

**LEGISLATIVE COUNCIL BRIEF**

**Implementation of Private Columbaria Ordinance -  
Issues on Land Premium and Traffic Impact Assessment**

**INTRODUCTION**

With the enactment of the Private Columbaria Ordinance (Cap. 630) (“the Ordinance”) on 30 June 2017, the Private Columbaria Licensing Board (“the Licensing Board”) will start to receive applications for specified instruments<sup>1</sup> from 30 December 2017. Under a pragmatic and sensitive approach, we need to facilitate **pre-cut-off columbaria<sup>2</sup> seeking a licence<sup>3</sup>** to address the land premium and traffic impact assessment (“TIA”) issues, with a view to minimising any social tension and disruption arising from massive displacement of interred ashes and frustration of pre-enactment agreements<sup>4</sup>.

2. At the meeting of the Executive Council on 21 November 2017, the Council ADVISED and the Chief Executive ORDERED that the following options be availed for **pre-cut-off columbaria seeking a licence** –

- (a) subject to imposition of the safeguards in paragraph 12 below, for **a pre-cut-off columbarium** confirmed to be eligible for **a licence** in all other respects, the Director of Lands should, upon application and subject to policy support from the Secretary for Food and Health, consider administratively regularising, in respect of the

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<sup>1</sup> A specified instrument means a licence, an exemption or a temporary suspension of liability.

<sup>2</sup> A pre-cut-off columbarium means a columbarium that was in operation, and in which ashes were interred in niches, immediately before the cut-off time, i.e. 8:00 a.m. on 18 June 2014.

<sup>3</sup> This refers to a licence under the Ordinance, not a land licence under the Land (Miscellaneous Provisions) Ordinance (Cap. 28).

<sup>4</sup> A pre-enactment agreement means an agreement for the sale of an interment right entered into before the enactment date (i.e. 30 June 2017).

**niches sold before the cut-off time<sup>5</sup> and facilities in existence immediately before the cut-off time and determined by the Licensing Board to be necessary for / ancillary to the operation of the columbarium (pre-cut-off sold niches), breaches of relevant lease conditions and / or unlawful occupation of unleased land by way of a waiver and / or a short term tenancy (“STT”), and consider waiving the relevant waiver fees, STT rentals and administrative fees before and during the licence period<sup>6</sup> (see paragraph 11 below)<sup>7</sup>;**

- (b) for post-cut-off interment of ashes of religious practitioners free of charge in **pre-cut-off yet-to-be-disposed-of niches in pre-cut-off religious ash pagoda** (should there be any), subject to policy support from the Secretary for Home Affairs (“SHA”), the approved arrangement of considering waiving the relevant waiver fees, STT rentals and administrative fees before and during **the exemption period of a pre-cut-off columbarium** confirmed to be eligible for **an exemption<sup>8</sup>** in all other respects should be extended to cover considering waiving the relevant waiver fees, STT rentals and administrative fees before and during **the licence period of a pre-cut-off columbarium** confirmed to be eligible for **a licence** in

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<sup>5</sup> The cut-off time means 8:00 a.m. on 18 June 2014, which was the announcement time of the Private Columbaria Bill (“the Bill”) for introduction into the Legislative Council (“LegCo”) on 25 June 2014.

<sup>6</sup> For the avoidance of doubt, the arrangement on waiving payments for regularisation exercises in respect of pre-cut-off columbaria (be these exemption or licence cases) for their pre-cut-off sold niches are meant to cover ashes (irrespective of whether or not these are in respect of religious practitioners or whether or not these are free of charge) interred before the cut-off time in pre-cut-off religious ash pagodas as well.

<sup>7</sup> Each application will be considered on a case by case basis having regard to its circumstances and merits.

<sup>8</sup> The eligibility requirements for seeking an exemption include the following –

- (a) the pre-cut-off columbarium commenced operation before 1 January 1990; and
- (b) no interment right in respect of the columbarium has been sold since the cut-off time (i.e. 8:00 a.m. on 18 June 2014).

