

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

ROCHDALE VILLAGE, INC.

and

Case No. 29-CA-30406

**LIUNA RESIDENTIAL CONSTRUCTION &
GENERAL SERVICE WORKERS LOCAL
UNION NO. 10**

*Linda S. Harris Crovella, Esq. and
Genaira L. Tyce, Esq., for the
General Counsel*
*Kevin J. McGill, Esq. (Clifton Budd &
DeMaria, LLP), of New York, NY
for the Respondent*

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in Brooklyn, New York, on February 22 and March 1 and 2, 2011. The Complaint alleges that Respondent, in violation of Section 8(a)(1) of the Act, threatened to arrest Union handbillers if they did not remove themselves from portions of a facility over which Respondent has no ownership interest. Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and Respondent on April 6, 2011, I make the following¹

Findings of Fact

I. Jurisdiction

The Respondent, a domestic corporation, with its principal office and place of business located at 169-65 137th Avenue, Jamaica, New York, is engaged in the ownership, management

¹ The Respondent's Exhibits were incorrectly bound by the reporting service: Respondent did not authenticate and did not offer to admit its Exhibit #3, and Respondent's Exhibit #4 was marked Rejected. The transcript is hereby corrected so that on page 5, line 23, the correct address is 169-65 137th Avenue; at page 49, line 11 and thereafter throughout the transcript, the correct term is "Liber page"; the witness who testified beginning at page 153 and whose name is mentioned throughout the transcript is "Rodney Frazier"; at page 240, line 1, the first phrase is "Alternate side street parking."

and maintenance of an apartment complex. Annually Respondent derives gross revenue in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$5,000 directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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Byron Silva testified that he is employed by the Laborers Eastern Region Organizing Fund. He works as the business manager of Local 10 which is affiliated with the Laborers International Union of North America. Silva testified that Local 10 was chartered in 2009 by LIUNA for the purpose of organizing the residential construction industry and the residential weatherization and energy efficiency industry. Local 10 has about 100 to 120 members. It is a signatory to 12 or 14 collective-bargaining agreements with various contractors. The collective-bargaining agreements deal with wages, benefits and working conditions. Local 10 designates shop stewards to represent the union at job sites, to handle grievances and to check safety conditions. At the instant hearing, after Silva had completed his substantive testimony, Respondent asked Silva whether he had brought a copy of the Local's charter with him. Silva had not brought it and I note that Respondent had not issued a subpoena to Silva to obtain this document. In response to Respondent's request, made after Silva had completed his direct testimony and most of his cross-examination, I ruled that I would not order production of the charter or the various collective-bargaining agreements. Silva's testimony on direct was more than sufficient to establish that Local 10 is a labor organization under the Act. Respondent's cross-examination of Silva did not establish any grounds for doubting his testimony; therefore, the demand for production of the charter and collective-bargaining agreements was unnecessary and would only have served to lengthen the hearing without changing the result.²

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I find that LIUNA Residential Construction & General Service Workers Local Union No. 10, is an organization 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 and that it is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. Background

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Rochdale Village is a cooperative apartment complex established under the laws of the State of New York to provide housing to middle income residents. The New York State Division of Housing and Community Renewal has jurisdiction over the operations of the cooperative corporation. The affairs of the corporation are overseen by a 15 person board of directors. The complex is managed by Marion Scott Real Estate, Inc.

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Rochdale Village is comprised of 20 high-rise apartment buildings located on 125 acres of land in Jamaica, in the Borough of Queens, New York City. There are approximately 22,000 residents living in about 5860 separate apartments.

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Also located within Rochdale Village are public schools, a public library, a New York City police precinct, a public park and at least two commercial malls. These are not at issue herein.

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² A labor organization may exist under the Act without having any collective-bargaining agreements. Manifestly, each union is formed to negotiate such agreements but cannot have a contract when it first begins to organize employees. *Rototype, Division of Litton*, 199 NLRB 354 (1972).

Rochdale Village sits on an irregularly shaped quadrilateral parcel bounded by New York Blvd. now known as Guy R. Brewer Blvd., 137th Avenue, Bedell St. and Baisley Blvd.

