



Determination 2019/048

Refusal to issue a certificate of acceptance for plumbing and drainage work associated with a refrigerated container used as a mortuary at 437 Notorious West Road, RD1, Dargaville



Figure 1: Photographs showing container and the hand basin

Summary

This determination considers the authority's refusal to issue a certificate of acceptance for plumbing and drainage work that was carried out without building consent. The plumbing and drainage work was installed to convert the shipping container for use as a mortuary and connects to an existing foul water drainage system that services a dwelling on the property, which in turn connects to a septic tank and evapotranspiration bed.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the Act") made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to this determination are:
 - J and B Young, owners of the refrigerated container ("the applicants") acting through an agent ("the agent")
 - Kaipara District Council, carrying out its duties as a territorial authority or building consent authority ("the authority").

¹ The Building Act, Building Code (Schedule 1 to the Building Regulations 1992), compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

- 1.3 The determination arises from the applicants' use of a refrigerated container next to their house for the preparation of dead bodies/tūpāpaku before burial. Plumbing and drainage work was carried out without building consent to install a hand basin on the side of the house near the container, a wash basin inside the container for disinfecting utensils, and to connect the waste from the basins and drain holes in the container to an existing foul water drainage system² that services the applicants' house. That system connects to a septic tank and evapotranspiration bed.
- 1.4 The authority refused to grant a certificate of acceptance³ for the plumbing and drainage work because it is not satisfied the work complies with the relevant Building Code⁴ requirements given the container's intended use⁵ as a mortuary. The authority advised the applicants of this decision via email and then sent a formal letter of refusal on 24 May 2019 ("the refusal letter"), after I received the application for a determination.
- 1.5 The matter to be determined⁶ is whether the authority was correct in its decision to refuse to issue a certificate of acceptance for the plumbing and drainage work that was installed without consent.
- 1.6 In determining this matter I must consider whether the applicants provided sufficient evidence in support of the application for a certificate of acceptance to demonstrate that the plumbing and drainage work complies with the relevant requirements of the Building Code. The authority identified non-compliance with Clause G13 Foul water in the refusal letter, but it has also referred to other clauses in correspondence and submissions; namely Clause G14 Industrial liquid waste and Clause F3 Hazardous substances and processes. I have also considered the applicability of these clauses in the determination.
- 1.7 In making my decision I have considered the parties' submissions and the other evidence in this matter. Appendix A includes relevant extracts from legislation and regulations.
- 1.8 The following terms are used in this determination:
- "foul water" – this is defined in Clause A2 of the Building Code as the discharge from any sanitary fixtures or sanitary appliances
 - "wastewater" – this is not defined in the Act or the Building Code but may be used to mean foul water⁷ or, as used in some standards, to mean foul water plus other water disposed of from a house⁸
 - "mortuary" – this term is defined in section 3 of the Health (Burial) Regulations 1946 ("the Burial Regulations") as "a room regularly used or intended to be regularly used for the preparation of dead bodies for burial or for the embalming of dead bodies or the examination or treatment of dead bodies prior to burial...". In this determination I use "container" when referring to the building in which the activity operates, and "mortuary" when referring to the activity occurring within the container and any relevant legislation relating to that activity.

² The terms "foul water" and "foul water drainage system" are both defined in Clause A2 of the Building Code.

³ Under section 96 of the Act.

⁴ First Schedule, Building Regulations 1992.

⁵ The term "intended use" is defined in section 7 of the Act.

⁶ Under sections 177(1)(b) and 177(3)(b) of the Act.

⁷ Refer the Ministry's website www.building.govt.nz "Onsite disposal of wastewater".

⁸ See, for example, joint Australia and New Zealand Standard AS/NZS 1547: 2012 On-site domestic wastewater management.

1.9 Matters outside the determination

- 1.9.1 As well as demonstrating compliance with the Building Code, the plumbing and drainage work must meet the requirements of other applicable legislation, regional plans and local bylaws. These may include the:
- Resource Management Act 1991 (“the RMA”) – this Act contains requirements for the discharge of contaminants into or onto land, which are then specified in the applicable regional plan and bylaws
 - Health Act 1956 (“the Health Act”) and the Burial Regulations. The regulations include requirements for the registration of funeral directors, the fit-out and maintenance of mortuaries, and the handling of dead bodies/tūpāpaku.
- 1.9.2 Schedule 1 of the Burial Regulations lists approved disinfectants and their concentrations for use in compliance with these regulations. In accordance with the Burial Regulations these approved disinfectants must be used for activities such as washing hands, cleaning surfaces and appliances, and for embalming. In relation to establishing compliance of the drainage system with the Building Code, I have taken into account the list of approved disinfectants that must be used as required by the Burial Regulations.
- 1.9.3 Whether or not there is a breach of other legislation than the Act falls outside the matters that I can determine. This determination is limited to the matter described in paragraph 1.5 and does not relieve the applicants from having to comply with other legislative requirements. The description of events leading up to the application for determination includes matters relating to other legislation and is included solely for context.
- 1.9.4 The applicants have referred in their submission to the length of time taken by the authority to make its decision, to information that may have been misplaced, and to the authority’s repeated requests for information. These issues do not fall within the matters that can be determined under section 177 of the Act. Such complaints should be made in the first instance to the authority, which is required to have policies and procedures for receiving and managing them⁹.
- 1.9.5 I was advised on 26 July 2019 that the applicants have filed an application in the High Court for judicial review, and the authority raised with me the question of the application of section 182(1) of the Act. That section provides “A person may not commence proceedings in the District Court or High Court if the matter that gives rise to those proceedings can be the subject of a determination.” On 27 July 2019 the applicants’ agent advised that the judicial review proceedings concerned the registration and subsequent de-registration of the mortuary under the Health Act, and accordingly were not in conflict with section 182 of the Act.

2. The building work and foul water drainage system

- 2.1 The applicants live in a two-bedroom house on a rural property (“the property”) at 437 Notorious West Road near Dargaville. Other buildings on the property include an outbuilding and the container.

⁹ Under regulation 7(2)(h) of the Building (Accreditation of Building Consent Authorities) Regulations 2006

- 2.2 The container, which is of unknown age, was moved onto the property in 2017. It is located 1.5m from and parallel to the house. It is 4.4m long by 1.8m wide, with a total floor area of less than 8m². I understand that the container's inside walls have been painted relatively recently with a two-coat epoxy system and its floor has been covered with high density vinyl. There are two drain holes in the container floor and a wash basin inside the container for disinfecting utensils, but no other plumbing fittings or fixtures inside the container.
- 2.3 An outside hand basin with hot and cold running water is located on the side of the house about 3m from the container door (see figure 1), over concrete paving tiles and gravel on the ground.
- 2.4 The plumbing and drainage work this determination is concerned with is the installation of floor waste, wash hand basin inside the container and the hand basin outside, and the connection of these basins and the container's drainage (via less than 10m of new PVC drains) to the house's existing foul water drainage system. An overflow relief gully¹⁰ and backflow devices were also installed as part of this work.
- 2.5 Figure 1 shows an extract from an undated plan provided to the authority (identifying the container as a chiller) that indicates the location of the new drains with respect to the foul water drainage system.

