

ITEM FOR FINANCE COMMITTEE

HEAD 139 – GOVERNMENT SECRETARIAT: FOOD AND HEALTH BUREAU (FOOD BRANCH)

Subhead 000 Operational expenses

Members are invited to approve a remuneration package for the Chairperson, Deputy Chairpersons, presiding officers and non-official members of the Private Columbaria Appeal Board appointed under the Private Columbaria Ordinance (Cap. 630).

PROBLEM

The Food and Health Bureau (FHB) needs to remunerate the Chairperson, Deputy Chairpersons, presiding officers and other non-official members of the Private Columbaria Appeal Board (PCAB) with effect from the date of appointment on 29 September 2017.

PROPOSAL

2. We propose to adopt the following remuneration package for the PCAB –

- (a) annual retainer at \$125,710 for the Chairperson;
- (b) annual retainer at \$83,810 for a Deputy Chairperson;
- (c) attendance fee of \$6,460 per attendance for the presiding officer of an appeal hearing;
- (d) \$12,900 for the writing of a decision by the presiding officer of an appeal hearing; and

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- (e) attendance fee of \$975 per attendance per non-official member not serving as presiding officer of an appeal hearing.

JUSTIFICATION

Regulation on Private Columbaria

3. The Private Columbaria Ordinance (Cap. 630) (the Ordinance) has come into operation since 30 June 2017 upon gazettal to regulate the operation of private columbaria through a licensing scheme. A specified instrument (i.e. a licence, an exemption or a temporary suspension of liability (TSOL)) must be obtained for operating a private columbarium, except during the grace period as applicable. Without a licence, a private columbarium will not be allowed to sell or let out new niches. From 30 December 2017, the Private Columbaria Licensing Board (PCLB) started to receive applications for specified instruments.

Encl. 1

4. The PCAB was established under section 83 of the Ordinance as an independent, quasi-judicial body to hear and determine an appeal lodged by an applicant or holder of a specified instrument aggrieved by a decision made on the licensing of private columbaria, an enforcement notice or an ash disposal plan. The membership list of the PCAB is at Enclosure 1.

Encl. 2

5. According to the appeal mechanism, an applicant or a holder of a specified instrument who is aggrieved by any of the relevant decisions (see Enclosure 2) made by the PCLB or by the Director of Food and Environmental Hygiene may lodge an appeal with the PCAB.

Remuneration to Government Boards and Committees

6. Generally speaking, non-official service on government boards and committees should be voluntary. However, according to the basic principles as laid down by the Finance Committee (FC) in 1980, an allowance might be considered to cover expenses (e.g. travel, out-of-pocket and related expenses) incurred by non-official members in connection with their duties.

7. A remuneration ceiling was also approved by the FC in 1980. In 1993, the then Secretary for the Treasury (SFST) was delegated with the authority to approve future revisions of the ceiling by reference to the movement in the Consumer Price Index. The prevailing ceiling is \$975 per member per attendance.

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The Proposed Remuneration Package

8. Having regard to the nature of work of the PCAB, we see a need to provide annual retainer fees higher than the prevailing ceiling discussed in paragraph 7 above for the Chairperson and the Deputy Chairpersons to serve as a recognition of their service to the PCAB, to offset their earnings forgone, albeit partially, and to help maintain continuity of their service for the PCAB; and fees for a presiding officer for presiding over appeal hearings and writing of a decision justifiable having regard to the demanding nature of the tasks and the expertise, time and efforts required of the presiding officer. Detailed justifications are set out in the ensuing paragraphs.

Complexity of issues involved

9. Under section 85(1) of the Ordinance, an Appeal Board constituted for hearing and determining an appeal consists of a presiding officer and four other panel members drawn from members of the PCAB in Enclosure 1. The presiding officer must be legally qualified (i.e. qualified for appointment as a District Judge). The Chairperson or a Deputy Chairperson will act as the presiding officer. Where the Chairperson and each Deputy Chairperson have a known direct or indirect interest in an appeal, a panel member who is legally qualified and who does not have a known direct or indirect interest in the appeal will act as the presiding officer.