5 The residential areas of Rochdale Village are located on five culs-de-sac.³ Each cul-de-sac opens onto one of the boundary roads listed above. The shape of the culs-de-sac may be likened to a capital letter P. Each cul-de-sac has a more or less straight street consisting of a roadway and contiguous sidewalks about 200 feet long running from one of the boundary roads to a circle. The roadway and sidewalks continue around the circle and return to the straight street and out to the boundary road. The circles are as much as 220 feet across and the straight areas of the culs-de-sac are about 75 feet across.

10 The culs-de-sac are known as 166th Pl., 130th Ave., 127th Ave., 130th Ave., [not a typographical error] and 133rd Ave.⁴

15 Four apartment buildings are arrayed around each circle of a cul-de-sac. The main entrances to the buildings are 10 to 15 feet from the sidewalks. There are ramps leading to the side entrances of the buildings so that tenants may drive up and park temporarily for the purpose of loading and unloading their belongings. Each circle has one or two parking lots.

20 Rochdale Village maintains a security department of about 96 employees in titles including Chief of Security, Administrative Assistant, Captain, Lieutenant, Sergeant, Special Police Officer and Public Safety Officer. These security employees are not armed. However, the Special Police Officers are given a background check and training by the New York City Police Department and are certified to give out “cease summonses” and to make arrests.⁵ A person arrested by a security department employee is taken to the local New York City police precinct for processing.

25 In the circle portion of each cul-de-sac there is a high rise security booth located on the grassy area contiguous to a building and placed near the sidewalk. One security employee is stationed in the booth and two others are assigned to perform perimeter checks and to check the lobbies and stairways of the buildings on the circle. The security booths do not block the sidewalk.

30 In the center of the circle portion of each cul-de-sac is a garden area which is planted in grass and flowers. The gardens are maintained by Rochdale Village employees.

35 Respondent admitted that D. James, a security supervisor, is a supervisor and agent of Respondent and that Chief of Security Thomas Mason is a supervisor and agent of Respondent.

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45 ³ Cul-de-sac is a French term meaning bottom of the bag. As used at Rochdale Village the phrase refers to a street or passage closed at one end. The correct plural of cul-de-sac is culs-de-sac.

⁴ The record does not disclose why there are two culs-de-sac named 130th Ave. One of these is located off Bedell Rd. and the other is off New York Blvd., now known as Guy R. Brewer, Blvd.

50 ⁵ A cease summons is a desk appearance ticket.

B. Relevant Real Property Transactions

In July 1960 the New York Racing Association conveyed to Rochdale Village, Inc., the land which is now occupied by the apartment complex. Construction on the property began after this date. In December 1963 Rochdale Village, Inc., conveyed certain pieces of its property on which the apartment complex is located to the City of New York and "its successors and assigns forever". These parcels may generally be described as portions of the five culs-de-sac. The rights reserved to Rochdale Village in the culs-de-sac are at the heart of the instant controversy.

The official City map shows, and the Respondent does not dispute, that the parcels deeded to the City in 1963 include the roadways and adjoining sidewalks of the five cul-de-sac streets, including the circles. The deed further states:

RESERVING therefrom to the said Rochdale Village, Inc., its successors and assigns, the right at any time without payment of fees or charges therefore to install, lay, maintain, operate, remove and relay under and across the beds of the said cul-de-sac streets hereinabove described, namely 127th Avenue, 130th Avenue west of Bedell Street, 130th Avenue east of New York Boulevard, 133rd Avenue and 166th Place, utility lines such as heating lines ..., plumbing lines for sanitary and storm drainage, gas, cold water, domestic hot water distribution lines and electric lines ... without the right of said Rochdale Village, Inc., or its successors and assigns, contractors, agents or employees to grant to others ... any rights for any purpose described herein, it being understood and agreed however that such right shall at all times be subject to (1) the duty of the said Rochdale village, Inc., its successors and assigns, to protect, relocate and reconstruct said structures at its own expense as public need or necessity requires either by the City or any public utility company, and (2) the observance of the rules and regulations of the various departments of the City with reference to construction, reconstruction and repair thereof.

The deed concludes by stating:

IT IS THE INTENTION OF [Rochdale Village, Inc.,] to convey all land in said street and all the estate therein that [Rochdale Village, Inc.,] may own.