Unlike that applicable to a licence, it is not required to fulfil the planning-related requirement, nor submit a management plan for prior approval by the Licensing Board. Also, please see item (1) of **Annex A** for waiving payments for regularisation exercises in respect of an exempted columbarium as approved by Chief Executive in Council (“ExCo”).

all other respects<sup>9</sup> (see paragraph 16 below)<sup>10</sup>; and

- (c) concerned bureaux and departments should process applications to the Town Planning Board (“TPB”) under the Town Planning Ordinance and to the Licensing Board under the Private Columbaria Ordinance as set out in paragraphs 25 to 27.

## JUSTIFICATIONS

### Pragmatic Approach to Handling Pre-Bill Legacy

3. The Private Columbaria Ordinance has come into operation since 30 June 2017. Amongst the specified instruments, only a licence authorises a columbarium to sell or newly let out niches. The deadline for pre-cut-off columbaria to submit their applications for specified instruments is 29 March 2018.

4. Back in the early 2010s, ExCo appreciated the fact that the Government had made its best endeavours to devise an overall scheme which could satisfy the test of necessity, reasonableness and proportionality and **strike a fine balance between competing interests of different stakeholders**, having regard to –

- (a) the overall interest of the community, including meeting public demand for columbaria;
- (b) the sentiment of the descendants, in particular their wish not to upset the resting place of the deceased as far as practicable;

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<sup>9</sup> This would cover ashes of religious practitioners interred free of charge in the pre-cut-off yet-to-be-disposed-of niches in pre-cut-off religious pagodas during the following periods –

- (a) between the cut-off time and the beginning of the enactment date; and
- (b) after specification of the religious ash pagodas by SHA and as long as the licence and the specification are in force, subject to implementing an administrative mechanism by SHA modelling on that currently in place for exempted columbaria under section 57 of the Ordinance (see paragraph 17 below).

<sup>10</sup> Each application will be considered on a case by case basis having regard to its circumstances and merits.

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

ExCo once directed that the Government should adopt a **pragmatic and sensitive approach** towards pre-cut-off columbaria (i.e. those that had commenced operation before the announcement of the Bill on 18 June 2014).

5. As a corollary, ExCo endorsed considering waiving the relevant waiver fees, STT rentals and administrative fees for the following niches in pre-cut-off columbaria eligible for an **exemption** in all other respects –

- (a) pre-cut-off sold niches as defined in paragraph 2(a) above, including –
  - (i) filled niches (i.e. with ashes already interred before the cut-off time); and
  - (ii) partially-filled or unfilled niches (i.e. with ashes to be interred after the cut-off time);
- (b) pre-cut-off yet-to-be-disposed-of niches in pre-cut-off religious ash pagoda.

This is referred to as the “waiving arrangement” below. A copy of the relevant decisions is set out in **Annex A**.

6. The objective is to contain the magnitude of social disruption that may arise due to enforcement actions under the Ordinance. Closure of columbarium operations would lead to dire consequences as traditional custom would be upset and mass relocation of interred ashes would arise. Our considerations behind the arrangement in paragraph 5 above and the safeguards in place to prevent abuse have been discussed at previous ExCo meetings as well as Bills Committee meetings, are summarised at **Annex B**.

## Challenges Ahead

7. Now that the Ordinance has been enacted, the greatest challenges before the Government and the community include –

- (a) early resumption of private supply of niches, to meet public demand and minimise disruption to the trade; and
- (b) overcoming the various hurdles in regularisation / rectification, thus avoiding unnecessary exodus of interred ashes or emergence of aggrieved consumers of niches sold before the enactment of the Ordinance (pre-enactment sold niches).

8. Based on a Notification Scheme administered by the Food and Environmental Hygiene Department (“FEHD”) when the Bill was announced in June 2014, there remain now as many as 131 private columbaria that have voluntarily joined the Notification Scheme. Subsequent verification reveals that over 78% (103) of these columbaria would not be able to obtain an exemption and hence benefit from the waiving arrangement in paragraph 5 above. Closure of these columbaria would definitely create social tension and disruption, given the frustration of pre-cut-off agreements and displacement of interred ashes.

