

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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In the Matter of:	:
	:
ROCHDALE VILLAGE, INC.,	:
	:
Respondent,	:
	: Case No. 29-CA-30406
- and -	:
	:
LIUNA, RESIDENTIAL CONSTRUCTION & GENERAL SERVICE WORKERS LOCAL UNION NO. 10,	:
	:
Charging Party.	:
	:
-----	X

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

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PRELIMINARY STATEMENT

In this matter, the ALJ ruled that Respondent, Rochdale Village, Inc. (“Rochdale”) engaged in unlawful activity by threatening to remove Union handbillers from the property in which Respondent had no property interest. Respondent denied all material allegations in the Complaint. A hearing was held before Judge Eleanor MacDonald on February 22, March 1 and March 2, 2011. The hearing was closed on March 2, 2011. The ALJ issued her decision on December 1, 2011.

This brief is submitted in support of Respondent’s exceptions to the ALJ’s decision. For each of the following independent reasons, the ALJ’s decision should be reversed and the Complaint should be dismissed in its entirety:

1. The ALJ erred by ruling that the Charging Party is a “Labor Organization” as defined by the Act.
2. The ALJ erred by ruling that the Charging Party was engaged in activity protected by Section 7 of the Act.
3. The ALJ erred by ruling that the actions complained of were unlawful because Respondent had no protected property interest in the cul-de-sac sidewalks.

STATEMENT OF FACTS

Rochdale

Rochdale, located in Jamaica, Queens, New York, is composed of 5,860 apartment residences. (Tr. 261:3-5). One hundred twenty-five acres large, it is home to approximately 22,000 residents. (Tr. 206:15-20). Rochdale first acquired its interest in the property formerly known as the Jamaica Race Track on July 13, 1960 from The New York Racing Association, Inc. (Resp. Exh. 5). Upon acquiring the property, Rochdale initiated the development of a massive residential community—in effect, a city within the city. Within its boundaries, Rochdale is home to, among other things, three parks, three schools, and a library. (Tr. 210:7-11). It also maintains its own power plant. (Tr. 261:19-21).

On May 28, 1963, Rochdale entered into an agreement with the City of New York (“the City”) to cede to it portions of the property previously received on July 13, 1960. (Resp. Exh. 5). Among other things, Rochdale agreed to cede to the City certain cul-de-sac streets. (Resp. Exh. 5, Section 3). According to Map No. 4028, referenced in this agreement, the cul-de-sac roads were 75-foot wide, composed of a 50-foot-wide road and 12.5-foot-wide sidewalks on each side of the road. (G.C. Exh. 7).

Further, pursuant to this agreement, the City required Rochdale to construct sidewalks on the cul-de-sac streets, with such construction to be commenced by May 28, 1965 and completed by May 28, 1966. (Resp. Exh. 5, Section 4). Lastly, Rochdale agreed that, upon ceding the required portions of the property to the City, it would maintain a liability insurance policy “until the improvements provided for in this agreement are completed and accepted by the City agencies having jurisdiction thereof, and the period of maintenance terminated.” (Resp. Exh. 5, Section 10) [emphasis supplied]. To date, Rochdale continues to maintain liability insurance on

the sidewalks on the cul-de-sacs. (Tr. 267:8-12). Rochdale's requirement to construct and maintain the sidewalks was a covenant running with the land owned by Rochdale on May 28, 1963 (including, but not limited to, the cul-de-sac streets, which were not ceded to the City until December 31, 1963) (Resp. Exh. 5, Section 19).

Subsequent to this agreement, by deed dated December 31, 1963, Rochdale divided its property such that it ceded to the City certain streets, including the cul-de-sac streets. (G.C. Exh. 4). From the time Rochdale was opened in 1963, it has exerted exclusive control over the cul-de-sac sidewalks. (Tr. 230:18 to 231:3; 234:8-19; 268:14-18).¹ No City agency, unit, or department exerts any control over the sidewalks in the cul-de-sacs. (Tr. 230:13-17). As testified to by Rochdale's General Counsel, "From the day Rochdale Village opened to today everything on the sidewalks has been done by Rochdale Village, Inc., whether it be maintenance, correct, replacement, security, it doesn't matter. Everything was Rochdale's." (Tr. 275:24 to 276:2).

Rochdale employs a 96-person security department. (Tr. 207:6-13). The security officers are empowered to issue cease summonses as well as make arrests. Among the security staff are "special police officers" who are certified by the Police Commissioner of the City of New York. (Tr. 207:21 to 208:4). Rochdale maintains a security booth at each cul-de-sac which is always staffed with a Rochdale security officer. (Tr. 209:16-24). A role of the Rochdale security officers is to observe pedestrian traffic and "patrol buildings and perimeters to prevent damage due to fire, theft, vandalism, sabotage, burglary and damage from water." (Resp. Exh. 6, p.1). Security officers are also responsible, with regard to the sidewalks, for enforcing rules on loitering (Tr. 217:10-14), disturbing the peace (Tr. 221:5-17), littering (Tr. 221:18-25),

¹ In that Rochdale assumed these responsibilities in 1963, any arguments as to later legal requirements concerning the maintenance of sidewalks miss the mark. (Tr. 235:7-12; 272:23 to 273:5). For example, the New York City Administrative Code 7-210 is effective for accidents occurring after September 2003—40 years after Rochdale's obligations arose.

handbilling/leafleting (Tr. 222:7-12), public intoxication (Tr. 222:13-22) and skateboarding (Tr. 222:23-25).

