***United States Government***
***National Labor Relations Board***
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: October 18, 2007

TO: James J. McDermott, Regional Director
Region 31

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Tri-Counties Building & Construction Trades Council (Shea Properties, LLC) 560-2575-6713
Case 31-CE-224, 31-CC-2156 584-5000
584-5028
584-5042

This Section 8(e) case was submitted for advice on: (1) whether the Council's grievance against the Charging Party, a nonparty to a Project Labor Agreement (PLA), reaffirmed the PLA within the Section 10(b) period; (2) if so, whether the Council violated Section 8(e) because the agreement was not privileged by the construction industry proviso; and (3) whether the Council violated Section 8(b)(4)(ii)(A) by filing the grievance.

We conclude that the Council's grievance against the Charging Party reaffirmed the PLA within the Section 10(b) period; the PLA violates 8(e) unless protected by the construction industry proviso, which shelters union signatory subcontracting clauses sought or negotiated with construction industry employers in the context of a collective bargaining relationship; and the developer signatories comprise a single employer with the project's general contractor, an employer in the construction industry. [*FOIA Exemption 5*

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[1] See Connell Const. Co. v. Plumbers Local 100, 421 U.S. 616, 633 (1975). We note that the Charging Party also argues that the Council is unlawfully attempting to enforce the PLA against potential lessees and purchasers, who are neither successors nor assigns under the PLA; and that the "successors and assign" language in the PLA violates Section 8(e) because Congress intended the proviso to apply only to subcontracting. [*FOIA Exemption 5*

**FACTS**

Background of Oxnard-RiverPark Project

In 1999, [*FOIA Exemptions 6 and 7(C)*] purchased a 700 acre tract of land for a commercial and residential project called "Oxnard-RiverPark." [*FOIA Exemptions 6 and 7(C)*] formed three limited liability, "single purpose" companies to hold title to the land: RiverPark A, holding title to commercial property; RiverPark B, holding title to residential property; and RiverPark Development, holding title to RiverPark A and B.

In early 2004, an entity named RiverPark Legacy LLC purchased the three RiverPark entities (RiverPark A, RiverPark B, and RiverPark Development). RiverPark Legacy LLC is owned in equal thirds by unrelated national companies: (1) Standard Pacific Homes, a homebuilder; (2) Centex Homes, also a homebuilder; and (3) Shea RiverPark Developers LLC, an entity formed by national homebuilder Shea Homes Limited Partnership ("Shea Homes"), and commercial developer Shea Properties (Charging Party), for the purpose of owning the one-third interest in RiverPark Legacy. Shea Homes manages day-to-day operations and owns 71 percent of SheaRiverPark Developers which, in turn, is the managing member of RiverPark Legacy.[2] Shea Properties owns 29 percent of Shea RiverPark Developers. Both Shea Homes and Shea Properties are sister companies in the family of J.F. Shea, LLC.

Project Labor Agreement

On August 19, 2004, the three original RiverPark entities, RiverPark A, RiverPark B, and RiverPark

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[2] Under Delaware corporate law, every "member" or owner of an LLC may participate in the management of the business while enjoying a shield of limited liability from personal assets. LLCs are run according to an operating agreement and can be "member-managed," meaning that each member has a vote in how the LLC is run, or "manager-managed," meaning that a manager is an agent for the purposes of the LLC's business. "Limited Liability Company Act," 6 Del. C. Sec. 18-101 et. seq.

Development, entered into a PLA with the Ventura County Building & Construction Trades Council, the predecessor of the charged party, Tri-Counties Building & Construction Trades Council. Section 1.1. of the PLA defines the parties to the agreement:

> This Project Labor Agreement ("Agreement") is entered into this __ day of ____, 2004, by and between RiverPark Development, LLC, RiverPark A, LLC, RiverPark B, LLC, and their respective successors and/or assigns, and such other contractors and subcontractors of whatever tier directly executing this Agreement or the Letter of Assent attached hereto . . . and Ventura County Building and Construction Trades Council, AFL-CIO ("Council"), and the signatory craft unions ("Unions"), with respect to the construction work within the scope of this Agreement at the RiverPark Project, in Oxnard, California ("the Project").