Type of columbaria	No. of columbaria
Pre-1990 columbaria, <b>with</b> documentary proof	28
Pre-1990 columbaria, <b>without</b> documentary proof	59
Not pre-1990 columbaria	44
Total	131

9. Public columbaria compete with other public policies for limited Government land, capital funding and recurrent resources. Hence, it is in Hong Kong’s overall interest to facilitate the development of private columbaria that comply with our regulatory regime. Of note is that most of the private columbaria tabulated above (be they eligible for an exemption or otherwise) would aspire to obtain in due course a licence. From the consumers’ perspective, whether a pre-cut-off columbarium applies for an exemption or a licence is beyond their control. If the columbarium fails to obtain the specified instrument, they would all be adversely affected, as they have already entered into the agreement before the cut-off time and possibly

fully paid for the niches in good faith. Therefore, there is merit for the Government to adopt a pragmatic approach to facilitate their compliance as far as possible. Two major hurdles that need to be overcome are land premium and TIA.

### **Arrangement Relating to Land Premia**

10. LandsD normally assesses the land premium for a private columbarium at full market value (“FMV”) based on the estimated proceeds from disposal of all its niches (unsold as well as sold niches) at present-day value. However, from the operators’ perspective, some niches were sold over time by pre-cut-off columbaria in the past few decades at different prevailing prices, with some sold long time ago at low prices. Most had not factored into account the land premium element. As the transactions were consummated, it would not be possible for them to afford the FMV land premium or to recoup such FMV land premium from consumers. Given the colossal amount involved, the land premium arrangement<sup>11</sup> is indeed a make or break issue. As per deliberation with relevant Bureaux/Departments, it was decided that -

- (a) to extend the waiving arrangement to cover the following niches in pre-cut-off columbaria eligible for a **licence** in all other respects –
  - (i) pre-cut-off sold niches as defined in paragraph 2(a) above; and
  - (ii) post-cut-off interment of ashes of religious practitioners free of charge in pre-cut-off yet-to-be-disposed-of niches in pre-cut-off religious ash pagoda (should there be any) as articulated in paragraph 2(b) above; and
- (b) in respect of post-cut-off sold niches in a columbarium (be this pre-cut-off columbarium or post-cut-off columbarium), to

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<sup>11</sup> Summary Table of Categories of Regularisation –

	Pre-cut-off Sold Niches	Post-cut-off Sold Niches
Eligible for an exemption in all other respects	(A) Already covered by paragraph 5	(B) Not applicable
Eligible for a licence in all other respects	(C) To be addressed (see paragraph 10(a))	(D) To be addressed (see paragraph 10(b))

administratively avail an option for an applicant seeking a licence fulfilling the respective criteria to opt for **payment for the regularisation exercise in phases or through periodic payments** as set out in paragraph 19 below.

*Paragraph 10 (a)(i): Waiving arrangements for **pre-cut-off sold niches in pre-cut-off columbaria** eligible for a licence in all other respects*

11. We consider that on the land premium issue for pre-cut-off sold niches for pre-cut-off columbaria, the line should be drawn on the basis of sold and unsold niches, rather than whether the pre-cut-off columbarium is seeking an exemption or a licence. Hence, similar to the waiving arrangement in paragraph 5 above, it was decided that for **pre-cut-off columbaria** confirmed to be eligible for **a licence** in all other respects, the Director of Lands should, upon application and subject to policy support from the Secretary for Food and Health, consider administratively regularising, in respect of the pre-cut-off sold niches as defined in paragraph 2(a) above, breaches of lease conditions and / or unlawful occupation of unleased land by way of a waiver and / or STT, and consider waiving the relevant waiver fees, STT rentals and administrative fees before and during **the licence period**<sup>12</sup>.

