THIS ITEM IS NOT YET AGENDIZED AND MAY OR MAY NOT BE ACCEPTED FOR THE AGENDA AS A LATE ITEM, SUBJECT TO THE CITY COUNCIL’S DISCRETION ACCORDING TO BROWN ACT RULES

Meeting Date: June 30th, 2020

Item Description: Tenant's Ability to End a Lease

This item is submitted pursuant to the provision checked below:

☐ Emergency Situation (54954.2(b)(1) - majority vote required)
   Determination by a majority vote of the legislative body that an emergency situation exists, as defined in Section 54956.5.

☐ Immediate Action Required (54954.2(b)(2) - two-thirds vote required)
   There is a need to take immediate action and the need for action came to the attention of the local agency subsequent to the agenda for this meeting being posted.

Once the item is added to the agenda (Consent or Action) it must be passed by the standard required vote threshold (majority, two-thirds, or 7/9).

Facts supporting the addition of the item to the agenda under Section 54954.2(b) and Chapter III.C.5 of the Rules of Procedure:

This clarification to BMC 13.78.017 and this addition to 13.110.020 are necessary to protect tenants from an application of the law that is contrary to the City Council’s intent.

As this amendment concerns the ability for tenants to pay a contractual, previously agreed upon fee to terminate their lease early, and leases for students most often end in the middle to late summer, delayed action on this item would expose a considerably larger number of students and other renters to an unintended consequence of this legislation originally meant to protect renters.
To: Honorable Mayor and Members of the City Council
From: Councilmember Harrison (Author), Councilmember Robinson (Coauthor)
Subject: Urgency Ordinance: Tenant’s Ability to End a Lease

RECOMMENDATION
Adopt an urgency ordinance amending Berkeley Municipal Code 13.78.017 to accurately reflect the intent of the City Council to protect tenants, while still allowing them to terminate a lease early in accordance with their contract and amending 13.110.020 to allow tenants the ability to terminate a lease without penalty due to an impact of COVID-19.

BACKGROUND
A. Existing State Law
Under California law, tenants are allowed to break leases before they expire by giving the landlord 30 days notice of termination. Such termination does not end the tenant’s liability under the lease. Some landlords include terms in their leases that require tenants to pay a fee to end their lease. These terms serve no legitimate purpose, since they charge the tenant an extra fee for exercising a right the tenant already had under state law, without providing any new benefit or consideration.

B. Original Ordinances
On April 28, 2020, the Mayor sponsored and the Berkeley City Council approved BMC section Chapter 13.78, regarding protections for tenant screening and lease fees. The Council added 13.78.017, which makes it unlawful for a landlord to charge a fee for the termination of a tenancy prior to the expiration of the lease.

By passing the protections in 13.78, the City Council clearly intended to protect Berkeley tenants from exploitative lease terms that charge fees for breaking a lease without providing the tenant an additional legal benefit or consideration. However, some Berkeley tenants have negotiated with their landlords for early termination options in their leases that provide additional consideration, such as releasing them from further liability under California Civil Code Section 1951.2, in exchange for the payment of a fee when they terminate their lease agreement. Tenants who pay fees to avoid greater potential or actual liability while terminating their leases are not being exploited by their
landlords; they are making an informed decision to exercise a conditional benefit of a contract for which they bargained.

The COVID-19 Emergency Ordinance sought to protect public health by protecting renters from eviction related to “Covered Reasons for Delayed Payment” of rent. It is clear that COVID-19 related shut downs will last for some time and University of California at Berkeley will have many or all of its classes online due to the pandemic.

C. Protecting Tenants
The changes to 13.110.020 acknowledge that, as result of COVID-19, many Berkeley tenants have lost roommates or have experienced drastic change in circumstances that renders the original purpose of the lease (or even of living in Berkeley) moot. California state law requires that a landlord must take reasonable steps to mitigate its damages and re-rent the unit in the event of a tenant's termination of a lease prior to the lease's expiration. During COVID-19, this is not as helpful for tenants forced to break their lease to rely on state law as it has been in the past.

The City Council did not intend for 13.78.017 to be used to block a tenant from exercising a beneficial option in a pre-existing lease term, like one that would allow the tenant to pay a fee to avoid future liability when ending the lease. Unfortunately, soon after the City Council passed 13.78.017, tenant attorneys funded by the City have seen landlords misinterpreting the code. For example, one group of tenants attempted to pay a fee to end their lease and end further liability to the landlord in accordance with their pre-existing lease terms but the landlord claimed that 13.78.017 does not allow lease terms that charge a fee for terminating the lease. Instead that landlord is trying to hold their tenants liable for a whole year of rent. This interpretation distorts the intent of the ordinance.

