



**QUEEN'S
UNIVERSITY
BELFAST**

Conundrums in Conservation: Complexity in Control

Rush, D., Macintyre, S., Mc Kay, J., & Mc Kay, S. (2012). Conundrums in Conservation: Complexity in Control. *Urban Studies Research*, 2012, [378326]. <https://doi.org/10.1155/2012/378326>

Published in:
Urban Studies Research

Document Version:
Publisher's PDF, also known as Version of record

Queen's University Belfast - Research Portal:
[Link to publication record in Queen's University Belfast Research Portal](#)

Publisher rights
Copyright © 2012 Danielle Rush et al. This is an open access article distributed under the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

General rights
Copyright for the publications made accessible via the Queen's University Belfast Research Portal is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy
The Research Portal is Queen's institutional repository that provides access to Queen's research output. Every effort has been made to ensure that content in the Research Portal does not infringe any person's rights, or applicable UK laws. If you discover content in the Research Portal that you believe breaches copyright or violates any law, please contact openaccess@qub.ac.uk.

Research Article

Conundrums in Conservation: Complexity in Control

Danielle Rush,¹ Sean Macintyre,² Jane Mc Kay,³ and Stephen Mc Kay⁴

¹ *Planning and Local Government Group, Department of the Environment Millennium House, 17-25 Great Victoria Street, Belfast BT2 7BN, UK*

² *School of the Built Environment, University of Ulster, Jordanstown, Newtownabbey, Northern Ireland BT37 0QB, UK*

³ *School of Law, Queen's University, Belfast BT7 1NN, UK*

⁴ *School of Planning Architecture and Civil Engineering, Queen's University Belfast, UK*

Correspondence should be addressed to Stephen Mc Kay, s.mckay@qub.ac.uk

Received 13 December 2011; Revised 2 May 2012; Accepted 7 May 2012

Academic Editor: Jianfa Shen

Copyright © 2012 Danielle Rush et al. This is an open access article distributed under the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

The departure point for this investigation is to highlight the centrality of regulation theory as a praxis in planning enforcement. The value of the conceptual framework is demonstrated by application in the problematic arena of conservation regulatory compliance, where there is currently a dearth of investigation. It is evidenced that this thematic approach provides a lens to scrutinise problematic areas of control and provides a deeper understanding of the difficulties faced by planning enforcement operational practice generally and heritage regimes specifically. The utility of the proposed mechanism is that it remedies the current, well documented, pitfalls of disjointed, piecemeal strategies by providing a framework for robust, coherent decision making not only in planning but in the wider regulatory arena.

1. Introduction

The legitimacy of the planning system is dependent upon the efficacious implementation of the planning trinity, which comprises forward planning, development management, and enforcement [1]. In this context, enforcement has been repeatedly criticised as being the weakest link in the planning process [2–5]. Specifically, there is a dearth in appreciation of the serious problems which pervade the regulatory planning system. The departure point for this investigation is, therefore, to develop a theoretical framework which can be applied to develop a deeper understanding of inherent problems which underpin operational practice. The investigation draws upon a raft of concepts to develop a lens which cannot only be applied to identify and scrutinise those matters which are most likely to contribute to solving this complex equation, but may be of value in the wider regulatory arena.

Nowhere has planning enforcement been more maligned than in cases where significant breaches of control relate to conservation matters [6]; and, driven by Prior's assertion that "lessons from practice alone risk missing the mark" [3, page 64], the paper will not only examine the legislative and policy mechanisms which are used both as a deterrent and

to remedy of breaches relating to conservation, but also it will analyse the structural factors which provide the cornerstone for the regulatory framework. In the first instance, the impetus for the investigation is established which subsequently facilitates a discussion on conservation regulatory mechanisms. Attention then turns to an exploration of the evolving theoretical framework within which regulatory control operates, particularly emerging thinking in fields such as risk-based and really responsive regulation [7, 8]. At each stage, a range of issues will be generated which are scrutinised in an empirical investigation which spans jurisdictions in the UK and Ireland. The paper concludes by not only suggesting how theory can inform practice but makes suggestions for improvement to the legislative framework and operational procedure, provides insights into structural problems which underpin conservation enforcement, suggests remedies which might be beneficial not only to planning but other disciplines, and draws attention to issues of ethics and legitimacy which have far reaching implications for the planning profession.

The impetus for this investigation has been generated by evidence that questions the effectiveness of enforcement practice on conservation matters across the UK. Northern

Ireland's (NI's) built heritage conservation record has been singled out for particular criticism and consequently provides an ideal departure point for the study. The Historic Buildings Council identified unauthorised works undertaken on listed buildings as a particular area of ineffective enforcement as long ago as 1996 [9] and the protection of built heritage was described in the recent BBC Two television programme "Restoration" as being bottom of the league in the UK. Lack of deterrent is the most commonly reported factor for maintaining this reputation [4] and recent high-profile examples of this include the illegal demolition of two listed buildings in Portstewart which resulted in a fine of just £250 fine per building; while in Bushmills developers were fined £5,000 for the unauthorised demolition of, again, two listed buildings. Such activities continue apace with de minimis fines issued by the courts when prosecutions are successful. Indeed, the demolition of the B+ listed Tillie & Henderson clothing factory in Derry, without prosecution, adds weight to the hypothesis that there are major inadequacies in the present system.

So far no one has offered comprehensive explanations as to why the system is not working effectively and why so many offences against jewels in the conservation crown have slipped through the enforcement net [10]. It is in this context that the synergy between theory and practice will provide a vehicle to scrutinise and contrast the motives, tactics, and strategies of participants in the regulatory arena.

2. Conservation and Planning

Conservation is one of the core activities in protecting and enhancing the built environment and its role is to promote the best architecture, support the restoration of the townscape fabric through new activity, and suitably develop vacant sites. Legislation in Great Britain has come a long way from when it was seen as a means of protecting individual monuments, to the present day with its current concern for entire townscapes.

The Ancient Monuments Act 1882 [11] represented the first government action to protect historic monuments, and by 1908, three Royal Commissions on the Historical Monuments of England, Scotland, and Wales had been established to construct inventories of ancient and historical monuments. Landmark legislative developments in the form of the Town and Country Planning Acts of 1944 and 1967 [12, 13] introduced lists of buildings which were thought worthy of preservation because of their architectural or historic interest and by 1969 legal protection had been provided to almost 12,000 buildings and nonstatutory recognition, but not protection, to a further 137,000 [14].

By 1967, however, the Civic Trust [15] pointed out that the shortfalls of this Act were clear for all to see.

"It is not merely that the machinery sometimes fails to work, although this is serious enough; it is that we did not set our sights high enough. The target we now realise; must be to keep not just individual buildings scattered here and there

about our towns, but whole town centres, or substantial parts of them" [page 139].

This wish to conserve entire areas of buildings, and not only listed ones, was brought about by the recognition that the amenity of many listed buildings was negatively affected by changes to the surrounding townscape. Consequently, the 1967 Civic Amenities Act [15] witnessed the beginning of Conservation Area designation in England and Wales.

Before 1972, NI did not have the provisions available throughout the rest of the United Kingdom for the listing of buildings and the designation of Conservation Areas. It was only with the introduction of the Planning (NI) Order 1972 [16] that such provisions were made available although, unlike local authorities in England, the power to designate Conservation Areas was made the direct responsibility of the Department of the Environment NI (DoENI).

3. Conservation and Enforcement

Planning enforcement is instrumental in ensuring the protection of our built heritage. The origins of enforcement as we now know it lie in the Town and Country Planning Act of 1947 [17]. In NI planning decisions are taken by the Planning Service (the agency has now been dissolved and absorbed into the Department of the Environment as Planning and Local Government Group), which is an agency within the Department of the Environment, (hereinafter referred to as the Department) following consultation with local authority representatives, who, unlike in England, do not have executive decision making powers. Nevertheless, NI legislation has largely mirrored its English counterparts in content and substance. In both NI and England, the enforcement of planning control is similar, in that discretion is used to take enforcement proceedings against a breach of control when it is necessary to do so. Moreover, both systems recognise that developing without planning permission or in breach of a consent which has been granted is not, in the first instance, a criminal offence and that planning permission may be sought retrospectively. The key mechanisms used to deal with breaches of control include enforcement notices, stop and temporary stop notices, as well as breach of condition notices and injunctions. Exceptions to the non-criminalisation approach occur when unlawful development is caught by conservation legislation. Such circumstances include where unauthorised alterations take place on listed buildings or any object or structure which lies within the grounds or curtilage of listed buildings or demolition occurs in Conservation Areas. In the context of this investigation, it is timely that a number of new and proposed legislative mechanisms have been targeted at Scotland and NI which represent the most significant changes to UK enforcement since the 1991 Planning and Compensation Act [18].