TO HAVE AND TO HOLD the above granted premises unto the said The City of New York and its successors forever in fee, in trust for street purposes, as fully as if the same had been acquired by condemnation proceedings.

C. Visits of Local 10 Agents to Rochdale Village

Vladan Ivkovic is employed by the Laborers Eastern Region Organizing Fund (LEROF), of the Laborers International Union of North America. Ivkovic works on organizing campaigns on behalf of various laborers local unions. Beginning in June 2010 he worked on a campaign on behalf of Local 10. At the end of August 2010 Ivkovic learned that Rochdale Village would be undertaking a large exterior restoration project; this work falls within the jurisdiction of Local 10.⁶

For a number of days in September 2010 Ivkovic distributed fliers in Rochdale Village.

⁶ The work was supposed to start in 2010. Ivkovic did not know if the project had begun.

One such flier was as follows:

Construction Training in Rochdale Village

5 **Train for careers in residential construction, weatherization and green construction.**

Local 10 is a residential construction and weatherization local union dedicated to create new jobs for new workers in the construction industry.

10 With nationally recognized training programs, a commitment to create living wage jobs, strong ties to the community, and proven experience as a workforce developer and provider, Laborers Local 10 has created a unique community based partnership to create jobs where they are needed most.

15 We are looking for high 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.

20 If you need more information please call Jose Castillo at 609-429- 3296

Disclaimer:

This notice is not an employment offer nor do we hereby promise any future employment. Laborers Local 10

25 Ivkovic explained that Local 10 has an established training program and his purpose in leafleting was to promote local hiring and to train residents of Rochdale to work on projects.

30 Ivkovic was not alone in distributing the fliers; other Local 10 agents who leafleted in teams of two men were Rodney Frazier, Oscar Borrero and Jose Castillo. Ivkovic distributed fliers in various areas of Rochdale Village including a mall and in the cul-de-sac known as 166th Place. Ivkovic stood on the sidewalk away from the entrances to the apartment buildings. He saw Rochdale Village security officers on these occasions; they did not ask him to leave. Ivkovic testified that he had given the union fliers to Rochdale security guards in the mall and in the cul-de-sac. He was not threatened with arrest on these occasions.

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D. Meeting with Board President of Rochdale Village

40 At one point, not further specified in the record, Ivkovic met with Rochdale Village board president Cross. He gave her some general promotional material to explain the aims of Local 10 so that she could learn about the union. Included in these materials was a copy of a collective-bargaining agreement. However, Ivkovic did not ask Cross to sign any agreement; she is not a contractor therefore she would not be able to enter into a contract with the union. Frazier was present at the meeting with Cross. He confirmed that Ivkovic did not ask her to sign anything. At the meeting with Cross, Frazier and Ivkovic explained that they wanted to promote construction training for Rochdale residents. Cross told them it was a great idea and she wanted to be part of it. She is a youth coordinator in the area and she promised to help the union set up a table so that residents could sign up for construction training.

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50 Apparently after this meeting, Kevin J. McGill, Esq., addressed a letter dated September 9, 2010 to Byron Silva, Business Manager, LIUNA Residential Construction and General Service Workers Local 10. McGill wrote that representatives of the Union had met with the

5 Rochdale Board president and had demanded that his client sign a collective-bargaining agreement with Local 10. McGill wrote that the Union sought recognition as the representative of employees already organized by Local 32BJ and that the Union wanted the upcoming restoration work assigned to “employee-members of Local 10 rather than employee-members of Local 32BJ or unrepresented employees of outside contractors.”

McGill’s letter continued

10 Please be advised that Rochdale Village is private property and its premises are not open to visits by non-resident persons or organizations that have no legitimate business with Rochdale Village. Accordingly, any further intrusions by representatives of your organization will consider to be a coercive act and we will not hesitate to access the multiple legal remedies available to us. (sic)

15 At the instant hearing Attorney McGill did not call Board president Cross to testify as to any of the assertions in his letter or about any other relevant matters. Thus, the testimony of Ivkovic and Frazier about the meeting with Cross stands uncontradicted and I shall credit it.

