Northern Ireland Assembly

Queen's University Belfast

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Knowledge Exchange Seminar Series (KESS)

Progression in planning: regression in enforcement?

Introduction

The operational planning system has three key components, forward planning, development management (formerly known as development control) and planning enforcement. As all three are mutually reinforcing and interdependent, the consequence of the ineffective application of any strand inevitably undermines the legitimacy of the entire planning system (Millichap, 1998). Unfortunately, it is apparent that this has often been the case with enforcement and it is no surprise that, through time, it has come to be referred to as the Cinderella of planning (Department of the Environment, 1975).

The legislative provisions for planning enforcement are set out in Part 5 of the Planning Act (Northern Ireland) 2011 and the principal components can be summarised as follows:

- Under section 133 a planning contravention notice may be served requiring the submission of certain information regarding the ownership or activities on land; and, if after the end of the period of 21 days beginning with the day on which the planning contravention notice has been served, that person has not complied with any requirement of the notice, they are guilty of an offence.
- Where it is deemed expedient to take enforcement action, an enforcement notice may be issued stating the required steps to remedy a breach of control within a specified time period (sections 138-149). In crafting the notice it is essential that the correct breach is specified, as set out in Eldon Garages Ltd. v Kingston-upon-Hull CBC [1974], and the steps to remedy the breach are not excessive in that the council or the Department does not exceed its powers by requiring the recipient of an enforcement notice to go beyond what is necessary, as in Mansi v Elstree RDC [1964].

- A stop notice may be served (sections 150-151) which can prohibit any activity to which the accompanying enforcement notice relates where the enforcement notice has not yet come into effect i.e. before the expiry of the period for compliance with an enforcement notice. This can only be served with, or on the foot of, an enforcement notice.

- Section 135 facilitates the issuing of a temporary stop notice. This can be served as soon as a breach of planning control is identified and without the need to have firstly, or concurrently, served an enforcement notice. Temporary stop notices take effect immediately and would be subject to the normal restrictions attached to a stop notice but cease to have effect after a maximum of 28 days.

- A breach of condition notice (section 152) can be served where planning permission for carrying out any development of land has been granted subject to conditions and there has been a breach of condition. If, at any time after the end of the period allowed for compliance with the notice, any of the conditions specified in the notice is not complied with; and the steps specified in the notice have not been taken or, as the case may be, the activities specified in the notice have not ceased, the person responsible in breach of the notice is guilty of an offence.

- Where an authorised officer of a council has reason to believe that a person has committed an offence under section 147 (non-compliance with an enforcement notice) in the district of that council, the officer may give that person a notice offering the person the opportunity of discharging any liability to conviction for that offence by payment of a fixed penalty (section 153) to the council. In this context, where a person is given a notice under this section in respect of an offence no proceedings may be instituted for that offence before the expiration of the period of 28 days following the date of the notice; and the person shall not be convicted of that offence if the person pays the fixed penalty before the expiration of that period.

- Where the council considers it necessary or expedient for: any actual or apprehended breach of planning control; any actual or apprehended contravention of sections 85(1) or (5) regarding unauthorised demolition, alteration or extension of listed buildings; or sections 126 or 127 regarding tree preservation orders and the preservation of trees in conservation areas; or any actual or apprehended contravention of hazardous substances control, to be restrained by injunction, it may apply to the court for an injunction under section 156. On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach. Furthermore, rules of court and county court rules may provide for such an injunction to be issued against a person whose identity is unknown.

- Section 157 allows for the issuing of a listed building enforcement notice. Where it appears to a council that any works have been or are being executed to a listed building in its district and are such as to involve a contravention of section 85(1) or (5), then, subject to subsection (3), the council may, if it considers it expedient to do so having regard to the effect of the works on the character of the building as one of special architectural or historic interest, issue a notice specifying the alleged contravention; and requiring such steps as may be specified in the notice to be taken for restoring the building to its former state or where the council considers that such restoration would not be reasonably practicable, or would be undesirable, for executing such further works specified in the notice as it considers necessary to alleviate the effect of the works which were carried out without listed building consent; or for bringing the building to the state in which it would have been if the terms and conditions of any listed building consent which has been granted for the works had been complied with.