Case law too plays an important role in conservation regulation and perhaps the most significant in the context of this investigation is Shimizu UK Limited v Westminster City Council (1997) [19] which concerned an application to demolish part of a listed building and resulted in a judgement

by the House of Lords which affected listing status. Before Shimizu, the demolition of a listed building was taken to cover either its total or partial demolition. The House of Lords ruled, however, that demolition referred in essence to the total or substantial destruction of the listed building and that works relating to the destruction of only part of the fabric of the building did not amount to demolition. It also considered that works for the demolition of an unlisted building in a Conservation Area must also involve the total or substantial removal of the building concerned, hence dilution of the Conservation Area regulatory framework as demolition of part of an unlisted building in a conservation area does not require conservation area consent.

Paradoxically, NI has an additional layer of conservation control to other UK regions. These powers enable the Department to define Areas of Townscape Character (ATCs) or Areas of Village Character (AVCs), where certain areas display a distinct character, normally based on their historic built form and/or layout. This differs from Conservation Areas, which are given this designation by virtue of their special architectural and/or historic interest. It has been argued that buildings within ATCs/AVCs, although a lesser designation in policy terms, have in some respects greater protection than those in a Conservation Area with regard to demolition. This is because any demolition, partial or otherwise, in an ATC/AVC, requires permission, as no Shimizu equivalent challenge on the meaning of demolition of a building has, as yet, been tested in the courts.

The existing enforcement powers, therefore, in theory, provide a strong deterrent based toolkit which planners can employ to remedy breaches of control. Noncompliance with an enforcement notice, for example, can mean a maximum fine of up to £20,000 in England (£100,000 in NI) and/or a custodial sentence, while on indictment there is no fine limitation. Coupled with this, there are powers to impose subsequent daily fines. No evaluation of the effectiveness of the enforcement of conservation control would be complete without also taking into account the role of the courts in the system's overall success or shortcomings. As the courts have been accused of being ill equipped to contend with the highly complex nature and often seriousness of breaches of planning control, this research will, therefore, investigate if anything can be learnt from recent legislative proposals and, by drawing upon developments in theory, ask whether alternative strategies can be devised which provide a catalyst for improved compliance with conservation regulations.

Since the 1991 Planning and Compensation Act, there have been numerous reviews of enforcement powers, most notably a Review of Planning Enforcement: Summary and Recommendations which was published in 2006 [20] (mirroring the contents of the Enforcement Strategy (2009) produced by the Department) [21]. Purdue [22] noted that the key recommendations are largely directorial in nature, ranging from the setting of indicators and increasing the priority of enforcement, to creating guidance on the suitable level of fines to be included in a good practice guide for magistrates. Notwithstanding statutory protection, it was again recommended that unauthorised development should not, in the first instance, be an offence. Key factors in this

rationale are that unwitting offenders should not be labelled as criminals nor should the burden of proof be placed upon the planning authority to prove its case beyond reasonable doubt. In planning the test of evidence is less onerous and based upon the balance of probability with the burden resting with the perceived offender. In the Republic of Ireland, however, a criminalised system has been introduced but the law has been amended to reverse the burden of proof from the planning authority to the perceived offender. Whether such an initiative would be appropriate in the UK will be investigated later.

While legislative developments are of significant importance to regulatory conservation matters, it is fundamentally important to explore the theory behind enforcement practice, as it is only through an understanding of the structural underpinning that more effective approaches can be crafted, which resonate across the wider regulatory spectrum.

4. Regulation Theory and Design

Regulation theory emerged in France in the 1970s as a critique of neoclassical economic theories and structuralist approaches [23] and regulation theorists believe answers can be found in an analysis of the habits and institutional forms which induce or force agents to behave in ways which are not antagonistic to the reproduction of structures [24]. In this context, regulations can, therefore, be defined as the laws or intervention used to influence or constrain human behaviour [25] and, while regulation theorists distinguish between forms of economic and social regulation [26, 27], it is the latter which is particularly relevant to this investigation.

It is widely documented that regulatory laws alone often prove ineffective in the pursuit of planning control [3, 4]. As such, Baer [28] argues that many of the problems and difficulties of planning enforcement can be related to statute and regulation design and emphasises the key role of local organisations and individuals in interpreting and applying directives in a transparent consistent and proportionate manner.

With this in mind, Ingram and Schneider [29] argue there is no single recipe for an effective statute, and instead smart statutes are designed for the context in which they are to be implemented. They identify four different levels to the design of regulations. The first of these is the strong or explicit statute which leaves little or no discretion to the implementing agency and should be conceptualised through transparent robust goals and objectives. The second tier comprises the vaguer statute which, while retaining control over the goals, allows greater discretion to administrative agencies. It is apparent that planning enforcement in the UK falls somewhere between levels one and two [3] as, while a strong statute exists, a high degree of discretion is allocated to those closest to the problem who apply the policy. This is reiterated by Wood and Becker [30]:

“local planning authorities’ policy and decision-making capacity has been informed rather than

imposed or dictated by a combination of legislation, government guidance, and case law interpretations that serve to set the boundaries for the exercise of discretionary judgement” [page 349].

Tier three in the hierarchy is deemed the grass roots or bottom-up approach, which leaves interpretation to street level bureaucrats doing little more than providing agents with the legal authority to act, while tier four is a support building approach which places better emphasis on the processes of policy rather than simply the policy outcomes or results. It supports the claim that negotiation over desired outcomes is best achieved by consensus building [3], and it is mirrored in the work of Lipsky [31] which advocated a consensus building approach, where the relationship between the regulators and the regulated is of vital importance.

While, in principle, it seems this fourth tier would represent a Utopian ideal and indeed many of its merits are imbued in the strategy analysis below, it will be evidenced that in matters of conservation, that is, what it is likely to remain.

5. Strategy Analysis

In assessing the effectiveness of enforcement of conservation control, it is important not only to look at the design of regulations but also the various techniques used by planning authorities in their quest for regulatory compliance. Much debate has surrounded a principles based approach to regulation which requires moving away from dependence on detailed, dictatorial rules and relying more on broadly stated rules or principles to set the standards by which regulates must comply. Although originally introduced in financial services regulation in the UK in the 1990s, it will be asked if such an approach to regulatory design can contribute to the more effective enforcement of conservation regulation.

Principles based regulation requires regulators to define the ending that they require regulates to achieve, instead of focusing on stipulating the processes or actions that regulates must take. The potential benefits of using principles are that they provide flexibility, are more likely to produce conduct which fulfils regulatory objectives, and may be easier to comply with. Principles, however, lack the certainty and clear standard of behaviour provided for by detailed rules, exemplified in planning enforcement notices. Furthermore, Black [32, page 108] states that “they can lead to inconsistencies, are prone to creative compliance and to the need for constant adjustment to new situations.”

Regulatory strategies for planning control are often considered under the banners of formal and informal techniques [5, 27, 33], which Ayres and Braithwaite [34] capture, in a sanctions pyramid, where actions range from informal techniques such as education, negotiation and persuasion to the more formal techniques of warnings, and eventually, at the apex, prosecution. Ayres and Braithwaite’s [34] responsive approach to regulation and enforcement involves the adoption of a flexible set of enforcement reactions where plausible and strong sanctions are generally held in reserve for the most serious of cases. Actions at one level must work

effectively with other levels, otherwise, there is a risk of making the whole system dysfunctional and the level of intervention must increase the more an offender fails to comply with the regulations. Baldwin and Cave [35] highlight this using a hierarchy of regulatory strategies. At the base of their hierarchy is self-regulation whereby rules are established and individuals are expected to comply with them. The next two tiers of the hierarchy are largely similar to the binary model of enforcement styles developed by Hutter [36]. One of the most important elements of Hutter’s binary model compares to Richardson et al. [37] accommodative or Hawkins [38] compliance strategy of enforcement. The aim of this strategy is to achieve compliance through the correction of existing problems and the prevention of new ones. While falling short of support building [29], Claydon and Chick’s [39] assertion that the role of negotiation can be conducive to consensus driven, long lasting remedies will be evidenced in the empirical investigation.