20 **E. Threats to Arrest Local 10 Agents**

20 On September 16, 2010 Ivkovic and Frazier were leafleting in a small mall area when they were approached by a person who identified herself as Ms. Harris, a member of the board of directors of Rochdale. She asked Ivkovic whether he had permission to leaflet and when he replied in the negative, Ms. Harris said he could not hand out his fliers. Ms. Harris took a flier from Ivkovic and went into the Rochdale management office. Minutes later a group of people exited the management office and approached Ivkovic. A security guard among this group told Ivkovic that he had to leave and that he could no longer leaflet in Rochdale Village. Ivkovic asked where in Rochdale Village he would be permitted to hand out fliers but the guard could give him no answer. Ivkovic then asked to see a supervisor. A man came over and identified himself as supervisor James. Ivkovic explained that he would leave the private areas of Rochdale and he asked James to indicate which areas were not private property. James told Ivkovic that he could not leaflet anywhere within the perimeter of Rochdale village. Ivkovic asked whether he could leaflet in a cul-de-sac. James replied that if he saw Ivkovic and Frazier in the cul-de-sac or any other area within Rochdale Village he had the power to arrest them and he would arrest them. When Ivkovic protested that the culs-de-sac were public city streets, James said the culs-de-sac were off limits to Ivkovic and he would arrest him if he stood in a cul-de-sac. Ivkovic persisted in seeking an agreement with James that would permit him to hand out fliers but James would not agree that the union could leaflet anywhere within the parameters of Rochdale Village.

40 After this confrontation, Ivkovic obtained a map from an official of the City of New York which designated the boundaries between the public and private spaces in Rochdale Village. Ivkovic returned to Rochdale Village and spoke to James outside the security office, offering to show him the map to establish that the culs-de-sac were public streets. After some discussion, James told Ivkovic that he had to remove any reference to Rochdale Village from his flier and Ivkovic agreed to come back with a different paper.

45 The next day Ivkovic and Frazier returned to Rochdale Village with a new flier. This flier read as follows:

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Construction Training with Laborers' Local 10

Laborers' Local 10 is here to offer training in residential and green construction and weatherization to qualified residents of your community.

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We equip you with skills that qualify you for better work opportunities in construction.

Laborers' Local 10 is a new residential construction and weatherization local union.

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We promote community growth through more job opportunities, quality work for a living wage, members' education and local hiring. We are looking for highly motivated men and women with some construction experience who want a career with a very progressive labor union.

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The training comes at no cost to local residents that qualify. A successful completion of the training program leads to an opportunity to become a member of our union.

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The same contact information and disclaimer as had appeared in the earlier handout was at the bottom of this document.

Ivkovic and Frazier looked for James in the security office intending to show him the new flier. James was out that day but the security office receptionist summoned other security guards to meet with the union agents. The leader of this group was a man who identified himself as Chief Mason. Mason told Ivkovic that he could not distribute fliers on private property and he threatened to arrest Ivkovic and Frazier if he saw them anywhere within Rochdale Village distributing fliers. Mason remarked that Rochdale already had a union, Local 32BJ. When Ivkovic protested that he did not want to stand on private property but that he wanted clarification where the private property ended, Mason repeated that he would arrest the men if he saw them anywhere on the Rochdale Village side of the boundary streets. He would arrest them if he saw them anywhere within 100 feet of the Rochdale Village perimeter. Ivkovic asked about the cul-de-sac streets and Mason reiterated that he would arrest the union agents if they leafleted on a cul-de-sac. Mason said everything within 100 feet of Rochdale Village was off limits.

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Ivkovic then told Mason that he had evidence from the Department of Buildings that showed the boundary between the public and private areas of Rochdale Village. Ivkovic testified that Mason "[U]sed an expletive. He told me that he didn't care about the Department of Buildings." Mason said he had jurisdiction over Rochdale and that the Department of Buildings map was outdated. When Ivkovic asked for a current map, Mason said he would not produce it.

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After this occasion Ivkovic gave out another flier across the street from the Rochdale Village perimeter. This document repeated the availability of training in the construction industry and informed the residents of Rochdale that their money would be used for a masonry project and they should have the work. The leaflet suggested that residents call Rochdale Village Board president Janine Cross and tell her that Rochdale Village residents ought to work at the masonry repair project. The flier gave a telephone number for Cross. I note that there is no record evidence that this is in fact Cross' telephone number.

