



To: Mayor and Commissioners

From: Craig E. Leen, City Attorney for the City of Coral Gables

A handwritten signature in blue ink, appearing to be "C. Leen", is written over the name of the City Attorney.

RE: Legal Opinion Regarding Chapters 175 and 185 Premium Tax Revenues

Date: July 5, 2016

Please note, I hereby adopt the attached legal memorandum from special counsel Jim Linn as a City Attorney Opinion pursuant to sections 2-201(e)(1) and (8) of the City Code. The opinion is well-reasoned and provides a helpful historical and legal perspective on Chapters 175 and 185 premium tax revenues, as well as “deemed to comply” status.

REPLY TO: TALLAHASSEE

MEMORANDUM

TO: Craig E. Leen, City Attorney
City of Coral Gables

FROM: Jim Linn and Glenn E. Thomas

DATE: June 17, 2016

SUBJECT: Overview and Brief History of Chapters 175 and 185, Florida Statutes

Overview

Chapters 175 and 185 establish a revenue sharing program whereby participating local governments can receive a portion of the state excise tax on property and casualty insurance premiums collected in their jurisdiction to fund pension benefits for firefighters and police officers. Chapter 175 was originally enacted in 1939 to provide an incentive – access to premium tax revenues – to Florida cities to encourage them to establish retirement plans for firefighters. Fourteen years later, in 1953, Chapter 185 was enacted to provide a similar funding mechanism for municipal police officers. Special fire control districts became eligible to participate under Chapter 175 in 1993. Both chapters provide for the establishment of defined benefit retirement plans for firefighters and police officers, and set standards for operation and funding of those plans.

Currently 351 police and firefighter pension plans in Florida receive premium tax revenues pursuant to Chapters 175 and 185, Florida Statutes. These plans had nearly \$12 billion in combined assets as of September 30, 2014. In 2015, more than \$147 million in premium tax revenues was distributed to local firefighter and police pension plans pursuant to Chapters 175 and 185.

Funding for police and firefighter pension plans established pursuant to Chapters 175 and 185 comes from four main sources:

1. Earnings on pension fund investments. Investment earnings are the largest source of funding for police and firefighter pension plans.

JACKSONVILLE

245 Riverside Ave., Suite 150
Jacksonville, Florida 32202
T: 904.353.6410
F: 904.353.7619

TALLAHASSEE

315 South Calhoun St., Suite 830
Tallahassee, Florida 32301
T: 850.222.5702
F: 850.224.9242

TAMPA BAY

101 Riverfront Blvd., Suite 620
Bradenton, Florida 34205
T: 941.708.4040
F: 941.708.4024

WEST PALM BEACH

515 North Flagler Dr., Suite 1500
West Palm Beach, Florida 33401
T: 561.640.0820
F: 561.640.8202

2. Premium tax – the net proceeds from the state excise tax on premiums paid for property insurance (for firefighter pensions) and casualty insurance (primarily automobile insurance, for police pensions), based on the taxes collected in each participating city and district.
3. Employee contributions – typically set in the plan as a fixed percentage of pay, generally ranging between 1% and 11% of employee compensation. Many plans provide for employer “pick-up” of employee contributions, which allows for contributions to be made in pre-tax dollars.
4. Employer contributions – by law, the local government plan sponsor is ultimately responsible for all pension plan assets and liabilities, and is required to fund employee pension plans on a sound actuarial basis. Art. X, Section 14, Fla. Constitution; Sec. 112.66(8), F.S. This means the local government must annually pay the difference between total required contributions as determined by an actuary, and the sum of all the other contributions. Employer contributions can vary widely from year to year based on investment performance, payroll changes, unanticipated retirements, inflation and changes in actuarial assumptions.

To qualify for premium tax revenues, local pension plans must meet the applicable requirements of Chapters 175 and 185. Responsibility for overseeing and monitoring these plans lies with the Division of Retirement, but day-to-day operational control rests with local boards of trustees.

There are two types of pension plans described in Chapters 175 and 185: “chapter plans” and “local law plans.” Chapter plans adopt or incorporate by reference the specific provisions of the chapters. Local law plans, on the other hand, meet certain minimum requirements in the law, but may vary significantly from the chapter plan requirements in numerous respects. Many local law plans provide benefits that, in the aggregate, substantially exceed the chapter minimums, but may not meet each and every minimum benefit or standard applicable to chapter plans. The overwhelming majority of police and fire pension plans in Florida are local law plans (there are currently more than 350 local law plans, compared to fewer than 17 chapter plans).

