BUILDING PERFORMANCE

Determination 2026/044

The compliance of building work with Building Code Clause E1.3.1 Surface Water as it relates to protection of other property and the authority's decision to refuse to issue a notice to fix.

6 Oakum Road, Whitby, Porirua

Summary

This determination considers whether building work carried out at 6 Oakum Road complies with Clause E1.3.1 in relation to the protection of 'other property' and the authority's decision to refuse to issue a notice to fix. The determination considers whether surface water collected and concentrated by the building work is disposed of in a way that avoids the likelihood of nuisance or damage to 4 Oakum Road.

In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 ("the Act") and references to "clauses" are to clauses in Schedule 1 ("the Building Code") of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor Determinations, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment ("the Ministry").[1]

1.2. The parties to the determination are:

1.2.1. K Banning, the owner of other property at 4 Oakum Road, who applied for this determination ("the applicant")

1.2.2. D Coe and D Clark, the owners of 6 Oakum Road, ("the owners")

1.2.3. Porirua City Council, the territorial authority or building consent authority ("the authority").

1.3. This determination arises from building work carried out at 6 Oakum Road, which the applicant believes has caused stormwater to drain into their property and so does not comply with Building Code Clause E1 *Surface Water*. The applicant is concerned that the construction of a planter box acting as a low-level garden wall ("the garden wall") together with its drainage, is causing nuisance or damage on the applicant's property.

1.4. The matters to be determined, in terms of section 177(1)(a), (1)(b) and (3)(e), are:

1.4.1. whether building work at 6 Oakum Road complies with Clause E1 *Surface Water*, as it relates to protection of other property, and;

1.4.2. the authority's decision to refuse to issue a notice to fix.

2. Background and building work

2.1. In 2020-2021, several new residential allotments at what became Oakum Road were created, including the owners' and applicant's properties. The properties are terraced adjacent to one another, with the applicant's property at 4 Oakum Road being lower than that of the owners at 6 Oakum Road.

[1] The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

2.2. In 2023, the owners constructed the garden wall, set into the base of the existing embankment to the properties above, with 50mm subsoil drainage pipe discharging to ground adjacent to the boundary with the applicant's property. This boundary is at the top of the embankment on the applicant's property.

2.3. During a weather event on 18 April 2026, the applicant photographed a concentrated water flow down their embankment and ponding of "…depths of 150mm – 200mm at its peak during heavy sustained rain" on the flat southern portion of their property.

2.4. Following this event, the applicant corresponded with the owners about the issue, including a discussion around possible remedial actions.

2.5. On 26 May 2026, the applicant received advice from a drainlayer about the situation. Three days later, the applicant wrote to the authority regarding the issue, maintaining that the building work to install the garden wall with drainage did not comply with the requirements of Clause E1 *Surface Water* and requesting the authority undertake a site inspection.

2.6. Correspondence between the authority and applicant followed. On 9 June, the authority explained it was "… prepared to issue advisory correspondence to the upper neighbouring property owner advising them, that concerns have been raised regarding stormwater runoff affecting adjoining properties and reminding them of their responsibility to manage stormwater within their site so as to not create nuisance or adverse effects…". It noted that this correspondence to the owners "would not constitute a formal enforcement action", such as issuing a notice to fix.

2.7. The applicant applied for this determination on 16 June 2026. In correspondence to the applicant on 17 June 2026, the authority acknowledged that it had been advised by the owners that they were taking steps to resolve the issue and that it would follow up in due course to receive an update on the progress.

3. Submissions

The applicant

3.1. The applicant has submitted that:

3.1.1. The building work for the garden wall on the owners' property does not comply with clause E1.3.1 as the garden wall is fitted with a drainage pipe which terminates without a compliant stormwater outfall and is instead discharging stormwater across the property boundary into the applicant's property. "This disposal method causes documented damage and nuisance and does not avoid the likelihood of either."

3.1.2. The applicant has described the effects on their property as flooding, surges of concentrated stormwater from the uphill pipe, permanent ground

saturation, increased risk of slippage, and loss of use of the rear of their property.

3.1.3. While the application for determination was focused on the event of 18 April 2026, the applicant stated "the concentrated ponding occurs during any period of heavy, sustained rainfall [of more than 6mm per hour]" and in describing the soil "…the ground does not naturally drain." "…Over the winter months, the constant seasonal discharge means the ground never had a chance to dry out, resulting in permanent bog-like conditions."

3.1.4. The applicant has stated "it is not possible to establish lawn, garden beds, or any landscaped outdoor living area in the effected (sic) zone. …the ground remains saturated and structurally unstable for days to weeks following rainfall events."