The State has approved of Rochdale's authority over the cul-de-sac sidewalks. (Tr. 254:20 to 255:10). Additionally, the State of New York maintains a seat on the Rochdale Board of Directors and, up until two years ago, attended every meeting of the Rochdale Board of Directors. (Tr. 264:10-16). In fact, the State of New York has always *approved* Rochdale's ability to restrict its residents' use of the sidewalks. (Tr. 269:11 to 270:19; Resp. Exh. 10, p.13, para. 1).

The community surrounding Rochdale is a high-crime area. For example, two weeks prior the hearing, 62 individuals were arrested on the perimeter of Rochdale for drug activities, including for the possession of firearms, drugs, marijuana, and crack cocaine. Rochdale security officers made the arrests. (Tr. 208:14-21).

In the middle of each cul-de-sac circle is an island garden. Rochdale maintains and landscapes the garden, including mowing and watering the grass, planting flowers, shoveling snow, sweeping, and cleaning. (Tr. 210:17-25; 232:3-9). Among other things, Rochdale enforces a "no walking on the grass" rule in each garden. (Tr. 231:20-23). The City assumes no responsibility for the maintenance of the cul-de-sac garden area. (Tr. 211:2-5).

Each residential lease at Rochdale contains the following rule, approved by the State of New York:

The sidewalks, entrances, driveways, elevators, stairways, or halls shall not be blocked by any Cooperator or used for any purpose other than for entering and leaving the Apartment and for deliveries in a fast and proper manner using elevators and passageways chosen for such deliveries by the Company [Rochdale]. . . . Those persons asked to move by Public Safety Personnel and who refuse to do so are subject to fine, administrative charge and/or eviction for repeated occurrences.

(Resp. Exh. 14, p.13, para. 1).

Local 10

Local 10, LIUNA is an alleged labor organization in its infancy. It was chartered in 2009 and claims 100 to 120 members. (Tr. 60:13-19). Local 10's business manager is appointed from a separate organization, the Laborers' Eastern Regional Organizing Fund ("LEROF"). (Tr. 59:20 to 60:7). The Local 10 individuals involved in the activity that occurred on Rochdale's sidewalks, Vladin Ivkovic, Rodney Frasier, Jose Castillo, and Oscar Borrero, are all employees of LEROF. (Tr. 104:1-6; 154: 5-8; 178:25 to 179:3; 184:14-19). No evidence was introduced that Local 10 employs any organizers. Rather, Local 10 relies on the support of LEROF. Additionally, no fact-based evidence was introduced that employees participate in Local 10. The ALJ merely accepted the purely conclusionary testimony of Local 10 Business Manager, Byron Silva (who was appointed by LEROF, not by any of the asserted Local 10 member-employees). The ALJ also denied Rochdale's demand for production of the very documents cited by Silva as evidence of labor organization status.

The Rochdale Cul-De-Sac Streets

At Rochdale, the perimeter of the village is pierced by five streets that end in cul-de-sacs in front of the residential buildings. (G.C. Exh. 7). The five streets are the primary entries to the residential community from the outside. None of the streets and cul-de-sacs allow for through-traffic. Rather, each is exclusively used for ingress and egress at the residential community.

Since Rochdale opened, it has exerted exclusive dominion and control over the sidewalks on the cul-de-sacs and the sidewalks on the streets connecting the cul-de-sacs to the roadways that border Rochdale. Among other things, Rochdale enforces no-solicitation and no-loitering rules. (Tr. 211:6-22).

When individuals congregate in or around the sidewalks and refuse to leave, Rochdale security issues them a cease summons (a desk ticket). If they continue to refuse to leave, Rochdale security arrests them. (Tr. 211:23 to 212:21). Rochdale security also performs stop-and-frisk activities between midnight and 6:00 a.m. for anyone on the sidewalks. (Tr. 213:11-14). The New York City Police Department engages in no enforcement activity on the cul-de-sac sidewalks. (Tr. 213:24 to 214:15; 249:8 to 250:4). Additionally, Rochdale repairs and performs snow removal on the sidewalks. (Tr. 233:6-14). It has been the subject of numerous personal injury lawsuits arising from the sidewalks and continues to maintain liability insurance coverage on those sidewalks. (Tr. 266:21 to 267:12).

*Relevant Events*²

On September 16, 2010, while leafleting on the Small Mall, LEROF employees were directed to leave Rochdale's premises.³ Upon asking whether Local 10 was permitted to leaflet in Rochdale's cul-de-sacs, Rochdale advised that such activity was prohibited. (Tr. 113:12 to 117:22). The following day, Rochdale reiterated that Local 10 was not permitted to leaflet in the cul-de-sacs. (Tr. 125:8-12). With regard to its activities in the cul-de-sacs, Local 10 conducted its leafleting solely on the sidewalks. (Tr. 130:16-19; 133:16-18; 166:3-12; 190:5-8).

As testified to at the hearing, Local 10's stated purpose for leafleting in the cul-de-sacs was to "promote local hiring and train residents of Rochdale Village to work on Rochdale Village projects." (Tr. 106:12-19). To that end, it distributed flyers that advertised, in relevant part,

² At the hearing, Counsel for the General Counsel conceded that the cul-de-sacs at Rochdale form the only disputed area that is the subject of this litigation. (Tr. 79:1-18). She withdrew the complaint allegation that Rochdale had no property interest in the commercial mall areas at the development.

³ The charging party, Local 10, relied on LEROF representatives to conduct the leafleting on its behalf.

