COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD RODGERS, et al., Plaintiffs-Appellees, v. CHARLES H. HUCKELBERRY, et al., Defendants-Appellants,	No. 2 CA-CV 2017-0091 Pima County Superior Court Case No. C20161761

APPELLEES' ANSWERING BRIEF

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Introduction

When the Legislature expanded counties' economic development authority by enacting A.R.S. § 11-254.04, did it impliedly repeal a separate longstanding competitive bidding law (A.R.S. § 11-256) that is intended to protect taxpayers from "favoritism, fraud and public waste"? *Johnson v. Mohave Cnty.*, 206 Ariz. 330, 333, ¶ 12 (App. 2003). The Arizona Supreme Court has said "no" to a very similar question, holding that repeal by implication is disfavored and economic development can coexist with honest government. *Achen-Gardner, Inc. v. Superior Ct. In & For Cnty. of Maricopa*, 173 Ariz. 48, 54 (1992). This Court has not disagreed with that ruling—nor could it. Defendants-Appellants ("the County") assert that a few cases go the other way, but those cases deal with a very different situation: when two *simultaneously enacted* laws *conflict*. Here, the statutes at issue were passed decades apart and they do not conflict. The appraisal, auction, and minimum price safeguards of § 11-256 place commonsense limits on the County's economic development authority under § 11-254.04. The Superior Court's decision requiring the County to comply with the § 11-256 safeguards should therefore be affirmed.

Statement of the Case and Facts

In 2016, Pima County built a $14.5 million headquarters and then leased it to World View Enterprises at a substantial discount, to subsidize its suborbital space balloon business. ROA 15 ep 2. The whole sordid tale, ROA 2 ¶¶ 1–6, need not detain us today because the only issue in this appeal is the County's admitted failure to follow the appraisal, auction, and minimum price safeguards of A.R.S. § 11-256 when it leased the headquarters to World View.

Under its deal with the County, World View pays the County a sharply discounted lease rate for the headquarters building—the rates are so low that World View will still owe taxpayers nearly $5 million after the County pays off the construction debt with general tax revenue. ROA 2 ¶¶ 30–31; ROA 15 ep 6. World View has the right to buy the building for $10 in the 19th year of the deal—just as rent rises closer to market rates and the County is recovering the subsidy. ROA 2 ¶ 28. World View also enjoys exclusive control of the County's $1.5 million balloon launch pad, including exclusive rights to determine whether any of its competitors can use the pad, and how much World View will charge for the privilege. ROA 2 ¶¶ 42–45; ROA 13. The County claims it gave World View all these benefits in order to keep the company in the Arizona—despite the fact that it was already contractually obligated to stay here, locate its headquarters here, and build its manufacturing facility here. ROA 2 ¶ 5.

Taxpayers[1] sued to remedy the County's violation of § 11-256, as well as violations of the Gift Clause, ROA 2 ¶¶ 49–65, and state and local competitive bidding requirements, ROA 2 ¶¶ 82–90. After the Superior Court denied the County's motion to dismiss, ROA 28, the parties filed cross-motions for partial summary judgment on the § 11-256 claim. ROA 29; ROA 38. The Superior Court held that the County's failure to follow the appraisal, auction, and minimum price safeguards of § 11-256 rendered the lease unlawful. ROA 47 ep 7. The County appealed. It argues, as it did in the Superior Court, that the detailed appraisal,

[1] Contrary to the County's insinuation, Plaintiffs-Appellees are Pima County taxpayers. Opening Br. ep 6 n.1. Their attorneys are not parties to this action, nor is the Goldwater Institute.

auction, and minimum price requirements of § 11-256 were impliedly repealed by the enactment of § 11.254.04.[2]

Statement of the Issue

When the Legislature expanded counties' economic development authority by passing A.R.S. § 11-254.04, did it impliedly repeal a separate longstanding competitive bidding law, A.R.S. § 11-256, that is intended to protect taxpayers from "favoritism, fraud and public waste"?

