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BEFORE THE HEARING EXAMINER
FOR THE CITY OF REDMOND, WASHINGTON

In the Matter of the Appeal of
Eugene Zakhareyev

Of the June 12, 2018 approval
Site Plan Entitlement LAND-2013-
00171 Decision for the Anjuman-E-
Burhani Mosque at 15252 NE 51st
Street, Redmond

Appeal No. LAND-2018-00701

Of LAND-2013-00171

**ZAKHAREYEV OBJECTION TO
PORTIONS OF AEB BRIEF AND
EXHIBIT AND MOTION TO
STRIKE**

I. MOTION.

Appellant Eugene Zakhareyev moves, a) to strike portions of the September 17, 2018, AEB brief that address constitutional arguments, found at page 23, lines 5-23 and page 27, line 8 to page 28, line 18, and b) to strike that portion of the brief at page 29, lines 17-25 discussing a new, previously undisclosed exhibit.

II. BACKGROUND.

In her Order Setting Hearing and Pre-Hearing Schedule (July 16, 2018) (the PHO) at page 5, Paragraph 21, the Examiner referenced the exhibits' exchange and stated:

However, the appeal is an open record appeal hearing, which means new/previously undisclosed evidence may be offered by any party during their presentation up to the close of the record.

1 (Emphasis supplied). See also City of Redmond, Hearing Examiner Rules of
2 Procedure, Section E. "Evidence":

3 **6. Evidence Received After Close of the Record Not Admitted.** Except for
4 limited circumstances detailed in the reconsideration section, below, evidence
5 will not be admitted after the close of the record.

6 (Emphasis supplied).

7 Appellant disclosed the substantial portion of his exhibits during disclosure
8 periods, adding two additional exhibits at the beginning of the hearing on September
9 10, which were shared with counsel and the Examiner before the start of the hearing.

10 In contrast, AEB only offered two exhibits during the pre-hearing exhibit
11 exchange, offered no exhibits at the hearing, offered no rebuttal and made no request
12 to hold the record open for the addition of new exhibits. Nonetheless, AEB attached a
13 new exhibit to its post hearing brief, filed at 3:00 p.m. on the due date for briefing, with
14 no advance notice to the appellant.

15 The Examiner also allowed the parties to file prehearing briefing (PHO,
16 Paragraph 9, page 4). The appellant filed a comprehensive prehearing brief, as did the
17 City, but no prehearing brief was filed by AEB. Now, a thirty page post hearing brief is
18 filed by AEB containing at page 23, line 5-23 and pages 27, line 8 to page 28, line 18,
19 arguments concerning the constitutional rights of AEB, citing extensive caselaw and a
20 statute.

21 **III. THE EXAMINER SHOULD STRIKE PORTIONS OF AEB'S POST HEARING
22 BRIEF AND REFERENCES TO AN EXHIBIT FILED AFTER THE CLOSE OF
23 THE HEARING.**

24 **3.1 NEW EXHIBIT.**

25 As noted above, the PHO and Hearing Examiner Rules explicitly prohibited
26 submission of additional exhibits or evidence after the close of the hearing. In blatant
27 violation of this rule, AEB yesterday provided an additional exhibit, together with new
28 argument in a post-hearing brief. The proposed exhibit has a date of August, 2018,
indicating its availability during the hearing and before the close of the record. No

1 notice was provided to the Appellant of this Exhibit until 3:00 p.m. on September 17,
2 2018. These hide-the-ball tactics should not be allowed and the Examiner should deny
3 admission of the exhibit and strike portions of the brief that refer to it, page 29, lines 17-
4 25 of the AEB post hearing brief.

5 Hearing witness Tom Flick, who owns the adjacent property, which has a narrow
6 pie shaped extension adjacent to the west property line of AEB, has checked with
7 Sound Transit to see if their acquisition plans have changed. His exchange with Sound
8 Transit is attached as Exhibit A and shows only a minor change in the property
9 acquisition.

10 3.2 CONSTITUTIONAL ARGUMENTS.

