

LEGISLATIVE COUNCIL BRIEF

**Implementation of Private Columbaria Ordinance -
Issues on Land Premia –
Option on Payment by Instalments**

INTRODUCTION

With the enactment of the Private Columbaria Ordinance (Cap. 630) (the Ordinance) on 30 June 2017, private columbaria are required to comply with stringent requirements before they could obtain a licence which authorises them to sell or newly let out niches. The public has been urging for the expeditious resumption of supply of private niches, now that these are regulated under proper footing. We need to avail an additional option on the payment of land premia to help private columbaria overcome difficulties in raising finance from financial institutions.

2. At the meeting of the Executive Council (ExCo) on 10 July 2018, the Council ADVISED and the Chief Executive ORDERED that subject to the safeguard measures in paragraph 14 below being imposed, the option of paying the land premia by instalments (the payment by instalments option) be availed to private columbaria (be these pre-cut-off columbaria¹ or otherwise) seeking a licence on the basis of the following terms –

- (a) with interest rate for the respective annual instalment determined as follows, subject to a cap at the prevailing best lending rate (P) plus 2% (P+2%) –
 - (i) the interest rate for the first instalment will be the rate of investment return on fiscal reserves (return on fiscal reserves) announced in the latest Budget available when a binding basic terms offer (BBTO) or a revised offer following premium

¹ A columbarium that was in operation, and in which ashes were interred in niches, immediately before the cut-off time, i.e. 8 am on June 18, 2014.

appeal (as applicable) for a proposed modified lease is issued²;

- (ii) the interest rate for a subsequent instalment will be the respective return of fiscal reserves announced in the latest Budget available at the start of that applicable instalment period³;
- (b) subject to a cap on the number of instalments (with the maximum being the number of years under the remainder term of the land lease or 10, whichever is the less), the lessee is required to pay land premium as follows –
- (i) upon acceptance of the BBTO: a down payment equivalent to 10% of the land premium;
 - (ii) upon execution of the proposed modified lease: with advice from the Private Columbaria Affairs Office (PCAO) to the Lands Department (LandsD) on items (1) to (3) below (if applicable), another down payment equivalent to land premium in respect of these three items –
 - (1) any pre-cut-off sold niches without agreement between operators and consumers on restrictions to be imposed nor other equally effective measures to ensure that such restrictions are complied with;
 - (2) niches sold between the cut-off time and the enactment date; and
 - (3) other essential / ancillary facilities in support of the columbarium (if separately valued for the land premium), e.g. offices; and
 - (iii) the remaining balance of land premium net of paragraph 2(b)(i) and (ii) above by annual instalments payable in arrears; and

² This will ensure that the lessee is aware of the interest rate when he or she accepts the offer.

³ For illustration, for an instalment period between **13 January 2019** and 12 January 2020, the applicable rate will be the one announced in **February 2018** (i.e. the latest one available as at 12 January 2019). However, for an instalment period between **1 March 2019** and 29 February 2020, the applicable rate will be the one announced in **February 2019** (i.e. the latest one available as at 1 March 2019).

- (c) with the following terms applicable to deviation from the payment schedule of annual instalments –
- (i) for late payment, the Government may, by discretion where justifiable in lieu of re-entry under the lease, allow the lessee to extend such payments, at interest charged at the prevailing floating rate of P+2% on any of the instalments (inclusive of interest) outstanding, for the period between the date upon which these should have been paid and the date of settling the outstanding instalments (inclusive of interest); and
 - (ii) for early payment, the lessee is entitled, at any time after giving at least 2 calendar months' notice in writing to the Director of Lands, to pay any of the outstanding scheduled instalments together with interest at the latest prevailing interest rate referred to in paragraph 2 (a) above accrued prior to the payment date, without any penalty charge⁴.

JUSTIFICATIONS

Columbarium Landscape

3. It is in the overall interest of the community to facilitate the development of private columbaria that comply with our regulatory regime as part of our three-pronged approach to cater for the growing demand for niches, namely promoting green burial, increasing the supply of public niches and regulating private columbaria.

4. The Government has been making 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;

⁴ For the scenario of not paying all outstanding scheduled instalments, the payment schedule for the remaining outstanding instalments as stipulated in the modified lease will not be adjusted nor affected as a result of such early payment.

- (b) the sentiment of the descendants, in particular their wish not to upset the resting place of the deceased as far as practicable;
- (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.

Now that the Ordinance has been enacted, the greatest challenges before the Government and the community include early resumption of private supply of properly regulated niches to meet public demand and minimise disruption to the trade.