12. On paragraphs 10(a)(i) and 11 above, to ensure that the benefit would accrue to the consumers who have purchased (or rented) the pre-cut-off sold niches, rather than the operators, intermediaries and/or speculators, the safeguards similar to those applicable to pre-cut-off sold niches in pre-cut-off columbaria seeking an exemption (as detailed in paragraph 5 of **Annex B**) will be applied which are as follows –

- (a) if these are filled niches, if any interred ashes are removed subsequently (such as claimed back by descendants), such niches are not allowed to be “refilled” as a matter of policy. This safeguard would also apply, after the partially filled or unfilled niches referred to in (b) below have become filled niches in future (see paragraph 5(a) of **Annex B**);
- (b) if these are partially filled or unfilled niches, the operator would have to provide to the Licensing Board registers on unused or partially used pre-cut-off sold niches (similar to section 24 of the

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<sup>12</sup> Each application will be considered on a case by case basis having regard to its circumstances and merits.

Ordinance) and fully used pre-cut-off sold niches before the regularisation is completed in support of an application for a licence, if the applicant wishes to apply for waiving payment for the regularisation exercise as set out in paragraph 2(a) above in respect of the pre-cut-off columbarium seeking a licence. After a licence is issued, the operator will have to implement the restrictions on the number of ashes interred (under section 54 and modelling on section 55 of the Ordinance) and restrictions on replacing the name of a dedicated person with another person in the registers unless that other person is a relative as defined in section 6(2) of Schedule 5 of the Ordinance (modelling on section 56). Such restrictions will be implemented by way of conditions to be imposed on the licence. To enable the operator to abide by the licensing condition regarding the restriction on the change of a dedicated person, the operator and the consumers should come to an agreement on the restriction on replacing the name of a dedicated person with another person or other equally-effective means of enabling this to be enforced; and

- (c) section 38 of the Ordinance empowers the Licensing Board to impose conditions on a specified instrument (including **a licence**) of a pre-cut-off columbarium restricting the imposition of additional fees, charges or other sums in respect of an interment right beyond the amounts, or not in accordance with any mechanism for their future revision, set out in the agreement for the sale of interment right entered into before the cut-off time. A licensee benefitting from waiving payments for the regularisation exercise will be subject to such a condition imposed in respect of pre-cut-off sold niches.

For (b) above, for the number of niches without agreement between the operator and the consumers being reached or in the absence of other equally-effective means to ensure compliance with the above safeguards, FMV land premium will be payable. If FMV land premium is paid, such niches could be traded in the market free of the above restrictions.

13. The justifications for extending the waiving arrangement as set out in paragraph 11 above (read together with paragraph 12 above) include –

- (a) avoiding massive dislocation of ashes arising from fly-by-night cases or enforcement actions, and reducing demand for niches from



the public;

- (b) avoiding massive frustration of agreements entered into before the cut-off time. It might not be realistic to expect that the operators could claw back the amounts from concerned consumers, or inducing a substantial increase in the prices of new supply (i.e. using revenues from new licensed niches to cross-subsidise pre-cut-off sold niches);
- (c) avoiding the need to relocate ashes under the mixed-mode operation (兩書並存)<sup>13</sup>, by which the columbarium may benefit from the waiving arrangement in paragraph 5 above. In fact, the scale of relocation of ashes arising from the building-related requirements will likely be substantial; and
- (d) facilitating the development of private columbaria and inducing more columbaria which should have applied for an exemption to apply for a licence instead.

In going through the licence route, apart from the planning-related requirement, it has to comply with other requirements relating to deed of mutual covenant and management plan.

Compliance with the planning-related and building-related requirements may involve substantial expenditures on assessment and certification of structural safety by authorized person / registered structural engineer, etc. and is by no means an easy task. It would be a pity that an otherwise compliant columbarium fails to get a licence merely because of land premium considerations.

*Paragraph 10(a)(ii): Waiving arrangements for pre-cut-off yet-to-be-disposed-of niches in pre-cut-off religious ash pagodas in pre-cut-off columbaria eligible for a licence in all other respects*

14. As noted in paragraph 8 above, as many as 103 pre-cut-off columbaria are unable to seek an exemption. We need to devise measures to cater for the post-cut-off interment of ashes of religious practitioners free of charge in pre-cut-off yet-to-be-disposed-of niches in pre-cut-off religious ash

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<sup>13</sup> This means applying for a licence or an exemption covering different parts of the premises in the vicinity of each other.

pagodas (should there be any), should these columbaria need to apply for a licence rather than an exemption.

