

Case No. CNU-25172-2011  
Sheriff Road FedExField  
Temporary Event Parking

Applicant: Brightseat Development  
Associates, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,  
SITTING AS THE DISTRICT COUNCIL

ORDER OF APPROVAL, WITH CONDITIONS

IT IS HEREBY ORDERED, after review of the administrative record, including the transcript of proceedings and exhibits for the District Council's consideration of the application, that the decision of the Planning Board in PGCPB Resolution No. 12-87 to disapprove, application CNU-25172-2011, certification of a nonconforming use for a commercial parking lot for use in conjunction with FedExField events in accordance with Subtitle 27 of the Prince George's County Code, is:

REVERSED, pursuant to §27-244, and Application CNU-25172-2011, is hereby APPROVED, for the reasons stated in Attachment A, which the District Council hereby adopts as its findings of fact and conclusions in this case.

In order to protect adjacent properties and the surrounding neighborhood, certification of the nonconforming use is subject to the following condition by the District Council:

The nonconforming use is subject to the rezoning of the 2009 Approved Landover Gateway Sector Plan and Sectional Map Amendment, Chapter 7: Implementation, page 138. The existing temporary graveled parking lot shall be allowed to continue as a temporary nonconforming use for the next five (5) years from the date of adoption of this Order. The temporary graveled parking lot use shall cease immediately at the expiration of the five year term and all future uses of the subject property shall comply with applicable law.

ORDERED this 11<sup>th</sup> day of February, 2013, by the following vote:

In Favor: Council Members Campos, Davis, Franklin, Harrison, Lehman, Olson, Patterson, and Toles.

Opposed:

Abstained:

Absent: Council Member Turner

Vote: 8-0

COUNTY COUNCIL OF PRINCE GEORGE'S  
COUNTY, MARYLAND, SITTING AS THE  
DISTRICT COUNCIL FOR THAT PART OF  
THE MARYLAND-WASHINGTON  
REGIONAL DISTRICT IN PRINCE GEORGE'S  
COUNTY, MARYLAND

BY: \_\_\_\_\_  
Andrea C. Harrison, Chair

ATTEST:

\_\_\_\_\_  
Redis C. Floyd  
Clerk of the Council

**ATTACHMENT A****ORDER OF APPROVAL—CNU-25172-2011****FINDINGS AND CONCLUSIONS****The Property**

In 2003 Brightseat Development Associates, LLC (Brightseat), the applicant in this matter, purchased approximately 22.13± acres of land in the C-M Zone (Commercial Miscellaneous), located in the northwest quadrant of the intersection of Brightseat Road and Sheriff Road. The address of the property is 8300 Sheriff Road, Landover, Maryland 20785. Brightseat and Sheriff Roads connect with Redskins Road, which lead directly to FedExField, a football stadium, and home of the Washington Redskins football team. The property was graded in 2004 for commercial development. Pending commercial development, a gravel driveway and aisles were installed so that the property can be used as a temporary “commercial parking lot,” in conjunction with FedExField events. A commercial parking lot is a permitted use in the C-M Zone pursuant to §27-461. However in 2009, the property was rezoned to the M-X-T Zone (Mixed Use-Transportation Oriented, M-X-T/17.20 ± acres, O-S/4.92± acres) as part of the *2009 Approved Landover Gateway Sector Plan and Sectional Map Amendment* (2009 Plan). Unlike the C-M Zone, the M-X-T Zone does not permit a commercial parking lot. Ex. App. #5, (7/26/12 Tr. 3, 4, 10-11), §27-547(b) (8), Technical Staff Report at 10, Application Form, April 21, 2012, PGCPB Resolution No. 12-87 at 1.

Despite the 2009 Plan mixed-use development vision for the property, the Plan expressly stated that “a temporary graveled surface parking lot” was an allowed use for the property “in anticipation of future mixed-use development as envisioned by the sector plan.” 2009 Plan at 138. Unable, due to the economic climate of the region, to secure the envisioned mixed-use development

for the property, Brightseat has requested certification of a nonconforming use for a commercial parking lot for use in conjunction with FedExField events. (7/26/12 Tr. 38-42).