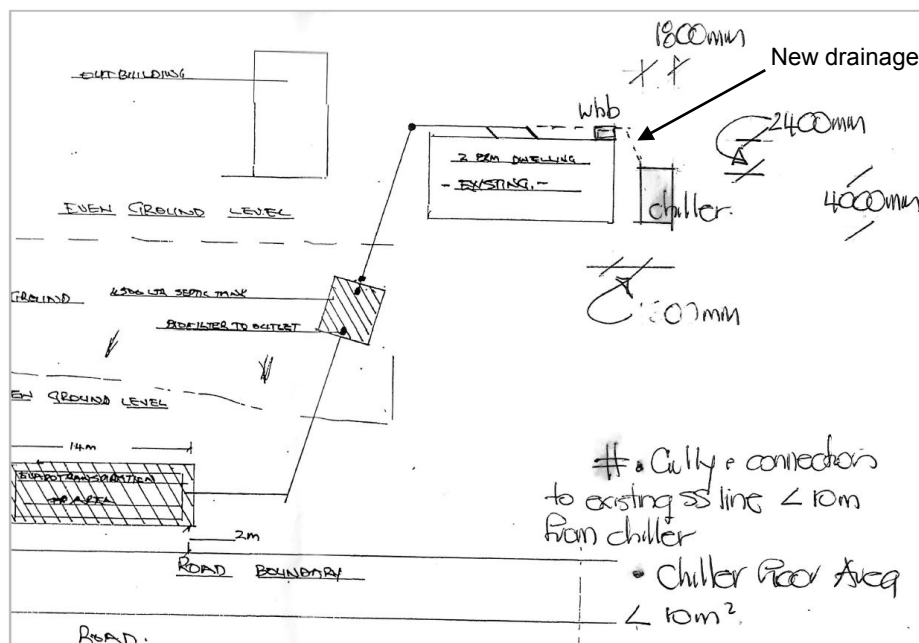


Figure 2: Extract from undated plan showing new plumbing and drainage (dotted lines) connecting to existing foul water drainage system

- 2.6 The foul water drainage system, which the new drainage is now part of, was originally installed in December 2005. Plans approved for building consent¹¹ show drains leading from the applicants' house from a bathroom, toilet, laundry and kitchen, to a 4,500 litre septic tank with an unspecified "biofilter to outlet"¹². The resulting effluent then flows via sloping ground to an evapotranspiration bed¹³ 14m long by 3m wide that is set back 2m from the road boundary. The approved plans

¹⁰ An overflow relief gully (ORG) is a fitting located outside that releases sewage in case of a blockage, so it does not enter the building.

¹¹ Building consent 050860 was issued on 23 November 2005, and a code compliance certificate was issued on 22 December 2005.

¹² I understand a biofilter to be a pollution control technique that uses living material to capture and degrade pollutants.

¹³ Evapotranspiration beds are a secondary treatment solution for effluents from septic tanks, using the loss of water from the soil by evaporation and by transpiration from plants.

also show an area 3m from this bed, and more than twice its size, for “future soakage”.

2.7 Evidence supporting the 2005 building consent application included a letter dated 19 September 2005 from a registered plumber and drainlayer that said the system was “in accordance with the TP58¹⁴ environmental plan”. The letter described the results of a soil soakage test carried out at the property and said:

- the soil could be described as medium to coarse loamy sand, good to well drained, and was “category 2 TP 58”
- the site would suit a 14m by 3m evapotranspiration bed from a 4,500 litre septic tank with bio filter to outlet
- the estimated quantity of water would be less than 2,000 litres per day and would be evenly distributed through this bed.

2.8 Foul water from the house receives initial treatment in the septic tank, where it is held temporarily for anaerobic bacteria and other organisms to start the decomposition process and for any remaining solids to settle. The resulting effluent then flows to the evapotranspiration bed, which is an area planted with select shallow-rooted plants that absorb effluent and release water into the atmosphere through their leaves. Any remaining effluent should be absorbed into the soil, where bacteria provide further treatment. I note that evapotranspiration provides one way, but not the only way, to dispose of effluent from a septic tank. Other land-based methods include gravity soakage trenches and soil or sand mounds.

3. Background

3.1 Events leading to the plumbing and drainage work

3.1.1 The applicants are managers of a funeral services business operating from the property. In October 2017 the authority became aware that the applicants were preparing bodies for burial in a refrigerated container they had moved onto the property.

3.1.2 On 23 April 2018 the authority’s environmental health officer issued a temporary certificate of registration under the Health Act to allow the applicants’ time to apply for a building consent for a new purpose-built building from which the mortuary would operate. The certificate, which expired on 30 June 2018, was for the applicants’ activities as funeral directors in accordance with the Health Act, Burial Regulations and unspecified bylaws. Conditions on this certificate included that it was granted on the applicants’ undertaking they would construct new premises which either:

- had “adequate wastewater disposal in accordance with TP58 and an engineer’s design and certification to adequately provide for the wastewater associated with such an operation”, or
- provided a separate wastewater treatment system or holding tank to receive the “waste chemicals” associated with embalming, which were described in the certificate as the “variety of preservatives, sanitising and disinfectant agents or

¹⁴ “On-site Wastewater Systems: Design and Management Manual”, Auckland Regional Council Technical Publication No. 58 (TP 58), third edition 2004.

other additives used in modern embalming to temporarily prevent further decomposition”.

(The applicants have repeatedly stated that they do not intend to carry out embalming. I note however that definition of “mortuary” under the Burial Regulations does not distinguish between facilities that are used for only preparation of bodies/tūpāpaku and those that are used for embalming.)

- 3.1.3 The certificate also stated that registration would not be renewed until new premises were complete and a code compliance certificate had been issued for the associated building work.
- 3.1.4 On 20 August 2018 the authority’s environmental health officer wrote to the applicants saying that if they intended to work from their home address they must provide a purpose-built area that met a list of requirements of the Health Act and Burial Regulations. These included providing adequate sinks for handwashing and cleaning; for all sinks to have hot and cold running water and be fitted with backflow devices; and for the floor to be drained so any liquid falling on it was “removed into the wastewater system”. The applicants were also required to submit a building consent application for the new premises.
- 3.1.5 This was followed by an email on 31 August 2018 from the authority to applicants advising that the applicants needed to submit a new floor plan of the container drawn to scale that included all the plumbing and drainage, and noting that the plumbing and drainage would require a building consent.
- 3.1.6 On 18 September 2018 the authority issued the applicants with a notice to cease operating the funeral director business because no building consent application had been received for new premises.
- 3.1.7 Later that month the applicants advised the authority that the plumbing and drainage work described in paragraph 2.4 had been completed. This prompted the authority’s building compliance officer to visit the property on 26 October 2018. The officer advised the applicants that the work to install the plumbing and drainage was carried out in breach of section 40 of the Act¹⁵ but that they could apply for a certificate of acceptance. This would have the effect of ‘regularising’ the work so there would be no ongoing breach of the Act.
- 3.1.8 The applicants subsequently engaged the agent and an environmental management planner (“the consultant”) to assist them with this and other matters. Correspondence with the authority late February/early March 2019 included the following:
- The consultant said the applicants had applied for a certificate of acceptance in September 2018¹⁶ and there had been a site inspection for this, but no further response from the authority. In relation to the applicants’ business activities, the consultant advised the authority that bodies arrived in caskets and no embalming or “blood work” was carried out, so no bodily fluids left the area.
 - The authority said it had received some relevant information but no application for a certificate of acceptance and one was required. The site inspection had been to confirm the extent of the plumbing and drainage work and whether a certificate of acceptance should be applied for. The authority also noted the type of evidence to demonstrate compliance with the relevant clauses of the

¹⁵ Section 40: Buildings not to be constructed, altered, demolished, or removed without consent

¹⁶ The applicants later said this application was made on about 2 October 2018 at the authority’s offices. I note there is ongoing dispute between the parties with regard to the date an application was made and what was required for the purpose of making an application.

Building Code might include testimony from a person deemed suitably qualified in such work, such as a certified plumber or drainlayer.

3.2 The application for a certificate of acceptance

3.2.1 The applicants submitted an application for a certificate of acceptance (“the application”) on 12 March 2019. They resubmitted the application on 15 March 2019¹⁷ with various revisions suggested by the authority, who also asked for as-built plans showing the container’s location on site and the placement of sanitary fixtures and their drainage.

3.2.2 The application described both the current and previous use of the container as a “refrigeration container”, and the building work as “installation of a floor waste, wash hand basin and their drainage and plumbing as associated with refrigeration container”; both descriptions were suggested by the authority. I note here that while the previous use of the container may well have been as a refrigeration container, it would have been more accurate to describe its current or intended use at the property as a mortuary.

3.2.3 The reason for the application was stated as being that the applicants were not aware a building consent was required. Supporting evidence included photographs and a Producer Statement Construction – plumbing (PS3) dated 4 November 2018 from a registered certifying plumber¹⁸.

3.2.4 From mid-March to mid-May 2019 the parties, the agent and the consultant corresponded extensively about the application and other matters. Key points from this correspondence are summarised below.

