



# ZONING EXAMINER

## REPORT TO MAYOR AND COUNCIL

April 20, 2015

**C9-14-13 Valley of the Moon – Allen Road, R-1 to HLR-1**

**Public Hearing: February 5, 2015, et.seq.**

(date corrected from Preliminary Report)

### **BACKGROUND**

This is a request by Damien Clinco of the Tucson Historic Preservation Foundation, as agent of the property owner, the George Phar Legler Society, Inc., operators of an entertainment venue known as Valley of the Moon. The applicant seeks to rezone approximately 2.3 acres of residential property from Residential R-1, to Historic Landmark-Residential-1, to form the Valley of the Moon Historic District. Valley of the Moon was primarily created by George Phar Legler from 1923 to 1932 as a theatrical experience from a child's perspective available for tours on weekends and during special events.

The annexation site is within the boundaries of the *Plan Tucson*, and the *Northside Area Plan*.

### **PUBLIC HEARING SUMMARY (Minutes Attached)**

John Beall, Planning and Development Services Department, presented the staff report with a recommendation for approval. Mr. Beall commented that seven approvals and 21 protests were received in the formal 150 foot protest area. A supermajority vote of Mayor and Council is thus required.

Demion Clinco presented the rezoning request.

### **FINDINGS OF FACT**

#### **A. Background**

This is a request by Damien Clinco of the Tucson Historic Preservation Foundation, as agent of the property owner, the George Phar Legler Society, Inc., operators of an entertainment venue known as Valley of the Moon. The applicant seeks to rezone approximately 2.3 acres of residential property from Residential R-1, to Historic Landmark-Residential-1, to form the Valley of the Moon Historic District. Valley of the Moon was primarily created by George Phar Legler from 1923 to 1932 as a theatrical experience from a child's perspective available for tours on weekends and during special events.

The proposal integrates physical improvements to existing property including a garden with interconnected walkways, fanciful buildings and structures, reflecting pools, grottos and caves, native and non-native plants, amphitheater and stage, utility buildings and a

## **C9-14-13 Valley of the Moon – Allen Road**

### **Rezoning: R-1 to HLR-1**

residence, among other structures. The rezoning site is located 320 feet east of Tucson Boulevard on the south side of Allen Road. The site consists of two parcels forming a 165 by 632 foot rectangle in the interior of a residential neighborhood south of the Rillito River, east of the Christmas Wash, and west of the Binghamton Rural Historic Landscape. The surrounding and immediate adjacent land uses are attached and detached single family residential units with R-1 and R-2 zoning.

The site consists of 26 contributing historic resources: four buildings, 20 structures, one object, and one site, all created no later than 1963. The contributing resources have names such as the “Enchanted Castle and Magic Stairs,” the “Temple of the Fairies,” the “Gnome Village,” and “The Wonderland Theater.” There are eight non-contributing resources: two buildings, two structures, and four objects all completed and installed recently. As recently as 2010, the Valley of the Moon setting was enlarged to include these structures as well as several outsized statues relocated from the now defunct Magic Carpet Miniature Golf business. A 20 foot tall parking lot light structure with 15 foot arms was installed recently as well.

The Historic Landmark rezoning process was added to Section 5.8 of the Unified Development Code in 2014 and this is the first request under the revised ordinance. The applicant’s agent, Mr. Clinco, participated in the drafting of the ordinance.

### **B. Existing Use**

The George Phar Legler Society operates Valley of the Moon under the claim of a nonconforming use right. A nonconforming use is colloquially known as a “grandfathered” right. The use predates the zoning law and can continue operating as long as use restrictions are strictly followed. The use, however, does not “conform” to the zone. For instance, a residentially zoned property could not ordinarily offer entertainment on a commercial scale because such use is illegal in a residential zone. The use might only be permitted because it was in operation prior to zoning. However, under nonconforming use law, abandonment, expansion, alteration, transformation, intensification, or changes in scale or scope, even if minor, can lead to a loss of the “grandfathered” right. The use must remain substantially similar to that which existed on the date the zoning went into effect or it may be lost.<sup>1</sup>

Neighbors, including residents of the Colonia Del Rey Homeowner’s Association, argued at the public hearing that the use of the property in recent years has intensified and expanded to the point of creating a nuisance. They testified that Valley of the Moon has hosted amplified entertainments with hundreds of attendees, created parking and traffic problems in the neighborhood, produced excess trash, brought in food trucks with generators for retail food sales, rented the venue to third parties for events that they did not control or for which they did not provide operations guidelines, and generally acted contrary to the nature of the residential neighborhood, against the definition of low-density residential uses spelled out in the applicable zoning laws and the *Northside Area Plan*, and beyond the scope of George Phar Legler’s modest entertainments. The applicant also testified, and other evidence was introduced, that the use had been abandoned and revived,

<sup>1</sup> *Blake v. City of Phoenix*, 157 Ariz. 93, 754 P.2d 1368 (App. 1988).