The enforcement system is failsafe in that its purpose is to bring unauthorised activity under control, remedy undesirable effects of unauthorised development and, where appropriate, take action against those who are in breach of the regulations (Department of the Environment, 2000). The planning enforcement equation is a complex one comprising many strands, all of which are underpinned by the need for provision of a robust legislative framework which can act as a deterrent to those who cause environmental damage. By necessity, however, the remedy to poor levels of regulatory compliance must be coupled with an understanding of the need for synergy between the legal tools and the knowledge, skills and attitudes of those who employ them. Anything less than optimal performance inevitably impacts detrimentally on the efficacy of operational practice.

As the jurisdiction of Northern Ireland embraces the devolution of planning powers to local authorities, the purpose of this paper is to investigate not only if the existing legal toolkit is fit for purpose but also whether there are more structural issues which require attention. In the first instance, therefore, a review of the evolution of

planning enforcement will be conducted. The rationale for this is that lessons from the past may be helpful, firstly, in identifying remedies to deal with contemporary problems and, secondly, the analysis will provide a platform for the scrutiny of operational practice. Issues emerge regarding the efficacy of the system and concerns are raised over the ethics and legitimacy of the actions of policymakers and legislators.

The evolution of planning enforcement law

The history of planning law in Northern Ireland reflects developments in other areas of legislation in that, for the most part, it tracks events in England and Wales (Dowling, 1995). In effect, it has often been imported piecemeal across the Irish Sea at a later date (Hendry, 1989) and although the rationale for this is that transposition can reflect the best aspects of practice, it will become apparent that Northern Ireland has sometimes failed to learn useful lessons from experiences in the neighbouring jurisdictions.

Whilst planning legislation *per se* can be traced back to the Housing Town Planning etc, Act 1909, the modern planning system evolved after the end of World War II. In this context, the 1947 Town and Country Planning Act established the basis for the contemporary planning system in England and Wales and many of the provisions contained therein form the central plank of the planning enforcement system in the different planning jurisdictions of the United Kingdom today. Before scrutinising the evolution of enforcement it is, however, important to understand the concept of development which is established in law as follows:

> "The carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land". (The Planning Act (Northern Ireland) 2011, Section 23 (1)).

The modern definition is, therefore, clearly divided into two key components, *operational development* and *material change of use.* Importantly, the rationale for this segmentation will become apparent as contentious issues are identified later in the paper.

Three key principles, in particular, emerged from the 1947 Act, discretion, time limitation and the enforcement notice. The local planning authority was given licence to serve an enforcement notice wherever a breach of planning control had taken place and it was deemed expedient to do so, having regard to the development plan and any other material considerations or, alternatively, it could let matters rest as they were (Brand, 1988). The decision to take enforcement action was, therefore, a matter at the discretion of the planning authority and there was no criminal liability for a breach of control in the first instance. For the most part this remains the case today. The rationale for this approach was that the margins between lawful and unlawful development were not considered to be sufficiently clear cut to justify grounds for a criminal offence. Specifically, if someone carried out development activity unwittingly it would be unfair if they were convicted and provided with a criminal record. Secondly, the concept of time limitation, which has subsequently become problematic, was also introduced, whereby the time limit for enforcement action was four years from the date of the breach. Interestingly, however, there was one exception to this which, as will be seen, could provide useful insights for legislators today. In the case of minerals development, the four year period ran from the date of discovery. Thirdly, if the planning authority did decide to serve an enforcement notice the recipient had three options. He or she could comply with the notice; apply for retrospective permission; or appeal to the Magistrates Court. If the requirements stipulated by the planning authority were not met, a criminal offence was deemed to have occurred.