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Ivkovic testified that he was not seeking to organize such employees of Rochdale Village as security guards or operating engineers. His target audience was the residents of Rochdale who wanted training for a construction career.

5 Rodney Frazier testified about his activities leafleting in Rochdale Village. Frazier is employed by LEROF as a union organizer working on behalf of Local 10. Frazier recalled that he handbilled for Local 10 on four or five occasions in September 2010 in the small mall area; he gave his fliers to quite a few security guards. Frazier also distributed the union fliers in the 10 166th Place cul-de-sac for a few hours. His testimony about the events of September 16 and the confrontation with James corroborated the account given by Ivkovic. Frazier also testified about the discussion with Mason and he recalled that the latter said the union could not leaflet anywhere within Rochdale Village and must confine its efforts to an area 100 feet from the perimeter of Rochdale.

15 Thomas Mason, the Director of Security, testified that he met with Ivkovic on September 16 or 17. Mason confirmed that he told Ivkovic he could not distribute literature in any area of Rochdale Village. Mason said the rules and regulations prohibit trespassing, soliciting and loitering. He said Rochdale was private property and Ivkovic could not come on the property without approval. Mason testified that he did not inform Ivkovic that he was permitted to leaflet 20 on City streets. He told Ivkovic to stand across the perimeter streets, outside the confines of Rochdale Village.

Mason stated that his security guards did not issue any violations for leafleting by the Union. A few days before September 16, 2010 Mason had learned that Ivkovic and the other 25 Union agents were handbilling, but we “did not institutionalize violations, because we wanted to find out their business of being on Rochdale.” Mason said the security guards were keeping an eye on the Union agents as they walked through Rochdale Village during these few days and he kept up with the situation by walkie-talkie.

30 F. Conditions and Activities in the Cul-de-Sac Streets

William Greenspan, Esq., is a former resident of Rochdale Village and has been general counsel to Rochdale Village for 25 years. Greenspan testified that since 1965 Rochdale has repaired and swept the sidewalks in the cul-de-sac streets. Rochdale maintains liability 35 insurance for the sidewalks. The City of New York cleans, repairs and removes snow from the roadways of the cul-de-sac streets.

Greenspan testified that recently enacted New York City Administrative Code Sec. 7-210 requires abutting landowners to repair and replace sidewalks abutting their property. But 40 Greenspan noted, even before the passage of Sec. 7-210 Rochdale Village repaired and maintained the sidewalks. Greenspan’s testimony is apparently not quite exact. In *King v. Alltom Properties, Inc.*, Unpublished, Index No. 10148/04, Sup. Ct., Kings Co., July 19, 2007, Justice Hurkin-Torres explained that the New York City Administrative Code “already required landowners to maintain the abutting sidewalk. However, because that section did not explicitly 45 impose liability upon the landowner for a breach of that duty, it was recommended ... that 7-210 be added” to make the landowner liable. Therefore, the fact that Rochdale has always maintained the cul-de-sac street sidewalks merely shows that it performed a duty common to all abutting owners in New York City.

50 Greenspan testified that the New York City Police Department does not patrol the cul-de-sac streets on a regular basis but, “We try to get them to come in as much as possible into the development as a deterrent.”

Greenspan identified the lease and attached rules and regulations that govern the right to occupancy by the shareholders.⁷ The rules prohibit such practices as throwing matter from the windows, blocking the public halls with carriages and bicycles, loitering in various areas of the development, blocking the sidewalks and keeping pets not approved by the corporation. The lease provides in paragraph 1:

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. Neither Cooperator, member of Cooperator's family, guests or visitors shall loiter in the public halls or areas of the buildings outside or in front of the buildings or on the stairwells. 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.

The lease also provides in paragraph 10:

No door-to-door sales and/or solicitations shall be permitted.

Mason testified that Rochdale did not permit "hanging around and chit-chatting" on the sidewalks in Rochdale Village. Mason maintained that the security department enforces a no loitering and no soliciting rule. If people refuse to leave an area when directed to do so by a Rochdale security guard, they may be asked to produce an ID. The post orders given to security guards require them to monitor the sidewalks, gardens and other areas of the apartment complex. Mason identified a monthly report he submitted to management that shows violations issued to tenants: however, this document is not useful herein as it lists where the tenants live but not where the violations occurred. Moreover, the report does not contain any infractions for "soliciting" or "leafleting."