**C9-14-13 Valley of the Moon – Allen Road**

**Rezoning: R-1 to HLR-1**

that new structures had been added, that new programs aimed at more mature audiences have been offered, and that in addition to personally hosting entertainments, the operators have rented the venue out to earn revenue to support their non-profit corporation.

Mr. Clinco contended that any inquiry into how the property was, is, or will be used is irrelevant since the Historic Landmark zoning designation will not change the use of the property in any way or change the nonconforming use or change the property owner's rights in that nonconforming use, whatever they may be.

**C. Request to Address Use Issues and Neighborhood Protest**

The Zoning Examiner twice directed the applicant to meet with the neighbors during the Zoning Examiner Public Hearing process to discuss their operations. The applicant refused to do this. The applicant did not provide any operating standards or guidelines. The applicant would not provide the neighbors with copies of its bylaws nor would they honor the Zoning Examiner's efforts to facilitate land use discussions between them and the neighbors

Instead, the applicant demanded that the Zoning Examiner hearing be closed and forwarded on to the Mayor and Council without consideration of the land use impacts.

In a letter to the Zoning Examiner on March 31, 2015, Mr. Clinco disputed that the Zoning Examiner has authority to continue a case in a Historic Landmark rezoning to request details regarding how an applicant will operate their property or how it impacts neighbors. At the hearing, Mr. Clinco further questioned that the Zoning Examiner has jurisdiction to facilitate land use conflict resolution between neighbors and applicants.

Mr. Clinco also suggested that the Zoning Examiner has no authority to inquire into the validity of a nonconforming use before issuing a recommendation on a rezoning application.

Mr. Clinco stated that the Zoning Examiner should disregard neighborhood protests about the impacts of the applicant's current use of the property. Mr. Clinco, however, did present his client's testimony regarding the positive impacts of Valley of the Moon and indicated that it should be considered. Mr. Clinco also suggested that the only evidence relevant to the Zoning Examiner recommendation was that regarding the historic structure, setting, and location of the property, not use, whether current or historic.

It is noted that under A.R.S. § 9-462.04(H), referring to protests levels and conflicts of interest by members of the governing body, a heightened voting requirement is required based on protest levels. Regardless of whether the *content* of neighborhood protest is relevant to the Zoning Examiner analysis and recommendation under the city ordinance, the *volume* of protests in this case requires a super-majority vote of Mayor and Council according to state law.

**C9-14-13 Valley of the Moon – Allen Road**

**Rezoning: R-1 to HLR-1**

**D. The Historic Landmark Ordinance and Zoning**

This is the first property to request a rezoning under the revised Historic Landmark ordinance spelled out in Section 5.8 of the Unified Development Code. The Historic Landmark ordinance is a zoning ordinance. Its purpose is to encourage preservation of significant historic resources and “keep them in active use or management.” The purpose statement of the ordinance thus contemplates considerations of property use. Additionally, land *use* is fundamental to the system of zoning regulation. The first provision of Arizona’s state law authorizing zoning specifies that zoning regulates land use. Therefore, it would seem the Historic Landmark ordinance in authorizing a zoning designation that regulates land might be interpreted as requiring that land use issues be addressed in its process. The applicant contends that it should not.

The ordinance provides that additional design standards be applied to proposed development within an HL zone and that strict demolition permit review is required for proposed demolition of historic structures. Mr. Clinco stated that the only legal outcome of an HL rezoning is the placement of these restrictive permit review processes for alterations or demolitions on the HL site.

Mr. Clinco argued that for purposes of this ordinance, demolition permit review in the historic preservation context is not a land use issue, to the extent that it changes land use regulations applicable to the property in such a way that other land use impacts of the rezoning are relevant for Zoning Examiner Public Hearing consideration.

Mr. Clinco noted that nothing in the ordinance specifically authorizes the Zoning Examiner to place conditions on property related to its use and the zoning must be granted unconditionally.

Mr. Clinco argued that this limitation on the Zoning Examiner’s authority to recommend conditions to the HL rezoning exists despite the provision of Section 3.5.2 of the UDC that states, in part, that “[a]ll rezoning ordinances require compliance with one or more conditions of rezoning . . .” Mr. Clinco maintained that any recommended restrictions would be a burden on the property inconsistent with the goal of the ordinance, which is solely to grant zoning protection to historic properties, not to safeguard neighbors from potential or existing nuisances.