The authority

3.2.5 The authority asked for:

- the application to be resubmitted with the agent’s details and the value of the building work; confirmation the drains had been covered over
- an assessment from a person deemed expert to verify that the sanitary plumbing and drainage, complete with the septic system, was adequate for the intended use.

3.2.6 The authority said it was concerned about the potential to overload the septic tank with “chemical cleaners” and risks to the anaerobic/aerobic digestion. In the authority’s opinion there was a change of use¹⁹ as a domestic drainage system would be used for a commercial activity and this could not be assessed under the means of compliance for domestic systems. The authority did not accept the statement that only “eco-friendly” chemicals would be used.

3.2.7 The authority also advised that the application had been declined, but listed five items that, if all approved by the authority, meant it would issue a certificate of acceptance. These items were:

- a wastewater system design suitable for the specific proposed commercial/industrial use by a suitably qualified design professional that demonstrated compliance with Clauses G14, G13 (if applicable) and F3

¹⁷ I take this to be the completed application form supplied to me and also dated 12 March 2019, but which includes revisions described in the authority’s email of 14 March 2019. The authority has identified this as application number CA0246.

¹⁸ While the expiry date of the certifying plumber’s registration is recorded as 31/03/2018 (i.e. prior to the date the PS3 was issued), I note that the registration appears to have been continuous, with a current expiry date of 31 March 2020.

¹⁹ In terms of sections 114 and 115 of the Act and the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

- endorsement of this design by a suitably qualified person (likely to be a Chartered Professional Engineer with the requisite skills in applying the Verification Methods for these clauses), with particular reference to the container's use as a mortuary
- evidence the plumbing and drainage work could be incorporated into the overall wastewater design and be suitable for this use
- evidence of approval from the regional council (as this was likely to be a discretionary activity and a discharge consent may be required)
- advising that a building consent would be required for the wastewater system.

(I note that because the drainage had already been installed no building consent could have been issued for this work. However, the authority has subsequently advised that this reference to consent was for any new or separate wastewater system proposed as part of the new facilities).

- 3.2.8 The authority said it understood the “eco-friendly” products proposed for use by the applicants were not suitable for the intended use (which I take to mean were not approved disinfectants under Schedule 1 of the Burial Regulations). The authority repeated that the domestic wastewater system did not comply with Clause G13 as its intended use had been changed to a commercial use, which was outside the scope of the approval when the system was installed, and that “no designer” had been involved with the plumbing and drainage work. The authority advised that operating a mortuary meant the same conditions under the Burial Regulations applied for the preparation of dead bodies for burial or for the embalming of dead bodies, and said the applicants must comply to those standards.
- 3.2.9 During this period, the authority also sought and received further advice to assist in its decision-making.

The applicants

- 3.2.10 The applicants' representatives (the agent and the consultant) sent as-built plans of the plumbing and drainage work and photographs showing the drainage had been covered. They described activities on site and advised that no embalming took place and that there was ‘no industrial waste’.
- 3.2.11 The applicants advised they used industry-recognised chemicals/cleaners for their business activities similar to those used in all funeral service homes, and noted that information about these was already on file with the authority's health team. The applicants were of the view that the authority had allowed the use of these chemicals and nothing had changed since when the business was “registered” (refer paragraph 3.1.2).
- 3.2.12 The agent provided a copy of an October 2018 feasibility report regarding the applicants' business (“the feasibility report”). The report:
- described the use of the container as to prepare bodies for burial but with no embalming or “blood work”
 - noted that bodies arrived and left on plastic sheeting inside a casket
 - described the products used and that these included disinfectant for surfaces and to soak utensils and makeup brushes
 - advised the container was washed out with bleach and water (an estimated five litres per body), and final handwashing in the hand basin.

- 3.2.13 The agent also provided other information including a letter from a Chartered Professional Engineer, and details of another proposed cleaning agent described as “biodegradable, enzyme based, and suitable for use in hospitals”.
- 3.2.14 On 17 April 2019 the consultant also sent the authority a letter dated 16 April 2019 from an engineer, who is a Chartered Professional Engineer with civil and environmental expertise (“the engineer”) and who was engaged to assess the foul water drainage system. The engineer said in this letter (“the engineer’s letter”):
- The engineer had carried out a site inspection of the system, which had been operating since 2005 with no obvious concerns and no sign of seepage.
 - The container and hand basin had added “minimal volume”. The engineer said the preparation of bodies in the container entailed cleaning with isopropyl alcohol, which mostly evaporated, and washing with less than 4 litres of “soapy water” per body. The engineer considered that using the hand basin afterwards added a further 1 litre, for a total five litres per body, and there was no embalming on site “ensuring no unwanted chemicals contaminate the system”.
 - In the previous year the applicants’ business had prepared 30 bodies. The engineer said an increase of 1,500 litres per year (I take this figure to be in error, and to mean 150 litres per year) would have “little to no effect” on the existing system.

3.3 The application for a determination and the refusal letter

- 3.3.1 On 22 May 2019 I received an application for determination. I note here that while the authority had indicated it would refuse to issue a certificate of acceptance, it had not at that time given written notice of that refusal.
- 3.3.2 On 24 May 2019 the authority sent the refusal letter to the applicants. This letter said the application had been refused “for not satisfying the functional requirement of Clause G13”, and:

It has not been demonstrated that adequate means are in place for the safe storage, treatment and disposal of foul water discharge of the chemicals that may potentially be used for the building’s new use as a funeral parlour (sic).

Furthermore, it is noted that the current connection of the unauthorised drainage is to the existing foul water system which was consented under AS/NZS 1547²⁰ for onsite domestic use only. The proposed/intended changed use of the building for commercial purpose as a funeral parlour (sic) does not comply with the current existing lawful established use of the foul water system.

4. Submissions

4.1 The applicants

- 4.1.1 With the application for determination the agent sent a submission and information including:
- the PS3 for the plumbing and drainage work, the engineer’s letter, and photographs of the property, including the container and hand basin
 - correspondence with the authority, including the 20 August 2018 letter and certificate of registration, and emails between 7 February - 15 May 2019.

²⁰ AS/NZS 1547:2012 On-site domestic wastewater management

- 4.1.2 The agent described events leading to the authority's refusal to issue the certificate of acceptance, said the authority had not followed the process in the Act, and listed reasons for the applicants' concerns including (in summary):
- The authority's letter of 20 August 2018 listed items of non-compliance including the additional drainage, but there was no indication a change of use was an issue and the agent did not consider there had been one as the container was "already registered for its use".
 - The information requested by the authority had been supplied, including the applicants obtaining an engineer's statement (the engineer's letter), and there had been no formal refusal of the application in spite of a request for one.
 - While the authority did not accept the engineer's letter and considered the application needed to be assessed on "a worst case scenario" (which I assume to mean including embalming), the applicants believed it should be looked at for its stated purpose at the time i.e. only the preparation of bodies/tūpāpaku and not including embalming.
 - The application concerned a "small amount of drainage" to an effluent field which the agent said had previously been approved by the authority and "further verified by the engineer". The chemicals used in the applicants' business were pure alcohol, which evaporated before touching the floor, and normal household disinfectants.
- 4.1.3 On 24 May 2019 the agent sent a copy of the refusal letter, saying the authority's reasons for refusing the application were not specific enough and some of the wording was "misleading".
- 4.1.4 On 28 May 2019 I asked the applicants for details of the chemicals or other agents proposed to be used in the container and disposed of to the septic tank; and also what existing buildings discharged foul water to the septic tank and their intended use, including any reasonably foreseeable occasional use.
- 4.1.5 Later on 28 May 2019 the agent provided copies of:
- an email to the authority on 24 May 2019 with a page from a supplier's website about the cleaning product proposed for use, which described the product as a biodegradable BioGro²¹ organic certified cleaner suitable for use in hospitals; and an updated sketch indicating the location and extent of the plumbing and drainage
 - the application for the certificate of acceptance (including the 12 March 2019 version) and related documents and emails; the feasibility report; the 2005 building consent and related documents for the house's foul water drainage system; correspondence with the authority on 24 May 2019 about the refusal letter.
- 4.1.6 The agent said there were no "toxic chemicals" entering the septic system and the container was only used on a "very intermittent" basis. The agent said 30 burials per year at five litres per burial only resulted in an extra 0.43 litres per calendar day, while a maximum of 70 burials per year would add 0.96 litres a calendar day.