11 As described above, the parties were allowed to file prehearing briefs, with
12 optional post hearing briefing. AEB did not file a prehearing brief, however, now,
13 apparently as a part of its plan to withhold its positions until the last minute, it has filed a
14 post hearing brief containing substantial new argument about its claimed constitutional
15 rights as referenced above. The general rule is that: "An issue raised and argued for the
16 first time in a reply brief is too late to warrant consideration." *Cowiche Canyon*
17 *Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Further, and
18 amazingly, AEB now claims that

19 The Appellant has failed to meet his burden of establishing an unconstitutional
20 limitation on membership growth is necessary to ensure adequacy of streets in
the area to accommodate the demand from this project.

21 Brief, page 28, lines 16-18.

22 During the hearing AEB presented no arguments about how the Appellant's
23 positions might impact religious practices nor why the burden of proof on such issues
24 lies with the Appellant. Constitutional arguments were not raised during the comment
25 period or the hearing. Indeed, Exhibit Z-40, the City's and AEB's detailed compilation
26 of comment period submissions, contained the following at page 9: "The City will also
27 place a condition on the project which limits the occupancy of the assembly area to the
28

1 number indicated on the application" but there were no constitutional issues raised at
2 that time or during the hearing, either in testimony or in argument. This was even after
3 the Examiner said in her Ruling on City and Applicant Motions to Dismiss that
4 constitutionally based arguments "will be anticipated." Anticipated yes, but not in a final
5 brief that provides no opportunity for Appellant to respond. Tactics of this nature are
6 inappropriate to a hearing where the Examiner's rules provide:

7 **A. Rights of Parties.** Every applicant, appellant, and interested party
8 shall have the right of due notice, rebuttal, presentation of evidence, objection,
9 motion, argument, and all other rights essential to a fair hearing.

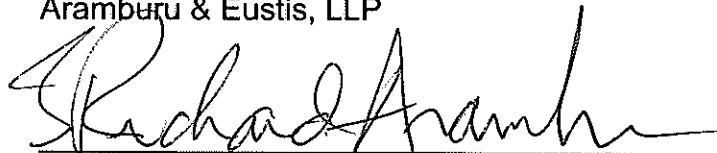
10 Last minute briefing intended to eliminate appellant's opportunity for rebuttal
11 should not be accepted.

12 **IV. CONCLUSION AND REQUESTED RELIEF.**

13 Appellant respectfully requests that the Hearing Examiner deny admission of the
14 late offered exhibit, together with references to it in the AEB brief. In addition, appellant
15 respectfully requests that the Examiner strike portions of the reply brief identified above
16 that present constitutional arguments. Should this relief not be granted, Appellant
17 requests the opportunity to respond to both the proposed exhibit and the constitutional
18 arguments raised.

19 Respectfully submitted on this 19th day of September, 2018.

20 Aramburu & Eustis, LLP



21 J. Richard Aramburu, WSBA #466
22 Attorney for Appellant

1 CERTIFICATE OF SERVICE

2 I am an employee in the law offices of ARAMBURU & EUSTIS, LLP, well over
3 eighteen years of age and competent to be a witness herein. On the date below, I
4 distributed copies of the foregoing document to counsel of record by email PRIOR TO
5 3:00 P.M.:

6 Office of the Hearing Examiner, c/o cdxanthos@redmond.gov
7 Redmond City attorneys grubstello@omwlaw.com, khambley@omwlaw.com, cc
cmace@omwlaw.com
8 Sarah Mack, Attorney for Applicants, mack@tmw-law.com, cc
cohee@tmw-law.com
9 Applicants eliyasy@microsoft.com, ahaveliwala@gmail.com
Planner dlee@redmond.gov
10 Appellant eugenez@outlook.com

11 I declare under penalty of perjury under the laws of the State of Washington that
12 the foregoing is true and correct to the best of my knowledge and belief.

13 DATED: September 19, 2018.

14 

15 _____
16 Carol Cohoe