



MEMORANDUM

Date: November 30, 2017

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator 

Re: **World View Enterprises Litigation**

Oral arguments before the Arizona Court of appeals, Division Two, were heard regarding Pima County's appeal of the Superior Court decision regarding which statute applies to the lease/purchase agreement with World View Enterprises. Prior to the oral argument, a Draft Decision was prepared and disseminated to the parties. The Draft Decision is attached for your information. It represents the preliminary opinion of only one of the judges on the three-judge panel; the actual ruling, after the parties' oral arguments are considered and the judges discuss the case as a group, may be different.

This Draft Decision reverses the Superior Court decision. It recognizes the County's ability to lease County real property as an economic development activity under the economic development statute, A.R.S. § 11-254.04, without following the auction process applicable to other types of leases under A.R.S. § 11-256. Providing high wage job expansion, development of new technology sector jobs, and the receipt of lease payments that exceed the County's investment by nearly \$9 million are the economic benefits of the World View transaction. Because of those benefits, the Board's decision to enter into the lease-purchase agreement with World View was clearly a legitimate economic development activity authorized by the economic-development statute. It is this type of activity that will allow the County to continue to recover from the most recent recession and rebuild our economy as well as our tax base.

At the conclusion of the oral argument, the Court took the matter under advisement and will issue a formal, final opinion in the near future. As noted, that opinion may differ significantly from the Draft Decision. The tenor of many of the judges' questions and comments during oral argument, however, seemed to suggest that a majority of the panel is supportive of the Draft Decision. When asked by the Court whether their opinion, when issued, should be published, Regina Nassen, who argued the case on behalf of the County, stated that publication would be appropriate in light of the issue's importance to all Arizona counties.

CHH/anc

Attachment

c: Andrew Flagg, Chief Civil Deputy County Attorney
Regina Nassen, Deputy County Attorney

NOTICE

This is a draft decision prepared by only one judge.
The draft may be changed entirely after argument.

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

RICHARD RODGERS, SHELBY MANGUSON-HAWKINS,
AND DAVID PRESTON,
Plaintiffs/Appellees,

v.

CHARLES H. HUCKELBERRY, IN HIS OFFICIAL CAPACITY
AS COUNTY ADMINISTRATOR OF PIMA COUNTY;
SHARON BRONSON, RAY CARROLL, RICHARD ELIAS,
ALLYSON MILLER, AND RAMÓN VALADEZ,
IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE
PIMA COUNTY BOARD OF SUPERVISORS; AND
PIMA COUNTY, A POLITICAL SUBDIVISION
OF THE STATE OF ARIZONA,
Defendants/Appellants.

No. 2 CA-CV 2017-0091

Appeal from the Superior Court in Pima County
No. C20161761
The Honorable Catherine Woods, Judge

REVERSED AND REMANDED

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COUNSEL

Scharf-Norton Center for Constitutional Litigation at the
Goldwater Institute, Phoenix
By James Manley and Veronica Thorson
Counsel for Plaintiffs/Appellees

Barbara LaWall, Pima County Attorney
By Regina L. Nassen and Andrew L. Flagg,
Deputy County Attorneys, Tucson
Counsel for Defendants/Appellants

DRAFT DECISION

¶1 Pima County Administrator Charles Huckelberry, Pima County, and the members of the Pima County Board of Supervisors (collectively, “the County”) appeal from the trial court’s grant of summary judgment directing them to cancel the county’s lease-purchase agreement with World View Enterprises for failure to comply with competitive bidding procedures. *See* [A.R.S. § 11-256](#). [[ROA 47](#) (UA Ruling); [ROA 70](#) (Judgment); [ROA 73](#) (NOA)] The sole issue before this court is whether [A.R.S. § 11-256](#) requires a county board of supervisors to comply with the competitive bidding process when it leases property pursuant to its economic development authority under [A.R.S. § 11-254.04](#). [[OB](#); [ROA 74](#)] For the following reasons, we determine competitive bidding is not required.

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Accordingly, we reverse the judgment of the trial court and remand with instructions to enter summary judgment in favor of the County.

