

For discussion
on 12 January 2016

Legislative Council
Panel on Food Safety and Environmental Hygiene

**Private Columbaria Bill: Anticipated issues that must be handled at
the initial stage of the implementation of the licensing regime**

Purpose

Private columbaria, some of which are in breach of statutory requirements, have been in existence in Hong Kong for decades. The Private Columbarium Bill (“the Bill”) currently under scrutiny in the Bills Committee introduces for the first time a regulatory regime on private columbaria. As in any transition towards a regulatory regime, dislocations and resistance by vested interests are inevitable. Since the problems have been in existence for the past few decades, we would not under-estimate the time and effort needed to clear up the historical legacy. This paper highlights the transitional issues that the Licensing Board to be set up would need to tackle as well as the likely political and public relations problems that this may give rise.

Background

2. There has been a proliferation of private columbaria in recent decades, driven in part by shortage of public supply and in part by consumer preference (e.g. for columbaria with certain religious denomination). A substantial number of these private columbaria are not fully compliant with the prevailing requirements. Some contravene statutory requirements on town planning and buildings, and/or are in breach of land leases and/or unlawfully occupying Government land. Members of the public, especially residents living near such columbaria, are dissatisfied with their presence and the traffic impact and environmental nuisances caused by them. Consumers demand better

protection. There have been instances of descendants complaining about the difficulties in getting back the money and their ancestors' ashes after individual operators have gone bust.

3. Backed by the support obtained from the two previous rounds of public consultation, the Government has proceeded to devise a regulatory regime. From day one, we are keenly conscious that for the regime to work, it would have to satisfy the test of necessity, reasonableness and proportionality, striking a fine balance amongst the following competing interests –

- (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) minimising the nuisance caused by such columbaria to their neighbouring community; and
- (d) the sustainable development of the trade in the long-run.

It was against the above background that the Bill was introduced into the Legislative Council (“LegCo”) on 25 June 2014. The Bill seeks to introduce a licensing scheme regulating the operation of private columbaria. Our policy objectives include ensuring compliance with statutory and Government requirements (with grandfathering arrangements for pre-Bill columbaria¹), enhancing protection of consumer interests and ensuring a sustainable and orderly provision of niches by private columbaria. Notwithstanding our inclination to be tolerant towards those pre-Bill columbaria, we also need to ensure that such columbaria would comply with the licensing requirements if they intend to continue to engage in the business of selling niches and interring ashes.

¹ A pre-Bill columbarium means a columbarium that was in operation, and in which ashes were interred in niches, immediately before the Bill announcement time (i.e. 8:00 a.m. on 18 June 2014).

4. Under the regulatory regime envisaged by the Bill, a private columbarium would be licensed only if it complies with the planning requirements, land lease conditions (including payment of land premium as required) and building and fire safety requirements (including being structurally safe). The enactment of the Bill could not be a panacea for all the problems inherited from the past. Nor is it expected to offer full solutions to the unwieldy situations that might eventually come about. To realise the benefits of the Bill, society as a whole would need to be prepared for the birth pangs that would be associated with bringing the status quo in line with the regulatory regime. The interests of many, especially the existing private columbaria and their consumers, would be affected.

Issues Relating to Seeking Compliance with Requirements

5. Prior to the implementation of the Bill, the Development Bureau publishes on its website (www.devb.gov.hk) and updates regularly the “Information on Private Columbaria” (DEVB’s List), which provides information on the land/lease (user restriction) and town planning aspects in relation to private columbaria that are made known to the Lands Department (“LandsD”) and/or Planning Department (“PlanD”) and which these departments have reasons to believe are operating as columbaria, with a view to providing such information to the public in a more systematic manner. Part A of DEVB’s List (“Part A”) sets out private columbaria which are compliant with the user restrictions in the land leases and the statutory town planning requirements and are not illegally occupying Government land. Part B of DEVB’s List (“Part B”) sets out those columbaria made known to LandsD and/or PlanD that do not fall under Part A. Based on information available as at June 2015, on Part A are 15 private columbaria (excluding private cemeteries) whereas on Part B are 126 private columbaria. Tables 1 and 2 below give the compliance status of the private columbaria in Part B.