15. As set out in paragraph 2(a) above, similar to exempted columbaria, the waiving arrangement for pre-cut-off licensed columbaria in respect of pre-cut-off sold niches could cover ashes (irrespective of whether or not these are in respect of religious practitioners or whether or not these are free of charge) interred before the cut-off time in pre-cut-off religious ash pagodas as well.

16. Subject to policy support from SHA, considering waiving the relevant waiver fees, STT rentals and administrative fees before and during the licence period in respect of pre-cut-off yet-to-be-disposed-of niches in its pre-cut-off religious ash pagoda (should there be any) with post-cut-off interment of ashes of religious practitioners free of charge would cover the following periods<sup>14</sup> –

- (a) between the cut-off time and the beginning of the enactment date; and
- (b) after specification of the religious ash pagodas by SHA and as long as the licence and the specification in force, subject to implementing the administrative mechanism by SHA in paragraph 17 below<sup>15</sup>.

17. For handling pre-cut-off religious ash pagodas in respect of **pre-cut-off columbaria applying for and being issued with a licence**, the Home Affairs Bureau (“HAB”) will, in consultation with the Food and Health Bureau (“FHB”) and the Department of Justice, devise an administrative mechanism modelling on that currently in place for exempted columbaria under section 57 of the Ordinance with requirements implemented through imposing licensing conditions by the Licensing Board. In gist, this mechanism seeks to allow such pre-cut-off columbaria that are Chinese temples specified by SHA to use **pre-cut-off yet-to-be-disposed-of niches in its pre-cut-off religious ash pagoda** specified by SHA in the licensed columbaria (similar to that for exempted columbaria) for **interring ashes of religious practitioners free of charge in the post-cut-off period** as long as the licence and the specification

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<sup>14</sup> While ashes may be kept temporarily in the columbarium during the grace period, the ash interment quantity will have to be reinstated to that as at the enactment date (i.e. 30 June 2017), before the issue of a temporary suspension of liability.

<sup>15</sup> Each application will be considered on a case by case basis having regard to its circumstances and merits.

are in force.

18. The justification for extending the waiving arrangement as set out in paragraph 16 is that from the religious perspective, whether a pre-cut-off columbarium applies for an exemption or a licence should not be a material consideration, as such niches are supposed to assist religious practitioners who have been residing and serving in Chinese temples.

*Paragraph 10(b): Options on land premium availed administratively for **post-cut-off sold niches in columbaria***

19. For post-cut-off sold niches of a pre-cut-off columbarium or a post-cut-off columbarium, they will not be covered by the waiving arrangement set out in paragraph 11 above. We will administratively provide options for an applicant seeking a licence fulfilling the respective criteria to opt either of the following –

- (a) linking the payment of FMV premium with the phased development of columbarium, and niches available for sale would tie in with the lease or relevant land instrument for the phased development as executed; or
- (b) similar to section 49(2)(b) of the Ordinance (whereby an interment right is sold for payment payable on the same periodic basis as that for the payment of FMV STT rentals), allowing periodic payment of FMV short-term waiver (“STW”) waiver fees to LandsD (if niches are also let out to consumers for payment payable on the same periodic basis as that for the payment of STW waiver fees to LandsD).

20. The justifications for the arrangements in paragraph 19 above are as follows –

- (a) this could help promote a policy on selling niches on a time-limited basis, facilitating greater turnover and recyclability;
- (b) this could help better protect the consumer interests in terms of lower risk and loss arising from default of operators, as compared with the upfront lump sum payment option; and

- (c) this could help ease the pressure on operators' cash flow and incentivise operators to sustain their operation with a regular stream of income.

### **Arrangement Relating to TIA**

21. Apart from the land premium issue, pre-cut-off columbarium operators have expressed serious concern over the past few years that the submission of TIA in seeking planning permissions (be these section 16 or section 12A applications under the Town Planning Ordinance) is another major hurdle.