1986 Amendments and Subsequent Legal Challenges

In 1986 the Legislature completely revised Chapters 175 and 185, F.S., in Chapters 86-41 and 86-42, Laws of Florida. In revising both chapters, the Legislature attempted to clarify its intent to protect pension funds and to establish minimum standards for operation and funding of plans by adding a legislative declaration of intent in Sections 175.021 and 185.02:

Therefore, the Legislature declares that it is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of police officers as hereinafter defined, and intends, in implementing the provisions of s. 14, Art. X of the State Constitution as they relate to municipal police officers' retirement trust fund systems and plans, that such retirement systems or plans be managed, administered, operated, and funded in such manner as to maximize the protection of police officers' retirement trust funds. This chapter hereby establishes minimum standards

for the operation and funding of municipal police officers' retirement trust fund systems and plans.

Local governments challenged the constitutionality of the 1986 amendments. The First District Court of Appeal affirmed the trial courts' determination that the 1986 law did not violate the constitution, stating in relevant part:

Chapters 175 and 185 create a purely voluntary program whereby municipalities may receive state-collected taxes, imposed on property and casualty insurance premiums, with which to fund retirement programs for local police and firefighters. In exchange for receipt of these funds, the Legislature has established certain criteria under which the funds must be operated and managed. The cities may opt into or out of such plans at their discretion. As the program is not mandatory as to any cities' participation, we find nothing that renders the amended statutes to be facially unconstitutional.

In November 1986, the Department of Insurance – the agency then charged with administering Chapters 175 and 185 – proposed a number of new rules to implement the statutes amended by the 1986 legislation. The rules essentially applied all the minimum requirements contained in Chapters 175 and 185 to both chapter plans and local law plans. The validity of these rules was also challenged by the Florida League of Cities and others. A hearing officer upheld the validity of all but two of the proposed rules.

On appeal, the hearing officer's ruling was reversed. Florida League of Cities v. Department of Insurance, 540 So.2d 850 (Fla. 1st DCA 1989), rev. denied, 545 So. 2d 1367 (Fla. 1989). The First District Court of Appeal reviewed each section of the statutes, and found that some sections were expressly applicable to all plans, while other sections were silent as to their applicability. The court concluded that

Had the Legislature intended that all minimum standards and procedures set forth in Chapter 175, including those silent as to local law plans, be applied to such local plans, it most assuredly would have expressly said so.

The First District Court of Appeal held that most of the proposed rules were invalid because the provisions in Chapters 175 and 185 governing chapter plans were not expressly applicable to local law plans, and thus did not preempt municipal home rule powers with respect to local law plans.

Enforcement Activity and Legislation after the League of Cities Case

In 1990 and 1991, the Department of Insurance withheld premium tax revenues from a number of cities because, in the Department's view, the cities' pension plans did not comply with various provisions of Chapters 175 and 185. These cases were eventually settled, and the Department continued to distribute premium tax funds to local law plans with the understanding that the disputed issues would be better resolved through rulemaking. Several rule workshops were held, but the Department did not initiate rulemaking.

In 1993, state oversight of local police and fire pension plans was transferred to the Division of Retirement. The Division withheld premium tax revenues from a number of local law plans in 1995, asserting the plans did not comply with various provisions of Chapters 175 and 185. Several cities challenged the Division's action through the administrative hearing process. The hearing officer ruled in favor of the cities, and directed the Division to release the premium tax monies and pay the cities' attorney's fees. The following year the Division of Retirement supported legislation developed by police and fire unions to rewrite Chapters 175 and 185.

State police and fire unions, with support from the Division of Retirement, pushed for the pension law rewrite in 1996 and 1997, and finally obtained passage of a bill in 1998. The 1998 legislation was vetoed by Governor Chiles, primarily because of internal inconsistencies in the bill. Despite continued heavy opposition from local governments, the bill was revised and passed early in the 1999 session, was signed by Governor Jeb Bush, and was codified as Chapter 99-1, Laws of Florida.