**Table 1: Compliance status of private columbaria in Part B
from the town planning perspective
(June 2015)**

Status		No. of columbaria
Not in compliance with town planning requirements	Planning application not submitted	83 (66%)
	Planning application in progress	8 (6%)
	Planning application withdrawn or rejected	19 (15%)
In compliance with town planning requirements or not covered by any statutory plans under the Town Planning Ordinance (Cap. 131)		16 (13%)
Total		126 (100%)

} 110 (87%)

**Table 2: Compliance status of private columbaria in Part B
from the land perspective
(June 2015)**

Status	No. of columbaria
Columbarium use not permitted under the user restrictions of the relevant lease/licence/tenancy	65 (51%)
Unlawful occupation of Government land	12 (10%)
Columbarium use not permitted under the user restrictions of the relevant lease/licence/tenancy and unlawful occupation of Government land	7 (6%)
Columbarium use may be permitted under the user restrictions, or breach of the user restrictions of the relevant lease/licence/tenancy not yet established or cases under litigation or investigation	42 (33%)
Total	126 (100%)

} 84 (67%)

6. The picture captured in Part B may well be an understatement of the problems at hand. It is possible that there remain some private columbaria that have not joined the Notification Scheme and/or not made known to LandsD and PlanD.

7. Though the regulatory regime avails the option of applying for an exemption, we surmise that most pre-Bill columbaria that meet the eligibility requirements for exemption (i.e. in operation before 1 January 1990) (“dated columbaria”) would likely wish to seek a licence instead, as an exemption would bar them from further trading in niches after 18 June 2014 8:00 a.m., which implies cessation of future streams of income. To allow time for seeking regularisation / rectification, pre-Bill columbaria seeking a licence or an exemption have the option of applying for a temporary suspension of liability (“TSOL”) in parallel. For a pre-Bill columbarium conferred with TSOL status, its operator does not commit an offence for operating the columbarium, unless he/she seeks to sell or let out niches before getting a licence. The maximum validity period of a TSOL is three years upon first application, extendable for another three years, but not beyond unless exceptional circumstances exist.

8. Taken together, we envisage that in the initial years of the implementation of the Bill, there would be complex procedures and disputes relating to the following problems –

- (a) applications to the Town Planning Board for changes in land use and/or planning parameters with a view to securing compliance with the planning-related requirements;
- (b) discussions in District Councils on the applications in (a) above;
- (c) traffic impact assessments and other technical assessments relevant to the applications in (a) above;
- (d) assessment of land premium for the regularisation by LandsD and the applicants’ possible appeal thereof;

- (e) assessment of structural safety² by authorized persons / registered structural engineers and the applicants' possible challenge in complying with the building and fire safety requirements advised by the Buildings Department ("BD"); and
- (f) ascertaining the applicants' right to use the columbarium premises and examination of their management plans.

9. Operation of private columbaria involves huge financial returns. The operators are likely to mount vigorous challenges of every aspect that may frustrate their attempts to seek regularisation / rectification at a lower cost. The possibility of appeals and judicial reviews cannot be ruled out either. To withstand challenges, the necessity of meticulous consideration for each and every application by the relevant authorities (planning, land, building or fire) and the Licensing Board cannot be over-emphasised.

Other Possible Political Problems

Post-Enactment Columbarium Landscape

10. Upon introduction of the Bill into LegCo on 25 June 2014, a Notification Scheme was launched administratively to allow us to obtain a fuller picture of the overall landscape and to provide the Licensing Board with some reference in assessing the pre-Bill status of an applicant in future. As at June 2015, a total of 140 private columbaria joined the Notification Scheme. Among them, 136 columbaria were on DEVB's List. In percentage terms, this represents about 96.5% of the 141 private columbaria on DEVB's List (see paragraph 5). Another 4 are outside DEVB's List. In total, 385 000 niches with interred ashes are reported by the 140 columbaria on the Notification Scheme. Amongst these, 312 000 niches with interred ashes are reported by 88 columbaria claiming to be dated columbaria.³

² Many private columbaria, especially those found in the New Territories, may involve cases of no building plans and/or suspected unauthorised building works.

³ The niche data provided in one small-scale dated columbarium are incomplete. Hence, the above aggregate figures of 385 000 niches and 312 000 niches have not reflected the data of this case.

11. Upon enactment of the Bill, the overwhelming majority would likely make their applications within the stipulated 3-month period. They should be allowed to go through the due process of seeking a licence or an exemption (including the processing by the Licensing Board and determination of appeals (if lodged) by the Appeal Board). Only after confirming their failure to secure any licence or exemption would they be subject to the Government's enforcement actions. Hopefully, the continuation or exit of the columbarium operations concerned would be in an orderly pace and manner.