Argument

I. The Arizona Supreme Court Has Rejected the County's Argument.

The County "must act not only within the limits of the power granted it by the legislature, but must also comply with the statutory requirements prescribed by the legislature." *Mohave Cnty. v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 420 (1978). To "prevent favoritism, fraud and public waste," A.R.S. § 11-256 requires that the County conduct an appraisal, hold a public auction, and set a minimum price when it leases property. *Johnson*, 206 Ariz. at 333, ¶ 12. The County admits it ignored those requirements. Opening Br. ep 14. Rather, it contends that A.R.S. § 11-254.04 implicitly repealed the safeguards of A.R.S. § 11-256. *See* Opening Br. ep 17–18. The Superior Court was right to reject that argument, and this Court should

[2] Other claims regarding the County's failure to follow competitive bidding requirements for the design and construction of the facility are ongoing. The Superior Court stayed its ruling on the § 11-256 claim in order to allow this appeal to proceed. ROA 70. Taxpayers' Gift Clause claim was also stayed, ROA 56, because a final ruling declaring the lease unlawful under § 11-256 would remedy the unlawful gifts and subsidies contained in the lease. (Indeed, had the County followed the statute, the transparency and fair dealing required by § 11-256 would have probably averted this lawsuit.)

affirm.

It is a basic principle of statutory construction that "[r]epeals by implication are disfavored—'very much disfavored.'" ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 327 (2012) (citation omitted). But there is no need to resort to secondary sources to resolve this dispute. The Arizona Supreme Court has said so, in a case quite similar to this. In *Achen-Gardner*, 173 Ariz. at 54, the Court refused to read A.R.S. § 9-500.05, which authorizes municipalities to enter into development agreements, as creating an implied exception in the competitive bidding statute. Its reasoning is a prescient rejection of the County's argument here: "If the legislature meant for agents to dispense with public bidding on work performed under an A.R.S. § 9-500.05 development agreement, it could and should have made this explicit, given the importance of public bidding. It did not." *Id*. Likewise, "[i]f the legislature meant for [counties] to dispense with public bidding [and the other requirements of A.R.S. § 11-256] on [leases] performed under an [A.R.S. § 11-254.04 economic] development agreement, it could and should have made this explicit, given the importance of public bidding. It did not." *Id*. The Supreme Court cited A.R.S. § 9-500.05(E) as an example of an explicit repeal "evincing an intent to supersede the competitive bidding law." *Id*. No such intent to "dispense with public bidding" appears in § 11-254.04. *Id*.

The County ignores this controlling precedent, and resorts to incomplete statutory history and policy arguments in favor of jettisoning § 11-256. None of the County's efforts overcomes *Achen-Gardner* and none is convincing in its own right.

II. Had the Legislature Intended to Exclude County Economic Development Leases from the Safeguards of § 11-256, it Knew How to Do So.

The County's argument begins with the unsupported assumption that § 11-254.04 did nothing if it did not implicitly repeal § 11-256. Opening Br. ep 17. But viewing § 11-254.04 in its historical context reveals why this is wrong. *See State v. Thomason*, 162 Ariz. 363, 366 (App. 1989) (statutory history helps explain legislative intent and aids in construing statutes to further that intent).

The County shortcuts the statutory history of § 11-254.04, which begins in 1989 (not 1994, as the County portrays it). Opening Br. ep 17. In 1989, counties were granted severely limited economic development authority: they could only appropriate $1.5 million per year for economic development, only to governmental agencies or nonprofits, and only for activities within the county. A.R.S. § 11-254. That was the limit of a county's economic development authority, since all county power must be explicitly granted by the legislature. *See Hartford Accident & Indem. Co. v. Wainscott*, 41 Ariz. 439, 448 (1933) ("If it were the intention of the Legislature to give counties the unlimited right to engage in every nature of private business for which their property might be used, we think that intention would have been made manifest in language very different from that in question.").

