

**Follow-up to the Meeting of the Bills Committee
on Private Columbaria Bill on 15 December 2014**

**Issues Raised by Members and
Responses Made by the Administration**

Purpose

This paper provides supplementary information sought by Members at the Bills Committee meeting on 15 December 2014 on the planning-related and land-related issues in respect of private columbarium operations prior to the expiry of their land leases.

Issue

2. Most if not all patrons of private columbaria are seeking a service (i.e. interment of ashes) that is long-term in nature. In respect of private columbaria that are licensed after the Private Columbaria Ordinance (the Ordinance) has come into operation, some Members observe that unscrupulous operators, after pocketing the proceeds received from selling their niches, might seek to apply for change in zoning and / or lease modification for purposes other than columbarium operations during the term of the licence or of the respective land lease. That might frustrate the continued use of the licensed premises for columbarium purposes. Members are concerned that such changes could proceed without the knowledge of the stakeholders, thus adversely affecting the interests of the patrons.

The Administration's Response

3. Under the existing town planning and land administration mechanisms, safeguards are in place. It is not conceivable that changes in zoning / lease modification / land resumption could have proceeded without the knowledge of the stakeholders, whether or not the changes are initiated by the private columbarium operators themselves or other parties. These safeguards are outlined in paragraphs 5 to 14 below.

4. In devising the provisions under the Private Columbaria Bill (the Bill), we have also taken great care to enhance transparency, for the purpose

of protecting consumer interest. These provisions are set out in paragraphs 15 to 24 below. For instance, the Bill requires private columbarium operators to insert the prescribed information, recommendations and essential terms into the agreement for sale of interment right (the Agreement) for it to be enforceable by the seller.

(A) Town Planning and Land Administration Mechanisms

(1) Town Planning Mechanism

5. Town planning is an ongoing process. The land use zonings of sites on statutory plans may be subject to review from time to time if so required to cater for changing planning circumstances and development needs of society, with a view to promoting health, safety, convenience and general welfare of the community.

6. Under the Town Planning Ordinance (Cap. 131) (TPO), any developments must conform to the requirements of the relevant statutory plans¹. Applicants making planning applications under section 16 of the TPO and rezoning applications under section 12A of the TPO must comply with the statutory procedural requirements under the TPO. The public will be consulted in respect of such applications as provided for under the provisions of the TPO. Members of the public may present their comments to the Town Planning Board (TPB) in respect of the applications. In considering the applications, the TPB will take into account all relevant planning considerations, including location of the site under the application, land use compatibility, traffic, visual, landscape, drainage and environmental impacts, views from relevant Government departments as well as any comments received in respect of the applications.

¹ Where a site is intended to be developed for a certain use –

- (a) if the use is listed under column 1 in the Notes of the relevant zoning or specified in the covering Notes of the statutory plan, it is permitted as of right and planning permission from the TPB is not required;
- (b) if the use is listed under column 2 in the Notes of the relevant zoning, planning permission from the TPB under section 16 of the TPO should be obtained; and
- (c) if the use is not included under column 1 or column 2 in the Notes of the relevant zoning, a rezoning application may be submitted to the TPB for consideration under section 12A of the TPO. If the TPB agrees to the proposal, the proposed amendment will be incorporated into a draft plan for exhibition in the normal plan-making process.

7. Similarly, amendments to a statutory plan will be exhibited for public inspection for a period of two months under section 5 or section 7 of the TPO, as the case may be. During the public inspection period, any person could make representations / comments in respect of the proposed amendments to the TPB. The TPB has to consider all representations and comments before making a decision. The statutory plan, together with the representations and comments, will be submitted to the Chief Executive in Council for approval.

8. Views from different stakeholders (including, where applicable, private columbarium operators whose interest in the land and persons whose interest in the niches (i.e. consumers or descendants) would be affected by the planning permissions or amendments to statutory plan under consideration) would be taken into account as appropriate.