5. The deadline for submitting applications for specified instruments (viz. licence, exemption or temporary suspension of liability (TSOL)) in respect of pre-cut-off columbaria expired by close of 29 March 2018. As at 15 May 2018, more than three hundred applications for specified instruments⁵ from 142 private columbaria are being processed⁶. Subject to completion of preliminary vetting by PCAO, details of the applications received are set out in the table below

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⁵ One private columbarium may submit more than one application for specified instruments.

⁶ When compared with private columbaria on the Development Bureau's Information on Private Columbaria (DEVB's List) that are not private cemeteries, the 142 private columbaria comprise the following –

- (a) all 15 private columbaria on Part A of DEVB's List;
- (b) 109 private columbaria on Part B of DEVB's List; and
- (c) 18 private columbaria that are not on DEVB's List.

Also, by close of 29 March 2018, according to information available to PCAO, 22 private columbaria, which comprise 15 private columbaria on Part B of DEVB's List and 7 outside DEVB's List, did not submit applications for specified instruments. Most of them have either completed returning ashes to the family members of the deceased; or are in the process of implementing or have undertaken to conduct the ash disposal procedures as stipulated in the Ordinance.

Category	No. of Private Columbaria	No. of Licence Applications	No. of Exemption Applications
Applying for licence only in respect of pre-cut off columbarium	75	87	-
Applying for exemption only in respect of pre-cut off columbarium	31	-	31
Applying for licence and exemption in respect of pre-cut off columbarium	33	38	35
Applying for licence in respect of non-pre-cut off columbarium	3	3	-
Applying for specified instrument as of 15 May 2018	142	128	66

Note:

- (1) There is a wide spectrum of private columbaria: The above applicants include some charitable organisations and religious organisations.
- (2) According to information collected under the 2014 Notification Scheme, among the private columbaria claiming to be dated columbaria, only 28 private columbaria have provided documentary proof.

With the applications for specified instruments having been submitted, the picture on private columbaria has become clearer –

- (a) the number claiming pre-cut-off columbarium status;
- (b) the number claiming datedness status (for seeking an exemption); and
- (c) the number not claiming datedness status.

6. Obtaining a licence requires satisfying various legislative, Government and other application requirements, including town planning, land use, building and fire safety, rights to use the premises, environmental protection, electricity and lift / escalator safety, crowd and traffic management, plans covering ash interment layout, ash interment capacity, ash interment quantity, as well as financial proposal for assuring sustainable operation, etc. Applications failing to meet these requirements may be refused by the Private Columbaria Licensing Board (Licensing Board).

Problems Encountered with Raising Finance from Financial Institutions

7. Unless otherwise approved by ExCo, LandsD normally assesses the land premium for a private columbarium at full market value (FMV) taking account of the estimated proceeds from disposal of all its niches (sold and unsold niches while allowing for an assumed disposal period) at present-day value. It is common for operators to resort to raising finance from financial institutions for paying land premia as well as other development costs of their columbarium projects. A private columbarium which does not comply with the land-related requirement, which includes paying the land premium, will not be able to obtain a licence from the Licensing Board.

8. According to feedback received after enactment of the Ordinance, raising loans from financial institutions for the above purpose has been increasingly difficult, as private columbaria are now considered a high-risk business –

- (a) the uncertainty associated with obtaining a licence: as the licensing regime is new, it takes time for a financial institution to build up proficiency in assessing whether a private columbarium is likely or unlikely to obtain a licence. Failure to obtain a licence ultimately will render a columbarium operator unable to pay the loan because of a lack of sales proceeds; and
- (b) the risks and consequences of default of the columbarium operator (even if he or she has obtained a licence): a financial institution will not wish to step in his or her shoes to become the licensee to operate the columbarium. Added to this is the statutory ash disposal obligations imposed on a person-in-possession (which includes a mortgagee).

The columbarium land and property are not accepted as collaterals of the loans, and other land and property and personal guarantees are being called upon instead. Some financial institutions that have been approached by certain columbarium operators for project finance for this purpose have indicated a lack of interest.

9. In other words, a private columbarium operator faces a catch 22 situation. He or she needs to pay the land premium in order to obtain a licence. However, without a licence, he or she is not able to obtain a loan for paying the land premium.