### **The Application Process**

The application for certification of a nonconforming use, CNU-25172-2011, was filed in April 2012, pursuant to §27-244, with the Planning Board, to validate an existing temporary parking lot used in conjunction with FedExField events. Application Form, April 21, 2012. The Planning Board, after a hearing on the record, voted 5-0 to DISAPPROVE the application on September 6, 2012, in PGCPB Resolution No. 12-87. On September 12, 2012, Brightseat filed an appeal, pursuant to §27-244(f) (5), to the District Council. The District Council voted 7-0 to review this matter on September 24, 2012. Zoning Agenda, September 24, 2012. After oral argument on November 19, 2012, Council took this matter under advisement pursuant to §27-244 (f) (5) (C). Zoning Agenda, November 19, 2012. On January 14, 2013, the Council voted 9-0, pursuant to §27-132 and §27-244, to refer this matter to staff for preparation of an order of approval with conditions. Zoning Agenda, January 14, 2012.

### **Applicable Law**

The Prince George's County zoning ordinance and Md. Code Ann., Land Use Article, in relevant part, address nonconforming use as follows:

#### **Sec. 27-107.01. Definitions.**

##### **(166) Nonconforming Use:**

(A) The "Use" of any "Building," "Structure," or land which is not in conformance with a requirement of the Zone in which it is located (as it specifically applies to the "Use"), provided that:

- (i) The requirement was adopted after the "Use" was lawfully established; or
- (ii) The "Use" was established after the requirement was adopted and the District Council has validated a building, use and occupancy, or sign permit issued for it in error.

(B) The term shall include any "Building," "Structure," or land used in connection with a "Nonconforming Use," regardless of whether the "Building," "Structure," or land conforms to the physical requirements of the Zone in which it is located.

**(244) Use:**

- (A) A "Use" is either:
  - (i) The purpose for which a "Building," "Structure," or land is designed, arranged, intended, maintained, or occupied; or
  - (ii) Any activity, occupation, business, or operation carried on in, or on, a "Building," "Structure," or parcel of land.

Subtitle 27, Pr. Geo. Co. Code (2008-09 ed., as amended).

**Sec. 27-244. Certification.**

**(a) In general.**

(1) A nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) or the District Council certifies that the use is nonconforming and not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division).

**(b) Application for use and occupancy permit.**

(1) The applicant shall file for a use and occupancy permit in accordance with Division 7 of this Part.

(2) Along with the application and accompanying plans, the applicant shall provide the following:

(A) Documentary evidence, such as tax records, business records, public utility installation or payment records, and sworn affidavits, showing the commencing date and continuous existence of the nonconforming use;

(B) Evidence that the nonconforming use has not ceased to operate for more than one hundred eighty (180) consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions of nonoperation for more than one hundred eighty (180) consecutive calendar days were beyond the applicant's and/or owner's control, were for the purpose of correcting Code violations, or were due to the seasonal nature of the use;

(C) Specific data showing:

- (i) The exact nature, size, and location of the building, structure, and use;
- (ii) A legal description of the property; and
- (iii) The precise location and limits of the use on the property and within any building it occupies;

(D) A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one.

**(c) Notice.**

(1) The following notice provisions shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.

(2) The Planning Board shall post the property with a durable sign(s) within ten (10) days of acceptance of the application and accompanying documentation. The signs(s) shall provide notice of the application; the nature of the nonconforming use for which the permit is sought; a date, at least twenty (20) days after posting, by which written comments and/or supporting documentary evidence relating to the commencing date and continuity of such use, and/or a request for public hearing from a party of interest will be received; and instructions for obtaining additional information. Requirements regarding posting fees, the number, and the location of signs shall conform to the requirements set forth in Subsection (f), below.

**(d) Administrative review.**

(1) If a copy of a valid use and occupancy permit is submitted with the application, where applicable a request is not submitted for the Planning Board to conduct a public hearing, and, based on the documentary evidence presented, the Planning Board's authorized representative is satisfied as to the commencing date and continuity of the nonconforming use, the representative shall recommend certification of the use as nonconforming for the purpose of issuing a new use and occupancy permit identifying the use as nonconforming. This recommendation shall not be made prior to the specified date on which written comments and/or requests for public hearing are accepted.

(2) Following a recommendation of certification of the use as nonconforming, the Planning Board's authorized representative shall notify the District Council of the recommendation.

(3) If the District Council does not elect to review the recommendation within thirty (30) days of receipt of the recommendation as authorized by Subsection (e), below, the representative shall certify the use as nonconforming.