Factual and Procedural Background

¶2 The facts are not in dispute. In January 2016, the County entered a twenty-year lease-purchase agreement (“the Agreement”), in which the County would construct a 135,000 square-foot facility on twelve acres of county-owned land to accommodate World View’s near-space exploration operations. [ROA 12 ep 2 caption (date, WV), §1.1 (near-space exploration), §1.2 (land), §1.3 (build), 3, § 3 (term), 4, § 5 (construction of improvements), 15 (signatures)] The County also agreed to construct a publically available launch pad on an adjacent parcel that World View agreed to operate and maintain. [ROA 12 ep 2] World View promised to employ specific numbers of employees at defined benchmarks and at certain salary levels. [ROA 12 ep 3-4 (emp-sal); ep 6 (rent)] In entering the Agreement, the County did not follow the competitive bidding process, normally required when a county leases property. See § 11-256(B)-(D). [ROA 11 ep 9:6-10] Instead, the County relied on its economic development authority to directly negotiate and contract with World View. See § 11-254.04. [ROA 12 ep 2-3 (§1.8)]

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¶3 In April 2016, three Pima County resident-taxpayers, Richard Rogers, Shelby Manguson-Hawkins, and David Preston (collectively, “Taxpayers”), initiated this action, seeking declaratory and injunctive relief. [ROA 2] Taxpayers complained the Agreement was invalid for failure to follow the competitive bidding process and sought to enjoin the County from enforcing or performing under the Agreement.¹ [ROA 2 ep 12-14] On that issue, the parties filed motions for partial summary judgment. [See next; ROA 29; ROA 38] The trial court concluded §§ 11-254.04 and 11-256 could be harmonized “without rendering any provision of either statute meaningless” and determined that “when the legislature authorized counties to enter leases . . . for purposes of economic development,” it intended the competitive bidding process to apply. [ROA 47 ep 4] The court entered judgment in favor of Taxpayers pursuant to Rule 54(b), Ariz. R. Civ. P. [ROA 29 (MPSJ); ROA 38 (XMPSJ); ROA 47 (UAR); ROA 70

¹In counts not before this court, Taxpayers also challenged the Agreement under the Gift Clause, Ariz. Const. art. IX, § 7, as well as related construction contracts under A.R.S. §§ 34-603, 34-604, and procurement contracts under Pima County Code §§ 11.12.060, 11.16.010. [ROA 2 ep 9-12 (GC), 14-15 (Const.), 15-17 (Proc.)]

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(Judg't)] The County timely appealed. [ROA 73] We have jurisdiction.
A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

Statutory Construction

¶4 The sole issue before this court is whether § 11-256 requires the County to employ competitive bidding when it leases property pursuant to its economic development authority under § 11-254.04. [OB ep 13] We review both summary judgment and statutory construction de novo. *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, ¶ 10, 395 P.3d 698, 701 (2017). “We interpret statutes to give effect to the legislature’s intent. When a statute is clear and unambiguous, we apply its plain language and need not engage in any other means of statutory interpretation.” *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 14, 110 P.3d 1013, 1017 (2005).

¶5 A county board of supervisors only possesses those powers “expressly conferred or expressly implied by statute.” *Davis v. Hidden*, 124 Ariz. 546, 548, 606 P.2d 36, 38 (App. 1979). Section 11-254.04 specifically authorizes boards to “appropriate and spend public monies for and in connection with economic development activities.” It defines these activities as “any project, assistance, [or] undertaking . . . including acquisition, improvement, leasing or

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conveyance of real or personal property.” § 11-254.04(C). The statute requires that the board “f[i]nd and determine[]” the activity “will assist in the creation or retention of jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the county.” *Id.* In practical terms, the statute grants counties the power to lease county-owned property at less than market value inasmuch as a discounted lease is equivalent to spending public monies by subsidizing a portion of a tenant’s rent.² See *Subsidy*, Black’s Law Dictionary (10th ed. 2014) (“below-market prices” a form of government spending).

¶6 By its own terms, § 11-254.04 contains no competitive bidding requirement. To the contrary, competitive bidding directly opposes its language and the purpose conveyed thereby: to empower counties to negotiate directly with specific lessees. That a county may spend upon determining the lease “will assist in the . . . retention of

²Citing the canon of interpretation *noscitur a sociis*, Taxpayers urge us to interpret the leasing authority granted under § 11-254.04 as conferring the ability only to act as lessee (“‘appropriat[ing] and spend[ing] public monies’ on rent”), but not as lessor (“collecting rent”). [AB ep 10 n.3] But § 11-254.04 authorizes not only monetary expenditures (acquisition and improvement), but also transactions by which it might receive money; namely, “conveyance” of property.