(2) Land Administration Mechanism

9. Under the land administration mechanism, virtually all private land in Hong Kong is leased or otherwise held from the Government. For leased land intended for use or development in compliance with the prevailing planning requirements that are different from certain conditions specified in the respective land lease, the lessee is required to apply to the Director of Lands for lease modification. A premium equivalent to the difference in land value between the development permitted under the existing lease and that permissible under the new lease terms (if any) is normally payable for any lease modification granted.

10. The land use specified as a condition in a land lease could not be changed during its term, unless with the agreement of both parties, i.e. the Government and the lessee. The Government would agree to a lease modification only if it is appropriate and in compliance with the prevailing planning requirements and all Government requirements. As this should be consistent with the planning requirements of the site, it would mean that where planning applications or amendments to statutory plan are applicable, members of the public, including relevant stakeholders, would have, as a matter of course, an opportunity to air their views by virtue of the process described in paragraphs 6 to 7 above.

11. By way of land resumption, the Government may exercise statutory power under various Ordinances to resume private land for various public purposes². Such decisions are made by the relevant authority, e.g. the Chief Executive or the Chief Executive in Council, as the case may be. The rights to compensation and the procedures for compensation claims when the legal interest in land is extinguished or affected are stipulated in the respective Ordinances.

12. In undertaking public works projects, the Administration is guided by the principle of minimising the extent of land acquisition. Generally, the project proponent would consult the relevant District Council on the relevant scheme / project and, with such information released in the public domain, affected parties could air their concerns with the project proponent and the relevant Department(s). The relevant authority will consider such feedback received before making a decision on the land resumption. In some cases, there are statutory procedures with stipulated timeframe set out in the Ordinances (e.g. Cap. 370 and Cap. 519), whereby affected parties may make objections and the relevant authority will consider all representations, comments and efforts made by the project proponent to resolve the objections, before making a decision.

(3) Summing Up

13. Any change in land use would need to be carried out in accordance with the relevant legislation and procedures, where applicable, as summed up in the above paragraphs. This applies equally to all business operations, which include columbarium operations.

14. The following added feature will come into play after commencement of the Ordinance: If and when any of the following is under departmental circulation –

² The Government may acquire private land by resumption for the implementation of public projects, such as public housing development, an urban renewal project, a road scheme, railway development, a drainage improvement project, public open space, a school etc. Depending on the circumstances, resumption proceedings may be instituted under the provisions of the relevant Ordinances, e.g. –

- (a) the Lands Resumption Ordinance (Cap. 124);
- (b) the Urban Renewal Authority Ordinance (Cap. 563);
- (c) the Roads (Works, Use and Compensation) Ordinance (Cap. 370);
- (d) the Railways Ordinance (Cap. 519);
- (e) the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276); and
- (f) the Land Drainage Ordinance (Cap. 446).

- (a) a planning application;
- (b) amendment to a statutory plan;
- (c) a lease modification application; or
- (d) a project proposal / feasibility study,

the Food and Environmental Hygiene Department, as the executive arm of the Private Columbaria Licensing Board (the Licensing Board), will assess each case on its own merits and convey its feedback to the relevant authority as to whether acceding to such an application / a proposal could give rise to non-compliance with the licensing requirements (including the planning-related requirement or the land-related requirement in paragraph 16 below) and the licensing conditions (e.g. restriction on subletting or assignment in a manner inconsistent with the operation of the columbarium in paragraph 17 below) in respect of a licence.

(B) Measures for Protecting the Interests of Consumers

15. Provisions in the Bill which help enhance transparency and protect consumer interests are set out below.

16. Under clause 13(1)(a)(i) and (ii) of the Bill, for an application for a licence in respect of any columbarium under clause 13 or 14 of the Bill, the private columbarium must comply with the planning-related requirements and land-related requirements.

17. Clause 25 of the Bill empowers the Licensing Board to impose, as it thinks fit, licensing conditions restricting any subletting or assignment of the columbarium premises, or any part of it, in a manner that is inconsistent with the operation of the columbarium.

18. Division 1 of Part 5 of the Bill imposes requirements that an Agreement must meet in order for it to be enforceable by the seller against the purchaser. Among other things, he/she must not purport to sell an interment right for a term extending beyond the term of lease, licence or other instrument under which the land on which the columbarium is situated is held from the Government (clause 41(2)(c) of the Bill).

