requested.⁷⁷

C. *Duties of Utility Companies*

In addition to the due process concern, utility companies also have a common law duty to serve.⁷⁸ This duty to serve means that the utility company must “render adequate and reasonably efficient service, on reasonable terms, impartially, without unjust discrimination, and at reasonable rates.”⁷⁹ A public utility company may be liable for damages for failing to provide service to a customer to whom it is legally entitled.⁸⁰ Moreover, the United Nations adopted a resolution in 2010 recognizing water as a basic human right⁸¹ and called upon states and organizations to provide financial resources to provide water for all.⁸² A fundamental problem with Baltimore, Jacobson has said, is that “the city treats its water utility like a private business instead of treating water like a human right.”⁸³

In addition to the common law duty to serve, the Department of Public Works must also follow Maryland consumer protection law, which prohibits “unfair or deceptive trade practices.”⁸⁴ Under this law, unfair or deceptive trade practices include “representation that . . . consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style,

⁷⁶ *Id.* at 168.

⁷⁷ *Id.* at 159, 169.

⁷⁸ NAT’L CONSUMER LAW CTR., *supra* note 15, at 2.1.1 (“The duty to serve applies to any company defined as a ‘public utility’ under common law, including municipal utilities . . .”).

⁷⁹ *Id.* at 2.2.2.

⁸⁰ 64 AM. JUR. 2D *Public Utilities* § 29, Westlaw (database updated November 2016); 78 AM. JUR. 2D *Waterworks and Water Companies* § 64, Westlaw (database updated November 2016).

⁸¹ G.A. Res. 64/292, ¶ 1 (July 28, 2010).

⁸² G.A. Res. 64/292, ¶ 2 (July 28, 2010) (“Calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.”).

⁸³ See Luke Broadwater, *Amid Billing Change, Some Baltimore Homeowners Hit with Water Bills of \$35,000, \$81,000*, THE BALT. SUN (Dec. 20, 2016), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-water-bills-20161220-story.html> .

⁸⁴ MD. CODE ANN., COM. LAW § 13-301 (West 2015).

or model which they are not.”⁸⁵ When a customer complains about an abnormally high water bill, the norm for the Department of Public Works is to assume that the problem is on the customer’s end.⁸⁶ In reality, it is likely that the mistake is on the City’s part,⁸⁷ and so the services provided to the consumer are potentially not of the “particular standard” that the City claims.⁸⁸

Aside from the consumer protection aspect, Baltimore City has generally not followed the adequate notice requirements set forth by the leading cases.⁸⁹ The Department of Public Works does not ensure that an employee personally speaks to a resident before terminating service. There is anecdotal evidence of residents unable to contest their bills before their water is shut off. This is most apparent in situations where tenants pay the water bill. For example, a seventeen-year-old girl living with her boyfriend in Harlem Park lived without water for five months because their landlord had not paid the bill.⁹⁰ The couple reportedly relied on a neighbor for food and water, and used kitchen pots and pans lined with plastic bags as toilets.⁹¹ Because the property owner controls the water account, tenants have no voice in contesting a water shut-off, even if the delinquent bill was through no fault of their own.⁹² A Baltimore attorney suggested setting up tenant-controlled water accounts so that the renter is protected from water shut-offs due to a landlord’s negligence.⁹³ The Department of Public Works, however, says tenants cannot be responsible for the water account because it is the property owner who is ultimately responsible for tax liens.⁹⁴

Even excluding landlord-tenant situations, there are enough situations with owner-occupied properties and faulty water bills to warrant concern. The fact that there has been substantial erroneous billing in the past, and that

⁸⁵ *Id.*

⁸⁶ See, e.g., Luke Broadwater, *Protestors Call on Mayor to Stop Water Shut-Offs Over Unpaid Bills*, THE BALT. SUN (April 16, 2015, 8:31 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-ci-water-shutoffs-20150416-story.html> (relating how a Baltimore resident received a \$3,700 water bill and when he tried to contest it, “They tell you, ‘Pay the bill.’ The rest is on you.”).