The PLA "is limited to those construction contracts awarded by Contractor on or after the effective date of this Agreement" and "relating to the Infrastructure and Commercial development construction work ("Covered Work"). (Section 3.1). All contractors and subcontractors awarded contracts for Covered Work are required to execute the PLA or a Letter of Assent. (Section 3.3).

The PLA sets forth wages (referring to the applicable Local Master Agreements, to the extent that they do not exceed prevailing wages), benefits, and holidays; contains a union recognition clause; requires employees performing Covered Work to become and remain members of the appropriate Union during the project; and provides that the Unions shall be the "source of all craft employees for Covered Work for the Project." The PLA also contains a grievance procedure and a no strike/lockout clause and is effective from the date of signature until project completion.

There are three separate signature pages for each RiverPark party to the agreement. Each page states the name of the signatory entity at the top (RiverPark Development, RiverPark A, or RiverPark B), and then states "by" the company that owns or manages that company, going down the corporate chain:

RIVERPARK A:

RIVERPARK A, L.L.C.
A Delaware limited liability company

BY: RiverPark Development, a
Delaware limited liability company
its sole member

By: RiverPark Legacy, LLC.
a Delaware limited liability company
its Sole Member

By: Shea RiverPark Developers, LLC.
a Delaware limited liability company
its Manager

By: Shea Homes Limited Partnership,
A California limited partnership
Its Managing Member

By: J.F. Shea LLC, a Delaware
limited liability company
Its General Partner

By: _____
[*FOIA Exemptions 6 and 7(C)*]
Assistant Secretary

By: _____
[*FOIA Exemptions 6 and 7(C)*]
Assistant Secretary

[*FOIA Exemptions 6 and 7(C)*] were agents of J.F. Shea. [*FOIA Exemptions 6 and 7(C)*] negotiated the PLA on behalf of the RiverPark entities, but the parties apparently never discussed which corporate entities would be signatories and why.

Numerous craft unions also signed the PLA, and, since the PLA was executed, several construction subcontractors have submitted Letters of Assent and completed work under the PLA.

RiverPark Legacy and Relationship to Other Entities

RiverPark Legacy is the master developer/general contractor, responsible for backbone infrastructure (such as mapping, design, approvals, sewer, water, and grading) and has contracted with several on-site construction

subcontractors to build infrastructure. After the PLA was signed, RiverPark B transferred the project's residential property to RiverPark Legacy, which sells the land in parcels to the three homebuilders (Shea Homes, Centex, and Standard). RiverPark Legacy is responsible for delivering to the homebuilders the graded pads of land upon which the homebuilders will then build homes.

RiverPark Legacy has no employees, but around seven Shea Homes employees are responsible for day-to-day operations of RiverPark Legacy. RiverPark Legacy reimburses Shea Homes for the services provided by these employees. [*FOIA Exemptions 6 and 7(C)*], employed as [*FOIA Exemptions 6 and 7(C)* ], works almost exclusively on RiverPark Legacy matters, including the solicitation of subcontracting bids. RiverPark Legacy's other employees, all on Shea Homes payroll, include a construction manager, a financial analyst, two or three superintendents working full-time on-site, and a staff assistant. [*FOIA Exemptions 6 and 7(C)*] reports to an Executive Committee comprised of representatives from all three homebuilders. For daily matters, [*FOIA Exemptions 6 and 7(C)*] reports to [*FOIA Exemptions 6 and 7(C)* ] has the authority to approve contractors, who are paid by Shea Homes through a RiverPark Legacy account.

RiverPark Legacy offices are the same address as Shea Homes, and all RiverPark Legacy mail is sent to the Shea Homes address.

Charging Party Shea Properties and Dispute over Scope of PLA

The Charging Party, commercial developer Shea Properties, employs 350 employees and operates in several Western states. It does not employ craft employees and utilizes the services of general contractors on its projects.

