Planning Enforcement in Scotland: research into the use of existing powers, barriers and scope for improvement

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1.1 Aim and objectives

Recommendation 30 of "*Empowering Planning to Deliver Great Places*[1]" – the report of the independent review of planning – called on the Scottish Government to work with local authority enforcement officers to identify and/or remove any barriers to the use of enforcement powers. Following the recommendation of the Review panel, LUC was commissioned by the Scottish Government to undertake research into current enforcement practice. The aim of the research is to identify barriers to the effective use of enforcement powers, and to make recommendations on scope for improving practice.

This was to be achieved through the following objectives. To:

- establish a picture of informal enforcement activity across Scotland, and of the effectiveness of such informal action in resolving breaches of planning control.
- establish a picture of formal enforcement activity across Scotland, including the nature of formal action taken (type of notice served) by development type (whether householder, other local development, major, or national development).
- gather information on the main reasons why some enforcement cases are not taken up.
- establish stakeholder views on the specific barriers to, and scope for improving effectiveness of, the use of current enforcement powers. The views of planning enforcement officials, and community bodies should be taken into account.
- identify existing good practice in enforcement.
- gather stakeholder views on whether, and to what extent, fixed penalties and fees for retrospective applications are acting as an effective deterrent to any breach of planning control.
- make recommendations for improving enforcement practice.

1.2 Method

The research was delivered through the following processes:

- review of national publications and data on enforcement;
- sourcing data on enforcement casework from planning authorities (11 of which provided database extracts);
- analysis of enforcement data to establish patterns of activity;
- online surveys of enforcement officers, community councils and civic society groups, to gauge perceptions of the enforcement system, barriers and opportunities for enhancement;
- follow-up discussions with a sample of respondents to draw out key issues;

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[1] http://www.gov.scot/Resource/0050/00500946.pdf

- comparative analysis of quantitative and qualitative information.

1.3 Function of planning enforcement

The enforcement process is intended to identify unauthorised development ('breaches of planning control'), notify developers of the issue and ensure appropriate remedial action to address any negative impact to amenity.

Restraining and remedying breaches – rather than punishing 'offenders' – is the primary function of the system.

1.4 Existing enforcement powers

Broadly, breaches of planning control relate to:

- carrying out any development without the required planning permission;
- failing to comply with any condition or limitation subject to which planning permission has been granted; or
- initiating development without giving appropriate notice to the planning authority or displaying relevant on-site notices.

Planning authorities are afforded a range of powers under the planning acts to identify, restrain and remedy breaches of planning control. In general, this can take a range of forms, including:

- informal correspondence and negotiation with developers/landowners to restrain and remedy breaches;
- serving one of a suite of notices to:
    - obtain information on ownership and interests in land;
    - require the submission of a planning application;
    - compel owners of land to comply with the relevant permission and any conditions or limitations attached,;
    - compel owners to cease, change or remove unauthorised development;
    - compel owners to improve the condition of land to address adverse impacts on amenity.
- Seeking an interdict from the courts to restrain breaches of control

Where notices are not complied with, further powers include;

- Taking direct action to remedy breaches of control, recovering costs from the developer;
- Imposed fixed penalties on developers in breach of planning control;
- Seeking prosecution.

1.5 Key findings from planning authority data

National statistics

The statistics reported to Scottish Government by planning authorities offer a very limited picture of the work of enforcement services.

The figures produced, understandably, focus on cases identified as breaches of planning control and for which some form of action is taken – whether formal (i.e. serving of notices) or informal (negotiation and voluntary resolution).

Benefits of local data

However, analysis of 10 authorities' data reveals an additional pattern of activity unrecorded at national level. While proportions vary considerably, on average 10% [8.2% median] of all complaints to authorities are found not to be breaches on investigation. Coupled with breaches determined not to be in the public interest to enforce, such cases comprise an average of 35% of caseload [31% median]. The means that around of a third of enforcement services' workload is essentially invisible at the national level, and in most local publications.

Informal activity

The research found that informal resolution of breaches of planning control comprises the vast majority of authorities' caseload – accounting for an average ~90% of all cases. Arguably, this is evidence of the system working as intended, and in line with current government guidance. (This is illustrated by national planning statistics and the data collected from planning authorities.)

Where the average duration of cases could be determined from planning authority data, those dealt with through informal means are generally resolved more quickly than those necessitating the service of notices and other formal processes. Given the numbers involved, precise causation cannot be attributed but the following factors are likely to play a role:

- Faster response times from developers that have made genuine mistakes and wish to resolve the issue quickly;
- Potentially less complex cases lending themselves to solution by informal means;
- Large numbers of low input householder cases, pulling down average duration figures;
- The inherent delay created by the exchange of correspondence and statutory timescales for action necessitated by the enforcement notice process.

Informal approaches do, however, appear to offer efficiency benefits inherent to the flexibility with which they can be applied.

Use of formal powers

As informal measures are so frequently – and successfully – applied, planning authorities seldom need to apply their formal enforcement powers. Patterns of use varies between authorities, largely as a consequence of the scale and severity of breaches encountered – although clear patterns of preference, custom and practice are visible. For example:

- None of the sample authorities issued Fixed Penalty Notices within the five-year sample period.

- Preference for use of Enforcement Notices in all applicable situations, because of procedural benefits over Breach of Condition Notices;
- Only one sample authority routinely applied to the courts for interim interdicts to restrain breaches of control (this approach was invisible in all other datasets).

The datasets provided did not allow tracking of cases to establish rates of non-compliance with notices and cases where further action (e.g. reports to the Procurator Fiscal) was sought – or its outcome.

1.6 Perceptions of enforcement

Enforcement officers

Broadly, enforcement officers believe that they have the 'tools for the job' in terms of powers – but that they are constrained in applying them by the following factors:

- Lack of resources for proactive monitoring – both of planning conditions and for more general breaches;
- Reliance on members of the public to report alleged breaches;
- Lengthy delays in implementing formal action and seeing results;
- Lack of effective deterrent (perception that fees for retrospective applications are too low, and that prosecution is both too difficult to secure and that penalties for offences on conviction are too low);
- Ability of developers to 'play the system' where they have appropriate knowledge or advice;
- Lack of financial resources to take direct action to remedy breaches of control (a combination of funding issues and difficulties in recovering costs from developers were highlighted as key issues).

Officers believed that the system is efficient and effective – up to the point that developers fail to comply with notices. After this point, Fixed Penalty Notices and prosecution are not considered to be viable, effective punitive measures – and do not in any case resolve the actual breach of planning control. Similarly, where authorities were reluctant or unable to pursue direct action, this was noted as a key barrier to the system operating effectively.

In addition, officers believed that enforcement was not necessarily given the level of priority required within both their authorities and at a national level. Examples of enforcement services being amalgamated with development management were highlighted by officers as evidence of degrading the delivery and perceived value of the service.

The conditions placed on planning permissions were a key concern for officers, particularly in terms of numbers, precision and enforceability. There was a strong perception that the numbers of conditions used had increased recently, which was attributed to the need to meet performance targets – resulting in matters being held over in conditions that may previously have been dealt with as part of the main consent.

Community and civic society groups

In the main, the community and civic society respondents to the survey were highly critical of the powers, structures and processes that comprise the current enforcement system.

There was a general perception – contrary to the findings derived from quantitative data – that informal approaches to enforcement were ineffective, and substantial dissatisfaction was recorded in relation to the application of formal measures by planning authorities.

Here, the interaction with statistics is important. There is a widely-held perception of a reluctance to act on the part of planning authorities which the data clearly contradicts. However, community respondents appeared to be focusing on the numbers of notices served – rather than the proportion of breaches resolved. This situation is potentially reinforced by publicly-available statistics (national returns and local authority planning performance frameworks) creating an impression that authorities are not using the powers available to them.

Respondents were keen to highlight that a lack of effective enforcement undermines the legitimacy of the wider planning system – something with which officers strongly concur. However, there was a focus on the punitive aspects of the process – rather than the planning imperative to regularise breaches of planning control. Like officers, community respondents recognised that the system was open to abuse by well-informed developers – but the perceived scale of this problem appears to be far greater than appears to be the case in fact.

It was clear that respondents were not aware of the amount of abortive work – in terms of cases where no breach occurred or enforcement was deemed not to be in the public interest – authorities undertake in enforcement. This is unsurprising, given that this aspect of caseload is invisible in public-facing information. Potentially, this may feed into respondents' perception that breaches of planning control are more common, and more serious, than the data indicates.

Again, in parallel with officers' opinions, the monitoring of planning conditions was a key concern – with a widespread recognition that resourcing in authorities played a role in this issue. There was a similar dissatisfaction with retrospective applications for planning permission, with these being viewed as a 'soft option' for both developer and planning authority. (That authorities only seek applications to regularise unauthorised development that has a reasonable prospect of being found acceptable against the development plan and other material considerations may not be widely known by members of the public.)

The perception of a system biased in favour of developers is widespread, with an attendant perception of bias against the public. It may therefore be helpful for authorities and Scottish Government to restate the planning system's alignment with the public interest and what this constitutes in planning terms.

A lack of understanding of the purpose, principles and delivery mechanisms of planning enforcement was apparent in many responses. This is not surprising, as it is a complex, technical and not readily accessible aspect of the planning system. Enforcement Charters generally deal with how enforcement is undertaken and set service standards – but rarely set clear policies in terms of what will, and will not, be deemed to be in the public interest to take action against (or indeed how such decisions are taken).

Key agencies

From an Agency perspective, Scottish Natural Heritage (SNH) considered that the current model of enforcement is too reactive and based on external (i.e. public) reporting of breaches – rather than a targeted approach that focuses on developments and breaches with the greatest potential for adverse environmental effects. Like other stakeholders, conditions monitoring is a key concern – particularly with regard to mitigation measures for major developments.

To this end, SNH is keen to see:

- Enforcement against breaches of planning control prioritised by environmental impact;
- More effective monitoring of conditions for higher impact / EIA development; and
- Improved transparency regarding frequency and detail of conditions monitoring of EIA development by local authorities.

1.7 Conclusions

There is significant common ground between stakeholders, however views regarding the role and effectiveness of informal enforcement activity differ markedly between planning authorities and Civic Groups. Addressing the negative perceptions of stakeholders is a critical issue – but rebuilding trust in the system will take substantial effort and is unlikely to be easily accomplished. It should be noted that this issue extends well beyond enforcement.

All stakeholders provided a wealth of information and a range of valuable suggestions for improving practice, enhancing the use of existing powers and a range of suggestions for change. These are reflected in the recommendations below.

Effectiveness

The analysis of available quantitative data suggests that the enforcement process is generally effective for the vast majority of cases. However, there is a strong perception amongst all stakeholders that effectiveness drops markedly past the point of non-compliance with notices. Unfortunately, due to data limitations it is not possible to track the progress of individual cases, and quantitative analysis of this aspect of the system was not possible.

Because informal means of resolution are so commonly effective, it can appear that authorities are under-using their formal powers – contributing to the perception of inaction. However, where cases cannot be resolved, prosecution is currently proving to be a sub-optimal sanction as prosecutions are notoriously difficult to bring and, on conviction, penalties are very low. This inherent weakness undermines confidence in the system and erodes any potential role in deterrence.

Barriers to the application of existing powers

Key barriers to use of existing powers can be summarised as follows:

- **Legal issues:**
    - Difficulties in preparing cases and securing prosecutions;
    - Liaison between planning authorities and the Procurator Fiscal service;
    - Ease of securing retrospective planning permission, and the lack of significantly higher fees to act as a deterrent;
    - Comparatively slow process of service notices and statutory time periods for compliance make the system less responsive.

- **Technical issues:**
    - Lack of consistency between authorities in terms of approach and practices;
    - Variation in understanding and definitions of the public interest;
    - Issues arising from a lack of precision in the application of planning conditions.

- **Resource issues:**
    - There is a general perception that enforcement is under-resourced, which is adversely affecting the service. Evidence for this is less clear-cut as Full-Time Equivalent (FTE) figures do not necessarily reflect the realities of day-to-day working.
    - Conditions monitoring is a particular concern for authorities, community respondents and key agencies alike.
    - Direct action, although a highly valued means of resolving breaches, is now comparatively rarely used as the capital costs and risk of non-recovery are considered to be too significant.

- **Practical issues:**
    - The widespread and significant mistrust of enforcement, and the planning system in general by some Civic Groups
    - The reliance on members of the public to report breaches of planning control is inherently problematic as this results in large numbers of cases in which either no breach has occurred, or the breach is so minor as to render action disproportionate.

- **Institutional issues:**
    - Officers perceive enforcement to be a lower priority for their authorities compared to development planning and development management.
    - Securing management and Elected Member buy-in for enforcement action – particularly more interventionist approaches – is frequently challenging.
    - Enforcement is considered to have a lower profile in terms of professional bodies and national policy.

1.8 Recommendations

Recommendation:	
1	Consider the development of national data standards for planning data collection Rationale: improve the ease and consistency of recording information; enable effective tracking of cases and provide richer, more meaningful performance statistics.
2	Consider the value of guidance and best practice worked examples to encourage the use of Stop Notices, Temporary Stop Notices and the use of interim interdicts to restrain urgent breaches of planning and listed building control. Rationale: learning from the experience of authorities that routinely take a stronger and more interventionist approach to restraining key types of breach (particularly unauthorised works to listed buildings)
3	Consider the development of simple, accessible guidance to planning enforcement for communities and stakeholders Rationale: improve the level of public knowledge and understanding of the purpose, process and outcomes of planning enforcement; potentially reduce rates of over-reporting.
4	Work with the Crown Office and Procurator Fiscal Service to develop specific

	guidance for bringing effective planning prosecutions Rationale: improve the efficacy of cases brought for prosecution
5	Work with the Crown Office and Procurator Fiscal Service to deliver appropriate training in planning law and relevant tests for senior officers and Fiscal Service staff. Rationale: ensure that planning authorities and the Fiscal Service are working to a common purpose and shared framework of understanding. Clear 'gatecheck' parameters to test cases being brought for prosecution could help to increase rates of prosecutions brought.
6	Commission comparative research into the process and effectiveness of prosecutions under environmental and planning law Rationale: understanding the benefits of both systems and identifying the need for legislative and/or procedural change
7a	Commission research into the use and effectiveness of Charging Orders under the building standards regime, drawing out opportunities to apply to planning Rationale: addressing an identified need to improve debt recovery for direct action and Fixed Penalty Notices
7b	Commission research into the potential costs and benefits of updating the process for discharging conditions to introduce charges for applications for matters specified in conditions and more rigorous processes to obtain 'completion certificates', ensuring all conditions are complied with. Rationale: bringing planning into line with building standards and shifting the burden for conditions monitoring and discharge more effectively on to developers.
8	Consider consulting on the need for substantially higher fees for retrospective applications for planning permission, and technical amendments to the existing legislation to close loopholes Rationale: higher fees – potentially charged on a sliding scale in line with the scale of the breach / development – could act as a more effective deterrent to deliberate breaches; may also assist in increasing rates of pre-application consultation and reducing overall numbers of breaches of planning and listed building control.
9	Consider the development of guidance and best-practice examples on the use of applications for interim interdicts as a means of responding quickly and effectively to breaches of control. Rationale: addressing a perceived lack of speed through existing tools; providing authorities with greater confidence in accessing the powers available through the courts.
10	Consider consulting with planning authorities on the costs and benefits to developing and adopting shared principles and approach to enforcement. Rationale: addressing the perceived lack of consistency in enforcement practice; promoting greater collaborative working between authorities and sharing good practice; improving the consistency of approach and decision-making across Scotland.
11	Encourage planning authorities to deliver training to development management officers on robust, appropriate conditions that can be effectively and efficiently

	enforced. Rationale: ensuring that conditions are proportionate, effective and enforceable may help to cut rates of breaches; it will also make effective enforcement in the event of non-compliance more straightforward.
12	Encourage planning authorities to audit their enforcement approach, processes and casework trends to identify opportunities for streamlining and delivering a more effective, responsive service. Rationale: addressing officers' perceptions of the system as slow and sometimes cumbersome; ensuring authorities are equipped to make full use of available powers. Likely links to Recommendation 10.
13	Work with HoPS and the Scottish Planning Enforcement Forum (SPEF) to develop guidance / decision-support tools to assist in the effective and proportionate securing of contributions from developers to monitoring compliance. Rationale: passing the cost of monitoring to the developer is a well-established principle and could reasonably be extended
14	Work with HoPS and the Scottish Planning Enforcement Forum (SPEF) to consult on approaches to securing capital funds for direct action, and appropriate methods of cost recovery. Rationale: direct action is a powerful tool, but is currently under-used on account of local authority resource pressure. Understanding the range of options available to recover costs from developers could help to expand the use of the approach.
15	Work with HoPS, the Scottish Planning Enforcement Forum (SPEF) and the RTPI to develop a strategy to raise the profile of planning enforcement Rationale: raising the profile of enforcement within the profession, in policy and across local authorities to address misconceptions, articulate the benefits and secure enhanced political and management buy-in
16	Consider consulting on the addition of binding mediation to the breach resolution process. Rationale: in cases where developers do not comply with notices, formal mediation could help to resolve cases where common ground can be reached and for which prosecution is not (yet) in the public interest
17	Work with the Improvement Service and Community Councils to develop training and guidance material to better explain the key elements of the enforcement process Rationale: there is a significant interest in conditions monitoring as a perceived area of under-performance. Providing training could help improve understanding and address areas of misunderstanding
18	Consult with authorities on revising the approach to enforcement sections of Planning Performance Frameworks to more accurately reflect the complexion of caseload, resourcing and decisions supporting the issue of notices Rationale: better, richer information may help to address some areas of misunderstanding amongst community stakeholders
19	In partnership with HoPS, the Law Society of Scotland and key development industry representatives, identify opportunities for development and application of model

	conditions and/or updated guidance to supplement Circular 4/1998 Rationale: enforceability of conditions is a key concern for authorities, communities and key agencies alike. Developing guidance and, where appropriate, model conditions could aid enforceability and reduce uncertainty for all parties.

2 Introduction

2.1 Background

Recommendation 30 of "*Empowering Planning to Deliver Great Places*" – the report of the independent review of planning – called on the Scottish Government to work with local authority enforcement officers to identify and/or remove any barriers to the use of enforcement powers.

Planning Review Recommendation 30.

The Scottish Government should work with local authority enforcement officers to identify and/or remove any barriers to the use of enforcement powers.

We acknowledge that there are concerns about planning authorities not taking enforcement action. Our understanding is that the legislation already allows for a wide range of action to be taken and that there are already options to respond quickly to a breach including fixed penalties and interim stop notices. We also propose that this work considers whether fixed penalties and fees for retrospective applications should be substantially increased to provide a more effective deterrent.

LUC was commissioned by the Scottish Government to undertake research into current enforcement practice. This is intended to help provide a better understanding of the key issues and opportunities raised by the existing suite of enforcement powers, and the means available to planning authorities to deliver their obligations.

2.2 Aim and objectives

The aim of the research is to identify barriers to the effective use of enforcement powers, and to make recommendations on scope for improving practice.

This was to be achieved through the following objectives. To:

- establish a picture of informal enforcement activity, and of the effectiveness of such informal action in resolving breaches of planning control.
- establish a picture of formal enforcement activity across Scotland, including the nature of formal action taken (type of notice served) by development type (whether householder, other local development, major, or national development).
- gather information on the main reasons why some enforcement cases are not taken up.
- establish stakeholder views on the specific barriers to, and scope for improving effectiveness of, the use of current enforcement powers. The views of planning enforcement officials, and community bodies should be taken into account.
- identify existing good practice in enforcement.
- gather stakeholder views on whether, and to what extent, fixed penalties and fees for retrospective applications are acting as an effective deterrent to any breach of planning control.
- make recommendations for improving enforcement practice.