12. For private columbaria that continue to sell niches after the enactment date without a licence, the Government would take enforcement actions, including prosecution actions, against them. In addition to this, the Government might also face the following –

- (a) some cases would abscond or fly by night;
- (b) some cases might choose not to make any applications; and
- (c) some cases would be determined, at the stage of processing the TSOL application, to be neither licensable nor exemptible (e.g. subject to specified enforcement actions, located in multi-storey buildings with a single staircase).

Ash Disposal

13. In cases of cessation of columbarium operation, the Bill requires operators to properly dispose of any ashes interred in the columbaria. The Food and Environmental Hygiene Department ("FEHD") would be obliged to handle the unclaimed ashes that remain. Therefore, it is incumbent upon FEHD to monitor closely whether the private columbaria have followed up the prescribed ash disposal procedures in conscientiously contacting the deceased's authorized representative to claim back the displaced ashes and to mount investigation and prosecution of unscrupulous operators who are derelict in discharging their obligations on ash disposal.

14. People who have bought niches, or have ashes of relatives interred, in private columbaria would likely clamour for either leniency to the private columbaria concerned, or even request for priority allocation of niches in public columbaria. Both of these options are non-starters. The former would amount to legitimising non-complaint columbaria and would raise an equity concern for future private columbaria and columbaria that have strived to meet the licensing requirements. The latter approach would absolve the responsibility of the non-compliant private columbaria, with public funds being used to bail out the unscrupulous operators pocketing the sales proceeds. It would amount to an unacceptable reduction in the supply of new public niches to meet public demand arising from new deaths. Noteworthy is that while the annual number of deaths is around 50 000 – 60 000, there are firm plans for only 850 niches (Wan Chai) and 160 000 niches (Tsang Tsui) coming on stream in 2018 and 2019 respectively after which the next batch of major supply will be sometime between 2020 and 2022.

15. Notwithstanding the above principled considerations, it is not unlikely that some unscrupulous private columbaria and some consumers (including speculators) affected by the Government's enforcement actions, would join hands and resort to protest and other means to apply pressure on the Government.

16. If we assume that about 20% of the 385 000 occupied niches mentioned above would be affected, the number of sets of ashes displaced could run up to 80 000. In the coming two years, the capacity of FEHD's temporary storage spaces (temporary in nature and with no paying of respect allowed) would be increased to around 50 000 urns. The public may apply for niches in columbaria at private cemeteries, re-allocated niches managed by FEHD, deposit additional sets of ashes in niches managed by FEHD and the Board of Management of the Chinese Permanent Cemeteries, or consider scattering of ashes at sea or in the 11 Gardens of Remembrance. The public may also consider keeping ashes at home.

Curtailed supply

17. Pending the Licensing Board's processing of the licence applications, all columbaria that are not covered by a licence are prohibited from selling or letting out new or unoccupied niches as from the enactment date. The processing time for some applications will inevitably be long. Society will have to come to term with the reality that the supply of private niches will be curtailed, before the first batch of licences are issued by the Licensing Board. The efforts of the Licensing Board to process expeditiously the licence applications by existing columbaria may however be resisted by residents living near these columbaria. Protracted consultations are not unlikely.

Way Ahead

18. The priority now is to enact the Bill which would provide a legal basis for us to bring the status quo progressively into compliance with land lease, planning, building, fire and other regulatory requirements. Before the full benefits of the Bill are realised, we would have to be prepared for a difficult transition period, marked by insufficient supply of niches in private columbaria, resistance by operators and consumers who see their interest affected by the regulatory regime and attempts by applicants to maximise their gains in the regularisation / rectification process. All parties affected would like to have their cases given first priority. However, for the Food and Health Bureau, FEHD as well as PlanD, LandsD, BD, the Fire Services Department etc., even assuming that adequate resources are available, this would simply not be possible, as complicated planning, land and building procedures are often involved.

19. The Government would strengthen the efforts to promote green burial and construction of new public columbaria. In respect of green burials, the current rate is on the low side (8% of the annual cremation figure). We expect that the promotional efforts would likely take time to bear fruit. In respect of public columbaria, they are necessary but unwelcomed facilities. This notwithstanding, we shall continue to work on the remaining 16 sites identified under the district-based approach and lobby the District Councils concerned.

Conclusion

20. Members are invited to note and comment on the content of this paper.

**Food and Health Bureau
January 2016**