10. According to sections 86(11) and (12) of the Ordinance, in determining an appeal, the Appeal Board may –

- (a) confirm, reverse or vary the decision appealed against;
- (b) substitute its own decision for the decision appealed against; or
- (c) make any other order that it thinks fit.

The decision of the Appeal Board on the appeal is final.

11. There are various unique and unprecedented challenges besetting the regulation of private columbaria and the work of the PCAB. The regulation of private columbaria involves complicated issues straddling different fields (e.g. planning, land, building, fire and other safety, traffic management and crowd control, environmental protection, Chinese traditions, religion, consumer protection) and sensitive issues involving various stakeholders (e.g. consumers, affected neighbours). At the request of the Bills Committee, the Government has undertaken to keep in view the implementation of the Ordinance, propose amendments to the Ordinance as and when necessary, and conduct a comprehensive review of the Ordinance in around three years after its enactment.

12. Columbarium operations involve substantial financial resources. The licensing regime is brand-new and the stake is high for operators. Given the nature of such business, columbarium operators would likely mount vigorous challenges against decisions of the Appeal Board not in their favour. Separately, the decisions of the Appeal Board are also open to legal challenges by other parties (such as affected residents or concern groups).

13. The Chairperson, Deputy Chairpersons and members of the PCAB shoulder heavy legal responsibilities. Common to the normal practice adopted by similar quasi-judicial bodies, if the Appeal Board decision is challenged in judicial review proceedings (with the Appeal Board being named as a respondent), a copy of the Appeal Board decision under challenge will have to be submitted to the Court for determining the judicial review application.

14. Amongst his or her various duties, the presiding officer is required to select panel members who do not have any known direct or indirect interest in the appeal, make decisions on various matters (ranging from consideration of preliminary issues and case management issues prior to an appeal hearing, conducting appeal proceedings, and giving directions in relation to the handling of the appeals) and ultimately write the decision (including giving reasons for the decision). These requirements call for considerable expertise and are very time-consuming.

15. Given the level of legal experience and expertise required of the presiding officer and the demanding nature of the appeal hearing, it would be appropriate to remunerate the presiding officer. We propose that the remuneration package for the presiding officer (including fees for presiding an appeal hearing and writing of a decision) should generally be on par with some similar statutory appeal boards which are also presided by persons who are legally qualified and are tasked to write decisions on appeal cases involving multiple fields including planning, land, building safety, environmental protection issues, etc.

Restrictions to members from engaging in matters relating to private columbaria

16. According to the internal guideline promulgated by the PCAB (details uploaded onto the PCAB website as early as 29 September 2017), members must not, in any capacity, engage in any activity that might undermine, or be reasonably thought to undermine, their independence and impartiality. Besides, they must not undertake any tasks or activities that may in any way limit their ability to discharge their duties of the PCAB to the full. As a general rule, they

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must not appear before the Appeal Board (i.e. not to act as an authorised representative in any appeal under the Ordinance). The above restrictions should apply to members during their term of appointment to the PCAB, and, if the panel members are Chairperson or Deputy Chairpersons, to another six months after expiry of appointment to the PCAB as well. Apart from retaining their legal expertise and serving as recognition of their service for the PCAB, the proposed remuneration, especially the annual retainer fees for Chairperson and Deputy Chairpersons, are intended to compensate for their earnings foregone, albeit partially.

Work involving the Chairperson and Deputy Chairpersons irrespective of appeal caseload

17. It is of fundamental importance that a sound system is in place for preventing and handling potential conflict of interests concerning panel members, with a view to commanding public trust and confidence that the appeals are determined independently, fairly and impartially. The Chairperson of the PCAB may make rules and determine practice or procedure of the Appeal Board pursuant to section 91 of the Ordinance.

18. The Chairperson, in consultation with the Deputy Chairpersons, has been working to lay down essential foundations for the operation of the PCAB, since their appointment in September 2017. Such work is required irrespective of the appeal caseload. On 29 September 2017, the PCAB made public its agreed internal guidelines on the declaration of interest requirements (<http://www.pcab.hk/en/doi.html>). On 29 December 2017, the PCAB made public the Rules on Practice and Procedure made by the Chairperson (http://www.pcab.hk/en/rules_procedure.html). As set out in paragraph 11 above, FHB will conduct a comprehensive review on the implementation of the Ordinance in about three years. The PCAB is expected to offer its views in the review process, which will further add to the workload of the members. The annual retainer fees for the Chairperson and Deputy Chairpersons could serve as a recognition of their contributions in terms of expertise, time and efforts.