1999 Legislation

Chapter 99-1, Laws of Florida was the first bill signed by Governor Bush. The 132 page bill significantly amended Chapters 175 and 185. Prior to the 1999 law, cities were largely free to bargain with local police and fire unions, or provide for their non-unionized police and firefighters, the pension benefits that best fit the priorities and needs of the city and its police officers and firefighters. The 1999 law made virtually all provisions of Chapters 175 and 185 expressly applicable to local law plans. The intent of the new law was clearly expressed in Sections 175.021(2) and 185.01(2) as follows:

This chapter hereby establishes, for all municipal and special district pension plans now or hereinafter provided for under this chapter, including chapter plans and local law plans, minimum benefits and minimum standards for the operation and funding of such plans, hereinafter referred to as firefighters' [police officers'] retirement trust funds. The minimum benefits and minimum standards set forth in this chapter may not be diminished by local charter, ordinance, or resolution or by special act of the Legislature, nor may the minimum benefits or minimum standards be reduced or offset by any other local, state, or federal plan that may include police officers in its operation, except as provided under s. 112.65.

The 1999 law required cities to comply with specific "minimum benefit" and "extra benefit" standards to be eligible for premium tax revenues. The new law also contained a number of new requirements for plan administration and funding. The law mandated compliance with the minimum and extra benefit requirements only to the extent of additional premium tax revenues received after 1998 (i.e., revenues in excess of the 1998 amount). Those cities found not to be in compliance with the new law would have future premium tax revenues withheld.

"Extra Benefits" – Chapter 99-1 also required that all premium tax revenues be used in their entirety to provide extra benefits to firefighters and police officers. "Extra benefits" were defined as benefits in addition to or greater than the statutory minimums and benefits provided to general employees. However, local law plans in effect on October 1, 1998 were required to comply with

the extra benefit provision only after the minimum benefit standards were satisfied, and then only to the extent that “subsequent additional premium tax revenues” became available.

As interpreted by the Division of Retirement, premium tax revenues in excess of the 1999 amount had to be used to provide extra benefits, regardless of whether the plan already provided substantial benefits above the statutory minimums and regardless of the financial condition of the plan.

Effects of the Great Recession of 2007-2010

For several years beginning in 2007, Florida cities and districts faced an extremely challenging combination of declining revenues and increasing costs. One of the largest and fastest growing costs facing local governments was the cost of employee pension plans. Florida law requires that public pension benefits must be funded on a sound actuarial basis. Employers generally must contribute an amount determined by the plan’s actuary, based on the following:

- The value of promised benefits
- Allocated over 30 years
- Actuarial assumptions (salary increase, rate of return, mortality, etc.)

Because the majority of pension funding is assumed to come from investment earnings as opposed to contributions, one of the most important assumptions is the rate of return on the investment of plan assets. Before the recession, most public pension plans assumed a rate of return of 8.0% or more. If this assumption was not met, actuarial losses usually resulted, leading to an increase in unfunded actuarial liabilities and increased contributions. Because the level of employee contributions is fixed, employer contributions must necessarily increase.

Most public pension plans had investment losses of between 10% and 15% for the year ending 9/30/08, and had modest investment gains for the year ending 9/30/09. Actuaries typically employ a five-year “smoothing” technique to soften the effects of significant actuarial losses resulting from investment shortfalls. Because of the smoothing, most plans had to achieve an investment return of 11% or 12% for each of the five years following 2008 to avoid further actuarial losses. This did not happen for most plans, and significant increases in unfunded liability and employer contributions ensued.

Plan sponsors looking for ways to reduce pension costs started to understand one of the main problems with Chapters 175 and 185. Because of the restrictive nature of Chapters 175 and 185, it was difficult, if not impossible, to enact any cost-saving measures even when agreed to by the unions. Many of the most obvious methods of reducing pension costs were nearly impossible to implement. For instance, the only way to increase employee contributions was to do so with approval of the union and in conjunction with a benefit increase. As a result, employers were unable to share the burden of increasing pension costs with their employees.

Moreover, plan sponsors could not access premium tax revenues over the frozen amount or “excess premium tax reserves” to reduce the cost of benefits (even costs associated with previously implemented “extra benefits”) without implementing even more extra benefits, which would result in even more additional costs to be borne by the plan sponsor. And if a local government attempted to reduce any pension benefit below what was in place in 1999, or join the Florida Retirement System, it would become ineligible for all future premium tax revenues.

2012 “Naples Letter”

In 2012 the City of Naples implemented pension reform for its police officers. The police union agreed to the pension reform effort. As part of the reform, pension benefits were reduced prospectively to below the 1999 level. The Division of Retirement informed the city that as a result of the benefit reductions it would no longer be eligible for Chapter 175 and 185 premium tax revenues – more than \$500,000 per year. Naples Mayor John Sorey wrote a letter to Governor Scott questioning the Division of Retirement’s interpretation.