19. Part 1 of Schedule 4 to the Bill provides for the prescribed

information and recommendations that are required to be contained in an Agreement, including –

- (a) information about ownership, tenancy, encumbrances and restrictions on use and disposition;
- (b) the term for which the land on which the columbarium is situated is held from the Government under a lease, licence or any other instrument;
- (c) information about financial risks involved with lump sum prepayment for an interment right for a long period;
- (d) a recommendation that the purchaser should carefully consider whether the purchaser's interest is protected against the financial risks; and
- (e) a recommendation that the purchaser should seek legal advice if the purchaser does not understand any part of the information, recommendations or terms in the Agreement.

20. Part 2 of Schedule 4 to the Bill provides for the essential terms that are required to be contained in an Agreement, including –

- (a) a full description of the interment right sold, including serial number, location and dimensions of the niche, the nature of the right or interest that the interment right comprises, any other services to be provided under the Agreement, duration of the interment right, or any right of the purchaser to renew the interment right for another term on the expiry of the term;
- (b) a comprehensive list of all fees, charges or other sums payable by the purchaser (whether recurrent or non-recurrent);
- (c) if the interment right includes a right to renew the interment right on the seller being granted a renewed term of the lease, licence or other instrument under which the land on which the columbarium is situated is held, any contribution due from the purchaser to the seller towards the premium payable by the seller to the Government, expressed as a share of the premium;
- (d) other essential terms as set out in section 2(e)(i) to (iii) of Schedule 4; and

- (e) the arrangement for handling interred ashes in the event of temporary suspension of operation of the Agreement or the termination of the Agreement (whether on expiry of the term of the interment right or not).

21. If an Agreement fails to meet the requirements stipulated in paragraphs 18 to 20 above, the Agreement is not enforceable by the seller, and the purchaser may cancel the Agreement at any time after it is made. Upon cancellation of the Agreement, the private columbarium operator must refund to the purchaser all money received under the Agreement if the interment right has not been exercised³.

22. Part 7 and Schedule 5 provide that after commencement of the Ordinance, the operators of private columbaria to which the Ordinance applies are required to dispose of interred ashes properly in accordance with the prescribed ash disposal procedures, including in the event of cessation of their columbarium operation. These provisions apply to the interred ashes of any private columbarium to which the Ordinance applies, irrespective of when the Agreement is entered into (i.e. including those entered into before or after commencement of the Ordinance).

23. In addition, we have put in place measures to inform potential buyers of columbarium premises of the responsibility to properly handle interred ashes. Clause 38 of the Bill enables the Licensing Board to issue a certificate of columbarium use (certificate (use)) as soon as a specified instrument is issued and register it in the Land Registry against the premises for which a land register has been kept. Such a certificate (use) must state, among others, the name of the instrument holder and that the provisions of Part 7 of and Schedule 5 to the Bill (relating to the prescribed ash disposal procedures) apply to the premises. Any potential successor or assign who acquires such premises from the instrument holder would thus be made aware

³ If the interment right has been exercised, the purchaser and seller may refer to the terms of the Agreement with a view to ascertaining whether, and the conditions upon which, the purchaser's cancellation rights under the Bill may be exercised after the interment right has been exercised.

that the subject premises are being used for columbarium operation.⁴

24. According to clause 63 of the Bill, if the relevant person fails to follow the prescribed ash disposal procedures to dispose of the interred ashes properly, he/she would be criminally liable, on summary conviction, to a fine of \$2 million and imprisonment for three years, and on conviction on indictment, to a fine of \$5 million and imprisonment for seven years. We believe such penalties should carry sufficient deterrence.

Presentation

25. Members are invited to note the content of this paper.

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⁴ The relevant party referred to in clause 68 of the Bill may apply to the Licensing Board for a certificate of cessation of columbarium use (certificate (cessation)). The Licensing Board may, if satisfied that the prescribed ash disposal procedures as applicable have been carried out in respect of the premises referred to in paragraph 23, issue a certificate (cessation) that the premises cease to be a columbarium. The person to whom the certificate (cessation) is issued may register it against the premises in the Land Registry.