Possible appeal caseload

19. The PCAB will be handling a wide range of cases, including refusal of an application for the issue of a specified instrument, decision to vary the conditions or impose new conditions, decision to serve enforcement notice, refusal of an application for the approval of an ash disposal plan, etc. (Enclosure 2). We anticipate a substantial number of appeals especially in the initial years of the PCAB's operation. Apart from the newly-emerged columbaria, there are

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numerous existing columbaria in operation before enactment. Based on a Notification Scheme^{Note} administered by the Food and Environmental Hygiene Department (FEHD) when the former Private Columbaria Bill was announced in June 2014, there remain currently as many as 130 private columbaria that have voluntarily joined the Notification Scheme. Subject to fulfilling the relevant requirements, they may apply for either a licence or an exemption or both, and on top of these applications, for a TSOL. As estimated by FEHD, the number of applications under the various possible categories could add up to as high as a few hundreds of applications in the first year. Depending on the caseload of refusal of applications, the caseload of appeals to the PCAB may be up to a hundred in the first three years.

20. Private columbaria which apply for a licence would need to comply with a series of requirements. A lot of private columbaria are not in compliance with the planning, land and building related requirements. For a columbarium located in a multi-storey building with a deed of mutual covenant, the application for a licence must be accompanied by a written legal advice confirming that there is no express restrictive covenant in the deed (prohibiting use of the premises as a columbarium, prohibiting commercial use of the premises, or permitting only private residential use of the premises). One should not under-estimate the difficulties in tackling multifarious issues during the licensing and appeal stages.

21. We will closely monitor the workload of the PCAB. In the event of an upsurge of appeal cases beyond a level that the current number of members can cope with, consideration will be given to increasing the number of members on the PCAB to expedite the processing of appeals.

22. Taking into account all the relevant considerations, a remuneration package for the PCAB is proposed with effect from the date of appointment on 29 September 2017. Future revisions to the rates by reference to the movement of the Consumer Price Index will be approved by SFST in accordance with the existing practice (paragraph 7).

FINANCIAL IMPLICATIONS

23. Assuming that fortnightly hearings are held for around 40 appeals that could be lined up within a year (with the Chairperson and the three Deputy Chairpersons each presiding a hearing every two months), the financial

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^{Note} Upon announcement of the former Private Columbaria Bill in June 2014, a Notification Scheme was launched administratively to invite columbarium operators to provide relevant particulars voluntarily, so as to provide the Licensing Board with some reference in assessing the pre-cut-off status (columbaria that were in operation and in which ashes were interred in niches, immediately before 8:00 a.m. on 18 June 2014) of applicants in future.

Encl. 3

implications for implementing the proposal are estimated at about \$1.1 million a year (see Enclosure 3). The actual amount of remuneration may vary depending on the number of appeal cases and the duration of appeal proceedings. Subject to FC's approval, FHB will absorb the financial requirements from within its resources.

PUBLIC CONSULTATION

24. We consulted the Panel on Food Safety and Environmental Hygiene about the proposed remuneration package on 12 December 2017. Members supported the submission of the proposal to the FC for approval. Panel Members requested the Administration to provide detailed information on the caseload of the PCAB in the initial licensing and appeal stage. Our estimate of possible caseload to the PCAB is set out in paragraphs 19 to 20 and paragraph 23 above.

BACKGROUND

25. There has been a proliferation of private columbaria in recent decades. Private columbaria, if properly regulated, could complement public columbaria and serve a useful role in terms of added supply and, more importantly, choice of niches and related services.

26. The Ordinance aims to ensure that private columbaria are operated in compliance with statutory and Government requirements, to enhance the protection of consumer interest, and to ensure that the mode of operation of the trade is sustainable.