It is important to recognize that no witness presented any document or any direct evidence to show that on a certain occasion prior to September 16, 2010 a person was prohibited from soliciting or handbilling on the public sidewalks in the cul-de-sac streets of Rochdale Village. No document in the record shows that a violation or appearance ticket was issued by the Rochdale security guards. No witness testified that he had directed a leafleter to cease his activities on any public sidewalk of a cul-de-sac. There is no proof that tenants and others have been prohibited from handbilling and soliciting on the public sidewalks of the cul-de-sac streets.

Mason maintained that from midnight to 6am, "We stop and frisk any individuals who are on our sidewalks." Mason explained that this is because, "We have a lot of hanging out, we have a lot of trespassing, we have a lot of soliciting." According to Mason, people want to sit on benches and hang out in front of the lobbies of buildings.

Mason testified that, "A lot of times when people are handing out handouts the [tenants] take them, look at them and throw them on the ground" before they enter their buildings. Mason said this was an example of prohibited littering.

⁷ Shareholders in New York State cooperative apartment corporations own stock in the corporation, which shares of stock entitle them to a lease for their particular apartment. Thus the shareholders, while owners of the corporation, are also tenants in their apartments.

Mason maintained that Rochdale Village posted signs near the sidewalks, in the lobbies and at side entrances to the buildings that prohibited various activities including soliciting. However, the photographs Mason provided to show the contents of the signs establish that these signs did not prohibit soliciting. Mason's photographs show that the signs read as follows:⁸

NO
Trespassing
This property is protect by video surveillance
Trespassers will be prosecuted

NO
Alcoholic Beverages
Loud Noise
Bike Riding
Loitering
Skating

Mason testified that he had been informed by Rochdale Village management that the City of New York owns the cul-de-sac streets.

Mason testified that parking is permitted in certain areas of the culs-de-sac. Official City of New York signs regulate parking on the straight portions of the cul-de-sac streets so that cars are prohibited from parking during certain hours on alternate days in order to permit street cleaning by the New York City Department of Sanitation. On the circular portions of the culs-de-sac there are no standing and no parking signs erected and maintained by the City of New York. The signs are all located on the sidewalks and not in the grassy areas adjoining them. New York City employees issue tickets for violations of the parking regulations in the culs-de-sac.

III. Discussion and Conclusions

I find that Mason's testimony is full of contradictions and inconsistencies. His evidence must be carefully parsed to arrive at a true picture of conditions in Rochdale Village. It is evident from the totality of Mason's testimony that the efforts of the Rochdale security department are aimed at preventing crimes such as drug use, robbery and assault. Hence, the policy of stop and frisk that is enforced from midnight to 6am. Further, it is evident that the security guards try to prevent large groups from congregating at the entrances to buildings and in the lobbies to prevent nuisances and criminal activity.

I note that Mason testified that Rochdale Village enforces a no soliciting rule. However, Mason's more explicit testimony showed that this assertion is not correct. Mason testified that "a lot of times when people are handing out handouts" the tenants take them and then throw them on the ground. This testimony makes it clear that handbilling frequently takes place in Rochdale Village. Indeed, Ivkovic and Frazier were not directed to cease handbilling for the first few days that they engaged in this activity; they even gave copies of their literature to Rochdale security guards. Further, Mason testified that for several days he and his security guards were

⁸ According to Mason the same wording appeared on signs posted in September 2010.

aware that Ivkovic and other union agents were distributing handbills in Rochdale Village but that no action was taken because he wanted to find out their business. This testimony by Mason shows that handbilling is not strictly prohibited in Rochdale and is not routinely subject to issuance of a violation or a cease summons or a threat of arrest. It was only after Mason
5 became aware of the purpose of the soliciting by Local 10 agents that he took any action to expel them from Rochdale Village. Moreover, despite Mason's testimony that the admonitory signs posted on the buildings of Rochdale Village prohibit solicitation, the photographic evidence shows that soliciting is not mentioned by these signs. The wording of the signs posted
10 in Rochdale Village shows that Respondent has not asserted the right to prohibit soliciting on the sidewalks of the apartment complex. Finally, as discussed above, Respondent produced no proof that any tenant or other person has actually been prohibited from soliciting or leafleting on the sidewalks of the cul-de-sac streets.

