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
Filed December 14, 2017

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

REVERSED AND REMANDED

COUNSEL

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OPINION

Chief Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E C K E R S T R O M, Chief Judge:

¶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(B)-(D). The sole issue before this court is whether § 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. For the following reasons, we determine competitive bidding is not required. 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. The County also agreed to construct a publicly available launch pad on an adjacent parcel that World View agreed to operate and maintain. World View promised to employ specific numbers of employees at defined benchmarks and at certain salary levels. 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). Instead, the County relied on its economic development authority to directly negotiate and contract with World View. *See* § 11-254.04.

¶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. 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] On that issue, the parties filed motions for partial summary judgment. 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. The court entered judgment in favor of Taxpayers pursuant to Rule 54(b), Ariz. R. Civ. P. The County timely appealed and 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. We review both summary judgment and statutory construction de novo. *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, ¶ 10 (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 (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 (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 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's plain language—authorizing spending in the context of lease transactions—grants counties the power to lease county-owned property at less than market value, inasmuch as a discounted lease is equivalent to

[1] In 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.

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 and create deals favorable to those entities. That a county may spend monies upon determining the lease "will assist in the creation or retention of jobs," necessarily contemplates that a board may do so 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 "on any project" 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 provide such assistance by introducing the risk that another bidder might supplant the target employer and derail longer-term goals that would ultimately benefit county residents.

¶8 By contrast, § 11-256(A) generally authorizes county boards to lease "any land or building owned by or under the control of the county." This power, however, 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 lease to "the highest responsible bidder, provided that the

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[2]Citing 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"). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) ("Associated words bear on one another's meaning . . . ."). But § 11-254.04 authorizes not only monetary expenditures (acquisition and improvement), but also transactions by which it might receive money ("conveyance" of property).

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 may 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. It states, "This section is supplementary to and not in conflict with other statutes governing or regulating powers of boards of supervisors." § 11-256(F). By enacting this provision, the legislature directed that § 11-256 should be construed to avoid conflict with other statutes addressing county powers.

¶10 We interpret this limitation to mean that not every power granted to those boards is constrained by the competitive bidding requirement. Rather, when the power to lease is not otherwise conferred, subsection (F) provides that a board may lease county property in combination with another power. And, 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.

¶11 Indeed, as a matter of policy, the aim of the competitive bidding statute is to ensure against "favoritism, fraud and public waste by encouraging free and full competition" among potential lessees. *Johnson v. Mohave County*, 206 Ariz. 330, ¶ 12 (App. 2003), *quoting Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 420 (1978). By contrast, the power to spend for the purpose of retaining or creating specific 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. Anticipating such conflicts, the legislature directed that § 11-256 would yield, rather than govern. § 11-256(F).

¶12 Furthermore, there is a dramatic difference between the roles of leases in the two sections. Section 11-256 is patently designed to require that counties secure fair-market value for leases of their property. By contrast, § 11-254.04 expressly enables counties to spend money to foster economic development—and, in context, do so by providing a lease agreement that is the functional equivalent of spending. For this reason,

the two statutes can only be harmonized by accepting that they were contemplated to address different types of transactions in pursuit of different governmental purposes. More pointedly, we can only harmonize § 11-256 with the language and purpose of § 11-254.04 by not applying the former to the latter. Nor is it our role to second-guess the legislature as to how to best balance the competing policy objectives in the two statutes. *See Prudential v. Estate of Rojo-Pacheco*, 192 Ariz. 139, 150 (App. 1997).

¶13 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. 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." 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.

¶14 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." Accordingly, they speculate that the County could have accomplished its economic development goals by limiting bids to aerospace and technology businesses and included other necessary terms.[4] But imposing a bidding process, under any terms and conditions, becomes both cumbersome and illogical when the goal of the underlying transaction is not to secure the highest price for the lease, but to induce a specific lessee to enter an agreement. Neither are we persuaded by Taxpayers' suggestion that the two statutes can be harmonized because "§ 11-256 allows the County to

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[3]Taxpayers did not challenge the County's findings either below or before this court.

[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. 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 for the same or other property when exercising its authority to engage in economic development by targeting a particular lessee.

lease property for 10 percent less than market value if necessary to attract a bidder." The language chosen by the legislature in § 11-254.04 articulates no such limitation on counties seeking to exercise the lease-related spending power to induce economic development. Furthermore, strategies such as setting terms and conditions on a lease to discourage all but one bidder undermine the core logic of § 11-256, which sets forth a legislative requirement of "competitive" bidding designed to maximize income from county property by securing as many bidders as possible. *See* § 11-256(D) (setting forth robust requirements for public notification of the proposed lease and auction date). In short, the legislature forged the respective statutes in pursuit of fundamentally different purposes. For this reason, neither statute can be bent to accommodate the other without distorting the legislature's intent.

¶15 Further, Taxpayers' reliance on *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48 (1992), is misplaced. Taxpayers contend that case reasons that the legislature "could and should have made [a competitive-bidding exception] explicit," had it intended one. *Id.* at 54. 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 a 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 development). Rather, such contracts fit squarely within the policy goals of competitive bidding. *See Achen-Gardner*, 173 Ariz. at 55 (in construction context, competitive bidding ensures public receives "proper quality" and "full value"); *see also Johnson*, 206 Ariz. 330, ¶ 12. 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).