**E. Planning and Other Considerations**

Regardless of other considerations, Valley of the Moon has an impact on its neighbors. Should the Valley of the Moon be granted HL zoning, neighborhood protest will not go away. Since, as the applicant acknowledges, HL zoning does not impact the land use rights of the underlying zoning, the granting of HL zoning will not ratify or validate any nonconforming use right, if one still exists, or protect the applicant from a nuisance action. Mr. Clinco asserted that discussions with the neighborhood regarding the way the property is used should be conducted outside the rezoning process.

Philip Oliver, president of the Colonia Del Rey Homeowner’s Association, stated that without the opportunity to discuss Valley of the Moon operations during the rezoning

## **C9-14-13 Valley of the Moon – Allen Road**

### **Rezoning: R-1 to HLR-1**

process, the HOA may opt to challenge the legality of the nonconforming use, or the zoning itself, in a legal forum.

Unless remanded to the Zoning Examiner, the opportunity for resolving disputes during the Zoning Examiner process is now past and the legality of nonconforming uses may be a fact question outside the purview of this recommendation.

The question for this recommendation is whether the Historic Landmark zone for this property is compatible with the intentions, plans, policies, and ordinances as articulated and adopted by Mayor and Council, with specific attention to the applicability of Section 5.8 of the UDC to the Zoning Examiner Public Hearing process.

Land use policy direction for this area is provided by the *Northside Area Plan* and *Plan Tucson*. The rezoning site is located within an Existing Neighborhood as identified on the Future Growth Scenario Map of *Plan Tucson*. Existing Neighborhoods are primarily developed and largely built-out residential neighborhoods and commercial districts in which minimal new development and redevelopment is expected in the next several decades. The goal is to maintain the character of these neighborhoods while accommodating some new development and redevelopment and encouraging reinvestment and new services and amenities that contribute further to neighborhood stability. *Plan Tucson* supports overlay districts such as Historic Landmark designation as a way to promote preservation and enhancement of historic structures and districts. The *Northside Area Plan* allows for nonresidential uses that are designed in harmony with adjacent development.

Although the present use of the property is not compatible with the *Northside Area Plan* and is not in harmony with adjacent development, nothing in that plan or *Plan Tucson* suggests that historic landmark zoning of the property is incompatible.

### **CONCLUSION**

Mr. Clinco on behalf of his client, Valley of the Moon, asserts that the intent of Mayor and Council in adopting revisions to Section 5.8 of the UDC as it applies to the Zoning Examiner Public Hearing Process is as follows:

- The Zoning Examiner cannot consider neighborhood testimony or evidence regarding the negative land use impacts of an HL rezoning.
- The Zoning Examiner has no discretion to continue a case in an HL rezoning to request details regarding how an applicant will operate their property or how it impacts neighbors.
- ~~The Zoning Examiner has no jurisdiction during an HL rezoning to request land use conflict resolution between neighbors and applicants.~~
- The Zoning Examiner has no jurisdiction to determine whether the current land use of a property is legal, since the HL rezoning does not address land use.

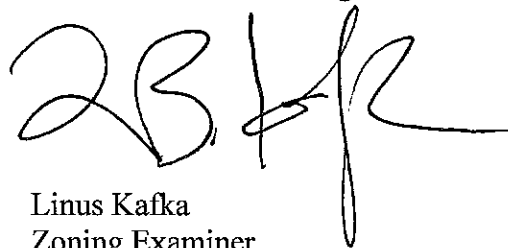
**C9-14-13 Valley of the Moon – Allen Road  
Rezoning: R-1 to HLR-1**

- Under an HL rezoning, the Zoning Examiner does not have authority to examine whether a nonconforming use is valid.
- Since the ordinance does not specifically allow conditions regarding land use, no conditions on the use may be imposed by the Zoning Examiner, despite the Unified Development Code provision that all rezonings may be subject to one or more conditions.
- Under HL rezoning, new restrictions on demolition permits are not changes in land use sufficient to constitute grounds for examining other land use impacts.

According to this interpretation of the UDC, HLR-1 zoning applies to the historic structures, setting, and location of Valley of the Moon, and should be recommended without additional conditions. Nothing in such a recommendation would suggest that the applicant's nonconforming status, or lack thereof, is altered in any way, or that HLR-1 zoning shields the applicant from a challenge to their rights in that status or to the rezoning ordinance itself, should it be adopted, or that the adoption of HLR-1 zoning alters any status of the property other than adding restrictive permit review.

