

Our Ref : ST/MIS/1371C/L11

Your Ref.: DEVB(PL-P) 50/31/06/1

19 December 2013

Development Bureau
17/F, West Wing,
Central Government Offices,
2 Tim Mei Venue
Hong Kong

By fax and post
(No. 2868-4530)

Attn : Miss Erica Lam

Dear Madam,

**Sin Tin Toa Home for the Aged
(Lot No. 475RP in DD 185 and
Government Land Licence No. Z0070 ("the Site"))**

We act for Sin Tin Toa Home for the Aged, the operator of a columbarium on the Site.

We are instructed to object to the Town Planning Information as detailed in Column 5 of the Information on Private Columbarium (Part B) which was updated on 30 September 2013 regarding our client. Column 5 states that :

“ OZP : Sha Tin Outline Zoning Plan
Zoning : Government, Institution or Community and Village Type Development
Not in compliance with planning requirements (unless it is an existing use) ”

We are of the view that the columbarium operated by our client on the Site is an “existing use”. We now attach our counsel’s advice on this matter and supporting documents for your consideration.

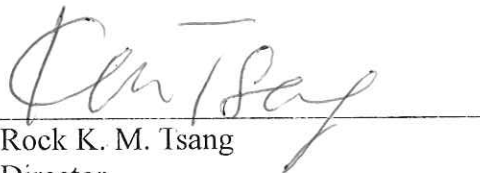
In the premises, we would request you to classify the columbarium on the site as an existing use under Column 5 of the Information on Private Columbarium

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In the meantime, all our client's rights in this matter are hereby expressly reserved.

Thank you for your kind attention on the matter.

Yours faithfully,
For and on behalf of
LANBASE SURVEYORS LIMITED



Rock K. M. Tsang
Director
RK/in

Encl.

c.c. Client

ADVICE

- Instructing solicitors act for Sin Tin Toa Home for the Aged (“the client”) and I am instructed to advise on whether the columbarium established by the client on the land Lot No. 475RP in DD185 and the land under the Government Land Licence No. Z0070 is in compliance with the planning requirements under the draft Sha Tin Outline Zoning Plan.

Background

- The client has been included in Part B of the Information on Private Columbaria which was published by the Development Bureau and updated on 31st March 2011. The reasons are (a) the columbarium operated by the client on the land Lot No. 475RP in DD185 (“the Site 1”) and the land under the Government Lease No. Z0070 (“the Site 2”) are not in compliance with planning requirements and (b) the user restrictions in the relevant land lease are still under consideration and investigation by the Sha Tin District Lands Office.
- This advice concerns solely whether the columbarium on the Site 1 and the Site 2 are in compliance with the planning requirements.
- The columbarium established on the Site 1 and the Site 2 falls within an area zoned “Government, Institution or Community” (“G/IC Zone”) and an area zoned “Village Type Development (“V Zone”)” respectively. The relevant town plan is the draft Sha Tin Outline

Zoning Plan No. S/ST/24 ("OZP 2011") which was published in the Gazette on 11th February 2011.

"Existing Use"

- It is trite that both the Plan and the Notes form part of the OZP 2011. Paragraph 3 of the Notes provides as follows:
 - "(3) (a) No action is required to make the existing use of any land or building conform to this Plan until there is a material change of use or the building is redeveloped.
 - (b) Any material change of use or any other development (except minor alteration and/or modification to the development of the land or building in respect of existing use which is always permitted) or redevelopment must be always permitted in terms of the Plan or, if permission is required, in accordance with the permission granted by the Town Planning Board.
 - (c) For the purposes of subparagraph (a) above, "existing use of any land or building" means-
 - (i) before the publication in the Gazette of the notice of the first statutory plan covering the land or building (hereafter referred as 'the first plan'),
 - a use in existence before the publication of the first plan which has continued since it came into existence; or
 - ...
 - (ii) after the publication of the first plan,
 - a use permitted under a plan which was effected during the effective period of that plan and has continued since it was effected....."
- It is also trite that the Guidelines are material documents and should not be disregarded. In *Henderson Real Estate Agency Ltd. v Lo Chai Wan* (1996) 7 HKPLR 1, Lord Lloyd said:

"The plan and the Notes attached to the plan are obviously material documents to which the Appeal Board were bound to have regard; indeed they are the most material documents in the case. But what about the Explanatory Statement, and the subsequent guidelines? The Explanatory Statement is expressly stated not to be part of the plan. But it does not follow that it was not a material consideration for the Appeal Board to take into account, even though, as Mr Read QC, for the appellants, pointed out, the Ordinance does not contain a provision, corresponding to s 72 of the Town and Country Planning Act 1990, or clause 38(2) of the new Town Planning Bill, requiring the Town Planning Board and the Appeal Board to have regard to material considerations.