The second element of Hutter’s binary model is characterised by a “penal” style of enforcement similar to the deterrent model [31] and Hawkins [38] sanctioning strategy. Both models aspire to reduce the instance of breaches and use prosecutions as a means to deter future infringements. Hutter [36] refined the binary model to include two new strategies—the first being a persuasive strategy which involves the education and persuasion of regulatees. The second is the more stringent insistent strategy comparable to the third level in Baldwin and Cave’s [35] hierarchy. Under this strategy, regulators are less likely to negotiate and instead initiate legal action when faced with continued reluctance to comply. The top level of Baldwin and Cave’s [35] strategy pyramid is command regulation which is a last resort for enforcement officers. Grekos [40] states how this type of strategy has come under much criticism as command and control regimes have been seen by some to be an expensive method of tackling environmental deviants, with penalties not always being seen as conducive to compliance and deterrence goals; while McKay and Ellis [41] echo this perspective stressing the importance of providing and, where appropriate, implementing robust deterrent mechanisms.

With the above perspectives in mind, it is interesting to note how in the UK, responsive regulation has been followed by risk-based regulation in the wake of the government commissioned Hampton Report [42] and the issuing of the Compliance Code and the Principals of Good Regulation [43], the purpose of which was to reduce administrative burdens without compromising the regulatory regime. The risk-based approach refers to an allocation of enforcement resources based on an assessment of the risks that a regulatee poses to regulatory goals. The main components of this approach are appraisals of the risk of noncompliance and calculations regarding the impact that such activity will have on the regulator’s capacity to achieve its objectives [7]. Risk-based approaches are, therefore, important in that they allow resources to be directed in a way that prioritises highest risks. Such approaches do, however, give rise to a number of problems. Risk-based systems require those managing enforcement teams to decide which risks are most important. As such, they must be prepared to deal with the consequences

of poor decisions [7]. The approach may also fail to detect new risks and overlook lower levels of risk which, if numerous, could prove catastrophic, particularly in sensitive locations where built heritage is concerned. Nonetheless, many of the merits of such an approach are worthy of investigation, for example, if risk regulation is based upon prioritisation, perhaps matters of conservation are high on the list?

While each of the above concepts generates its own unique issues, it is interesting to examine the emerging concept of really responsive regulation [8]. This suggests there are five main tasks of enforcement involving the discovery of breaches, developing tools for responding to such breaches, enforcing those tools, gauging their success or failure, and eventually modifying them accordingly. To be really responsive, “regulation has to be responsive not only to compliance performance but also to the attitudinal settings of regulatees; to the institutional environment of regulation; to the operation and interplay of logics to the different regulatory tools and strategies; to its own performance; to changes to each of these elements” [8, page 44]. Importantly, really responsive regulation emphasises the need to deal with “decentred” regulatory regimes in which regulation is carried out by a variety of types. Decentred analyses involve a move away from looking at regulation solely by the state and instead consider the many people involved in the regulation process.

Conceptually, the decentring approach has a good understanding of the nature of the problems of regulation and the nature of the relationships that comprise the regulatory regime [44]. It rejects an idea of regulation whereby regulatees are assumed to comply with regulations and instead “problematises the responses of actors to attempts by others to regulate them.” Strategies are, therefore, required to be “multifaceted, using a number of strategies simultaneously or sequentially and indirect” [45, page 140]. Importantly, the attitudinal mindsets of regulatees may have a bearing on the enforcement strategy used by a regulator and any eventual success of that strategy. There is a considerable body of literature to suggest that indeed the attitudinal mindset of the enforcer may also contribute to the enforcement strategy employed. How enforcement officers make decisions is only partly determined by the rules, be they organisational or legal. It will be evidenced that organisational norms and practices [46], past experiences [47], personal relationships, intuition, and the decision maker’s own perceptions and attitudes will all play a part in how decisions are made [48], raising interesting ethical questions for decision takers. In this context, the ethical basis for the planning profession, as per the RTPI Code of Conduct [49], is that planners obtain specialised knowledge and skill sets to serve society and protect the public interest with honesty and integrity. While three broad categories of ethics can be identified in virtue, consequentialist and nonconsequentialist [50], it is perhaps the second of the three which is most appropriate to this investigation. This is underpinned by utilitarianism which, as Taylor [51] points out, aims to maximise good over bad in the public interest, and, as will be seen later, is driven by the consequences of decisions rather than the intrinsic motives and attitudes of the decision taker.

5.1. Regulatory Compliance. Although the various models provide useful insights into how the issues of enforcement can be tackled, no study of enforcement would be complete without considering current thinking on how compliance might best be achieved in planning. It will become apparent that by drawing upon key components from this perspective and synergising these with emerging paradigms, new ideas can be generated which contribute to our rudimentary knowledge of regulatory control.

In recent years, there has been much debate over what is the most effective approach to achieving compliance with planning regulations [3, 4]. The work of Burby et al. [52] is useful in identifying and exploring the broader limitations of institutional capacity in the regulatory process. The investigation examined the options available to enforcement agencies when attempting to achieve the objectives of law and found that there are three main choices open to enforcement officers. The first of these focuses on whether to increase the ability to enforce which is known as systematic compliance; or whether, secondly, to improve the commitment of developers to comply voluntarily with regulations, referred to as facilitative compliance. The third choice is whether to combine elements of both the systematic and facilitative approaches to form a new enforcement strategy. The systematic compliance approach assumes that breaches of regulations are intended and that the majority of perpetrators are aware of the rules and standards. As such, increasing the capacity to enforce and maximising expectations of discovery of noncompliance, along with the threat of punitive sanctions is an essential deterrent to potential violation. On the other hand, facilitative compliance is based upon the theory that most regulatory breaches are unintended and carried out due to ignorance. This model is less about the uncovering and correction of breaches and instead entails creating conditions whereby people are more aware of regulations through education and negotiation. In addition to the use of incentives to promote compliance, Burby et al. [52] make a number of recommendations to support their facilitative philosophy. These include the following:

- (i) an adequate number of technically competent staff,
- (ii) strong proactive leadership,
- (iii) adequate legal support, and
- (iv) a consistently strong effort to check building and development plans, inspect building and development sites, and provide technical assistance.

Burby et al. [52] alternative perspective provides an excellent framework within which to evaluate the enforcement regimes in both NI and England. Indeed, “recognition of the scope of alternative approaches has important implications for understanding the “enforcement gap” between the intentions of statutory powers and their use in practice” [3, page 66].

It is, therefore, apparent that there is an extensive and emerging range of thematic approaches which purport to influence regulatory control: the real complexity of the matter is identifying which is best in specific circumstances. What is apparent is that each concept generates a raft of issues

worthy of investigation and while what might be considered an environmental commodification of regulation theory is unlikely to emerge as the remedy to the conservation conundrum, it may be possible to provide an insight into mechanisms, tactics, and strategies which could prove beneficial to operational practice and procedure in conservation control and beyond.

6. The Research Approach

The methodology employed to facilitate this research was triangulation based [53] involving a combination of primary and secondary sources. The review of secondary information, which included literature, legislation, and policy generated a raft of issues relating to statute design, strategy, ethics, legislation and operational practice. These issues provided the framework for the research instrument which was a semistructured questionnaire containing a list of issues for discussion. These were themed to explore the concerns raised and, depending on the respondent's knowledge and experience, considered the role of participants and the responsibilities with which they are challenged. As a thematic guide, it enabled the researcher to target areas of expertise and develop a deeper understanding of the research problems. Furthermore, it provided latitude to probe beyond the answers and engage in dialogue with the interviewee.