Past Experience on the Payment by Instalments Option

10. Payment of land premia by instalments was offered in the past having regard to the policy justifications at the relevant time, with the most recent one being the time-limited initiative introduced in 2009 for industrial buildings (the industrial building scheme). The key features of the industrial building scheme include –

- (a) the interest rate at a fixed rate (P+2%) determined upfront (i.e. at the time of issuing the BBTO or a revised offer following premium appeal (as applicable) for the proposed modified lease) during the whole 5-year period⁷;
- (b) available for cases where the land premia payable exceed \$20 million;
- (c) the lessee is required to pay –
 - (i) upon acceptance of the BBTO, a down payment equivalent to 10% of the land premium;
 - (ii) upon execution of the modified lease, another down payment equivalent to 10% of the land premium; and
 - (iii) thereafter, the remaining 80% of the land premium by annual instalments in arrears;
- (d) application for consent to sell or assign will not be considered by LandsD until the lessee has paid all outstanding premium plus interest or provided a bank guarantee for the outstanding premium; and
- (e) with the following terms applicable to deviation from the payment schedule –
 - (i) for late payment, the Government may, by discretion where justifiable in lieu of re-entry under the lease, allow the lessee to extend such payments, at interest charged at the prevailing floating rate of P+2% on any of the instalments (inclusive of

⁷ The redevelopment is expected to be completed within 5 years, but extension may be accepted LandsD at a premium if there are valid grounds.

interest) outstanding, for the period between the date upon which these should have been paid and the date of settling the outstanding instalments (inclusive of interest); and

- (ii) for early payment, the lessee is entitled, at any time after giving at least 2 calendar months' notice in writing to the Director of Lands, to pay the whole of the balance of the premium then outstanding together with interest accrued prior to the payment date, without any penalty charge.

In the light of past experience, the details of the initiative are set out in the ensuing paragraphs.

Detailed Initiative

(1) Justifications

11. The phased premia for phased development (the phased development option) and periodic payment of waiver fees for short-term waiver (STW) were set out in paragraph 19⁸ of the LegCo Brief (ref. FH CR 2/3751/07) dated 22 November 2017. As a matter of fact, not all cases can resort to the phased development option, e.g. it will not be possible to adopt this option for individual storeys with niches in a multi-storey columbarium building. Thus, **an additional payment by instalments option** is availed to private columbaria (be these pre-cut-off columbaria or otherwise) seeking a licence, with a view to breaking the catch 22 situation mentioned in paragraph 9 above. The difference between the two options is that –

⁸ For post-cut-off sold niches (be this pre-cut-off columbarium or otherwise), they will not be covered by the waiving arrangement. We will administratively avail an option for an applicant seeking a licence fulfilling the respective criteria to opt for 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 short term tenancy rentals), allowing periodic payment of FMV 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).

- (a) under the phased development option, the land premium is assessed at current values for each phase as and when each phase proceeds; and
- (b) under the payment by instalments option, the land premium is assessed upfront⁹ at the time of the land grant/transaction.

Under the payment by instalments option, the Government is not in a position to capture any rise in land values over the total period allowable for instalment payments if land values are rising, whereas the Government stands to gain from such frozen land values upfront if land values are falling, as compared to the land premium received under the phased development option. The Government has the sole and absolute discretion to decide whether to allow the phased development option or the payment by instalments option or both, depending on the circumstances and merits of a case.

12. The justifications for availing the additional payment by instalments option are meeting the policy objectives in paragraphs 3 to 4 above by providing relief under the circumstances in paragraph 8 above in terms of easing the operator's cash flow through reducing his or her initial capital outlay.

(2) Guiding Principles

13. As a common thread applicable to all such schemes, the guiding principle is to ensure effective restrictions against the lessee's ability in receiving payback from its project (see restrictions against assignment or alienation in paragraph 10 (d) above) beyond the land premium paid to the Government. In our case, there will be safeguard measures to ensure that the number of niches which could be sold or newly let out under the licence concerned is restricted to no more than the number of niches under the lease where the applicable premium instalments have been paid.

(3) Control Mechanism

14. Under the control mechanism to be adopted under the land administration regime and the licensing regime, the safeguard measures in support of the above guiding principles will take the following form –

⁹ At values as at the date of assessment based on a disposal programme for the niches which is not bound by the annual instalment plan and the corresponding niches allowed to be sold/underlet under such arrangements.