⁸⁷ *Id.* (quoting a DPW customer, “I feel like it’s pretty ridiculous to have a \$3,700 water bill. We have a lot of unanswered questions.”).

⁸⁸ MD. CODE ANN., COM. LAW § 13-301 (West 2015).

⁸⁹ See *Craft*, 436 U.S. at 1; see also *Palmer*, 479 F.2d at 153.

⁹⁰ Fern Shen, *Baltimore’s High Water Rates Violate U.N. Standards, Advocates Say*, BALT. BREW (Oct. 27, 2016, 2:54 PM), <https://www.baltimorebrew.com/2016/10/27/baltimores-high-water-rates-violate-u-n-standards-advocates-say/>.

⁹¹ *Id.*

⁹² See *id.* (describing how a client of a Public Justice Center attorney was “hit by a \$685 erroneous water bill due to a burst water pipe but couldn’t participate in the discussion between the landlord and the Department of Public Works.”).

⁹³ *Id.* (quoting Public Justice Center attorney Zafar Shah).

⁹⁴ Informational Hearing, *supra* note 36.

systemic problems still exist, is troubling in light of a municipal utility's common law duty to serve, the U.N.'s call to scale up efforts to provide water, and the potential violation of due process rights Baltimore faces.

IV. SOLUTION

A. *New Meters are a Good Start, but Problems Persist*

Of course, there is no simple solution to Baltimore's complicated water billing problems. The city's recent switch to monthly bills instead of quarterly bills, and the installation of new meters are a good start.⁹⁵ The Department of Public Works contends that these new water meters provide hourly water consumption data which can be viewed online through a property owner's personal account.⁹⁶ This is an improvement to the old billing system, which was based on a "predetermined, minimum amount of water, regardless of how much customers actually used."⁹⁷ Furthermore, the new online personal account feature allows the customer to monitor water usage in real time.⁹⁸ Ideally, residents will pay attention to their water consumption by checking their accounts, and thus will be more knowledgeable about what their bill should look like. Having this check on the system, from the customer's side, should help curb the frequency of residents being blindsided by exorbitant bills.

However, the new system does not fix everything. Baltimore introduced the new system in October of 2016.⁹⁹ As a result, it is too early to know how accurate the readings are on a large scale. Already, there have been reports of more erroneous bills even with the new meters.¹⁰⁰ Additionally, The

⁹⁵ See *New Water Billing System*, BALT. CITY DEP'T OF PUB. WORKS, <https://publicworks.baltimorecity.gov/new-water-billing-system> (last visited Jan. 5, 2017) (explaining that "monthly billing makes it easier for customers to manage household budgets, detect leaks sooner, and find opportunities to adjust household water usage.").

⁹⁶ *Id.* ("The new meters are outfitted with technology that can collect and transmit hourly and daily usage data.").

⁹⁷ Press Release, *BaltiMeter Billing Switches On*, BALT. CITY DEP'T OF PUB. WORKS, (Oct. 11, 2016), <http://publicworks.baltimorecity.gov/news/press-releases/2016-10-11-baltimeter-billing-switches>.

⁹⁸ *Id.* ("About two weeks after they receive their first bill, account owners will get a letter from DPW with information – including an activation code – that will help them log into the new self-service portal. Customers will be able to use this secure databank to see how much water they use hour by hour, thus alerting them to unexpected water usage that could be costing them money.").

⁹⁹ Press Release, *supra* note 97.

¹⁰⁰ See *Broadwater*, *supra* note 83 (relating that in addition to receiving water bills that were obviously too high, some residents have not received any bills under the

Department of Public Works itself “acknowledge[ed] that there have been some issues.”¹⁰¹ Until it can be proven that the new billing system is without flaws, the city should not engage in water shut-offs nor should it include water bills in the annual tax sale. Otherwise, Baltimore continues to expose itself to the possibility of violating due process rights.