The empirical investigation was conducted in two key phases. Phase one comprised three strands. Strand one took the form of semi-structured interviews, strand two questionnaire surveys, while strand 3 consisted of follow-up discussions to develop matters emerging from the preceding strands. The research, which was endorsed at the outset and subsequently evaluated by the Planning Service in NI, was mainly conducted in each of the six NI Divisional Planning Offices (DPOs) and with six local planning authorities in England. The English authorities were selected on the basis of geographic location: two from the North, two from the Midlands, and two from the South of England. The target population for Phase 1 comprised planning enforcement officers with at least two years experience in the area of conservation enforcement. A planning officer from each grade (principal/senior/planner/planning assistant) was interviewed in each case meaning that, in total, 48 officers were surveyed, plus two representatives from the Ulster Architectural Heritage Society (UAHS) and one each from the Heritage Society and SAVE Britain's Heritage. In addition, to these discussions were conducted with six private sector planning professionals and four developers. The strand two questionnaire surveys targeted the public sector interviewees and enabled issues which emerged in the course of the discussions to be developed more extensively. Strand three comprised a round of additional semistructured discussions with key respondents, to provide clarification on a number of outstanding matters.

In Phase 2, on completion of the data collection and analysis, two focus groups were established comprising professional practitioners in both the public (5) and private sector (6) plus 4 developers with experience of conservation related planning matters (Table 1). Prior to commencement,

TABLE 1: Survey population.

Professional planners	Public sector	48
Professional planners	Private sector	6
UAHS	Nongovernmental organisation	2
SAVE	Nongovernmental organisation	1
Heritage society	Voluntary	1
Developers	Private sector	4
Total		62

each participant was provided with briefing papers to act as discussion arenas around which the research findings were evaluated. The sessions provided an opportunity to consider and validate information gleaned, reflect on feedback based upon perceptions of protagonists, and draw conclusions which could be linked to operational practice.

6.1. Statute Design. Prior [3] suggests that advice on the carrying out of regulation is often contradictory as a result of the allocation of discretion within statutes, while Baer [28] considers that the problems of achieving compliance with planning regulations relate to their design. In this context, all public sector respondents stated that they have little input into the design process and none disagreed that the existing system rests between the strong and vaguer statute as identified by Prior [3]. Indeed, it was asked in the evaluation process if there was a need to rethink the regulatory planning structure. Opinion was mixed, but most believed that the current design has the potential to combine flexibility with a relative degree of certainty. The weaknesses in the system were perceived to lie more with operational practice than regulatory design. It must, however, be stressed that this was not a unanimous opinion as it was also argued that a reframing of the regulatory relationship from one largely underpinned by directing and controlling may prove useful. This reverberates with the comments of Black [45], *“that regulators and regulatees move from a directing relationship of telling and doing, to a relationship in which regulators communicate their goals and adopt a self-reflexive approach to the development of processes and practices to ensure that these goals are substantively met, and critically, both trust each other to fulfil their side of this new regulatory bargain”* (page 430).

Such a principles based approach requires the establishment of outcomes to be achieved, not in-depth procedures for achieving them, thus allowing greater room for local or grassroots modification. It is not without criticism however, as it could be seen as a way for regulatees to do whatever they want. This view is reinforced by the department's policy stance on enforcement which states, that

“The Department has a general discretion to take enforcement action against a breach of planning control when it regards it as expedient to do so” [54, page 7].

This clearly leaves substantial room for interpretation, although interestingly an exception to this stance is the policy relating to demolition of listed buildings, which states

“where either of the following actions are undertaken: (a) the unauthorised demolition of a listed building; or (b) the unauthorised demolition of an unlisted building within a conservation area; the department will normally pursue direct court action” [54, page15].

Finally, in this context, a significant proportion of respondents considered the discretionary nature of planning enforcement to be problematic. This is surprising, in view of the policy direction in relation to built heritage, which indicates limited room for discretion in terms of enforcement options. The majority of those highlighting the problematic nature of discretionary powers were public sector planners from NI one of whom stated “discretion fosters inconsistent approaches.” These views raise the following questions: firstly, have the broader discretionary powers relating to general planning enforcement activities been inappropriately applied to breaches relating to built heritage and conservation; secondly, has this situation transpired because of the action of individual planners, or is it the prevailing culture within planning offices that is leading to the inconsistent application of policy? In this context, it is interesting that the interviewees from UAHS (2) believe “the discretionary nature of planning is dangerous, especially where buildings of architectural and historic interest are concerned, as some officers are more likely than others to grasp the severity of breaches and pursue prosecutions.”

6.2. Strategies of Regulation. Understanding how enforcement officers exercise their functions is vital to an understanding of how any regulatory system operates, as regulation is not a creation of legislators or those who write the rules, rather it is the outcome of interactions between regulators and regulatees. In the first instance, therefore, attention turns to a review of the strategies employed by enforcement officers in undertaking their work on matters of conservation.

Planning decision-makers are effectively faced with a choice between deterrence based approaches based on sanctioning and compliance strategies, which are bargaining and negotiation driven. Enforcement officers may, however, gain compliance with the law, not merely by resort to formal enforcement action and prosecution, but by using a host of informal techniques including education, advice, persuasion, and negotiation [35]. The trick to successful regulation, according to Ayres and Braithwaite [34] is to establish a synergy between punishment and persuasion. Likewise the work of Hutter [36] revealed how enforcement relates not only to sanctioning, but also to a string of mechanisms underpinned by collaboration and negotiation. The binary model identified a progression of approach between the two extremities of compliance and deterrence with the compliance approach further separated into “persuasive” and “insistent” strategies based on the willingness to use sanctions. The pyramids work on a slope of severity, so the more reluctant the regulatee is to comply, the higher they find themselves on the slope of the pyramids and hence will be subject to the more serious strategies and sanctions. Conversely, provisions

are made at the bottom of the pyramid for unwitting offenders who are willing to comply and thus no sanctioning is necessary. In between, the persuasive strategy uses measures short of sanctions such as education to achieve compliance.

The findings from the investigation, in line with the framework put forward by Hutter, were that the choice for enforcement officers should not be whether to adopt a facilitative or sanction-based enforcement strategy, but rather to choose the appropriate action within a progressive two-sided enforcement model matched to the regulatee. The majority of enforcement officers concurred with the words of one respondent, from NI, who stated “even on conservation matters, facilitation through negotiation and persuasion should be explored initially and prosecution should be the last resort,” whilst an overwhelming proportion of respondents supported the combination of facilitation and sanction-based approaches to cater for all types of enforcement breaches.

Only 6 of the 48 public sector respondents perceived sanction-based strategies to be the most effective enforcement style for serious breaches of conservation control, which at best represents a very limited endorsement of Hawkins’ [38] belief that prosecutions are more likely to be pursued when infringements are flagrant. This view is understandable within the context of broad planning enforcement, however, it is at odds with the department’s articulated policy in relation to conservation matters, where it “will normally pursue court action” [54, page 15]. This raises the question, is there a widely held misunderstanding among planning officers regarding the differing enforcement policy stances in relation to conservation matters and, if so, are they applying an inappropriate enforcement strategy of negotiation and persuasion in dealing with these matters when a more sanction-based approach is the policy directive?

Whichever enforcement strategy is deployed in the interactions between regulators and regulatees the decision maker must be cognisant of issues such as transparency, consistency, and proportionality. These matters are pertinent as they can act as impediments to the efficacy of enforcement activity, and in this context, it is interesting to note that the implementation of a proportionate, risk-based approach to regulation was advocated in the Barker Review of Land Use Planning [55].

However, as pointed out by one of the public sector planners from England (this insight is interesting as Environmental Health in England is, unlike in NI, with planning a function of local government), “the planning profession is not alone in having accusations of inconsistency or of either lax or over-zealous enforcement laid against it. Other local government regulatory services such as Environmental Health have had similar criticisms made but have used the provisions of the Enforcement Concordat Guidelines [56] as a basis to develop local organisational enforcement policies.” These policies set out to ensure that the enforcement decisions are considered within the guiding principles of consistency, fairness, proportionality, transparency, and objectivity. This approach ensures that officers take decisions relating to enforcement action within a specified framework designed to bring a degree of consistency to the process.