Shea Properties has reached a deal with RiverPark Legacy to purchase RiverPark A (the commercial property). Using a general contractor, Shea Properties plans to develop a commercial shopping center and will lease "shells" to retail tenants who will modify the interior spaces. Anticipating its purchase of RiverPark A, Shea Properties has negotiated a tentative lease with Whole Foods to rent an anchor store in the commercial development. Whole Foods, however, does not want to be a party to the PLA and has negotiated an "out" provision, permitting it to terminate the lease if subject to the PLA.

In 2006, Shea Properties'[*FOIA Exemptions 6 and 7(C)*], approached [*FOIA Exemptions 6 and 7(C)*], seeking clarification that the PLA would not apply to Shea Properties' tenants, such as Whole Foods. The Council argued that the PLA applied to all interior work and that any contractor that a tenant hired would have to abide by the PLA.

The parties claim that they will not finalize the sale of RiverPark A to Shea Properties until the dispute as to whether the PLA applies to tenant improvements is resolved.

On May 17, 2007, Shea Properties filed initial charges with the Region, alleging that the PLA violated Section 8(e). After receiving the charge, the Council's attorney sent Shea Properties' attorney a letter dated May 22, 2007, seeking to invoke the Council's grievance rights under the PLA against "Shea."[3] Shea Properties responded two days later by withdrawing and refiling Sections 8(e) and 8(b)(4)(A) charges, arguing that the Council's May 22 letter constitutes a reaffirmation of the PLA as an 8(e) agreement.

**ACTION**

We conclude that the Council has reaffirmed the agreement within the Section 10(b) period, that RiverPark Legacy is a single Employer with the signatory RiverPark entities, and that RiverPark Legacy is an employer in the construction industry. [*FOIA Exemption 5*

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A. Reaffirmation of the PLA

A contract that is unlawful as written under Section 8(e) must be "entered into" within the 10(b) period to constitute a violation. A later reaffirmation of the initial agreement constitutes an "entering into."[4] The Board interprets broadly the statutory phrase "to enter

[3] The Council argues that all Shea entities are a single employer.

[4] Teamsters Local 277 (J & J Farms Creamery), 335 NLRB 1031, 1031 (2001).

into," encompassing "the concepts of reaffirmation, maintenance, or giving effect to any agreement" within 8(e)'s scope.[5] The Board has repeatedly held that the filing or pursuit of a grievance seeking to enforce an 8(e) agreement within the 10(b) period constitutes a reaffirmation of an 8(e) agreement.[6] A signatory also reaffirms an agreement where it explains in writing the subcontracting requirements to potential subcontractors or buyers.[7] A grievance is thus not a requirement to showing that an 8(e) agreement has been reaffirmed within the 10(b) period.

Here, we conclude that the Council has reaffirmed the agreement within the 10(b) period by filing a grievance against Shea Properties. Regardless of whether Shea Properties is a party to the PLA, a "successor" or "assign" under the PLA, or even a proper party to the grievance, the Council is clearly attempting to invoke the grievance procedure and to enforce the PLA against Shea Properties. Thus, even if the grievance is ultimately meritless, the Council has reaffirmed the PLA within the 10(b) period.

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[5] Dan McKinney Co., 137 NLRB 649, 654 (1962).

[6] See, e.g., Teamsters Local 917, 349 NLRB No. 97, slip op. at 12 (2007) (reaffirmation shown by filing grievance during 10(b) period); Central Pennsylvania Regional Council of Carpenters (Novinger's), 337 NLRB 1030, 1030 (2002) (reaffirmation shown by union's pursuit of grievance during 10(b) period through subpoena and information requests, even where actual grievance filed outside 10(b) period), enfd. 352 F.3d 831 (3rd Cir. 2003).

[7] See SEIU Local 1 (The Wackenhut Corp.), 13-CE-127, Advice Memorandum dated January 24, 2007 (agreement reaffirmed where signatory to agreement explained and reproduced the subcontracting requirements to potential subcontractors and included the subcontracting provisions in circulation of requests for proposals); Sun Ridge LLC, 32-CE-77-1, Advice Memoranda dated April 5, 2004, and May 12, 2003 (agreement reaffirmed where entity that was single employer with signatory distributed brokers' packages including written requirement that buyer comply with PLA provisions); UAW (Dana Corp.), 7-CC-1786, Advice Memorandum dated July 8, 2004 (agreement would have been reaffirmed by form letters sent from signatory to suppliers).