Food and Health Bureau
March 2018

**Membership List of the Private Columbaria Appeal Board
(29.9.2017 - 28.9.2020)**

Chairperson

Mr. Ambrose HO, SBS, SC, JP

Deputy Chairpersons

Mr. Frederick CHAN Hing-fai
Mr. Kenneth KWOK Hing-wai, SBS, SC, JP
Dr. William WONG Ming-fung, SC

Members

Ms. Bonnie CHAN Jo-ying
Mrs. Pamela CHAN WONG Shui, BBS, JP
Dr. CHAU Chi-kwan
Sr CHIU Kam-kuen
Dr. Catherine CHONG Shiu-yin
Dr. CHOY Hung-tat
Mr. Ivan FU Chin-shing, JP
Mr. Nevin HO Chi-lok
Mr. Sunny HO Lap-kee, JP
Mr. Lincoln HUANG Ling-hang, JP
Sr Spencer KWAN Tin-che
Mr. Alex LAI Ting-hong
Miss Queenie Fiona LAU
Ir Ben LEUNG Chi-hung
Mr. Philip LEUNG Kwong-hon
Mr. Fred LI Wah-ming, SBS, JP
Mr. Thomas LO Sui-sing, JP
Mr. Timothy MA Kam-wah, JP
Mr. Aidan TAM Lon-foong
Sr TANG Chi-wang
Mr. Aaron WAN Chi-keung, BBS, JP
Sr WU Kam-fai
Miss Vivian YU Yuk-ying

**Decisions that are appealable to the Private Columbaria Appeal Board
(see extracts from section 84 of Cap. 630)**

(1) An applicant or a holder of a specified instrument who is aggrieved by any of the following decisions under this Ordinance may appeal to the Appeal Board –

- (a) a refusal under section 18 (whether or not as modified under section 19) or section 20 or 21 of an application for the issue of a specified instrument;
- (b) a refusal under section 40(1)(c) –
 - (i) to renew a licence or exemption; or
 - (ii) to extend a temporary suspension of liability;
- (c) a refusal under section 39(4) of an application for –
 - (i) the transfer of a licence or exemption; or
 - (ii) the transfer of a temporary suspension of liability together with one or both of the following –
 - (A) the related application for the issue of a licence;
 - (B) the related application for the issue of an exemption;
- (d) a decision under section 40(1)(a)(i) or (b) to revoke or suspend a specified instrument;
- (e) a decision under section 40(1)(a)(ii) to revoke or suspend an authorization under a licence;
- (f) a refusal of an application for permission for the purposes of section 53(1);

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- (g) a decision under section 39(6) or 40(1)(d) –
 - (i) to vary the conditions to which a specified instrument is subject;
or
 - (ii) to impose new conditions;
- (h) a refusal of an application made under section 41 to vary the conditions to which a specified instrument is subject;
- (i) a decision under section 42(1) to vary a particular or matter;
- (j) a refusal of an application made under section 43(1)(a) for the suspension of the operation of a decision under section 40(1) pending the determination of an appeal;
- (k) a decision under section 64 to serve an enforcement notice;
- (l) a refusal of an application for the issue of a certificate under section 80;
- (m) a refusal of an application made under section 18(2) of Schedule 5 for the approval of an ash disposal plan.

**Breakdown of Financial Implications on
the Remuneration Package for the Private Columbaria Appeal Board**

| | <u>Proposed Remunerations</u> | <u>Estimated cost per year</u> |
|-----|---|--------------------------------|
| (a) | Annual retainer for Chairperson (\$125,710) | \$125,710 |
| (b) | Annual retainer for Deputy Chairperson (\$83,810 x 3 persons) | \$251,430 |
| (c) | Attendance fee for presiding officer (\$6,460 per sitting x 2 hearings x 12 months) | \$155,040 |
| (d) | Decision-writing fee for presiding officer (\$12,900 per decision x 40 decisions) | \$516,000 |
| (e) | Hearing attendance fee for non-official members not serving as presiding officer (\$975 per attendance x 4 members x 2 hearings x 12 months) | \$93,600 |
| | | \$1,141,780 |
| | Say | \$1,100,000 |

Assumption: Fortnightly hearings are held
