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Bills Committee on the Private Columbaria Bill

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information on the Administration's legislative proposal to establish a licensing scheme to regulate the operation of private columbaria, and summarizes the deliberations of the Panel on Food Safety and Environmental Hygiene ("the Panel") on the legislative proposal.

Background

2. In view of the public's concern over the shortage of columbarium facilities as well as the increasing number of unauthorized private columbaria, the Government launched a public consultation on the review of columbarium policy in July 2010. When briefing the Panel on the outcome of the public consultation at the meeting on 12 April 2011, the Administration advised that while there was public support for introducing a licensing scheme to enhance the regulation of private columbaria, there were divergent views on the scope and level of regulation under the proposed licensing scheme and the arrangement for pre-existing private columbaria. Subsequently, the Government launched another public consultation in December 2011 regarding the licensing scheme for private columbaria. The Panel was briefed by the Administration on the consultation document at the meeting on 13 December 2011.

3. The Administration consulted the Panel on the legislative proposal for regulating private columbaria at the meetings on 11 December 2012 and 19 November 2013. Members were advised that the proposed licensing scheme would seek to strike a balance among competing interests of various stakeholders, having regard to (a) the wider community interest, including meeting society's needs for provision of columbaria; (b) the sentiment of the descendants, in particular their wish not to upset the resting place of the

deceased as far as practicable; (c) minimizing the nuisance caused by such columbaria to their neighbouring community; and (d) ensuring a sustainable mode of operation in the long-run.

The Private Columbaria Bill ("the Bill")

4. According to the Legislative Council ("LegCo") Brief (File Ref.: FH CR 2/3751/07) issued by the Food and Health Bureau on 18 June 2014, the Bill seeks to provide a licensing scheme for regulating the operation of private columbaria¹. Upon enactment of the Bill, all private columbaria which are not exempted or given temporary suspension of liability ("TSOL") must obtain a licence for operating their columbaria. The key elements of the Bill are set out below.

Licensing of private columbaria

5. The Bill proposes to set up a statutory licensing authority, the Private Columbaria Licensing Board ("the Licensing Board"), with the Director of Food and Environmental Hygiene as the chairperson, and other official and non-official members appointed by the Chief Executive ("CE"). The Food and Environmental Hygiene Department ("FEHD") will be the executive arm and enforcement agency of the Licensing Board.

6. It is proposed that all private columbaria² which are not exempted or given TSOL must obtain a licence for operation. Applicants seeking a licence must comply with all statutory and government requirements (including those relating to land leases or other land instruments, town planning and building safety) and submit a management plan to the Licensing Board. A columbarium operator must have a licence before he or she can sell (or offer for sale) interment rights.

¹ Under the proposed licensing scheme, a private columbarium is any premises that are used, or intended to be used, for keeping ashes. The term "ashes" means ashes resulting from the cremation of human remains, but excludes materials transformed from ashes, such as synthetic diamonds, jewellery or ornaments.

² The Bill does not apply to (a) a columbarium that is built, operated, administered or maintained by the Government; (b) an authorized private crematorium in Part 6 of Schedule 5 to the Public Health and Municipal Services Ordinance (Cap. 132) ("PHMSO"); (c) a columbarium in a private cemetery specified in Part 2 of Schedule 5 to PHMSO; (d) a columbarium (if any in future) operated by the Board of Management of Chinese Permanent Cemeteries outside private cemeteries specified in PHMSO; (e) undertakers with their licences not prohibiting storage of ashes in their place of business; and (f) the keeping of no more than five containers of ashes (with each container containing the ashes of one person only) in domestic premises.

Grandfathering arrangements for pre-Bill columbaria

7. The Bill provides that a columbarium which was in operation before the Bill announcement time (i.e. 8:00 am on 18 June 2014) with interred ashes in niches ("pre-Bill columbarium"³) and meets other requirements under the Bill may apply for one of the following regulatory instruments -

- (a) TSOL status for pre-Bill columbarium operation, under which the columbarium may continue operation (without selling interment rights) whilst action is being taken by the operator to seek regularization / rectification in order to obtain a licence or exemption. The period of TSOL will be set at no more than three years for the first time, and may be extended for no more than three years if warranted⁴;
- (b) exemption status for pre-Bill columbarium operation, under which the columbarium may continue operation (without selling interment rights). However, to be eligible for the exemption status, the applicant must have commenced columbarium operation⁵ before 1 January 1990 and ceased sale of new or unoccupied niches from the Bill announcement time; and
- (c) licence status for pre-Bill columbarium operation, under which the columbarium may continue operation and sell interment rights, provided that relevant requirements (including planning and land related requirements) are complied with.

