



Memorandum

City Attorney's Office

Date: March 26, 2020
To: City Council
From: Harvey E. Levine, City Attorney
Subject: **Item 2.A., Urgency Ordinance (Anti-Price Gouging) and
Item 2.C. (Zoning Administrator Permit Process)**

Item 2.A., Section 6 of the Urgency Ordinance regarding the anti-price gouging should read as follows:

SECTION 6. EFFECTIVE DATE

Based upon the findings in Section 1 and the urgency declaration in Section 3 above, this Ordinance shall take effect immediately upon its adoption by a minimum 4/5 vote of the City Council.

Item 2.C., Emergency Zoning Administrator Permit Process

Attached are 1) Exhibit "B" Findings and Conditions of approval and 2) Zoning Administrator Permit Staff Report

EXHIBIT "B"
Findings and Conditions of Approval
For BLD2020-04234, BioGenex Covid-19 Test Kit Component Manufacturing
Emergency Zoning Administrator Permit
48810 Kato Road

FINDINGS FOR APPROVAL:

Pursuant to FMC Section 2.20.110, the City of Fremont declaration of Local Emergency, and California Governor Newsome's proclamation of a State of Emergency, the Zoning Administrator makes the following findings;

(a) The State of California has declared a State of Emergency;

Analysis: As part of the State of Emergency the state has waived cities from any time requirements to renew local health emergencies. Any local emergency proclaimed will remain in effect until each local governing authority terminate its respective local emergency.

(b) City Council has declared a Local Emergency;

Analysis: In Response the COVID-19 crisis the City of Fremont's City Council has empowered the City Manager to serve as the Director of Emergency Services. When a Local Emergency is declared the Director of Emergency Services can make decisions related to the provisions of FMC Section 2.20.110.

(c) The proposed use is consistent with the goals of FMC 2.20.110;

Analysis: FMC 2.20.110 gives authority to the City Manager or their designee in a declared emergency to "Obtain vital supplies, equipment, and such other properties found lacking and needed...". The City Manager or their designee may also "Make and issue rules and regulation of matters reasonably related to the protection of life and property as affected by the emergency...". The Director has authorized a process for an Emergency Zoning Administrator Permit, which shall be processed in the same manner as Zoning Administrator Permit pursuant to FMC Section 18.275; however, the Director or designee may waive or provide less than ten days public notice required by FMC Section 18.275.050 for an Emergency Zoning Administrator Permit. In addition, the ten day appeal period following an approval required by FMC Section 18.275.070 is waived and the Emergency Zoning Administrator Permit becomes effective immediately upon approval by the Zoning Administrator. BioGenex manufactures a key component to develop needed testing kits for COVID-19. Allowing their operations to run on an Emergency Zoning Administrator's Permit would be in compliance with the municipal code by meeting the goals of procuring supplies, and protection of life.

Pursuant to Emergency Zoning Administrator Permit process established by the Director and FMC Section 18.275.060, in order to approve an Emergency Zoning Administrator Permit, the Zoning Administrator must make the following findings:

(a) The proposed use is consistent with the general plan and any applicable community or specific plan;

Analysis: The existing General Plan land use designation for the project site is Tech Industrial and the corresponding zoning designation is Tech Industrial. The applicant's proposed use of limited hazardous materials within an established industrial area is in accordance with General Plan Land Use Policy 2-5.8 (Industrial Land Use Compatibility), as well as other General Plan Goals and Policies addressing Land Use and Safety. Additionally, the proposed use would be located within a zoning district which allows limited hazardous materials uses subject to an approved Zoning Administrator Permit.

(b) The site is physically suitable for the type, density, and intensity of the proposed use;

Analysis: The subject site is physically suitable for the proposed fabrication facility, including its use of Group A chemicals. No addition of floor area to the existing building is proposed as part of this project. No modifications to the existing parking facilities are proposed as part of this project.