B. Whether PLA Is Protected by Construction Industry Proviso to Section 8(e)

The PLA here, which requires contractors and subcontractors who work on the project to sign the PLA or a "Letter of Assent," is a secondary agreement with a cease doing business object, prohibited by Section 8(e), unless exempted by the construction industry proviso.[8] The construction industry proviso to Section 8(e) exempts an agreement between a labor organization and "an employer in the construction industry" relating to the contracting or subcontracting or work to be performed at the construction site.

In Connell, the U.S. Supreme Court added a nonstatutory test for proviso coverage, holding that the construction industry proviso "extends only to agreements in the context of collective-bargaining relationships," and possibly, to agreements aimed at avoiding friction when union and nonunion employees of separate employers are working side-by-side on a site (Denver Building Trades[9] problem).[10] The party asserting the construction proviso protection bears the burden or proof.[11]

1. Whether Employer is in Construction Industry.

The Board has had few opportunities to address the applicability of the construction industry proviso to employers that are not traditional construction contractors but generally looks at the employers' degree of control

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[8] See, e.g., National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 629-30 (1967); Iron Workers Pacific Northwest Council (Hoffman Const.), 292 NLRB 562, 580 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990).

[9] NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675 (1951).

[10] Connell Const. Co. v. Plumbers Local 100, 421 U.S. 616, 633 (1975).

[11] Carpenters Chicago Council (Polk Bros.), 275 NLRB 294, 296 (1985).

over the construction-site labor relations.[12] The Board, for instance, has held that an owner/operator of a chain of drug stores that had entered into agreements to use unionized labor in building its stores was not "an employer in the construction industry" because it hired a general contractor, did not select or contract with any of the subcontracts, had limited involvement in the construction, and made only "sporadic visits" to the site.[13] On the other hand, the Board has found employers to be covered by the proviso where the employers act as general contractors.[14]

As set forth in Section 1.1. of the PLA, RiverPark A, RiverPark B, and RiverPark Development are parties to the

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[12] Glen Falls Bldg. and Const. Trades Council (Indeck Energy Services of Corinth) ("Indeck I"), 325 NLRB 1084, 1087 (1998).

[13] Carpenters Local 743 (Longs Drugs), 278 NLRB 440, 442 (1986); see also Polk Brothers, 275 NLRB at 296-97 (employer that signed a union signatory subcontracting clause was not covered by the proviso as it was primarily a carpet retailer, not an installer as described by the SIC Manual; only 1% of its installation work was performed on construction sites and it only subcontracted installation work which could not be performed by its own employees within a normal workweek); Columbus Bldg. and Const. Trades Council (Kroger), 149 NLRB 1224, 1226, 1231-32 (1964) (unions violated Section 8(b)(4) in attempting to obtain union signatory subcontracting agreement with retail chain food store operator regarding construction by its landlords; store was merely a prospective lessee and not a construction industry employer, despite its own direct employment of unionized carpenters, sheet metal workers and truck drivers after the landlord had completed construction).

[14] Building and Const. Trades Council (Church's Fried Chicken), 183 NLRB 1032, 1037 (1970) (retail chain employer that acted as its own prime contractor and controlled labor relations of subcontractors is employer in construction industry); Milwaukee & Southeast Wisconsin Dist. Council of Carpenters (Rowley-Schlimgen), 318 NLRB 714, 716 (1995)(carpet installer employer was employer in construction industry where it exercised control over the labor at its site).