²¹ A New Zealand organic certification company

4.1.7 In later correspondence (18-19 June 2019) the agent raised concerns with some of the information the authority had supplied that the agent considered was not relevant to the determination.

4.2 The authority

4.2.1 In accepting the application for determination I asked the authority to confirm that its references in the refusal letter to a change of use were regarding the container, and identify the specific performance criteria in Clause G13 it considered had not been met. I also asked the authority to provide its reasons for considering the plumbing and drainage work would not achieve those criteria, plus the information or evidence this view was based on.

4.2.2 On 17 June 2019 the authority sent a submission, summary of events and information, including copies of the following:

- The building consent, code compliance certificate, installation plans and other documents relating to the foul water drainage system as originally installed.
- The application for certificate of acceptance and supporting documents, the refusal letter and photographs taken on site.
- Correspondence between the authority, the applicants and their representatives, including in relation to the certificate of acceptance
- Internal correspondence between the authority’s building compliance and health teams, and correspondence between the authority and other people and entities including the relevant District Health Board and Regional Council, and a member of the Funeral Directors Association of New Zealand (FDANZ).
- Other information relating to the applicants’ business activities, including the feasibility report and an extract from the FDANZ Members Handbook and Guideline Manual (2016) concerning the operation of mortuaries.

4.2.3 The authority’s submission included the following points in support of its position:

- The authority had applied the “change of use” provisions to the drainage installed to take the discharge from an existing outbuilding (the container), and considered it could not assess the intended use of the unauthorised drainage without reference to the intended use of the container, which was stated by the applicants as either a mortuary or funeral parlour. The authority considers the existing use²² of this container was IA (Intermittent Low) and new intended use was WL (Working Low), and as this was more onerous, sections 114 and 115²³ of the Act applied.
- While the authority had not been notified formally of the change of use at the time, the application for a certificate of acceptance could be taken as “written notice” by default. However, the authority was not satisfied the container in its new use would comply with the Building Code to the extent required by the Act, so in the authority’s view the certificate of acceptance could not be issued.

²² As defined in the Buildings (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

²³ Section 114: Owner must give notice of change of use, extension of life, or subdivision of buildings; and section 115: Code compliance requirements: change of use

- The authority had advised the applicants of its reasons for being unable to issue the certificate of acceptance and had taken their objections into account. However, the authority sent the refusal letter as it considered no further information had been provided to change its view.
- The authority did not consider it necessary to issue a notice to fix²⁴ for the plumbing and drainage work as the applicants' business was not operating.
- The authority said it had reviewed the application for a certificate of acceptance in consultation with specialists including a wastewater engineer, plumbing and drainage specialist and the authority's health manager. The authority considers certain performance requirements of Clauses G13 and G14 are relevant (refer to the table below), but reached the view it could not be satisfied the discharge from the mortuary would meet these requirements. The authority acknowledged the refusal letter's reference to Clause G13 was "short of what was intended".

Performance clauses the authority considers relevant ²⁵	Authority's views on compliance (in summary)
G13.3.2(a) (requirement for drainage system to convey foul water to an appropriate outfall)	Existing wastewater system consented for domestic use with means of compliance via TP58. No satisfactory evidence to demonstrate the additional chemical discharge would not damage the evapotranspiration field; this potentially rendered the outfall "inappropriate". No discharge consent provided from the regional council under the RMA in spite of repeated advice that the discharge is regarded as a discretionary activity and requires approval.
G13.3.4 (d), (g) (requirements for the construction of facilities for storage, treatment and disposal of foul water)	Not satisfied the discharge from commercial operation of a mortuary can be discharged directly into the existing domestic effluent field. Had sought advice from various health experts who said there could be no certainty of chemical types or volume from this business activity that would assure the relevant performance criteria of Clauses G13/G14 could be met or continue to be met satisfactorily. Had also been advised that New Zealand mortuaries discharged waste into a holding chamber to enable safe collection and treatment to a guaranteed acceptable level before discharge into a reticulated wastewater system, which ensured treatment to a consistent level in spite of fluctuating volumes/type of discharge.
G14.3.1 (a),(b), (c) (requirements for transfer of industrial liquid waste or foul water to storage containers and within disposal systems)	Not satisfied applicants had demonstrated the installed PVC pipework including joins and primer/adhesive was suitable for consistent discharge of the type of chemicals that may be drained (e.g. isopropyl alcohol). If dispersal field rendered ineffective by the discharge, foul air was likely to enter the house and container

²⁴ Under section 164 of the Act

²⁵ Refer Appendix A for relevant extracts from Clauses G13 and G14.

<p>G14.3.2 (a), (d), (f), (g) (requirements for the construction of facilities for storage, treatment and disposal of industrial liquid waste)</p>	<p>Had received advice from in-house environmental health officers who sought external expert advice – they advised that the types of chemicals potentially used along with volumes and frequency of leakage of bodily fluids and accidental discharge could not be accurately measured. Also that New Zealand mortuaries discharged waste into a holding tank to ensure consistent treatment before discharging into a reticulated system.</p>
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4.2.4 In correspondence on 18-19 June 2019 the authority said it had provided background from the authority’s health department with its submission to the determination as this had influenced the authority’s decision to refuse the certificate of acceptance and was relevant to the container’s use. The authority maintains the drainage could not be considered without regard to the building’s use as a mortuary. It had refused the certificate of acceptance on the basis of section 115(a) – ie that it was not satisfied the “building”, which included the drainage, in its new use would comply as nearly as is reasonably practicable with the Building Code in all respects. The authority said it had also advised the agent a discharge consent would be required from the regional council. However, the authority had not been given any evidence of such consent or any explanation for it not being supplied.

4.3 The draft determination and further submissions

4.3.1 A draft of this determination was issued to the parties for comment on 8 August 2019.

4.3.2 The authority responded to the draft determination by email on 9 August 2019. The authority clarified its views regarding the container’s change of use, and also advised that an application for building consent had been made for a new separate building on the property proposed to operate as the mortuary, and that the proposal for waste from that building was for it to be discharged to a holding chamber. The authority submitted that the registration of the container as a mortuary under the Health Act was not approval for the disinfectants to be discharged to the drainage system, and that registration under the Health Act is not authorisation under section 115 of the Building Act for a change of use.

4.3.3 The applicant’s agent responded to the draft determination by email on 19 August 2019 and on 1 September 2019, submitting (in summary):

- The applicants were not aware of building consent requirements, but improvements (the drainage) had been installed at the request of the authority and the applicants have made improvements to the container after it was registered. Correspondence from the authority when it requested work to be carried out did not mention any requirement for building consent²⁶. It was only after the drainage works were completed that the applicants were advised that the work required building consent.
- Although the building work was carried out without building consent, in the agent’s opinion the building work is compliant with the Building Code.
- The drainage from the container has not been used to date, and at this point in time the drainage system continues to only receive waste from the dwelling.

²⁶ I note the authority’s request the agent is referring to and related correspondence concerned requirements under the Health Act for the purpose of operating as a mortuary.

- The applicants are currently seeking discharge consent under the Resource Management Act. The agent queried whether if this was obtained it would mean that the certificate of acceptance could then be issued.
- The cleaners that the applicants propose to use would not cause an issue with the drainage system. The container is only 8m² and so the area involved in washing down surfaces in the container is minimal.
- The use of the container has not changed since it was put on the property – it was always intended to be used for body preparation. The agent reiterated that there is no intention to carry out embalming as part of the operations in this mortuary.
- It could be argued that a change of use occurred in respect of the drainage system. However, that change of use would only occur at the point in time at which bodies/tūpāpaku were being prepared in the container, and that has not yet occurred.
- The authority had received the engineer’s letter regarding the discharge from the container to the wastewater system in accordance with TP58 (refer paragraph 3.2.14).

(I note here for clarity that the engineer’s letter refers to TP58 in respect of soakage tests and the soil category established at the time the drainage system was installed in 2005.)

