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**PRIVATE COLUMBARIA APPEAL BOARD**

APPEAL NO. 5/2020

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BETWEEN

NG HO YUEN HENCHLEY

Appellant

and

PRIVATE COLUMBARIA LICENSING BOARD

Respondent

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Private Columbaria Appeal Board (“**Appeal Board**”) -

Presiding Officer : Mr Ambrose HO, S.B.S., S.C., J.P.

Panel Members : Miss LAU Queenie Fiona

Ir Ben LEUNG Chi-hung

Mr Fred LI Wah-ming, S.B.S., J.P.

Mr Aidan TAM Lon-foong

Date of Hearing (held in public): 27<sup>th</sup> August 2021

Date of Handing down Decision with Reasons: 11<sup>th</sup> November 2021

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**DECISION**

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1. This is the appeal by Mr Ng Ho Yuen Henchley, against the Decision of the Private Columbaria Licensing Board (“**the Licensing Board**”) made on 3 September 2020 (and later embodied in a Notice of Decision dated 21 September 2020). By that Decision, Mr Ng’s applications for the issue of (i) a licence of a columbarium, namely, 龍巖寺, (“**the Licence Application**”) and (ii) a temporary suspension of liability in respect of the said 龍巖

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寺, being a pre-cut off columbarium, (“**the Liability Suspension Application**”) were both dismissed by the Licensing Board.

## **Background**

2. The Licence Application and the Liability Suspension Application were made by Mr Ng on 12 March 2018, shortly before the cut-off date 29 March 2018. Both applications (“**the Applications**”) were contained in a Standard Application Form. For the Licence Application, Mr Ng has filled in Part IV(A) and (B), and for the Liability Suspension Application, Mr Ng has filled in Part IV(D) of the Standard Form. It is evident on the Application Form that Mr Ng did not provide all the supporting documents as required for the Applications. Some of the items were simply marked “後補” on the Form.
3. On 7 May 2018, the Private Columbaria Affairs Office (“**PCAO**”) informed Mr Ng by letter that parts of the Applications were incomplete. The PCAO gave Mr Ng an extension of 3 months to provide the outstanding information and documents, that is, on or before 6 August 2018.
4. In a series of subsequent letters, respectively dated 28 August 2018, 24 September 2018, 6 March 2019, 23 April 2019, 30 May 2019 and 30 August 2019, the PCAO reminded Mr Ng that despite the provision of some requested information and documents, some information and documents were still outstanding for the purpose of Mr Ng’s Applications.
5. In the 30 August 2019 letter, the PCAO notified Mr Ng that for the purpose of the Liability Suspension Application, any outstanding information and documents would have to be submitted by the deadline on 31 December 2019. The letter further stated that any information or documents tendered after the deadline would not be considered by the Licensing Board without special reasons given for the delay. The letter further stated that any non-compliance

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with the requirement to produce information or documents would result in the Licensing Board rejecting the Liability Suspension Application.

6. Mr Ng has failed to provide all the required information or documents by the 31 December 2019 deadline.
7. In the letter dated 13 February 2020, the PCAO informed Mr Ng that the required information and documents in a number of areas remained outstanding for the Liability Suspension Application. The Licensing Board would cease to process the Liability Suspension Application or seek further comments from the relevant authorities in respect of the application. The Licensing Board would consider the materials already submitted before the deadline at an open meeting at a date to be notified.
8. In response to PCAO's 13 February 2020 letter, Mr Ng explained in an email dated 17 February 2020 that because of the limited resources and manpower available to 龍巖寺, he and other managers of the columbarium would need more time to provide the outstanding materials.
9. The PCAO acceded to the request. In its letter of 6 March 2020 PCAO informed Mr Ng of the extension of 6 months, that is, up to 5 September 2020, to enable him to provide the outstanding information and documents, on condition that Mr Ng must take immediate steps to procure proof of the structural and fire safety of the columbarium. Mr Ng was required to produce evidence by 31 March 2020 that he had actually taken steps to instruct relevant professionals with a view to producing the proof as required. It was stated in the letter that if eventually the Licensing Board were to reject the Liability Suspension Application, the Licensing Board would at the same time also reject the Licence Application if the latter did not fulfil all requirements pertaining to such application. The operation of the columbarium would have to cease.