2.3 Limitations

Following the Independent Review of the Scottish Planning System, the Scottish Government has signalled its intention to publish a consultation paper on options for change in Winter 2016. This research project was commissioned to inform that consultation paper and due to timing constraints it was not possible to source appropriate data from all 34 of Scotland's planning authorities. The findings of this report are therefore based on data from 10 authorities, supplemented by survey responses from 23 authorities and 16 Community Councils.

In scoping the nature and availability of enforcement casework data from planning authorities, it quickly became apparent that information on the type of development giving rise to breaches in planning control is not currently recorded. While in strict terms this is not a consideration for enforcement officers, it means that part of one of the project's objectives (set out above) cannot readily be fulfilled (i.e. providing quantitative information on the types of development giving rise to breaches of planning control). Instead, anecdotal evidence from planning officers has been used to give the best available impression of caseload.

2.4 Structure of the report

The report is structured as follows:

2. Methodology
3. Existing planning enforcement powers
4. Application of enforcement powers – the national picture
5. Analysis of planning authority enforcement data
6. Perceptions of planning enforcement – enforcement officers
7. Perceptions of planning enforcement – community and civic society groups
8. Conclusions and recommendations.

3 Method

3.1 Desk-based research

Reviewing national publications on enforcement activity

A rapid review of Scottish Government's publications on enforcement activity (e.g. the Planning Performance Statistics and Planning Performance Annual Reports) was undertaken to establish a general picture of enforcement activity for Scotland as a whole and for each local authority area. Local authority Planning Performance Frameworks were also reviewed to provide comparator figures and sense-check national statistics.

Early engagement

In order to determine the extent of enforcement activity by factors such as type of notice served, decision reason, etc. it will be necessary to obtain extracts from each local authority's casework management system. Contact, in the form of detailed briefing notes and data specification, was made with local authorities through a number of routes:

- Heads of Planning Scotland (HoPS), via the Improvement Service;
- Through the Scottish Planning Enforcement Forum (SPEF) contacts;
- Follow-up calls to named contacts.

The briefing note and data specification is provided as Appendix 1.

3.2 Review of local authority enforcement data

Data sourcing

Data was provided by 14 authorities, but only 10 datasets were useable (the others simply being copies of the relevant Enforcement Register[2], rather than full downloads from casework management systems).

Data cleaning

The data provided was recorded to different standards, using a different combination of database fields and approaches to information management, therefore each dataset was audited to determine its accuracy and requirements for editing. Generally, this related solely to eliminating typographical errors in key fields required for analysis and adding calculated fields to determine case duration. However, for other datasets substantial work was required to source and integrate code tables (e.g. used for types of breach) through the use of lookup queries.

Four datasets required substantial editing and recoding of data to achieve consistency.

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[2] Enforcement register information was not directly comparable, as it only relates to cases where action has been taken by the authority – missing out the wider contextual picture of cases investigated, but not taken up etc. Similarly, it contains no information on reasoning or decision-making by authorities. It is, however, useful in providing context for national data returns.

To enable cross-dataset analysis, key data had to be manually collated into summary tables.

Analysing results

Each authority dataset was analysed using MS Excel 'PivotTable' functions to summarise data, enable graphing and identify key patterns.

For authorities where free text fields were used to record information on breach type or decision-making, a number of approaches were trialled to enable pattern identification. The most successful of these was the use of statistical package JMP13's 'text explorer' phrase recognition functions to draw out patterns.

3.3 Review of stakeholder's views on enforcement activity

Survey design

Taking the broad objectives established in the brief as the starting point, two separate – but linked – surveys were designed to test local authority officers' and community groups' perceptions of enforcement, effectiveness, barriers to implementation and opportunities for improvement.

Survey questions were prepared and reviewed and agreed with the Scottish Government.

Finalised questions were built into an online survey tool (SurveyMonkey) and web links circulated to planning authorities and community groups via:

- Named contacts that responded to the Planning Review;
- Heads of Planning Scotland (HoPS);
- The Improvement Service

Analysis of survey responses

Survey responses were analysed initially using SurveyMonkey's built in tools, and subsequently exported to Excel for collation and graphing.

Follow-up discussions

Sample follow-up discussions were held with selected local authority and community/civic society respondents to draw out key issues or obtain contextual information to help interpret comments and data-led findings.

3.4 Comparative analysis and recommendations

The two survey datasets and the planning authority casework data were then analysed to compare emerging findings and verify or falsify assertions made in qualitative surveys.

A series of recommendations were then developed, responding to the key points identified.

4 Existing planning enforcement powers

4.1 Introduction

Planning enforcement is a critical part of the system, underpinning the legitimacy and effectiveness of both development planning and development management. Without effective, visible enforcement, public confidence in the planning system as a whole is eroded and the legitimacy of the legal and policy framework is undermined.

The enforcement process is intended to identify unauthorised development ('breaches of planning control'), notify developers of the issue and require remedial action to address any negative impact on amenity.

Planning authorities in Scotland are afforded extensive powers under the Town and Country Planning (Scotland) Act 1997, as amended ('the 1997 Act'), and related legislation[3] to identify, restrain and render acceptable 'breaches of planning control'.

A 'breach of planning control' is defined as consisting of:

- Carrying out any development without the required planning permission; or
- Failing to comply with any condition or limitation subject to which planning permission has been granted; or
- Initiating development without giving notice in accordance with Section 27A(1); or carrying out development without displaying a notice in accordance with Section 27C(1).

A breach of planning control is generally not, in itself, an offence. An offence occurs when a developer fails to comply with formal enforcement action. (Unauthorised works to Listed Buildings are a key exception[4].)

Sections 156-158 of the 1997 Act provide planning authorities with rights of entry to land, where there are reasonable grounds to do so, to determine:

- Whether a breach has occurred;
- Whether the authority should exercise formal enforcement powers;
- How any such powers should be deployed; and
- To determine whether previous enforcement action has been complied with.

Where entry without a warrant is refused, Section 157 provides that a suitable warrant may be sought from a Sheriff.

The intended outcome of the enforcement process is to remediate any impact on amenity from unauthorised development.

Separate provisions exist for breaches of listed building control – see Section 4.6 below.

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[3] E.g. secondary legislation and topic-specific primary legislation, particularly with regard to Listed Buildings and Conservation Areas

[4] See Sections 6 and 8 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

4.2 Informal approaches

Informal communication

Authorities are free to approach developers, land owners, occupiers and those undertaking operations on land informally to highlight potential breaches, request information or propose a course of action.

Planning Contravention Notices

These notices (PCNs) are an information-gathering tool and as such do not constitute 'taking enforcement action' for the purposes of Section 123 of the 1997 Act.

Section 125 of the 1997 Act establishes a procedure by which planning authorities, at their discretion, can seek information about activities or development where a breach of planning control is suspected. These powers supplement the more limited powers to require information on interests in land conferred by Section 272. It is an offence for the recipient of a PCN not to supply any information required by the PCN.

Authorities are able to serve PCNs on anyone who is the owner or occupier of land in question, has an interest in said land or is carrying out operations on the land. Several notices can therefore be served in respect of the same suspected breach.

PCNs can provide authorities with sufficient information to determine whether a breach has occurred, who may be responsible and the need for further action.

4.3 Formal action

NB: the following section is not exhaustive, but is instead intended to provide readers with a flavour of the enforcement tools available to planning authorities, their nature and the broad conditions in which they can be applied. For more information, readers should consult *Scottish Government Circular 10/2009: Planning Enforcement*.

Enforcement Notices

Sections 127-139 of the 1997 Act empower planning authorities to issue notices to the owner, occupier and any other person with an interest in land which may be materially affected where it appears to them that there has been a breach of planning control on that land and that – with regard to the development plan and other material considerations – it is expedient to issue the notice. In other words, the breach of control is sufficiently significant that formally seeking remedial action is in the public interest.

An Enforcement Notice is intended to remedy a breach of planning control by:

- compelling the owner of the land to comply with the terms and limitations of any relevant planning permission; or
- requiring changes to the development or activity to render it acceptable in the context of the development plan and other material consideration; or
- removing the relevant development, or ceasing the relevant use, and restoring the site to its original condition.

The planning authority can undertake direct action under section 135 of the Act to enter land and carry out required work, recovering costs from the landowner.

Breach of Condition Notice

Section 145 of the Act enables planning authorities to enforce conditions acting on any planning permission – including limitations applied by statute to certain permitted development rights.

Breach of condition notices (BCN) can be used where action is required to remedy a breach of planning control arising from non-compliance with any condition.

Before serving a BCN, planning authorities are expected to ensure that conditions are:

- Legally valid;
- Satisfy the criteria for the imposition of conditions stated in Circular 4/1998; and
- Have clearly been breached

It is an offence for a responsible person to be in breach of a BCN (i.e. not to comply with its requirements).

4.4 Stop notices and temporary stop notices

Where planning authorities consider it expedient that any 'relevant activity' should cease in advance of the compliance period specified on an enforcement notice – Section 140 of the Act empowers them to serve a stop notice prohibiting the use or activity to which the enforcement notice relates. A stop notice cannot be issued without an associated enforcement notice.

Prohibitions may be directed at:

- A use of land which is ancillary or incidental to the main use of land specified in the enforcement notice as a breach of planning control; or
- A particular activity taking place only on part of the land specified in the enforcement notice; or
- An activity which takes place on the land intermittently or seasonally.

Because serving stop notices can have significant effects on businesses (e.g. by requiring them to cease key operations), authorities are expected to investigate with care and consider how many people are likely to benefit from the cessation of the activity.

A stop notice must be issued before the enforcement notice to which it relates takes effect i.e. before the time period for compliance specified in the enforcement notice expires. It may be physically issued at the same time as the enforcement notice, or at any time within the 28 day (or whatever longer period the authority has set) notice period between the enforcement notice taking effect.

Where there is a need to stop an activity immediately, planning authorities are empowered to issue a Temporary Stop Notice, which prohibits the relevant activity from the point it is displayed on site.

Temporary Stop Notices can be served by displaying the notice on the land in question and take effect immediately, ensuring that activities can be stopped while an enforcement notice and any required associated stop notice are issued and come into effect. A temporary Stop Notice expires after 28 days.

Unlike other notices, there is no right of appeal to Ministers against a stop notice or a temporary stop notice, although in the case of a stop notice the associated enforcement

notice can be appealed. The stop notice would cease to have effect if the appeal was successful and/or the enforcement notice was quashed or withdrawn.

4.5 Other notices

Section 272 Notice

Section 272 empowers planning authorities to serve a notice requiring the provision of information on ownership, use of, and interests in land. Matters on which information can be sought are:

- The nature of a party's interest in the relevant land;
- Name and address of any other person known to the recipient as having an interest in the land, whether as a superior, owner, heritable creditor, lessee or otherwise (i.e. anyone with a financial stake in the land or activities thereon);
- The purpose for which the land is currently being used;
- The time then that use began;
- The name and address of any person known to the recipient as having used the land for the specified purpose;
- The time when any activities being carried out began.

This is intended solely as an information-gathering tool – and is more limited than the powers available under Section 125 (planning contravention notices) – but can be used in circumstances where no suspected breach of control has occurred. Recipients have 21 days to comply; non-compliance or provision of knowingly false or misleading information is an offence.

Section 179 Notice

Planning authorities are empowered to serve a notice on the owner, lessee or occupier of land in their area the condition of which they consider to be adversely affecting the amenity of the area. This could be applied to, for example, require the removal of detritus, redundant equipment or machinery or the restoration of degraded areas caused by the use or development of the site.

Section 179 notices do not constitute taking enforcement action and authorities have no additional power to seek prosecution or issuing fixed penalties. They can, however, take direct action under Section 135 to carry out required work themselves and recover costs from the landowner.

4.6 Listed Building and Conservation Area control

In general planning terms, the carrying out of unauthorised development is a breach of planning control. Such breaches are treated as civil offences since most development is considered to be reversible.

With listed buildings the situation is different as separate legislation applies. Section 8 of the Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 ('the LBCA Act') makes it a criminal offence to execute any works to a listed building in a way that would affect its character without written consent, known as 'Listed Building Consent', from the planning authority. Any works which fail to comply with conditions attached to a Listed Building Consent also constitutes an offence. This is on the basis that often the damage to historic buildings from unauthorised works cannot be completely reversed. While the visual

appearance may be returned, reinstatement cannot fully replicate original materials, methods or craftsmanship.

Listed Building Enforcement Notice

Where it appears to a planning authority that unauthorised works of alteration, extension or demolition (including partial demolition) to a listed building have occurred, they are empowered by Section 34-41 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 to serve a Listed Building Enforcement Notice on the land owner, occupier, lessee and any other person with an interest in the land indicating the contravention and requiring:

- The remedial steps which must be taken to restore the listed building to its previous state;
- If the authority considers that restoration would not be reasonably practicable or would be undesirable, specifying further works that should be undertaken to alleviate the effects of the breach; or
- Bringing the building to the state it would have been in if the terms and conditions of any Listed Building Consent for the works had been complied with.

The notice will also set a time-scale within which these steps must be taken. The terms of the notice take effect on a specific date. There is a right of appeal to Scottish Ministers against the issue of a Listed Building Enforcement Notice. An appeal must be lodged prior to the enforcement notice taking effect. Failure to comply with an enforcement notice is an offence. Anyone found guilty of such an offence would, on summary conviction, be liable for a fine of up to £20,000 or an unlimited fine if convicted on indictment.

Retrospective Applications

Section 7(3) of the LBCA Act allows for retrospective applications for Listed Building Consent.

Listed Building Stop Notices and Temporary Stop Notice

Failure to comply with a Listed Building Stop Notice or Listed Building Temporary Stop Notice would be an offence. Anyone found guilty of such an offence would, on summary conviction, be liable for a fine of up to £20,000 or an unlimited fine if convicted on indictment.

Listed Building Prosecutions

A person found guilty of an offence can be liable, on summary conviction, to imprisonment for a term not exceeding six months, a fine not exceeding £20,000 or both. Conviction on indictment can result in imprisonment for up to two years, a fine, or both. In considering whether someone is guilty of an offence, the judge will not consider the defendant's intent, state of mind, motive or knowledge. However, these issues may be relevant to any sentence. It is a defence to show that:

(a) The works were urgently necessary in the interests of health and safety or the preservation of the building

(b) Health and safety or the preservation of the building could not be secured through works of repair or works affording temporary support or shelter

(c) The works were limited to the minimum immediately necessary

(d) That written notice justifying in detail the carrying out of the works was sent to the local authority as soon as reasonably practicable

Conservation Area Enforcement Notice

Demolition of any building in a Conservation Area requires Conservation Area Consent from the relevant planning authority. Section 66(3) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 applies the same offences and penalties as for unauthorised works to listed buildings.

4.7 Immunity from enforcement action

Time periods for action

Four-year limits

Where a breach of planning control consists of carrying out 'operational development' (e.g. building, engineering, mining and other operations in, on, over or under land) without planning permission, section 124(1) provides that enforcement action can only be taken within 4 years of the date on which the operations were 'substantially completed'.

Where the breach relates to a change in use of any building, or part of a building, as a 'single dwellinghouse', section 124(2) provides that enforcement action may only be taken within 4 years of the date of the breach.

Ten-year limits

Where there is any other breach of planning control (i.e. any breach involving any material change in use of land, to anything other than a single dwellinghouse), or breach of condition or limitation to which a planning permission is subject, section 124(3) provides for a 10-year limit on enforcement action.

4.8 Regularising development

Retrospective applications

Section 33 of the Act enables an application for planning permission to be made retrospectively for buildings or works constructed or carried out, or a use of land instituted, before the date of application.

Section 33A allows an authority to issue a notice requiring the submission of such an application. This enables authorities to follow a comparatively 'light touch' track for development that can be regularised through the grant of planning permission (i.e. where there is reasonable grounds to believe the use or development could be acceptable in light of the development plan and other material considerations).

Application of conditions

A planning authority may consider that development carried out without permission can be made acceptable through the imposition of planning conditions (e.g. minor mitigation measures such as landscaping or changes to the hours of operation of a particular use). In such cases, the authority can require the submission of an application for planning

permission, through a Section 33A notice. Authorities may, to ensure the swift submission of an application, highlight that only minor changes to the development or use will be required by condition – but that they are obliged to safeguard public amenity.

If an application is not forthcoming, authorities may then proceed with the issue of an enforcement notice.

Certificates of lawfulness

Sections 150-153 of the Act define the concept of 'lawfulness'. Section 150(2) provides that, for the purposes of the Act, uses of land and operations are lawful:

- If no enforcement action may then be taken, because:
  - they did not involve 'development' for the purpose of the Act; or
  - they did not require planning permission; or
  - because the appropriate time period for enforcement against them has expired; or
  - for any other (relevant) reason.
- If they do not contravene any of the requirements of any enforcement notice then in force.

Section 150(3) makes similar provision in respect of any failure to comply with a condition or limitation to which a planning permission was subject.

Certificates of Lawful Use or Development (CLUD) can therefore be used to regularise historical breaches. There is no compulsion to apply for a certificate[5] - but land and property owners can run into difficulty when attempting to sell on buildings or land uses without the appropriate planning permission.

Under Section 151, developers may also apply for a Certificate of Lawfulness of Proposed Use or Development (CLoPUD) to test whether their intended use of land would be lawful in its own right – or would require an application for planning permission.

In all such applications, the onus of proof is on the applicant – meaning that it is important for applicants to ensure that they hold or obtain all the relevant evidence. While CLUD/CLoPUD applications are not publicised, applicants need to be aware that neighbours or others with interests in land could hold evidence useful – or detrimental – to their case and should take care to source this in a timely fashion.

Refusal to issue a certificate by a planning authority on the grounds of insufficient evidence does not necessarily render the use or development unlawful – instead, applications found 'not proven on present evidence' can be resubmitted should additional evidence come to light.

Relocation

Unacceptable development can, on occasion, be relocated either within the same site or moved to another, acceptable, location. While this is potentially complex and time-consuming, enforcement notices can require relocation of a use or development to a suitable alternative (where one is available). For example, temporary structures

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[5] Except for certain types of development that require a valid planning permission to obtain other necessary permits (e.g. for waste management licences under the Environmental Protection Act 1990)

connected to seasonal uses may be acceptable on a different part of the same agricultural holding.

What is reasonable depends on individual circumstances, including: the nature, extent and impacts of the unauthorised development; the time needed for negotiation and securing a suitable site; and the need to avoid unacceptable disruption in the relocation process.

Where relocation is not possible, the authority and developer can agree a reasonable period within which the operation should either cease or reduce to acceptable levels. If such an agreement can be reached, formal enforcement action can be avoided.

Direct action

As noted above, planning authorities are empowered to take direct action to rectify breaches of planning control by Section 135[6] and to recover costs from the landowner.

It is important to note that direct action – and cost recovery – can only be taken against the current landowner. This means that, for example, where a developer has not complied with conditions, but the development has been sold on, it is the buyer that is liable.

Measures available through the Courts

Section 146 of the Act enables planning authorities to apply to the courts for an interdict to restrain or *prevent* breaches of planning control. Importantly, this provision is separate from any other powers in the Act, and is not therefore dependent on any other process or procedure. Interdicts can therefore be used as a preventative measure to stop a developer following an unacceptable, unauthorised course of action that the authority has reasonable evidence to lead them to believe is about to occur. (This could, for example, be historical breaches relating to seasonal or temporary uses, or the arrival on site of heavy machinery likely to be connected to a potential, but unauthorised, use or development.)

It is down to individual authorities to determine when it is appropriate to apply for an interdict. Authorities are required to assess the seriousness of the breach and the particular circumstances against whom proceedings are contemplated. Applications can be made either to the Court of Session or to the Sheriff.

The Court may grant such an interdict as it thinks appropriate for the purpose of restraining or preventing the breach, or it may refuse the application (e.g. due to a lack of evidence). Further processes where notices not complied with

Section 136 of the Act makes it an offence for owners of land to be in breach of an enforcement notice (S145 for BCNs). It is also an offence for those (other than the owner) who control, or have an interest in, the land to carry on any activity which is required to cease, or cause to permit such an activity to be carried on.