(c) The design, location, size, and operating characteristics of the proposed use are compatible with development in the vicinity;

Analysis: The subject site is located within the Tech Industrial zoning district, which is an area that permits industrial land uses including a number engaged in research and development operations. The proposed hazardous materials use is located in an existing industrial building. All chemicals would be stored temporary refrigeration unit that has been reviewed and will be inspected by the Fire Department.

(d) The proposed use will not be detrimental to the public health, safety, or welfare of persons or property in the vicinity.

Analysis: The proposed handling and storage of hazardous materials would occur exclusively on-site. Conditions of approval for the proposed use stipulate that the operator must comply with current and future provisions and permitting requirements of the Federal Environmental Protection Agency (EPA), California EPA, California Fire Code, California Health and Safety Code, California Code of Regulations, Fremont Municipal Code, and other regulations governing the use, storage, handling, and transportation of hazardous materials.

CONDITIONS OF APPROVAL:

1. The approval of this Emergency Zoning Administrator Use Permit shall allow the use of the property by a Small User of Group "A" Chemicals as represented by Hazardous Materials Inventory. Only in the manufacturing of materials necessary in the production of COVID-19 diagnostic testing kits.
2. Changes in the type(s), or increases in the quantity, shall be subject to approval by the Fire Department. Increases to chemical inventory beyond the quantities listed in the HMIS and, cited above, may require submission and approval of a Risk Management Plan and/or additional entitlement review in accordance with Condition of Approval No. 7 based on the impact to public and environmental receptors.
3. The Emergency Zoning Administrator Permit is approved through 180-days, or until the state of "Local Emergency" has been rescinded. The applicant will have 30-days to

apply for a Zoning Administrator permit once either of the above conditions are met. The applicant may apply for another 180-day extension if a state of "Local Emergency" still exists.

4. The applicant shall comply with current and future provisions of the Federal EPA, California EPA, California Fire Code, California Health and Safety Code, California Code of Regulations, Fremont Municipal Code, and other regulations governing the use, storage, handling, and transportation of Hazardous Materials.
5. The applicant shall comply with the provisions and permits required from any federal, state, or regional agencies, including but not limited to the Bay Area Air Quality Management District (BAAQMD), Region Water Quality Control Board, Union Sanitary District (USD) and the Alameda County Department of Environmental Health.
6. All chemicals shall be stored either inside the existing building or the temporary cold storage trailer.
7. Any tenant improvements or modifications to the existing facility will require plans be submitted and approved by the City of Fremont and concurrent review and approval by the Fire Department. The most currently adopted edition of the California Building, Fire and City of Fremont Municipal Codes in effect at the time of the building permit application will be used.
8. Minor modifications to this Emergency Zoning Administrator Permit may be made subject to review and approval by the Zoning Administrator if such modifications are in keeping with the intent of the original approval. However, the Zoning Administrator may refer any modifications to the Planning Commission if he/she feels the request is of such a nature that it warrants consideration by the Planning Commission.
9. The applicant shall defend, indemnify, and hold harmless the City or any of its boards, commissions, agents, officers, and employees from any claim, action or proceeding against the City, its boards, commissions, agents, officers, or employees to attack, set aside, void, or annul, the approval of the project. The City shall promptly notify the applicant of any such claim, action or proceeding. The City shall have the option of coordinating the defense. Nothing contained in this condition shall prohibit the City from participating in a defense of any claim, action, or proceeding if the City bears its own attorney's fees and costs, and the City defends the action in good faith.
10. This Emergency Zoning Administrator Permit shall be subject to revocation by the Zoning Administrator at such time as any of the following conditions are found to exist:
 - a. Conditions of approval, including state or local standards of operation, have not been fulfilled;
 - b. The use has resulted in a substantial adverse effect on the health and/or general welfare of users of adjacent or proximate property;
 - c. The use has resulted in a substantial adverse impact on public facilities or services.