A key issue of concern, which resonates with the problems of today, emerged subsequent to the enactment of the 1947 legislation. Specifically, these difficulties have been associated with the Magistrates Court. Since the inception of the system two matters in particular have been problematic. Firstly, the technicality and vagaries of planning are such that the Magistrates Court has perennially been considered by many to be an unsuitable arena for dealing with the complexities of planning law. Secondly, the Magistrates Court has frequently been accused

of adopting a judicial attitude which is highly protective of private property rights. Evidence to support these criticisms has been periodically presented, yet little action has been taken to remedy the situation (McKay and Ellis, 2005).

The impact of these difficulties has been manifested in enforcement notices being dismissed by the courts on minor technicalities and, even in the event of a successful prosecution, low level sanctions have been imposed which have failed to act as a deterrent (Carnwath, 1989; Carnwath et al, 1990). Despite landmark case law, for example, *Mansi v Elstree RDC* (1964) and *Miller-Mead Ltd. V Minister of Housing and Local Government* (1963) which established precedents for the drafting of enforcement notices and enabling notices with minor defects to be amended (varied), the problems continue to permeate the system. With these issues in mind attention turns to evidence emerging through time, lessons learnt and new questions emerging.

Lessons for legitimacy?

For the most part, developments in planning enforcement legislation have been systematic and reactionary rather than radical, as evidence of extant failings emerged. Notwithstanding, substantive knowledge has been gleaned which is helpful in terms of crafting remedies for current practice. With this in mind attention turns to two issues which have been constantly in the spotlight, time limitation, and the activities of the Magistrates Court.

Time limitation

One of the most significant developments in the evolution of enforcement law resulted from cognisance that there was a significant difference between *operational development* and *material change of use* as set out in the Planning Act (Northern Ireland) 2011. As highlighted above, the 1947 legislation provided immunity to *all* development through the four year time limitation regulation. However, it quickly became apparent that there was a need to differentiate between the two forms of development. In the case of operational development the structure is visible and relatively easy to detect but a change of use is notoriously difficult to spot (Humphreys, 2011). Potentially, a use may commence within a structure without being visible but can, by degrees, intensify, or morph into a new use without being detected until such time as it has become immune from enforcement action. In effect, not only were these difficulties the impetus for the current legal definition of development, but the realisation that four years is not enough time to justify immunity for a material change of use. The net effect was to revise the limitation period for material change of use.

The current status in the planning jurisdiction of England and Wales is that, whilst the four year rule remains for operational development, there is a ten year rule for material change of use. The only exception to this is for material change of use to a single residential dwelling, where the four year time limitation applies. Interestingly, the same situation prevailed in Northern Ireland until the commencement of the 2011 Act and here it is important to scrutinise the sequencing of legislative change.

As part of the programme for the devolved planning system of new local government in Northern Ireland, fresh planning legislation has been required. In this context, an extensive consultation process took place whereby questions were asked regarding the content of the new Planning Act. Specifically, what was wrong with the existing system and how might this be remedied were queried (Department of the Environment, 2009). Subsequently, a consultation paper, coupled with responses by the Department to comments received, was published to take forward legislative change. Though the issue of four and ten year rules was raised, no suggestion was made to introduce change. It was, therefore, no surprise that when the Planning Bill 2010, the precursor to the 2011 Act, was published, Section 131(1) dealt with time limitation and provided that for operational development the time limitation period for immunity would, as previously, be four years. Similarly, Section 131(3) indicated that, as previously, immunity for material change of use would be ten years. What followed, however, has been cause for concern. When the Planning Act (Northern Ireland) 2011 was subsequently

published, Section 132 (3) specified that in the case of any material change of use "no enforcement action may be taken after the end of the five years beginning with the date of the breach" (page 84). In effect, the four year rule for operational development and the ten year rule for material change of use had been changed to a uniform five year rule for both operational development and material change of use.