It also facilitates elected members being given all the relevant information required to come to a decision in relation to legal action, in a consistent manner. In addition, this framework ensures that the information is provided in a manner which makes it less likely that irrelevant considerations can be brought into the decision-making process, thus reducing the probability of perverse decisions being arrived at. This has the benefit of avoiding accusations of decisions being made amounting to instances of Wednesbury Unreasonableness. The publication of enforcement policies articulating the use of this framework, usually on Council websites, has also countered criticisms that these services operate in a veiled and inconsistent manner in relation to enforcement. Despite its applicability to planning, only a small minority of respondents were aware of the Enforcement Concordat's existence and there was an almost total dearth of knowledge as to its content.

6.3. Tactics, Legitimacy, and Ethics. Findings from the investigation indicate that there is disparate application of formal enforcement powers between authorities. There appears to be a greater reluctance by enforcement officers to use formal action in the North of England and parts of NI, a finding supported by the research of Claydon and Chick [39] which revealed both wide-ranging discretionary opportunity and significant variation in practice among authorities surveyed. Moreover, the study exposed contrasting attitudes amongst senior planners as to how discretion should be applied and the constraints upon it. A number of possible explanations were put forward, the main one being, as explained by one NI public sector planner, "there is a general reluctance by those managing enforcement teams to venture down formal routes." This corroborates the findings of Hood et al. [57] that the organisational culture, and socialisation into the norms of the organisation, play an exceptionally strong role in affecting the type of enforcement approach an officer is likely to take. This is further mirrored in the work of Hutter and Manning [58] who suggest the pattern of enforcement is, at least in part,

"a result of the dialectic between management with their concern for overall performance and organisational mandate, middle management whose aim it is to control the practices of inspectors, and the inspectors who are inclined to see their task as exercising an immediate face-to-face responsibility and resolving culpability on their particular patch" [page 127].

A small number of interviewees (7) discussed a shift from professionalism towards practices dominated by performance indicators which has affected the strategies employed when undertaking enforcement duties. Officers in both jurisdictions described a constant pressure to close as many enforcement cases as possible in line with targets and as such, less serious breaches were often left to go by the wayside, sometimes with "serious detriment to matters of conservation import." This supports the findings of Campbell and Marshall [59] who found that a number of altered circumstances were giving rise to unease over the ways in which

decisions were being motivated by needs rather than reflecting planning considerations. Again this raises serious questions in terms of legitimate decision making by professional practitioners and infers conflict with the professional Code of Conduct [49] of the planning profession where the overarching objective is to make decisions, with honesty and integrity, in the public interest.

Some respondents in England also attributed a reluctance to use formal enforcement action to "pressure from elected representatives to progress in ways at odds with those recommended." This reverberates with findings by Simmons [60] who suggests that the involvement of elected members in the planning process presents very difficult ethical issues; while Baldwin [61] states that there is a fundamental tension between the notion of regulatory action in the public interest and the reality that regulators have to live with their political masters. In this context, again, serious questions might be asked about the legitimacy of the decision-making process [62]. Specifically, are the motives and strategies of those empowered through the democratic process sometimes questionable and does this, in turn, put professional officers in difficult positions when they perceive the evidence-base for taking decisions is less than robust? The key point is that, as stressed in the seminal work of Marcuse [63] and Mizzoni [64], while planners have a duty of care to their employer, they have a duty to dissent when they believe that their actions would not be "for the benefit of the public" [49, page 6].

In a similar context, the evidence inferred that enforcement officers' own perceptions play a role in the strategies they apply to cases of noncompliance. Although a number of interviewees were hesitant to answer the question, officers in lower grades were more open and frank about how this operates in practice. The majority agreed that their personal past experiences, perceptions, and attitudes always or occasionally influenced the strategy they were likely to adopt. Interestingly, the majority of the remainder who considered this never to be the case were largely higher ranking principal or senior enforcement officers. Significantly, only one interviewee argued that all of his team "are professionals dealing with each case on its individual merits and, as such, not allowing personal opinions to have any bearing on overall decision-making."

The opinion that individual officers' attitudes and values have no influence on decision-making contradicts previous research which has found that the perceptions enforcement officers have of regulatees and the nature of their relationship with them are key factors in determining the enforcement strategy adopted [65]. With this in mind, Greasley [46] find it surprising that the ethic of impartiality is still profoundly embedded in conceptions of the planning officer's professional role. Follow-up interviews with public sector respondents concurred with the comments of one of the English based planners that "while officers were more likely to use a facilitative approach if they have had no previous dealings with the offender, they are more likely to precipitate towards sanction-based approaches for persistent offenders." The key issue in this context is that while this may be legitimate, it only remains so as long as the strategy adopted is targeted at

remedying the problem and not influenced by any personal feelings towards the perceived offender. If a decision is based upon personal attitudes or motivated by career progression opportunism, the ethical boundary has been crossed and, while such activities cannot be explicitly policed by the profession, it must be cognisant that such problems exist and endeavour to nurture a culture which strives to eradicate such practice.

6.4. Really Responsive and Risk Regulation in Practice. An additional layer of knowledge was provided in discourse with UAHS and SAVE representatives where opinion was firstly, that conservation breaches are not taken as seriously as they should and, secondly, that a willingness to be facilitative at the early stages of the enforcement process has led to the loss of some important buildings of architectural and historic merit which might have been saved if, as one respondent explained “appropriate enforcement strategies had been adopted.” Enforcement activity in relation to listed buildings was perceived by one of the representatives from UAHS as being “slow and inadequate, with officers often being persuaded to accept inappropriate modifications to listed buildings during negotiations with developers, rather than taking a firm enforcement stance.” Of the total target survey population, the majority felt that where a listed building or conservation breach occurs, enforcement officers should move towards formal action at the early stages to ensure it sends out the right message that such breaches will not be tolerated.

These issues were taken up in the evaluation process where it was agreed that deterrent strategies are the most effective mechanism on conservation matters. Interestingly, it was mooted by one senior professional planner that “a decentred [32] partnership approach could foster the development of a really responsive approach [8] to regulation on conservation matters.” It was suggested by one of the respondents from UAHS that “coordinated contributions from willing volunteers, for example, Nongovernmental Organisations (NGOs), local community, and conservation groups in tandem with conservation officers and enforcement officers could increase the knowledge base available on site specific conservation issues. Such knowledge could even be translated to datasets and, where appropriate, mapped with images using Geographical Information Systems (GISs). The enriched knowledge base could act as a tool to gauge the severity of problems, enable appropriate strategies to be identified, and ensure prioritised coordinated action.” In effect, in identifying and coupling these strands, the focus group crafted a process which knits succinctly with the really responsive construct [8].

Prioritisation infers risk and, consequently, risk-regulation also emerged as important in the evaluation process. The point was made by 12 respondents that a major weakness in the planning system per se is the monitoring of approvals. Evidence that monitoring is implemented rigorously was disparate, with the general feeling that it was often piecemeal and incremental. The suggestion was made by one private sector respondent that “the scattergun approach was less

than effective and that greater consideration might be made to a form of risk assessment to make better use of resources,” whilst a senior official from NI suggested “that monitoring for compliance could be prioritised and targeted at matters of greatest significance with the most important cases specifically identified as major, sensitive and conservation related forms of development.”

6.5. Criminalisation. Whilst, in theory, if regulations relating to conservation control are broken, legislative action can be taken which may result in criminal prosecution, the survey findings indicated that this is the exception rather than the rule, particularly in NI. Indeed, it was significant that it was here that there was the greatest differential in responses between respondents from NI, and England. In NI there was consensus with one respondent that “that there is a dearth of will to prosecute, a dearth which is exacerbating daily as resources are cut and planning senior management seem to consistently make economic arguments in support of the offenders.” Conversely in England, as one respondent explained, “prosecutions could be higher but intervention and pressure from powerful organisations like English Heritage (English Heritage is funded by Government and is empowered to deliver heritage protection in England—no such body exists in NI.) means that a substantive number of cases are followed through in the courts.”