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10. In his letter of 22 May 2020 to the PCAO, Mr Ng intimated that due to lack of resources of 龍巖寺, he and other managers had decided that they would not engage any professionals to give the required certification.
11. In light of Mr Ng's response, the Licensing Board decided not to further process the Liability Suspension Application as well as the Licence Application. Mr Ng was notified by the PCAO of the stance of the Licensing Board by letter dated 3 July 2020.
12. Since the PCAO's letter of 3 July 2020, Mr Ng had not provided any further information or materials in relation to either of the applications. By a letter dated 4 August 2020, the PCAO notified Mr Ng that the Licensing Board would hold an open meeting on 3 September 2020 to consider the Applications.
13. Mr Ng replied to the PCAO by letter of 20 August 2020 that he would not attend the opening meeting on 3 September.
14. Despite Mr Ng's indication not to attend the opening meeting, the PCAO nevertheless sent Mr Ng the papers to be discussed at the meeting by the Licensing Board in relation to the Liability Suspension Application.
15. Mr Ng did not attend the open meeting on 3 September 2020, nor has he submitted further materials or representations for consideration by the Licensing Board. At the meeting, Licensing Board decided to reject both the Licence Application and the Liability Suspension Application ("**the Decision**").
16. The Decision was embodied in a written Notice of the Decision dated 21 September 2020 ("**the Notice of Decision**").

### **The Notice of Decision**

17. In the Notice of Decision, the background of the Applications was briefly set out. In particular, the Licensing Board noted Mr Ng's

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response that he would not engage any professionals to certify the structural and fire safety of the columbarium, and on that basis that the Licensing Board had ceased to process the Applications.

18. The Licensing Board further set out 14 aspects of the requirements under the Private Columbaria Ordinance which Mr Ng had failed to comply with in the Applications. The 14 aspects of non-compliance are set out in Annex I attached to this Decision.

### **This Appeal**

19. Mr Ng appealed the Decision of the Licensing Board. In his initial Notice of Appeal dated 30 September 2020, Mr Ng sought to explain that the columbarium had been in use for more than 30 years. He asked for permission to retain Tower 1 of the columbarium mainly on compassionate ground.

20. By an Amended Notice of Appeal dated 30 December 2020, Mr Ng sought to contend that Tower 1 of the columbarium could have qualified to apply for exemption as a pre-cut-off columbarium. He asked that the matter be considered by the Licensing Board with a view to granting an exemption for Tower 1 of the columbarium. Enclosed with his Amended Notice of Appeal was a copy of a certificate issued by an authorised person concerning the structural stability of Tower 1.

21. By a further revised Notice of Appeal (sent through a letter from A&D Surveyors Ltd. on Mr Ng's behalf) dated 9 March 2021 and further supplemented by a statement to the Licensing Board dated 31 March 2021 which was copied to the Appeal Board, Mr Ng further sought to explain that Block 1 was erected in 1987 and had housed 1,252 niches. It had been inspected by an authorised person in December 2020 and was certified to be in good condition structurally. Mr Ng further attached a number of documents purportedly in relation to various aspects of what is now application for exemption ("**the Exemption Application**"). Mr Ng accepted that these documents were not produced before the Licensing

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Board but had asked the Appeal Board for permission to adduce such evidence in support of the present appeal (“**the New Materials**”).

22. At the hearing of this appeal, Mr Ng and his representatives<sup>1</sup> emphasised that they were not contending that the Licensing Board was wrong to have rejected the Applications on the basis of the materials then submitted before the Licensing Board. Mr Ng and his representatives asked the Appeal Board to take the New Materials into account and to remit the Exemption Application to the Licensing Board for consideration. Mr Ng highlighted the fact that he was suffering from serious illness in the course of making the Applications. He was unfamiliar with the procedure and had no professional assistance at the time. He was under the mistaken belief that because Block 1 was included as a Part A Private Columbarium, it could be retained. In short, the representations amounted to asking the Appeal Board for indulgence to remit the Exemption Application for consideration by the Licensing Board on compassionate ground.

23. This Appeal Board had carefully considered the representations made by Mr Ng and his representatives. The Appeal Board is aware that in previous decisions of the Appeal Board (differently constituted panels), there has been different approach in construing the Appeal Board’s power to admit new evidence on appeal under s.87 of the Private Columbaria Ordinance. In PCAB Appeal No.4 of 2020, the Appeal Board was of the view that an appellant should not be permitted to adduce new evidence on appeal which was not previously available to and considered by the Licensing Board. Even if s.87 were to receive a generous interpretation and be constructed as permitting the reception of new evidence, exceptional reasons akin to the rule in *Ladd v Marshall*<sup>2</sup> would have to be shown before the Appeal Board would be prepared to receive such evidence. In contrast, a differently constituted Appeal

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<sup>1</sup> Mr Chan Kam Cheong and Mr Yu Hon Kwan, both of whom had obtained permission from the Appeal Board to make representations on behalf of Mr Ng at the hearing  
<sup>2</sup> [1954] 1 WLR 1248

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Board in PCAB Appeal No.3 of 2020 took a different view of s.87. In the latter case, the Appeal Board was of the view that s.87 did not constitute an absolute procedural bar against the reception of new evidence by the Appeal Board. The Appeal Board would have power to take into account all materials placed before it. The threshold is that the party seeking to adduce new evidence on appeal would be required to show good reasons for doing so.