I find that the rules and regulations attached to the tenant leases which prohibit "door-to-door sales and/or solicitations" are not meant to apply to sidewalk handbilling. The phrase
15 "door-to-door" connotes an activity carried out within an apartment building by persons going from one apartment door to the next. It is significant that Attorney Greenspan who testified about the rules and regulations did not state that they prohibited soliciting and handbilling on the public sidewalks by the tenants who are subject to the conditions of the lease. Nor did
20 Greenspan testify about the ability of Rochdale to prohibit leafleting by agents of Local 10. Greenspan has been general counsel to Rochdale Village for 25 years; he has been responsible for drafting amendments to the lease and the rules and regulations and he would have been the best authority on this subject.

Respondent's Brief urges that the activities of Local 10 are not governed by Section 7 of
25 the Act. None of the cases cited by Respondent are apposite to the facts in the instant case.

Respondent points out that the Union was not seeking to organize employees of
30 Rochdale Village. Many cases support the right of a union to handbill on public property in an effort to reach persons who are not employees of the employer asserting the right to exclude the union. A foremost example is *Lincoln Center for the Performing Arts*, 340 NLRB 1100 (2003).

Section 7 of the Act grants employees "the right to self-organization, to form, join or
35 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...." It is well-established that the statutory protections extended to employees include job applicants and potential applicants. *NLRB v. Town & Country Elect., Inc.*, 516 U.S. 85, 87-88 (1995).

In the instant case, the handbills which the Union distributed and sought to distribute
40 informed both residents of Rochdale and other persons who took the handbills that a training program was available to those with some experience in construction which could equip them with skills that qualified them for better work opportunities. The handbills stated that the training program could lead to "living wage jobs" and possible membership in Local 10. Thus, the
45 message of the handbills was directed at training for jobs with good wages and possible union membership. Local 10 was offering to train interested persons so that they could apply for employment by construction contractors, including whichever contractor might be chosen to perform restoration work at Rochdale Village. Many labor organizations run programs that prepare trainees so that they can apply for employment in a field within the jurisdiction of the
50 union. Manifestly, offering a potential job applicant union training so that he can obtain a job

with good wages and possible union membership is an activity that implicates concerted activity for mutual aid or protection.⁹

5 I find that Respondent has not articulated a valid argument to remove Local 10's recruitment of trainees and potential employee members from the protection of the Act.

10 Finally, Respondent argues that Rochdale Village has a property interest in the cul-de-sac sidewalks sufficient to exclude the Local 10 handbillers. This question must be answered by reference to New York State law. *Bristol Farms*, 311 NLRB 437 (1993). Respondent argues that "Rochdale has an implied easement in the sidewalks."

15 As quoted above, the 1963 deed from Rochdale to the City of New York states Rochdale's intention to convey the roadways and adjoining sidewalks to the City "for street purposes." The deed explicitly lays out the rights reserved to Rochdale. These are "to install, lay, maintain, operate, remove and relay under and across the said cul-de-sac streets ... utility lines ... plumbing lines ... and electric lines...." Thus, New York City owns the cul-de-sac streets but Rochdale was granted an easement for utility, plumbing and electric lines. The language of the reservation of rights to Rochdale is unambiguous and clear and no further interpretation of these terms is necessary. "[W]hen 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 Associates, Inc. v. Evans*, 306 N.Y. 297, 305 (N.Y. 1954). On this basis alone, Respondent's argument about an implied easement must fail.

25 However, even on the basis of the case cited by Respondent its claim of an implied easement must be rejected. Respondent relies on *Sadowski v. Taylor*, 56 A.D.3d 991, 993; 867 N.Y.S.2d 574 (3rd Dept. 2008):

30 [I]n 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.