Then, in 1994, the Legislature passed § 11-254.04 and lifted those restrictions. It removed the $1.5 million cap, removed the limitation on grants only to "governmental agencies or nonprofits," eliminated the location requirement, and explicitly authorized counties to "appropriate and spend public monies" on "economic development," which the statute defined as a long list of activities, including leases. These changes "vastly increased counties' authority to engage in

economic development activities." ROA 47 ep 6. But the Legislature left § 11-256 untouched.[3]

The County ignores this context and argues that the only reason § 11-254.04 mentions leases is to excuse counties from complying with § 11-256. Yet the new law never mentions the old one that the County claims it was designed to repeal. If § 11-254.04's only purpose was to repeal § 11-256, it would be a bizarre example of legislative sloppiness. Courts assume, when interpreting a statute, that the Legislature was aware of the law as it existed at the time of enactment, and that if it wishes to repeal a statute, it will do so explicitly. *State v. Bonillas*, 197 Ariz. 96, 97 ¶ 5 (App. 1999). Courts also strive to avoid interpreting statutes as repealing other statutes by implication, *Hounshell v. White*, 219 Ariz. 381, 387 ¶ 22 (App. 2008), and "will not find" that the Legislature meant to repeal a previous statute by enacting another one, "unless the interplay between the statutes … *compels* [the court] to find the legislature *must* have intended" that. *Pijanowski v. Yuma Cnty.*, 202 Ariz. 260, 263 ¶ 14 (App. 2002). "It is only when by no reasonable construction can two statutes

[3] Section 11-254.04 says nothing specific about *how* the County leases property, and its general grant of economic development authority is unclear about whether the county can act as *lessor* in an economic development lease. Section 11-254.04 only authorizes the County to "appropriate and spend public monies"; its reference to "acquisition, improvement, leasing or conveyance of real or personal property or other activity" thus refers to action as a lessee ("appropriat[ing] and spend[ing] public monies" on rent), not a lessor (collecting rent). *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326 (2011) ("*noscitur a sociis*—a canon closely related to *ejusdem generis*—dictates that a statutory term is interpreted in context of the accompanying words); SCALIA & GARNER, *supra* at 195 ("*noscitur a sociis* … words grouped in a list should be given related meanings." (citation omitted)). Section 11-254.04 allowed the County to spend more than the old $1.5 million limit contained in § 11-254 and to build a facility for a private company, but it says nothing at all to about how the County exercises its authority as a lessor.

be operative that the latter act repeals the former by implication." *State ex. Rel. Larson v. Farley*, 106 Ariz. 119, 122-23 (1970) (citing *City of Mesa v. Salt River Project Agric. Imp. & Power Dist.*, 92 Ariz. 91, 105 (1962)). The County's argument is incompatible with these rules. Certainly its reliance on *implicit* meaning conflicts with the rule that county authority must be *explicitly* granted by the Legislature, *Hartford Accident & Indem. Co.*, 41 Ariz. at 448, and the canon against repeals by implication—a canon the Arizona Supreme Court had emphasized just two years earlier in a similar context, *Achen-Gardner*, 173 Ariz. at 54. The County says it would have been "awkward" to create an explicit exception to § 11-256, so the Legislature must have done it implicitly when it passed § 11-254.04. Opening. Br. ep 21. Of course, even if that were true, that falls short of the "compel[ling]" and "unequivocal[]" proof of implicit repeal that the Court must find in order to rule that § 11-254.04 undid the prior law. *Pijanowski*, 202 Ariz. at 263 ¶ 14.