Train for careers in residential construction, weatherization and green construction . . . We [Local 10] are looking for highly motivated men and woman [sic] **who has [sic] experience in construction and want more than a job but a career with a very progressive labor union** . . . Disclaimer: This notice is not an employment offer nor do we hereby promise any future employment. Laborers' Local 10.

(G.C. Exh. 15) [emphasis supplied].

LABORERS' LOCAL 10 is a new residential construction and weatherization local union . . . We [Local 10] are looking for highly motivated men and woman [sic] **who has [sic] experience in construction and want more than a job but a career with a very progressive labor union** . . . A successful completion of the training program leads to an opportunity to become a member of our union. Disclaimer: This notice is not an employment offer nor do we hereby promise any future employment. Laborers' Local 10.

(G.C. Exh. 18) [emphasis supplied].

Employees were not the target audience of Local 10's efforts. Rather, the residents of Rochdale who "wanted to get into a construction career" were the target audience. (Tr. 134:10 to 135:1; 147:13-19). LEROF admits that Rochdale did not employ, nor did it intend to employ, the workers needed to perform the proposed masonry restoration project. (Tr. 150:24 to 151:8). In conducting their leafleting, Local 10 had no objective or intent to organize any of the employees of Rochdale. (Tr. 168:8-10). Nor was it trying to communicate with employees or customers of mall retailers. According to Local 10, the purpose of the leafleting was adequately stated in the flyers that were distributed. (Tr. 168:11-15).

QUESTIONS PRESENTED

1. Is Local 10 a “labor organization” under the Act? (Exceptions 1-4, 6, 26-28, 37).
2. Does Section 7 protect the activities of Local 10? (Exceptions 1-4, 6-7, 16-18, 21, 26-28, 37).
3. Does Rochdale have a property right in the sidewalks lining the cul-de-sac, such that it did not violate the Act by excluding the Local 10 leafletters? (Exceptions 5, 7-15, 19-20, 22-25, 29-36, 38-39).
4. Was the relevant New York law correctly interpreted, and were the record facts relevant thereto properly applied? (Exception 5, 7, 8-15, 19-20, 22-25, 29-36, 38-39).

ARGUMENT

I. THE ALJ ERRED IN RULING THAT LOCAL 10 IS A “LABOR ORGANIZATION” UNDER THE ACT

Pursuant to Section 2(5) of the National Labor Relations Act, “The term ‘labor organization’ means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” [emphasis supplied]. While by design this definition is broad, it is not without limitation.

At the hearing, General Counsel introduced conclusory testimony that Local 10 is involved in dealing with employers concerning grievances and other terms and conditions of employment. (Tr. 60:20 to 61:20). Unsubstantiated testimony was also introduced that Local 10 has approximately 100 to 120 members. (Tr. 60:17-19). However, no evidence was introduced establishing whether those members are “employees,” as defined by the Act, or that statutory employees participate in any other way with Local 10. The ALJ denied the production of the Local 10 charter, which could have established if employees are involved in the negotiation and execution of labor contracts. (Tr. 63:16 to 65:8). *See, Marina Associates*, 267 NLRB 163 (1983) [dismissing the representation petition when petitioner gave vague testimony about labor organization status and objected to producing documents that would tend to show labor organization status]. Plainly stated, the record is entirely devoid of evidence that “employees” participate in Local 10.

Local 10, by all accounts, is a new organization. The issue is whether it is even a functioning labor organization. All of the leaflets distributed at Rochdale proclaim the “newness” of Local 10. Even the distributors of the leaflets were provided by another

organization, i.e., LEROF. It ought to be remembered that Rochdale did not raise the issue of the asserted charter or the alleged collective bargaining agreement. Byron Silver did so in his testimony. Since these documents were cited as evidence of labor organization status, fundamental fairness requires that Respondent have the right to demand their production. Nonetheless, the ALJ accepted the most general and unsubstantiated testimony as proof of Local 10's labor organization status. At the same time, the ALJ precluded Rochdale from testing the veracity of the testimony via production of the cited documents. The ALJ might just as well have read the definition of "labor organization" to the witness and asked if it adequately described Local 10. The ALJ's further comment that production of the documents would have unduly delayed the hearing is not borne out by the facts. Silver's testimony took place on February 22nd, and the hearing resumed seven days later on March 1, 2011. Surely, the documents could have been produced during the recess, and Silver's testimony could have been expeditiously concluded on the morning of March 1st.

II. SECTION 7 DOES NOT PROTECT THE ACTIVITIES OF LOCAL 10

It is axiomatic that in order to find a violation of Section 8(a)(1) of the Act, as alleged, General Counsel must first prove that the charging party was engaged in activity that is protected under Section 7 of the Act. Pursuant to Section 7 of the Act:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities

29 U.S.C. § 157.

In the instant matter, the alleged Section 7 activity was the distribution of leaflets by Local 10 deep inside the Rochdale development. However, as established below, Section 7 of the Act does not protect such leafleting activity. As such, the theories accepted by the ALJ are fatally flawed.

First, it needs to be remembered that unions and non-employee union organizers do not possess Section 7 rights. Only *employees* possess Section 7 rights. *Lechmire, Inc. v. National Labor Relations Board*, 502 U.S. 527, 531-32 (1992). Section 7 is not triggered simply because a union conducted the challenged activity. An employer cannot commit a Section 8(a)(1) violation unless employees are in some manner involved.