It is a defence to show that they did everything they could be expected to do to secure compliance, or to demonstrate that they were not aware of the existence of the notice.

Where a person is in breach of an enforcement notice, and authority may – at their discretion – take one of the following actions:

- Seek prosecution through the Procurator Fiscal; or

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[6] For Listed Building Enforcement Notices, Section 38 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- Issue a fixed penalty notice.

It is important to note that planning authorities are not obliged to seek prosecution or take further action. They may conclude that:

- Prosecution would not be in the public interest due to the nature or extent of the breach (e.g. technical in nature or insufficiently severe / minimal impacts on amenity and public interest);
- The evidence available could not meet the courts' burden of proof requirements;
- The cost and risk to the authority of unsuccessful prosecution – and potential liability for costs – outweigh the public benefits of prosecution.

Prosecution

Where an offence has occurred (through non-compliance with an enforcement notice, BCN, PCN, Stop notice, TSN, amenity notice), the planning authority may refer the case to the Procurator Fiscal. The Fiscals service will then review the evidence and determine whether prosecution is both feasible, based on the available evidence, and in the public interest.

A person found guilty of an offence under the relevant sections of the Act is liable:

- For failing to comply with an enforcement notice, on summary conviction to a fine not exceeding £20,000, or on conviction on indictment to an unlimited fine;
- On summary conviction to a fine of £2,000 for failing to comply with a Breach of Condition Notice.

It should also be noted that the courts have no power to remedy or require that breaches are put right.

Fixed Penalty Notices

Introduced by the Planning etc. (Scotland) Act 2006 amendments to the Act, planning authorities are empowered by section 136A to follow an alternative process to prosecution for developers in breach of an enforcement notice, issuing fixed penalty notices (FPN), levying a fixed financial penalty. Section 145A makes similar provisions in respect of breach of condition notices.

They may do so provided that:

- The notice is served within the six months immediately following the compliance period stated in the enforcement notice in question; and
- No prosecution proceedings have been started in respect of the breach.

The FPN offers the developer the opportunity to discharge any liability for prosecution in respect of the relevant breach by paying the authority the relevant sum within 30 days, with a 25% discount if paid within 15 days. The penalty paid accrues to the planning authority.

No court proceedings can be initiated during the 30 day payment period, but can be commenced thereafter in the event of non-payment. Only one FPN can be issued in relation to a particular step or activity, but an enforcement notice may require several steps to be taken to remedy a breach, or activities to be ceased, in order to comply with the notice. As a failure to comply with any step or activity is a breach of the notice, several FPNs could be issued in respect of a single enforcement notice.

Clearly, payment of a financial penalty does not remedy the breach of planning control, which should still be corrected by the developer. The authority retains the power to take direct action and recover costs.

The standard rates for FPNs are:

- Breach of enforcement notice: £2,000
- Breach of condition notice: £300

There is no requirement on planning authorities to consider or use FPNs.

4.9 Enforcement charters

Section 158A of the 1997 Act, added by the 2006 Act, requires planning authorities to prepare and publish an 'enforcement charter'. This is intended as a publicly available and accessible document setting out how the enforcement system works, in particular the role of the planning authority and the service standards to which the service will be delivered.

Charters should set out:

- The planning authority's policies for taking enforcement action;
- How members of the public can report ostensible breaches of planning and listed building control to the authority;
- How the public can complain to the authority as regards how they take enforcement action; and
- The relevant complaints procedure.

Charters must be reviewed every two years and, upon review, be submitted to Ministers for review.

There is no requirement to consult the public, key agencies or other stakeholders on the form and content of enforcement charters.

5 Application of enforcement powers: the national picture

5.1 Introduction

This section of the report provides an overview of enforcement on a national scale and sets out the analysis of casework data supplied by Scottish planning authorities.

5.2 National enforcement data

The Scottish Government publishes annual Planning Performance Statistics which include data on enforcement activity by each planning authority in Scotland, including the number of cases taken up; the number of breaches resolved; the numbers of notices served; the number of reports to the Procurator Fiscal; and the number of prosecutions. The latest annual performance statistics relate to 2015/16 which cover the period from April 2015 to March 2016 (published on 20th July 2016). On the 3rd October 2016, the Scottish Government published its quarterly planning performance statistics for April to June 2016 (Quarter 1 of 2016/17).

All planning authorities, strategic development plan authorities and seven key agencies must prepare a Planning Performance Framework (PPF) report annually to assess their performance against a set of Performance Markers agreed by the High Level Group on Planning Performance[7]. The most recent PPF reports were published in July 2016 and relate principally to local authorities performances during the financial year April 2015 to March 2016.

The Scottish Government produces annual Planning Performance Reports (PPR) which summarise the information contained in the individual PPFs, however, at the time of writing, the 2015/16 PPR has yet to be published with the most recent PPR relating to 2014/15. Therefore, in order to provide a fair comparison of the most recent data presented in the Planning Performance Statistics and the Planning Performance Frameworks, it was necessary to manually collate enforcement activity data from the individual PPFs for 2015/16. This data was combined with the information presented in the annual Planning Performance Reports from 2014/15 to 2012/13 and has been used in the analysis below.

Although both the Planning Performance Statistics and the Planning Performance Frameworks use information from the same reporting periods (April to March), there are some slight discrepancies in the overall enforcement activity figures. A comparison of the figures from both publications will be provided in the following paragraphs.

[7] The Group, established in 2013, consists of representatives from Scottish Government, Heads of Planning Scotland, the Society of Local Authority Chief Executives, the Society of Lawyers and Administrators in Scotland, and the Royal Town Planning Institute.

Caveat for the Planning Performance Statistics
The national total for number of breaches resolved excludes those local authorities who were not able to supply this information (East Dunbartonshire and Edinburgh).
Caveat for the Planning Performance Frameworks
Data was not available for East Ayrshire in 2014/15 and for Clackmannanshire in 2012/13.
A review of each local authority's Planning Performance Framework from 2015/16 to 2012/13 provided the figures for the 'number of breaches identified' for each year. Analysis of the data reveals that many local authorities did not provide details on the number of breaches identified and many other local authorities did not differentiate between the number of cases taken up and the number of breaches identified, i.e. the same figure was reported for both categories.

Table 5.1 provides an overview of enforcement activity in Scotland for 2015/16.

Table 5.1 Summary of Enforcement Activity in Scotland in 2015/16

Enforcement Activity	Total number from Planning Performance Frameworks	Total number from Planning Performance Statistics
Breaches Identified (note a)	5,029*	Not available
Cases Taken Up (note b)	5,532	5,475
Breaches Resolved (note c)	4,867	4,782
Notices Served (note d)	501	495
Reports to Procurator Fiscal	2	2
Prosecutions	2	2

(a) 'Breaches identified' are **all cases** recorded **where a breach occurred**, irrespective of whether formal notification took place.

(b) 'Cases taken up' are defined as **all cases** where parties are **formally notified in writing** that enforcement action may be taken by the authority under Sections 127-137 of the T&CP (Scotland) Act 1997.

(c) 'Breaches resolved' are **all cases where a breach occurred** and was **resolved**, irrespective of whether formal notification took place.

(d) 'Notices served' includes enforcement notices; breach of condition notices; planning contravention notices; stop notices; temporary stop notices; fixed penalty notices, and notices requiring application for planning permission for development already carried out.[8]
* Data updated from SG records – only Edinburgh missing.

[8] Definitions used in notes agreed by HoPS/SG: 'formally notified' should be interpreted as authorities making contact with landowners/developers to alert them to a breach of control and the need to remediate it – not necessarily 'taking enforcement action' through the issue of notices.

Figures do not include amenity (Section 179) notices

Cases taken up

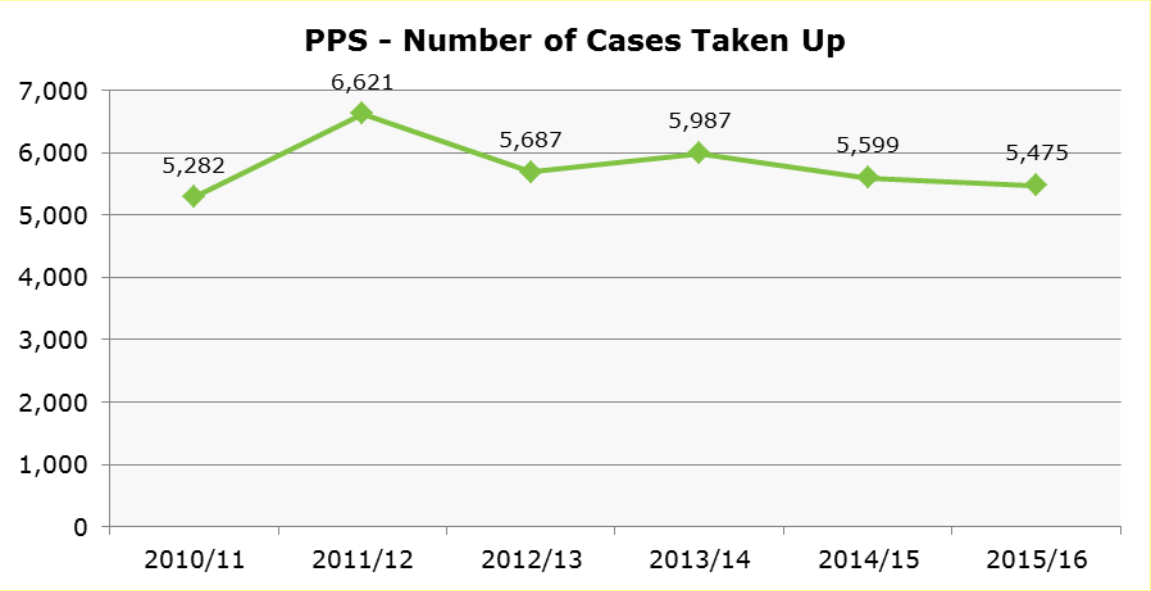

Figure 5.1 Planning Performance Statistics - Number of cases taken up in Scotland

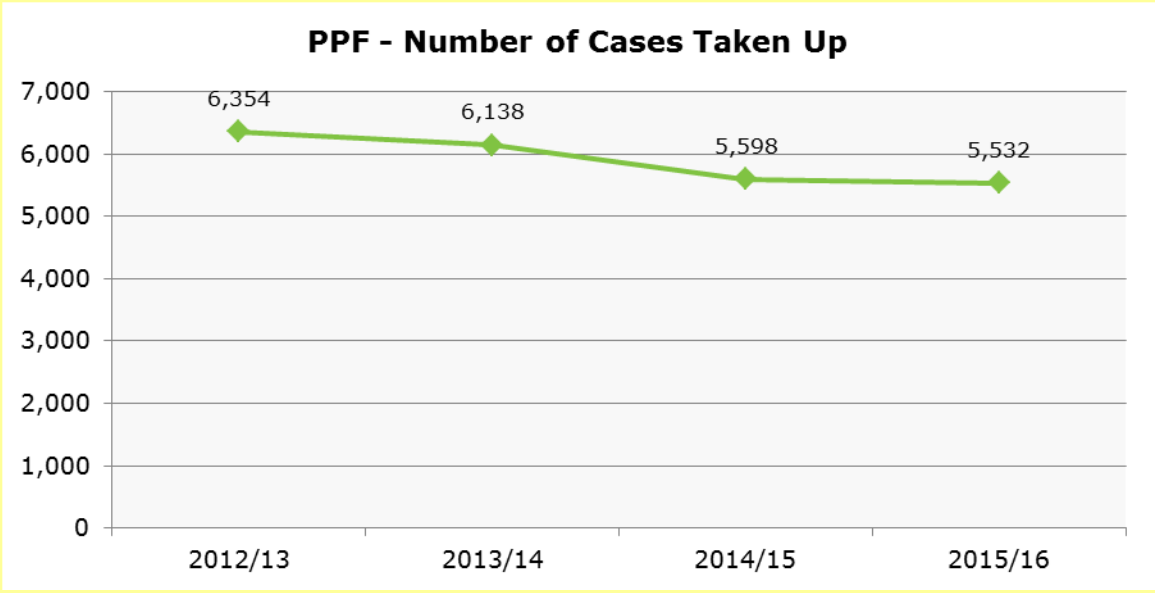

Figure 5.2 Planning Performance Frameworks - Number of cases taken up in Scotland

Figure 5.1 depicts the total number of enforcement cases taken up in Scotland from 2010/11 to 2015/16[9] (derived from the Planning Performance Statistics). There has been a

[9] It is unknown whether the numbers provided in the Performance Statistics are new cases identified during the recording period or all outstanding enforcement cases.

downward trajectory in the number of cases taken up since 2013/14, with a decrease of 124 cases in 2015/16 compared to 2014/15. The period between 2011/12 recorded the highest number of cases taken up, with an increase of 1,339 cases from the previous period. (However, when viewed in the round, 2011/12 could be viewed as an aberration, with average rates of cases taken up sitting between 5,600 and 5,700[10].)

Figure 5.2 depicts a similar downward trend in the number of cases taken up since 2012/13. The most notable difference between the two graphs is the total number of cases taken up in 2012/13 and 2013/14, with the Planning Performance Frameworks data identifying an additional 667 cases in 2012/13 and 151 additional cases in 2013/14.

In 2015/16, the following planning authorities reported the highest number of cases taken up[11]:

1. Aberdeenshire (674 cases)
2. Edinburgh City (584 cases)
3. Glasgow City (532 cases)
4. Perth and Kinross (296 cases)
5. Moray (243 cases)
6. Angus (225 cases)
7. West Lothian (223 cases)
8. East Lothian (210 cases)
9. East Ayrshire (193 cases)
10. Argyll and Bute (191 cases)

"The increase in enforcement cases is notable and reflects growing public awareness of the development process and how they can interact with it".
East Lothian Planning Performance Framework 2015/16

"There has been an increased level of enforcement with more cases been taken up and more resolved than the previous year".
North Lanarkshire Planning Performance Framework 2015/16

"We have received a substantial increase in enforcement investigations. This is in part as a result of increased unauthorised flyposting and advertising in the area which is increasingly taking up officer's time".
Falkirk Planning Performance Framework 2015/16

Breaches identified

The number of breaches identified is not recorded in the Planning Performance Statistics annual reports, however, this information was obtained by reviewing each local authority's Planning Performance Framework from 2015/16 to 2012/13.

[10] Averages: 5,775 including 2010/11; 5,606 excluding 2010/11 – a c.3% variation

[11] Numbers of cases are the same for both the Planning Performance Statistics and Planning Performance Frameworks.

Analysis of the data reveals that many local authorities did not provide details on the number of breaches identified and many other local authorities did not differentiate between the number of cases taken up and the number of breaches identified, i.e. the same figure was reported for both categories. Therefore, the figures provided below should be used with caution.

The number of breaches identified has progressively decreased from 3,388 in 2012/13, to 3,346 in 2013/14, to 3,188 in 2014/15, and to 2,818 in 2015/16.

"The number of breaches identified was 176 and the number resolved was 199. This is a drop from 2014/15 when 246 breaches were identified, 216 resolved and 8 notices served. This drop is part due to the introduction of a new Enforcement Charter".
South Ayrshire Planning Performance Framework 2015/16

"Case numbers received year on year are fairly consistent but there has been a drop in the number of breaches identified from these reported alleged breaches".
Glasgow City Planning Performance Framework 2015/16

Breaches resolved

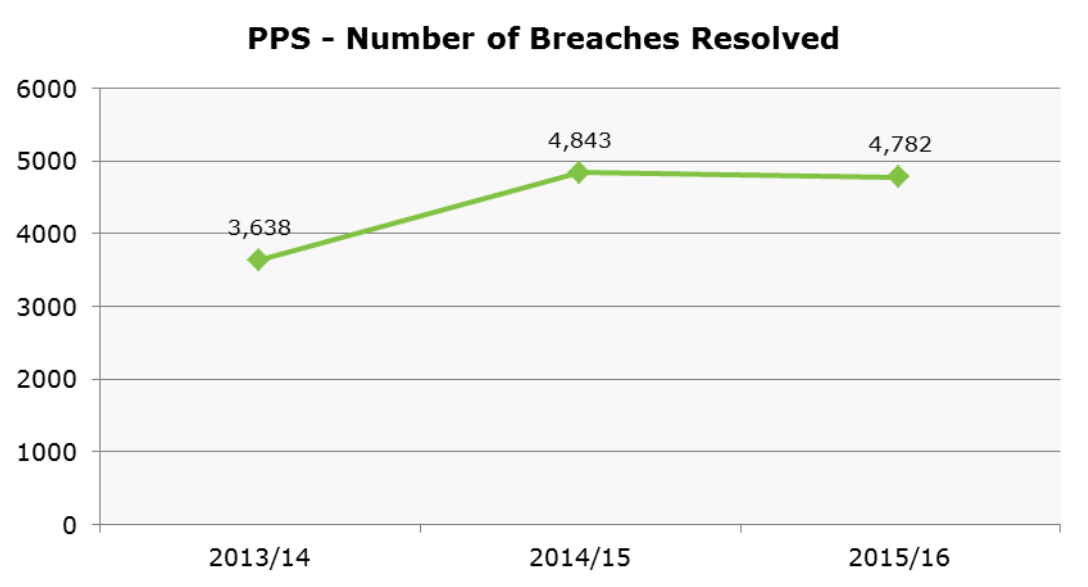

Figure 5.3 Planning Performance Statistics - Number of Breaches Resolved in Scotland

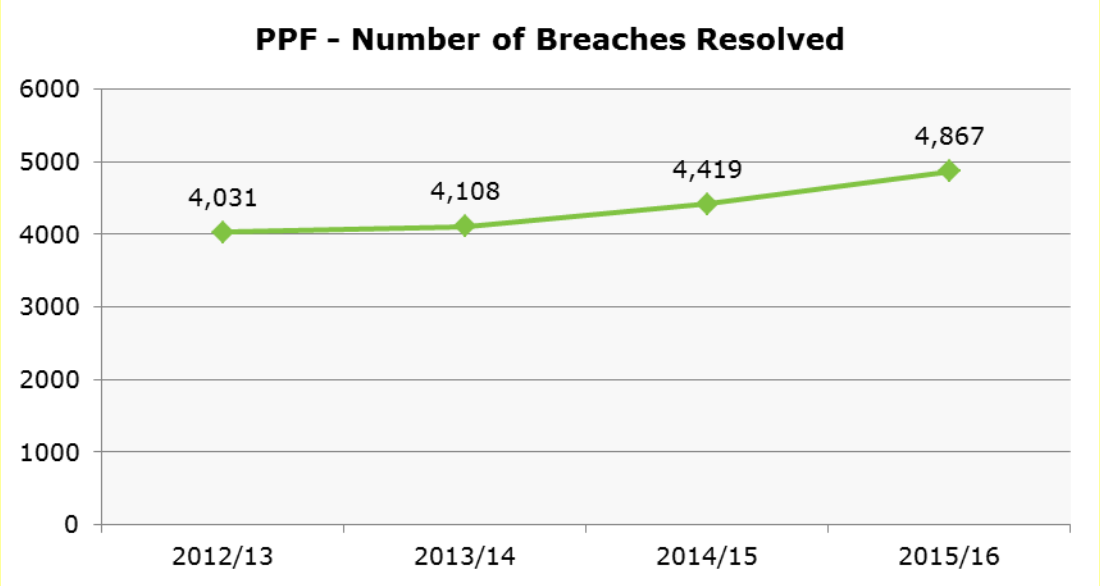

Figure 5.4 Planning Performance Frameworks - Number of Breaches Resolved in Scotland

Figure 5.3 shows that there was a slight increase in the number of breaches resolved from 2013/14 to 2014/15, while there was a marginal decrease in 2015/16 (although the figure remains high).