PLA.[15] These entities have no employees or officers and engage in no construction work; their sole function is to hold title to the residential and commercial land. Thus, like the employer in Long Drugs, the signatory entities are not employers in the construction industry within the meaning of the construction industry proviso to Section 8(e).[16]

The Council argues that RiverPark Legacy and the Shea entities are subject to the PLA because they are a single employer with the RiverPark entities.[17] To determine whether various entities are a single employer, the Board examines four factors: interrelation of operations, centralized control of labor relations, common management, and common ownership.[18] The Board finds no one factor controlling, although it has stressed the first three factors, particularly centralized control of labor relations, which tend to show "operational integration."[19] While the Board has generally described centralized control over labor relations as the most important, this factor

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[15] The Council argues that RiverPark Legacy and the Shea entities are also subject to the PLA because the names of those companies are listed on the signature page. Section 1.1 explicitly states that only RiverPark A, RiverPark B, and RiverPark Development are parties to the agreement. While agents of J.F. Shea actually signed the agreement, the signature page makes it clear that they were obligating the signatories, not the Shea entities, to the agreement.

[16] See Sun Ridge LLC, 32-CE-77-1, Advice Memorandum dated April 5, 2005 (where signatories only business was to sell parcels of land to builders for development, signatories were not employers in construction industry).

[17] There is no allegation that RiverPark Legacy was formed for an illegal motive and thus, that entity is clearly not an alter ego of any of its owners. Valley Electric, 336 NLRB 1272, 1275 (2001) (alter ego status can only be found when there is a finding of an illegal motive).

[18] See, e.g., Navigator Communications Systems, 331 NLRB 1056, 1061-62 (2000), enfd. 337 F.3d 446 (5th Cir. 2003).

[19] Id.; see also NLRB v. Jordan Bus Co., 380 F.2d 219, 222 (10th Cir. 1967).

becomes less important where the companies have no employees.[20] Ultimately, single employer status depends on all the circumstances of the case and is characterized by absence of an "arm's length relationship found among unintegrated companies."[21]

Here, we conclude that RiverPark Legacy is a single employer with RiverPark Development, RiverPark A, and RiverPark B. RiverPark Legacy is the sole member or owner of RiverPark Development, RiverPark A, and RiverPark B.[22] RiverPark Legacy also manages all three companies, and the entities are related, as RiverPark Legacy is the master developer of the RiverPark property and has already transferred the RiverPark B property to RiverPark Legacy. Since none of the companies have any employees, the last factor, centralized control of labor relations, is not critical. RiverPark Legacy completely owns and controls the other RiverPark entities, and there is no arms-length relationship between them. Thus, RiverPark Legacy is a single employer with the three signatory companies, RiverPark A, RiverPark B, and RiverPark Development.

RiverPark Legacy, by its own admission, is the "general contractor" on the backbone infrastructure for the Oxnard-RiverPark project, oversees the construction work, and has superintendents on site to oversee the subcontractors. RiverPark Legacy is therefore a general contractor clearly encompassed within the construction industry proviso.

The Council further argues that Shea Homes and Shea Properties are a single employer with RiverPark Legacy. We

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[20] Navigation Communications, 331 NLRB at 1056; Three Sisters Sportswear Co., 312 NLRB 853, 863 (1993).

[21] See Parklane Hosiery Co., 203 NLRB 597, 612-613 (1973) (finding franchiser and franchisee were not single employer where parties had symbiotic relationship but franchisee managed itself and labor relations independently); see also NLRB v. Don Burgess Const. Corp., 596 F.2d 378, 384 (9th Cir. 1979).

[22] See Masland Industries, 311 NLRB 184, 186 (1993) (relationship of privately held corporate parent to wholly owned corporate subsidiary indicates common ownership); Dow Chemical, 326 NLRB 288, 288 (1998) (same).

disagree. Shea Homes, through its 71 percent interest in Shea RiverPark Developers, owns less than a one-third interest in RiverPark Legacy. In terms of management, an Executive Committee comprised of all three homebuilding companies runs RiverPark Legacy. While Shea Homes, through Shea RiverPark Developers, acts as manager, it appears to act pursuant to limited authority granted by all three owners.[23] While there is some functional integration between Shea Properties and RiverPark Legacy, including a shared a mailing address and payroll systems, the relationship appears to be arms-length in that RiverPark Legacy reimburses Shea Homes for the services of its employees; RiverPark Legacy reimburses Shea Homes for its rentals and equipment; and Shea Homes pays RiverPark Legacy for the sale of land to build homes on the project. In terms of control over labor relations, a handful of Shea employees work full-time on RiverPark Legacy matters, but these employees ultimately report to an Executive Committee run by all three owners – Centex, Standard, and Shea RiverPark Developers. Weighing all the factors, we conclude that, while Shea Homes and RiverPark Legacy are somewhat functionally integrated, Shea Homes' minority ownership and the arms-length nature of their transactions weigh against a finding of single employer status.