B. Other Cities' Property-Owners are Better Protected

Baltimore should look to other cities such as New York and Washington D.C. to compare how they handle delinquent water accounts and tax lien sales. According to Jacobson's Abell Foundation report, New York City's tax sale laws are one of the most progressive and homeowner-friendly in the country.¹⁰² For example, New York does not allow the sale of liens on single-family homes for unpaid water bills, and the threshold for selling liens on two and three-family homes stemming from delinquent water bills is \$2,000.¹⁰³ Furthermore, New York “bans the sale of homes for back taxes owned by low-income disabled and senior citizens, as well as veterans and active military personnel.”¹⁰⁴ If a homeowner does lose his/her home in a tax sale in New York, the interest rate charged for the homeowner to redeem the house is only nine percent, as compared to Baltimore's eighteen percent.¹⁰⁵ Finally, the law provides that the New York City Council receive a list of homeowners who qualify for exemption from tax sales (low-income disabled and senior citizens, veterans, active military personnel) from the city's finance department so that the city council can then notify these homeowners to file the appropriate paperwork which will ensure that their homes are exempt from the sale.¹⁰⁶ This type of proactive measure, aimed to protect homeowners from foreclosures, is lacking in Baltimore when compared to New York.¹⁰⁷

Other parts of the country have also acted more efficiently and in a manner that is more protective of its property owners than Baltimore. Similar to New York, Washington D.C. has a law that prohibits owner-

new system, and some have paid their bill but have not been credited for their payment).

¹⁰¹ *Id.*

¹⁰² JACOBSON, *supra* note 9, at 26.

¹⁰³ *Id.* at 27.

¹⁰⁴ *Id.* at 26.

¹⁰⁵ *Id.* (this interest rate applies to houses valued under \$250,000).

¹⁰⁶ *Id.* at 26-28 (“New York’s Department of Finance must contact homeowners eligible for exclusion from the sale by sending an ‘eligibility checklist.’ The homeowner must follow up with a formal application for exemption. The city also sends the New York City Council a list, broken down by councilman district, of property owners who filled out the checklists but failed to submit a timely application before the tax sale.”).

¹⁰⁷ See discussion, *supra* Part III.

occupied homes with water liens to be sold.¹⁰⁸ Moreover, homes cannot be sold at tax sale auctions if their liens are less than \$2,500, and the interest rate during the redemption period is twelve percent.¹⁰⁹ And unlike Baltimore, homeowners who do lose their home in a tax sale do not necessarily lose all of the equity because of a protection in D.C. law.¹¹⁰ In Rhode Island, the state's housing agency investigates tax-delinquent, owner-occupied properties and offers them help to prevent a tax sale.¹¹¹ If a tax sale does occur, the local government is allowed to sell the property to the housing agency, which allows the homeowner to remain in their house for up to five years with a monthly lien payment, instead of selling it to a private bidder.¹¹²

Baltimore could also learn from Detroit, a city that has had similar water problems.¹¹³ In March of 2014, almost 19,500 Detroit residents had had their water service interrupted as a result of the city responding to over \$900 million in debt.¹¹⁴ Now, a group of activists and professors in Detroit have conducted a study which shows that “the city’s policy of shutting off water to those who don’t pay water bills is driving residents from their homes and exacerbating the city’s foreclosure crisis.”¹¹⁵ This is not a position that Baltimore wants to be in, as vacant homes are already a blight in the city.¹¹⁶

C. *Baltimore Should Remove Water Bills from Tax Sales*

¹⁰⁸ JACOBSON, *supra* note 9, at 28.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (“The D.C. law now requires any owner-occupied home subject to a tax sale auction to be handled by the D.C. Superior Court through a trustee sale so any excess proceeds will be turned over to the former homeowner.”).

¹¹¹ *Id.* at 29.

¹¹² *Id.* (“By providing Rhode Island Housing, rather than private speculators, the first option to purchase these liens, homeowners are helped rather than thrown out into the street,” states a report from the state agency on early years of the program.”).

¹¹³ See generally Bill Mitchell, *In Detroit, Water Crisis Symbolizes Decline, and Hope*, NAT’L GEOGRAPHIC, <http://news.nationalgeographic.com/news/special-features/2014/08/140822-detroit-michigan-water-shutoffs-great-lakes/> (last visited February 10, 2017).