Figure 5.4 shows that the numbers of breaches resolved has steady increased since 2012/13, reaching a peak in 2015/16 of 4,867 cases resolved. There is a significant difference in the number of cases reported to be resolved in 2013/14, with an additional 470 cases reportedly resolved according to the Planning Performance Frameworks.

In 2015/16 the following planning authorities reported the highest number of breaches resolved:

1. Aberdeenshire (1,050 cases)
2. Glasgow (323 cases)
3. Argyll and Bute (309 cases)
4. Highland (282 cases)
5. Moray (255 cases)
6. East Ayrshire (207 cases)
7. South Ayrshire (199 cases)
8. West Lothian (188 cases)
9. Perth and Kinross (167 cases)
10. Scottish Borders (140 cases) (Planning Performance Statistics) / Angus (148 cases) (Planning Performance Frameworks)

Upon further investigation of the significantly higher figure reported by Aberdeenshire Council, it was revealed that the enforcement team in 2015/16 cleared a backlog of work resulting in a large volume of cases being closed. The total number of breaches reported and resolved for Aberdeenshire in this period was 422.

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“It is very encouraging that a higher proportion of the increased number of cases was resolved”.

East Lothian Planning Performance Framework 2015/16

“Decline in the number of cases resolved and identified since the previous year has resulted from a halving of the team resource. With the resource diminished in the team, it is evident that planning case officers are more inclined to try and resolve any issues themselves on sites and seek advice from the enforcement officer as appropriate. This has helped to develop case officers’ knowledge of enforcement and has kept the enforcement officer free to deal with more difficult cases”.

East Dunbartonshire Planning Performance Framework 2015/16

“From the overall cases identified as breaches, there has been a drop in breaches resolved of approximately 84% to 61%. Due to the high priority given to MLU enquires (Elected Members enquires), there has been a tendency to lower the priority of other tasks, including carrying out the formal process of closing-off cases where those cases are understood to be resolved (they will be closed but there is often a lag in formalising this on Uniform). There is a legacy of this which is being addressed”.

Glasgow Planning Performance Framework 2015/16

Notices served

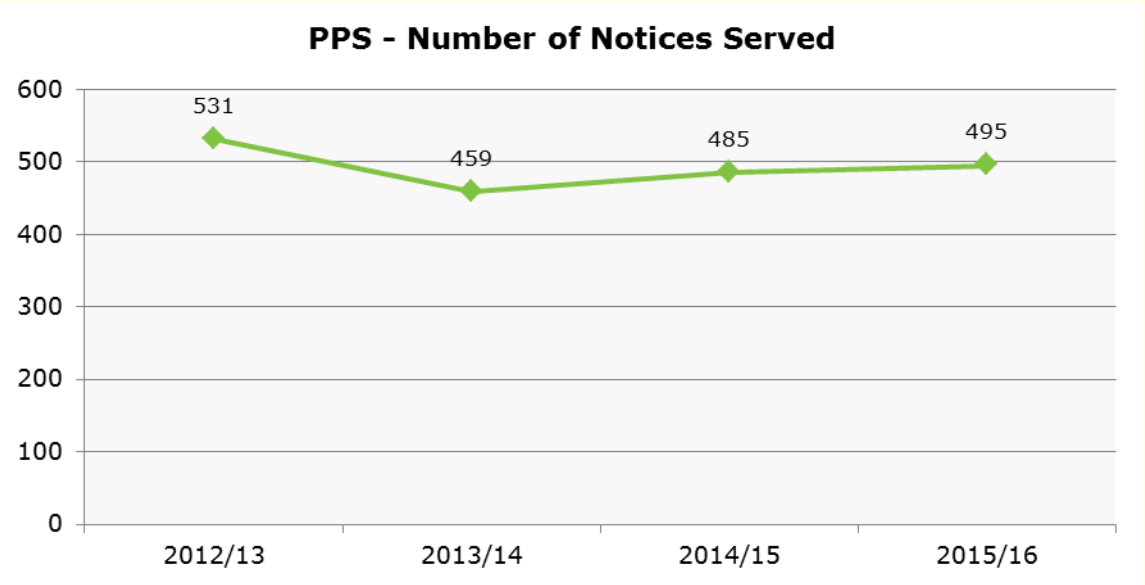


Figure 5.5 Planning Performance Statistics - Number of notices served in Scotland

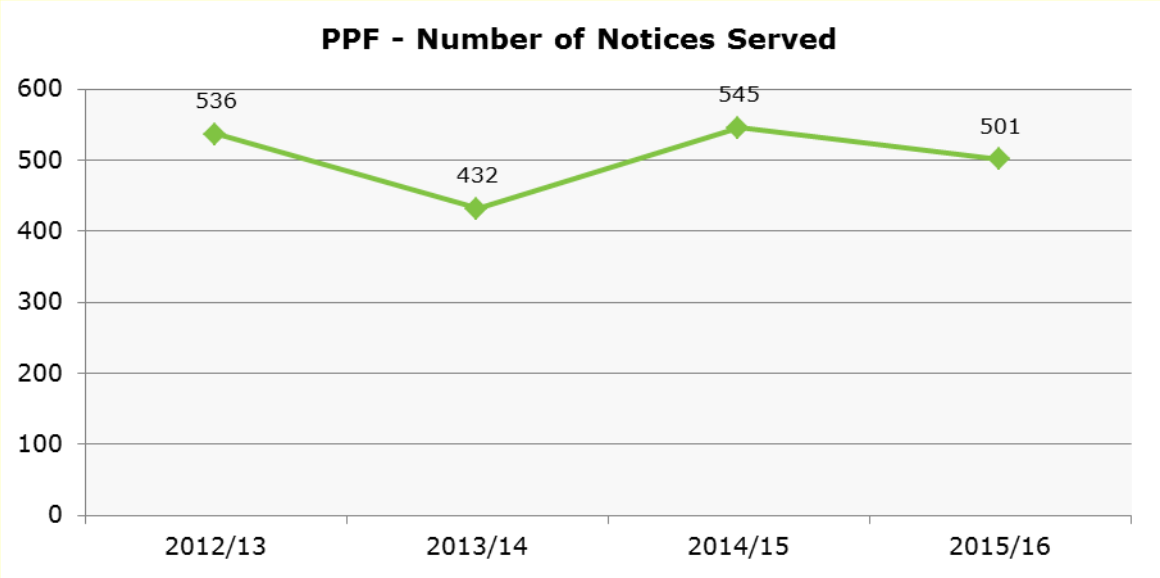
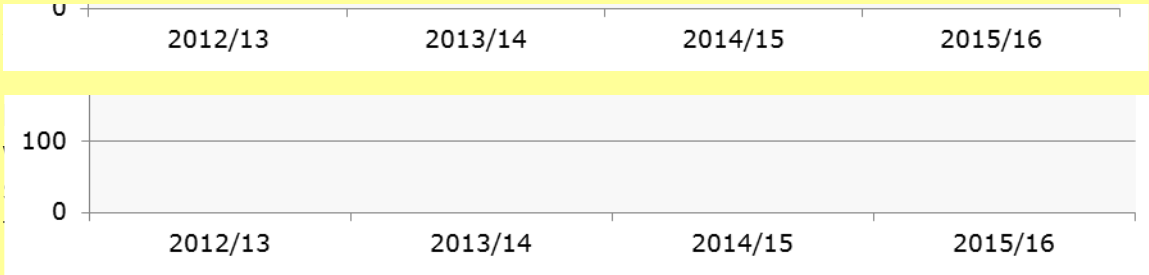


Figure 5.6 Planning Performance Frameworks - Number of notices served in Scotland



2013/14
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Figure 5.6 shows that the highest number of notices served was in 2014/15, an increase of 113 cases since 2013/14. There was a decrease in the number of notices served in 2015/16 by 44 notices.

In 2015/16 the following planning authorities reported the highest number of notices served:

1. Aberdeenshire (53 notices)
2. West Lothian (49 notices)
3. Edinburgh (42 notices)
4. Argyll and Bute (37 notices)
5. Glasgow (34 notices)
6. Highland (33 notices)
7. South Lanarkshire (32 notices)
8. Angus (30 notices)
9. North Lanarkshire (26 notices)
10. Perth and Kinross (23 notices).

Twenty-one authorities served less than ten notices, with Shetland and the Loch Lomond & the Trossachs National Park not serving any notices.

“The reporting year recorded an increase in the number of notices served, which can in part be explained by the nature of the cases arising, with more cases requiring immediate initial action, followed by longer term preventative action”.
North Lanarkshire Planning Performance Framework 2015/16

Reports to Procurator Fiscal

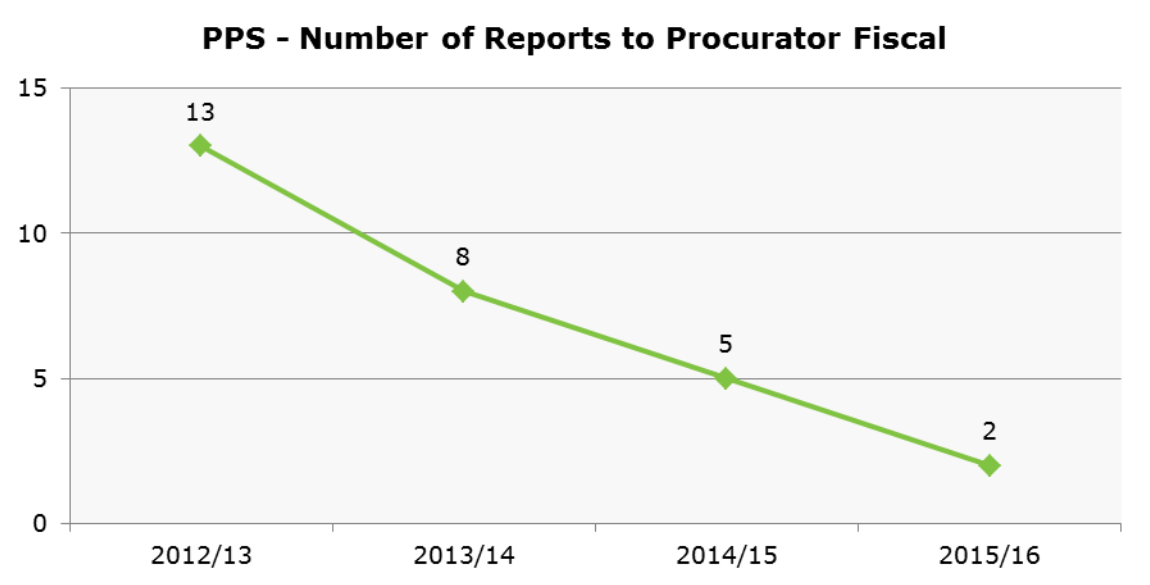


Figure 5.7 Planning Performance Statistics - Number of reports to Procurator Fiscal

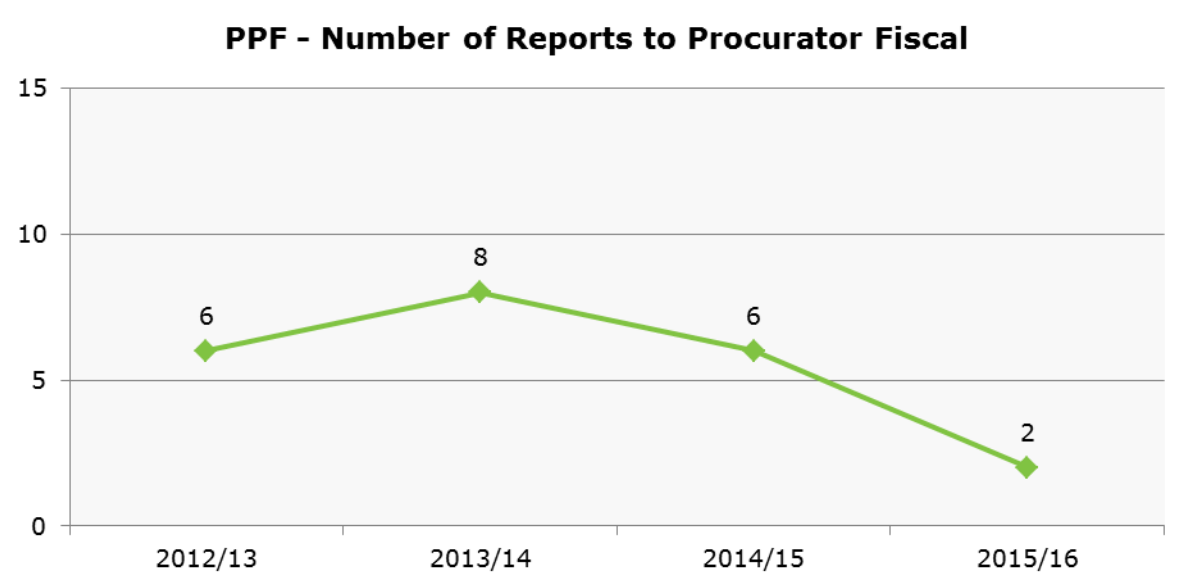


Figure 5.8 Planning Performance Frameworks - Number of reports to Procurator Fiscal

Although the exact number of reports to the Procurator Fiscal varies between the Planning Performance Statistics and the Planning Performance Frameworks, the number of cases referred to the Procurator Fiscal has declined in recent years.

Prosecutions

The number of cases resulting in prosecutions corresponds in the Planning Performance Statistics and the Planning Performance Frameworks. A total of five cases have resulted in prosecutions from 2012/13 to 2015/16, with no discernable pattern related to type of notice or success rate. The overall prosecutions figures are consistently low indicating that either planning authorities endeavour to resolve breaches without the aid of prosecution or they are reluctant to turn to the prosecution service due to concerns about the costs of such an action or lack of familiarity with the process. (It should also be noted that prosecution in itself does not remedy the breach of control.)

5.3 Conclusions

Caseload

Because both national and Planning Performance Framework statistics focus solely on cases taken up (with a limited discussion of breaches identified) and breach resolution, this data paints a potentially misleading picture of what enforcement services are actually doing. By failing to account for all alleged breaches reported and investigated – which is necessary to identify whether there has been a breach of planning control and reach a determination as to the appropriate course of action – the statistics miss out a significant and vital proportion of enforcement officers' workload. As illustrated below by the analysis of individual planning authority data, the bulk of officers' time is spent investigating alleged breaches reported to the authority, the significant majority of which are either not breaches of planning control or dealt with through informal means.

Authorities' own interpretations of the trends in caseload – for example, the quotes from Falkirk and East Lothian – suggest that overall reporting rates are increasing; potentially as a consequence of both increased 'offending' in some areas and greater public awareness and willingness to report. No national data is available, but the rates of

electronic reporting visible in authorities' data submissions could suggest that members of the public are more willing to report alleged breaches through email / online systems due to the convenience and speed offered – in addition to greater anonymity.

The trends visible and discussed in terms of 'breaches identified' and 'cases taken up' (see Figures 4.1 – 4.4) are, therefore, lacking in the wider context and patterns provided by an understanding of overall caseload, and the proportion of which breaches identified, cases taken up and breaches resolved actually constitute.

Mechanisms

The national data is also largely silent on how planning authorities are resolving cases. Although increasing rates of resolution appears to be a 'good news story' (although with the caveats discussed above), understanding the ways in which this has been achieved would be very useful. The 'breaches resolved' data relates to all breaches of planning control resolved, whether by formal means or otherwise. A little more subtlety would potentially tell a more realistic story for authorities, illustrating the proportion of caseload resolved by informal means and through the use of formal powers. It would also be useful to understand the rates of outstanding enforcement notices each authority has on the books, to show the level of problematic enforcement cases.

Similarly, reporting on the duration of cases would provide a powerful means to illustrating the lengths that authorities often have to go to secure resolution. The current suite of statistics reports on the number of breaches identified and resolved within a reporting year, but inevitably misses out on the fact that, although a great many cases are resolved comparatively quickly, most authorities have a small number of long-running cases that are often highly problematic.

Effectiveness

As currently presented, national data – either in the form of Scottish Government statistical returns or in Planning Performance Frameworks – tells users comparatively little about how effective planning enforcement is, or can be. Clearly, this varies from case to case, but where authorities enjoy particular success in employing, for example, informal negotiation – or conversely obtaining interim interdicts to restrain breaches – being able to showcase this would be beneficial. As will be explored in more detail below, unpacking the terminology applied to casework could be beneficial in terms of explaining to the public what the service does, and that the significant majority of effort goes in to cases that, ultimately, do not require the issue of a notice – and that this is an indicators of the system working as it should. (Working on the premise that a proportionate, informal response has the desired effect of bringing unauthorised development within planning control.)

Problems with prosecution?

Rates of reporting of planning enforcement cases to the Procurator Fiscal continue to fall, but the causation is not entirely clear. Anecdotal evidence from planning authorities and exploration of the process suggests the following factors are considerations:

- Improving rates of resolution;
- Reluctance within planning authorities to take on the costs and potential risks of bringing a prosecution;
- Lack of political will from Elected Members to support officers in seeking prosecution;
- Significant discrepancies between planning tests of public interest and those applied by the Procurator Fiscal;

- Evidential requirements of criminal prosecution;
- Conviction does nothing to address the breach itself;
- Case law suggests that fines imposed on those convicted are not generally punitive, and rarely reflect the gain accruing to developers as a consequence of unlawful use or development of land.

No data is readily available on the types of development / breaches of planning control that reach the courts, nor the steps that authorities have taken to resolve breaches prior to seeking conviction. Again, given the lack of public awareness of the complexities of planning enforcement, unpacking this process could be a valuable means of explaining why authorities are not routinely seeking prosecution.

5.4 Recommendation

In terms of monitoring enforcement performance at the national – and indeed the planning authority – level, development of consistent data standards would be very valuable. Ensuring that all authorities are recording the same information with regard to the type of breach, types of development involved and the processes followed for each case would enable more effective and meaningful analysis. In turn, this would help authorities and the Scottish Government tell a more realistic and detailed story of how the enforcement process is working.

This would require some changes to the structure and content of local authority databases, but could convey significant benefits in terms of consistency, ease of producing the necessary statistical returns and opportunities for using data to inform more effective business cases for investment. In turn, this could convey substantial benefits in terms of improving transparency and providing stakeholders with greater confidence in the enforcement process – and in planning more generally.

Realistically, it is unlikely that this should be confined to enforcement – although it could be used to pilot the benefits of a shared approach and scope the potential time/cost involved in a more extensive reworking.

Recommendation:	
1	**Consider the development of national data standards for planning data collection** ***Rationale****: improve the ease and consistency of recording information; enable effective tracking of cases and provide richer, more meaningful performance statistics.*

6 Analysis of planning authority enforcement data

6.1 Introduction

Data parameters

Planning authorities, through Heads of Planning Scotland, the Scottish Planning Enforcement Forum and the Improvement Service, were asked to provide data – drawn from their development management systems – on their enforcement caseload from 1st January 2011 – 31st December 2015. While it was recognised that the majority of authorities use the same casework management system (IDOX Uniform), it was noted that there is some variation in the ways this is configured. A data specification, developed in partnership with local authority partners, was therefore supplied that identified the following fields to include in reporting:

- Case reference
- Date received
- Date closed
- Breach type
- Description
- How the breach was received
- Notice type served (including a record of where no breach)
- Reason for the decision
- Case status
- Date notice issued

Usable data was returned by 10 local authorities. It forms the basis of the analysis below.

Limitations

Because of differences in recording practices between authorities, it is not possible to join and analyse datasets in a single tranche. The 10 datasets have therefore been analysed separately and, where there is read-across between content and potential findings, this is drawn out below.

As set out in **Recommendation 1** above, developing consistent nationwide data standards would enable more effective data collection and analysis, with substantial benefits for planning authorities – and greater transparency for communities and stakeholders.

6.2 Informal action

When is informal action undertaken?