8. To give effects to the above grandfathering arrangements, there are express provisions in the Bill providing that in respect of pre-Bill columbaria, certain tightly ring-fenced enforcement provisions under the land regime against unlawful occupation of unleased land, the planning regime against unauthorized development, and the building regime against structures certifiable for a pre-Bill columbarium, as applicable, do not apply, provided that certain tightly prescribed conditions are fulfilled by the operators. According to the Administration, enforcement actions already taken before receipt of an application for a regulatory instrument will not be affected.

³ To assist the Licensing Board to be set up in future to determine which columbarium is a pre-Bill columbarium, FEHD has launched a notification scheme on 18 June 2014 and issued letters to private columbaria known to the Government, requesting them to submit relevant information.

⁴ As set out in the Bill, TSOL may not be extended more than once, unless exceptional circumstances exist.

⁵ By "Commencement of columbarium operation", it means by reference to the first set of ashes interred in a niche or the interment right in a niche first sold, whichever was the earlier.

Consumer protection

9. The Bill proposes to mandate the signing of contracts for the sale of interment rights in a columbarium. Before commencement of the licensing scheme, the Licensing Board will, through promulgating a Code of Practice, provide contract templates covering the information (e.g. the seller's licence and Government lease or land instrument, etc.) and essential terms (e.g. names of parties to the contract and description of the interment right sold and the duration of the contract, etc.) required by the Bill. An agreement will be made unenforceable by the operator (or voidable by the consumer) in case (i) the agreement fails to include the above information and essential terms; and (ii) the interment rights sold are purported to extend beyond expiry of the term of the lease or land instrument under which the columbarium premises are held.

10. In the event of cessation of a columbarium operation, the Bill provides a skeleton framework for the prescribed ash disposal procedures for application to FEHD, operators and innocent third parties. Improper handling of interred ashes and/or abandoning a columbarium will be made offences.

Commencement and appeals

11. The Licensing Board will undertake preparatory work within the first three months following the enactment of the Ordinance. Applications from pre-Bill columbaria for a licence, exemption and TSOL will have to be submitted within the following three months. Under the Bill, a period of six months from the enactment of the Ordinance will be allowed for a columbarium in operation before the commencement date to continue to operate without a regulatory instrument, but the columbarium still must not sell interment right. If a TSOL application is made, the period will be extended until the application is disposed of.

12. Any aggrieved applicant could appeal to the Private Columbaria Appeal Board, of which the chairman and members would be appointed by CE. The Licensing Board will have the discretion to withhold enforcement actions pending determination of appeals.

Deliberations by the Panel

13. The Panel discussed with the Administration the legislative proposal at the meetings on 11 December 2012 and 19 November 2013, as well as the latest development of the columbarium policy (including the Bill) on 8 July 2014. Major views and concerns expressed by members are summarized below.

The licensing scheme for private columbaria

14. Expressing dissatisfaction with the Administration's procrastination in introducing the Bill, members urged the Administration to speed up the process of introducing the Bill so as to avoid further worsening of the problem of unauthorized private columbaria. Some members expressed concern that the proposed exemption for pre-existing columbaria as well as the definitions of columbaria and ashes might create loopholes that could be exploited by unauthorized columbaria. Concern was also raised that the proposed exemption for undertakers from the licensing scheme might cause nuisances to residents in the vicinity of undertakers such as Hung Hom.

15. The Administration advised that it took time to draw up details of the proposed licensing scheme, as it was a complex social issue with divergent public views and was sensitive given the traditional concepts involved. Members were assured that a cut-off date would be clearly indicated in the legislative proposal so as to exclude those unauthorized columbaria that had proliferated in recent years to take advantage of the shortage of niches, and key terms such as "columbaria" and "ashes" would be clearly defined so as to effectively regulate private columbaria. The Administration also explained that under the Undertakers of Burials Regulation (Cap. 132CB), undertakers were required to obtain licences from FEHD. Enforcement actions would be taken against non-compliance when complaints on nuisances caused by the undertakers were received.

16. At the Panel meeting on 8 July 2014, members noted that under the proposed Bill, the term "ashes" meant ashes resulting from the cremation of human remains but excluded materials transformed from ashes such as synthetic diamonds. Some members were worried that if the cremated ashes being transformed into other crystalline structures were not included in the definition of "ashes", unauthorized columbaria might circumvent the regulation by selling niches for putting the "memorial" diamonds which were formed by the carbon extracted from cremation ashes.

