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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. CATHERINE M WOODS

CASE NO. C20161761

DATE: February 2, 2017

RICHARD RODGERS, ET AL.
Plaintiff,

vs.

CHARLES H HUCKLEBERRY, ET AL.
Defendant(s)

RULING

IN CHAMBERS RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Pending before the Court is Plaintiffs' Motion and Defendants' Cross-Motion for Partial Summary Judgment on Count Two of Plaintiffs' Complaint. The Court has carefully reviewed and considered the Cross-Motions and the related Responses and Replies, and the Separate Statements of Facts. For reasons stated more specifically below, the Court finds that there exists no genuine dispute as to any material fact related to Count Two of Plaintiffs' Complaint, and Plaintiffs are entitled to partial summary judgment as a matter of law. The Plaintiffs' Motion for Partial Summary Judgment is GRANTED and Defendants' Cross Motion for Partial Summary Judgment is DENIED.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Non-party World View Enterprises, Inc. ("World View") is a private, for-profit corporation that plans to conduct "near-space exploration," utilizing high altitude balloon technology for purposes of space tourism, other commercial applications, and scientific research. On January 19 and February 9, 2016, Pima County and World View entered a "Lease-Purchase Agreement," through which Pima County agreed to design and construct World View's 135,000 square-foot headquarters on a 12-acre parcel of land owned by Pima County, at a cost not to exceed $14.5 million. Pima County also agreed to design and construct World View's 700-foot diameter balloon pad on a 16-acre parcel of land owned by Pima County, at a cost not to exceed $1.5 million. The Lease-Purchase Agreement commits to lease the headquarters to World View for a term of twenty years. Subject to World View's purchase option, Pima County will own the headquarters. Provided that World View

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has fully performed its obligations under the lease, World View's purchase option allows it to purchase the headquarters from Pima County for a sum to be determined based upon the timing of the purchase.

Defendants did not obtain an appraisal of the land or building, publish notice of the proposed lease, set a minimum price, and/or hold a public auction prior to entering the Lease-Purchase Agreement with World View. Plaintiffs contend that this transaction was subject to the mandatory appraisal, public auction, and minimum price requirements established by A.R.S. § 11-256. Plaintiffs further contend that due to Defendants' failure to meet those requirements, the Court should declare the lease invalid and enjoin Defendants' performance under the lease unless and until they comply with § 11-256. Defendants contend that because they entered the lease for purposes of economic development, they were exempted from the requirements of § 11-256. They rely primarily upon A.R.S. § 11-254.04 and *Johnson v. Mohave County*, 206 Ariz. 330, 333, ¶ 12, 78 P.3d 1051, 1054 (App. 2003), in support of their position.

FINDINGS AND CONCLUSIONS OF LAW

The county, in its contracts, "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 County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 420, 586 P.2d 978, 981 (1978). A county's failure to comply with statutory requirements precludes enforcement of the contract. *Id.* The county board of supervisors may exercise powers granted by statute, but must do so in the manner specified by statute. *Id.* Acts by the board of supervisors outside of their statutory authority have been recognized as "without jurisdiction and wholly void." *Id.*

With certain conditions and limitations, the Arizona legislature has authorized counties to lease or sublease to others any land or building that it owns or controls. *See* § 11-256(A). However, for any land or building valued in excess of $5,000, prior to such lease "an experienced appraiser shall be appointed to determine the rental valuation of [the] land or building." *See* § 11-256(B). The land or building "shall be leased … at a public auction to the highest responsible bidder, provided that the amount of the bid is at least ninety per cent of the rental valuation as determined by the appraiser … ." *See* § 11-256(C). In addition, notice of the proposed lease "shall be given by publication, once a week for four consecutive weeks, in a newspaper of general circulation in the county … [and] shall state the period and all material conditions of the proposed lease," as well as the day on which the auction will be held. *See* § 11-256(D).

The Arizona legislature also has authorized counties to appropriate and spend public monies "for and in connection with economic development activities." See § 11-254.04(A). "Economic development activities"

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means "any project, assistance, undertaking, program or study, … including acquisition, improvement, leasing or conveyance of real or personal property or other activity, that the board of supervisors has found and determined will assist in the creation or retention of jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the county." *See* § 12-254.04(C).

Arizona's Courts have long recognized that the purpose of a competitive bidding statute is to "prevent favoritism, fraud, and public waste by encouraging free and full competition." *Mohave County*, 120 Ariz. at 420, 586 P.2d at 981. *See also Johnson v. Mohave County*, 206 Ariz. 330, 333, ¶ 12, 78 P.3d 1051, 1054 (App. 2003). Since first adopting a competitive bidding requirement in 1939, the legislature over the years has specifically created exemptions to the bidding requirements for government property to be used for certain specified purposes. For example, the legislature specifically exempted the public auction and publication requirements for leases to people and entities that owned, leased, or otherwise possessed the property immediately before the county purchased or acquired it. *See* § 11-256(E). It also specifically exempted the public auction, publication, and minimum bid requirements for property dedicated to certain specified uses, such as affordable housing for persons and families of low income, and hospitals for counties of small population. *See* §§ 11-251.10, 12-256.01, 12-256.02. It further specifically exempted the public auction requirement for land leased to another governmental entity for a non-park purpose. *See* § 12-256.01. It also specifically exempted certain community health system agreements and industrial development projects from the competitive bidding requirements. *See* §§ 11-1435(B) and 35-751(B). In contrast, in enacting § 11-254.04, the legislature did not specifically exempt leases entered for purposes of economic development from the requirements of § 11-256.