3.1.5. The applicant considers the 18 April 2026 event "is not consistent with a once-in-a-generation exceedance falling outside any reasonable design expectation. It is a recurring feature of the local rainfall pattern that the drainage system at 6 Oakum Road must be designed and constructed to manage".

3.1.6. The applicant believes the authority has not correctly exercised its powers in relation to notices to fix under section 164 of the Act, as the "body of evidence [provided by the applicant] was sufficient to establish reasonable grounds…" as to the non-compliance with E1.

The owners

3.2. The owners have submitted that "…at no stage have we disputed the existence of an issue with the drain coil overflow, nor suggested that we would not address it". They outlined the drain-laying work that they had commissioned after the event in April 2026, as a response to the concerns raised by the applicant and the authority. The owners stated this work was expected to begin at the end of July 2026.

The authority

3.3. The authority submitted, in summary, with regard to clause E1.3.1:

3.3.1. At the time of the original correspondence with the applicant, the authority had only been provided with evidence of surface water from a weather event on 18 April 2026.

3.3.2. Based on rainfall data from a nearby measurement site and information produced for government agencies in relation to the specific weather event, it considered that event was of greater magnitude than a 10% AEP event[2]. This event therefore could not be used to determine the compliance of the building work with clause E1.3.1 as it exceeds the 10% AEP threshold.

3.3.3. There are other potential sources of surface water, other than from the owners' property, that would impact the applicant's property. The authority gave examples such as from surrounding uphill properties, or from the applicant's own property where other retaining works have been carried out.

3.4. With regard to its decision to refuse to issue a notice to fix, the authority stated that as it considered the event was of a greater magnitude than the 10% AEP threshold this could not be used to assess compliance with E1.3.1, and that the information provided by the applicant from a single event "…was not sufficient to establish reasonable grounds of a contravention of [the Act] …".

3.5. The authority also provided information regarding its approach to issuing notices to fix.

3.5.1. When faced with situations such as this, it assesses the extent of harm, intent and behaviour of parties, and public interest and importance. In this case, these factors "…were all on the 'low' scale based on our assessment of the potential non-compliance".

3.5.2. The authority encourages neighbours to discuss their concerns directly, and then it applies tools to encourage voluntary resolution, such as informal communication to educate and inform, "rather than move straight to formal direction by issuing a formal notice". In this case, "…voluntary tools were appropriate to first be used to seek a resolution…".

3.5.3. The authority considers that section 164 of the Act provides it with "an element of discretion" in deciding whether to issue a notice to fix, as the section states that there must be "reasonable grounds" to do so.

3.6. It referred to previous Determination 2016/009 to support its view, which stated that a "notice to fix should be issued where other measures, such as advice or a written letter from the authority, have failed to produce compliance. A notice to fix will generally be inappropriate where an owner has indicated a willingness to comply."[3]

[2] AEP refers to the 'annual exceedance probability', being the probability of an event occurring in any given year. For example, a 10% AEP means there is a 10% chance in any given year of the event occurring.

[3] Determination 2016/009 *Regarding the issuing of notices of fix and the refusal to issue a certificate of acceptance in respect of the conversion of a double garage over a boundary* [7.5.8].

4. Discussion

Compliance with E1

4.1. Section 17 requires "All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work."

4.2. The relevant performance requirement in Clause E1 *Surface Water* is clause E1.3.1:

> **E1.3.1** Except as otherwise required under the Resource Management Act 1991 for the protection of other property, surface water*,* resulting from an event having a 10% probability of occurring annually and which is collected or concentrated by buildings *or* sitework*,* shall be disposed of in a way that avoids the likelihood of damage or nuisance to other property*.*

4.3. "Surface water" is defined in the Building Code Clause A2 *Interpretation* as:

> all naturally occurring water, other than sub-surface water, which results from rainfall on the site or water flowing onto the site, including that flowing from a drain, stream, river, lake or sea.

4.4. The objective of clause E1 includes to "safeguard…other property from damage, caused by surface water". The functional requirement is:

> **E1.2** Buildings and sitework shall be constructed in a way that protects people and other property from the adverse effects of surface water.

4.5. "Other property" is defined in section 7 of the Act as:

> **other property** –
> (a) means any land or buildings, or part of any land or buildings, that are –
> (i) not held under the same allotments; or
> (ii) not held under the same ownership; …

4.6. Therefore, for compliance with E1.3.1, there is a requirement to dispose of surface water in a way that avoids the likelihood of damage or nuisance to other property in a 10% AEP event scenario. I consider the topography of the area means that the garden wall will have surface runoff from the slope behind, which will be collected by the drainage system.