END OF CONDITIONS



**ZONING ADMINISTRATOR PERMIT
STAFF REPORT
MARCH 24, 2020**

- Proposal:** **BioGenex Coronavirus (COVID-19) Test Kit Component Manufacturing – BLD2020-04234** - To consider an Emergency Zoning Administrator Permit in accordance with the City's Local Emergency declaration, to allow a Hazardous Materials "Small User Site" associated with the production of materials critical to the manufacturing of testing kits for COVID-19 in an existing facility located at 48810 Kato Road in the Bayside Industrial Community Plan Area; and to consider a categorical exemption from the California Environmental Quality Act (CEQA) per CEQA Guidelines Section 15301, Existing Facilities, and Section 15269(c), Emergency Projects.
- Recommendation:** Approve, based on findings and conditions of approval.
- Location:** 48810 Kato Road
Bayside Industrial Community Plan Area
APN 519-1010-08-01
- Area:** 40,550-square-foot industrial building located on a 2.68-acre site
- People:** Ajay Kumar (BioGenex), Applicant
BPP Industrial CA REIT Owner 2 LLC, Property Owner
Marc Cleveland, Staff Planner, (510) 494-4543, mcleveland@fremont.gov
- General Plan:** Industrial - Tech
- Zoning:** I-T (Industrial – Tech)

EXECUTIVE SUMMARY:

The applicant, BioGenex, is a company involved in the research and development of molecular pathology systems and life science research. BioGenex produces 6-Carboxyfluorescein-CX CED Phosphoramidite, which plays a critical role in the development of test kits for COVID-19. BioGenex will occupy an existing 40,550-square-foot industrial building at the 2.68-acre subject site in the Bayside Industrial Community Plan Area. BioGenex will use the building as an office, warehouse, and laboratory for their research and development operations. They will also be utilizing a temporary cold storage unit on their site for chemicals integral in their manufacturing process. Operations would include the handling and storage of various hazardous materials at quantities that classify the facility as a "Small User Site." The proposed hazardous materials inventory includes "Group A" ("higher risk") chemicals. The use of "Group A" chemicals at a "Small User Site" in the Tech Industrial (I-T) zoning district requires a Zoning Administrator Permit.

On March 4, 2020, Governor Newsom declared a State of Emergency in response to the global outbreak of a novel coronavirus ("COVID-19"), which is known to cause severe acute respiratory illness and other ailments and possibly death. On March 11, 2020, the World Health Organization declared that the outbreak of COVID-19 had transitioned from an epidemic to a pandemic. On March 13, 2020, the City of Fremont Director of Emergency Services proclaimed a Local Emergency in response to COVID-19. The proclamation was ratified by the City Council on March 17, 2020.

A critical challenge in detecting and slowing the spread of COVID-19 in the United States has been the limited availability of test kits. BioGenex approached the City regarding changes in their operations related to the manufacture COVID-19 test kits. Their operations involve the use hazardous materials and require a Zoning Administrator Permit; however, the normal approval process for consideration of a Zoning Administrator Permit could take several months, time that cannot be afforded in light of the current COVID-19 pandemic.

Pursuant to FMC Section 2.20.110, the Director of Emergency Services (Director) is authorized to control and direct the effort of the emergency organization of the City. When a state of emergency has been declared, the Director is empowered to make and issue rules and regulations on matters reasonably related to the protection of life and property as affected by such emergency; to obtain vital supplies, equipment, and other such properties found lacking and needed for the protection of life and property; and to execute his or her ordinary power as city manager, together with all special powers conferred by the City Council, statute, or any other lawful authority.

Pursuant to this authority, the Director has authorized a process for an Emergency Zoning Administrator Permit, that includes reduced public notice and appeal period requirements. Specifically, the Director of Emergency Services has modified or waived the following requirements, where the proposed use is reasonably related to the protection of life or property as affected by a declared emergency:

- Section 18.275.050: Notwithstanding Government Code Sections 65905 and 65901, The Zoning Administrator may provide less than ten days' public notice prior to the public hearing.
- Section 18.275.070: The ten-day appeal period following an approval is waived. The Emergency Zoning Administrator Permit becomes effective immediately upon approval by the Zoning Administrator.