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jobs,” necessarily contemplates that a board may assist in retaining those jobs by offering a favorable lease to a particular employer. [§ 11-254.04\(C\)](#). To require competitive bidding in such a circumstance would only frustrate that purpose by driving up the price and thereby nullifying the very power the statute grants: the power to spend monies for economic development.

¶7 Likewise, although a board might pursue generalized job creation, [§ 11-254.04](#) grants the same board the power to “assist in the creation . . . of jobs” by directly negotiating with private employers to incentivize them to locate within the county by offering a below-market lease. Again, competitive bidding would substantially frustrate the board’s ability to so assist by introducing the risk that a less suitable bidder may supplant the target employer.

¶8 By contrast, [§ 11-256\(A\)](#), the general leasing statute, provides that a board “may lease . . . any land or building owned by or under the control of the county.” This power is limited by a competitive bidding procedure that includes appraisal of the subject property, auction, and publication giving notice of the proposed lease. [§ 11-256\(B\)-\(D\)](#). By requiring the board to not only appraise, auction, and publish notice of proposed leases, but also to award the

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lease to “the highest responsible bidder, provided that the amount . . . is at least ninety per cent of the rental valuation,” the statute is designed to produce maximal revenue for county owned or controlled property with a definite floor below which the county will not enter a lease. [§ 11-256\(C\)](#).

¶9 Importantly, [§ 11-256](#) does not specify that whenever the County leases property, it must follow the competitive bidding procedures. Instead, subsection (F) provides a limit on the competitive bidding statute. [§ 11-256\(F\)](#). It states, “This section is supplementary to and not in conflict with other statutes governing or regulating powers of boards of supervisors.” *Id.* We interpret this limitation to mean that when that power is not otherwise conferred, a board may generally lease county property. Further, when it so leases, it must employ competitive bidding unless such a process would conflict with the language or power elsewhere conferred. Thus, insofar as the competitive bidding process in [§ 11-256](#) would frustrate the ability of county boards to pursue economic development under [§ 11-254.04](#), particularly concerning job retention and creation, [§ 11-256](#) is inapplicable to the exercise of that power.

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¶10 Indeed, as a matter of policy, the aim of the competitive bidding statute is ensure against misuse of county property “by encouraging free and full competition.” *Johnson v. Mohave County*, 206 Ariz. 330, ¶ 12, 78 P.3d 1051, 1054 (App. 2003) quoting *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 420, 586 P.2d 978, 981 (1978). By contrast, the policy behind economic development reverses roles by casting counties as competitors seeking to attract employers. Accordingly, the power to spend for the purpose of retaining or creating certain employer-tenants by leasing at less-than market value is directly at odds with the competitive bidding process designed to produce full-market value without respect to the identity of the tenant. See § 11-256; *Johnson*, 206 Ariz. 330, ¶ 12, 78 P.3d at 1054. Anticipating such conflicts, the legislature directed that § 11-256 would yield, rather than govern. § 11-256(F).

¶11 Here, the County explicitly entered the Agreement with World View pursuant to § 11-254.04 with the express intent of creating specific numbers of jobs at defined salary levels. [See next] Further, the County found “World View’s operations, and hence this lease . . . will have a significant positive impact on the economic welfare of Pima County’s inhabitants.” [ROA 12 ep 2-3 § 1.8 (finding),

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3-4 (jobs/salaries)] Thus, the County did not enter the Agreement pursuant to its general leasing power, but appropriately acted pursuant to its economic development power. Having made the requisite findings,³ the County was not bound by the competitive bidding process, but was free to negotiate and contract directly with World View.

¶12 Taxpayers assert the competitive bidding process can be harmonized with § 11-254.04 because § 11-256(C) allows boards to limit bids “to such other terms and conditions as [they] may prescribe.” [See next] Accordingly, they assert, the County could have accomplished its economic development goals by limiting bids to aerospace and technology businesses and included other necessary terms.⁴ [AB ep 15-16] Although the County could have employed the

³ Taxpayers did not challenge the County’s findings either below or before this court. [OB; ROA 2]

⁴ Taxpayers point to the County’s 2013 auction of unimproved land for a raceway facility within Southeast Regional Park that published a proposed lease agreement with material terms. [AB ep 16; Bidders’ Information Package (description ep 1-2)(bid submittal ep 6)(proposed lease agreement ep 14-39)] But nothing prevents the County from voluntarily using the competitive bidding process even when it is not required to do so. Further, that the County employed competitive bidding before does not mean that it must thereafter do so.