22. FHB and FEHD have had in-depth discussions with relevant departments (Transport Department (“TD”), Hong Kong Police Force (“HKPF”), Fire Services Department (“FSD”) and Planning Department (“PlanD”). Three pertinent observations provide the basis for identifying a way forward. Firstly, the columbaria concerned are not brand-new planned establishments but have already been in existence and operation in the community for a long time. Secondly, the traffic and pedestrian flow problem mainly surfaces at the gravesweeping seasons (Ching Ming Festival and Chung Yeung Festival) and the situation outside the gravesweeping seasons is usually not of a major concern. Thirdly, an applicant for a licence would have to submit a management plan covering the traffic and pedestrian flow management measures for prior approval by the Licensing Board and are required to comply with the licensing conditions relating to the traffic and pedestrian flow management measures imposed by the Licensing Board.

23. We have conducted a reality check. During the gravesweeping seasons, traffic and pedestrian flow management arrangements are already implemented by the Government and / or the operators in certain districts, including –

- (a) closure of roads and metered car parks;
- (b) control of pedestrian flow; and
- (c) arranging shuttle buses.

Moreover, departments concerned have already prepared contingency plans in certain districts to cater for ad hoc situations. According to observation,

with traffic and pedestrian flow management arrangements as well as contingency plans, the traffic and pedestrian flow level in those areas during the peak hours is at least at an acceptable level.

24. According to the stock-taking exercise of the pre-enactment niche data of 131 columbaria claiming to be pre-cut-off columbaria –

- (a) about 486 000 niches (pre-enactment sold niches where ashes have interred, pre-enactment sold niches where ashes have yet to be interred, and niches still available for sale) in 30 columbaria are with rezoning or planning permission obtained or do not require rezoning or planning permission;
- (b) if an **empirical evidence approach** is not approved, about 139 000 niches in 101 columbaria (about 76 000 pre-enactment sold niches where ashes have been interred and 63 000 pre-enactment sold niches where ashes have yet to be interred) would be affected.

25. Considering the wider public interest (avoiding massive displacement of interred ashes and frustration of pre-enactment contracts), the proposed **empirical evidence approach**, i.e. when departments assess the applications before the TPB and the Licensing Board, the niches referred to in paragraph 24 (a) and (b) above will be treated as **the baseline at or below which departments concerned will generally not call for a TIA**. For paragraph 24(a), they have been and will continue to be considered as existing or committed developments and hence a new TIA will not be required by departments concerned. For paragraph 24(a) and (b) taken together, our assessment shows that in future when those niches have all been interred with ashes and, where required, with existing or enhanced traffic and pedestrian flow management arrangements, the traffic and pedestrian flow level should still be at an acceptable level. All private columbaria applying for a licence under the Ordinance will be required to submit a management plan to the Licensing Board. Hence, they will still be required to propose traffic management and pedestrian flow management measures which can be implemented by themselves to minimise any adverse impact of the columbarium operation on the local community.

26. It should be noted that the TIA mechanism will still be adopted for pre-cut-off columbaria, when the applicants seek approval for the niches still available for sale, and from any post-cut-off columbarium for their columbarium development. The operators will have to work out, on their own

or collectively, mitigation measures to bring the cumulative traffic impact back to the acceptable level.

27. To facilitate relevant departments, the TPB and the Licensing Board to have a better grasp of the situation, FHB will commission a counting survey to collect the **actual traffic and pedestrian data in the Ching Ming Festival of 2018 of columbaria claiming pre-cut-off status in their applications for specified instruments submitted to the Licensing Board** (where deemed by the Government to be needed). This together with pre-enactment sold niches (where ashes have yet to be interred) will also form a basis for departments concerned to assess the additional mitigation measures required from operators and the Government for bringing the impact down to an acceptable level. We believe that the Licensing Board can, after considering advice from relevant departments, impose licensing conditions, requiring the operator to adopt effective traffic and pedestrian flow mitigation measures and fire safety measures. Relevant departments in the Government may consider enhancing / increasing supporting facilities relating to pedestrian flow management, traffic management and fire safety / rescue measures depending on the circumstances.

## **IMPLICATIONS OF THE PROPOSAL**

28. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no civil service, competition, economic, productivity or gender implications. The financial, sustainability, family and environmental implications are set out at **Annex C**.