In this case, it is undisputed that the value of the land or building exceeds $5,000 and that World View previously had not owned, leased, or otherwise possessed the land or building. World View is a private for-profit entity that does not fall within any of the exemptions created by §§ 11-256(E), 11-251.10, 11-251.01, 11-251.02, 11-1435, or 35-751. The sole legal question before the Court is whether § 11-254.04 impliedly exempts the county from the mandatory appraisal, auction and publication requirements of § 11-256.

In interpreting a statute, the Court's primary goal is to ascertain and give effect to legislative intent. *Mercy Healthcare Arizona, Inc. v. Arizona Health Care Cost Containment System*, 181 Ariz. 95, 98, 887 P.2d 625, 628 (App. 1994). "We look primarily to the language of the statute … and statutory language controls our interpretation when the language is clear and unequivocal. *Id.* A statute should be construed so that no part is rendered redundant or meaningless. *State v. Eddington*, 228 Ariz. 361, 363, ¶ 9, 266 P.3d 1057, 1059 (2011).

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When construing two statutes, the Court should read them in such a way as to harmonize and give effect to all of the provisions involved. *State v. Bowsher*, 225 Ariz. 586, 589, ¶ 14, 242 P.3d 1055, 1058 (2010). Seemingly conflicting statutes must be interpreted to harmonize the apparent inconsistencies and give effect to both statutes. *Steer v. Eggleston*, 202 Ariz. 523, 527, ¶ 16, 47 P.3d 1161, 1165 (App. 2002). The Court should review the history of various statutes in order to ascertain legislative intent, and construe the statutes to further that intent. *State v. Thomason*, 162 Ariz. 363, 366, 783 P.2d 809, 812 (App. 1989). Unless the statute's language or effect clearly requires a conclusion that legislature must have intended it to supersede or impliedly repeal earlier statute, courts will not presume such intent. *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 839 P.2d 1093 (1992).

Here, the Court finds that the competitive safeguards of § 11-256 can be applied in harmony with the county's right to engage in economic development endeavors pursuant to § 11-254.04 without rendering any provision of either statute meaningless, and doing so will give effect to the provisions, purpose, and intent of both statutes. Giving effect to the purpose and intent behind § 11-254.04 and § 11-256, the Court finds that when the legislature authorized counties to enter leases with private for-profit entities for purposes of economic development through its enactment of § 11-254.04, it still intended to protect public resources from being used wastefully, or with fraud or favoritism. Requiring the county to comply with the § 11-256 appraisal, bidding and minimum price procedures when using public property for economic development ventures would further the goal of avoiding waste, fraud, and favoritism. Considering the recognized importance and long standing public policy of protecting public property from waste, fraud, or favoritism, it would seem that had the legislature intended to waive the § 11-256 requirements for a county's economic development efforts, it would have explicitly said so in § 11-254.04, just as it has done many times for other worthy public purposes.

This conclusion is supported by the legislative history of both statutes, and the fact that the legislature created specific exemptions to § 11-256 before and after it enacted § 11-254.04. The legislature adopted the precursor to § 11-256 in 1939. *See Johnson*, 206 Ariz. at 333, ¶ 12, 78 P.3d at 1054. That same legislature in 1939 also enacted § 11-932, which relaxed the competitive process for land to be used for public parks. *Id.* Between 1939 and 1994, the legislature specifically exempted from the competitive process certain industrial development projects, and land leased to county fair associations, non-profit corporations, and other governmental entities for non-park purposes. See §§ 35-751, 11-256.01, and 11-256.02. In 1994, the legislature enacted § 11-254.04. Through § 11-254.04, it expanded counties' economic development authority, and granted counties the authority to enter leases for economic development. After 1994, the legislature created

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additional specific exemptions to the public bidding and competitive process for projects dedicated to affordable housing for low income people and families, and certain community health system agreements. *See* §§ 11-1435 and 11-256.10. The fact that the legislature has not used similar specific exempting language in § 11-254.04 appears to be a strong indicator of legislative intent to *not* exempt counties from following the competitive process of § 11-256 in their economic development leases.

Defendants cite *Johnson v. Mohave County, supra*, to support their claim that § 11-254.04 need not specifically exempt economic development leases from §11-256's requirements in order for an exemption to impliedly exist. However, *Johnson* is distinguishable from this case on its facts in that it involved the lease of land used as a park. The Plaintiff, Johnson, sought to have the county's sublease of park land to the City of Lake Havasu declared unenforceable and to prevent the county from performing under the sublease due to its failure to comply with the public auction or unanimous consent provisions of § 11-251(9) and/or § 11-256. After reviewing the legislative history of the relevant statutes, the *Johnson* Court made particular note that in the same year the legislature enacted the public bidding requirements in what is the predecessor to § 11-256, the legislature also enacted the predecessor to § 11-932 which authorizes park agreements without imposing the public auction requirement. *Id*. at ¶ 12. Construing the relevant statutes together and giving particular weight to the fact the same legislature in the same year enacted both laws, the Court in *Johnson* concluded that the legislature in 1939 intended to exempt park leases from the public auction requirement because it intended to promote and facilitate the development of public parks. *Id*. at ¶ 15.