An Emergency Zoning Administrator Permit may be approved by the Director or his or her designee, upon finding that an emergency situation exists, the proposed use is consistent with the goals of FMC Section 2.20.110, and the proposed use satisfies FMC Section 18.275.060. An Emergency Zoning Administrator Permit authorizes operations for a period of 180 days from the date of approval, or until the state of "Local Emergency" has been rescinded. The applicant will have 30-days to apply for a Zoning Administrator permit once either of the above conditions are met. The applicant may apply for another 180-day extension if a state of "Local Emergency" still exists at the end of the initial 180-day period. These requirements will be specified as conditions of approval.

Staff has reviewed the proposed use and found it to be in conformance with local and state emergency policies, ordinances, and the General Plan. Staff recommends approval of the Emergency Zoning Administrator Permit.

PROJECT DESCRIPTION:

BioGenex seeks to establish emergency production operations within the 40,550-square-foot existing building located at 48810 Kato Road. The subject building is on a 2.68-acre site in the I-T zoning district and the Bayside Industrial Community Plan Area. The project involves no additional floor area being added to the building and no changes to building design. BioGenex develops and manufactures 6-Carboxyfluorescein-CX CED Phosphoramidite, a critical raw material in the development of diagnostic kits for testing COVID-19. Once operations have started the manufacturing of 6-Carboxyfluorescein-CX CED Phosphoramidite will take approximately six weeks. With the state of emergency in place and a pandemic associated with COVID-19 declared by the World Health Organization, demand for the testing kits has increased dramatically over the past month.

The chemicals used in the manufacturing process require refrigeration. BioGenex has plans to construct refrigeration units for long term operations; however, as part of their short-term operations, they will be utilizing a temporary cold storage trailer located in a non-required parking area to store chemicals needed in the process.

The research and development employed by BioGenex involves the handling and storage of various hazardous materials, including oxidizing, flammable, and inert gasses; combustible, corrosive, and highly toxic materials. BioGenex proposes use of Group A ("higher risk") chemicals, in addition to the use of other chemicals classified as Group B ("moderate risk") or Group C ("least risk") chemicals. Pursuant to the definitions contained in Fremont Municipal Code (FMC) Section 18.190.220(d), the aggregate volume of all non-exempt chemicals that would be handled and stored within the facility and a proposed temporary cold storage trailer categorizes it as a Small User Site. BioGenex's proposed use of Group A chemicals at a Small User Site requires a Zoning Administrator Permit in the I-T zoning district.

PROJECT ANALYSIS:

General Plan Conformance:

The General Plan land use designation for the subject site is Tech Industrial. The primary uses in this designation are for research and development, "clean and green" tech, semi-conductor production, computer hardware, and uses supporting these technology companies. The Bayside Industrial Community Plan area is characterized by one- or two-story buildings sitting on large parcels in a campus like environment.

Analysis: The issuance of an Emergency Zoning Administrator Permit for BioGenex's proposed use of the subject site is consistent with the following General Plan goals and policies:

Land Use Goal 2-5: Employment Districts – *Strengthen Fremont as a major regional job center, a health care and professional office hub, a preferred location for technology, research and development, and home to a diverse mix of businesses and industries.*

Land Use Goal 2-5.8B: Industrial Land Use Compatibility– *Use the zoning code to require discretionary review (use permits or Zoning Administrator's permit) for uses in areas designated Service Industrial that could potentially impact nearby non-industrial uses.*

Safety Goal 10-6: Hazardous Materials and Waste – *Minimum feasible risks to life, property and the environment resulting from the use, storage, transportation and disposal of hazardous materials.*