¶16 Taxpayers rely on *Johnson*, 206 Ariz. 330, ¶ 13, for the proposition that apart from explicit exemptions, § 11-256 governs all leases of land. Accordingly, they maintain that we should not interpret subsection (F) as an omnibus exception in cases, as here, where § 11-256 would not logically apply. Specifically, they maintain that our reading would render exceptions elsewhere surplussage, "drained of meaning completely and . . . [that] we would be tearing apart . . . the revised statutes."

¶17 Taxpayers are correct that the legislature has seen fit to enact express exemptions from § 11-256 and other competitive bidding statutes.

See A.R.S. §§ 11-251.10(A) (affordable housing exemption), 11-256.01(A) (governing leases of county property to governmental entities, county fair associations, or nonprofit corporations), 11-1435(B) (blanket exemption for operating agreements with nonprofit corporations for community health systems). But we cannot agree that the legislature intended that such exemptions be the exclusive means of determining the applicability of the competitive bidding requirement.

¶18 First, we do not read *Johnson* to require an explicit exemption to relieve the county of the competitive bidding requirement. That case merely recognizes that § 11-256 governed leases of land not involving parks prior to enactment of A.R.S. § 11-256.01 in 1981. *Johnson*, 206 Ariz. 330, ¶ 13. The court applied the doctrine *in pari materia*[5] and reasoned that competitive bidding did not apply to park agreements because the authorizing statute, enacted during the same session as § 11-256, did not impose a public-auction requirement. *Id.* ¶¶ 12-13. *Compare* 1939 Ariz. Sess. Laws, ch. 9, § 1, *with* 1939 Ariz. Sess. Laws, ch. 78, §§ 2-3. Here, a similar canon of construction applies; namely, "the more recent, specific statute governs over the older, more general statute." *Lemons v. Superior Court*, 141 Ariz. 502, 505 (1984). 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. Accordingly, our interpretation does not conflict with *Johnson.*

¶19 Moreover, the presence of an express exception to § 11-256 in the statutes Taxpayers cite is warranted because competitive bidding does not inherently conflict with those powers in the same manner as it does with § 11-254.04. Whereas § 11-254.04 primarily grants spending authority, the exercise of which may entail a lease, §§ 11-251.10 and 11-256.01 primarily grant authority to lease or otherwise dispose of real property, warranting an explicit exemption. Put another way, §§ 11-251.10 and 11-256.01 involve types of lease transactions that would be logically controlled by § 11-256 if the express exemptions from competitive bidding were not specified therein. By contrast, as explained above, § 11-254.04 enables a type of transaction, spending for economic development, for which competitive bidding requirements would not harmoniously or logically apply. Also, in exempting nonprofit community health corporations from § 11-256, § 11-1435(B) enumerates several other statutes from which it is exempt and failure to include § 11-256 in such a list would strongly indicate the

[5]Statutes enacted by the same legislature "are to be interpreted together, as though they were one law." Scalia & Garner, *supra,* 252.

legislature intended it to apply.[6] *See Rash v. Town of Mammoth*, 233 Ariz. 577, ¶ 6 (App. 2013) (applying principle of *expressio unius est exclusio alterius*[7]).

¶20 Indeed, Taxpayers' contention cuts both ways; had the legislature intended the competitive bidding process to apply to those leases offered for economic development under § 11-254.04, it 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"). Lastly, Taxpayers' assertion overlooks that § 11-256(F) contains an implicit exemption to the competitive bidding process when that process, as here, conflicts with other powers of county boards.

¶21 Finally, Taxpayers maintained at oral argument that if competitive bidding does not apply when a county exercises its economic development authority, this would "render [§ 11-]256 null and void" because "the county could couch every lease as an exercise of its [§ 11-]254.04 power."[8] We acknowledge that county boards, acting in bad faith, could attempt to circumvent competitive bidding by characterizing all leases as economic development. However, we will not read into either statute a limitation the language does not require merely because a

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[6]Taxpayers also cite §§ 11-256.02 and 35-751(B), providing exemptions from public auction and competitive bidding without specific reference to § 11-256 for leases to hospital districts in counties with less than 250,000 persons and for nonprofit industrial development corporations, respectively.

[7]"[E]xpression of one or more items of a class and the exclusion of other items of the same class implies intent to exclude those items not so included." *Rash*, 233 Ariz. 577, ¶ 6, *quoting Sw. Iron & Steel Indus. v. State*, 123 Ariz. 78, 79-80 (1979).

[8] Taxpayers also characterize the issue as whether § 11-254.04 "implicitly repeal[ed]" § 11-256. But this mischaracterizes § 11-256, transforming it from a general, albeit limited, power to lease into a pervasive requirement limiting the exercise of other, distinct powers merely because a county board elects to exercise that power by leasing real property.

potential for abuse exists.[9] *See Collins v. Stockwell*, 137 Ariz. 416, 420 (1983) ("Courts will not read into a statute something that is not within the manifest intent of the Legislature as gathered from the statute itself."). And, we trust the ability of our courts to recognize when a county board has improperly characterized a transaction to evade the intended scope of § 11-256.

¶22 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

¶23 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.

[9]We also note county boards do not act devoid of accountability when exercising their economic development authority; rather, a majority of the board is required to transact business and "[a]ll sessions of the board shall be public." A.R.S. § 11-216(C).