Interestingly, Hawkins [38] asserts that noncompliance may be institutionally organised, a perspective supported by the provisions of the Enforcement Concordat [56], the Regulatory Reform Act 2001 [66] and the Regulatory Enforcement and Sanctions Act 2008 [67], which, combined, advocate reducing red tape and applying a light-touch approach to breaches of control. It was also suggested by a number of respondents, in the first round of discussions, that criminalisation would be to the detriment of the existing enforcement system by increasing staff workload. Moreover, as one professional planner went on to explain “criminalisation would involve all breaches of planning control, including those of a frivolous nature, resulting in small cases, previously resolved through negotiation and persuasion, being brought to court. As such, unwitting offenders could acquire a criminal record”. Such a rationale does not, however, demand the imposition of a noncriminalised framework. Significantly, discretionary strategies mirror practice in other legislative areas where *mala prohibita* (strict liability) applies, as there is invariably an option to apply discretion where it is not in the public interest to prosecute. Perhaps, therefore, the option of criminalisation should not be immediately dismissed, as such an approach would still protect unwitting offenders from acquiring criminal records.

The second major strand to this debate is underpinned by the burden of proof and test of evidence. The research evaluation process considered this matter in detail and, while it was considered unreasonable to place the onus of proving beyond reasonable doubt on planning authorities [20], the remedy implemented in the Republic of Ireland, where a legislative twist reverses onus to the perceived offender, was deemed worthy of further investigation. The findings from

the investigation infer that there is a dichotomy in thinking between enforcement officers working in practice and policymakers who have consistently rejected criminalisation. An overwhelming majority of respondents felt, as one respondent from the Heritage Society explained, “that there should be greater use of criminalisation for conservation breaches” whilst the vast majority of these were supportive of criminalisation across the board. The thinking behind this was, as explained by one of the senior English respondents, “if there was blanket criminalisation, the knowledge of certain prosecution would deter vexatious offending, reduce enforcement case loads and most importantly, reduce the risk to built heritage.”

6.6. The Role of the Courts. There was almost absolute consensus among respondents that the role of the courts is imperative in the imposition of deterrent based strategies. It is usually the Magistrates Court which determines the most appropriate sanction to be applied and, in this context, the findings reflected the well-documented criticisms which have been targeted at the judiciary. Interestingly, the findings resonated with the comments of one UAHS respondent who stated “sanctions taken are not proportionate to economic benefits realised by violators.” These comments mirror the findings of Grekos [40] who found that offenders accrue benefit from compliance deficit. In a similar context, the majority of respondents agreed that the courts do not sentence at levels commensurate with the severity of offences, consequently suggesting that there is, in effect, no deterrent. This is of particular concern in conservation matters, as evidenced in the Portstewart and Bushmills cases. These findings endorse the oft-expressed opinion [1, 41] that the Magistrates Court is sometimes overly protective of private property rights and hence less likely to apply the law to its maximum effect. The majority of respondents perceived the penalties imposed by the courts to be inconsistent and inadequate, with comments that the courts typically impose a fine, that is, 20% to 30% of the maximum, though statistics show that in many recent NI cases the penalties have been even lower. The emerging picture was, however, disparate with, for example, Magistrates in Bromley and Bath imposing fines considered to reflect the breach, particularly in conservation matters, while in NI perceptions were that only magistrates in one of the twenty-six district council areas which comprise the jurisdiction, Newtownards, were prepared to impose financial penalties which might be construed as deterrents.

6.7. Resourcing. Inadequate staffing of enforcement in both England and NI has been a recurring issue and according to research findings by Prior [3] and McKay [5] a lack of manpower has time and time again been blamed for the ineffectiveness of the enforcement process. Whilst dedicated enforcement teams have been in local authorities for some time, this is in contrast to the Department where this is a more recent phenomenon. Indeed, McKay [5] found that almost all participants were employed mainly in development control (management) and there were no separate

enforcement teams. In NI, there has since been a paradigm shift and there are now distinct enforcement teams in each DPO and in Planning Headquarters. There are now over 50 personnel, equating to approximately 8% of the staff complement, allocated to enforcement duties throughout NI. In spite of this significant increase in staff, all Planning Service staff questioned in NI felt they had inadequate numbers, in contrast to just two respondents in England who agreed with this statement (since completion of the investigation staffing levels in both jurisdictions have experienced drops in enforcement staffing levels).

With the literature placing such an emphasis on staff numbers, it is interesting to note that the local authorities in England, who generally have least issue with the legal framework and behaviour of the Courts, are most content with enforcement and have fewer staff pro rata than the Department. This would suggest then that there is no direct correlation between the number of officers employed and effective enforcement but would indicate that this may be due to some other factor. With this in mind almost all respondents in both jurisdictions specified that there is a need for greater training provisions for the technical aspects of enforcement. While all respondents stated that formal enforcement training is provided, it was made clear that this has not been sufficient to equip officers, especially those in the lower grades, with the necessary skills to carry out their role. One recent welcome improvement to the system of knowledge provision in NI has been the introduction of an enforcement practice manual. Interestingly, such a resource did not seem to be utilised in the English authorities yet the majority of respondents in that jurisdiction considered that the employment of an enforcement manual would help overcome problems emanating from the highly technical nature of enforcement. Interestingly, only a small minority of respondents from England expressed knowledge of the National Association for Planning Enforcement (NAPE) and the existence of an NAPE enforcement handbook, raising concerns over communication and knowledge sharing in planning practice.

Perhaps another factor impacting on efficacy and reflecting the staffing concerns of respondents in NI relates to time in post. Burby et al. [52] point to a need for experienced staff in the discipline of enforcement yet the evidence emerging from this investigation was that 22 of the 24 of officers surveyed in NI have been working in enforcement for less than 5 years as opposed to 12 of the 24 officers in England. In the case of NI, officers generally only see working in enforcement as a transient part of their career, indeed staying too long in post is perceived as detrimental to career development. Indeed, it was agreed that that this perception results in high turnover rates, as staff seek to develop their career elsewhere within the organisation, and consequently many staff do not have time to build up high levels of expertise.

6.8. Reactive versus Proactive Enforcement. The Review of Planning Enforcement in England [68] has shown that enforcement remains a resource poor and a low priority

function, again confirming the enforcement role as the Cinderella of the planning system. The end result of such insufficient resources is a system, that is, as suggested by Burby et al. [52], largely reactive as opposed to proactive. The consequence of such a resource deficit is a process which responds to neighbours' complaints instead of actively pursuing the more serious breaches of planning control. The research findings concur with the findings of McKay [5] that enforcement in NI and in the majority of local authorities in England is reactive. The feelings of the majority of public sector planning professionals were reflected in the comments of one NI professional who stated "rather than proactively identifying serious breaches of conservation control, resources are often devoted to frivolous cases where complaints have been lodged. Frequently these emerge as a result of neighbour disagreements and rivalry, but enforcement officers are pressurised to focus on these as opposed to more serious breaches of planning control, particularly when the complainant has the support of an elected representative." If this is true, it raises ethical challenges for professionals as they must not succumb to pressure to spend inordinate amounts of time and resources on such matters solely to appease complainants or fearing criticism by those in a position of power.

The findings from this investigation indicate that authorities which employ a more proactive approach, monitor planning permissions, and look for breaches of planning control are more effective, particularly with regard to conservation matters, again endorsing the findings of Burby et al. [52]. Follow-up interviews with respondents highlighted that Bath and Bromley are largely proactive and have monitoring teams that keep files on every listed building and conservation area. These are monitored regularly and updated with photographic records, meaning that breaches can be detected and evaluated at an early stage, thus reducing the risk of serious detriment to the built heritage. The point was also made by one respondent that "potential offenders are cognisant that the region is being rigorously policed and similarly aware that vexatious flouting of the regulations will result in severe punitive sanctions," suggesting that a coordinated approach with experienced staff and support of the courts is effective.

