Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
James Manley (031820)
Veronica Thorson (030292)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

RICHARD RODGERS; SHELBY MAGNUSON-HAWKINS; and DAVID PRESTON,

Plaintiffs,

vs.

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; PIMA COUNTY, a political subdivision of the State of Arizona,

Defendants.

Case No.: C20161761

(Assigned to the Honorable Catherine Woods)

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants admit that they did not follow the appraisal, auction, and minimum price requirements of A.R.S. § 11-256 when they entered into the World View Headquarters lease. PSOF ¶ 24. This Court ruled on August 22 that Section 11-256 applies to the Headquarters lease, but gave Defendants an opportunity to submit "additional or new authorities" on that matter. DSOF ¶ 26. In their Response and Cross-Motion for Summary Judgment they present one additional authority, which is irrelevant to the scope of Section 11-256. As explained below, Defendants have offered no reason for this Court to revisit its straightforward conclusion that the safeguards of Section 11-256 apply. For the reasons Plaintiffs stated previously, Plaintiffs are entitled to summary judgment on their Section 11-256 claim.

I. Had the Legislature intended to exclude county economic development leases from the safeguards of Section 11-256, it knew how to do so.

All along, Defendants' argument has been that A.R.S. § 11-254.04 repealed the safeguards of A.R.S. § 11-256 by implication. *See* Defs.' Mot to Dismiss at 9; Defs.' Cross-Mot. at 2. But contrary to Defendants' suggestion, *id*. at 4, it is a basic principle of statutory construction that repeals by implication are disfavored.

Achen-Gardner, Inc. v. Superior Ct. In & For Cnty. of Maricopa, 173 Ariz. 48, 54 (1992), is directly on point. There, the Supreme Court refused to read the development agreement statute as creating an implied exception in the competitive bidding statute—and its reasoning is a prescient rejection of Defendants' 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 Section 11-256] on [leases] performed under an [A.R.S. § 11-254.04] development agreement, it could and should have made this explicit, given the importance of public bidding. It did not." *Id*.

Defendants admit 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." Defs.' Cross-Mot. at 4. Indeed, that *is* all Defendants say. They do not point to a single example of an implicit, later-enacted exception to Section 11-256, or any other statute. And they provide no other argument to justify the imagined exception supposedly implied in A.R.S. § 11-254.04. Their 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.

Defendants' only new authority is not to the contrary. *State v. Bowsher*, 225 Ariz. 586, 586, ¶ 8 (2010), interpreted two statutes enacted *simultaneously* "as part of [a] comprehensive revision of Arizona's criminal statutes." Like *Johnson v. Mohave Cnty.*, 206 Ariz. 330, 333, ¶ 12 (App. 2003), on which Defendants relied previously, *Bowsher* simply does not address the statutory interpretation question here: whether a later-enacted statute implicitly repealed an earlier one. As in *Bowsher*, the court's reasoning in *Johnson* turned on the fact that "statutes enacted by the same legislature are deemed to share the same 'public policy underpinnings … .'" *Id.* (*quoting Arizona Prop. & Cas. Ins. Guaranty Fund v. Ueki*, 150 Ariz. 451, 456 (App. 1986)). *Achen-Gardner*, on the other hand, does explain the effect of a later-enacted statute: repeals by implication are disfavored, especially in the context of public bidding requirements. 173 Ariz. at 54.

Defendants' new reliance on *Bowsher* actually damages their argument, because in that case the Court relied on statutory history and the text of the statutes at issue. *See, e.g.*, 225 Ariz. at 588 ¶ 11, n.2. Here, those factors show that Section 11-254.04 does *not* create any implied exception to Section 11-256.

Defendants ignore the statutory history of section 11-254.04, which begins in 1989, when county economic development authority was severely limited. Prior to the enactment of Section 11-254.04 in 1994, counties had only the authority to appropriate $1.5 million per year to governmental agencies or nonprofits for economic development. A.R.S. § 11-254. That was the limit of the 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."). The addition of Section 11-254.04 lifted the $1.5 million cap, and—for the first time—added authority for economic development leases.

Defendants assume that county authority for economic development leases already existed; but Defendants point to nothing to support that assumption. *But see Hartford Accident & Indem. Co.*, 41 Ariz. at 445–46 ("counties have no powers to engage in any activities of any nature unless there is a statute so authorizing them expressly or by strong implication."). Their entire interpretation of Sections 11-256 and 11-254.04 depends on that baseless assumption.