35 As to the second criterion cited above, Respondent has not shown that the claimed easement was "long continued and obvious or manifest prior to separation" in 1963. Indeed, Rochdale acquired its land in 1960 and Respondent has not shown when the first residential buildings were opened and when the sidewalks were put into use. Based on the record before me it is not apparent what period of time passed between 1960 and 1963 during which the claimed easement might have been exercised. For ought that appears in the record, the first sidewalks were built in 1963 around the time Rochdale conveyed the sidewalks to New York City for street purposes. As found above, Respondent has not proved that it has prohibited handbilling on the sidewalks of the cul-de-sac streets. I conclude that Respondent has not shown any long continued and manifest practice of prohibiting handbilling on the sidewalks of the cul-de-sac streets.

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50 ⁹ Respondent urges that the leafleting was directed towards recruiting union business agents; it asserts that the fliers should be read as offering training for organizers and business agents. This argument rests on a willful misreading of the fliers. The headings of the respective fliers, "Train for careers in residential construction..." and "Construction training with Laborers' Local 10" clearly explain the type of training offered by the Union and the headings are not contradicted by anything in the body of the Union's literature

As to the third *Sadowski* criterion, Respondent concludes that the 1963 deed “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.....” Respondent argues that an implied easement to prevent any person from handbilling on the New York City sidewalks within Rochdale Village is “necessary.” As I found above, Respondent has not shown that it has actually prohibited handbilling or soliciting on the cul-de-sac streets. To the contrary, Chief Mason’s testimony shows that handbilling has occurred without hindrance, including, for a time, handbilling by Local 10. Further, as quoted above, the signs posted on the buildings near the sidewalks do not prohibit solicitation. There is no evidence that Rochdale residents seeking to use the sidewalks as a public forum have actually been prohibited from exercising that right. Finally, Respondent has not shown by competent testimony or evidence that there is a connection between the safety of Rochdale residents and a prohibition on handbilling by the Union. While the sidewalks of the cul-de-sac streets may be necessary for the beneficial enjoyment of the Rochdale property, it does not follow that the asserted easement to prevent handbilling is necessary. I conclude that the asserted easement has not been proven to be necessary for the beneficial enjoyment of the land retained by Rochdale.

In New York State “Implied easements are not favored in the law and the burden of proof rests with the party asserting the existence of the facts necessary to create an easement by implication to prove such entitlement by clear and convincing evidence.” *Zentner v. Fiorentino*, 52 A.D. 2d 1036; 384 N.Y.S. 2d 297 (1976). The burden of proof in such cases has always been high:

As the conveyance was in fee, it vested in the grantee and his assigns all the rights of absolute ownership, except as restricted by the reservation, which, being in favor of the grantor is to be construed most strongly against him. *Grafton v. Moir*, 130 N.Y. 465 (1892).

Respondent has presented no clear and convincing evidence in the instant case to show that it has an implied easement to prohibit handbilling on the public sidewalks of the cul-de-sac streets.

The General Counsel views Respondent’s defense in the instant case as an assertion of adverse possession against the City of New York. However, “lands held by a municipality in its governmental capacity may not be lost by adverse possession.” *City of New York v. Sarnelli Bros., Inc.*, 280 A.D.2d 573; 720 N.Y.S.2d 555 (2001).

I further find that Respondent has no property right in the sidewalks abutting the perimeter boundaries of Rochdale Village sufficient to prohibit union agents from leafleting on those sidewalks. Thus, Respondent had no right to direct Local 10 leafleters to stay at least 100 feet from the perimeter of Rochdale Village on pain of arrest. I note that Respondent’s Brief does not argue to the contrary.

Conclusions of Law

1. By threatening agents of Local 10 with arrest if they did not cease handbilling on the cul-de-sac streets of Rochdale Village and on the perimeter sidewalks abutting Rochdale Village, thereby excluding the Union from an area where the Respondent has no property right entitling it to do so, Respondent violated Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Rochdale Village, Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to arrest Local 10 agents if they distribute handbills in the cul-de-sac streets, including the sidewalks, of Rochdale Village and the perimeter sidewalks abutting the property of Rochdale Village.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Jamaica, New York, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 2010.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C. December 1, 2011

Eleanor MacDonald
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

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 or the perimeter sidewalks abutting the property of Rochdale village.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

Rochdale Village, Inc.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100

Brooklyn, New York 11201-3838

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.