¹¹⁴ *Id.*

¹¹⁵ Bill Laitner, *Detroit Group Says Water Shutoffs Add to Foreclosures*, DETROIT FREE PRESS (Aug. 11, 2016, 8:08 PM), <http://www.freep.com/story/news/2016/08/11/detroit-group-says-water-shutoffs-add-foreclosures/88593888/>.

¹¹⁶ See, e.g., Terrence McCoy, *Baltimore Has More Than 16,000 Vacant Houses. Why can’t the Homeless Move In?*, THE WASHINGTON POST (May 12, 2015), https://www.washingtonpost.com/local/baltimore-has-more-than-16000-vacant-houses-why-cant-the-homeless-move-in/2015/05/12/3fd6b068-f7ed-11e4-9030-b4732caefe81_story.html?utm_term=.05a99d6d385a.

Baltimore City should join New York, D.C., and Rhode Island, in updating its tax lien sale laws. First and foremost, Baltimore should remove delinquent water bills from the tax sale process. The evidence shows that Baltimore's water billing system is seriously flawed, and therefore relying on that system to instigate a foreclosure on someone's home is unjust. Even more problematic, if the city were to auction off a lien from a delinquent water bill that was proven to be erroneous, the city would have committed an uncompensated taking which would violate the Fourteenth Amendment's Due Process clause.

Maryland has previously held that in order to redeem a property that has been auctioned in tax sale, the property owner must first pay all delinquent taxes.¹¹⁷ In a 2006 case involving a property-owner who had not paid his property taxes in seven years, the Maryland Court of Appeals concluded that the property-owner's due process rights were not violated because he had sufficient notice of the sale, and had plenty of time during the redemption period to pay all of his delinquent taxes.¹¹⁸ The appellant in this case argued that his property had been unlawfully put in the tax sale and therefore his foreclosure should be vacated.¹¹⁹ While the court found that there was not in fact any illegality in putting the property into tax sale, the court made clear that the appellant needed to pay all of his delinquent taxes regardless.¹²⁰

Some might argue that this holding applies to delinquent water bills, and that a property-owner who loses their home from an unpaid water bill must also pay the full amount owed during the redemption period if they wish to contest the tax sale. These people might say that like the appellant in *Canaj*, the property-owner's due process rights would not be violated if they never paid the delinquent water bill. However, there is one big difference between water bills and basic property taxes. In *Canaj*, the fact that the appellant

¹¹⁷ See *Canaj, Inc. v. Baker and Division Phase III, LLC*, 893 A.2d 1067 (Md. 2006) (holding that payment of delinquent taxes is a condition precedent to delinquent taxpayer's right to seek a vacation of foreclosure judgment).

¹¹⁸ *Id.* at 1098 (“[A]ppellant’s due process argument is entirely without merit. It was on notice that taxes were overdue; it was on notice that the properties were to be disposed of at the tax sale; and, it had ample opportunity to contest any of the sales or pay the taxes due.”).

¹¹⁹ *Id.* at 1074 (relating a previous hearing in which appellant argued that the City had illegally put his properties into tax sale).

¹²⁰ *Id.* at 1077 (“We have never overruled the holding of our cases that where it is admitted (or proven) that there are delinquent taxes due, in order to challenge the holding or ratification of the tax sale or to seek to vacate a judgment of the foreclosure of the equity in redemption, the taxpayer must first pay to the Collector or the certificate holder the total sum of the taxes, interest, penalties and expenses of the sale that are due. While not recently addressed, it remains the law in this State.”).

owed payment to Baltimore City was uncontested.¹²¹ Basic property taxes are easy to track and are a fixed amount. Water bills, on the other hand, depend on personal consumption and are different to every household. The amount owed differs every bill period. Baltimore City has accidentally overbilled its residents many times, and has admitted to doing so. A house being sold at tax sale because of an erroneous water bill, therefore, is markedly different from a house being sold due to unpaid property taxes. There is a much greater risk of error with water bills, as the city has proven over and over again.