Second, while the arc of Section 7 covers considerable and varied activities, it does not protect all activities of a labor organization. The U.S. Supreme Court addressed the law on this issue in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-68 (1978). In *Eastex*, the Court was called upon to determine whether the content of certain newsletters distributed by employees was protected under Section 7 of the Act. The Court noted that “labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context.” *Id.* at 565. However, the Court continued:

It is true, of course, that some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection’ clause [of Section 7].

Id. at 567-68. [emphasis supplied].

In the instant case, the message of Local 10 concededly was not aimed at employees. It was aimed at the 22,000 residents of Rochdale and other members of the public who happened to be

on-site. Amazingly, the ALJ did not even cite *Eastex*, and even more amazingly, she proclaimed the population of Rochdale to be statutory employees (treated below).

Third, the message itself did not concern employment. It concerned training to acquire certain skills that might be used in the future to obtain employment. It did not concern itself with improving the lot of “employees as employees.” *Id.* at 567. It offered to train “qualified” applicants. It disclaimed any immediate employment opportunity and suggested instead that employment might eventuate down the line after training. The same message might have been disseminated by the Acme Training School or any other training facility. Surely, such organizations would not be deemed to possess Section 7 rights.

Thus, the activities at issue in this case are *three times* removed from the necessary degree of immediacy that the Supreme Court contemplated in *Eastex*. A message was imparted by non-employees to non-employees, and the message itself did not concern employment or immediate employment opportunities.

Applicants

The ALJ’s conclusion that the flyers were addressed to “employees” because applicants are regarded as employees under the statute is simply wrong. To begin with, the 22,000 residents of Rochdale have not applied for employment. Webster defines the word “applicant” to mean “one who applies.” Suggested synonyms for “applicant” include “candidate,” “applier,” “aspirant,” “campaigner,” “contender,” “expectant,” “hopeful,” “prospect,” “seeker.” Merriam-Webster Dictionary Online Free Dictionary, *available at* www.merriam-webster.com (last visited Jan. 3, 2012). Other governmental agencies that regulate employment have substantially more detailed definitions. For example, the EEOC ADOPTION OF QUESTIONS AND ANSWERS TO CLARIFY AND PROVIDE A COMMON INTERPRETATION OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES provides the definition of “applicant” for the EEOC,

Départment of Justice, Department of Labor, Office of Personnel Management, and Department of Treasury. 44 Fed. Reg. 43, Q.15 (Mar. 2, 1979). According to the Answer to Question 15 in this document, “The precise definition of the term ‘applicant’ depends upon the user’s recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer’s practice.” 44 Fed. Reg. 43, Q.15 (Mar. 2, 1979).

The ALJ is simply wrong when she states that the Supreme Court has approved the extension of employee status to “potential applicants.” (J.D., 11:37-39). The Supreme Court has done no such thing. *NLRB v. Town and Country Electric Inc.* (the case cited by the ALJ) concerned persons who *had applied for employment*, and who were denied it because of their concurrent employment by unions. 516 U.S. 85 (1995). *Phelps Dodge Corp. v. NLRB*, which the Court cited in *Town and Country*, established that the statutory word “employee” includes job applicants, “for otherwise the Act’s prohibition of ‘non-discrimination in regard to hire would serve no function.’” 313 U.S. 177, 185-86 (1941). The thrust of both decisions is that employers may not frustrate the non-discrimination mandate of the Act by refusing employment to union members who *have applied*. At the very least, the reach of the term “applicant” must be limited to those who have applied or who would have applied for employment but for the employer’s unlawful actions. The point here is that neither Court decision said anything about “potential applicants,” let alone rule that they were to be regarded as employees. Following the ALJ’s reasoning here would lead to absurd consequences. It would open up the general citizen

population to “employee” status and Section 7 protection because all living persons in this country are “potential applicants” for employment.

In *Five Star Transportation, Inc.*, two bus drivers were lawfully denied employment after they participated in a letter-writing campaign regarding the school’s choice of bus operator. 349 NLRB 42 (2007). The letters focused solely on safety issues with the operator who was chosen. The drivers did not address any concern as to their safety as opposed to the safety of others. The Board held that Section 7 of the Act does not protect such activity. In doing so, the Board held, “we determine whether certain communications are protected by examining the communications themselves.” *Id.* at 44. It concluded that the underlying communication must have “a nexus to terms and conditions of employment.” *Id.* at 45. *See also, NLRB General Counsel Memorandum 08-10*, at n.24 (July 22, 2008) [“The Board looks to whether there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees.”] [emphasis supplied].

In the instant matter, there is no connection between the communications Local 10 distributed and a term or condition of employment. To the contrary, one LEROF employee, Oscar Borerro, testified that the leafleting had nothing to do with employees. As Borerro testified:

- Q. And in the course of this effort did you have a reason to go to Rochdale Village?
- A. Yes, we did. We came across with a contractor, he was really interested in a contract and in sign with us, but he didn’t have any work at that time. So he gave us the information about this job that it was going to come out. So we offered our help to try to see what we could do for him and to help to get this job.

(Tr. 185:6-13).

The motivation of Local 10 had nothing to do with employees or their terms and conditions of employment. Rather, Local 10 approached Rochdale with a strategy to help a contractor. There can be no conclusion that such activity has a sufficient nexus to a term or condition of employment.

