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Our Ref : ST/MIS/1371C/L23
Your Ref.: DEVB(PL-P) 50/31/06/1

15 December 2016

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

By fax and post
(No. 2868-4530)

Attn : Mr. Kevin Ip

Dear Sir,

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 2016 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.

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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

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

Re: Sin Tin Toa Home for the Aged

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

先天道安老院創立十週年
暨新建男女宿舍落成紀念刊

一九五四年
十月廿三日
歲次甲午九
月廿七日

院址
香港九龍
新界沙田

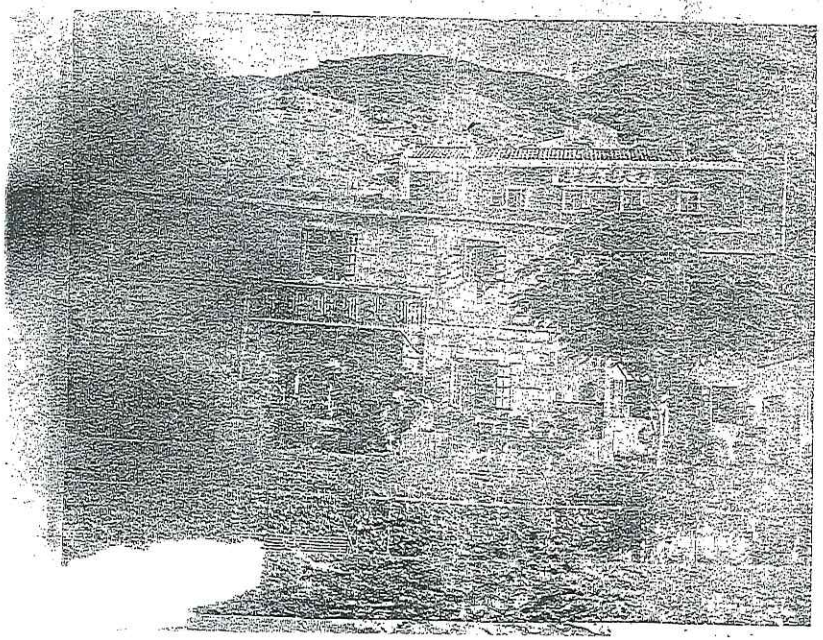
沙田先天道安老院
創辦十週年事略

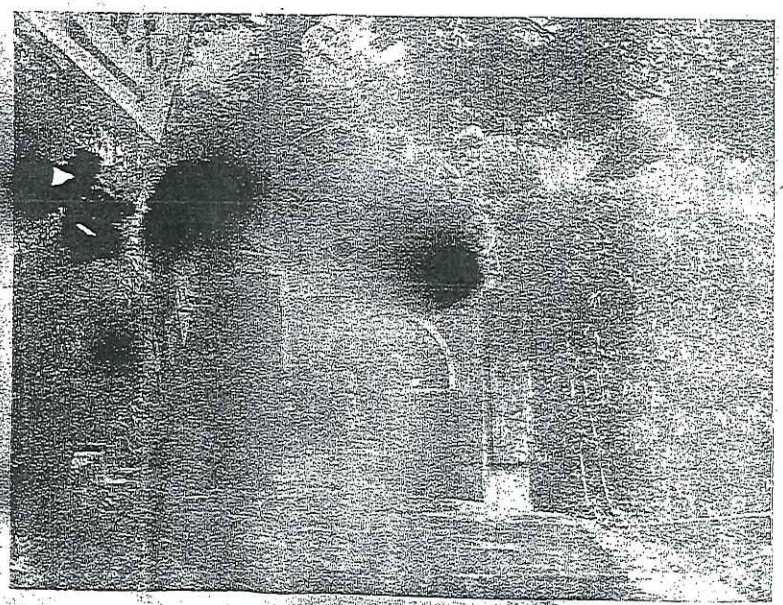
李載華

沙田先天道安老院之開始；乃在一九四三年，即香港陷敵之三年。時政府供糧已盡，米食停止配給，死亡枕藉；饑孚靈道先天道同人，固舉辦義賣白粥以施救濟。日數千人，零缺而來者，不餬修行之老婦，及其內以至此，則皆以室毀於寇，員扶養貧者，亦不能自存，散之四方而已。身既矢志修行，又不願沿門以求苟活，故逃避來此，坐候饘粥云云。同人等因本孤悲免死之心，持聯合先天道各堂，舉組先天道安老院，陴收容始末修真之人，以竟其志。當時因地方所限，收容初步，祇三十六名。院址則設於深水埗通菜街，一連五層二三樓，共佔七層。經兩月之籌備，始於夏歷六月十五日開幕，更事收容，使生存扶養，死有飾終。當時米食價格由軍米數十元漲至百餘元，然留院老人，永嘗有一餐之缺食。益深得各方人士之同情，時予協助，此誠堪欣頌。竟仔安然渡過，亦云幸矣！越年秋，港土重光，各業復元，院址乃遷於牛池灣先天道地之宗宜洞；仍屬僧居性質，當事人等，以假宅資屬，終非久計，亟擬購地建築。惟苦無適當之地段。