Further, Shea Properties is clearly not a single employer with RiverPark Legacy. It owns a very small percentage of RiverPark Legacy (29 percent of Shea RiverPark Development, which only owns one-third of RiverPark Legacy), has no common management with RiverPark Legacy, operates independently, shares no employees or labor relations, and has negotiated an arms-length deal to purchase RiverPark A from RiverPark Legacy. Thus, Shea Homes is not a single Employer with RiverPark Legacy.

2. Whether Employer Satisfies Connell Nonstatutory Requirement of Construction Industry Proviso.

In Connell, the U.S. Supreme Court added a nonstatutory test for proviso coverage.[24] The Court reasoned that, despite the unqualified proviso language, Congress did not intend to permit a union to approach a

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[23] [*FOIA Exemption 5*

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[24] In Connell Const. Co., 421 U.S. at 633.

"stranger" contractor and obtain a binding agreement not to deal with nonunion subcontractors. Thus, the Court held that the proviso extended only to subcontracting agreements "in the context of collective-bargaining relationships," and possibly, to the problem of having union and nonunion labor working on a common-situs (the Denver Building Trades problem).[25]

a. First Prong of Connell – Negotiated in Context of Collective Bargaining Relationship.

The Board has held that an 8(f) pre-hire agreement can satisfy Connell's requirement that the subcontracting agreement be "in the context of a collective bargaining relationship."[26] The parties, however, must have intended the agreement to cover an existing or anticipated collective bargaining relationship between the signatories.[27] In St. Joseph Equipment Corp.,[28] for instance, the Board held that a Section 8(f) agreement was not negotiated in the context of a collective bargaining agreement where the union was aware that the employer had never employed employees represented by the union or engaged in work within the union's jurisdiction. Thus, the record showed that the union approached the employer solely to guarantee fringe benefit payments, not to seek a bargaining relationship.[29]

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[25] Id. at 627-30.

[26] Los Angeles Bldg. & Const. Trades Council (Schriver), 239 NLRB 264, 269-79 (1978), enfd. 635 F.2d 859 (D.C. Cir. 1980).

[27] Carpenters Dist. Council of Detroit, 243 NLRB 678, 680 (1979) (subcontracting clause negotiated in context of collective bargaining relationship where clause was contained in collective bargaining agreement covering multi-employer unit represented by union for several years).

[28] 302 NLRB 47, 48 (1991).

[29] Id; see Hoffman, 292 NLRB at 578 (union unlawfully sought subcontracting agreement outside collective bargaining relationship where charging party had no contractual unit employees and did not intend to employ them in the future).

Most recently, in Glen Falls Building & Construction Trades Council (Indeck Energy) ("Indeck II"),[30] a wall-to-wall labor council of craft workers and a developer and general contractor on a project agreed to subcontract work only to subcontractors who agreed to sign the PLA. The Board held that subcontracting agreements between the council and developer and general contractor were not negotiated in the context of a collective bargaining agreement where, at all relevant times, the parties understood that the developer had no employees and that neither the developer nor the general contractor would employee anyone in the council's trades at the jobsite. The Board noted that nothing in the subcontracting agreements related to terms and conditions of employment for any of the developer or general contractor's employees; the sole purpose of the agreement was to bind the developer to select a subcontractor who would subcontract work only to employers who would sign the PLA; and neither the developer nor the general contractor were themselves subject to the PLA.[31]

Here, the parties' purpose in negotiating and entering into the PLA is unclear. [*FOIA Exemption 5*

.] As discussed above, RiverPark Legacy, not Shea Homes or Shea Properties, is a single employer with the signatories, and thus, a

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[30] 350 NLRB No. 42, slip op. at 5 (2007). The Board had remanded Indeck I, 325 NLRB at 1086-87, because the ALJ erroneously excluded evidence on whether the developer was "an employer in the construction industry." Despite the remand on this issue, the Indeck II Board found no need to decide whether the developer was an employer in the construction industry because the council failed to prove the nonstatutory test for proviso coverage set forth in Connell. 350 NLRB No. 42, slop op. at 5.