In *Amcast Automotive of Indiana Inc.*, 348 NLRB 836 (2006), an employee, Rowe, was lawfully discharged after searching on the Internet for information about a company, KPS, that was rumored to acquire the employer. The employee claimed that the possible acquisition could impact his terms and conditions of employment. The Board, relying on *Eastex*, held that Section 7 of the Act does not protect such activity. It found that

The most that can be said is that Rowe was acting on a rumor that a *future* sale to KPS might occur, and that if and when it actually occurred, it might ultimately affect the value of Rowe's stock and also could affect the employees' terms and conditions [of] employment. We find that these possibilities were simply too attenuated to bring Rowe's Internet activity within the scope of Section 7.

Id. at 838.

In *Amcast*, the Board focused on the unsubstantiated and speculative predicate of the speech and its remoteness from the terms and conditions of employment of existing employees. In the instant case, Local 10 heard rumors of a contract going out to bid for masonry repair work at Rochdale. The argument in favor of its leafleting being governed by Section 7 appears to be that if a restoration contract was awarded, depending on the identity of the contractor and the employees hired, the leafleting efforts might contribute to the mutual aid and protection of the yet-to-be hired/assigned employees. As in *Amcast*, such an argument is too attenuated to bring Local 10's activity within the scope of Section 7.

Further, it is insufficient for the underlying activity simply to be beneficial to employees in general. Rather, the activity must benefit individuals as employees. As reviewed in *Harrah's Lake Tahoe Resort Casino*, “The test of whether an employee’s activity is protected within the mutual aid and protection provision is not whether it relates to employee’s interests generally but whether it relates to “the interests of employees qua employees.” 307 NLRB 182 (1992) (*citing G&W Electric Specialty Co.*, 154 NLRB 1136, 1137 (1965)). *See also, Waters of Orchard Park*, 341 NLRB 642 (2004) [activity not directly related to the working conditions of employees or otherwise to “improve their lot as employees” is not protected under Section 7].

The activities of Local 10 on September 16 and 17, 2010 offered specialized job training to “qualified” Rochdale residents. Undisputed is the fact that Local 10 was leafleting concerning a proposed construction project for which the contractor had yet to hire or seek to hire or assign any employees. It is also undisputed that Local 10 was not attempting to communicate with Rochdale employees nor was it promising employment to the Rochdale residents. Accordingly, there was no nexus between the communication and a term or condition of employment of existing employees. Had the speaker been a non-labor organization, there would be little substance to any claim that it was engaged in Section 7 activity for the mutual aid and protection of employees. But the issue should not turn on the identity of the speaker. Rather, the issue should turn on the content of the communication (*Five Star Transportation, supra*, 349 NLRB) and the identity of the target audience. We know of no case that holds that “mutual aid and protection” can be stretched to embrace the *possible* vocational aspirations of non-employees. Any such legal theory is unwarranted and would not withstand *Eastex* analysis.

Finally, the absurdity of the ALJ's "applicant" theory can perhaps be best illustrated by a review of the proposed notice to employees (J.D., Appendix) entitled "NOTICE TO EMPLOYEES." It is to be signed by a Rochdale representative and states in pertinent part that:

WE WILL NOT threaten to arrest agents of Local 10 or any other union if they distribute handbills in the cul-de-sac streets, including the sidewalks, of Rochdale Village

Significantly, Rochdale is ordered to say that it will not "interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act." Exactly which employees is this notice addressed to? We know that it cannot be Rochdale employees because Local 10 has disclaimed any intent to organize or communicate with those employees. Following the ALJ's tortured logic, this notice must be addressed to the entire residential community of Rochdale. According to the recommended order (J.D., 14), a notice is to be posted in "conspicuous places including all places where notices to employees are customarily posted." (J.D., 14:30). This would require the conclusion that the "you" referred to in the notice includes the employees of Rochdale. But, as noted, the record makes clear that Rochdale employees made up no part of the targeted audience. Under these circumstances, one is compelled to ask, "whose Section 7 rights have been violated here?" Using the ALJ's analysis, the only possible victim class would be the 22,000 residents of Rochdale, and in order to carry out the intent of the Recommended Order, these notices would have to be posted within the residential buildings in conspicuous places because under her analysis, all of the residents of Rochdale are the affected employees. By attempting to fit a square peg into a round hole, the ALJ has produced a truly absurd decision.

III. THE ALJ ERRED IN RULING THAT ROCHDALE HAD NO PROPERTY RIGHT IN THE SIDEWALKS LINING THE CUL-DE-SAC AND THEREFORE VIOLATED THE ACT BY EXCLUDING THE LOCAL 10 LEAFLETTERS

Rochdale has an implied easement in the sidewalks of the cul-de-sacs. More specifically, Rochdale has an easement to construct and maintain sidewalks on the property immediately abutting the city roads found among the cul-de-sac streets. Affirming an opinion of Justice Bergan, the New York Court of Appeals, in *Jacobson v. Luzon Lbr. Co.*, ruled that “the elements of the New York rule on implied easements are these: (1) The estates presently resting in the hands of different owners must formerly have been in unitary ownership; (2) while so formerly held in one estate, a use must have been created by the owner either in which one part of the land was subordinated (made ‘subservient’) to another; or a use made of the two parts as to create a reciprocal subordination; (3) the use made must be plainly and physically apparent on reasonable inspection; (4) it must affect the value of the estate benefits and must be necessary to the reasonable use of such estate.” 300 N.Y. 697 (1950).