Defendants are arguing that the *only* reason Section 11-254.04 mentions leases is to excuse counties from complying with Section 11-256, yet 254.04 never mentions 256. It would be a bizarre approach to legislative drafting if that were Section 11-254.04's purpose—such an interpretation would certainly conflict with the rule that County authority must be explicitly granted by the Legislature, *Hartford Accident & Indem. Co.*, 41 Ariz. at 448, and with the limit on repeals by implication announced just two years earlier in *Achen-Gardner*, 173 Ariz. at 54. And courts assume, when interpreting a statute, that the Legislature was aware of the law as it existed at the time of enactment. *State v. Bonillas*, 197 Ariz. 96, 97 ¶ 5 (App. 1999).[1]

Defendants say it would have been "awkward" to create an explicit exception to Section 11-256, so the Legislature must have done it implicitly when it passed Section 11-254.04. But this argument ignores that two decades before it passed Section 11-254.04, the Legislature gave Industrial Development Authorities an explicit exemption "from any restrictions imposed on municipalities, counties or political subdivisions relating to the leasing, sale or other disposition of property or funds."

[1] Defendants also try to throw the burden of proof on the wrong side, claiming that "[i]t does not necessarily follow" from Plaintiffs' arguments "that the Legislature did not create an exemption." Defs' Cross-Mot. at 4. But it is not Plaintiffs' obligation to prove that negative. It is *Defendants* who bear "a heavy burden of persuasion" to show that a later statute implicitly repealed an earlier one. *Amell v. United States*, 384 U.S. 158, 165 (1966). Defendants' argument embraces the age-old fallacy of the *probatio diabolica*.

A.R.S. § 35-751(B). Had the Legislature intended to create a similar exception when it passed Section 11-254.04, it knew how to do so. Many other sections of Title 11 create explicit exemptions to Section 11-256. [2]

For example, the Legislature could have easily 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. Defendants cannot enlist this Court to add it.

Defendants were required to comply with Section 11-256, they have not, and the Headquarters Lease (PSOF, Ex. 1) should therefore be declared unlawful and Defendants should be enjoined from performing the Lease unless they comply with that law.

II. There is no conflict between the Section 11-256 safeguards and economic development.

Putting aside the rules of statutory construction, Defendants also raise a pragmatic argument, that enforcing the Section 11-256 safeguards would "obstruct" economic development by "requiring leases to be awarded based on the amount of rent alone." Defs.' Cross-Mot. at 7. But Section 11-256 requires no such thing.

Plaintiffs pointed out previously that applying the Section 11-256 safeguards is perfectly compatible with economic development leases. Pls.' Mot. for Summ. J. at 5; Pls.' Resp. to Mot. to Dismiss at 13. 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 also allows counties to set other lease terms, so they are free to accomplish their economic development goals. *See* A.R.S. § 11-256(C) ("Such land or building shall be leased … subject to such other terms and conditions

[2] *See* A.R.S. § 11-256.01(A) ("Notwithstanding § 11-256"); A.R.S. § 11-256.02 ("Notwithstanding any other statute"); A.R.S. § 11-251.10(A) (County may "provide affordable housing *without holding a public auction* and for less than the fair market value *as required by § 11-256.*"); A.R.S. § 11-1435(B) (Community Health Systems agreements "*are exempt from ... § 11-256* … .") (all emphasis added).

as the board may prescribe."). If the County has some rational reason for leasing a property to only aerospace, defense, and technology businesses, Section 11-256 allows the County to do that. *Id*. Defendants admit that Pima County did just that when it *complied* with Section 11-256 in an earlier economic development lease. Defs.' Cross-Mot. at 8. It is therefore simply false that applying Section 11-256 would "obstruct [the] obvious purpose," *id*. at 4, of the economic development powers granted in Section 11-254.04. Section 11-256 also allows Defendants to lease property at a 10% discount, and it does nothing to inhibit other kinds of economic development, including improving County infrastructure and police services, to draw local investment without violating the law.

What Section 11-256 prohibits 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 be willing to 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 Defendants point out, Section 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; Defs.' Cross-Mot. at 8. But Defendants have argued that none of these protections apply to them, so that taxpayers have no protections against Defendants' political 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). Defendants should not be allowed to ignore taxpayer protections when they find it convenient.

III. Conclusion.

Given this Court's ruling that A.R.S. § 11–256's appraisal, public auction, and minimum price requirements do apply, and Defendants' admission that "the County entered into a Lease-Purchase Agreement with World View without following the procedures in A.R.S. § 11-256," Defs.' Cross-Mot.

at 2, Plaintiffs are entitled to summary judgment on Count Two of their complaint. The Headquarters Lease (PSOF, Ex. 1) should be declared unlawful and Defendants should be enjoined from performing the Lease unless and until they comply with A.R.S. § 11–256.

DATED: December 1, 2016

Respectfully submitted,

/s/ James Manley
James Manley (031820)
Veronica Thorson (030292)
Attorneys for Plaintiffs

E-FILED this 1st day of
December, 2016 with:

Pima County Clerk of the Superior Court
110 W. Congress St.
Tucson, AZ 85701

COPY E-SERVED this 1st day of
December, 2016 to:

Regina L. Nassen
Andrew Flagg
Pima County Attorney's Office
32 North Stone Avenue, 21st Floor
Tucson, Arizona 85701
Regina.nassen@pcao.pima.gov
Andrew.Flagg@pcao.pima.gov
Attorneys for Defendants

/s/ Kris Schlott
Kris Schlott