7. Conclusion

Despite recent reviews there appears to be a dearth of understanding of the substantive aspects of planning enforcement practice and procedure which has far reaching implications for regulatory compliance generally and conservation matters in particular. The departure point for this investigation was therefore to demonstrate how the theory of regulation can be applied to develop a deeper understanding of the inherent problems which underpin operational practice and, accordingly, it has been demonstrated that these constructs can indeed be employed as a praxis. The investigation has drawn upon a raft of concepts to develop a lens which can be applied to identify and scrutinise those matters which are most likely to contribute to solving this complex equation. Specifically, the conceptual framework can enable planners

to employ a coherent, strategic approach in identifying and investigating core problems, as opposed to the existing scatergun approach which is typically piecemeal, disjointed, and incremental. The corollary of this is that the application of theory to practice, manifested in the empirical investigation, has enabled key questions to be asked and yielded rich information in terms of problematising operational practice and identifying potential remedies.

In this context, the broad brush reference to deterrence-based strategies coupled with negotiation is underpinned by an ethos which is strongly supportive of target setting and establishing deadlines [20]. While such practices may foster expediency, the research findings raise questions over whether hastening to close cases and meet office deadlines can backfire, resulting in increased levels of environmental damage, particularly in areas of greatest sensitivity. Similarly, the evidence suggests that the much heralded negation approach often results in a less than optimum outcome. Such concerns are reflected in the DoENI guidelines [21] for enforcement practice which do not mention conservation as an enforcement priority, further evidence of undervaluing conservation? Burby et al. [52] point about well trained and resourced teams which conduct monitoring exercises was endorsed, and one lesson from NI is that increased staffing levels is not enough to improve efficacy per se, as there is no substitute for well-trained experienced staff. This has implications for career professional planners who require experience of multiple roles and not just enforcement, hence a desire to learn the basics and move to a different specialism within the discipline. More significantly, it has detrimental implications for planning enforcement as rarely will staff be in place long enough to develop highly specialised skill sets and penetrative knowledge of one of the most complex areas of planning practice.

In terms of instrumental tinkering, it is clear that there is strong support for deterrent mechanisms when dealing with conservation enforcement matters. Does one answer to increasing efficacy lie in higher fines or greater education and guidance for magistrates? The evidence suggests both, though Mushal [69] advises that both of these have been done in America with limited success. It does, however, seem that there is strong support for some legislative strengthening, for example, recrafting the framework to remedy the perceived damage resulting from the Shimizu ruling [19].

The evidence also suggests that previous reviews of enforcement have neglected to target the full suite of implications generated by the concept of criminalisation. That is not to say that it is the most appropriate pathway to follow, but there is merit in exploring the potential offered by options presented by reverse onus within the parameters of the Human Rights Act 1998 [70]. A strong statute [29] approach would not, per se, preclude discretion but, similarly, may signpost the emergence of a culture which rejects persuasive practice [36]. Support building [29] may not be an option due to the proliferation of those who flagrantly flout regulations, of particular importance in conservation sensitive locations and, consequently, regulation design must be conceptualised as a matter of balance. Responsive regulation [34] provides flexibility enabling top down deterrence to

harmonise with bottomup negotiation and, consequently, requires a robust operational framework. Principles based approaches [32], however, may not be suited to such a framework as the procedural nature of prosecution is dependent upon providing offenders with clear guidance on how to remedy breaches, in the interests of avoiding inconsistencies in approach. While an element of risk regulation is inevitable due to the inordinate number of enforcement cases generated and future fiscal constraint, the evidence suggests that really responsive, decentred approaches [8] can contribute substantively to designing a conservation regulatory regime, as the constructs weave succinctly with the cultural fabric usually found in Conservation Areas. The Bath and Bromley case studies evidence how appropriately trained, experienced staff can work effectively with partner organisations, NGOs, and volunteer interest groups; and, when complemented by a willingness of the courts to apply sanctions to the maximum, the outputs are impressive. On matters of conservation there are ready made partners who will willingly police sub-regions, the technology is in place to formulate datasets and GIS maps can foster the construction of a substantive evidence base to better inform decision making. Whether such decisions are legitimate and ethical remains another matter.

Perhaps, however, the most important structural finding from this investigation is one which is of deeper significance, relates to attitudinal responses and which has only been addressed superficially in discussions of really responsive approaches to date. Attitudinal approaches of professional practitioners presents serious ethical challenges to the individual. Impartiality forms the cornerstone of the RTPI Professional Code of Conduct [49] and while practitioners are bound to discharge their duty to their employers with due care and diligence, they must remain cognisant of their overarching duty to the public interest. As such they must take a utilitarian stance and not be influenced by personal like or dislike for perceived offenders but focussed upon an outcome for the common good. Similarly, they must be prepared to speak fearlessly in the face of adversity albeit when it means dissenting from the desires of those in higher positions of power, risking consequences which may ultimately be detrimental to their career progression. In this context, external policing of misconduct is procedurally impossible, but cognisance that such behaviour is unacceptable is imperative. Worryingly, a number of respondents stated that they prefer to remain silent rather than express their discontent with an enforcement decision by superiors. Planners must be prepared to “speak truth to power” or inevitably the discipline will be faced with a crisis of both truth and trust which will undermine the legitimacy of the entire planning profession.

In conclusion, whilst it is clear that there is much to learn in terms of operational practice for built heritage protection, useful lessons can be learnt which are of relevance not only to planning enforcement but the wider regulatory arena, particularly with regard to how really responsive approaches can foster the development of new instruments in the form of legislative toolkits, technologically driven risk-based monitoring and collaborative approaches

underpinned by transparency, consistency, and proportionality. At a more substantive level, it is clear that theory informs practice. It enables decision makers to divorce themselves from micromanagement and view institutional and operational frameworks in their entirety. Whilst the enforcement equation remains complex, recognition of the need for synergy between normative modelling and instrumentalism is imperative. Theory and practice are inextricably linked and it is only through recognition of the need to develop this dynamic that our rudimentary knowledge of planning enforcement dynamics will begin to grow.

References

- [1] D. Milichap, *The Effective Enforcement of Planning Controls*, Butterworths, London, UK, 1995.
- [2] Department of the Environment, *Investigation into Planning Enforcement, The Dobry Report*, HMSO, London, UK, 1975.
- [3] A. Prior, “Problems in the theory and practice of planning enforcement,” *Planning Theory & Practice*, vol. 1, pp. 53–69, 2000.
- [4] S. McKay, “Contravention and conformity in EIA: an investigation into regulatory compliance in Northern Ireland,” *European Planning Studies*, vol. 15, no. 1, pp. 87–105, 2007.
- [5] S. McKay, “Sheriffs and outlaws: in pursuit of effective enforcement,” *Town Planning Review*, vol. 74, no. 4, pp. 423–445, 2003.
- [6] R. Harkin, The role of enforcement in conservation in: Mourne Heritage Trust (Ed.) *Jewels in the Crown or Albatrosses? The Proceedings of a conference in re-inventing Northern Ireland’s Conservation Areas* (Belfast, UK, UAHS), 2001.
- [7] B. Hutter, “The attractions of risk-based regulation: accounting for the emergence of risk ideas in regulation,” CARR Discussion paper 33, London School of Economics and Political Science, London, UK, 2005.
- [8] R. Baldwin and J. Black, “Really responsive regulation,” Law Society and Economy Working Papers, 15/2007, LSE, London, UK, 2007.
- [9] House of Commons, Northern Ireland Affairs Committee, First Report, *The Planning System in N. Ireland*, 1996.
- [10] M. McEldowney, “Why Conservation?” in *Jewels in the Crown or Albatrosses: Reinventing Northern Ireland’s Conservation Areas*, Mourne Heritage Trust, Ed., UAHS, Belfast, UK, 2001.
- [11] “The Ancient Monuments Act,” OPSI, London, UK, 1882.
- [12] “The Town and Country Planning Act,” HMSO, London, UK, 1944.
- [13] “The Town and Country Planning Act,” HMSO, London, UK, 1967.
- [14] B. Cullingworth and V. Nadin, *Town and Country Planning in the UK*, Routledge, London, UK, 14th edition, 2006.
- [15] “The Civic Amenities Act,” OPSI, London, UK, 1967.
- [16] “The Planning (Northern Ireland) Order,” HMSO, Belfast, UK, 1972.
- [17] “The Town and Country Planning Act,” HMSO, London, UK, 1947.
- [18] “The Planning and Compensation Act,” HMSO, London, UK, 1991.
- [19] *Shimizu UK Limited v Westminster City Council*, 1997.
- [20] Department for Communities and Local Government, *Review of Planning Enforcement in England*, DCLG Publications, Wetherby, UK, 2006.