Moreover, when the Legislature *has* intended to repeal prior restrictions on county authority, it has found ways to do just that, both before and after § 11-254.04 was enacted. Two decades before it expanded counties' economic development authority, the Legislature explicitly made Industrial Development Authorities "exempt from any restrictions imposed on municipalities, counties or political subdivisions relating to the leasing, sale or other disposition of property or funds." A.R.S. § 35-751(B); *see also, e.g.*, A.R.S. § 11-256.01(A) (enacted 1981); A.R.S. § 11-256.02 (enacted 1983). And several times in the years following enactment of § 11-254.04, the Legislature *explicitly* included "notwithstanding" clauses excusing counties from complying with § 11-256 when it intended that result. *See, e.g.*, A.R.S. § 11-1435(B) (enacted 1995); A.R.S. § 11-251.10(A) (enacted 2000). The

Legislature has also added several *explicit* exceptions to § 11-256 itself over the years. 2012 Ariz. Legis. Serv. Ch. 254 (H.B. 2389) (no appraisal for land worth less than $5,000); 2005 Ariz. Legis. Serv. Ch. 43 (S.B. 1019) (no auction for certain leaseback deals). By contrast, when the Legislature expanded counties' economic development authority in 1994, it left § 11-256 undisturbed, to protect taxpayers from exactly the sort of deal the County devised with World View.

The County admitted below that explicit repeal is the norm: "All we can say is that the Legislature has included several explicit § 11-256 exemptions in later-enacted, more specific statutes regarding county leasing authority." ROA 38 ep 4. Indeed, that *is* all the County can say, even now. Opening Br. ep 21. The County does not point to a single *non*-explicit, later-enacted exception to § 11-256, or any other statute. *Id*.

That failure is unsurprising given the Supreme Court's ruling in *Achen-Gardner* that it will not read into later-enacted statutes implicit exceptions to competitive bidding requirements and the Legislature's consistency in utilizing notwithstanding clauses. 173 Ariz. at 54. This is not a case of "denying the antecedent," Opening Br. ep 21 n.9; it is a case of reviewing the statutory context and existing case law and adhering to the Arizona Supreme Court's holding that repeals by implication are disfavored.

The County tries to throw the burden of proof on the wrong side, claiming that "the Legislature's failure to include an explicit § 11-256 exemption in § 11-254.04 does not conclusively indicate that compliance with that statute is required." Opening Br. ep 20. That argument embraces the age-old fallacy of the *probatio diabolica*, or the impossible proof. It is not the Taxpayers' obligation to prove the

negative. It is the County that bears "a heavy burden of persuasion" to show that a later statute implicitly repealed the earlier one. *Amell v. United States*, 384 U.S. 158, 165 (1966).

Following its past and subsequent practice, the Legislature easily could have said, "In addition to the authority granted under § 11-254, *[and notwithstanding § 11-256,]* a board of supervisors may appropriate and spend public monies for and in connection with economic development activities." But the bracketed text does not appear in the statute. The County cannot enlist this Court to add it.[4]

III. This Court has Held that "Section 11-256 Governed All Leases of Land Not Involving Parks" Until the Legislature Added *Explicit* Exceptions.

The County's incomplete reading of *Johnson v. Mohave Cnty.*, 206 Ariz. 330, 333, ¶ 12 (App. 2003), and *State v. Bowsher*, 225 Ariz. 586, 586 ¶ 8 (2010), confuses their holdings and gets the import of those cases exactly backward. Section 11-256 was enacted in 1939, alongside a single exception to its requirements for public park leases. *Johnson*, 206 Ariz. at 333, ¶ 12. That the two statutes were passed *simultaneously* "at the same session of the legislature" led the *Johnson* court to conclude that park leases were not subject to § 11-256. *See id*. Also important was the distinction between government-to-*government* leases and government-to-*private party* leases—abuse being more likely in the latter context. *See id*. at 333–34, ¶ 13; ROA 47 ep 5. In any event, *Johnson*'s holding is clear and determinative here: "Section 11-256 governed *all leases of land* not involving parks until 1981, when the legislature added A.R.S. § 11-256.01 (2001), obviating the need for a