(4) Subsections (2) and (3), above, and Subsection (e), below, shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.

**(e) District Council review.**

(1) The District Council may, on its own motion, vote to review the Planning Board representative's recommendation, for the purpose of determining whether the use should be certified as nonconforming, within thirty (30) days of receipt of the recommendation.

(2) If the District Council decides to review the proposed certification, the Clerk of the Council shall notify the Planning Board of the Council's decision. Within seven (7) calendar days after receiving this notice, the Planning Board shall transmit to the Council all materials submitted to it in connection with the application.

(3) The Zoning Hearing Examiner shall conduct a public hearing on the application.

(4) The Zoning Hearing Examiner shall file a written recommendation with the District Council within thirty (30) days after the close of the hearing record.

(5) Any person of record may appeal the recommendation of the Zoning Hearing Examiner within fifteen (15) days of the filing of the Zoning Hearing Examiner's recommendation with the District Council. If appealed, all persons of record may testify before the District Council.

(6) Persons arguing shall adhere to the District Council's Rules of Procedure, and argument shall be limited to thirty (30) minutes for each side, and to the record of the hearing.

(7) The District Council shall affirm the certification only if it finds that a nonconforming use exists and has continuously operated.

(8) The District Council shall make its decision within forty-five (45) days from the filing of the Zoning Hearing Examiner's recommendation. Failure of the Council to take action within this time shall constitute a decision to certify the use.

**(f) Planning Board review.**

**(1) Required hearing.**

(A) If a copy of a valid use and occupancy permit is not submitted with the application, if the documentary evidence submitted is not satisfactory to the Planning Board's authorized representative to prove the commencing date or continuity of the use, or if a public hearing has been requested by any party of interest challenging the commencing date and/or continuity of the use, the Planning Board shall conduct a public hearing on the application for the purpose of determining whether the use should be certified as nonconforming.

**(2) Application for certification.**

(A) Whenever the Planning Board will hold a hearing on a certification of the use as nonconforming, the applicant shall complete the appropriate form provided by the Planning Board.

(3) At least seven (7) calendar days prior to the public hearing, the Planning Board shall send written notice of the date, time, and place of the hearing to the applicant and to all persons of record.

**(4) Planning Board action.**

(A) The Planning Board may decide to either grant or deny certification of the use as nonconforming. If it decides to certify that a nonconforming use actually exists and has continuously operated, the Planning Board shall find that the conclusion it reaches is supported by a preponderance of evidence.

(B) The decision of the Planning Board shall be in the form of a resolution adopted at a regularly scheduled public meeting. The resolution shall set forth findings of fact and conclusions of law in support of the Planning Board's decision.

(C) The Planning Board shall send a copy of the resolution to all persons of record.

**(5) Appeal of Planning Board's decision.**

(A) The decision of the Planning Board may be appealed by any person of record to the District Council by filing an appeal with the Clerk of the Council.

(B) The appeal shall be filed within thirty (30) calendar days after the resolution of the Planning Board was mailed.

(C) Before the District Council makes a decision on the appeal, it shall hold a public hearing.

(D) The Council may decide to affirm, reverse, or modify the decision of the Planning Board. The decision of the Council shall be based on the record made before the Planning Board. No new evidence shall be entered into the record of the case unless it is remanded to the Planning Board and a rehearing is ordered.

Subtitle 27, Pr. Geo. Co. Code (2008-09 ed., as amended).

**§22-113. Lawful nonconforming uses allowed to continue  
—In general.**

A person may continue, and appropriate licenses may be issued to the person for, a lawful nonconforming use existing on the effective date of the respective zoning law in the metropolitan district.

Md. Code Ann., Land Use Article (2012).

**§22-114. Lawful nonconforming uses allowed to continue  
—Outside metropolitan district.**

A lawful nonconforming use that existed on the effective date of a zoning law enacted by Montgomery County or Prince George's County under this title in that portion of the regional district in the applicable county that is outside the metropolitan district may be continued and appropriate licenses may be issued.

Md. Code Ann., Land Use Article (2012).