Based on the data available, informal action is, following investigation, the first step for planning authorities in dealing with breaches of planning control. Of the enforcement datasets analysed informal action was successfully taken in, on average, a little over 90%

of cases found to be breaches of planning control[12]. Unsurprisingly, this mirrors the broad picture set out in the national data (see Table 5.1), with just over 92% of cases in which some form of action was taken.

Anecdotal evidence from enforcement officers suggests that, except for the most serious cases, informal efforts are made – even where notices are subsequently issued.

The way in which data is recorded by local authority systems, unfortunately, does not allow systematic tracking of cases that progress through multiple stages of engagement between officers and developers and informal and formal processes. What is clear is that there is substantial variation between authorities in the way that informal approaches to enforcement are deployed – but again, this is not reflected in the available data. Instead, this is explored in more detail through qualitative survey-based methods in the following chapter.

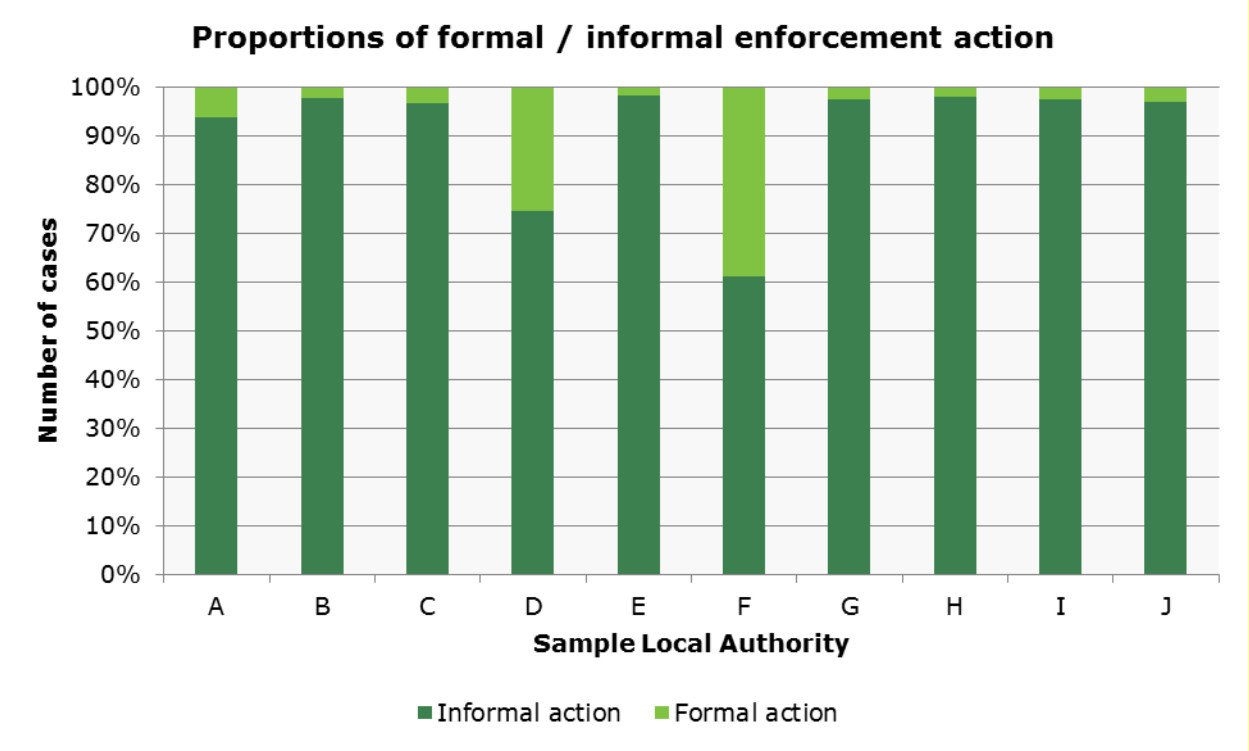


Figure 6.1: Proportion of formal to informal action / resolution

Clearly, authorities are required to respond to the breaches occurring and being reported in their districts – however, patterns of activity are comparatively consistent year-on-year.

[12] Cases not relating to breaches of planning control excluded. 91.3% average; 97.4% median value

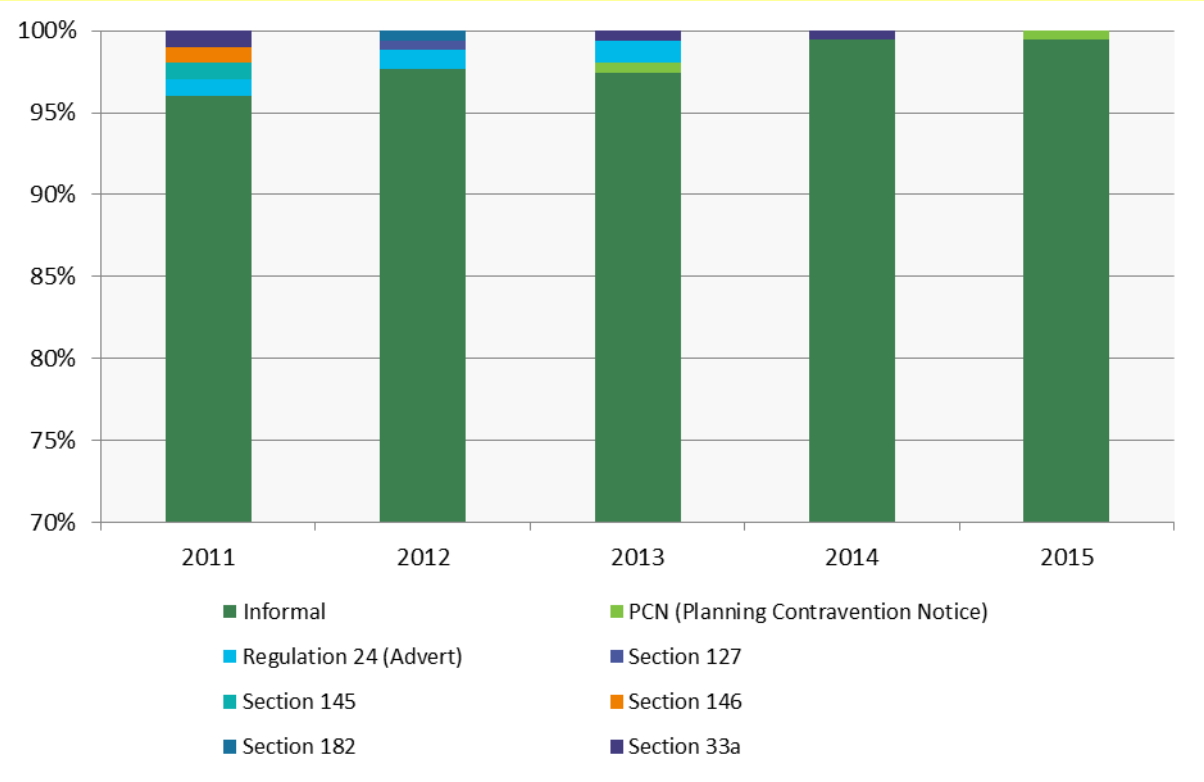


Figure 6.2: Sample authority D - notices served, 2011-15 (note Y axis scale begins at 70%)

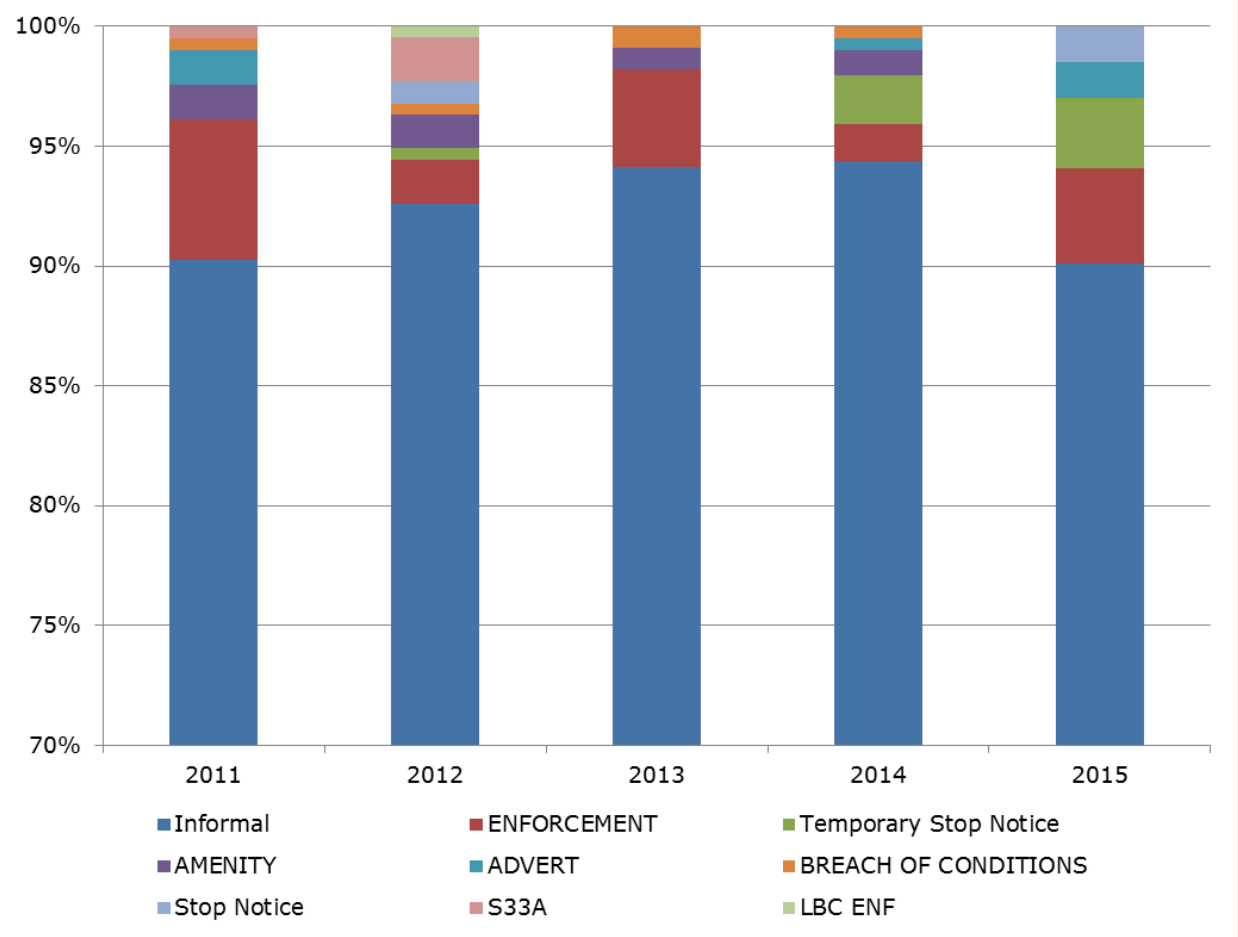


Figure 6.3: Sample authority G - notices served, 2011-15 (note Y axis scale begins at 70%)

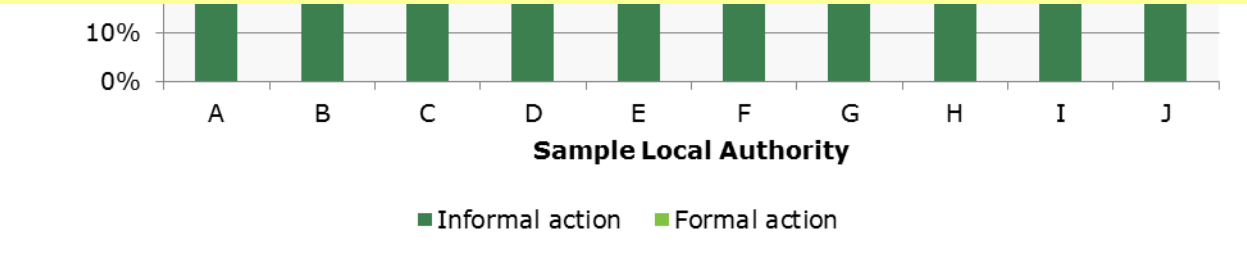


Figure 6.1), two authorities (D and F) stand out. (Although Authority D's data return was based on a single year, this was confirmed as being broadly representative.)

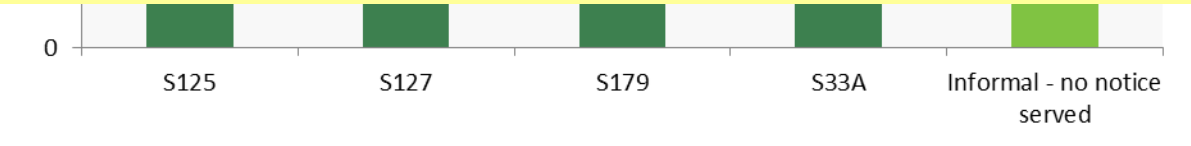
It is important to note that the sample group included urban, rural and island authorities – but that the general pattern of a preponderance of informal resolution is replicated nationwide regardless of local conditions or development pressures.

How effective is informal action?

As noted above in Recommendation 1 the way that planning authority databases are configured means that the progress of cases cannot be definitively tracked. However, anecdotal evidence, drawn from survey results and discussions with enforcement officers, confirms that informal approaches are applied to the majority cases in the first instance – except where the breach is so severe or of a nature that is unlikely to be effectively regularised through retrospective applications or remedial measures.

The measure of effectiveness in terms of planning enforcement is whether or not a breach has been regularised and brought within planning control – i.e. rendered acceptable in terms of the development plan and other relevant material considerations. The sheer weight of numbers in the data provided by planning authorities suggests that informal approaches to enforcement should be considered, in the main, to be highly effective. Informal enforcement accounts for the resolution of, on average, ~90% of the sample authorities' caseload – as illustrated by the foregoing figures.

It should, however, be noted that authorities all have individual approaches to informal enforcement and employ a range of techniques to encouraging developers to take action. Unfortunately, the precise means employed in individual cases is not systematically recorded so the effectiveness of individual mechanisms cannot readily be measured. This is discussed below in relation to evidence gathered from enforcement officers.



(see Figure 6.5 as examples), it appears that those case dealt with through informal means are often resolved more quickly than those necessitating the service of notices and other formal means. Anecdotal evidence suggests that, for more severe breaches, authorities will adopt a formal approach from the outset (for example, where there is no realistic prospect of unauthorised development being regularised through retrospective applications or simple remedial action) – but this is invisible in the data.

Although precise causation cannot be attributed, there are a number of factors that are likely to come into play. These include:

- Faster response times from developers that have made genuine mistakes and wish to resolve the issue quickly;
- Potentially less complex cases lending themselves to solution by informal means;
- Large numbers of low input householder cases, pulling down average duration figures;
- The inherent delay created by the exchange of correspondence and statutory timescales for action necessitated by the enforcement notice process.

Nevertheless, informal approaches do appear to offer some efficiency benefits precisely because of the flexibility they allow. The examples selected are broadly representative of the dataset as a whole, and have appropriate data available to enable visualisation.

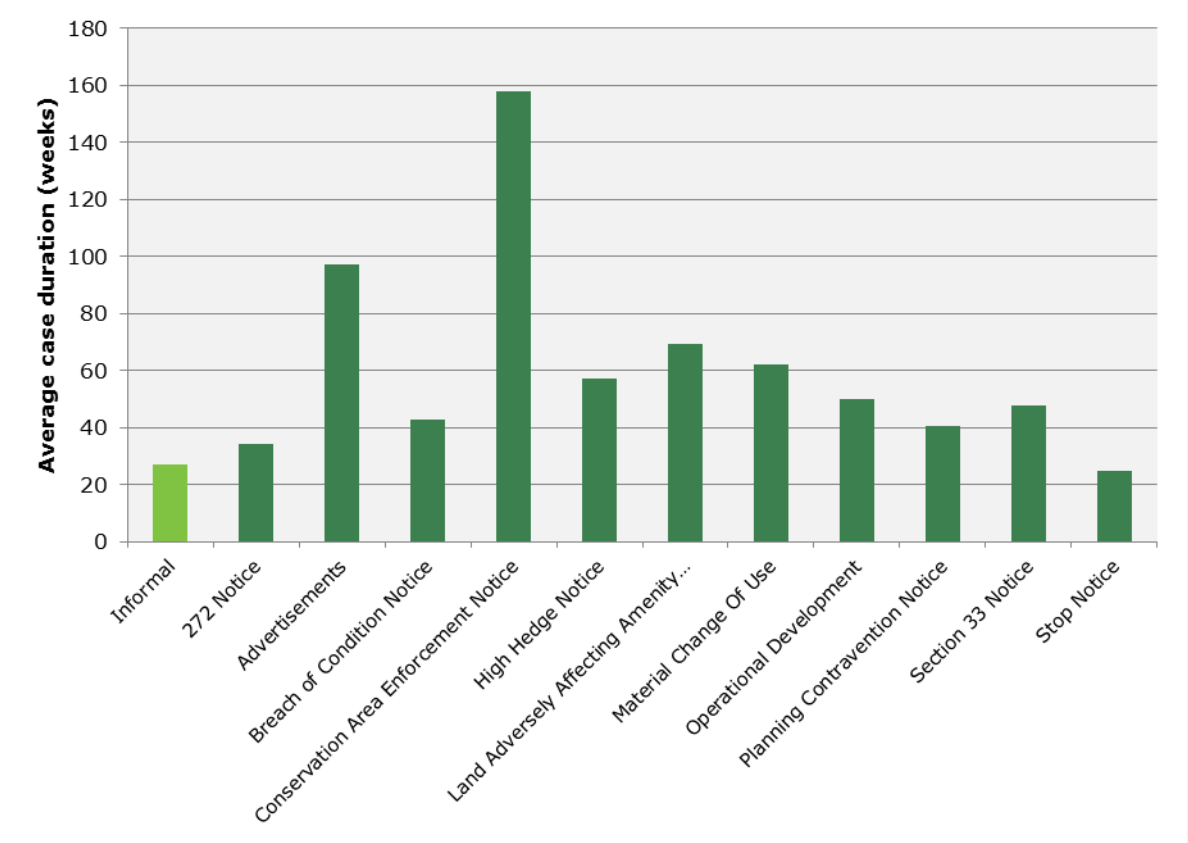


Figure 6.4: Sample authority A - average duration of enforcement cases (in weeks)

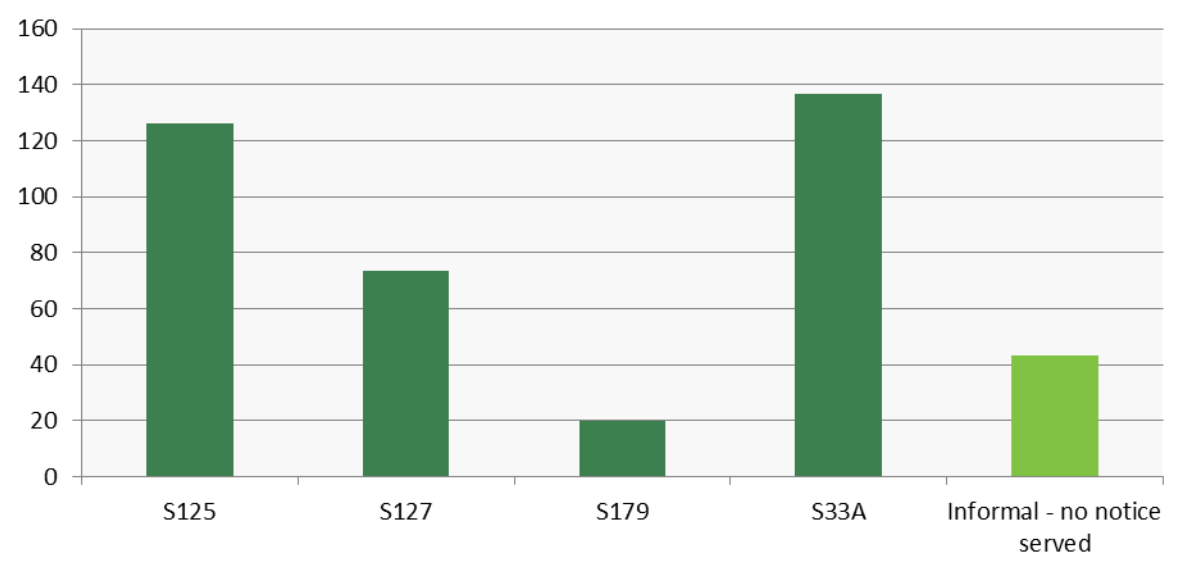


Figure 6.5: Sample Authority B - average duration of enforcement cases (in weeks)

Only one authority was able to provide quantifiable data on the types of development to which enforcement action related. All others record breach/development descriptions in free text database fields – entirely appropriate for the purpose intended, but impossible to analyse accurately.