4.3.4 The agent provided additional information on the cleaners the applicants propose to use, and stated that the cleaners “meet with the requirements of the system and environment”, and are “deemed ‘hospital and food grade’”. The agent provided information on the dilution of the cleaning product (30ml cleaning product to 1 litre of water) along with the following:

- General product information on the proprietary cleaner/sanitiser (“the cleaner”) and an industrial deodoriser/degreaser (“the deodoriser”). The information sheet for the deodoriser states that it “augments biological action” and:

...includes natural enzymes that break down oils and greases in holding ponds, waster water treatment systems, ... drains etc...

The information sheet for the deodoriser also includes septic tanks and waste drains in the list of uses of the product, and under a list of features and benefits the statement that it “enhances and conditions waste water treatment systems”.

- A Safety Data Sheet dated August 2018 for the cleaner, which included the following:

Section 12: Ecological information

Exotoxicity: Not Determined
 Biocumulative: No
 Rapidly Degradable: Yes

Section 13: Disposal considerations

Product:

Recycle if possible.

This product may be treated so it is no longer hazardous by means other than dilution (class 6 & class 8 only may be diluted). This includes burial in landfill in such a manner that it will not lead to any adverse health effects to any person or exceed any TEL (tolerable exposure limit) set by the Authority for this substance. Avoid contamination of waterways.

- A Safety Data Sheet dated August 2018 for the deodoriser, which included the following:

Section 12: Ecological information

Exotoxicity: Not Determined

Biocumulative: No

Rapidly Degradable: Yes

Section 13: Disposal considerations

Product:

Recycle if possible.

Dispose spent solution to sewer.

Avoid contamination of waterways.

- A BioGro New Zealand Certificate of Compliance for the manufacturing company and its operations; related Inputs Certification Programme and a letter from BioGro listing three proprietary products (including the cleaner and the deodoriser) as “compliant for use in organic production or food processing and handling” subject to surfaces requiring an “intervening event prior to contact with the product”.
- Two letters from the Ministry for Primary Industries (21 October 2016 and 24 July 2017²⁷) stating that: the cleaner/sanitiser is approved for use in farm dairies for external areas only subject to certain conditions, and not for use within processing environments; and is approved for use in premises processing all animal product except dairy.
- An “Environmental Choice New Zealand Licence”²⁸ in respect of the proprietary “detergents and cleaning products” (unspecified).

4.3.5 The agent also raised a concern that the advice the authority had received regarding the operation of mortuaries and disposal of waste was from a person who had laid a complaint about the applicant’s business and who also owned a competing business. In the agent’s view this was a conflict of interest and the authority should not rely on that information. The agent considered that the authority should have either issued the certificate of acceptance “subject to a discharge consent” under the Resource Management Act, in much the same way as a certificate issued under section 37 of the Act for a building consent where the resource consent will or may materially affect the proposed building work, or should have withheld the certificate of acceptance under section 99AA.

4.3.6 The authority responded by email on 1 September 2019, noting that discharge consent is not approval under section 115(b) relating to a change of use, but that the discharge consent can be included for the authority to consider in relation to the change of use (and I note can also be included in support of an application for a certificate of acceptance for the existing building work or building consent for proposed work).

²⁷ Another MPI letter dated 21 October 2015 was provided which has identical content as the 24 July 2017 letter.

²⁸ A Government owned voluntary eco-label scheme designed to assist private, corporate and government buyers identify sustainable products and services.

5. Discussion

5.1 General

- 5.1.1 The matter to be determined is whether the authority was correct to refuse to issue a certificate of acceptance for the plumbing and drainage work. The authority's reasons for refusing to issue the certificate were that the work did not satisfy Clause G13's functional requirement and the existing foul water drainage system would not comply in respect of the waste from the use of the container as a mortuary.
- 5.1.2 Since issuing the refusal letter the authority has identified specific performance requirements of Clause G13 and Clause G14 it considers have not been met (refer table in paragraph 4.2.3). The authority has also added that it refused the certificate of acceptance on the basis of section 115(a) of the Act in relation to the change of use of the existing foul water drainage system (paragraph 4.2.4).
- 5.1.3 The issue of a certificate of acceptance 'regularises' building work that has been carried out without a building consent when one was required²⁹. The authority may only issue a certificate of acceptance for the unconsented plumbing and drainage work "if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the Building Code"³⁰.
- 5.1.4 I agree with the authority that a building consent was required in this case. The plumbing and drainage work is building work, i.e. "work for, or in connection with, the... alteration... of a building"³¹, and it does not fall under the exemptions listed in Schedule 1 of the Act³².
- 5.1.5 Section 17 of the Act requires that all building work must comply with the Building Code whether or not a building consent is required in respect of the building work. The new plumbing and drainage is required to comply, and this includes the disposal of the industrial liquid waste via the septic tank and evapotranspiration bed.

5.2 The intended use

- 5.2.1 The Building Code prescribes the functional requirements and performance criteria with which buildings must comply in their "intended use"³³. In considering the compliance of the foul water drainage system, the intended uses of the house and container are directly relevant. In this case the intended use of the house remains as a dwelling and the intended use of the container is as a mortuary (as this term is defined in the Burial Regulations).
- 5.2.2 I understand from correspondence between the parties that the applicants are not carrying out their funeral business activities at present, so no waste from the mortuary is currently being added to the foul water drainage system. However, this does not affect the authority's consideration regarding the issue of a certificate of acceptance, which must take into account the "intended use" of the building. At the time the certificate was applied for, the intended use of the building was as a mortuary.

²⁹ Under section 96 of the Act

³⁰ Under section 96(2) of the Act

³¹ Refer section 7 Interpretation: building work.

³² Schedule 1 of the Act: Building work for which building consent not required

³³ Refer section 7 Interpretation: intended use, which includes "any reasonably foreseeable occasional use that is not incompatible with the intended use".

- 5.2.3 The applicants' agent contends that the use of the building (or the drainage system) remains unchanged until the point in time at which a body/tūpāpaku is being prepared in the container, i.e. when the container is "in use". I disagree with the agent's view on this matter.
- 5.2.4 The purpose of the Building Code (as stated in section 16 of the Act) is the prescription of functional requirements for buildings and the performance criteria with which buildings must comply in their "intended use". Therefore the intended use of a building must be established before an authority can consider how the Building Code applies – whether at the time a building consent is applied for or, as in this case, when a certificate of acceptance is sought.
- 5.2.5 The various categories for the use of a building are described in Clause A1 Classified uses. The classified use establishes how the Building Code will apply to a building – some classified uses are excluded from particular performance criteria by way of limits on application of the particular clause. For completeness I also note that the definition of intended use under section 7 of the Act includes "any reasonably foreseeable occasional use that is not incompatible with the intended use."

5.3 The relevant Building Code clauses

- 5.3.1 The relevant clauses the authority has raised concerns about are Clause G13 Foul water, Clause G14 Industrial liquid waste, and Clause F3 Hazardous substances and processes. I have also considered Clause E3 Internal moisture in relation to the hand basins.

Clauses G13 and G14

- 5.3.2 Clause G14 is relevant because the waste from the container and the hand basins flowing into this system is not foul water but is industrial liquid waste generated by the operation of the mortuary. As already stated, the new plumbing and drainage is an alteration to the existing foul water drainage system for the house, so the ongoing compliance of the drainage system with Clause G13 must also be considered.
- 5.3.3 In its submission, the authority identified specific performance requirements of Clauses G13 and G14. I agree that the relevant clauses include:
- Clause G13.3.2, which includes the requirement that the drainage system shall convey foul water to an appropriate outfall
 - Clause G14.3.1, which includes requirements for conveying industrial liquid waste within disposal systems safely and hygienically, and to avoid the likelihood of foul air and gases entering buildings, and
 - Clauses G13.3.4 and G14.3.2 regarding the construction of facilities for the storage, treatment, and disposal of foul water (where no sewer is available) and for industrial liquid waste. This includes:
 - the requirement that these facilities must be constructed with adequate capacity for the volumes and frequency of discharge
 - to avoid the likelihood of contamination of soils, ground water, and waterways except as permitted under the RMA
 - and to avoid the likelihood of foul air and gases accumulating in or entering buildings.