- [21] Department of the Environment (NI), "Reform of the Planning System in Northern Ireland: Your chance to influence change," Consultation Paper, Planning Service, Belfast, UK, 2009.
- [22] M. Purdue, "Reform of the enforcement of planning control: a forgotten cause?" *Journal of Planning and Environment Law*, vol. 4, pp. 434–449, 2008.
- [23] R. Boyer and Y. Sallard, "A summary of regulation theory," in *Regulation Theory, The State of the Art*, R. Boyer and Y. Sallard, Eds., Routledge, London, UK, 2001.
- [24] G. L. A. Benko and A. Lipetz, *What is Political Ecology? The Great Transformation of XXIst Century*, 1998.
- [25] B. Hutter and P. Sorenson, "Business adaption to legal regulation," *Law and Policy*, vol. 15, pp. 69–78, 1993.
- [26] P. C. Yeager, *The Limits of the Law: the Public Regulation of Private Pollution*, Cambridge University Press, Cambridge, UK, 1991.
- [27] K. Parkhill, "Tensions between Scottish national policies for onshore wind energy and local dissatisfaction—insights from regulation theory," *European Environment*, vol. 17, no. 5, pp. 307–320, 2007.
- [28] W. C. Baer, "Toward design of regulations for the built environment," *Environment and Planning B*, vol. 24, no. 1, pp. 37–57, 1997.
- [29] H. Ingram and A. Schneider, "Improving implementation through framing smarter statutes," *Journal of Public Policy*, vol. 101, pp. 67–88, 1990.
- [30] G. Wood and J. Becker, "Discretionary judgement in local planning authority decision making: screening development proposals for environmental impact assessment," *Journal of Environmental Planning and Management*, vol. 48, no. 3, pp. 349–371, 2005.
- [31] M. Lipsky, *Street-Level Bureacracy: Dilemmas of the Individual in the Public Sector*, Russel-Sage, New York, NY, USA, 1980.
- [32] J. Black, "Constructing and contesting legitimacy and accountability in polycentric regulatory regimes," *Regulation and Governance*, vol. 2, pp. 137–164, 2008.
- [33] M. Goodwin, "Regulating rurality? rural studies and the regulation approach," in *Handbook of Rural Studies*, P. Cloke, Ed., SAGE Publications, London, UK, 2006.
- [34] I. Ayres and J. Braithwaite, *Responsive Regulation*, Oxford University Press, New York, NY, USA, 1992.
- [35] R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice*, Oxford University Press, Oxford, UK, 1999.
- [36] B. M. Hutter, *Compliance: Regulation and Environment*, Clarendon Press, Oxford, UK, 1997.
- [37] G. M. Richardson, A. I. Ogus, and P. Burrows, *Policing Pollution: a Study of Regulation and Enforcement*, Clarendon Press, Oxford, UK, 1983.
- [38] K. Hawkins, *Environment and Enforcement: Regulation and Social Definition of Pollution*, Clarendon Press, Oxford, UK, 1984.
- [39] J. Claydon and M. Chick, "Teaching negotiations (negotiation skills for town planners)," *Planning Practice and Research*, vol. 20, no. 2, pp. 221–234, 2005.
- [40] M. Grekos, "Review of civil and administrative penalties for environmental offences: background and development update paper," *Journal of Planning and Environment Law*, no. 4, pp. 463–478, 2008.
- [41] S. McKay and G. Ellis, "Reparation or retribution: an investigation into regulatory compliance in planning," *Environment and Planning A*, vol. 37, no. 7, pp. 1249–1262, 2005.
- [42] P. Hampton, *Reducing Administrative: Burdens Effective Inspection & Enforcement*, HMSO, Norwich, UK, 2005.
- [43] BERR, "Application of the regulators' compliance code and the principles of good regulation," Dept for Business Enterprise & Regulatory Reform, London, UK, 2008.
- [44] J. Black, "Decentring regulation: understanding the role of regulation and self regulation in a 'post-regulatory world,'" *Current Legal Problems*, vol. 54, pp. 103–146, 2002.
- [45] J. Black, "Forms and paradoxes of principles-based regulation," *Capital Markets Law*, vol. 3, no. 4, pp. 425–457, 2008b.
- [46] S. Greasley, "Maintaining ethical cultures: self-regulation in English local government," *Local Government Studies*, vol. 33, no. 3, pp. 451–464, 2007.
- [47] J. Black, *Penalties: Policy, Principles and Practice in Government Regulation—Managing Discretion*, ARLC, London, UK, 2001.
- [48] H. Campbell and R. Marshall, "Towards justice in planning: a reappraisal," *European Planning Studies*, vol. 14, no. 2, pp. 239–252, 2006.
- [49] RTPI, *Royal Town Planning Institute, Code of Professional Conduct*, RTPI, London, UK, 2008.
- [50] R. Brewster, *Ethics and The Changing Role of Planners in Australia*, Chifley Business School, Chifley, Australia, 2007.
- [51] N. Taylor, "Consequentialism and the ethics of planning research," in *Ethics and Planning Research*, F. Lo Piccolo and H. Thomas, Eds., Ashgate, Farnham, UK, 2009.
- [52] R. J. Burby, P. J. May, and R. C. Paterson, "Improving compliance with regulations choices and outcomes for local government," *Journal of the American Planning Association*, vol. 64, no. 3, pp. 324–334, 1998.
- [53] A. Bryman, "Why do researchers integrate/combine/mesh/blend/mix/merge/fuse quantitative and qualitative research?" in *Advances in Mixed Method Research*, M. Bergman, Ed., Sage, London, UK, 2008.
- [54] Department of the Environment (NI), *Planning Policy Statement 6- Planning, Archaeology and the Built Environment*, Planning Service, Belfast, UK, 1999.
- [55] DCLG, *Barker Review of Land Use Planning*, HMSO, Norwich, UK, 2006.
- [56] Department of the Environment, *Enforcement Concordat*, HMSO, London, UK, 1998.
- [57] C. Hood, R. Baldwin, and H. Rothstein, "Assessing the dangerous dogs act: when does regulatory law fail?" *Public Law*, pp. 282–305, 2000.
- [58] B. Hutter and P. K. Manning, *The Contexts of Regulation: The Impact Upon Health...Risk and Policy Analysis*, Cambridge University Press, New York, NY, USA, 1990.
- [59] H. Campbell and R. Marshall, "Moral obligations, planning, and the public interest: a commentary on current British practice," *Environment and Planning B*, vol. 27, no. 2, pp. 297–312, 2000.
- [60] G. Simmons, "Ethics and decision-making under the planning acts," *Irish Planning and Environmental Law*, vol. 15, no. 2, pp. 52–57, 2008.
- [61] R. Baldwin, *Is Regulation Right?* London School of Economics, London, UK, 2000.
- [62] D. Beetham, *The Legitimation of Power*, Macmillan, Basingstoke, UK, 1991.
- [63] P. Marcuse, "Professional ethics and beyond: values in planning," *Journal of the American Planning Association*, vol. 42, no. 3, pp. 264–274, 1976.
- [64] J. Mizzoni, *Ethics: The Basics*, Wiley-Blackwell, Oxford, UK, 2010.
- [65] K. Hawkins and B. Hutter, "The response of business to social regulation in England and Wales," *Law & Policy*, vol. 15, no. 3, pp. 199–218, 1993.

- [66] *The Regulatory Reform Act*, HMSO, London, UK, 2001.
- [67] *The Regulatory and Enforcement Sanctions Act*, HMSO, London, UK, 2008.
- [68] Department for Communities and Local Government, *Review of Planning Enforcement in England*, DCLG Publications, Wetherby, UK, 2006.
- [69] R. W. Mushal, "Reflections upon American environmental enforcement experience as it may relate to post Hampton developments in England and Wales," *Journal of Environmental Law*, vol. 19, no. 2, pp. 201–226, 2007.
- [70] *The Human Rights Act*, HMSO, London, UK, 1998.