**Permit History of Property**

1. **July 19, 2004**—Rough Grading Permit No. 1661-2004-01 issued by the Prince George's County Department of Environmental Resources (DER).
2. **August 11, 2005**—Use and Occupancy Permit No. 27736-2005-U placed on hold by The Maryland-National Capital Park and Planning Commission (M-NCPPC), Prince George's County Planning Department, Development Review Division, Permit Review Section for a commercial parking lot proposed on the C-M-Zoned portion of the site. Written comments were issued to the applicant that outlined the outstanding zoning issues and the site plan revisions that would be needed in order to bring the site in compliance with the minimum requirements of the Zoning Ordinance and Landscape Manual and to obtain approval of a permanent use and occupancy permit. The applicant did not pursue the permanent use and occupancy permit and temporary permits were subsequently issued by the Department of Environmental Resources.

3. **Fall of 2005**—Applicant states Temporary Use and Occupancy Permit No. 38505-2005 was issued by the Prince George's County Department of Environmental Resources (DER) for stadium events during the fall of 2005. Copies of this temporary permit were not submitted.
4. **September 29, 2005**—Applicant signs lease agreement with the Board of Education (BOE) to use portions of the Bonnie F. Johns Educational Media Center located at 8437 Landover Road (and abutting the subject property to the north) 10 to 15 times a year for vehicular access.
5. **August 3, 2006**—Temporary Use and Occupancy Permit No. 25195-2006-00 issued by the Prince George's County Department of Environmental Resources (DER) for a parking lot, (valid only for the 2006-2007 Redskin home games, and entrance only from Barlowe Road).
6. **September 29, 2006**—Letter issued from Donna Wilson, Director of the Prince George's County Department of Environmental Resources (DER), to the applicant stating that the existing parking lot does not meet several Prince George's County Code requirements, and that should a permanent use and occupancy permit be desired that the applicant would need to undertake the development process and obtain all required approvals including approval from the M-NCPPC.  
  
The letter further stated that it was DER's understanding that the parking use on the property was an interim one and that the temporary use and occupancy permit provides that the applicant an annual option to pursue the conditional use of the property until they move forward with the permanent utilization.
7. **2008**—No temporary use and occupancy permits were issued for 2008. However, the applicant states that parking lot was used for home Redskin games.
8. **May 19, 2009**—Adoption of the 2009 Landover Gateway Sector Plan and Sectional Map Amendment and the subject property was rezoned from the C-M Zone to the M-X-T Zone.
9. **August 12, 2009**—Temporary Use and Occupancy Permit No. 23836-2009-00 issued by the Prince George's County Department of Environmental Resources (DER) for a temporary parking lot, (Conditions – Valid only for August 22 and 28, September 20, October 4, 18 and 26, November 15, December 6 and 21 Redskins games and any home playoff games that may occur in January 2010, Entrance only from Barlowe Road, No overnight parking permitted).
10. **September 4, 2009**—Temporary Use and Occupancy Permit No. 26838-2009-00 issued by the Prince George's County Department of Environmental Resources (DER) for a temporary parking lot, (Conditions – Valid only for August 22 and 28, September 20, October 4, 18 and 26, November 15, December 6 and 21 Redskins games and any home playoff games that may occur in January 2010, Entrance only from Barlowe Road, No overnight parking permitted). This permit appears to be a duplicate and covers the same time period as the temporary permit previously issued on August 12, 2009.
11. **2009 & 2010**—Applicant states that the property was leased directly to the Redskins Organization during this time period. No documentation was provided. The next temporary permit submitted was not issued until September 1, 2011.

- 12. September 1, 2011**—Temporary Use and Occupancy Permit No. 25849-2011-00 issued by the Prince George’s County Department of Environmental Resources (DER) for a parking lot, (Conditions–Valid only for September 1, 2011, Entrance only from Barlowe Road, No overnight parking is permitted).
- 13. September 1, 2011**—Permanent Use and Occupancy Permit No. 25172-2011-U placed on hold by M-NCPPC. Written comments were issued to the applicant.
- 14. September 11, 2011**—Temporary Use and Occupancy Permit No. 25850-2011-00 issued by the Prince George’s County Department of Environmental Resources (DER) for a parking lot, (Conditions–Valid only for September 11, 2011, Entrance only from Barlowe Road, No overnight parking is permitted).
- 15. September 16, 2011**—Temporary Use and Occupancy Permit No. 27454-2011-00 issued by the Prince George’s County Department of Environmental Resources (DER) for a temporary parking lot for Redskins Game, (Conditions–Valid only for September 18, 2011, Entrance only from Barlowe Road, No overnight parking permitted, Must provide handicapped parking).
- 16. October 14, 2011**—Temporary Use and Occupancy Permit No. 30410-2011-00 issued by the Prince George’s County Department of Environmental Resources (DER) for a temporary parking lot for Redskins Game, (Conditions – Valid only for October 16, 2011, entrance only from Barlowe Road, No overnight parking permitted, Must provide handicapped parking).
- 17. November 9, 2011**—Temporary Use and Occupancy Permit No. 32752-2011-00 issued by the Prince George’s County Department of Environmental Resources (DER) for a temporary parking lot, (Conditions–Valid only for Redskins games and two College games on November 12, and 20<sup>th</sup>, and December 4, 10, 11 and 24<sup>th</sup>, 2011, Entrance only from Barlowe Road, No overnight parking permitted).