- 5.3.4 I note in particular that Clause G13.3.4(d) and G14.3.2(d) provide that foul water and industrial liquid waste must be stored, treated and disposed of to avoid the likelihood of contamination of soils, ground water, and waterways except as permitted under the RMA.
- 5.3.5 The discharge of contaminants into or onto the land (in this case, via the evapotranspiration bed) is controlled under the RMA. Specifically, section 30(1)(f) of the RMA provides that a regional council's functions for the purpose of giving effect to that Act in its region include:
- (f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:
- 5.3.6 The Ministry has no jurisdiction to determine whether a particular waste discharge is permitted under the RMA; this is a matter for the regional council (or territorial authority under delegated authority from the regional council).
- 5.3.7 That said, given the nature of the waste generated by the mortuary I consider that for the purpose of obtaining the certificate of acceptance the applicants needed to provide specific evidence of compliance with Clauses G13.3.4(d) and G14.3.2(d). I note that the authority sought advice on this issue from the Regional Council³⁴, which advised that the applicants would require resource consent for the discharge to land under the RMA and relevant regional plan. That is because it is not considered "domestic type wastewater" but rather is covered by industrial and trade discharge rules, and as the type of activity being undertaken was not permitted by these rules resource consent would be required.

Clause F3

- 5.3.8 The authority has also referred to Clause F3 Hazardous substances and processes in earlier correspondence with the applicants, but not in the refusal letter or submissions. Hazardous substances are defined in the Building Code by reference to the definition in the Fire Service Act 1975³⁵, which includes "any ... infectious substance that may impair human, animal or plant health". The definition in the Fire Service Act also cites the definition under the Hazardous Substances and New Organisms Act 1996 ("the HSNO Act"), which includes any substances that are intrinsically toxic or ecotoxic (with or without bioaccumulation³⁶).
- 5.3.9 Embalming products are hazardous substances and are regulated under the HSNO Act³⁷. I am of the view therefore that some, if not all, of the approved disinfectants under the Burial Regulations for use in mortuaries will fall under this definition, and that therefore Clause F3 applies in respect of the handling of industrial liquid waste from mortuaries.
- 5.3.10 However, in this case the applicants have clearly stated that embalming will not be occurring in this mortuary. Accordingly it is only those approved disinfectants under the Burial Regulations that are used for preparation only that must be considered. Before discussing the information the applicants provided regarding the disinfectants proposed to be used, I turn first to the obligations under the Building Code.

³⁴ Email to the authority 16 May 2019 provided with the authority's submissions.

³⁵ The Fire Service Act was repealed on 1 July 2017 and replaced by the Fire and Emergency New Zealand Act 2017. The definition of Hazardous substance under the latter Act has some changes to the wording regarding harm to human, animal and plant health but still also cites the HSNO Act. ³⁶ The accumulation means accumulation within the tissues of living organisms (the HSNO Act section 2).

³⁶ The accumulation means accumulation within the tissues of living organisms (the HSNO Act section 2).

³⁷ Working safely with embalming products, a joint publication from the Environmental Protection Agency, Funeral Directors Association New Zealand and New Zealand Embalmers Association Inc. (September 2013).

5.3.11 Clause F3's functional requirement is as follows:

F3.2 Buildings where hazardous substances are stored and hazardous processes undertaken, shall be constructed to provide adequate protection to people and to other property.

5.3.12 The relevant performance criteria in Clause F3 include:

F3.3 Spaces in buildings where hazardous substances are stored, handled or used, or where hazardous processes are undertaken, ... shall be provided with...

(b) means of preventing hazardous substances, or other materials unacceptable to the network utility operator, from entering sewers or public drains, ...

(f) impervious, easily cleaned surface finishes on building elements likely to be splashed or become contaminated in the course of the intended use of the building.

...

5.3.13 The discharge from the container and hand basins in this case is not entering a sewer or public drain, and therefore Clause F3.3(b) does not apply. There are no performance requirements in Clause F3 relating to discharge to land, i.e. relevant to the discharge of the waste in this case via the existing foul water drainage system. I note that the discharge of waste from this system will be controlled by the regional council under the RMA.

5.3.14 Clause F3.3(f) applies in relation to surface finishes on building elements likely to be splashed or become contaminated.

Clause E3

5.3.15 Regardless of whether or not the cleaners and disinfectants used are hazardous substances, Clause E3.3.4 and E3.3.5 (refer Appendix A2) also apply with regard to the building work that has been carried out. These clauses relate to wall surfaces adjacent to sanitary fixtures and surfaces of building elements likely to be splashed or become contaminated, and require that they must be impervious and easily cleaned.

5.4 Demonstrating compliance

5.4.1 I now consider the compliance of the unconsented plumbing and drainage work with the relevant requirements of Clauses G13, G14, F3.3(f), and E3.3.4 and E3.3.5. In my view, whether the authority can be satisfied the building work, including the alteration to the drainage system, meets these requirements with respect to the intended use as a mortuary where no embalming will occur, turns on:

- the composition of industrial liquid waste discharged from the container and hand basin – in particular, the type of chemicals/disinfectants/cleaners/other agents that may be discharged and in what concentrations; their effect in these concentrations on the operation of the septic tank and when combined with foul water from the house
- the volume of industrial liquid waste likely to be discharged and whether this volume can be adequately processed by the septic tank and evapotranspiration field
- the requirement to obtain a discharge consent from the Regional Council under the RMA and, if one is granted, to comply with any conditions of that consent (which may or may not entail further building work)
- whether the approved disinfectants proposed to be used in the mortuary are hazardous substances

- whether the surface finishes of building elements likely to be splashed or contaminated are impervious and easily cleaned, in relation to Clauses E3.3.4 and E3.3.5 and potentially Clause F3.3(f).
- 5.4.2 The authority has also questioned the suitability of the new pipework, fittings and joins for the container's intended use. I do not consider this to be of particular concern in this case. While specialist drains and fittings may be required in some laboratory settings (for example), given the dilution of the approved disinfectants set out in Schedule 1 of the Burial Regulations I am of the view that is not a requirement in this case.
- 5.4.3 In regard to establishing compliance of the drainage system, I note that while mortuaries are listed in Table 1 of the Acceptable Solution G14/AS1 Industrial Liquid Waste, this Acceptable Solution only contemplates discharge to a sewer. Verification Method G14/VM1 does not discuss on-site disposal directly but refers paragraph 1.2.1(c) to "storage within the building site for later removal and disposal in a manner that meets the requirements of the [RMA] or other relevant legislation". Where industrial liquid waste includes hazardous substances, the Verification Method F3/VM1 should be used. This Verification Method references other legislation as a means of establishing compliance, and the scope of the Verification Method is limited to specific classes of hazardous substances³⁸.
- 5.4.4 The existing drainage system for the foul water from the house has been altered and must continue to comply with Clause G13. However as the drainage system is now a combined system (for both foul water and industrial liquid waste) it is outside the scope of the Acceptable Solution G13/AS2 Drainage, the Verification Method G13/VM4 On site disposal, and other standards generally accepted by authorities for foul water systems.
- 5.4.5 Accordingly, the building work must be considered an alternative solution and evidence of compliance directly against the relevant performance criteria is required.
- 5.4.6 Supporting evidence provided by the applicants or otherwise available to the authority includes:
- a plan indicating the plumbing and drainage in relation to the rest of the foul water drainage system and a PS3 from a certifying plumber regarding its installation and testing
 - plans and other evidence for the foul water drainage system as originally consented and installed (I note that the design of this system was described as in accordance with TP58 at the time, but with the addition of the industrial liquid waste would no longer fall within the scope of this document.)
 - the engineer's letter, which provides an assessment of the foul water drainage system in relation to capacity in view of the container's intended use as a mortuary
 - some information on products likely to be discharged from the container and hand basin into this system.
- 5.4.7 In response to my initial request for details of the chemicals or agents proposed to be used in the container and disposed of to the septic tank, the agent supplied a copy of a website page about the "biodegradable" cleaner, which had also been provided to the authority (refer paragraph 3.2.13). The agent did not any provide further

³⁸ See Hazardous Substances (Classification) Regulations 2001

information about this cleaner's composition or intended concentration in use. The website describes the cleaner as containing enzymes and being beneficial for sewage treatment, but does not provide further details of its components. Further information was provided by the applicants in response to the draft of this determination (see paragraph 4.3.4), which I discuss below.