As addressed more recently in *Sadowski v. Taylor*:

In order to establish an easement by implication from pre-existing use upon severance of title, three elements must be present: (1) unity and subsequent separation of title; (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent; and (3) the use must be necessary for the beneficial enjoyment of the land retained.” *Beretz v. Diehl*, 302 A.D.2d 808, 810, 755 N.Y.S.2d 122 (2003), *quoting*, *Abbott v. Herring*, 97 A.D.2d 870, 469 N.Y.S.2d 268 (1983), *aff’d*, 62 N.Y.2d 1028, 479 N.Y.S.2d 498 (1984).

* * *

[W]ith respect to the third element, the necessity required for an implied easement based upon a preexisting use is only reasonable necessity, in contrast to the absolute necessity required to establish an implied easement by necessity. *Four S Realty Co. v. Dynko*, 210 A.D.2d 622, 623, 619 N.Y.S.2d 855 (1994); *see*, *Mobile*

Motivations, Inc. v. Lenches, 26 A.D.3d 568, 570-71, 809 N.Y.S.2d 253 (2006).

56 A.D.3d 991, 993, 867 N.Y.S.2d 574 (3rd Dept. 2008). *See also, Minogue v. Monette*, 158 A.D.2d 843, 844, 551 N.Y.S.2d 427 (3rd Dept. 1990) [“Generally, an implied easement arises upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate.”]; *Monte v. Domenico Di Marco*, 192 A.D.2d 1111, 1112, 596 N.Y.S.2d 253 (4th Dept. 1993) (*citing Paine v. Chandler*, 134 N.Y. 385, 389 (1892)) [to establish an easement by implication, only a reasonable (not absolute) necessity must be shown]; *O’Connor v. Demarest*, 280 A.D.2d 878, 880, 720 N.Y.S.2d 648 (3rd Dept. 2001) [“The grantor’s intention [regarding an implied easement] must be gleaned from the surrounding circumstances . . .”].

Further, implied easements have been found in favor of private property owners on land owned by the City of New York. In *Cypress Hills Cemetery v. City of New York, et al.*, a private entity, owner of the dominant estate, was found entitled to easement by implication on a roadway owned by the City of New York. 35 A.D.3d 788, 826 N.Y.S.2d 736 (2nd Dept. 2006). As such, the fact that the City might hold its property in the public interest does not prohibit a finding of an easement by implication.

With regard to unity of title, there is no dispute that Rochdale held title to all the property before ceding the streets/sidewalks to the City. (Resp. Exh. 5; G.C. Exh. 4). There was a unity of title in Rochdale. Upon ceding the street property to the City, a dominant estate served by the sidewalks was retained by Rochdale while a servient estate, to the extent the sidewalks were created to benefit the residential property, was delivered to the City.

Likewise, there can be no question that the Rochdale sidewalks were plainly established at the time title in the property was divided and that they were intended to be permanent. Indeed, it was the City itself that required Rochdale to construct the permanent sidewalks noted on Map No. 4208. (Resp. Exh. 5, Section 4). The agreement between Rochdale and the City expressly set forth that part of the City's acquired property was to be used and maintained as a sidewalk and that Rochdale was required to construct and maintain that sidewalk. This is not a case where the grantee believed that a property interest did not exist. This is a case where the grantee required the grantor to construct and maintain the sidewalk.

Unequivocally, Rochdale had unity of title prior to ceding the cul-de-sac street properties to the City. Likewise, there can be no dispute that both Rochdale and the City knew that part of the property was to be used for sidewalks and that Rochdale was responsible for constructing and maintaining them until such time as the obligation to maintain them terminated. The final question, therefore, is whether Rochdale's use of the sidewalk is reasonably necessary for the enjoyment of the dominant estate.

On this question there can be no doubt. The cul-de-sac street sidewalks, passing within feet of the main entrances to the residential buildings, are the main pedestrian thoroughfares to and from the residential units. Despite the fact that on the perimeter of the village there are significant criminal issues, including illegal firearm and drug possession, the City of New York does not police these sidewalks. Rochdale polices the sidewalks. Despite the fact that City roads border these sidewalks, the City of New York does not maintain them. Rochdale maintains the sidewalks and has done so for nearly a half century.

Rochdale Village is, in essence, a residential island within Queens, New York. It is essential that the cul-de-sac sidewalks be maintained and policed in order to protect the residents

who live in the village from outside elements and criminal activity. The dominant estate (i.e., the residential buildings) benefits from having sidewalks that are safe and passable for the residents who live thereon. Being the main means of ingress and egress for the village with no through-traffic, it is impossible to conclude that the sidewalks are not for the benefit of the dominant estate. Simply stated, the sidewalks serve no other purpose.

It is significant to note that the City does not, and has not, challenged Rochdale's property interest in the cul-de-sac street sidewalks. The fact that the City has had knowledge of Rochdale's control and maintenance of those areas for the past 48 years, including maintenance, insuring, improvement, and policing of the same, and has voiced no objection, provides strong evidence that, in fact, the City intended Rochdale to have that interest in the property. To conclude otherwise would require a finding that both the City and Rochdale, for nearly five decades, have acted in a manner entirely inconsistent with their intentions for the property. There simply is no sufficient evidence to counter the clearly evidenced intent of the City and Rochdale as to the property interests in the cul-de-sac sidewalks. Indeed, the State of New York, which obviously sits at the highest level of governmental authority, has approved Rule #1 incorporated into every residential lease:

The sidewalks, entrances, driveways, elevators, stairways, or halls shall not be blocked by any Cooperator or used for any purpose other than for entering and leaving the Apartment and for deliveries in a fast and proper manner using elevators and passageways chosen for such deliveries by the Company [Rochdale] Those persons asked to move by Public Safety Personnel and who refuse to do so are subject to fine, administrative charge and/or eviction for repeated occurrences.