PGCPB Resolution No. 12-87 at 1-3, Technical Staff Report at 2-4.

### **Planning Board Findings and Conclusions**

Planning Board found that the property was previously zoned C-M, which permitted parking lots by right, and that the Department of Environmental Resources (DER) issued temporary use and occupancy permits for a temporary parking lot, which the 2009 Plan “points to the use of the property as a parking lot that is permitted as a temporary use” and “essentially recognized the existing land use that was on the ground at the time of the sectional map amendment.” PGCPB Resolution No. 12-87 at 4, Technical Staff Report at 4-5. Planning Board also found that in July 2005, prior to the rezoning of the property to the M-X-T Zone, Brightseat applied for a use and

occupancy permit for the use of a commercial parking lot within the C-M Zone, which was placed on hold by Planning Board subject to comments for “needed plan revisions.” Planning Board opined, however, that Brightseat chose not to pursue the development process and chose not to pursue the use and occupancy permit comments *that would have legally established the use on the property as a permanent one*. PGCPB Resolution No. 12-87 at 6- 8, Technical Staff Report at 6-8. (Emphasis added). Planning Board further opined as follows:

In this case, the operation of the use on the property was restricted to the specific dates that were listed on the temporary use and occupancy permits. Once the time period listed on a temporary permit lapses, the applicant’s legal right to continue operations on the property also lapses. Therefore, a temporary use could not be considered nonconforming.

Further, it would appear that the temporary permits that were issued by DER may have been in error because the use of a commercial parking lot is not one of the specific temporary uses permitted by Section 27-261 of the Zoning Ordinance. Regardless of the legal status of the temporary permits that were issued for the site, what is clear is that the use never went through the development process to ensure the commercial parking lot was constructed in accordance with the minimum requirements of the Zoning Ordinance, ADA standards (American with Disabilities Act), and the 2010 *Prince George’s County Landscape Manual*, or met the required zoning criteria needed in order to obtain a permanent use and occupancy permit.

This is not a case of a use predating zoning requirements. The commercial parking lot use did not begin on the property until 2004, and prior to the rezoning of the property to the M-X-T Zone, the use was never in compliance with the requirements of the C-M Zone. Rather than complying with the minimum zoning requirements and pursuing a permanent use and occupancy permit for the commercial parking lot when the use was permitted in the underlying zone, the applicant continued to request temporary permits that were only valid for specific events. Because the site was never properly developed in accordance with the requirements of the Zoning Ordinance when it was in the proper zoning category, the applicable County Code provision(s) confers no relevant rights on an owner who wishes to continue operations. In addition, the Board notes that a “Temporary Commercial Parking Lot” is not provided as a specific use in the C-M Zone Use Table. If the applicant had submitted a site plan that met the requirements of the Zoning Ordinance, he would have been granted a use and occupancy permit for a “Commercial Parking Lot” which is a permitted use in the C-M Zone. Whether or not the parking lot is used on a temporary or full-time basis is a business decision left for the applicant.

PGCPB Resolution No. 12-87 at 8-9. The Planning Board voted to adopt the findings of Technical Staff and disapproved the application, CNU-25172-2011, filed by Brightseat for certification of a nonconforming use. The motion carried 5-0. (7/26/12 Tr. 72-73). After reviewing the record before the Planning Board pursuant to §27-244 (f) (5) (D), the Council respectfully disagrees with the findings, conclusions and decision of the Planning Board and shall REVERSE.