In August 2012 the Florida Division of Retirement issued a letter to the City of Naples concerning the City’s eligibility for future premium tax revenues under Chapter 185. The Naples letter reflected a significant change in the Division’s longstanding position concerning a city’s eligibility to receive premium tax revenues. The Division had taken the position for many years that if a city reduced any pension benefit below the statutory minimum benefits or below the plan benefits in effect in 1999, the city would be ineligible for future premium tax revenues. In the Naples letter, the Division of Retirement acknowledged that its prior interpretation “appears inaccurate.” The letter stated that for local law plans in effect on October 1, 1998, chapter minimum benefits must be provided only to the extent they can be funded with premium tax revenues in excess of the amount received for 1997. Once there are sufficient additional premium taxes to fund the chapter minimum benefits, any subsequent additional premium tax revenues must be used to provide extra benefits. In essence, the new interpretation allowed cities to provide benefits below the chapter minimums and below the benefits in effect in 1999, if there are insufficient additional tax revenues to fund extra benefits.

The Naples letter resulted in many cities implementing pension reform measures that would not have been possible under the Division of Retirement’s prior interpretation. Police and firefighter unions immediately embarked on a campaign to revise Chapters 175 and 185, to nullify the Naples letter.

2015 Legislative Changes

After unsuccessful attempts to enact legislation amending Chapters 175 and 185 in 2013 and 2014, police and firefighter unions achieved their goal in 2015 with the enactment of Senate Bill 172. SB 172 contained completely new rules for the use of premium tax revenues, as well as an option for deviation from the rules by mutual consent of the city/special district and the union representing the affected employees (or a majority of plan members if there is no union). The revisions in SB 172 marked the most significant changes to Chapters 175 and 185 since 1999.

Premium Tax Revenues – Default Rules: SB 172 established new default rules for the use of premium tax revenues. These rules governed the manner in which all premium tax revenues were to be allocated. Effective October 1, 2015 for plans where collective bargaining does not apply, or upon entering into a collective bargaining agreement on or after July 1, 2015 where collective bargaining does apply, premium tax revenues were to be applied as follows:

- “Base premium tax revenues” means, for plans in effect on October 1, 2003, the amount received for calendar year 2002 and distributed in 2003. For plans created between October 1, 2003 and March 15, 2015, base premium tax revenues means the tax

collections during the second year of participation. Base premium tax revenues must be used to fund the chapter minimum benefits (same as current minimums except the minimum multiplier is increased from 2.0% to 2.75%), or benefits in excess of the minimums, as determined by the city or special district. In other words, base premium tax revenues may be used to reduce city/district pension contributions.

- Premium tax revenues above the 2002 amount up to the amount received for calendar year 2012 (distributed in 2013) must be used to fund benefits in excess of the minimum benefits. In most cases, the amount of premium tax revenues received in 2013 may be used to reduce city/district pension contributions (subject to confirmation by the plan actuary that the value of benefits provided above the statutory minimums exceeds the difference between the 2003 and 2013 amounts).
- Premium tax revenues above the 2012 amount: 50% must be used to fund minimum benefits or benefits in excess of the minimums as determined by the city or special district (i.e., reduce city/district contributions); and 50% must be placed in a defined contribution “share plan” to provide additional benefits to police officers and firefighters.
- Any accumulations of premium tax revenues that have not been applied to fund benefits in excess of the minimum benefits (i.e., excess reserve amount): 50% must be used to fund the share plan, and 50% must be applied to reduce the unfunded actuarial liabilities of the plan. Any amount in excess of the amount required to fund unfunded actuarial liabilities must be used to fund special benefits.
- For pension plans created after March 1, 2015, 50% of the premium tax revenues must be used to fund defined benefits, and 50% must be used to fund defined contribution benefits.

Deviation from the Default Rules by Mutual Consent – The above default rules may be modified by mutual consent of the city/special district and the union representing the affected employees (or a majority of plan members if there is no union) as long as the plan continues to meet the minimum benefits and standards of Chapters 175 and 185. A mutually agreed deviation could include the use of future premium tax revenues, as well as accumulations of past premium tax revenues that have not been applied to fund benefits in excess of the minimum benefits. A mutually agreed deviation could be made if a plan did not meet the minimum benefits as of October 1, 2012, as long as the same level of minimum benefits is maintained. An existing arrangement for the use of premium tax revenues in a special act plan or a plan in a “supplemental plan municipality” (defined as a city with a supplemental plan in place as of December 1, 2000) is considered to be a mutually agreed deviation. A mutually agreed deviation must continue until modified or revoked by subsequent mutual consent.