**RECOMMENDATION**

Based on the above construction and presumption of the Mayor and Council's legislative intent in adopting revisions to UDC Section 5.8, the Zoning Examiner recommends approval of HLR-1 zoning.

A handwritten signature in black ink, appearing to read 'L. Kafka', is written over the printed name and title.

Linus Kafka  
Zoning Examiner

**ATTACHMENTS:**


Public Hearing Minutes  
Rezoning Staff Report



# MEMORANDUM

DATE: January 21, 2015  
For February 5, 2015 Hearing

TO: Linus Kafka  
Zoning Examiner

FROM:   
Ernie Duarte  
Planning & Development Services  
Director

SUBJECT: REZONING  
PLANNING & DEVELOPMENT SERVICES REPORT  
C9-14-13 Valley of the Moon – Allen Road  
R-1 to HLR-1 (Ward 3)

**Issue** – This is a request by Demion Clinco, of the Tucson Historic Preservation Foundation, on behalf of the property owner, the George Phar Legler Society, Inc., to rezone approximately 2.3 acres from R-1 to HLR-1 (Historic Landmark) zoning to create the Valley of the Moon Historic District. Valley of the Moon is a nonconforming Cultural Use. Physical improvements consist of a parking lot serving a garden with interconnected walkways, fanciful buildings and structures, reflecting pools, grottos and caves, native and non-native plants, utility buildings and a residence. It was primarily created by George Phar Legler from 1923 to 1932 as a theatrical experience from a child's perspective available for tours on weekends and during special events. The rezoning site is located 320 feet east of Tucson Boulevard on the south side of Allen Road (see Case Location Map). The Valley of the Moon Historic Site Plan submitted in support of the rezoning request serves the purpose of a preliminary development plan and is referred to as such throughout this report. The preliminary development plan does not propose any change of use nor does it propose any new development at this time. The Historic Landmark application indicates the Valley of the Moon property will remain as it exists today.

**Planning & Development Services Recommendation** – The Planning & Development Services Department recommends approval of HLR-1 zoning, subject to the attached preliminary conditions.

## Background Information

Existing Land Use: Cultural Use

### Surrounding Zones and Land Uses:

North: Zoned R-1; Single-family Residential

South: Zoned R-2; Single-family Residential

East: Zoned R-1; Single-family Residential

West: Zoned R-1; Single-family Residential

Previous Cases on the Property:

HL-14-01 – Historic Landmark (HL) Designation – Valley of the Moon On May 22, 2014, the Tucson-Pima County Historical Commission Plans Review Subcommittee made a recommendation to adopt the Historic Landmark nomination for the Valley of the Moon. On August 5, 2014, the Mayor and Council directed staff to initiate the rezoning process for the Historic Landmark designation of Valley of the Moon

Related Cases: There are five Historic Landmarks within the City of Tucson:

1. San Pedro Chapel, designated May 11, 1981
2. El Tiradito Wishing Shrine, designated August 7, 1995
3. Cannon-Douglas House, designated June 23, 1986
4. Smith House, designated June 23, 1986
5. El Con Water Tower, designated August 12, 1991

Applicant's Request – “To protect this historic resource of Historic significance the application is for Historic Landmark designation.”

Planning Considerations – Land use policy direction for this area is provided by the *Northside Area Plan* and *Plan Tucson*. The rezoning site is located within an Existing Neighborhood as identified on the Future Growth Scenario Map of *Plan Tucson*. Existing Neighborhoods are primarily developed and largely built-out residential neighborhoods and commercial districts in which minimal new development and redevelopment is expected in the next several decades. The goal is to maintain the character of these neighborhoods while accommodating some new development and redevelopment and encouraging reinvestment and new services and amenities that contribute further to neighborhood stability. *Plan Tucson* supports overlay districts such as Historic Landmark designation as a way to promote the preservation and enhancement of historic structures and districts.

The *Northside Area Plan* allows for nonresidential uses that are designed in harmony with adjacent development. The *Northside Area Plan* requires that all applications for rezoning include a plan showing at least (but not limited to) the location of structures, screening and landscape buffers, building heights, setbacks, pedestrian and vehicular circulation, existing vegetation, lighting, and the parking layout. The rezoning site is located within the *Tucson-Prince Subarea* of the *Northside Area Plan*. Within the Tucson-Prince Subarea, building height is limited to a maximum of 26 feet, all new nonresidential development should have primary access from an arterial street, and business activities that generate excessive noise, lights, and traffic between 9 p.m. to 6 a.m. are discouraged. Access to the rezoning site is from Allen Street, a local street, via Tucson Boulevard, also a local street, to Prince Road approximately 1,250 to the south. Prince Road is identified on the *Major Streets and Routs Plan* map as an arterial street. Given the unique nature of the existing development, a reliable estimate for the number of vehicle trips per day is not available. If use of the rezoning site remains as it is today, no new traffic will be generated.