### **Findings and Conclusions of the District Council**

#### **A. Nonconforming Use**

One of the earliest Maryland cases discussing the right of a property owner with a legal use to continue that use after passage of a new zoning ordinance making the use non-permissible is *Amereihn v. Kotras*, 194 Md. 591, 71 A.2d 865 (1950). In *Amereihn*, the Court of Appeals explained the rationale for recognizing nonconforming uses as follows:

If a property is used for a factory, and thereafter the neighborhood in which it is located is zoned residential, if such regulations applied to the factory it would cease to exist, and the zoning regulation would have the effect of confiscating such property and destroying a vested right therein of the owner. Manifestly this cannot be done, because it would amount to a confiscation of the property, and nonconforming use is a vested right and entitled to constitutional protection.

*Id.* at 601. Since 1950, Maryland courts have developed and refined the law regarding the respective rights of zoning authorities and owners of properties' qualifying as nonconforming uses. *See, e.g., Board of Zoning Appeals v. Meyer*, 207 Md. 389, 114 A.2d 626 (1955) (holding that when a property owner at time of adoption of last comprehensive zoning was using land for use which by new legislative action became non-permitted, the owner has a lawful nonconforming use).

The *use* of land which is not in conformance with a requirement of the Zone in which it is located (as it specifically applies to the "Use"), is *nonconforming* provided that the requirement was adopted *after* the "Use" was lawfully established. §27-107.01 (166) (A) (i). (Emphasis added). The

2009 Plan expressly stated that the *use* of “a temporary graveled surface parking lot” is *allowed* on the Brightseat property in anticipation of future mixed-use development. 2009 Plan, Chapter 7: Implementation at 138, PGCPB Resolution No. 12-87 at 4, Technical Staff Report at 4-5. The Court of Appeals has held that a valid and lawful nonconforming use is *established* if a property owner can demonstrate that before, and at the time of, the adoption of a new zoning ordinance, the property was being *used in a then-lawful manner for a use* that, by later legislation, became non-permitted. *Trip Assocs., v. Mayor & City Council*, 392 Md. 563, 898 A.2d 449 (2006). See e.g., *Chayt v. Board of Zoning Appeals of Baltimore City*, 177 Md. 426, 434, 9 A.2d 747, 750 (1939) (concluding that, to be a nonconforming use, an existing business use must have been known in the neighborhood as being employed for that given purpose); *Lapidus v. Mayor and City Counsel of Baltimore*, 222 Md. 260, 262, 159 A.2d 640, 641 (1960) (noting that an applicant claiming that a nonconforming use had been established before the effective date of the city zoning ordinance needed to prove that the use asserted existed prior to the date of the ordinance); *Vogl v. City of Baltimore*, 228 Md. 283, 288, 179 A.2d 693, 696 (1962) (holding that the party claiming the existence of a nonconforming use has the burden of establishing the existence of the use at the time of the passage of the prohibiting zoning ordinance). *See also Lone v. Montgomery County*, 85 Md. App. 477, 496, 584 A.2d 142, 151 (1991). Brightseat has shown, and it was known in the neighborhood, that the property was used as a parking lot in conjunction with FedExField events. The Board of Education and Brightseat signed a lease agreement to use portions of the Bonnie F. Johns Educational Media Center located at 8437 Landover Road 10 to 15 times a year for vehicular access. The Redskins Organization and Brightseat also entered into a lease in 2009 and 2010. The Director of DER, since 2006, knew that parking was a temporary use on the property. And the County, in its 2009 Plan, expressly allowed the use in

anticipation of future mixed-use development. PGCPB Resolution No. 12-87 at 2-3, Technical Staff Report at 2-3, 2009 Plan, Chapter 7: Implementation at 138.