且至一九四八年春，承道侶蔣女士慨捐坐落沙田之舊石屋一座，連地一萬五千方尺，以為院址。當即大事修葺，展拓地基；先將原有老人遷入居住，一面繼續加建臥室、客堂、養病室、廚房、浴室；及加築石壁裝設水電等等。全部費用，達四萬餘元。本院素無恒產，幸得各堂道侶，暨社會熱心人士，同情捐助，始克落成。乃增收道中及道外老人三十名，并健全其組織，分設財務、總務、文書、聯絡、調查、各部，分責辦理，設院長一人，副院長二人，以處理院務；設常家二人，常川駐院管理；什役四人，負責清潔。及服侍老人等什務，番樂方面，則任道侶中，投近當地之中醫生，及聘大埔興九龍之西醫生，分別為之治理。病者遷入病室以息；指定工人為之服役。老人身後，所有衣衾棺木，均由院方料理安葬，春秋佳日，全院老人，能步者，隨工作人員，登山祭掃之。老人日常生活，依規定秩序，起居飲食，細經禮佛靜坐誦語，均有一定時間。暇則任許自由蒔花種樹，領略生趣，以增其愉快之情。

當一九四九年夏歷四月，本院舉行遷居沙田，成立開幕典禮時，蒙新界民政署長班路先生寵臨為之剪綵。

一九五零年，又蒙政府給賜院後山地二萬餘尺，惟苦無款興築。因於一九五一年冬，與沙田鄉公所，在沙田聯修萬綠腸會七日，籌得善款二萬餘元。除先華石壁，規畫地基等，仍未足有所建造。乃先將內部加強組織，公選理監事若干名，正副會長三名，與正副院長三名，處理院務。更分設總務，財務，文書，膳食，衛生，服務，會計，各部，及出納，保管，庶務，醫藥，等股，皆義務任職，祇書記一人，女工數人，則略薄酬而已。一九五三年，為推許，回憶先先捐華女宿舍兩座，嗣後為紀念胡公文豹，更捐建療養室一座。是年冬，又得黃達煊先生捐建男宿舍一座。現均次第完成；且將院內上下道路修改，互相通貫，規模始告粗備。本院長老，固非一人之事，亦非一團體之事，更非一種宗教之事。誠以老有所養，為人類中最有同情之舉。人非無老，當其年富力強，其精神體力，消磨於一切工作，以為社會服務；又每因審無所積，遂致垂老無依。故一念其過去，寧忍坐視而肯不一為援手，且本院雖為先天道中人所辦，而收容老人，則素無畛域之分；倘確屬年老無依，又非有痼屢疾者，則不論何人，皆可申請送入安養。是以各界人士，無不大表同情，樂為援助。現本院統計有男女宿舍七間，收容女性老人一百七十餘名，不日再將男性老人收容，即當在二百名以上。將來各界援助日眾，宿舍日增，則又必不止此數矣！本院素為財力及地方所限，而只能收容女性老人，今更有宿舍可慕收容男性，於安老之義，益覺完備。並值本院創辦十週年之辰，因於上月卅日集院務會議，定於十月廿三日舉行本院開辦十週年紀念典禮。用將本院歷年經過概況奉陳，以供採覽。尚請賜予指導，曷勝銘感！





本院入門處，三五老人伤步之後情形。三

本院在各界善長仁翁協助下，致成經營，從此堅頹垣，舉路禮祭，而成今日園宇院宇，花木扶疏，不特老者有所安身，即過客莊止，足供憩息，微各方善士之力，曷克臻此！

梁安君之靈
新友會