- 5.4.8 In regards to the response to my initial request, it was not clear whether this cleaner was intended as a replacement for the other cleaning agents (including bleach in a 2:1 solution, and a disinfectant for soaking utensils) referred to in correspondence and in the feasibility report. I also assume that the applicants still propose to use isopropyl alcohol, as referred to in the engineer's letter. In regard to the use of isopropyl alcohol, I agree with the engineer that as this alcohol evaporates quickly it is unlikely to enter the foul water drainage system at a concentration that would adversely impact the drainage system.
- 5.4.9 The engineer's letter also describes the waste entering the system as "soapy water". However, given that the intended use of the container is as a mortuary, which must also comply with the Burial Regulations, the use of disinfectant, not just soap, will be required. As noted previously in this determination, Schedule 1 of these regulations lists "approved disinfectants" for use in mortuaries, along with the concentrations in which they are approved for use (refer Appendix A4). In accordance with the Burial Regulations these "disinfectants" must be used for activities such as washing hands, cleaning surfaces and appliances, and for embalming.
- 5.4.10 To my knowledge, the applicants have not provided any information to show that the products they propose to use would meet the requirements of the Burial Regulations, which they must follow in order to operate as funeral directors. The applicants have said they do not intend to carry out any embalming so would not use embalming agents on site. However, I consider that, as their business activities would be approved under the Burial Regulations and as the definition of "mortuary" in these regulations includes embalming, the authority needs to consider whether any of the agents on the list of approved disinfectants that the applicants propose to use could enter the foul water drainage system and, if so, the likely impact of this. As already noted, I consider such information is essential to determining compliance.
- 5.4.11 The authority sought specialist advice on this issue and was advised that other New Zealand mortuaries discharge liquid waste into holding chambers to enable safe collection and treatment to a guaranteed acceptable level before being discharged into a reticulated wastewater system. This was to ensure treatment to a consistent level in spite of fluctuating types or volumes of discharge. The advice provided to the authority included details of another New Zealand mortuary without access to a sewer; this mortuary uses a separate, aerated treatment system³⁹ for its foul water and has another holding tank for industrial liquid waste.
- 5.4.12 In my view, at the time the applicants applied for the certificate of acceptance, there was insufficient information supplied to the authority on the type and concentration of the approved disinfectants that the applicants proposed to use and especially regarding the impact of the industrial liquid waste on the septic tank, which relies on anaerobic bacteria and other organisms to operate properly. In this respect I consider the authority was correct to refuse to issue the certificate of acceptance.
- 5.4.13 I note that when applying for the certificate of acceptance it is for the applicants to provide sufficient information to establish that the approved disinfectants proposed

³⁹ Aerated treatment systems are different to septic systems as they pre-treat the foul water before discharge.

for use in the mortuary are suitable for discharge to the septic tank. The applicants have subsequently provided further information on the proposed disinfectants (refer paragraph 4.3.4), and it is this sort of information that should be provided in support of an application for a certificate of acceptance for the authority to consider.

- 5.4.14 In regard to Clause F3, I am of the view that the application for a certificate of acceptance did not include sufficient information to establish whether the cleaners and disinfectants the applicants proposed to use were or were not hazardous substances. Accordingly I consider the authority was correct to refuse to issue the certificate of acceptance as it did not have sufficient information to establish compliance with Clause F3.
- 5.4.15 I consider that the building work would not meet the performance criteria in Clause F3.3(f) in respect of the use of any approved disinfectants that fall within the definition of hazardous substance. Likewise, the building work would not meet the performance criteria in Clause E3.3.4 or E3.3.5, regardless of whether or not the disinfectants are hazardous substances. Photographs supplied by the applicants of the basin installed to be used for washing utensils and the hand basin on the outside wall of the house clearly show adjacent surface finishes that are not impervious or easily cleaned. I note that the matter of whether other surface finishes of building elements within the container meet this performance clause is something that the authority can assess during an inspection in due course. This determination does not consider other building elements or features or other Building Code requirements that may need to be assessed for the purpose of a certificate of acceptance.
- 5.4.16 In terms of the volume of industrial liquid waste likely to be discharged and whether this can be processed by the septic tank and evapotranspiration field, the engineer calculated the volume at five litres per body and given only 30 bodies were prepared for burial the previous year concluded this would have minimal impact on the foul water drainage system.
- 5.4.17 If these volumes are correct, even a rate of two or three burials a week should have limited impact on the operation of the septic tank. In my view, five litres per body seems a small amount of liquid to use in completing the required functions, which include cleaning down surfaces within the mortuary and managing any accidental spills. However, taking into account the capacity of the existing septic tank and that it currently only serves the two bedroom house, I am of the view that the volumes likely to be generated in the mortuary are unlikely to exceed the capacity of the tank.
- 5.4.18 In conclusion, taking into account the information the authority had before it, I consider that the authority was correct to refuse to issue the certificate of acceptance on the basis that the installation of the hand basin and utensil basin do not comply with Clause E3, and there is not sufficient evidence to be satisfied that the drainage system complies with the relevant performance requirements of Clauses G13 and G14 and possibly also Clause F3; in particular, regarding:
- the composition and concentration of the proposed disinfectants, with due regard to the requirements of the Burial Regulations, and the likely impact of this and the approved disinfectants on the septic tank's operation
 - whether the liquid industrial waste will contain hazardous substances
 - the lack of a discharge consent from the regional council under the RMA (as required by Clauses G13.3.4(d) and G14.3.2(d)).

5.4.19 The authority said in the refusal letter that it refused to issue a certificate of acceptance because the functional requirement of Clause G13 was not satisfied. I have concluded the authority was correct to refuse to issue the certificate of acceptance, and I confirm that decision for the reasons set out above. I note though that the authority's refusal did not go so far as to identify the specific performance criteria and did not include other relevant Clauses for which the authority had insufficient information on which to establish compliance.

5.5 Change of use

5.5.1 The legislation relevant to a change of use is sections 114 and 115 of the Act and the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 ("the Regulations"). Under section 114, an owner who is planning to "change the use" of a building, as defined in Schedule 2 of the Regulations, must provide written notice to the authority. An owner must not change the use of a building unless the authority has given written notice that the building in its new use will comply to the extent required by section 115.

5.5.2 Regulation 6 of the Regulations provides:

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

5.5.3 In other words, for the provisions in sections 114 and 115 to apply:

- there must be a change of use of the all or a part of the building in terms of Schedule 2 of the Regulations, and
- if so, the Building Code requirements relating to the new use of the building or part of the building must be additional to or more onerous than those that relating to the old use.

5.5.4 Since issuing the refusal letter the authority has submitted that it refused to issue the certificate of acceptance on the basis of section 115(a) of the Act.

5.5.5 With regard to the container's use as a mortuary, the authority considers the container's old use to fall within the use category IA (Intermittent Low) in Schedule 2 of the Regulations. It considers the container in its new use, i.e. as a mortuary, to fall within WL (Working Low) in Schedule 2. I agree that the use category under the Regulations has changed from IA to WL.

5.5.6 The applicants' agent contends that the use has not changed because the container was brought onto the property specifically for use as a mortuary and that use has not changed in the intervening period, and also that the new use (of the drainage system) does not occur until the mortuary is in operation. I note here that the building was originally a refrigerated container used for the storage and transportation of goods. It is in this use that the container falls under the category IA. The point at which the container ceased to be used as a shipping container and its use was changed to a mortuary is the point in time at which the category changed to WL.

5.5.7 However, there is a second step in establishing whether the container has undergone a change of use under the Regulations. This requires consideration of the container's

correct “classified use” as defined in Clause A1⁴⁰ in order to ascertain whether there are additional or more onerous Building Code requirements in its new use.