Pursuant to §27-107.01 (244) of the Zoning Ordinance, a use is either the purpose for which land is designed, arranged, intended, maintained or occupied or any activity, occupation, business, or operation is carried on in, or on a parcel of land. The record is uncontroverted that the Brightseat property, prior to the 2009 Plan, was designed, arranged, intended, maintained, occupied, and operated as a temporary parking lot for parking in conjunction with FedExField events, subject to valid although not required temporary use and occupancy permits by DER.<sup>1</sup> See Rough Grading Permit No. 1661-2004-01, Use and Occupancy Permit No. 27736-2005-U, Use and Occupancy Permit No. 38505-2005, Use and Occupancy Permit No. 25195-2006-00, Use and Occupancy Permit No. 23836-2009-00, Use and Occupancy Permit No. 26838-2009-00, Use and Occupancy Permit No. 25849-2011-00, Use and Occupancy Permit No. 25172-2011-U, Use and Occupancy Permit No. 25850-2011-00, Use and Occupancy Permit No. 27454-2011-00, Use and Occupancy Permit No. 30410-2011-00, Use and Occupancy Permit No. 32752-2011-00. PGCPB Resolution No. 12-87 at 1-3, Technical Staff Report at 2-4. The record also reflects that since 2004, on a typical or average Redskins game day, the lot can accommodate between 700 and 800 cars. (7/26/12 Tr. 30, 44). Brightseat has demonstrated that before, and at the time of, the adoption of the 2009 Plan, the property was being used in a then-lawful manner for a use that, by later legislation, became non-permitted. See, e.g., *McKenny v. Baltimore County*, 39 Md. App. 257, 385 A.2d 96 (1978) (affirming Board's finding of nonconforming use of parking lots for the temporary parking of cars

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<sup>1</sup> Planning Board concluded that temporary permits issued by DER may have been in error because a commercial parking lot is not one of the specific temporary uses permitted by §27-261. But §27-260, which authorize DER to issue temporary permits, also states that "*No temporary permit shall be required if the use is allowed by other provisions of this Subtitle as a permanent use.*" §27-260 (a) (c). (Emphasis added). A commercial parking lot is a permanent use in the C-M Zone. §27-461. Although not directly applicable here, the Zoning Ordinance authorizes the District Council to validate permits issued in error for uses that are nonconforming. §§27-246, 27-258 (h) (1).

and trucks, from 1936–1945, by the transient patrons of a restaurant and bar located across the street from the parking lots).

Whether or not Brightseat chose to pursue the development process to become a permanent use prior to the 2009 Plan is not determinative of a lawfully *established* nonconforming use. The term “nonconforming use” shall include *any land used in connection with a “non conforming use,” regardless of whether the land conforms to the physical requirements of the Zone in which it is located.* §27–107.01 (166) (B). (Emphasis added). Planning Board did not include or consider this section of the nonconforming use definition in its findings or conclusions. PGCPB Resolution No. 12–87 at 7–9, Technical Staff Report at 7–8. Maryland follows the majority of jurisdictions and apply the rule that a valid nonconforming use will not be forfeited by the failure of the business owner to secure a license to operate his business because this rule accords reasonable protection to the property right that has been long recognized under law as a vested right subject to constitutional protection. *Mayor and City Council of Baltimore v. Dembo, Inc.*, 123 Md. App. 527, 719 A.2d 1007 (1998), See e.g., *Derby Ref. Co. v. City of Chelsea*, 407 Mass. 703, 555 N.E.2d 534, 539 (Mass. 1990) (stating that “a valid nonconforming use is not rendered unlawful by failure to possess requisite governmental approval, provided that such approval can be easily obtained”); *Henning v. Goldman*, 8 Misc. 2d 228, 169 N.Y.S.2d 817, 819 (N.Y. App. Div. 1957) (holding nonconforming use status is not lost by failure to renew license to operate parking lot). Contrary to the Planning Board, PGCPB Resolution No. 12–87 at 9, Technical Staff Report at 8, *this is a case of a use predating* the 2009 Plan and the use is nonconforming regardless of whether the land conforms to the physical requirements of the Zone in which it is located. §27–107.01 (166) (B). Because the 2009 Plan was also an amendment, pursuant to Article 28, to the Zoning Ordinance and to the official zoning map for the Maryland–Washington Regional District in Prince George’s County, at the time

the nonconforming use existed, we also find that the nonconforming use may continue pursuant to Md. Code Ann., Land Use Article, §§ 22-113 and 22-114, which replaced and repealed former Article 28. See 2009 Plan at 179-189.

#### B. Master Plan Conformance

Planning Board found that the “temporary event parking lot does not conform to the M-X-T land use recommendations within the 2009 Plan, which recommends Office, Retail and Residential land uses.” PGCPB Resolution No. 12-87 at 4, Technical Staff Report at 4. We disagree. By definition a nonconforming use does not conform to the physical requirements of the Zone in which it is located but may be continued and appropriate licenses may be issued. See §27-107.01, §27-244, and Md. Code Ann., Land Use Article, §§ 22-113 and 22-114. See also *Board of Zoning Appeals v. Meyer*, 207 Md. 389, 114 A.2d 626 (1955) (holding that when a property owner at time of adoption of last comprehensive zoning was using land for use which by new legislative action became non-permitted, the owner has a lawful nonconforming use). Notwithstanding the 2009 Plan mixed-use development vision for the Brightseat property, the Plan expressly allowed the nonconforming use to conform in anticipation of future mixed-use development. 2009 Plan, Chapter 7: Implementation at 138.