The policy concerns between delinquent property taxes and a delinquent water bill are different as well. With *Canaj*, if the city had stopped the foreclosure and given the appellant his property back before he paid his delinquent taxes, “the City would be left where it was before the tax sale.”¹²² That is, the appellant would still owe the same amount of property taxes.¹²³ If a home is foreclosed on due to an erroneous water bill, in contrast, the city would not be left where it was before the tax sale if the homeowner were able to get his property back. The city would simply need to fix the billing error, and if the owner had been overcharged, then it is possible that the owner could pay the correct amount.

V. CONCLUSION

In short, the stakes are too high, and the risk of Baltimore overbilling on water is too high, for a water bill to be included in the tax lien sale. Instead of sending the properties of vulnerable residents into the hands of predatory investors, Baltimore should take a more protective approach to holders of delinquent water accounts. The city should offer more financial assistance programs to those who have trouble paying for water, and should advertise these programs more.¹²⁴ If water bills remain in the tax sale, it is only a matter of time before the unreliable billing system overcharges someone and that person’s property is taken without just compensation.

¹²¹ *Id.* at 1073 (“There are no contested facts relating to whether the taxes have, in fact, been paid. All parties to the present appeal agree that taxes have not been paid.”).

¹²² *Id.* at 1080.

¹²³ See *Canaj*, 893 A.2d at 1080 (“The public would be burdened perpetually with the problems created by the thousands of abandoned properties, which the delinquent owner would be unlikely to ever pay taxes on . . .”).

¹²⁴ See DETROIT FREE PRESS, *supra* note 115 (Detroit has a “simple installment plan that lets those who’ve fallen behind on water bills keep up . . . In addition, we will come out and do a free assessment of your house, look for leaks and pay \$1,000 toward fixing your leaks if you qualify on the basis of low income . . .”).

Finally, Baltimore should end its practice of shutting off people's water. As water is considered a fundamental human right,¹²⁵ no city should voluntarily render its citizens without access to water. It is noteworthy that Maryland Code has a section which provides regulations for turning off gas and electricity to low-income customers.¹²⁶ The statute provides that "the Commission shall adopt regulations concerning the prohibition against or limitation of authority of a public service company to terminate service for gas or electricity to a low income residential customer during the heating season for nonpayment."¹²⁷ One of these regulations that the Commission considers is "the minimum heating levels required to maintain life, health, and safety."¹²⁸ Evidently, Maryland legislators were concerned about people losing their heat in cold weather. Yet, there is no parallel provision saying that the Commission must adopt regulations regarding shutting off water, which is arguably just as necessary for health and safety as heat is. The State should have the same concern for low income residents losing access to water as it does for residents losing heat. Perhaps Baltimore City should adopt its own regulations for cutting off water to low income residents and inspire the rest of Maryland to do the same.

In fact, as with the tax sale, if the city shuts off water based on an inflated bill, the city risks taking property in violation of due process rights.¹²⁹ It thus would not only be a generally progressive move for the city to enact water shut-off regulations, but would also help the city avoid encountering a Constitutional violation. In other words, the city would look good publicly while at the same time covering itself from legal repercussions. Therefore, it is in the best interest of both Baltimore City and its citizens to find another way to settle delinquent water accounts.¹³⁰ In brief, the billing system is simply too faulty to base house foreclosures and water shut-offs on overdue water bills.

¹²⁵ G.A. Res., *supra* note 81.

¹²⁶ See Md. Code Ann., Pub. Util. § 7-307 (West 2013) ("Termination of gas or electric services to low income customers").

¹²⁷ *Id.*

¹²⁸ *Id.* at ¶ (b)(2)(i).

¹²⁹ See discussion, *infra* Part III.B.

¹³⁰ See NATIONAL GEOGRAPHIC, *supra* note 113 (describing various fundraisers begun on social media to help residents in Detroit who lost water: "Another conversation—this one on Twitter between two women on opposite sides of the country—led to an initiative called the Detroit Water Project . . . Three weeks later, the project they had built had poured more than \$84,000 into the water department on behalf of more than 700 customers.").