Safety Policy 10-6.1: Hazardous Materials Regulation – *Maintain sufficient regulation of land use and construction to minimize potential health and safety risks associated with future, current or past use of hazardous materials in Fremont.*

Safety Policy 10-6.5: Hazardous Materials Oversight – *Maintain sufficient oversight regarding the storage, transport and handling of hazardous materials within the City.*

Further, allowing the proposed use at the subject site would be consistent with the goals of the state and local emergency declarations, which authorize the Director to control and direct the effort of the emergency organization of the City. The Director is empowered to make and issue rules and regulations on matters reasonably related to the protection of life and property as affected by such emergency and to obtain vital supplies, equipment, and such other properties found lacking and

needed for the protection of life and property. The manufacturing of 6-Carboxyfluorescein-CX CED Phosphoramidite is necessary for the production of test kits for COVID-19. Test kits have been identified by health organizations as essential for containing the spread of COVID-19 and the treatment of patients. Accordingly, the issuance of an Emergency Zoning Administrator Permit to facilitate BioGenex's manufacturing of 6-Carboxyfluorescein-CX CED Phosphoramidite will help to protect the life and property of not only the members of the Fremont community, but also the broader population.

Zoning Compliance:

Land Use and Hazardous Materials

Research and Development of medical technologies is a permitted use within the I-T zoning district. FMC Section 18.190.220 specifies the requirements for high intensity hazardous materials uses. This section of the municipal code categorizes hazardous materials into three categories:

- Group A, representing those materials that pose a higher risk
- Group B, representing those that pose a more moderate risk
- Group C, those posing the least risk to health, safety, or property

The hazardous material which falls into the highest risk category determines the entitlement requirements for an entire project, regardless of the quantity of that material.

The quantities of all hazardous materials are then added together to determine the aggregate quantity range. The aggregate quantity of hazardous materials proposed in BioGenex's operations results in classification as a Small User Site. FMC section 18.190.220(d)(7) defines Small User Sites as sites where hazardous materials are used for on-site operations only and do not exceed quantity range 3 (aggregate quantities between 550 and 2,750 gallons for liquids, 5,000 and 25,000 pounds for solids, and 2,000 to 10,000 cubic feet at STP for compressed gasses).

Small User Sites utilizing Group A ("higher risk") chemicals require a Zoning Administrator Permit within the I-T zoning district in order to ensure that the hazardous materials are handled and stored in a safe manner consistent with industry standards and applicable Fire Department regulations.

The Fire Department has reviewed BioGenex's proposed hazardous materials inventory, as well as the proposed storage and containment systems, enclosure, and other safety measures that would be employed, and deemed them to be in conformance with current industry standards. Any change in the type or increase to the amount of the chemicals stored or used on site would be subject to additional Fire Department review and any Zoning Administrator Permit or Conditional Use Permit as required by the zoning code.

Parking

The project site was approved and constructed for industrial uses in 1990. No modifications to parking or site circulation are proposed. The building will remain as a research and development use, and therefore no additional parking would be required.

Environmental Review

The proposed project would be exempt from the California Environmental Quality Act (CEQA) per CEQA Guidelines Section 15301, Existing Facilities, because the proposed research and development use would occupy an existing building and represent negligible or no expansion to an existing use. The scope of work would be limited to minor interior and exterior alterations. In addition, the

proposed project would be exempt from CEQA per CEQA Guidelines Section 15269(c), Emergency Projects. The project is necessary to facilitate the applicant's manufacture of 6-Carboxyfluorescein-CX CED Phosphoramidite, which include specific actions necessary to prevent or mitigate an emergency. As described in this staff report, the State of California and the City of Fremont have made emergency declarations related to the COVID-19 pandemic. The project would assist with the production of test kits that are essential for containing the spread of COVID-19 and the treatment of patients.

FINDINGS FOR APPROVAL:

Pursuant to FMC Section 2.20.110, the City of Fremont declaration of a Local Emergency, and Governor Newsom's proclamation of a State of Emergency, the Zoning Administrator makes the following findings:

(a) The State of California has declared a State of Emergency;

Analysis: On March 4, 2020, Governor Newsom declared a State of Emergency in response to the global outbreak of COVID-19.