#### C. Certification

In general, a nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued *after* the Planning Board *or* the District Council certifies that the use is nonconforming and not illegal. §27-244(a) (1). (Emphasis added). Although a lawful nonconforming use is a vested right, it is the aim of zoning to reduce as speedily as possible nonconformance to conformance, with due regard to the legitimate interests of all parties, but the right to continue a nonconforming use is not a perpetual easement to make a use of one's property

detrimental to his neighbors and forbidden to them. *County Comm'rs of Carroll County v. Uhler*, 78 Md. App. 140 552 A.2d 942; (1989), *cert. denied*, 316 Md. 428, 559 A.2d 791 (1989) *cf. Higgins v. City of Baltimore*, 206 Md. 89, 98, 110 A.2d 503 (1955); *Amereihn v. Kotras*, 194, Md. 591, 601, 71 A.2d 865 (1950); *Laque v. State*, 207 Md. 242, 251, 113 A.2d 893, *cert. denied*, 350 U.S. 863, 76 S.Ct. 105, 100 L.Ed. 765 (1955); *Grant v. City of Baltimore*, 212 Md. 301, 307 129 A2d 363 (1957). Maryland Courts have recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, the Courts have recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. *County Council of Prince George's County v. E.L. Gardner, Inc.*, 293 Md. 259, 443 A.2d 114 (1982). The aim of the 2009 Plan rezoning of the Brightseat property was to reduce as speedily as possible nonconformance to conformance, with due regard to the legitimate interests of all parties. *Uhler*, 78 Md. App. 140 552 A.2d 942; (1989), *cert. denied*, 316 Md. 428, 559 A.2d 791 (1989). The 2009 Plan specifically discussed the Brightseat property as follows:

The plan proposes mixed-use development with offices/retail and residential uses for the property. However, a temporary graveled parking lot is currently *allowed* in anticipation of future mixed-use development as envisioned by the sector plan.

2009 Plan, Chapter 7: Implementation at 138 (Emphasis added). See also PGCPB Resolution No. 12-87 at 4, Technical Staff Report at 4-5. Because we find the use of the Brightseat property, as a parking lot, albeit temporary, is nonconforming and not illegal, a use and occupancy permit may be issued identifying the use as nonconforming subject to the following condition:

The nonconforming use is subject to the rezoning of the 2009 Approved Landover Gateway Sector Plan and Sectional Map Amendment, Chapter 7: Implementation, page 138. The existing temporary graveled parking lot shall be allowed to continue as a temporary nonconforming use for the next five (5) years from the date of adoption of this Order. The temporary graveled parking lot use shall cease immediately at the expiration of the five year term and all future uses of the subject property shall comply with applicable law.

*Gardner*, 293 Md. at 268, 443 A.2d at 119 ("These local ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses.") (citing *City of Hagerstown v. Wood*, 257 Md. 558, 563, 263 A.2d 532, 534 (1970); *Hewitt v. County Comm'rs of Baltimore County*, 220 Md. 48, 59, 151 A.2d 144, 150 (1959); *Mayor of Baltimore v. Byrd*, 191 Md. 632, 638, 62 A.2d 588, 591 (1948); *Colati*, 186 Md. at 658-59, 47 A.2d at 616; *Knox v. Mayor of Baltimore*, 180 Md. 88, 96, 23 A.2d 15, 18 (1941)). Brightseat has "no objection to a condition that limits" its use of the property to parking in conjunction with FedExField events until it finds a use that conforms with the M-X-T Zone because the property was never intended to be used permanently for parking in conjunction with FedExField events. (7/26/12 Tr. 36, 38-40, 44-45).

### **Conclusion**

For the reasons stated above, the decision of the Planning Board in PGCPB Resolution No. 12-87, to DISAPPROVE Application CNU-25172-2011, is REVERSED, and certification is subject to the findings, conclusions and condition set forth herein by the District Council.