(Resp. Exh. 14, p.13, para. 1).

Any remaining doubts can be resolved by reference to the cul-de-sac gardens which, although encompassed within the "streets" ceded to the City, have remained under the control of

Rochdale for the past five decades. Aside from the actual roadways for vehicular traffic, the evidence clearly shows that the City and Rochdale intended to vest in Rochdale an easement for the maintenance of the property for residential purposes. If a resident attempted to plant a garden or erect a holiday decoration in Central Park, the City would not permit it. Why, then, are residents permitted to do so on “City property” in Rochdale? If an individual attempted to exercise police powers and impose rules on the use of Fifth Avenue, the City would not permit it. Why, then, does the City permit such activity on Rochdale’s cul-de-sac sidewalks?

Clearly, the 1963 deed to the City providing a transfer of title to the cul-de-sac streets left Rochdale with an implied easement to maintain and control the subject land for residential purposes. Rochdale residents themselves have never been permitted to use the sidewalks as public forums, and there is no reason to *prefer* Local 10 over the inhabitants of this residential development. General Counsel’s overreliance on the deed and accompanying map fails to address the facts existing before, at the time of, and after the conveyance to the City. Such facts compel a finding that both Rochdale and the City intended for Rochdale to maintain a strong property interest in the cul-de-sac streets, including, but not limited to, the construction and maintenance of the sidewalks. Every action between the City and Rochdale for the past five decades has been consistent with this intention. No evidence in the record allows for a contrary conclusion.

IV. THE ALJ ERRED IN BOTH THE INTERPRETATION OF NEW YORK LAW AND THE APPLICATION OF THE RECORD FACTS

In her decision, Judge Macdonald dismissed Rochdale’s claim of a property interest in the cul-de-sac sidewalks based on an easement by implication. (J.D., 12:6 to 13:43). In doing so, she relied on a single sentence from a decision in *Loch Sheldrake Associates, Inc. v. Evans*, 306

N.Y. 297, 305 (N.Y. 1954). (J.D., 12:11-21). With the sentence taken in context, as reprinted below, Judge Macdonald's reliance on *Loch Sheldrake* is entirely inappropriate in this matter:

The briefs here join in debate as to whether the Divine-Greenspan 1919 deed reservation created an 'easement appurtenant' or an 'easement in gross' The settled rule for the construction of such instruments [deeds] is that all evidence must be excluded which is offered 'to vary, explain or contradict a written instrument that was complete in itself and without ambiguity in its terms' since, when words in a deed 'have a definite and precise meaning, it is not permissible to go elsewhere in search of conjecture in order to restrict or extend the meaning.'

Loch Sheldrake, 306 N.Y. at 303-05.

The decision in *Loch Sheldrake* did not address the issue of an easement by implication. Rather, it dealt with a claimed easement appurtenant. More specifically, the analysis in *Loch Sheldrake* dealt with an attempt to add meaning to the plain language used in an express easement in the deed. It has no application to the analysis of implied easements. *Loch Sheldrake* stands for nothing more than a review of the parol evidence rule.

In the instant matter, Rochdale asserts that an easement is to be implied from its transactions with the City of New York. By definition, therefore, analysis must be made of the circumstances surrounding the transaction. Rochdale does not urge the interpretation of an express contract term and, consequently, the prohibition against consideration of matters outside the words used in the deed is inapplicable. Indeed, such consideration is mandatory. As addressed by Chief Judge Cardozo in *In re Application of the City of New York*:

Whether a grant of an easement arises from implication in a grant of real estate, depends upon the intent of the parties to the grant; and in construing the grant the court will take into consideration the circumstances attending the transaction, the particular situation of the parties, the state of the country and the state of the thing granted, for the purpose of ascertaining the intention of the parties.

258 N.Y. 136, 147-48, 179 N.E. 321 (N.Y. 1932).

Judge Macdonald’s misunderstanding of New York real property law and misplaced reliance on excerpted quotes about larger principles is amplified in her analysis of *Sadowski, supra*. *Sadowski* set forth a three-point test by which easements by implication can be established. Judge Macdonald found no issue with the satisfaction of the first criterion (unity of title). However, she wrongly concluded that the second (intent to be permanent) and third (necessary for the beneficial enjoyment of the land retained) criteria were unsatisfied.

The second *Sadowski* criterion provides that, “the claimed easement must have, prior to separation, been so long and continued and obvious or manifest as to show that it was meant to be permanent.” 56 A.D.3d at 993. Judge Macdonald concluded that this criterion was not met because there was a lack of record evidence showing long and continued use of the easement prior to the separation of title. (J.D., 12:33-40). Judge Macdonald’s analysis misses the mark. The standard set forth in the second criterion was one of permanence—that a showing must be made that “it [the easement by implication] was meant to be permanent.” *Sadowski*, 56 A.D.3d at 993. Indeed, in *Minogue, supra*, 158 A.D.2d at 844 (citing 49 N.Y. JUR.2D, EASEMENTS, sec. 65, at 159), the Court made no mention of a duration requirement. Rather, in *Minogue*, the Court held simply that, “Generally, an implied easement arises upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate.” *Id.* Additional guidance is found in *Monte, supra*, wherein the Court held that in order to establish an easement by implication, the following facts must be established:

1. A unity and subsequent severance of title with respect to the relevant parcels;

2. During the period of unity of title, the owner established a use in which one part of the land was subordinated to another;
3. That such use established by the owner was so continuous, obvious, and manifest that it indicated that it was meant to be permanent; and
4. That such use affects the value of the estate conveyed and that its continuation is necessary to the reasonable beneficial enjoyment of the estate conveyed.