The rezoning site consists of two parcels totaling 2.3 acres forming a 165 by 632 foot rectangle in the interior of a residential neighborhood south of the Rillito River, east of the Christmas Wash, and west of the Binghamton Rural Historic Landscape. The surrounding and immediate adjacent land uses are attached and detached single family residential units with R-1 and R-2 zoning.

The Valley of the Moon Historic District consists of 26 contributing historic resources: four buildings, 20 structures, one object, and one site, all created no later than 1963. The contributing resources have names such as the “Enchanted Castle and Magic Stairs,” the “Temple of Fairies,” the “Gnome Village,” and “The Wonderland Theater.” There are also eight non-contributing resources: two buildings, two structures, and four objects all completed and installed more recently. The non-contributing resources include a bathroom building and four large statues relocated in 2010 from the Magic Carpet Miniature Golf business formerly located on Speedway Boulevard. In addition, a fanciful 20 foot tall parking lot light structure with two lights on 15 foot arms was installed in the recent past but not documented on the Historic Landmark application.

Zoning – The rezoning site has nonconforming status for a Cultural Use. “Nonconforming” means the use of the site is legal but not in conformance with the current R-1 zoning. Valley of the Moon is nonconforming because it existed prior to adoption of Pima County zoning and prior to annexation by the City of Tucson. “Cultural Use” is defined as the collection and display of objects having literary, artistic, historic, natural, historic or scientific value for public appreciation. As a nonconforming Cultural use, Valley of the Moon may continue indefinitely but cannot be expanded or intensified.

The Historic Landmark designation is a zoning overlay which is added to the base zoning (in this case R-1 zoning) of a specific tract of land or property, but does not change the allowable uses, including nonconforming uses. The purpose of the Historic Landmark designation is to encourage preservation and rehabilitation of significant historical resources. A Historic Landmark is defined as a historic site or structure of the highest historic, cultural, architectural or archaeological importance to Tucson that if demolished or significantly altered would constitute an irreplaceable loss to the quality and character of Tucson. A Historic Landmark is an outstanding or unique example of architectural style; is associated with a major historic event, activity, or person; or has unique visual quality and identification. A Historic Landmark may be located within the boundaries of or outside a historic district.

### Design Considerations

Land Use Compatibility – The Valley of the Moon is a Cultural Use within a residential neighborhood that was developed over the years in an organic nature and primarily constructed between 1923 and 1932. The proposed rezoning is for a Historic Landmark designation, with no new development proposed at this time. Comments from the neighborhood meeting held on December 2, 2014, reflected concerns regarding annual events, overflow parking, intermittent noise levels, and lighting. Though outside the scope of the rezoning/Historic Landmark designation, recommended “Good Neighbor” practices include the following:

1. Provide event management contact information (phone number and email) in a conspicuous location near the pedestrian entrance to the facility.
2. A facility management plan with the days/hours of operation, a schedule of regular/recurring events, description of potential special/non-recurring events, overflow parking plan, and methods for addressing pedestrian traffic, intermittent noise levels, and lighting.
3. Regular attendance at neighborhood association meetings to ensure information regarding upcoming events is available to neighborhood leadership and other interested parties.

**Conclusion** – The *Northside Area Plan* supports the proposed Historic Landmark designation. *Plan Tucson* supports preservation of distinctive historic resources for the larger community and the establishment of overlay districts, such as Historic Landmark designation, as a way to promote the preservation and enhancement of historic structures and districts. Given the importance of Valley of the Moon to the history, quality, and character of Tucson, the requested Historic Landmark Designation (HLR-1 zoning), is appropriate

The appropriateness of the Historic Landmark designation for the Valley of the Moon is independent of its legal status as a nonconforming Cultural Use. As Cultural Use it has been and will continue to be open to the public. Because of the location within the interior of a residential neighborhood and given the concerns regarding the use of the site identified during the rezoning process, “Good Neighbor” practices are appropriate to further stabilize use of the property and achieve the goal of the Historic Landmark Designation to preserve and enhance the Valley of the Moon for future generations of Tucson children.