Figure 6.7 below illustrates those dealt with through formal means. Broadly, informal approaches have been employed in a wider range of cases. (It should be noted that the authority in question use this development type information instead of the breach type data recorded by all other authorities that provided data – therefore datasets are not directly comparable.)

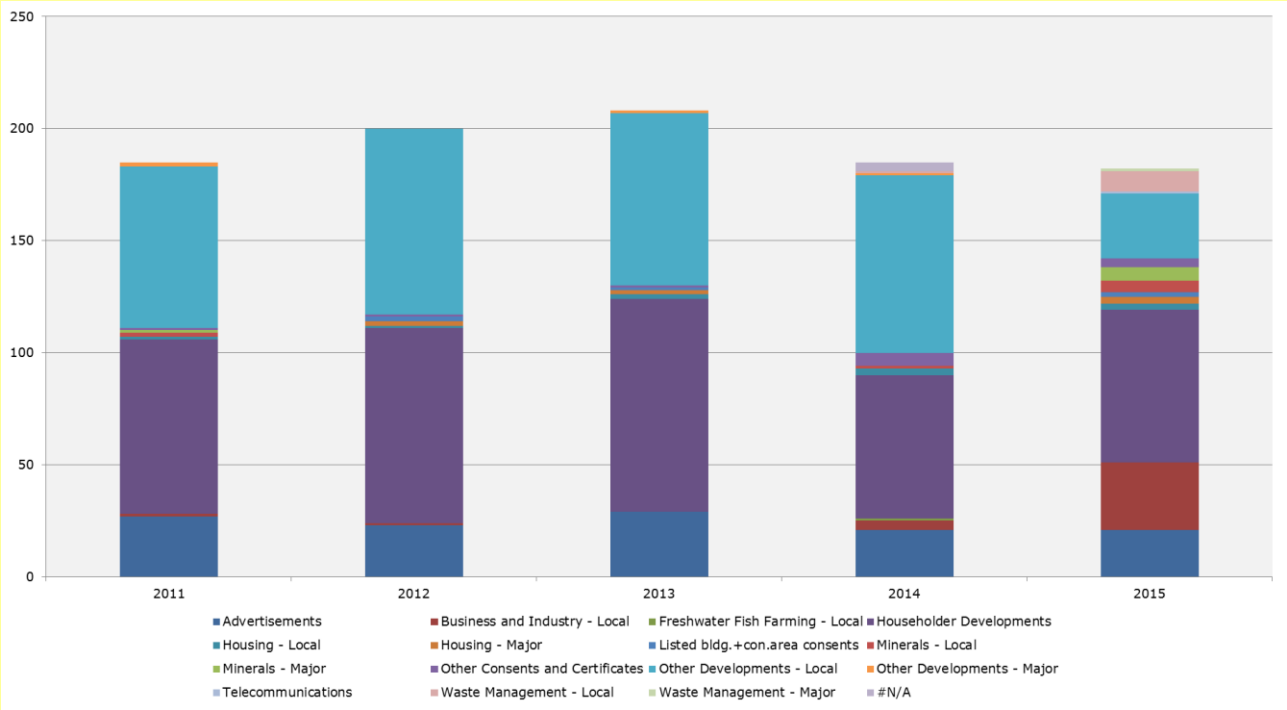


Figure 6.6: Authority G, unauthorised development by type and year (all breaches dealt with by informal means)

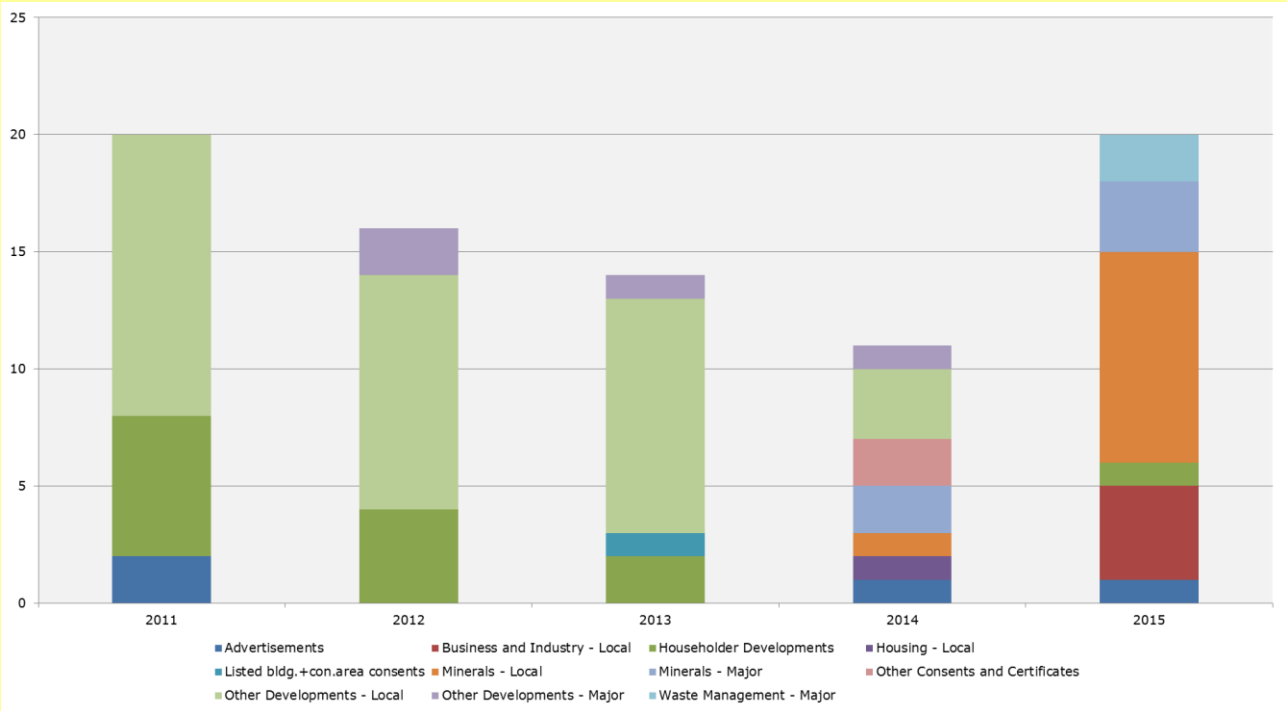


Figure 6.7: Authority G, unauthorised development by type and year (breaches dealt with by formal means)

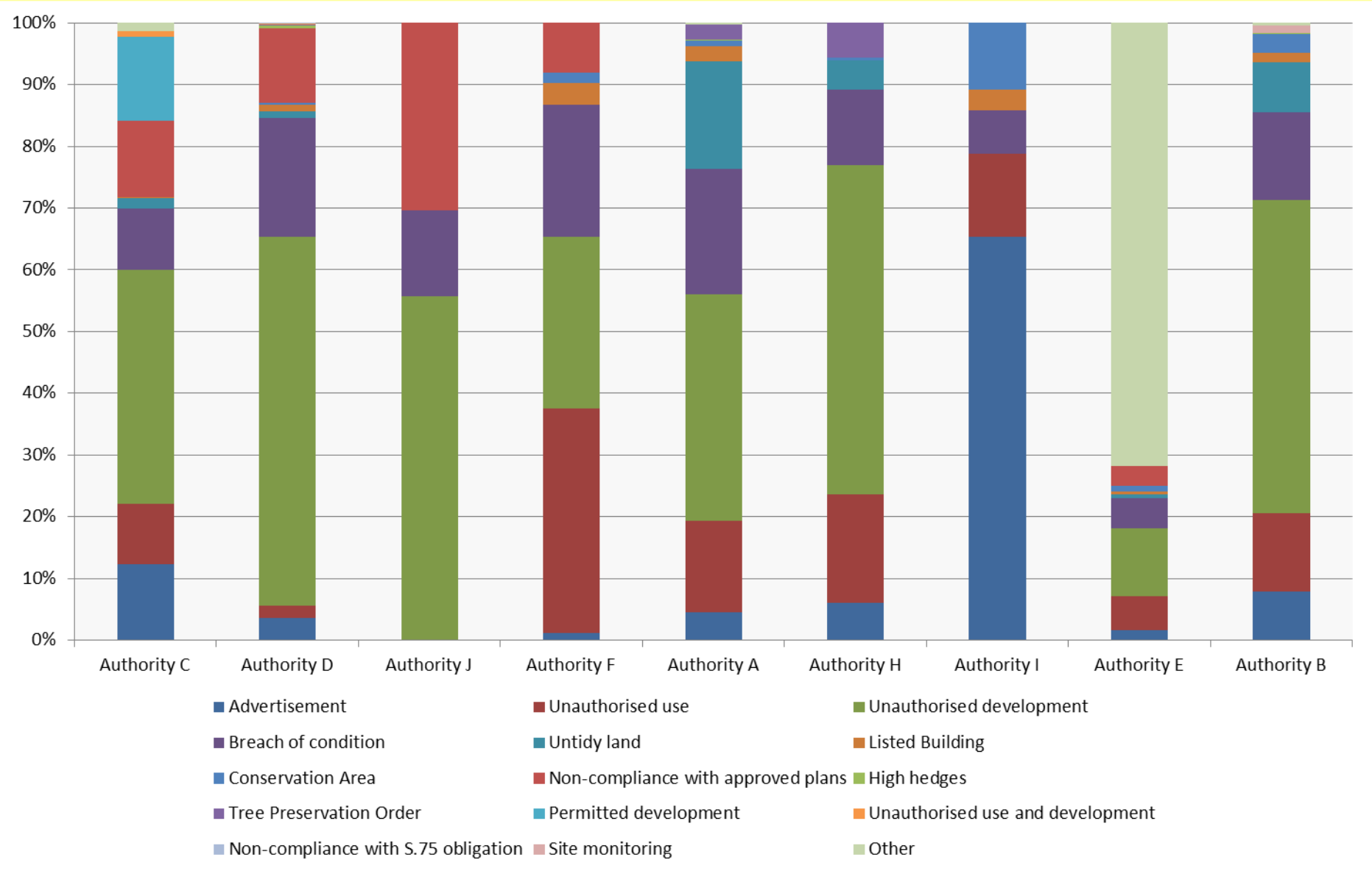


Figure 6.8: Proportion of breach by type 2011-2015, by planning authority (for authorities with *, see data limitations below)

6.3 Exercise of formal powers

Types of breach

As Figure 5.12 illustrates, the proportion of breach types varies considerably between authorities. While unauthorised development is the commonest breach type for six of the nine authorities, there are quite different patterns of other types of breach. For example, Falkirk appears to have a very specific issue relating to unauthorised advertisements; unauthorised use appears to be a more significant issue to CnES; while East Ayrshire has a greater proportion of 'untidy land' cases.

Rates of breaches of conditions appear relatively consistent across most authorities.

Numbers of breaches reported

Figure 6.9 below.

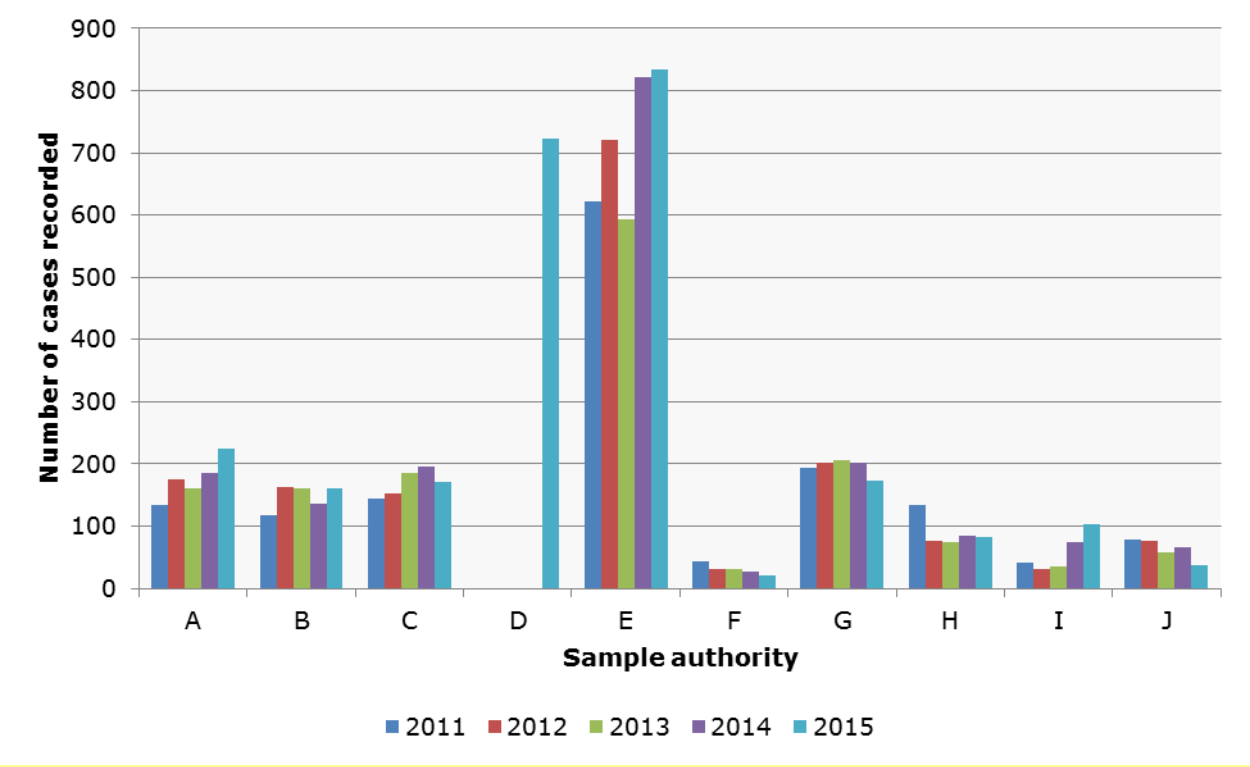


Figure 6.9: Cases recorded by authorities, 2011-15

Clearly, Authorities D and E have substantially higher numbers of cases than the other authorities sampled. They are both relatively populous, but not especially densely populated compared to other authorities in the sample. They do, however, have relatively high rates of development pressure. Follow-up discussions with officers also suggested that rates of reporting may also be higher than for most authorities.

Types of action

As previously indicated, informal action is by far the most common approach to addressing breaches of planning control. However, when formal action is taken the nature of the intervention is generally guided by the type of breach that has occurred, given the range of specific mechanisms in place – in that targeted tools are available to, for example, address Breaches of Conditions etc.

Again, it is unfortunate that the range of notices used is not recorded consistently between authorities as this makes definitive comparison challenging. The chart below has been pulled together from the 10 datasets, homogenising results into the illustrated categories (data for Authority E was extrapolated from notice and breach data, as only one record was returned for notices issued – likely an issue with the data download).

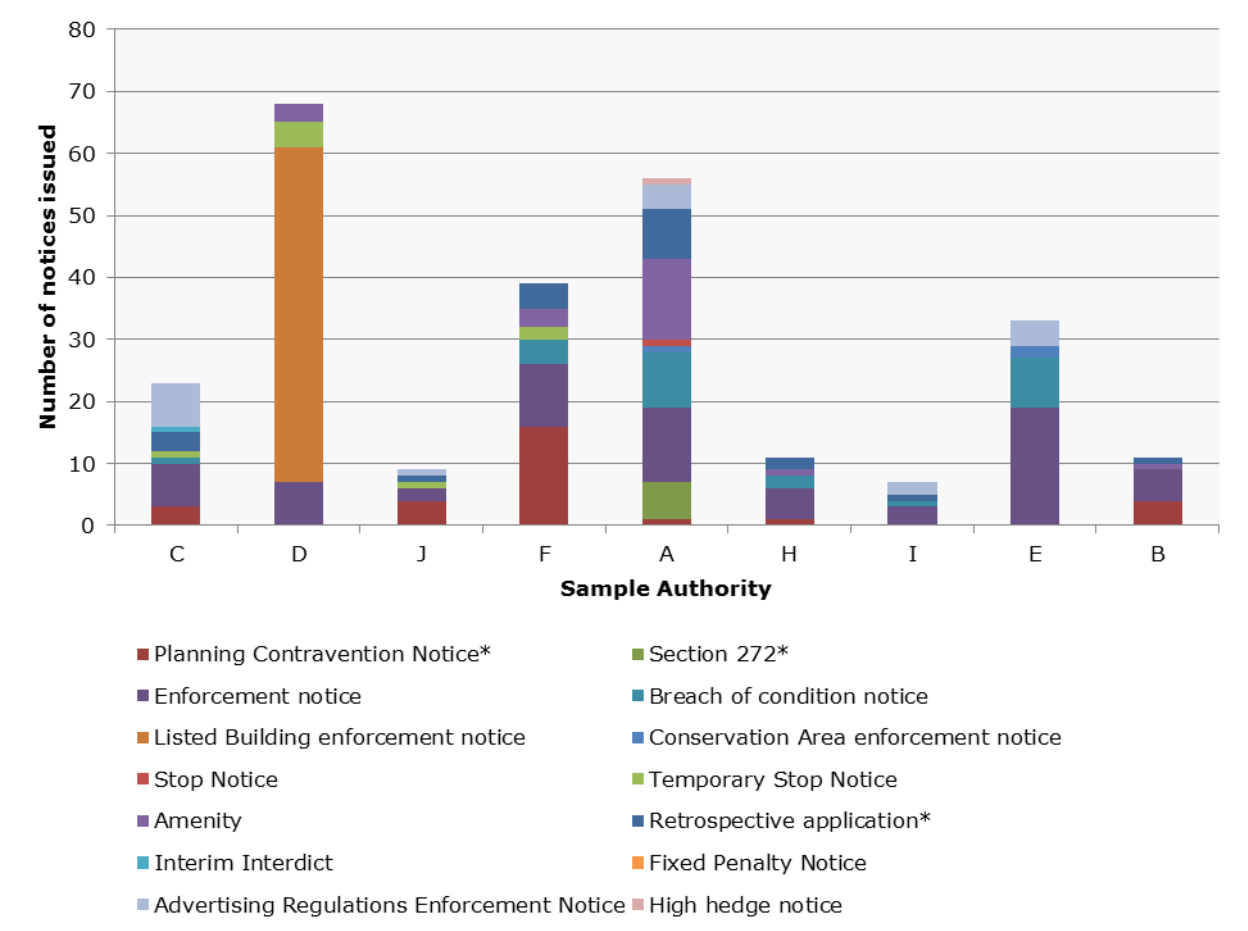


Figure 6.10: Notices issues 2011-2015, by planning authority (*notices do not constitute 'taking enforcement action') Aberdeenshire data for 2015 only

None of the authorities that supplied data used Fixed Penalty Notices during the sample period (although anecdotal evidence suggests that they have never exercised this option).

It is perhaps surprising that Enforcement Notices, as the most flexible tool available to enforcement officers, do not appear to be used most frequently. (In Chapter 6, planning authority respondents indicated that this was the case.) While it may have been expected that the rates of notices being served might broadly mirror the numbers of that type of breach, it appears that – for example – breaches of condition are more commonly resolved through informal means. Similarly, where Authority I displayed a

particularly high rate of advertising-related breaches, comparatively few advertising enforcement notices had to be served – again suggesting that informal solutions play a substantial role in addressing the issue.