It is a matter of concern that, in the absence of any supporting evidence, this change has been implemented, particularly when post 1947 legislation has continuously viewed differentiation between the two classes of development as a necessity. Indeed, all evidence presented since has been to the contrary, with most pointing to a need to expand the ten year limitation period. Recent work in England by Richard Humphreys QC (2011) has, for example, suggested that the ten year rule should be doubled to 20 years. The Law Society, however, whilst at variance with this opinion, explained how the difficulties presented by the ten year rule could be remedied. It suggested that the provisions of the Localism Act 2011 may go some way towards remedying concealment (Law Society, 2011). Section 124 of the Act allows enforcement action to be taken within the six months, beginning with the date on which evidence of the apparent breach of planning control came to the authority's knowledge. To understand how this development originated it is important to consider two judgements: firstly, *Robert Fidler v SoSCLG and Reigate and Banstead DC* (2004) and, secondly, *Welwyn Hatfield DC v SSCLG and Beesley* (2011).

In both Fidler and Beesley the defendants had concealed residential buildings, waited until the immunity period expired and then applied for Certificates of Lawful Use. In the case of the former (Fidler), the defendant built his house beneath a haystack covered by a tarpaulin, without planning permission. Having been refused a Certificate of Lawful Use, the court ordered that the building be demolished because the straw bales and tarpaulin were, in the eyes of the law, necessary parts of the building operation and the building was not substantially complete until they had been removed. Importantly, however, the judge ruled that concealment did not in itself provide a legitimate basis for the enforcement to succeed, as hiding something does not take away the lawful rights that accrue due to the passage of time. This was considered by many to be an unsatisfactory ruling. In the Beesley case, a farm building for agricultural purposes was given consent but was then used purely for residential purposes for a period in excess of four years. Subsequently, the Beesleys applied for a Certificate of Lawful Use for residential purposes. Again the application was refused and the case went all the way to the Supreme Court which ruled that not to take action against such concealed development would be unthinkable:

> "It would damage public confidence in planning legislation and any law abiding citizen would be astonished to suppose that the (owner's) dishonest scheme, once discovered, would not be enforced against, but rather crowned with success, thereby undermining the maxim *volenti non fit injuria* that 'one cannot profit from one's own wrongdoing." (Welwyn Hatfield BC v. Secretary of State for Communities and Local Government & Beesley [2011] 2 WLR 905)

It is significant to note that whilst the remedy implemented was essentially identified back in 1947, when it was applied to mineral development, its wider value was not appreciated for 64 years. Importantly, the evidence from the courts, compounded with the provisions of the Localism Act 2011, demonstrate not only Northern Ireland's failure to learn from good practice but suggest perversity in the adoption of an approach which precipitates the problems which have haunted the system for decades. Time limitation, however, is not the only issue of concern.

The Magistrates Court

Perhaps the area which is most frequently targeted for criticism in discussions of the failings of planning enforcement is the Magistrates Court which normally determines the most appropriate sanction to be applied to convicted offenders. The findings of Rush et al (2012) regarding the imposition of derisory penalties mirrors the findings of Grekos (2008) who found that offenders actually accrue benefit from compliance-deficit. Evidence which resonates with this accrues from the scrutiny of a number of Northern Ireland cases. First is the unauthorised demolition of Harrymount House which was a listed building in Warringstown. This was successfully prosecuted and a £50,000 fine imposed, the highest ever levied in Northern Ireland. However, on

appeal the £15,000 fine imposed on each of the two owners was reduced to £500 and the fine of £20,000 imposed upon the contractor was reduced to the derisory sum of just £100. Secondly, at Piney Ridge which is just off the Malone Road in Belfast, the offender was fined £150 and the company of which he was a Director fined £200, again for the unauthorised demolition of a listed building.

One of the most high profile breaches of planning control has been the unauthorised parking of vehicles adjacent to Belfast International Airport (Department of the Environment, 2012). This is a particularly lucrative activity as many air travellers park cheaply at *fly-parking* locations (car parks without planning permission) in close proximity to the airport, from where they are bussed in for their flights and collected upon their return, generally at lower prices than those charged on site at the airport. A fine of £24,000 is the highest to have been imposed on one of the unauthorised enterprises but, on appeal, this was reduced by 50%. A fine of £22,000 was issued to another operator and, whilst at the time of writing there was still an opportunity to appeal, serious concerns have been raised over the sanction. The legislation has provision to award daily fines and fines proportionate to the crime. However, the revenue from these activities is so high that these fines are proportionately *de minimis* and all fly-parking businesses continue to operate, apparently prepared to be taken to court, pay the fine, or in some instances, successfully appeal against the level of sanction imposed.