D. Proposed Change
The proposed ordinance modifies BMC section 13.78.017 to include the following sentence:

*Negotiations between the parties, occurring when the tenants notified the landlord to their intention to exit the lease, in order to terminate a tenant’s liabilities are not precluded by the ordinance.*

This language clarifies the true intent and scope of the statute to avoid having tenants charged arbitrary fees for changing roommates and other common occurrences. At the

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1 Civil Code 1951.2
same time, tenants should also be permitted to choose to fulfill a negotiated contract term to pay a fee to end legal liability for the unit, if they decide that is the most beneficial option for them. Allowing landlords to charge tenants a fee for exercising their rights chills tenant agency.

The amendment to 13.110.020 will allow for tenants to exit their leases with 30 days’ notice, if they qualify for those same “Covered Reasons for Delayed Payment” used for determining eligibility to delay rent. It also allows tenants to terminate with 30 days’ notice if they are registered at an educational institution impacted by COVID-19. The amendment adds the following:

D. For the duration of the local State of Emergency, if a tenant has a Covered reason for delayed payment the tenant may terminate a lease or rental agreement with 30 days' notice without penalty. A tenant may also exercise rights under this subsection if the tenants or roommates of the tenants are or were registered at an educational institution that cancelled or limited in-person classes due to the COVID-19 pandemic.

ENVIRONMENTAL SUSTAINABILITY
There are no identifiable environmental impacts associated with this action.

FISCAL IMPACTS OF RECOMMENDATION
None

CONTACT PERSON
Councilmember Kate Harrison
(510) 981-7140
ORDINANCE NO. XXXX–N.S.

AMENDING THE BERKELEY MUNICIPAL CODE TO PROTECT RENTERS DURING THE COVID-19 CRISIS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 13.110.020 D is amended to read as follows:

13.110.020 Prohibited Conduct

A. During the local State of Emergency, no landlord or other entity shall evict or attempt to evict an occupant of real property unless necessary for the health and safety of residents. For purposes of this Ordinance, the basis for an exception to this Ordinance cannot be the Resident's COVID-19 illness or exposure to COVID-19, whether actual or suspected.

B. Residential Eviction Moratorium. It shall be a complete defense to any action for unlawful detainer that the notice upon which the action is based was served or expired, or that the complaint was filed or served during the local State of Emergency.

C. No landlord of an Impacted Business or Nonprofit may upon expiration of a lease increase rent for an Impacted Business or Nonprofit in an amount greater than ten (10) percent over the rent in effect at the commencement of the local state of emergency declared by the Director of Emergency Services. For purposes of this section, rent means all consideration for the use and enjoyment of the rented premises, including base rent and any additional rent or other charges for costs such as utilities, maintenance, cleaning, trash removal, repairs and any other charges to the tenant required under the rental agreement. This section 13.110.020 C. shall expire on May 31, 2020, concurrent with Executive Order N-28-20; provided, however, that this section shall be automatically extended if Executive Order N-28-20 is extended or the tenant protections therein are extended pursuant to another Governor’s Executive Order.

D. For the duration of the local State of Emergency, if a tenant has a Covered reason for delayed payment the tenant may terminate a lease or rental agreement with 30 days' notice without penalty. A tenant may also exercise rights under this subsection if the tenants or roommates of the tenants are or were registered at an educational institution that cancelled or limited in-person classes due to the COVID-19 pandemic.

Section 2. That Berkeley Municipal Code Section 13.78.017 is amended to read as follows:

13.78.017 Prohibition of Lease Termination Fees
It is unlawful for an owner of residential property, or the owner’s agent, to charge any fee for the termination of their tenancy prior to the expiration of a lease. Nothing in this section shall prohibit a landlord from recovering any charges, fees or damages associated with termination of tenancies that are authorized under California Civil Code Section 1951.2. Negotiations between the parties, occurring when the tenants notified the landlord to their intention to exit the lease, in order to terminate a tenant’s liabilities are not precluded by the ordinance.

Section 3. Vote Required, Immediately Effective

Based on the findings and evidence in Section 13.110.010 of the Urgency Ordinance, the Council determines that this Ordinance is necessary for the immediate preservation of the public health, peace and safety in accordance with Article XIV Section 93 of the Charter of the City of Berkeley and must therefore go into effect immediately. This Ordinance shall go into effect immediately upon a seven-ninths vote of the City Council, in satisfaction of the Charter of the City of Berkeley.