In contrast, in this case, the legislature enacted § 11-254.04 several decades after § 11-256 and its predecessor. The Court has seen nothing in the statutory language, the case law, or legislative history of § 11-254.04 to indicate that the legislature intended to exempt leases entered in the name of economic development from the appraisal, notice, bid, and auction requirements of §11-256. It is far from clear that the legislature would put a county's general economic development efforts with private for-profit entities on the same par as developing affordable housing for low income residents, or providing community hospitals for counties of small population.

Defendants raise a valid concern that § 11-256 may impede or obstruct economic development. While § 11-256 mandates an appraisal, notice, minimum bid, and auction, these requirements do not prevent the county from pursuing economic development. Under the facts of this case, if the county deemed the property would be limited to a specific use, and its occupant was required to abide by certain conditions and restrictions due to the needs and requirements of neighboring Raytheon and Tucson International Airport, and if in the name of

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economic development the county intended to lease the property to an entity in the field of high-tech aviation and aerospace, nothing in § 11-256 prevents the county from making all of those terms and conditions part of a qualified bid by a responsible bidder. In fact, § 11-256 explicitly allows the county to prescribe the terms and conditions upon which any land or building under its ownership or control will be leased. *See* § 11-256(C), (D). Further, Defendants have failed to explain how or why an appraisal of the land or building by an experienced appraiser would interfere with economic development. Generally speaking, while the minimum bid, notice, and auction procedures in some instances could limit a county's economic development efforts, it would be for the legislature to address these concerns through new legislation. The Court will not overstep its judicial role to "usurp the Legislature's prerogative … on matters within its exclusive domain." *See Bowsher*, 225 Ariz. at 588, ¶ 11, 242 P.3d at 1057.

If Defendants are correct that the legislature impliedly intended to exempt economic development leases from § 11-256, or if the legislature in the future develops that intent, it most certainly can and likely will amend the appropriate statutes to specify the exemption. As Defendants recognize in their Reply, following the decision rendered in *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 839 P.2d 1093 (1992) (in which the Court declined to interpret certain work performed under a §9-500.05 development agreement as impliedly exempt from Title 34's public bidding requirement), the legislature did amend § 34-201, a public bidding statute, to specify its intent.

Defendants also contend that a failure to exempt § 11-254.04 from the requirements of § 11-256 creates a redundant authorization for the county to lease property within its ownership and control. If there is a redundancy, it is slight, and is significantly outweighed by the many other applicable principles of statutory construction. When the legislature enacted A.R.S. § 11-254.04, it vastly increased counties' authority to engage in economic development activities. Most notably it removed the annual $1,500,000 cap and removed the requirement that contributions could be given only to governmental agencies or to nonprofit corporations. Additionally, the legislature through § 11-254.04 broadly authorized counties to engage in essentially any activity that its board of supervisors determines "will assist in the creation or retention of jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the county." It includes the authority, among many other things, to lease and convey county-owned land and buildings to others.

It is clear that with § 11-254.04, the legislature intended to give counties more options and greater ability to pursue and accomplish economic development than they previously enjoyed pursuant to § 11-254. In enacting A.R.S. § 11-254.04, the legislature did not place any restrictions on the board's use of its new power

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beyond the required finding that the use, expenditure, or activity would assist in retaining or creating jobs, or otherwise would enhance the economic welfare of county residents. Considering the lack of restrictions contained within § 11-254.04, it is reasonable to read the statute as being subject to other statutes that place restrictions or procedures that relate to how the county acquires, improves, leases, and conveys real and personal property, as well as any statute that might govern any "other activity." This includes the restrictions and procedures outlined in § 11-256. Giving meaning to all provisions of both statutes, and giving due weight to the purpose and intent behind both statutes, in this Court's view, compels the conclusion that the legislature did not impliedly intend to exempt counties from § 11-256 in its leases with private for-profit entities, even when done for economic development. Applying and enforcing the requirements of § 11-256 to the county's lease of land and buildings, even when done for economic development, will honor the legislature's intent to allow economic development and at the same time guard against favoritism, fraud, and public waste. The Court is not persuaded that the Gift Clause (Ariz. Const. art. 9, § 7), or the statutory prohibitions on conflicts of interest and open meeting laws provide the substantial equivalent of the protections afforded by § 11-256.

Based upon the foregoing, and good cause appearing,

IT IS ORDERED granting Plaintiffs' Motion for Partial Summary Judgment.

IT IS FURTHER ORDERED denying Defendants' Motion for partial summary judgment.

/s/
HON. CATHERINE WOODS
(ID: 771149fa-a690-451f-b9c7-d2a1f55b38e1)

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