- 5.5.8 Under Clause A1 there are 11 classified uses that a building, or part of a building, may have. In my view the container in its intended use as a mortuary would fall under the classified use “Commercial”. I do not have any information on the container’s use prior to its arrival at the applicant’s property, and whether it had already been converted from a container used for storage and transport to a building; however, if previously in use as a building it is likely to have fallen with the classified use “Outbuilding” or “Ancillary” as a building not intended to be used for human habitation.
- 5.5.9 There are a number of performance requirements in the Building Code which apply to the Commercial classified use but which do not apply to the Outbuilding and Ancillary classified uses. Examples include some of the fire safety provisions in Clause C1-C6 (eg Clause C3.4 regarding internal surface linings), Clause D1.2.1 regarding access routes, and Clause E3.3.1 regarding internal moisture.
- 5.5.10 Accordingly, given the change in the container’s use and classified use from IA to WL and from Outbuilding to Commercial respectively, and that the building in its new use has additional or more onerous requirements under the Building Code, I consider a change of use has occurred and sections 114 and 115 apply. Section 115 of the Act requires the container in its new use to comply as nearly as is reasonably practicable in relation to specific provisions (more information on this can be found on the Ministry’s website⁴¹).
- 5.5.11 I note that the applicants were required to notify the authority of this change of use at the time, and that the requirements relating to registration of the mortuary (temporary or otherwise) should not be conflated with this requirement under the Act. However, the authority is willing to accept the application for a certificate of acceptance as written notice. I leave the matter of compliance to the extent required under section 115 to the parties to resolve in due course.
- 5.5.12 I also note that the unconsented plumbing and drainage work altered the existing drainage system, and the compliance of this system, as altered, must be considered as part of the assessment for a certificate of acceptance.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004 I hereby determine that the authority was correct to refuse to issue a certificate of acceptance for the plumbing and drainage work described in paragraph 1.3 of this determination, and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 September 2019.

Katie Gordon
Manager Determinations

⁴⁰ These have some correlation with the “uses” in the Regulations but are not identical

⁴¹ See “Identifying what you need to upgrade” and “Defining ‘as nearly as is reasonably practicable’” at <https://www.building.govt.nz/managing-buildings/change-of-use-and-alterations/>

Appendix A: Extracts from the legislation and regulations

Relevant sections of the Building Act and Building Code, the Resource Management Act 1991 and the Health (Burial) Regulations 1946 include the following:

A1 Relevant sections of the Building Act 2004

96 Territorial authority may issue certificate of acceptance in certain circumstances

- (1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—
 - (a) if—
 - (i) the work was done by the owner or any predecessor in title of the owner; and
 - (ii) a building consent was required for the work but not obtained; or
 - (b) if section 42 (which relates to building work that had to be carried out urgently) applies; or
 - (c) if subsections (3) and (4) of section 91 (which apply if a building consent authority that is not a territorial authority or a regional authority is unable or refuses to issue a code compliance certificate in relation to building work for which it granted a building consent) apply.
- (2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.

...

114 Owner must give notice of change of use, extension of life, or subdivision of buildings

- (1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.
- (2) An owner of a building must give written notice to the territorial authority if the owner proposes—
 - (a) to change the use of a building; or

...

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

- (a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and
- (b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use,—
 - (i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:
 - (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance;
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and

(ii) will,—

- (A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or
- (B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

A2 Relevant sections of the New Zealand Building Code (Schedule 1, Building Regulations 1992)

Clause E3 – Internal moisture

Functional requirement

E3.2 Buildings must be constructed to avoid the likelihood of –

- (a) Fungal growth or the accumulation of contaminants on linings and other building elements; and
- (b) ...
- (c) Damage to building elements caused by the presence of moisture.

Performance

...

E3.3.4 Wall surfaces adjacent to sanitary fixtures or sanitary appliances must be impervious and easily cleaned.

E3.3.5 Surfaces of building elements likely to be splashed or become contaminated in the course of the intended use of the building, must be impervious and easily cleaned.

Clause G13 – Foul water

...

Functional requirement

G13.2 Buildings in which sanitary fixtures and sanitary appliances using water-borne waste disposal are installed must be provided with—

- (a) an adequate plumbing and drainage system to carry foul water to appropriate outfalls; and
- (b) if no sewer is available, an adequate system for the storage, treatment, and disposal of foul water.

Performance

G13.3.1 The plumbing system shall be constructed to:

- (a) convey foul water from buildings to a drainage system,
- (b) avoid the likelihood of blockage and leakage,
- (c) avoid the likelihood of foul air and gases entering buildings, and
- (d) provide reasonable access for maintenance and clearing blockages.

G13.3.2 The drainage system shall:

- (a) convey foul water to an appropriate outfall,
- (b) be constructed to avoid the likelihood of blockage,
- (c) be supported, jointed and protected in a way that will avoid the likelihood of penetration of roots or the entry of ground water,
- (d) be provided with reasonable access for maintenance and clearing blockages,

- (e) be ventilated to avoid the likelihood of foul air and gases accumulating in the drainage system and sewer, and
- (f) be constructed to avoid the likelihood of damage from superimposed loads or normal ground movement.,

...

G13.3.4 If no sewer is available, facilities for the storage, treatment, and disposal of foul water must be constructed—.

- (a) with adequate capacity for the volume of foul water and the frequency of disposal; and
- (b) with adequate vehicle access for collection if required; and
- (c) to avoid the likelihood of contamination of any potable water supplies in compliance with Clause G12 Water supplies; and
- (d) to avoid the likelihood of contamination of soils, ground water, and waterways except as permitted under the Resource Management Act 1991; and
- (e) from materials that are impervious both to the foul water for which disposal is required, and to water; and
- (f) to avoid the likelihood of blockage and leakage; and
- (g) to avoid the likelihood of foul air and gases accumulating within or entering into buildings; and
- (h) to avoid the likelihood of unauthorised access by people; and
- (i) to permit easy cleaning and maintenance; and
- (j) to avoid the likelihood of damage from superimposed loads or normal ground movement; and
- (k) if those facilities are buried underground, to resist hydrostatic uplift pressures.

Clause G14 – Industrial liquid waste

...

Functional requirement

G14.2 Buildings, in which industrial liquid waste is generated shall be provided with adequate spaces and facilities for the safe and hygienic collection, holding, treatment and disposal of the waste.

Performance

G14.3.1 Industrial liquid waste shall be conveyed to storage containers and within disposal systems in a way which will:

- (a) transfer wastes from buildings safely and hygienically,
- (b) avoid the likelihood of blockage and leakage,
- (c) avoid the likelihood of foul air and gases entering buildings, and
- (d) provide reasonable access for clearing of blockages.

G14.3.2 Facilities for the storage treatment and disposal of industrial liquid waste shall be constructed:

- (a) with adequate capacity for the volume of waste and the frequency of disposal; and
- (b) with adequate vehicle access for collection if required; and
- (c) to avoid the likelihood of contamination of any potable water supplies in compliance with Clause G12 Water supplies; and

- (d) to avoid the likelihood of contamination of soils, ground water, and waterways except as permitted under the Resource Management Act 1991; and
- (e) from materials that are impervious both to the waste for which disposal is required, and to water; and
- (f) to avoid the likelihood of blockage and leakage; and
- (g) to avoid the likelihood of foul air and gases accumulating within or entering into buildings; and
- (h) to avoid the likelihood of unauthorised access by people; and
- (i) to permit easy cleaning and maintenance; and
- (j) to avoid the likelihood of damage from superimposed loads or normal ground movement; and
- (k) if those facilities are buried underground, to resist hydrostatic uplift pressures.

A3 Relevant sections of the Resource Management Act 1991

30 Functions of regional councils under this Act

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

- (f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

A4 Relevant sections of the Health (Burial) Regulations 1946

26 The occupier of a mortuary shall at all times provide at the mortuary adequate and convenient supplies of hot and code water and of approved disinfectant for cleansing the hands of the attendants ...

27 The occupier of a mortuary shall comply with the following requirements:

- (a) after removal of a coffin containing a dead body from any slab on which the coffin has rested, the slab shall forthwith be treated with approved disinfectant
- (b) after a dead body has been embalmed or otherwise treated by post-mortem work, the slab on which the work was done and the floor of the mortuary shall immediately be washed and treated with approved disinfectant, and all appliances used in the work shall be cleansed and disinfected by boiling or by steeping in approved disinfectant.

Schedule 1 Approved disinfectants

<u>A mixture of 1 part of</u>	<u>In parts of water</u>
Carbolic acid	20
Formalin	10
Izal	50
Kerol	50
Lysol	20
Mercury perchloride (corrosive sublimate)	1 000

A mixture of 38 grams of chloride of lime in 1 litre of water.