4.7. In considering the meaning of "likelihood" as it relates to clause E1.3.1, I have adopted the reasoning in *Auckland City Council v Selwyn Mews Ltd*[4] ("Selwyn Mews") where the Judge concluded:

> [47]… In cl B1.3.3 "a low probability of becoming unstable or collapsing" means that the risk of such events is no more than an appreciable risk (as distinct from a slight risk) or is at most a low risk (as distinct from a very low risk)

4.8. As discussed in previous determinations, protection of "other property" is not limited to the protection of buildings, and the land itself must also be protected from the likelihood of damage.[5] Regarding "likelihood of damage" I refer to the reasoning in *Selwyn Mews*, where the Judge concluded:

> [47]... In cl B1.3.6 "the likelihood of damage to other property" refers to a real and substantial risk of such damage

4.9. The term "nuisance" is not defined in the Act or Building Code. Previous determinations have held that the term "nuisance" in E1.3.1 should not be given a narrow legal meaning, and there must be some significant nuisance effect before there can be a breach of E1.3.1.[6] This was expanded on in Determination 2015/052,[7] which said:

> [6.1.5] The term "nuisance" is not defined in the Act or the Building Code, and it appears only in Clauses E1.3.1 and G4.3.4. The term "nuisance" has a particular common law meaning which is 'the unreasonable interference with an individual person's use or enjoyment of land or of some right connected with that land'. The question of whether a nuisance is unreasonable is a question of fact and must be considered in relation to factors such as the nature of the harm and the locality in which it occurs, and the frequency, duration and intensity of the interference.
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> [6.1.6] … I am of the view that any nuisance has to be an unreasonable interference; calling a nuisance a significant nuisance is simply reflecting the fact that it is not a trivial or minor interference with a person's use and enjoyment, but must be an unreasonable or significant interference with that use or enjoyment.

4.10. Regarding the disposal of surface water, I hold the same view as discussed in previous determinations, that not all surface water needs to be so disposed of; only surface water resulting from an event with a 10% probability of occurring annually.

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[4] District Court Auckland CRN2004067301-19, 18 June 2003, [2003].

[5] See for example Determination 2024/067 *Regarding compliance and decisions in relation to building work to construct four new dwellings with Clause E1.3.1 as it relates to the protection of other property at 32 and 32A Wolsley Avenue, Milford* (29 November 2024) at [6.8]

[6] See Determination 2024/067 and Determination 2015/052 *Regarding the compliance of proposed building work … in respect of adjacent other property* (12 August 2015) at [6.1.5 – 6.1.6].

[7] Determination 2015/052 *Regarding the compliance of proposed building work … in respect of adjacent other property* (12 August 2015).

4.11. Compliance requires surface water collected or concentrated by building work during an event of that magnitude, and during more frequent events of lesser magnitude, to be disposed of in a way that avoids the likelihood of damage or nuisance to other property.

4.12. Clause E1.3.3 is also relevant:

> **E1.3.3** Drainage systems for the disposal of surface water shall be constructed to: (a) convey surface water to an appropriate outfall[8] using gravity flow where possible […].

4.13. In this matter, E1.3.3 is relevant because an outfall that results in non-compliance with E1.3.1 cannot be considered an appropriate outfall.

4.14. Data available from Earth Sciences NZ based on historic events at a nearby measurement site shows that the rainfall depths for an hourly duration in a 10% AEP event are expected to be 28.3mm, with a similar hourly intensity.[9]

4.15. The applicant has identified 18 April 2026 as a day where ponding occurred on their property. Based on Greater Wellington Regional Council rainfall data from a nearby measurement site on that day, there were two significant hours of rainfall that day: 21.8mm at 6am and 24.5mm at 9am.[10] The rainfall on that day fell within the 10% AEP event threshold.

4.16. The first question here is whether surface water collected or concentrated by the building work at 6 Oakum Road is being disposed of onto the applicant's property. This question is distinct from whether the consequences of that disposal amount to damage or nuisance for the purposes of E1.3.1.

4.17. The drainage associated with the garden wall collects surface water and discharges it from a pipe adjacent to the boundary. The photographs taken during the 18 April 2026 event show a concentrated flow of water travelling down the applicant's bank from a location corresponding with the pipe discharge. I am satisfied that surface water collected and concentrated by the building work is discharged adjacent to the boundary and then flows across the boundary onto 4 Oakum Road.

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[8] Clause A2 – Interpretation provides a definition of outfall as: "that part of the disposal system receiving surface water or foul water from the drainage system. For foul water the outfall may include a sewer or a septic tank. For surface water, the outfall may include a natural water course, kerb and channel, or soakage system"

[9] Earth Sciences NZ (formerly NIWA) High Intensity Rainfall Design System (HIRDs), rainfall event statistics for site 'Pauatahanui'.

[10] Greater Wellington Regional Council - Environmental Data Dashboard; rainfall at hourly intervals for site 'Duck Creek at James Cook Reservoir'.