[4] The County *did* consider asking the Legislature to make the needed change, but has apparently not pursued that appropriate avenue for statutory change. Recommended Legislative Agenda for 2017 at 6–8 (Nov. 22, 2016).

public auction for land leased to another governmental entity for a non-park purpose." 206 Ariz. at 333–34 ¶ 13 (emphasis added). When the non-park exception was added in 1981, it was explicitly prefaced with a "[n]otwithstanding § 11-256" clause. A.R.S. § 11–256.01(A). Each time that the Legislature has chosen to create an exception or modification of § 11-256, it has done so *explicitly*, through a "notwithstanding" clause. *See infra*.

Bowsher, 225 Ariz. at 586 ¶ 8, is consistent with *Johnson*. That case also interpreted two statutes enacted *simultaneously* "as part of [a] comprehensive revision of Arizona's criminal statutes." As in *Johnson*, the court's reasoning in *Bowsher* turned on the fact that "statutes enacted by the same legislature are deemed to share the same 'public policy underpinnings ….'" *Johnson*, 206 Ariz. 333 ¶ 12 (*quoting Arizona Prop. & Cas. Ins. Guaranty Fund v. Ueki*, 150 Ariz. 451, 456 (App. 1986)); *Bowsher*, 225 Ariz. at 586 ¶¶ 8–10. Like *Johnson*, *Bowsher* simply does not address the statutory interpretation question here: whether a *later*-enacted statute implicitly repealed an *earlier* one.

Still, *Bowsher*, like *Johnson*, is consistent with the harmonious reading of §§ 11-256 and 11-254.04 that the Superior Court correctly applied here. To paraphrase the County's recitation of *Bowsher*: "By reading [§ 11-256] in a manner that merely limited the scope of the discretion granted to [counties] by [§ 11-254.04], the Court was able to preserve both statutes and avoid rendering the language in the latter one entirely meaningless." Opening Br. ep 16. Even if *Bowsher* had involved a later-enacted statute, the same harmonious reading works here. The competitive safeguards of § 11-256 easily harmonize with the economic development authority in § 11-254.04: the later law expands counties' economic development authority,

consistent with the basic safeguards for county leases in the earlier law. This reading is consistent with the history of the two sections and with controlling rules of statutory construction. *Steer v. Eggleston*, 202 Ariz. 523, 527, ¶ 16 (App. 2002) ("When reconciling statutes *in pari materia*, we will construe them in a way that creates harmony and gives effect to all statutes involved.").

All this is ultimately nonessential, because *Achen-Gardner* explains the effect of a later-enacted statute: repeals by implication are disfavored, especially in the context of public bidding requirements. 173 Ariz. at 54. Section 11-256 applies here.[5]

IV. There is No Conflict Between the § 11-256 Safeguards and Economic Development.

Putting aside the rules of statutory construction, the County also raises a policy argument: that enforcing the § 11-256 safeguards would "obstruct" economic development by requiring a "sole focus on the amount of rent." Opening Br. ep 22–23. But § 11-256 requires no such thing. ROA 47 ep 5–6.

Applying the § 11-256 safeguards is perfectly compatible with economic development leases. *Id*. The Supreme Court agrees: "We are not convinced that competitive bidding significantly diminishes the legislative incentives to private development …." *Achen-Gardner*, 173 Ariz. at 54.