[31] Id. We note that the Board and the Eleventh Circuit have suggested than an employer in the construction industry could be protected by the construction industry proviso even if the employer does not employ and does not intend to employ any employees in that industry. See A.L. Adams Const. Co. v. Georgia Power Co., 733 F.2d 853, 856 (11th Cir. 1984); Rowley-Schlimgen, 318 NLRB at 716. The Inland II Board did not directly address these cases.

party to the PLA. While RiverPark Legacy presently has no craft employees, it is unclear why the collective bargaining agreement was negotiated or whether the parties knew that RiverPark would not employ any workers on the project. [*FOIA Exemption 5*

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b. Second Prong of Connell – Reducing Jobsite Friction

The Supreme Court in Connell suggested in dicta that secondary subcontracting clauses might be protected by the construction industry proviso even without a collective-bargaining relationship if they addressed the problems posed by common situs relationships on jobsites or the reduction of friction between union and nonunion employees at a jobsite.[32] While the Board has not yet identified the circumstances that may justify a union signatory subcontracting clause negotiated outside of a collective-bargaining relationship, three decisions provide guidance.

In two cases, the Board held that subcontracting agreements (clearly sought outside the context of collective-bargaining relationships) were not aimed at reducing friction between union and nonunion on the jobsite because the agreements did not restrict the subcontracting of other types of work at the jobsite.[33] Thus, where subcontracting clauses allow for the possibility of union

[32] Connell, 421 U.S. at 633.

[33] Colorado Bldg. & Const. Trades (Utilities Services), 239 NLRB 253, 256 (1978); Hoffman, 292 NLRB at 580-81. See also Sun Ridge Developers LLC, 32-CE-77-1, Advice Memorandum dated April 5, 2004 (where agreement only covered electrical, plumbing, and sheet metal subcontractors, and therefore permitted subcontracting to nonunion carpenters, laborers, or any other trades, it was not negotiated to avoid the Denver Building Trades problem).

and nonunion employees working side by side, the agreements were clearly not negotiated to reduce friction between union and nonunion labor at a jobsite.[34]

Most recently, the Indeck II Board determined that the fact that a labor council signatory is a wall-to-wall craft union is not sufficient, standing alone, to show that the signatories negotiated the subcontracting agreement to address tensions that may arise if union and nonunion labor employees of different employers are required to work together at the same jobsite.[35] The Indeck II Board noted that it had "yet to determine whether an alternative basis for proviso coverage exists" under the Connell common-situs dictum, but found no need to do so because the labor council had failed to prove that the subcontracting clauses were executed to avoid common-situs tensions between union and nonunion labor. In fact, the Board noted, the developer wanted to "remove the threat of union opposition" to the developer's efforts to secure regulatory approval of its project and to ensure a steady labor source for jobsite subcontractors, and the labor council wanted" a labor monopoly at a major construction site to provide employment for their out-of-work members."[36] Thus, while the Board has not yet decided whether proviso coverage exists under the Connell dictum, the Board clearly requires more than a PLA covering wall-to-wall trades and a bare allegation that the clause was necessary to reduce on-site friction.

As discussed above, the parties' purpose in negotiating the agreement — whether to address an anticipated bargaining relationship, to avoid labor tension at the jobsite, or to address other issues — is unclear from the record. [*FOIA Exemption 5*

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[34] Id. at 256.

[35] 350 NLRB, slip op. at 5.

[36] Id., slip op. at 5.

In sum, the PLA has been reaffirmed within the 10(b) period, but [*FOIA Exemption 5*

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B.J.K.