## **PUBLIC CONSULTATION**

29. During deliberations at the LegCo Panel on Food Safety and Environmental Hygiene and the Bills Committee, some Members have urged the Government to address the land premium issue for regularising pre-cut-off columbaria so as to avoid the “catastrophic” consequences. After the Ordinance has been enacted, the Private Columbaria Affairs Office of FEHD organised a round of briefings for private columbaria operators in July to August 2017. Almost all private columbaria under the Notification Scheme joined the briefings. During the Question and Answer sessions, many operators have expressed grave concern over the land premium and TIA issues.

## **PUBLICITY**

30. The Licensing Board released the Application Guide and Forms on 31 October 2017, and will conduct another round of briefings to operators from 23 to 30 November 2017. We will inform the operators of the new arrangement at the briefings and issue a press release on the new arrangement on 22 November 2017. Also, we would highlight that in general, there is existing case law determining what constitutes dishonest acts. Dishonest acts involving cheating the Government to obtain unjust pecuniary gains may constitute fraud and deception under the Theft Ordinance (Cap. 210) (for fraud, sanction could be as high as imprisonment for 14 years).

## **ENQUIRIES**

31. Enquiries on this brief can be address to Miss Diane Wong, Principal Assistant Secretary (Food) 2, at 3509 8926.

**Food and Health Bureau**  
**22 November 2017**

**Extracts from past decisions**

(1) Decision in April 2014:

For as long as the exempted dated columbaria status of a pre-existing columbarium is in force –

- (a) insofar as the proposed exempted area shown in the relevant plan is concerned, D of Lands should consider administratively, upon application, regularise the breach of the relevant lease condition(s) and / or unlawful occupation of unleased Government land, by way of a waiver or an STT or both, as the case may be; and
- (b) consider waiving such waiver fees or STT rentals or both, as well as administrative fees, in respect of the proposed exempted area before and during the exemption period.

Each application will be considered on a case by case basis having regard to its merits and circumstances.

(2) Decision in January 2016:

- (a) relaxing the prescription in the Bill which disqualifies a pre-Bill columbarium from seeking exemption should it continue to inter ashes after the Bill Announcement Time (“BAT”), i.e. 8:00 a.m. on 18 June 2014, so that, subject to fulfilment of conditions to forestall abuse, exempted columbaria can be allowed to inter ashes in the post-BAT period in niches sold before the BAT;
- (b) empowering the Secretary for Home Affairs (“SHA”) to allow bona fide religious organisations to use the pre-BAT yet-to-disposed of niches, subject to a designated quota, in religious ash pagodas inside exempted columbaria for interring in the post-BAT period the ashes of bona fide monks/nuns/priests and the like who serve the religious institutions in a full-time and life-time fashion, and prescribe rules for the purpose; and
- (c) considering waiving the relevant waiver fees, STT rentals and administrative fees in respect of sold niches in exempted



columbaria before and during the exemption period should be extended to cover the pre-BAT yet-to-be disposed niches with post-BAT interment referred to in (b) above and the pre-BAT sold niches with post-BAT interment referred to in (a) above,

Each application will be considered on a case by case basis having regard to its circumstances and merits.

At the stage of consideration, it is also noted that if an operator deceives the Government, thus resulting in prejudice to the Government, that person commits the offence of fraud under the Theft Ordinance, which would render an offender liable on conviction to a maximum penalty of imprisonment for 14 years. Moreover, if a columbarium operator and a consumer conspire to deceive the Government, they commit the offence of conspiracy to defraud. Such an act is contrary to Common Law and punishable under the Crimes Ordinance, which would render an offender liable to a maximum penalty of imprisonment for 14 years.

**Waiving the Relevant Waiver Fees, Short Term Tenancy Rentals and Administrative Fees in respect of Pre-Cut-Off Sold Niches for Pre-cut-off Columbaria Confirmed to be Eligible for an Exemption in All Other Respects**

According to the decisions in April 2014 and January 2016, considering waiving the relevant waiver fees, STT rentals and administrative fees for the regularisation exercise in respect of **niches sold before the cut-off time** for pre-cut-off columbaria confirmed to be eligible for **an exemption** in all other respects (“the waiving arrangement”), thus covering the following –

- (a) filled niches (i.e. with ashes already interred before the cut-off time); and
- (b) unfilled or partially-filled niches (i.e. with ashes to be interred after the cut-off date),

but each application will be considered on a case by case basis having regard to its circumstances and merits.

