**STATEMENT OF THE CITY OF AVON PARK’S AUTHORITY**

**TO LEASE THE AIRPORT**

**(PART 1G, AVON PARK-FAM AIPP APPLICATION)**

**City Law:** Article II, Division 3, Section 2-330 adopts the City’s procurement code into the City Code by Ordinance14-15. The *City Of Avon Park Purchasing Manual & Including Sale Or Transfer Of City-Owned Personal Property & Leases Of City-Owned Real Property,* section 10.30 (pg 34 of 39) requires that leases of City real estate for periods in excess of five (5) years must be by ordinance. Therefore, when the proposed Florida Airport Management, LLC (“FAM”) Lease document(s) are in final order for approval by the City Council, they must be attached to an ordinance approving such lease document(s) at two readings, including a public hearing for final reading.

**State Law:** Pursuant toFlorida State Constitution, section 2(b) Article VIII, the City of Avon Park has the general legal authority to sell, lease or otherwise dispose of Avon Park Municipal Airport under its “governmental, corporate, and proprietary powers to enable [it] to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.”

The constitutional authority was codified under §166.021 F.S., which states in relevant part:

(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

Section 161.021(4) F.S. (In relevant part).

While the home rule authority provided in Florida State Constitution, section 2(b) Article VIII is broad, in the context of long-term leases tantamount to public-private partnerships (“P3”) or privatization, it must be read to be also limited by Florida State Constitution, section 10 Article VII which states in relevant part:

SECTION 10. Pledging credit. —**Neither the state nor any** county, school district, **municipality**, special district, or agency of any of them, **1)** **shall become a joint owner with, or stockholder of, or 2) give, lend or use its taxing power or credit to aid any corporation, association, partnership or person** . . . .

Article VII, Section 10, Florida Constitution (In relevant part; numbering and other emphasis added).

Nonetheless, in *Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 8 So.3d 1076 (Fla. 2008) the Florida Supreme Court has determined that a “joint venture” or being a “partner” with a private corporation does not equate to being a prohibited “joint owner” with a private corporation and under Florida law a lease is a valid exercise of municipal powers. *Jackson-Shaw* at 1090. A concern would arise if the lease was deemed a “joint venture.” Although a long-term lease between a public entity and a private entity is not *per* se invalid (*Jackson-Shaw* at 1092) the question of whether a lease with a private entity amounts to “joint ownership” has much to do with the terms of the lease between the parties.

**No Joint Ownership**

The *Jackson-Shaw* court found that for the relationship to create a joint venture, five elements must all exist: “ (1) a community of interest in the performance of the common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits and (5) a duty to share in any losses which may be sustained.” *Jackson-Shaw* at 1089. The court went on to emphasize “[t]he absence of one of the elements precludes a finding of a joint venture.” *Id.*

In the proposed lease at hand, while some of the 5 elements are also questionable, it is absolute that the lease does not create a duty to share in the losses that may be sustained by FAM’s operation as required by element 5, thereby negating any argument of the lease creating a joint venture, and therefore, according to the Florida Supreme Court in *Jackson-Shaw*, also negating an argument of the City having joint ownership with FAM under the lease at hand. *Jackson-Shaw* at 1089. The City has scrupulously avoided any possible direct or indirect obligations to FAM creditors and has provided for an equitable unwinding without the City incurring FAM debt due to any FAM bankruptcy.

**Pledge of Credit**

The *Jackson-Shaw* court also looked at whether the government in that case had incurred financial obligations through the lease that might be interpreted as pledging credit. *Id.* The court then looked at “the relationship that arises under the lease.” *Jackson-Shaw* at 1093. The *Jackson-Shaw* court found that there is a bifurcated “Public Purpose Test” (*Jackson-Shaw* at 1095) for determining the amount of benefit to the private entity will create an unlawful pledge of credit: 1) if the government has “given, lent, or used its credit” for a project, the project “must serve a paramount public purpose and any benefits to a private party must be incidental”; or where there is no such giving, lending or using of the public entity’s credit, then the project need only have a “public purpose”. *Jackson-Shaw* at 1095, 1097 & 1098.

Under the draft lease between the City and FAM, the City is neither obligated to incur additional financial obligations, nor does the City intend to incur any additional financial obligations not already planned as part of its existing master plan, therefore the lease and its parts need only serve a public purpose, and a “paramount public purpose is inapplicable.

It should also be noted that the lending, giving or using of credit prohibited under the constitution refers to no “new” credit being pledged. *Jackson-Shaw* at 1095. Although Avon Park has several grants and bonds associated with the airport being leased, any new bonds would be limited to the improvement of the airport generally and not to improvements solely or uniquely benefiting FAM.

Additionally, there is no support for P3s that was absent in the area of airport projects until the Florida Legislature passed section 255.065 F.S. (2013), stating that they found that “there is a public need for the construction or upgrade of facilities that are used predominantly for public purposes and that it is in the public’s interest to provide for the construction or upgrade of such facilities”(§255.065(2) F.S.), and

It is the intent of the Legislature to encourage investment in the state by private entities; to facilitate various bond financing mechanisms, private capital, and other funding sources for the development and operation of qualifying projects, including expansion and acceleration of such financing to meet the public need; and to provide the greatest possible flexibility to public and private entities contracting for the provision of public services.

§255.065(2)(b) F.S.

This statute appears to be a codification of the common law aspects of Florida P3s in compliance with the state constitution which was not available to the Florida Supreme Court in *Jackson-Shaw* in 2008 but would have added additional emphasis to the validity of the relationship in *Jackson-Shaw* and does provide further legal buttressing to the validity of AIPP lease at hand*.* *See, Jackson-Shaw* at 1098& 1099 (discussing “lack of specific legislative authority for that airport authority” to lease unimproved property for non-airport uses now allowed under §255.065 F.S. for simple “public purpose” by providing citizens and taxpayers tax relief from new taxpayers). The City followed the framework of section 255.065 FS in its procurement of FAM as the potential long-term P3 lessee. (§255.065(3)F.S. The legislative findings under section 255.065(2)(a) F.S., closely relate to the purpose and intent of the City and FAM in negotiating the lease at hand.

**Conclusion**

The City Charter and code provide no impediment to the long-term lease of the airport to FAM, except that the approval by the City Council must be performed by an ordinance requiring two readings and 10 days published notice between the readings, and the second and final reading must be done through a public hearing.

The City has the state authority to enter into the long-term lease under constitutional and statutory home rule powers under Florida law so long as it does not violate constitutional prohibitions on engaging in joint ownership of a project with a private entity or pledging new credit on behalf of a private entity. The City has not engaged in joint ownership with FAM through the lease because the lease does not provide for the City to share any losses with FAM. The City has not promised to pledge any new credit on behalf of FAM, and the leasing by FAM of existing City airport assets paid through City credit meets the Public Purpose Test.