Benefit Reduction – benefits in excess of the minimum benefits (excluding any supplemental plan benefits in effect on September 30, 2014) may be reduced as long as the plan continues to meet the minimum benefits and standards in Chapters 175 and 185. However, if benefits are reduced the amount of premium tax revenues that were previously used to fund the benefits in excess of the minimums before the reduction must be used as follows: 50% to fund minimum benefits or benefits in excess of the minimums as determined by the city or special district; and

50% must be placed in a defined contribution plan. However, no benefits can be reduced if the plan does not meet the new 2.75% minimum multiplier before the reduction.

Grandfather Clause – Prior to 2015, many cities and special districts obtained an opinion letter from the Division of Retirement concerning the use of premium tax revenues to fund minimum benefits. Those cities relied on this interpretation (referred to commonly as the “Naples letter,” after the first city to receive it) in plan funding and restructuring of plan benefits. As a result, SB 172 provides that a city or special district that implemented or proposed changes to a local law pension plan based on the Division of Retirement’s interpretation of Chapters 175 and 185 (the Naples Letter) on or after August 14, 2012 and before March 3, 2015, may continue such changes in effect until the earlier of October 1, 2018 or the effective date of a collective bargaining agreement that modifies the changes. The city or special district’s reliance on the Division of Retirement’s interpretation would have to be evidenced by a letter from the Division, or a collective bargaining agreement or proposal dated before March 3, 2015.

Defined Contribution “Share Plan” – Cities and special districts with a Chapter 175 or 185 defined benefit pension plan must also establish a defined contribution “share plan” component effective October 1, 2015 for non-collectively bargained plans, or upon entering into a collective bargaining agreement on or after July 1, 2015. The share plan may or may not receive any funding, depending on the application of other provisions in the bill relating to the use of premium tax revenues.

Effect of “Deemed to Comply” Status

Although generally to be eligible to receive an annual distribution of premium tax revenues, the city/district must comply with the minimum benefits and standards set forth in Chapters 175 and 185, sections 175.351(2) and 185.35(2) state: “Local law plans created by special act before May 27, 1939, are deemed to comply with this chapter.”

The Coral Gables retirement plan was created by special act before May 27, 1939, and has been determined by the Florida Division of Retirement to be “deemed to comply” with Chapters 175 and 185. In a letter dated October 25, 2013, Division of Retirement Assistant General Counsel Thomas Wright wrote that “the Division agrees that [the] Coral Gables pension fund ... meets the ‘deemed to comply’ criteria in Chapters 175 and 185, Florida Statutes.” As a result, the City is not strictly bound by the requirements of Chapters 175 and 185. For example, Chapters 175 and 185 contain the detailed requirements for the composition of pension boards that oversee police and firefighter pension plans. But based on the Coral Gables plan’s “deemed to comply” status, the Division concluded in 2013 that the composition of the City pension board could be changed in a manner not consistent with the Chapter 175 and 185 requirements without jeopardizing the City’s continued receipt of premium tax revenues.

Current Use of Chapter 175 and 185 Premium Tax Revenues Received by Coral Gables – Last year the City received more than \$1.4 million in Chapter 175 and 185 premium tax revenues (\$909,000 under Chapter 175 for firefighters, and \$534,000 under Chapter 185 for police officers). However, based on longstanding practice and an old interpretation of state law, only \$145,830 was used to offset the cost of police and firefighter retirement benefits. The balance – nearly \$1.3 million – went to police and firefighter “share plans” to provide additional benefits

on top of the benefits provided through the City retirement plan. Meanwhile, the City's required contribution to the City retirement plan for the current fiscal year is more than \$6.1 million (95.5% of payroll) for firefighters and more than \$7 million (69.8% of payroll) for police officers. The 2015 legislation retained the "deemed to comply" exception for plans created before May 27, 1939. Thus, the new rules for the use of Chapter 175 and 185 premium tax revenues do not apply to plans, like the Coral Gables retirement plan, that are "deemed to comply" with Chapters 175 and 185.