24. In the present appeal, this Appeal Board is not required to decide which of the approach accords with the construction of s.87. Even adopting an interpretation most favourable to Mr Ng, we are still of the view that admission of the New Materials ought not to be allowed for the purpose of the appeal. Even though this Appeal Board is sympathetic to Mr Ng's personal circumstances concerning his illness, we cannot ignore the fact there are other managers for 龍巖寺 and Mr Ng had had ample opportunity to adduce the New Materials before the Licensing Board. He and other managers had chosen unequivocally not to engage professionals to certify the structural and fire safety of the columbarium, and had chosen not to attend the hearing or present representations to the Licensing Board before a decision was made in respect of the Applications. Furthermore, this Appeal Board is unimpressed by the belated change of tact by turning this appeal into an Exemption Application. As is apparent on the Application Form, Mr Ng clearly was not seeking an exemption when the Applications were put forward, as Mr Ng had chosen only to fill in Parts IV(A), (B) and (D) but had left blank the entire Part IV(C) which was the relevant part for an application for exemption. In all circumstances, this Appeal Board takes the view that Mr Ng has failed to show good reasons for the New Materials to be admitted for the purpose of the appeal now. We had therefore declined to take account of the New Materials.

25. In the course of the representation, counsel for the Licensing Board had taken us through the comments from the various government departments regarding the deficiencies of information provided in

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relation to the columbarium in 龍巖寺 for the purpose of the Applications, including comments from the Lands Department, the Planning Department, the Buildings Department, the Fire Services Department and the Police. While Mr Ng and his representatives now seek to address those deficiencies or endeavour to assure the Appeal Board that the deficiencies are capable of being remedied, the fact remains that such materials ought to have been presented to the Licensing Board in the first place. It is now far too late for Mr Ng to invite the Appeal Board to assess the merits of the Exemption Application with reference to these materials.

26. We would agree with Counsel for the Licensing Board that the Applications were rightly dismissed by the Licensing Board on the basis that a number of requirements for the Applications were not satisfied. Those deficiencies include:

In relation to the Liability Suspension Application:

- (1) Failure to show as regards the unleased land as occupied unlawfully by the columbarium, that Mr Ng had either (i) applied to the Director of Lands for lawful authority to occupy the unleased land; or (ii) provide a written declaration to the Director of Lands that Mr Ng has no claim to the unleased land, as required under s.21(2)(b) of the Ordinance;
- (2) Failure to prove to the satisfaction of the Licensing Board that the columbarium had been certified, by a qualified professional, as not posing any obvious or imminent danger in terms of building safety and fire safety, as required under s.21(3) of the Ordinance;
- (3) Failure to submit documentary proof regarding fire safety of the columbarium to accompany the Applications in accordance with the 申請指引, contrary to the requirement under ss.22 and 23(1) of the Ordinance;
- (4) Failure to submit the requisite plans to accompany the Applications in accordance with the 申請指引, contrary



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to the requirement under ss.23(1) and 25 of the Ordinance;

(5) Failure to provide a summary for the Applications in accordance with the 申請指引, contrary to the requirement under s.23(1) of the Ordinance;

(6) Failure to produce evidence to prove that all the joint-owners or co-owners of the columbarium premises have given authorization or consent for the premises to be used as a columbarium, contrary to the requirement under s.23(2) of the Ordinance. In particular, not all the managers of Shing Sum Tong (the registered owner of the land on which the columbarium situates) had given their requisite consent in question;

In relation to the Licence Application:

(7) Non-compliance with the land-related requirements for the Licence Application under s.18(1)(a)(i);

(8) Non-compliance with the planning-related requirements under s.18(1)(a)(ii);

(9) Non-compliance with the building-related requirements under s.18(1)(a)(iii);

(10) Failure to produce evidence to prove that Mr Ng holds the columbarium premises directly from the Government under a lease, as required under s.18(1)(b) of the Ordinance;

(11) Failure to submit proof regarding fire safety of the columbarium in accordance with the 申請指引, contrary to the requirement under ss.22 and 23(1) of the Ordinance;

(12) Failure to submit proof regarding environmental protection in accordance with the 申請指引, contrary to the requirement under ss.22 and 23(1) of the Ordinance.