4.18. That finding does not, by itself, establish non-compliance with E1.3.1. The further question is whether the manner in which the water is disposed of avoids the likelihood of damage or nuisance to the applicant's property.

4.19. For the purposes of E1.3.1, nuisance requires an unreasonable or significant interference with the use or enjoyment of the other property rather than an interference that is merely trivial or minor. Relevant considerations include the nature, frequency, duration and intensity of the interference.

4.20. In this case, the effect is not limited to water temporarily passing across the applicant's land. During the 18 April 2026 event, the photographs show substantial ponding on the applicant's land, which the applicant estimated reached approximately 200 mm in depth. The applicant has also described the affected ground as remaining saturated for days to weeks after heavy rainfall, preventing the establishment or ordinary use of lawn, garden beds and landscaped outdoor areas. I accept that account as consistent with the photographs, the location of the concentrated discharge and the physical characteristics of the affected area.

4.21. I consider that the depth of ponding, the persistence of saturated conditions following rainfall, and the resulting restriction on the use of part of the residential property amount, collectively, to more than a trivial or minor interference. Those effects constitute a significant and unreasonable interference with the use and enjoyment of the land and therefore amount to nuisance for the purposes of E1.3.1.

4.22. The rainfall recorded on 18 April 2026 was within the 10% AEP rainfall threshold discussed above. The evidence therefore demonstrates nuisance-type effects occurring before the rainfall level contemplated by E1.3.1 is exceeded. I am satisfied that in a 10% AEP event the building work, as constructed, does not dispose of the collected or concentrated surface water in a way that avoids the likelihood of nuisance to 4 Oakum Road.

4.23. Because the pipe discharges collected surface water adjacent to the boundary in a manner that results in nuisance to other property, its termination at that location is not an appropriate outfall for the purposes of E1.3.3.

4.24. Accordingly, the building work does not comply with E1.3.1 and E1.3.3 because the method of disposal is not to an appropriate outfall and does not avoid the likelihood of nuisance to other property.

The refusal to issue a notice to fix

4.25. Notices to fix are governed by sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations. The main purpose of a notice to fix is to ensure that contraventions of the Act are remedied.

4.26. As I have concluded that the building work does not comply with Clauses E1.3.1 and E1.3.3 as they relate to the protection of other property, there were grounds to issue a notice to fix for a contravention of section 17.

4.27. Recent determination 2026/007 has recognised that there are a range of factors that will be relevant for authorities to consider when deciding whether a notice to fix should be issued.[11] Relevant considerations may include the scale of the risk and effects on neighbouring property, whether the matter has previously been communicated, whether it is ongoing or repeated non-compliance, and whether the non-compliance is significant and whether the building is unsafe or likely to become unsafe.

4.28. These factors, alongside any other relevant information, should be weighed to determine whether the threshold for issuing a notice to fix is met.

4.29. I consider that significant weight should be given to the scale and risk of the effects on other property. In this case, surface water from an event within the 10% AEP threshold has caused nuisance on the applicant's property, and the method of disposal presents an ongoing risk of the same effects recurring.

4.30. I acknowledge that the owners had communicated with the applicant and the authority, and I accept that they had indicated an intention to undertake remedial work. The owners' willingness to undertake remedial work is relevant, but it does not, by itself, outweigh the nature and extent of the non-compliance, the effects already experienced on other property, and the ongoing risk of those effects recurring.

4.31. The authority referred to Determination 2016/009, in which it was stated that issuing a notice to fix will generally be inappropriate where an owner has demonstrated a willingness to address the non-compliance. However, the circumstances are distinguishable. In that determination, the effects of the non-compliance were experienced solely by the owner, whereas the non-compliance in this case has resulted in effects on other property.

4.32. The owners' willingness, intentions and plans for remediation can be taken into account when specifying the remedial steps required by the notice and the date by which compliance must be achieved.

4.33. Therefore, having regard to the nature and effects of the non-compliance, the effects already experienced on the applicant's property, and the ongoing risk of those effects recurring, I am satisfied that the issue of a notice to fix requiring the non-compliance to be remedied was warranted.

[11] Determination 2026/007 *The issue of a building consent, an alleged failure to issue a notice to fix, and compliance of proposed building work with Clause B1* (13 March 2026) at [3.29].

5. Decision

5.1. In accordance with section 188 of the Building Act 2004, I determine,

- the building work at 6 Oakum Road does not comply with clauses E1.3.1 and E1.3.3 as they relate to the protection of other property, and
- the nature and effects of the non-compliance, including the effects already experienced on other property and the ongoing risk of those effects recurring, warranted the issue of a notice to fix requiring the non-compliance to be remedied, and accordingly I reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 03 November 2026.

Andrew Eames
Principal Advisor Determinations