192 A.D.2d at 1112.

In the instant matter, the record evidence as to the intent of the City of New York and Rochdale at the time of the 1963 conveyance of the cul-de-sac streets is uniform and substantial. It includes the pre-conveyance requirement that Rochdale construct and maintain the sidewalks, including the maintenance of insurance of the same. It includes nearly five decades of conduct wherein Rochdale has maintained, governed, and policed those sidewalks to the exclusion of the City of New York. It includes the language of the legal documents which establishes that the parties intended for Rochdale to permanently construct and maintain those sidewalks. There can be no reasonable question that both parties understood that Rochdale would construct and maintain those permanent sidewalks prior to the conveyance of the cul-de-sac streets.

Such understanding is all that is required. Indeed, there is no record evidence offering a different interpretation as to the intent of the parties concerning the maintenance and governance of the cul-de-sac sidewalks. In light of the volume of evidence concerning the intent of both Rochdale and the City of New York prior to, at the time of, and subsequent to the conveyance of the cul-de-sac streets and the lack of any contrary evidence, Judge Macdonald erred in concluding that the parties did not intend for Rochdale to have a permanent easement to manage the cul-de-sac sidewalks.

With regard to the second *Sadowski* criterion, Judge Macdonald also reiterated her finding that Rochdale had not previously prohibited handbilling on the cul-de-sac sidewalks. (J.D., 12:40-43). Based on this finding, she concluded that, “Respondent has not shown any long continued and manifest practice of prohibiting handbilling on the sidewalks of the cul-de-sac streets.” (J.D., 12:41-43). If Rochdale had argued that it had an implied easement simply to prohibit handbilling, perhaps Judge Macdonald’s analysis would be valid. It did not. Rochdale has argued that it has an implied easement to maintain, manage, and police the cul-de-sac sidewalks. The property interest is Rochdale’s right to exercise dominion and control over the sidewalks—the property interest is not merely to prohibit handbilling in the area. As such, Judge Macdonald’s remaining analysis of the second *Sadowski* criterion is grounded in her misunderstanding of the arguments presented.

Judge Macdonald continues this erroneous analysis in her review of the third *Sadowski* criterion, which provides that an implied easement “must be necessary for the beneficial enjoyment of the land retained.” *Sadowski*, 56 A.D.3d at 993. Again, Judge Macdonald confuses Rochdale’s property interest in exercising control over the cul-de-sac sidewalks with a single example of the exercise of such control—handbilling prohibition. (J.D., 13:1-17). Judge Macdonald’s analysis that a prohibition against handbilling is necessary for the beneficial enjoyment of the land retained is inapposite. If it was reasonably necessary for Rochdale to control the cul-de-sac sidewalks for the benefit of the remainder of the property (as has been clearly established in the instant matter, given the need to control crime, littering, and orderliness in this residential setting), the third *Sadowski* criterion is satisfied and a proper analysis ends.

The pivotal question, therefore, is not whether a prohibition against handbilling is reasonably necessary for the enjoyment of Rochdale (as addressed by Judge Macdonald).

Rather, the correct analysis is whether the implied easement is reasonably necessary for the enjoyment of the property. For the reasons stated earlier, it is clear that the implied easement—allowing Rochdale to maintain, govern, and police the cul-de-sac sidewalks—is reasonably necessary.

In sum, Judge Macdonald’s application of New York state law on these issues is repeatedly and prejudicially flawed. For the reasons detailed above, the Board should find that Rochdale had an easement by implication in the cul-de-sac sidewalks that permits it to maintain, govern, and police the activities occurring thereon.

CONCLUSION

Based upon the foregoing, the Complaint should be dismissed in its entirety and the Respondent awarded such other and further relief as may be just and proper.

Dated: New York, New York
January 6, 2012

Respectfully submitted,
CLIFTON BUDD & DeMARIA, LLP

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

-----x
In the Matter of: :
ROCHDALE VILLAGE, INC., :
Respondent, :
- and - : Case No. 29-CA-30406
: :
LIUNA, RESIDENTIAL CONSTRUCTION & :
GENERAL SERVICE WORKERS LOCAL UNION :
NO. 10, :
Charging Party. :
-----x

AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

STATE OF NEW YORK)
 : ss.
COUNTY OF NEW YORK)

VIRGINIA CUATON, deposes and says:

I am not a party of the action, I am over 18 years of age, and I reside in Jersey City, New Jersey. On January 6, 2012, I served the within **Respondent's Brief in Support of Exceptions** upon:

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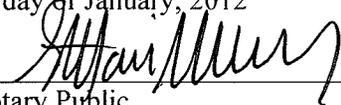
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at the addresses designated for that purpose, by depositing true copies of the same in a properly addressed wrapper into the custody of Federal Express for overnight delivery, prior to the latest time designated by FedEx for overnight delivery within New York State, and upon Counsel for the General Counsel by electronic mail at the e-mail address indicated above.



VIRGINIA CUATON

Sworn to before me this
6th day of January, 2012


Notary Public

STEFANIE MUNSKY
Notary Public, State of New York
No. 02MU6191987
Qualified in New York County
Commission Expires Aug. 25, 2012