- (a) upon execution of the modified lease: based on advice from PCAO to LandsD on items (i) to (iii) below (if applicable), another down payment equivalent to land premium in respect of these three items –
- (i) any pre-cut-off sold niches¹⁰ without agreement between operators and consumers on restrictions to be imposed nor other equally effective measures to ensure that such restrictions are complied with¹¹;
 - (ii) niches sold between the cut-off time and the enactment date; and
 - (iii) other essential / ancillary facilities in support of the columbarium (if separately valued for the land premium), e.g. offices.
- (b) LandsD will insert a new clause in the modified lease stipulating the maximum number of niches that could be sold or newly let out under each instalment payment, with each instalment permitting the same number of niches (i.e. calculated by dividing the total number of unsold niches by the number of instalments). In any case, the aggregate number of niches that could be sold or let out is not allowed to exceed the total number of niches in respect of which the full land premium has been paid; and
- (c) the Licensing Board has confirmed that, subject to the views of its own legal adviser, if an application for payment by instalments is opted by a licence applicant and the proposed modified lease is executed, it is agreeable to effect the following complementary arrangement: upon application by the licence applicant / licensee, the Licensing Board is, upon receipt of LandsD's confirmation on the number of permitted niches in respect of which the applicable instalment(s) has(ve) been paid (instalment-specific number of niches) and provided that the columbarium complies with all other licence application requirements, to decide (if a licence is to be issued) that –

¹⁰ On 22 November 2017, the Government announced that subject to safeguard measures imposed, land premia for pre-cut-off sold niches of pre-cut-off columbaria confirmed to be eligible for a licence in all respects other than payment of land premia may be waived.

¹¹ Please see paragraph 12 of the LegCo Brief (ref. FH CR 2/3751/07) on 22 November 2017.

- (i) the approved ash interment capacity of the licence¹² will only reflect the instalment-specific number of niches; and
- (ii) the approved plan¹³ of the licence will only include the portions of the columbarium in respect of such instalment-specific number of niches are located.

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

(4) Interest Rate

15. By way of background, financial institutions offer different finance charge rates to different parties, reflecting risk and business relationships. The best lending rate (P)¹⁴ is a benchmark interest rate offered by banks to their prime customers (most credit-worthy) customers, with the actual interest rate applicable to an individual customer reflecting an adjusted interest rate as appropriate expressed as above or below P. P has remained stable over the years (5.083% for at least the past 6 years) and is less commonly used for pitching interest rate

¹² The ash interment capacity means, inter alia, the total maximum number of sets of ashes that may be interred in the columbarium.

A licensee is not permitted to sell niches beyond the approved ash interment capacity in the approved plan (see sections 13 and 30(a) of the Ordinance).

¹³ The particulars authorized or permitted by the Licensing Board (including the ash interment capacity and the ash interment layout) are shown in the approved plan. The ash interment layout means, inter alia, the location and serial numbering of niches in the columbarium and any area in the columbarium in which ashes may be interred otherwise than in niches.

This may take the form of variation of the approved plan after the licensee has paid each subsequent instalment of land premium.

¹⁴ P, in relation to a day, means the arithmetic mean of the best lending rate quoted by each note-issuing bank on that day. In other words, P is the average prevailing best lending rate announced by the current 3 note-issuing banks in Hong Kong, namely the Hongkong and Shanghai Banking Corporation Limited, Standard Chartered Bank (Hong Kong) Limited and Bank of China (Hong Kong) Limited).

in recent years. Hong Kong Interbank Offered Rates (HIBOR)¹⁵ are benchmark interest rates offered on loans offered by banks in the interbank market, and represent the cost of funds to banks. The HIBOR (with maturity at 12 months) as at 29 June 2018 is 2.55429%. According to field experience on two cases, banks offering loans to columbarium operators prior to the enactment of the Ordinance have been pitching interest rate at a percentage above HIBOR.

16. The interest to be charged in our case will be the return on fiscal reserves, as this may be seen as the **opportunity cost** for money owed to the Government, and is considered to be **cost-neutral** to the Government, from the investment perspective. The return on fiscal reserves is available once a year in the context of the Budget¹⁶. In the Budget for 2018-19, the announced rate is at 4.6%. The interest rate for our initiative will also be subject to a cap at P+2% (currently at 7.083%), which is the interest rate adopted in the industrial building scheme and also the “penalty” rate of interest for late payment of instalments. After all, this cap is already higher than the commercial rate of interest charged on banks for their prime customers (most credit-worthy) customers.