Regulation of pre-existing private columbaria

17. Noting the proliferation of unauthorized private columbaria in recent years, members expressed concern that it was ineffective for various government departments to take enforcement actions against unauthorized aspects of private columbaria under their respective mandate and relevant legislation. Criticizing that the Administration had been taking the problem of unauthorized columbaria lightly, some members expressed worries that the Administration would procrastinate in taking enforcement actions by providing

a long transitional period for unauthorized private columbaria to meet the licensing requirements as proposed in the Bill. Expressing grave concern that operators of unauthorized columbaria would rush to sell off their niches before the enactment of the Bill, members urged the Administration to enhance the public's understanding of the proposed licensing scheme for private columbaria and advise them to refrain from buying niches from non-compliant columbaria.

18. According to the Administration, FEHD would take responsibility in the operation of the licensing scheme for private columbaria after the enactment of the Bill. Members were assured that the passage of the proposed Bill would provide justifiable grounds for effective enforcement actions against unauthorized private columbaria. Members were also advised that the Administration and the Consumer Council had undertaken to remind members of the public to exercise care when purchasing niches from private columbaria. To facilitate members of the public to make informed decisions when purchasing niches before the introduction of the proposed licensing scheme, the Development Bureau had since December 2010 updated quarterly the Information on Private Columbaria ("the List") and had uploaded the List onto the website of the Development Bureau for public inspection.

19. At the Panel meeting on 8 July 2014, members were advised that during the validity period of TSOL, the columbarium concerned could not sell or let out any new or unoccupied niches. For as long as the exemption status for pre-Bill columbarium operation was in force, the operator of the columbarium concerned should fulfill certain prescribed conditions including no sale of niches, and no intensification of use in terms of niches as well as containers during the exemption period. Some members pointed out that there were cases where consumers had already paid to unauthorized columbaria for niches before the Bill announcement time but had yet to place ashes of their deceased family members/relatives in these niches. These members were concerned about the rights of the deceased who had paid for the niches before death and purchasers of niches earmarked for the future use by themselves or their relatives. The Administration was urged to consider seriously how to protect the interest of these consumers. There was a view that the Government should consider taking actions to assist consumers to recover their financial loss.

Business impact assessment study

20. Noting that the consultant commissioned by the Administration to conduct the business impact assessment ("BIA") study had proposed the "outcome-based approach" to replace the maintenance fund of 15% of the sales proceeds from niches as proposed in the second-round consultation exercise, members expressed concern whether the BIA consultant's proposed approach could protect the interest of consumers. The Administration explained that

under this approach, the operators of private columbaria were required to devise their management plans, including the submission of certified maintenance reports and fire safety certificates, to ensure a sustainable mode of operation in the long-run.

Handling of interred niches

21. Some members expressed concern about the arrangement for handling the interred niches deposited in unauthorized private columbaria upon commencement of the proposed Bill. While members generally supported the Administration's proposal of making transitional arrangement to provide temporary storage for the interred niches, a concern was raised that some members of the public might have the false expectation that the Administration would handle interred ashes of their deceased family members deposited in the unauthorized private columbaria in the event that these columbaria ceased operation. Concern was also raised about whether the number of temporary storage would be sufficient when the Administration took enforcement actions against all unauthorized private columbaria after the transitional period.

22. The Administration advised that it would not announce details of transitional arrangement and relevant facilities too early in order to avoid making consumers less alert to the risks to which they were exposed. The Administration also pointed out that paying tribute to the deceased would not be allowed in the temporary storage facilities.

Relevant papers

23. A list of the relevant papers on the LegCo website is in the **Appendix**.

Relevant papers on the Private Columbaria Bill

Committee	Date of meeting	Paper
Panel on Food Safety and Environmental Hygiene	9.2.2010 (Item VI)	Agenda Minutes
	6.7.2010 (Item III)	Agenda Minutes
	20.9.2010 (Item I)	Agenda Minutes
	12.4.2011 (Item IV)	Agenda Minutes
	13.12.2011 (Item IV)	Agenda Minutes
	16.3.2012 (Item I)	Agenda Minutes
	11.12.2012 (Items III and IV)	Agenda Minutes
	19.11.2013 (Item I)	Agenda Minutes
	8.7.2014 (Item III)	Agenda