2. The exempted columbaria opting to continue to operate rather than exiting from the market would mean that –

- (a) they would have no new income from the new sale of niches;
- (b) they would have costs to incur, including seeking compliance with the building-related requirements<sup>1</sup>, maintenance costs for fire services installations, and complying with exemption conditions to ensure safety and abate nuisance, etc.; and
- (c) in case of business cessation, they would have to comply with the prescribed ash disposal procedures, failure of which would subject to sanction with heavy penalties in the form of fines and imprisonment.

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<sup>1</sup> These include certification on structural safety, rectification and relocation.

3. The above waiving arrangement has generally been accepted, out of consideration to benefit the consumers who have purchased (or rented) the niches before the cut-off time, rather than the operator.

4. The following safeguards are applicable to exemption cases in order to guard against abuse –

- (a) for filled niches, if any interred ashes are removed subsequently (such as claimed back by descendants), such vacated niches are not allowed to be “refilled” as a matter of policy. This applies to (b) below, after the partially filled or unfilled niches have become filled niches in future;
- (b) for partially filled or unfilled niches, there are provisions in the Ordinance on registers on unused or partially used pre-cut-off sold niches (section 24), approved plans (section 26), restrictions on the number of ashes interred (sections 54 and 55), restrictions on replacing the name of a dedicated person with another person in the registers unless that other person is a relative as defined in section 6(2) of Schedule 5 (section 56); and
- (c) section 38 of the Ordinance empowers the Licensing Board to impose conditions on a specified instrument (including **an exemption**) of a pre-cut-off columbarium restricting the imposition of additional fees, charges or other sums in respect of an interment right beyond the amounts, or not in accordance with any mechanism for their future revision, set out in the agreement for the sale of interment right entered into before the cut-off time. An exemptee benefitting from waiving payments for the regularisation exercise will be subject to such a condition imposed in respect of pre-cut-off sold niches.

**Implications of the Proposal**

Financial implications

The proposal has been drawn up as a special and pragmatic initiative for not affecting the resting place of the deceased as far as practicable. Hence, the conventional market-based land administration policy might not be applicable in this case. The proposed waiver of waiver fees, STT rentals and administrative fees to columbaria eligible for a licence for seeking regularisation in respect of breaches of lease conditions and / or unlawful occupation of unleased land will result in revenue forgone. However, the amount of revenue forgone cannot be estimated at this stage as it depends on the number of pre-cut-off columbaria applying for a licence and the circumstances (e.g. the location and the number of niches, etc.) of individual sites. Resources for implementing the proposals, if necessary, will be sought and justified in accordance with the established mechanism.

Sustainability implications

2. Under the proposal, some existing unauthorised private columbaria, which should otherwise be subject to enforcement actions, will be allowed to continue to exist while they are applying for or holding a specified instrument subject to certain conditions being met. This will make more efficient use of existing private columbarium facilities, hence freeing up scarce land resources for other priority uses by society. Besides, as the Licensing Board would be able to impose conditions on private columbaria including, inter alia, plans to control nuisance, on crowd management and to prevent any potential environmental problems that may arise, the impact on the living environment of the neighbourhood by the continued operation of these private columbaria would be put under control under the licensing scheme. The proposal will thus have a positive impact on sustainability.

Family implications

3. From the family perspective, effective regulation of columbarium operations would reduce tension and anxiety on the part of family members in handling post-death matters of the deceased. This would help promote greater harmony and cohesion in families and society.

## Environmental implications

4. Regarding the environmental implications, the columbaria covered by the proposal will still be subject to the control of relevant environmental legislation. Under the Ordinance, the Licensing Board may also, as it thinks fit, impose conditions on the licences in respect of the columbaria on measures for minimising the environmental nuisance caused to the neighbourhood by the operation of the columbaria.