(b) City Council has declared a Local Emergency;

Analysis: In response to the COVID-19 crisis, the City of Fremont Director of Emergency Services/City Manager proclaimed a local emergency on March 13, 2020, and the City Council ratified the proclamation of the local emergency on March 17, 2020. The Director of Emergency Services is empowered to take emergency actions when a Local Emergency or a State of Emergency has been declared, pursuant to FMC Section 2.20.110.

(c) The proposed use is consistent with the goals of FMC 2.20.110;

Analysis: FMC Section 2.20.110 gives authority to the Director in a declared emergency to "Obtain vital supplies, equipment, and such other properties found lacking and needed...". The Director may also "Make and issue rules and regulation of matters reasonably related to the protection of life and property as affected by the emergency...". Pursuant to his authority under FMC Section 2.20.110(b)(1) and (b)(2), the Director has authorized a process for an Emergency Zoning Administrator Permit, which shall be processed in the same manner as Zoning Administrator Permit pursuant to FMC Section 18.275; however, the Director or designee may provide less than ten days public notice required by FMC Section 18.275.050 for an Emergency Zoning Administrator Permit. In addition, the ten-day appeal period following an approval required by FMC Section 18.275.070 is waived and the Emergency Zoning Administrator Permit becomes effective immediately upon approval by the Zoning Administrator. BioGenex manufactures a key component to develop needed testing kits for COVID-19. Allowing their operations to run on an Emergency Zoning Administrator's Permit would be in compliance with the municipal code by meeting the goals of procuring supplies, and protection of life.

Pursuant to the Emergency Zoning Administrator Permit process established by the Director and FMC Section 18.275.060, in order to approve an Emergency Zoning Administrator Permit, the Zoning Administrator must make the following findings:

(a) The proposed use is consistent with the general plan and any applicable community or specific plan;

Analysis: The existing General Plan land use designation for the project site is Tech Industrial and the corresponding zoning designation is Tech Industrial. The applicant's proposed use of limited hazardous materials within an established industrial area is in accordance with General Plan Land Use Policy 2-5.8 (Industrial Land Use Compatibility), as well as other General Plan Goals and Policies addressing Land Use and Safety. Additionally, the proposed use would be located within a zoning district which allows limited hazardous materials uses subject to an approved Zoning Administrator Permit.

(b) The site is physically suitable for the type, density, and intensity of the proposed use;

Analysis: The subject site is physically suitable for the proposed fabrication facility, including its use of Group A chemicals. No addition of floor area to the existing building is proposed as part of this project. No modifications to the existing parking facilities are proposed as part of this project.

(c) The design, location, size, and operating characteristics of the proposed use are compatible with development in the vicinity;

Analysis: The subject site is located within the Tech Industrial zoning district, which is an area that permits industrial land uses, including a number of uses engaged in research and development operations. The proposed manufacturing use, including the handling and storage of hazardous materials, is located in an existing industrial building. All chemicals would be stored in a temporary refrigeration unit that has been reviewed and will be inspected by the Fire Department.

(d) The proposed use will not be detrimental to the public health, safety, or welfare of persons or property in the vicinity.

Analysis: The proposed manufacturing use, including the handling and storage of hazardous materials, would occur exclusively on-site. Conditions of approval for the proposed use stipulate that the operator must comply with current and future provisions and permitting requirements of the United States Environmental Protection Agency (EPA), California EPA, California Fire Code, California Health and Safety Code, California Code of Regulations, Fremont Municipal Code, and other regulations governing the use, storage, handling, and transportation of hazardous materials.

ENCLOSURES:

Exhibits:

- Exhibit "A" ["Statement of Operations"](#)
- Exhibit "B" ["Findings and Conditions of Approval"](#)