27. We would further agree with Counsel for the Licensing Board that even if the present appeal is to proceed as if the Applications were

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to be treated as an Exemption Application (which we would decline to do), most of the requirements for the Exemption Application would have been similar to the Licence Application and the Liability Suspension Application, including the requirements relating to the land, the building, the right to use the premises, fire safety, the required plans, environmental protection and the summary of the Applications. The majority of the Licensing Board’s reasons for rejecting the Applications would have been applicable so that the Exemption Application would also fail.

28. In the circumstances, this Appeal Board would dismiss the present appeal.

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- (i) 此暫免法律責任書申請並不符合《私營骨灰安置所條例》(《條例》)第 21(2)(b)條的規定，因為申請人對營辦該骨灰安置所屬必需(或與之配套)的土地佔用(在《條例》第 25 條規定的圖則上顯示的範圍內)，包括不合法佔用未批租土地，但申請人(i)沒有向地政總署署長申請合法權限，以佔用該未批租土地；及(ii)沒有向地政總署署長提供書面聲明，述明申請人對該未批租土地沒有申索權(不論是基於在申請日期之前、當日或之後管有該土地，或任何其他理由)；
- (ii) 此暫免法律責任書申請並不符合《條例》第 21(3)條的規定，因為申請人沒有提交文件證明致使私營骨灰安置所發牌委員會(發牌委員會)信納該骨灰安置所已獲合資格專業人士證明在樓宇安全及消防安全方面不構成明顯或迫切的危險的規定；
- (iii) 此暫免法律責任書申請並不符合《條例》第 22 條及第 23(1)條的規定，因為申請人沒有按發牌委員會的《私營骨灰安置所牌照及其他指明文書申請指引》(《申請指引》)的指明要求提交足以證明符合消防安全要求的文件；
- (iv) 此暫免法律責任書申請並不符合《條例》第 23(1)條及第 25 條的規定，因為申請人提交的建議圖則並不符合《條例》內上述條文的規定及發牌委員會的《申請指引》的指明要求；
- (v) 此暫免法律責任書申請並不符合《條例》第 23(1)條的規定，因為申請人提交的暫免法律責任書申請摘要並不符合《申請指引》的指明要求；
- (vi) 此暫免法律責任書申請並不符合《條例》第 23(2)條的規定，因為申請人沒有提交證據以證明致使發牌委員會信納，有關骨灰安置所處的所有擁有人已給予授權或同意，讓該處所用作骨灰安置所；
- (vii) 此牌照申請並不符合《條例》第 18(1)(a)(i)條關乎土地的規定，因為申請人並沒有提交文件證明致使發牌委員會信納此牌照申請符合《條例》內上述條文的規定；

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- (viii) 此牌照申請並不符合《條例》第 18(1)(a)(ii)條關乎規劃的規定，因為申請人並沒有提交文件證明致使發牌委員會信納此牌照申請符合《條例》內上述條文的規定；
- (ix) 此牌照申請並不符合《條例》第 18(1)(a)(iii)條及第 19(2)條 關乎建築物的規定，因為申請人並沒有提交文件證明致使發牌委員會信納此牌照申請符合《條例》內上述條文的規定；
- (x) 此牌照申請並不符合《條例》第 18(1)(b)條的規定，因為申請人並沒有提交文件證明致使發牌委員會信納該骨灰安置所處所，是由該人直接從政府租入，並根據租契持有的；
- (xi) 此牌照申請並不符合《條例》第 22 條及第 23(1)條的規定，因為申請人沒有按發牌委員會的《申請指引》的指明要求提交足以證明符合消防安全要求的文件；
- (xii) 此牌照申請並不符合《條例》第 22 條及第 23(1)條的規定，因為申請人沒有按發牌委員會的《申請指引》的指明要求提交證明符合環保要求的文件；
- (xiii) 此牌照申請並不符合《條例》第 23(1)條及第 25 條的規定，因為申請人提交的建議圖則並不符合《條例》內上述條文的規定及《申請指引》的指明要求；以及
- (xiv) 此牌照申請並不符合《條例》第 23(1)條的規定，因為申請人提交的牌照申請摘要並不符合《申請指引》的指明要求。

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Mr Ambrose Ho, S.B.S., S.C., J.P.  
(Presiding Officer)

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Miss LAU Queenie Fiona

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Ir Ben LEUNG Chi-hung

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Mr Fred LI Wah-ming, S.B.S., J.P.

(Signed)

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Mr Aidan TAM Lon-foong

Appellant : Represented by Mr NG Ho Yuen Henchley

Respondent : Represented by Ms Deanna LAW of counsel instructed by  
Messrs. Gallant