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competitive bidding process, it was not required to do so. Neither are we persuaded by Taxpayer's suggestion that "§ 11-256 allows the County to lease property for 10 percent less than market value if necessary to attract a bidder." [AB ep 16] Given that an appraisal is merely an estimate of value, *The American Heritage Dictionary* 87 (5th ed. 2011), we disagree that accepting the highest bid, so long as it is not less than ninety percent of that estimate, meaningfully constitutes the form of spending for economic development that § 11-254.04 expressly authorizes.

¶13 Further, Taxpayers' reliance on *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 839 P.2d 1093 (1992), is misplaced. [OB ep 5, 8, 11-12, 15] Taxpayers contend that case reasons that that the legislature "could and should have made [a competitive-bidding exception] explicit," had it intended one. *Id.* at 54, 839 P.2d at 1099. But there, construction contracts were at issue, *id.*, which do not conflict with competitive bidding because they are not premised on incentivizing an employer to locate or remain within the county. Compare A.R.S. § 9-500.05 (authorizing municipalities to enter into development agreements), with § 11-254.04 (authorizing board of supervisors to appropriate and spend in connection with economic

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development). Rather, such contracts fit squarely within the policy goals of competitive bidding. See *Achen-Gardner*, 173 Ariz. at 55, 839 P.2d at 1100 (in construction context, competitive bidding ensures public receives “proper quality” and “full value”); see also *Johnson*, 206 Ariz. 330, ¶ 12, 78 P.3d at 1054. Moreover, the relevant statute in *Achen-Gardner* lacks an exception clause such as the one found in § 11-256(F). Compare A.R.S. § 34-201 (competitive bidding requirements for municipal employment of contractors), with § 11-256(F) (competitive bidding exception for lease or sublease of county lands and buildings).

¶14 Taxpayers insist if the legislature had intended to exempt economic development from the competitive bidding process, it would have done so explicitly in § 11-254.04. [AB ep 9-15] In support, Taxpayers cite several statutes explicitly creating exemptions from their corresponding competitive bidding statutes. [AB ep 11] See A.R.S. §§ 11-251.10 (affordable housing exemption), 11-256.01 (governing leases of county property to governmental entities, county fair associations, or nonprofit corporations), 11-256.02 (governing leases to hospital districts in counties with less than 250,000 persons), 11-1435(B) (blanket exemption for operating agreements with

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nonprofit corporations for community health systems), 35-751(B) (blanket exemption for activity of nonprofit industrial development corporations). [AB ep 11] But Taxpayers' contention cuts both ways; had the legislature intended the competitive bidding process to apply, it just as easily could have made this explicit. Cf. A.R.S. §§ 11-812(D) (aggregate mining operation recommendation committee "subject to the open meeting requirements of [A.R.S.] title 38, chapter 3, article 3.1"), 11-952.01(B) (county workers' compensation pool "subject to [A.R.S.] title 23, chapter 6"). And, Taxpayers' assertion overlooks that § 11-256(F) indeed contains an exception to the competitive bidding process when that process conflicts with other powers of county boards.⁵

⁵Accordingly, Taxpayers' reliance on *Johnson*, 206 Ariz. 330, ¶ 13, 78 P.3d at 1054-55, for the proposition that apart from an explicit exception, § 11-256 governs all leases of land not involving parks, is misplaced. [AB ep 13-15] *Johnson* does not require an explicit exception; it merely recognizes that § 11-256 governed all leases of land not involving parks prior to enactment of A.R.S. § 11-256.01 in 1981. *Johnson*, 206 Ariz. 330, ¶ 13, 78 P.3d at 1054-55. As Taxpayers recognize, the statutory history of § 11-254.04 began later, in 1989, with the enactment of § 11-254. 1989 Ariz. Sess. Laws, ch. 203, § 7. [AB ep 9] See also *Lemons v. Superior Court*, 141 Ariz. 502, 505, 687 P.2d 1257, 1260 (1984) ("the more recent, specific statute governs over the older, more general statute").

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¶15 For all the above reasons, we determine that county boards are not required to employ the competitive bidding process when they enter lease agreements pursuant to their economic development authority under [§ 11-254.04](#).

Disposition

¶16 For the foregoing reasons we reverse the judgment of the trial court and remand with instructions to enter summary judgment in favor of the County as well as further proceedings consistent with this decision. Because Taxpayers do not prevail, we deny their request for attorney fees. See [A.R.S. § 12-341](#).