City's Ability to Change the Current Use of Premium Tax Revenues -- There are no reported cases concerning a local government's ability to make changes to a "deemed to comply" pension plan that are inconsistent with the requirements of Chapters 175 and 185. However, the Division of Retirement has recognized that pension plans in four cities satisfy the "deemed to comply" criteria: Miami, Miami Beach, Coral Gables and Jacksonville. In letters to each of these cities, the Division has approved plan changes that were inconsistent with the requirements of Chapters 175 and 185. In his June 29, 2012 letter confirming the "deemed to comply" status of the City of Jacksonville police and fire pension fund, Keith Brinkman, Bureau Chief of the Division of Retirement's Local retirement Plans Section, noted:

We agree that the provisions found in sections 175.351(2) and 185.35(2), Florida Statutes, which state that local law plans created by special legislative act before May 27, 1939 are deemed to comply with this chapter, appear to provide great deference to such plans.

Based on the Division's statement, it is reasonable to conclude that because the Coral Gables retirement plan is "deemed to comply" with Chapters 175 and 185, the provisions of sections 175.351 and 185.35 concerning the use of premium tax revenues, including the "mutual consent" requirement for deviations, do not apply. However, because the vast majority of premium tax dollars received by the City are now going to the police and fire share plans to provide an additional benefit for police officers and firefighters, any decrease in the amount of premium tax revenues going to the share plans would result in a reduction in share plan benefits. Such a reduction in benefits would be a mandatory subject of collective bargaining with the police and firefighter unions. Ultimately, in our opinion, the City could impose a change in the current use of premium tax revenues in accordance with the collective bargaining impasse resolution process in section 447.403, Florida Statutes.

From: [Leen, Craig](#)
To: [Paulk, Enga](#)
Cc: [Ramos, Miriam](#)
Subject: FW: Legal Memorandum Regarding Chapters 175 and 185 Premium Tax Revenues
Date: Tuesday, July 05, 2016 7:41:43 PM
Attachments: [Memo to C. Leen re History of Chapters 175 and 185 6.17.16 \(00672899xBA9D6\).pdf](#)
[image001.png](#)

Please publish.

Craig E. Leen, City Attorney

*Board Certified by the Florida Bar in
City, County and Local Government Law*
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
Phone: (305) 460-5218
Fax: (305) 460-5264
Email: cleen@coralgables.com



Celebrating 90 years of a dream realized.

From: Leen, Craig
Sent: Tuesday, July 05, 2016 7:41 PM
To: Commissioners
Cc: Swanson-Rivenbark, Cathy; Fernandez, Frank; Elejabarrieta, Raquel; Gomez, Diana; Ramos, Miriam; 'Jim Linn'; 'Denise Heekin'
Subject: RE: Legal Memorandum Regarding Chapters 175 and 185 Premium Tax Revenues

Mayor and Commissioners,

Please note, I hereby adopt the attached legal memorandum from special counsel Jim Linn as a City Attorney Opinion pursuant to sections 2-201(e)(1) and (8) of the City Code. The opinion is well-reasoned and provides a helpful historical and legal perspective on Chapters 175 and 185 premium tax revenue, as well as “deemed to comply” status.

Please do not reply to all, and please call with any questions.

Craig E. Leen, City Attorney

*Board Certified by the Florida Bar in
City, County and Local Government Law*

City of Coral Gables

405 Biltmore Way

Coral Gables, Florida 33134

Phone: (305) 460-5218

Fax: (305) 460-5264

Email: cleen@coralgables.com



Celebrating 90 years of a dream realized.

From: Leen, Craig

Sent: Monday, June 20, 2016 6:27 PM

To: Commissioners

Cc: Swanson-Rivenbark, Cathy; Fernandez, Frank; Elejabarrieta, Raquel; Gomez, Diana; Ramos, Miriam; 'Jim Linn'; 'Denise Heekin'

Subject: Legal Memorandum Regarding Chapters 175 and 185 Premium Tax Revenues

Mayor and Commissioners,

Attached is a legal memorandum from special counsel Jim Linn regarding the history of Chapters 175 and 185 premium tax revenues, as well as the authority of the Coral Gables City Commission based on its "deemed to comply" status with regards to Chapters 175 and 185 premium tax revenues.

Please do not reply to all, and please call with any questions.

Craig E. Leen, City Attorney

*Board Certified by the Florida Bar in
City, County and Local Government Law*

City of Coral Gables

405 Biltmore Way

Coral Gables, Florida 33134

Phone: (305) 460-5218

Fax: (305) 460-5264

Email: cleen@coralgables.com



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