Authority D's use of Listed Building Enforcement Notices is particularly striking, comprising the vast majority of the notices served. However, it should be noted that the council was only able to provide data for 2015 – and that a specific effort had been made to clear the backlog of cases. Nevertheless, the authority issued many more notices in one year than the others did in five, so this relates to an impressive effort to remedy unauthorised works to historically and architecturally important buildings across the authority area.

Authority D's data also reveals an interesting pattern of activity, also related to managing the impacts of unauthorised development on Listed Buildings. In 44[13] instances, the Council applied to the Sheriff for interim interdicts to restrain breaches of planning and listed building control – all of which relate to cases for which Listed Building Enforcement Notices were also served. In 34 cases, as shown in Table 5.1 below, positive planning outcomes were secured in the form of compliance, regularisation through planning applications or agreement of non-material variations to existing consents. The remaining 11 were deemed not in the public interest to pursue.

Table 6.1: Authority D Interim Interdict application outcomes

Outcome of Interim Interdict application	Breach type		Total
	Non-compliance with conditions	Unauthorised development	
Full compliance	4	15	19
New or Retrospective application approved to address breach	1	13	14
No Enforcement Action - minor breach not expedient to pursue Action/Not in Public Interest	2	9	11
Non-Material variation agreed to address breach of Approved drawings	1		1
Total	8	38	44

No other applications for interdicts were visible in the data from other authorities – although numerous Listed Building and Conservation Area breaches were. It appears that this approach has worked well for the authority concerned, resulting in mostly positive outcomes. Because of the structure of this authority's data, it is possible to identify these cases, and understand that they have all been subject to previous enforcement notices – with which the developers have not complied. Being able to discern this process from the data is particularly useful as it gives the planning authority insights into the rates of non-compliance with notices and the measures that prove effective in restraining and regularising such breaches.

[13] Three cases were recorded with 'n/a' breaches and outcomes and were not, therefore, counted.

Types of development

As noted above, only one authority systematically records the type of development involved in breaches of planning control (in place of breach type information). All other datasets include descriptive information on the nature of breaches and key facts, but coding and quantifying this information would be prohibitively time-consuming, resource-intensive and – ultimately – subjective.

Testing an alternative approach

Phrase analysis, using statistical package JMP's 'text explorer' function, provided a useful impression of key issues occurring in Authority B (selected because of lengthy and frequently-updated descriptive fields) by highlighting repeating phrases and counting instances. The ability to exclude terms reveals some interesting patterns in the occurrence of issues, including:

- Erection of fencing (44 instances);
- Unauthorised development in domestic gardens (69 instances);
- Unauthorised use of shipping containers for storage appears to be a major issue (176 instances);
- Small-scale householder changes – such as satellite dishes and solar panels – in Conservation Areas;
- Expirations of temporary consents, especially for meteorological masts for wind farm sites (20 instances for met. masts alone).

Error! Reference source not found. below illustrates the frequency of the top six phrases used in Authority B's breach descriptions. The full phrase analysis output is included for reference in Appendix 2. While this approach can provide useful insights, it is comparatively subjective – requiring the selection of phrase length, 'stop words' and considerable specialist interpretation of what is potentially interesting. It is an expedient solution and should not be considered to be an appropriate proxy to more systematic data recording.

6.4 Reporting of breaches

Consistency of data is a particular issue for this subject. However, sufficient data is available to make the following observations:

- Members of the public, particularly neighbours, are by far the most common source of reports to enforcement services
    - For most authorities, email is now the most common reporting means, accounting for over 50% of cases in some areas (e.g. Authority G, 68%).
    - Online reporting systems – via authority websites – are surprisingly poorly represented, with the majority of breaches coming via email or telephone
- Some authorities (e.g. Authority C, 13%) appear to have higher rates of reporting through Elected Members;
- Site inspections / monitoring are not well recorded – again, most datasets do not include this as an option

- Authorities F, B, I and A – in the form of NID/NCD – include this information, but this rarely comprises more than 12% of caseload; Authority I is the exception with site visits comprising 21% of reports.

- Other elected representatives (MP, MSP) are occasional sources of reports

6.5 Decision making

It is important to remember that enforcement action is taken at the discretion of the planning authority. There is no statutory duty on authorities to undertake enforcement action for all breaches of planning and listed building control, rather an expectation that they will take action commensurate with the nature and severity of the breach.

For each case reported, authorities first need to investigate the alleged breach, determining whether a breach has indeed occurred, establishing the facts of the case and reaching a decision on whether enforcement action is required to regularise unauthorised development and protect the public interest.

Cases not taken up

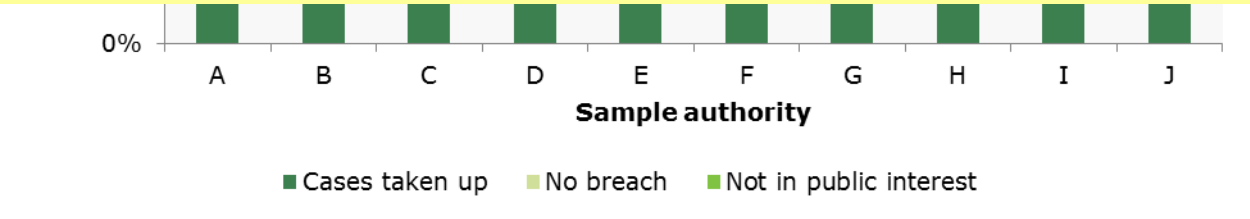


Figure 6.11. This underpins the interpretation of these authorities' significantly larger caseload over the sample period relating to higher rates of reporting and development pressure (see 0 above) – rather than significant differences in patterns of breaches of planning control.

Similarly, each authority had a number of cases that, due to the nature or extent of the breach, were not in the public interest to pursue.

There are two potentially key factors underlying these figures:

- Over-reporting of suspected breaches of planning control – resulting in (sometimes very) large number of cases that require investigation, but are found not to be breaches; and
- Reporting of substantial numbers of breaches that are very small-scale and minor in nature ('de minimis' breaches) that – while technically unauthorised development – do not result in adverse effects on amenity or the public interest.

This suggests that the proportionality of the approach taken by officers and authorities is not well understood by the public and others reporting alleged breaches – potentially suggesting the need for tools or guidance to focus reporting more effectively.

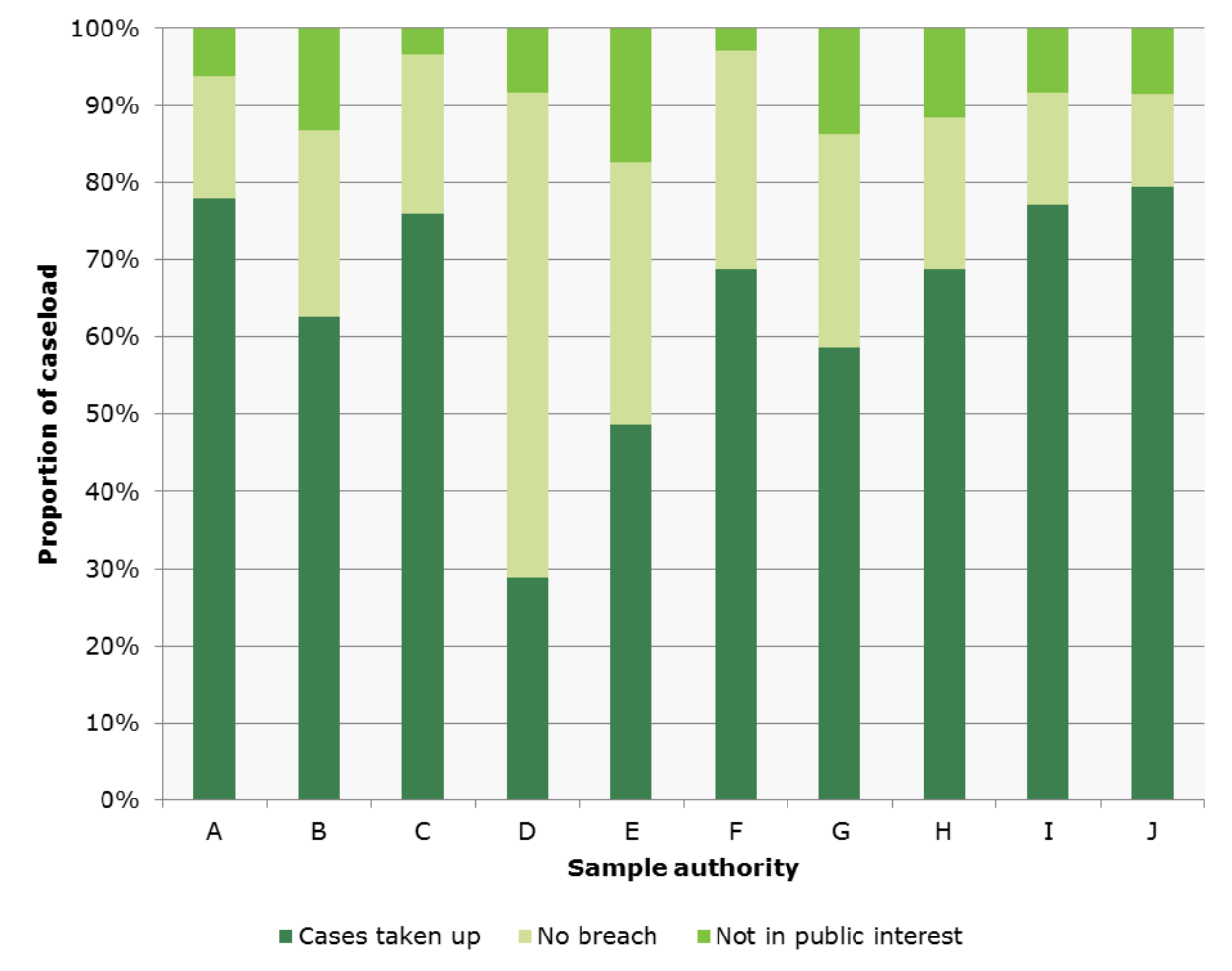


Figure 6.11: Proportion of cases found not to be breaches of planning control, or not expedient to pursue (not in public interest / de minimis breaches)

Across the sample authorities, 'no breach' cases as noted above comprise on average 10% of caseload – meaning that a substantial allocation of officer time is spent investigating cases where no breach has occurred, with no prospect of action being taken. When combined with breaches that are found not to be in the public interest to pursue, this accounts for an average 35% of total caseload. Although the actual proportion of officer time spent on these cases is likely to be lower overall, this still represents a major use of resources.

Where possible, examination of case duration reveals no specific pattern to the duration of 'no breach' cases – with many being resolved quickly (within a few weeks), to others that remain live for well over a year, and everything in between. It therefore appears that the key variable is not whether or not a breach has occurred, but the difficulty that the process of investigation for individual cases can pose – particularly where information takes a long time to gather, including from landowners/occupiers/developers.

6.6 Patterns in the data

Case duration

For the majority of authority datasets, it is possible to examine the average duration of cases over time and by type of breach. This is more instructive when viewed at an individual authority level, as illustrated below by the following examples.

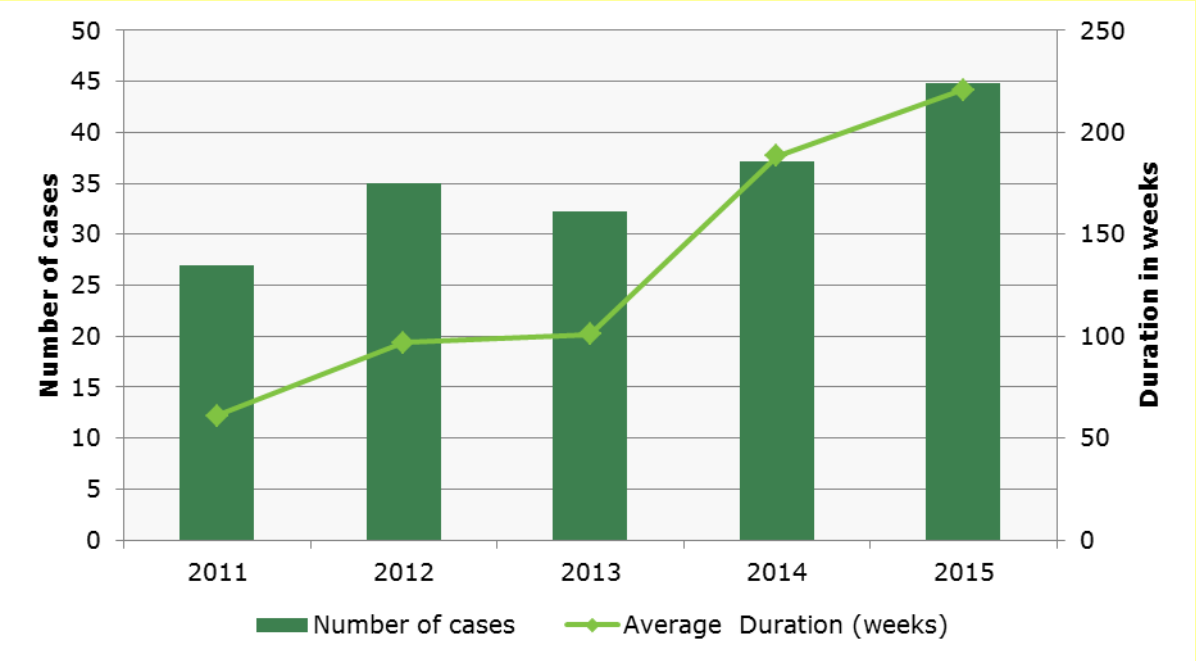


Figure 6.12: Authority H, average case duration against number of cases 2011-2015