17. For the first instalment, the interest will be set at the return on fiscal reserves announced in the latest Budget available when a BBTO or a revised offer following premium appeal (as applicable) for a proposed modified lease is issued. We appreciate adopting a fixed rate for the whole instalments period under the industrial building scheme, as this helps provide certainty and predictability and streamline the administrative procedures for ease of implementation. However, to make it closer to the opportunity cost to the Government as far as possible, interest will be calculated based on a **floating rate for any subsequent instalment**, by adopting the respective return of fiscal reserves announced in the latest Budget available at the start of that applicable instalment period. An annual floating rate can help minimise the possibilities of undercharging or overcharging as compared with a fixed interest rate up to 10 years. Such an arrangement is reasonable in terms of clarity, certainty and consistency –

¹⁵ HIBOR are the rates of interest for Hong Kong Dollar deposits for the relevant period calculated by Hong Kong Association of Banks (HKAB) each day (except Saturdays and general holidays). The fixings are made on the basis of quotations provided by 12-20 banks designated by HKAB as reference banks and are available for HKD deposit maturity ranging between overnight deposits and 12 months.

¹⁶ The rate of return on fiscal reserves announced in the Budget for a financial year is set with reference to the average annual rate of return achieved by the Exchange Fund’s investment portfolio in the past six years.

- (a) given commitment is known upfront (i.e. before the start of the instalment period) and payment is made in arrears (i.e. at the end of the instalment period), the lessee knows the amount payable for the next instalment upfront and has more than one year to plan ahead with making his or her payment; and
- (b) with the updated respective rate available, LandsD will each time, before the subsequent instalment starts, advise all subsequent annual equal instalments to the lessee, which will enable him to consider early payment of such future instalment(s) before the due date(s).

(5) Payment Schedule

18. Private columbaria are to comply with the statutory and administrative requirements. This would include the sequential process whereby –

- (a) the land premium will be paid upon acceptance of the BBTO;
- (b) the modified land lease will be executed;
- (c) the operator will complete the development (including the building structures) by the time limit stipulated in the building covenant clause; and
- (d) the Licensing Board will make a decision on the licence after the application requirements (including the land-related requirement and the building-related requirement) have been fulfilled.

19. In accordance with section 15(2) of the Ordinance, any licence, if granted, will not exceed 10 years. The intention of the formulation in paragraph 2 (b) above is that all land premium should have been paid well before expiry of the validity period of that licence. While the down payment is only 10% of the land premium (as compared with 20% of the land premium under the industrial building scheme), we should bear in mind that the operator is already required to pay the land premium referred to in paragraph 2 (b) (ii) above (though there is no second down payment of 10% of the land premium as under the industrial building scheme).

20. The formulation in paragraph 2 (c) above is generally modelled from the industrial building scheme. We also build in the flexibility for early payment of any of the remaining instalment(s) as set out in paragraph 2 (c) (ii) above. The

option of allowing early payment of outstanding instalments without penalty charge is in the interest of the Government in encouraging early payment of the land premium.

(6) Default Risks

21. The following measures seek to protect the Government against default risks –

- (a) with paragraph 2 (b) and the safeguard measures imposed in paragraph 14, there is a restriction against the operator selling or newly letting out niches under the licence concerned beyond the niches under the lease where the applicable premium instalments have been paid or beyond the validity period of the licence¹⁷;
- (b) on grounds of breaching the lease conditions, the Government may re-enter the columbarium land. The Ordinance has provided for a mechanism on ash disposal, and hence the columbarium land should be free of any ashes by the end of the procedures or steps on ash disposal; and
- (c) default in payment constitutes a breach of contractual obligation. The operator remains liable to pay all the outstanding amount to the Government and the Government may pursue a civil lawsuit to claim damages from the operator.

IMPLICATIONS OF THE PROPOSAL

22. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no civil service, productivity, gender or sustainability implications. The other implications are set out at Annex A.

PUBLICITY

23. A press release will be issued on 11 July 2018. A spokesman will be arranged.

¹⁷ The operator will not be able to recoup other substantial expenditures already incurred upfront for obtaining a licence (e.g. complying with the planning-related and building-related requirements) through proceeds from selling or letting out further niches after default.

ENQUIRIES

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

**Food and Health Bureau
Food and Environmental Hygiene Department
Lands Department
11 July 2018**

Implications of the Proposal

Financial implications

Providing an option for private columbaria operators seeking a licence of paying land premia by instalments would unlikely result in revenue forgone having regard to the proposed financial terms. Safeguard measures will also be put in place to protect the Government against default risks. The interest rate will be set with reference to the rate of investment return on fiscal reserves which represents the opportunity cost from the Government's investment perspective. The departments concerned would endeavour to absorb the additional workload, if any, from within their existing resources. Additional resources, if necessary, will be sought and justified in accordance with the established mechanism.

Family implications

2. 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. Also, the initiative will facilitate compliant private columbaria in resuming the supply of private niches. This would help promote greater harmony and cohesion in families and society.

Environmental implications

3. Regarding the environmental implications, the columbaria covered by the initiative 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.