By the same token, the 1992 and 1993 guidelines are also material considerations to be taken into account. The Appeal Board was not bound to follow the Explanatory Statement or the guidelines. But they could not be disregarded."

- In the Town Planning Board Guidelines for Interpretation of Existing Use in the Urban and New Town Areas issued by the Town Planning Board in May 2004 (TPB PG-NO.24C), paragraphs 2.3 and 3.3 are relevant. They read as follows;

"2.3 Generally speaking, the use of any land or building which was in existence at the time when a new statutory plan or a new land use zoning restriction affecting the land or building came into effect will be regarded as the "existing use" of the land or building. The "existing use" of the land or building will be allowed to continue whether or not the use conforms to the new statutory plan or the new land use zoning restriction. However, if the use was effected (i.e. came into existence) when a statutory plan was in force, it must be a use permitted under that statutory plan before the existing use right can be claimed...

3.3 It is not for the Planning Department or the Board to provide evidence to prove whether a use is an "existing use". Any person who intends to claim an "existing use right" will need to provide sufficient evidence to support his claim."

- Similarly, the definition of the phrase "existing use" is found under section 1A of the Town Planning Ordinance (Cap. 131) where it is defined as "a use of a building or land that was in existence

immediately before the publication in the Gazette of notice of the draft plan of the development permission area” in relation to a development permission area.

- The exemption of “existing use” accords with the important principle that “our citizens and businessmen should be confident that, save in the most exceptional circumstances, their lives and businesses should not be affected by any laws or regulations retrospectively” (*Kam To Sauna*, Town Planning Appeal No. 1 of 1998).
- The columbarium established on the Site 1 and the Site 2 is not one of the always permitted uses as set out in Column 1 of the Schedule of Uses to the Notes of the OZP 2011 in G/IC Zone and V Zone respectively.
- The sole issue is whether the said columbarium falls within the exception of “existing use” in accordance with paragraph 3 of the Notes.
- The significant date in determining whether the said columbarium is the “existing use” is 15th April 1966 when the draft Sha Tin Outline Zoning Plan (then numbered as No.:LST/47) was first published in the Gazette.
- It is essential to set out the history of the client.
- In 1943, the client was established. Since its establishment, the client has been operating a home for the aged, poor and the disabled. The client has been providing a one stop caring service from the

provision of foods and accommodation to after death services.

- Since 1949, the client has been operating a home for the aged on a piece of land which is now the Site 2 and was granted by the Government such licence since 1977.
- In 1950, the client obtained the Site 1 under the Government Lease New Grant No. 7859. Since 1950, the client has been providing the after death services to its inmates on both the Site 1 and the Site 2.
- The after death services were first in the form of traditional soil burials (see a copy of the extract of an article published by the client on 23rd October 1954 during its 10th anniversary annexed hereto as Annex I).
- Since 1960, the after death services were in the form of columbarium services where the bodies of dead inmates were burned and their ashes were stored in urns (see a copy of the photos annexed hereto as Annex II where the year of death of some of the inmates were stated to be in the years of 1961 and 1962). The year of death appearing on the urns represents the time when the bodies of dead inmates were burned and their ashes were stored in urns. Otherwise, it is against common sense that the bodies were placed elsewhere and buried some time before burning them and placing their ashes in urns.
- The article annexed as Annex I supports the fact that the client provided the after death services on both the Site 1 and the Site 2 as early as 1950. Most importantly, the photos annexed as Annex II are strong evidence to prove that the client provided the columbarium services at least as early as 1961, before the significant date of 15th

April 1966.

Conclusion

- My view is that there is sufficient evidence to prove that the columbarium services provided by the client on both the Land Licence No.: Z0070 and the land Lot No. 475RP in DD185 fall within the “existing use” in accordance with the Notes of the OZP 2011. Accordingly, such columbarium services are in conformity with the planning requirements under the OZP 2011.

Dated the 16th day of May 2011

Frederick FONG
Counsel