Section 11-256 requires an appraisal, public auction, and minimum rent, but it allows counties to set other lease terms, so they can accomplish their economic

[5] Because the statutes do not conflict with each other, and can be easily reconciled even if they did, the general/specific cannon on which the County relies, Opening Br. ep 18, does not apply here. *See* SCALIA & GARNER, *supra* at 183 (that canon "deals with what to do when conflicting provisions simply cannot be reconciled—when the attribution of no permissible meaning can eliminate the conflict").

development goals. *See* A.R.S. § 11-256(C) ("Such land or building shall be leased … subject to such other terms and conditions as the board may prescribe."). If the County has some rational reason for leasing a property to only aerospace, defense, and technology businesses, § 11-256 allows it to do so. *Id*.; ROA 47 ep 5–6. The County did just that when it *complied* with § 11-256 in an earlier economic development lease. Bidders' Information Package at 14. It is therefore simply false that applying § 11-256 "obstructs the obvious purpose of § 11-254.04." Opening Br. ep 22. Also, § 11-256 allows the County to lease property for 10 percent less than market value if necessary to attract a bidder who will comply with "such other terms and conditions as the board may prescribe." A.R.S. § 11-256(C). And, of course, § 11-256 does nothing to inhibit other kinds of economic development—e.g., improving County infrastructure and police services—to draw local investment without violating the law.

What § 11-256 *does* prohibit is what happened here: giving one company special dispensation to lease a County-owned building, without assessing how much the lease is worth, without determining if other companies would pay more, and without regard to minimum lease rates designed to protect taxpayers' investment. *See Turken v. Gordon*, 223 Ariz. 342, 350 ¶ 32 (2010) ("The potential for a subsidy is heightened when, as occurred here, a public entity enters into the contract without the benefit of competitive proposals.").

As the County points out, § 11-256 works hand-in-hand with other good-government provisions, like the Gift Clause, to protect taxpayers and to make it harder for counties to play favorites. *Johnson*, 206 Ariz. at 333 ¶ 12; Opening Br. ep 24. But the Superior Court recognized that these other safeguards do not "provide

the substantial equivalent of the protections afforded by § 11-256." ROA 47 ep 7. Section 11-256 provides an important safeguard against favoritism, cronyism, and abuse—safeguards this Court should not short-circuit.

Worse still, the County has argued that the Gift Clause does not apply here—an argument that, if successful, would leave Taxpayers with *no* protections against the County's favoritism and willingness to "deplet[e] the public treasury by giving advantages to special interests or by engaging in non-public enterprises." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984) (citations omitted). The County is right that § 11-256's "obvious purpose is to ensure that the disposal [of county property] is done in a manner that prevents the squandering of public assets. That makes sense." Opening Br. ep 22. The County should not be allowed to ignore legal protections for taxpayers because it thinks it expedient. *That* would *not* make sense.

Notice Under Rule 21(a)

Taxpayers respectfully request an award of costs pursuant to A.R.S. § 12-341 and attorneys' fees pursuant to the private attorney general doctrine. *See Arizona Ctr. For Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 371 (App. 1991).

Conclusion

Section 11-256 was enacted to protect the public fisc from the sort of irresponsible subsidies at issue in this case. Nothing in § 11-254.04 even hints that the Legislature meant to give counties free rein to ignore existing safeguards when "appropriat[ing] and spend[ing] public monies" on economic development projects. Indeed, that is precisely when taxpayers most urgently need the good-government protections contained in § 11-256. The two statutes are easily harmonized, especially

when § 11-254.04 is placed in historical and statutory context as an expansion of the narrow economic development authority first granted by § 11-254. An interpretation that harmonizes the two statutes still leaves counties with significant flexibility under § 11-256 to craft leases that serve their economic development plans. What they cannot do is ignore the safeguards of § 11-256, as the County did. The Superior Court was correct that the headquarters lease was unlawful, and its judgment should be affirmed.

Respectfully submitted this 5th day of September, 2017 by:

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Pursuant to Rule 14(a) of the Ariz. R. of Civ. App. P., I certify that the body of the attached Answering Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 3,966 words, excluding the table of contents and table of citations.

Respectfully submitted this 5th day of September, 2017 by:

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The undersigned certifies that on September 5, 2017, she caused the attached Appellants' Answering Brief to be filed via the Court's Electronic Filing System, mailed via first class mail, and emailed a copy to:

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