The key question emerging is, therefore, why are magistrates failing to impose sanctions which act as deterrents to those who flagrantly flout planning regulations? Perhaps part of the answer is not only, as highlighted by Dobry (Department of the Environment, 1975) and Carnwath (1989), that the judiciary fails to adequately understand the complexities of planning law but is also overly protective of private property rights. In this context, the problem is partly attitudinal. Work by Rush et al (2012) indicated that magistrates deal with many different types of offences and many spend limited time dealing with breaches of planning control. It was suggested that when planning is compared to more serious crime, there is the danger that those imposing sanctions across the range of offences may tend to deal more leniently with planning crimes. Whether or not this is the case, the evidence suggests that breaches of planning control have not been subject to serious penalties. However, it is significant to note that in 2012 the Judicial Studies Board issued new guidelines which state that the minimum fine for a planning offence should be £5,000. This has had immediate impact in that derisory fines, such as those used as illustrations above, have disappeared. Coupled with a high media profile provided to planning crimes led by the then Minister for the Environment, Alex Attwood, it is significant to note there has been a recent trend of much higher level sanctioning than previously. Fines in the range of £20,000 are currently not uncommon and, whilst it is premature to make any assessment regarding whether or not this indicates a paradigm shift, it will be interesting to see if a new pattern is emerging in terms of the actions of the judiciary.

Conclusion

The history of enforcement in the planning jurisdictions across the United Kingdom and Ireland provides interesting insights not only into legislative mechanisms which may or may not be effective weapons in the armoury against those who breach planning regulations, but also into the ghosts in the machine (Millichap, 1989) or structural problems that continue to haunt the system.

In terms of the Magistrates Court, concerns were raised over the attitudes of the judiciary, the low levels of sanction imposed and the unsuitable nature of such a court system to deal with the complexity and technicality of planning law, particularly when cases were being dealt with in the same forum as serious non-environmental crime. Whilst studies in the past have highlighted the notion of a dedicated planning circuit court, this has been dismissed, mainly on grounds of cost. However, whilst evidence emerging from the courts has motivated legislative change in England regarding time limitation, Northern Ireland has taken little cognisance of lessons learnt. Specifically, section 124 of the Localism Act 2011 for England applies to deliberate cases of concealment of planning breaches. The new legal framework has been designed to tackle blatant violations of planning control where offenders have deliberately hidden development from the planning authorities to take advantage of the

time limitation restrictions. The provision gives local authorities the power to apply to the courts for a ”planning enforcement order” which gives them the opportunity to take enforcement action even though the usual time limit for enforcement action has expired. The new legal mechanism, therefore, has a definitive resonance with the 1947 Act, though this time it applies to all forms of concealed development. In reality, however, this may not necessarily have the anticipated holistic impact. The wording of Section 124 is such that it deals only with concealed forms of development whereby the court must be satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed. In effect, this begs the question whether all forms of unauthorised material change of use take place through concealment? If not, then it is unlikely to satisfactorily address the perennial problems created by material change of use. In this context, therefore, perhaps there is merit in re-considering the findings of the Department for Communities and Local Government (2006) and Humphreys (2011) by expanding the time limitation period from ten to fifteen or even twenty years.

However, perhaps the area of most serious concern relates to the ethics of the processes underpinning legislative development. Law making and policy development must be informed by a robust evidence base coupled with extensive consultation, otherwise questions emerge over legitimacy. Where there is a disconnect between the evidence base and the legislative mechanisms introduced there should, at the very least, be a transparent explanation for its rationale. Veracity on the part of decision makers is imperative in instilling public confidence but, unfortunately, too many questions remain unanswered in regard to planning enforcement.

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