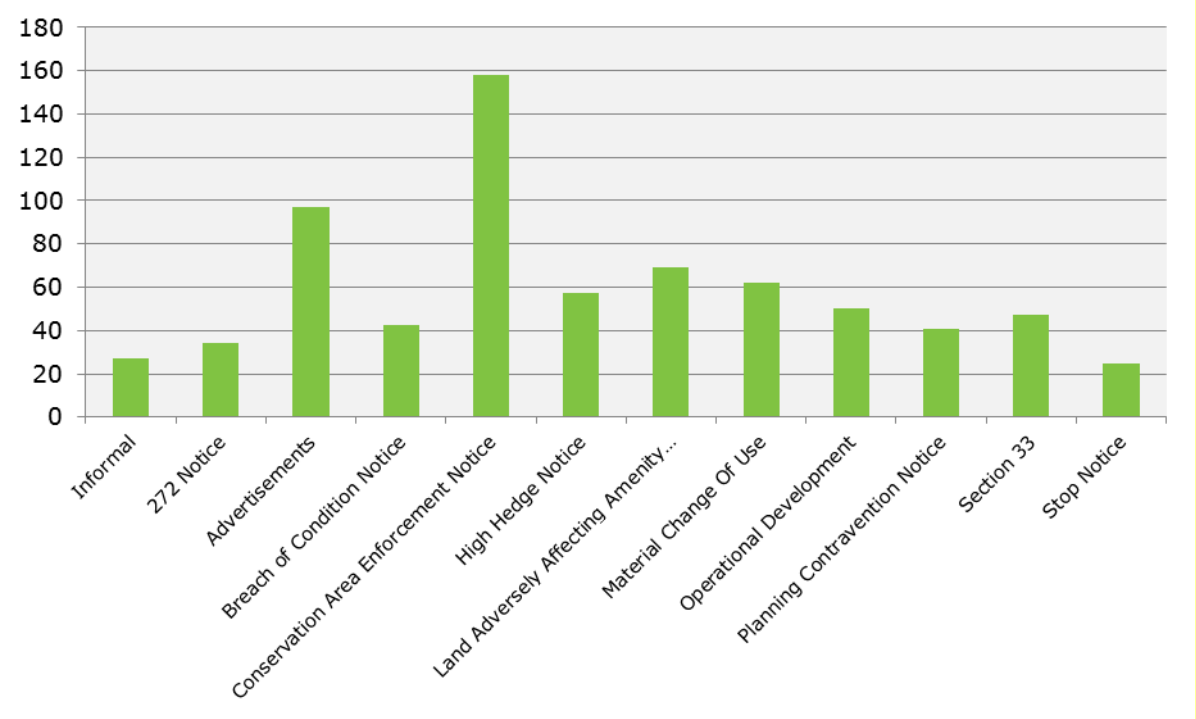


Figure 6.13: Authority H, average duration by notice type

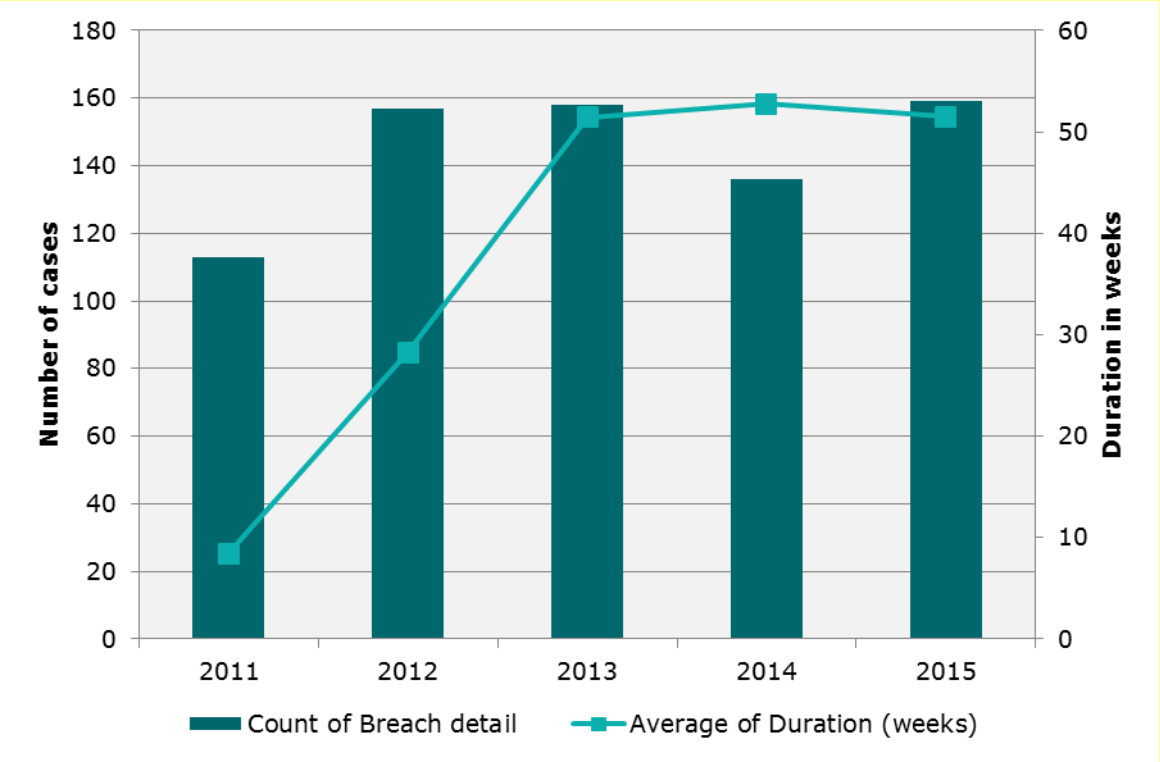


Figure 6.14: Authority B, average case duration against number of cases

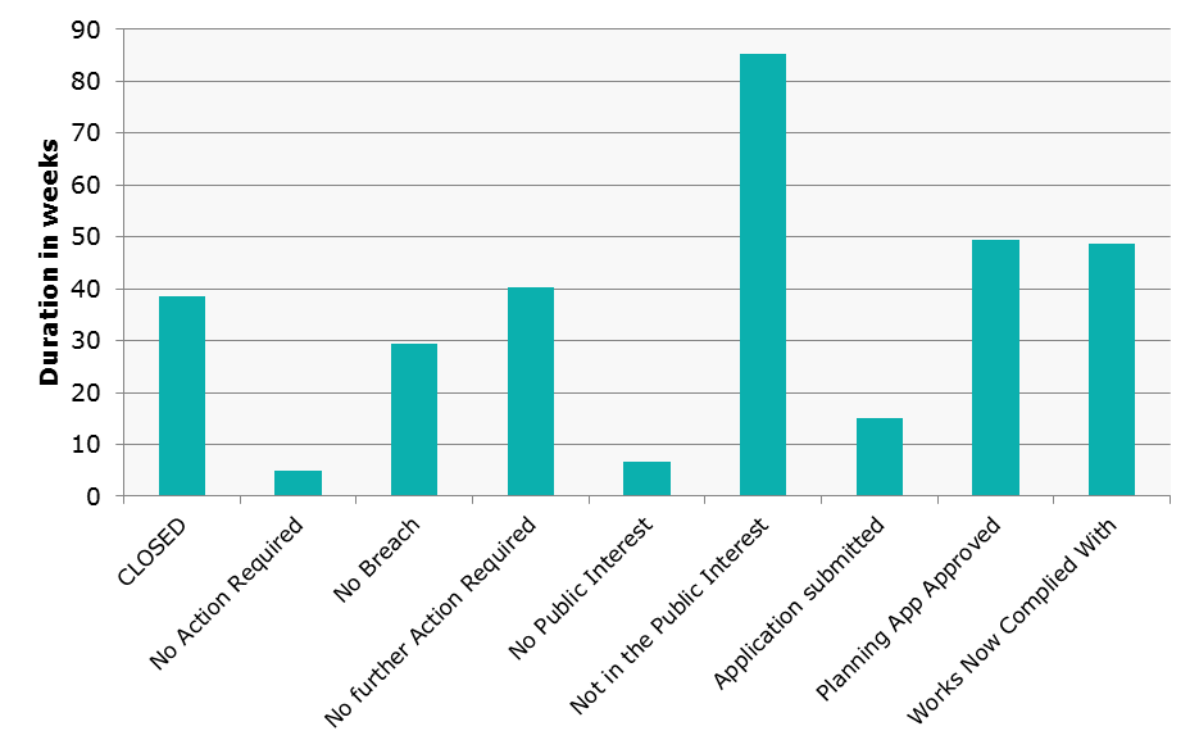


Figure 6.15: Authority B, average duration by decision type

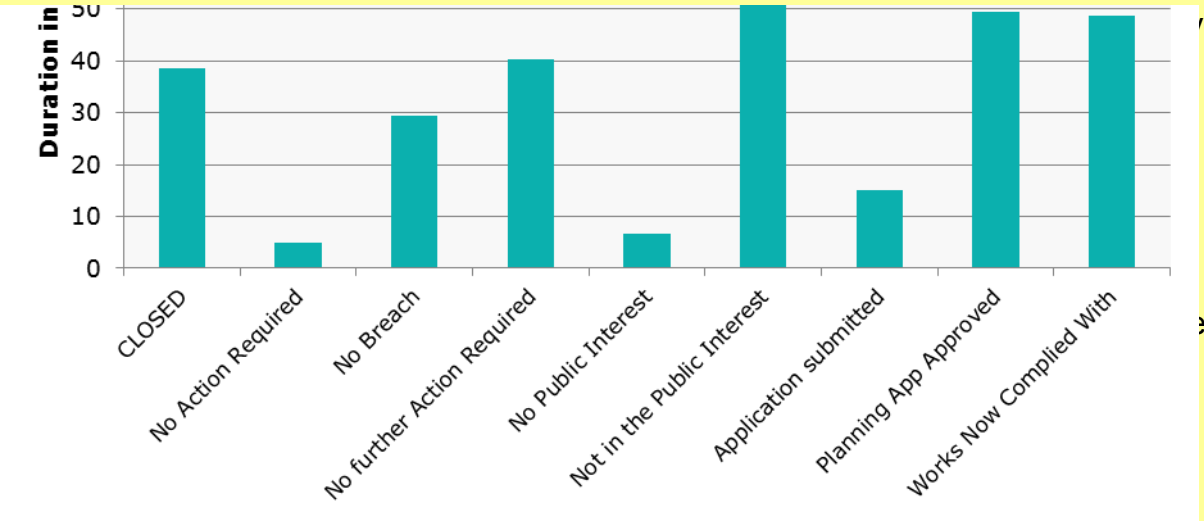


Figure 6.15).

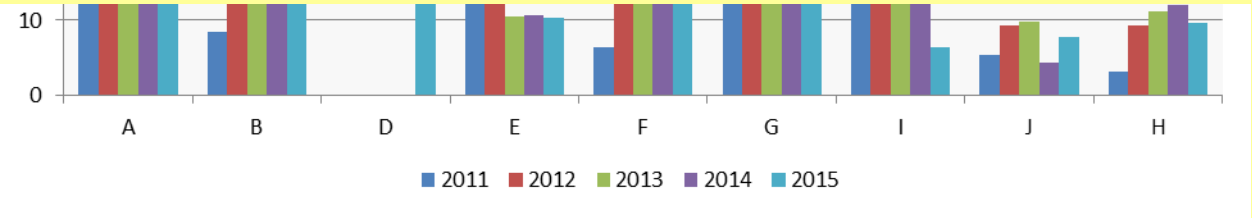


Figure 6.16 shows, overall trends vary substantially between authorities – with four displaying trends of broadly increasing case duration and three with generally reducing duration.

[14] Case duration is used as a metric in this context because data is available for most of the sample authorities – rather than it necessarily reflecting effectiveness.

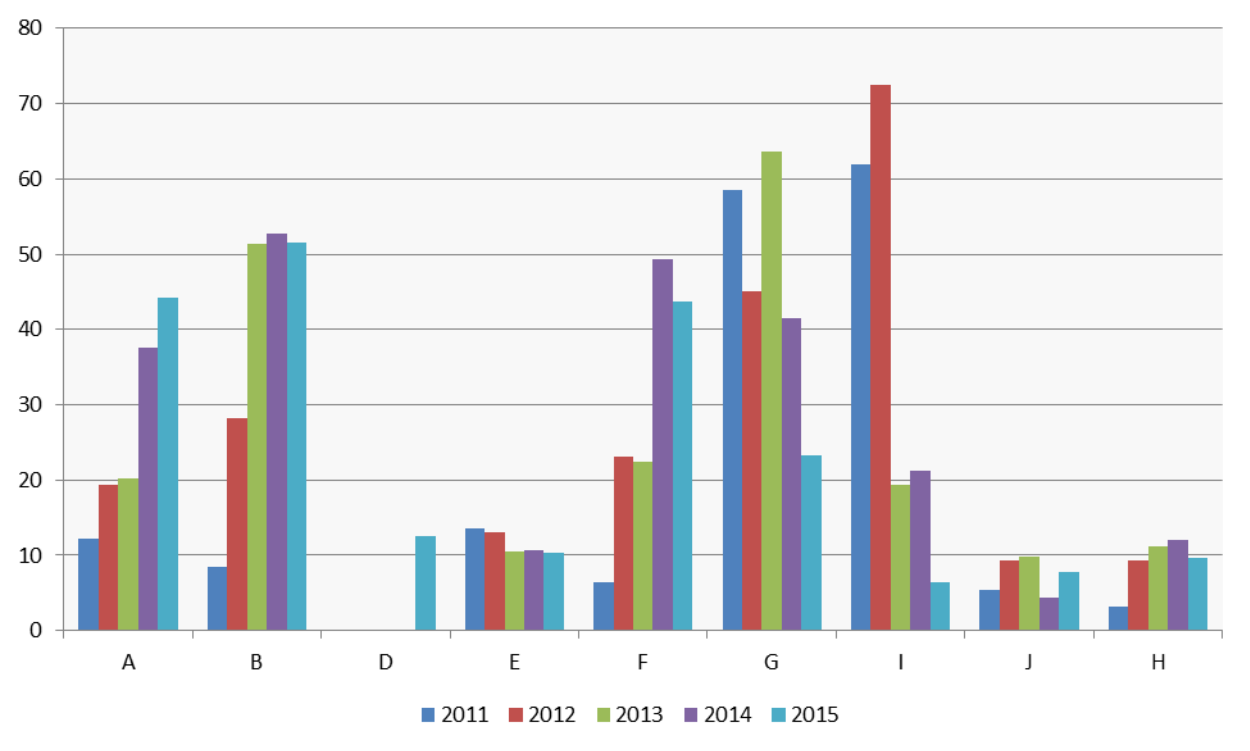


Figure 6.16: Average case duration, 2011-2015 (no data for Authority C)

Action taken

As illustrated by Figures 5.13 and 5.15, authorities are taking individual approaches to addressing breaches of planning control, with some (D and F) deploying a greater proportion of formal action, while some use a far narrower selection of the available formal tools than others – but generally driven by the nature of the cases coming forward. Unfortunately, the data as currently available does not allow easy systematic comparison of breach type against means of resolution.

Similarly, the structure of the data means that, where breaches have not been resolved, the next steps – e.g. reporting to the Procurator Fiscal – are generally invisible within the data. Only Authority D's data includes outcome information and routinely records non-compliance and next steps (hence the ability to detect applications to the courts for interdicts).

As noted above, Fixed Penalties Notices are wholly absent from the sample data.

6.7 Barriers and opportunities

Legal powers

Barriers

At present, authorities appear to be making good use of most of the tools available, varying in line with the requirements of the cases presented and the necessary approach to resolution. The data is silent on whether there are differentials in terms of effectiveness, and case duration – while available – is not a suitable proxy.

No authority within the sample group made use of Fixed Penalty Notices or obviously reported cases to the Procurator Fiscal for prosecution. (Small numbers of cases were put forward for prosecution during the study period, but national data returns do not

elaborate on which authorities made the reports.) Similarly, only one authority made use of powers to apply for interdicts to restrain breaches of planning and listed building control. It is, however, interesting to note that this appeared to be a successful means of dealing with non-compliant listed buildings enforcement – and something other authorities could potentially learn from.

Stop Notices and Temporary Stop Notices are extremely infrequently used, perhaps surprisingly so. It would be useful to understand whether this is a function of administrative issues, or whether frequent use is unnecessary based on the cases encountered. Follow-up interviews indicated a mixed picture – with one respondent highlighting that the speed of Interim Interdicts (both in serving and removing if required) makes them a more effective tool.

Informal action is revealed as both the dominant and potentially most effective – in terms of weight of numbers – means of dealing with breaches of planning control.

Opportunities

The data is not especially instructive in highlighting opportunities for improvement in terms of the exercise of legal powers, generally recording what has been done rather than why. Nevertheless, the comparative rarity of more active mechanisms for restraining breaches, in the form of Stop Notices and applications for interdicts, suggests that – while the vast majority of casework does not call for such measures – there may be a benefit in reaffirming the value of these tools.

Recommendation:	
2	**Consider the value of guidance and best practice worked examples to encourage the use of Stop Notices and the use of interim interdicts to restrain urgent breaches of planning and listed building control.** ***Rationale**: learning from the experience of authorities that routinely take a stronger and more interventionist approach to restraining key types of breach (particularly unauthorised works to listed buildings)*

Technical

Barriers

At present, the structure and content of the available data is a key barrier to an accurate and consistent understanding of patterns of enforcement in Scotland.

While this does not necessarily hamper enforcement action on the ground, it makes understanding the patterns of activity and action even within authority areas more challenging than it needs to be.

Opportunities

As set out in **Recommendation 1**, there is considerable merit in investigating the feasibility of developing consistent data standards for planning in Scotland.

More effective, richer data could help authorities manage their resources more efficiently based on understanding of emerging trends. Similarly, the information included in national statistical returns and Planning Performance Frameworks could better explain what enforcement officers are doing – particularly with regard to the amount of time spent investigating ‘no breach’ cases. Similarly, being able to explain the reasoning where cases are dropped due to de minimis breaches, or where it is not in the public interest to pursue resolution, could help in reassuring communities.

Logging the case input time required from individual officers could also be a valuable addition, helping to track what proportion of cases are genuinely resource-intensive, and which are merely long-running.

Practical

Barriers

Rates of reporting, and the amount of time spent investigating cases with no realistic prospect of – or need for – enforcement action is an important consideration, as well as a potential barrier to deploying time to where it would add more value.

The public and stakeholders, based on the available guidance and Enforcement Charters, are unlikely to have a sufficiently strong understanding of:

- What constitutes a breach of planning and listed building control;
- What the appropriate tests of acceptableness will be; and
- How the planning authority measures the public interest.

This could in part account for the significant numbers of abortive cases across all authorities – and the particularly high reporting rates for Aberdeenshire and Fife. Data confirms that the general public are by far the most significant source of reports, and therefore providing better quality information and education at the point of reporting could be beneficial.

Opportunities

A comparatively easy win may be the preparation of consistent, accessible guidance for communities and stakeholders explaining the enforcement process, its key purposes and tests to which breaches will be subject. Potentially, a simple online tool could help to guide those seeking to report a breach through the process, helping to front-load proportionality in the system.

Recommendation:	
3	**Consider the development of simple, accessible guidance to planning enforcement for communities and stakeholders** ***Rationale****: improve the level of public knowledge and understanding of the purpose, process and outcomes of planning enforcement; potentially reduce rates of over-reporting.*

7 Perceptions of planning enforcement: enforcement officers

7.1 Introduction

This section of the report draws out the findings of a series of surveys and interviews that sought to gather the opinions and experience of key stakeholders.

23 responses from local authority enforcement officers – all from different planning authorities – were received. Not all respondents answered all of the questions: proportions given in relation to individual questions therefore relate to those respondents who provided answers, rather than of the overall total.

Caseload

All local authority respondents indicated that the vast majority of their caseload is derived from unauthorised householder development, generally highlighted by other members of the public.

Balance between reported breaches, investigation and action taken

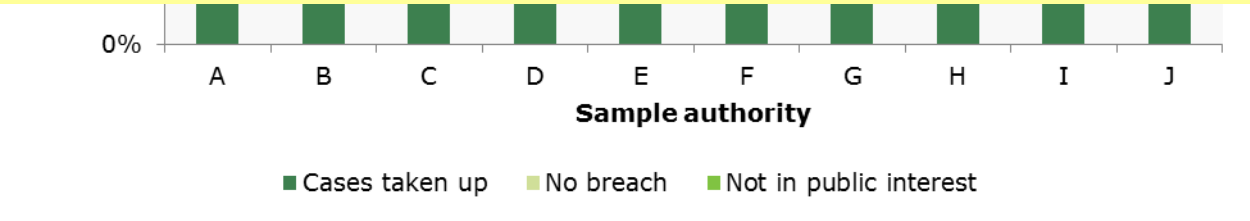


Figure 6.11, on average these cases actually comprise around 10% of caseload.]

When asked why some reported breaches are not taken up, the dominant explanation (recorded by 10 respondents) was that it was either not expedient or not in the public interest to take action. A further seven respondents highlighted the number of reported cases in which no breach of planning control occurred.

Informal action

Types of breach

As shown below, of the 20 responses received in relation to the circumstances which most frequently prompted informal action, nine of these noted cases where the breach was relatively minor and / or unintentional as being the most frequent. In these cases the breach was not classified as being serious enough to warrant formal action.

Informal action was most frequently taken by a further two respondents in cases where the consequences of non-compliance would not pose significant risk to public health and safety, or be detrimental to amenity. In addition, four respondents most frequently employed informal action in response to breaches where circumstances indicated that this may be more effective than a formal approach.

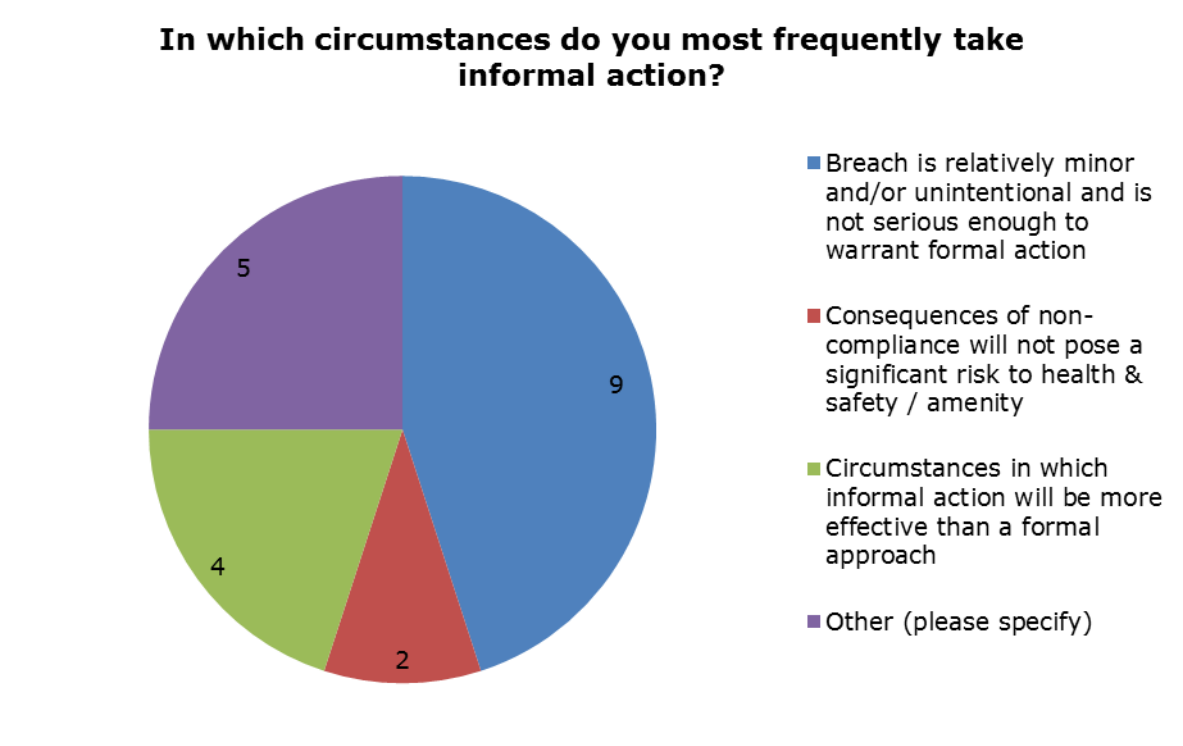


Figure 7.1: Circumstances in which informal approaches to enforcement applied

Within the further five responses two noted that in all but the most serious cases, informal action and negotiation are the first stages of any resolution process, and generally result in the breach being resolved. This approach is as recommended by Scottish Government Enforcement guidelines.

In free text responses, one respondent highlighted that the priority is generally to resolve or mitigate the breach on the ground. Instigating formal action is complex and time consuming, while any delays in resolving the issues could result in further, or more severe harm.

Respondent quotes:

"The main harm caused by breaches relates to natural heritage issues. The priority is to get the breach resolved/mitigated on the ground. Instigating formal action is complex and time consuming. Any delays in resolving the issues could result in further/worse harm."

"In all but the most serious cases informal action and negotiation is the first stage and usually results in the breach being resolved."

"The vast majority of cases are taken up by issuing of a letter first before formal action is considered through the serving of an enforcement notice."

It was also noted that key judgements on whether to take action include effects on amenity (including appearance) and other issues such as any impact on neighbours etc. The past history of the individual, with regards to planning breaches, is not considered to be a determining factor in the prompting of informal action.

Role of informal action in the enforcement process

Figure 7.2, (as stated by 10 of the 20 respondents) was the issuing of an advisory letter, closely followed by a request for action (as stated by seven respondents). Two respondents most frequently provided verbal advice, while a further one most frequently provided verbal advice, and then issued a follow up letter explaining the planning requirements.

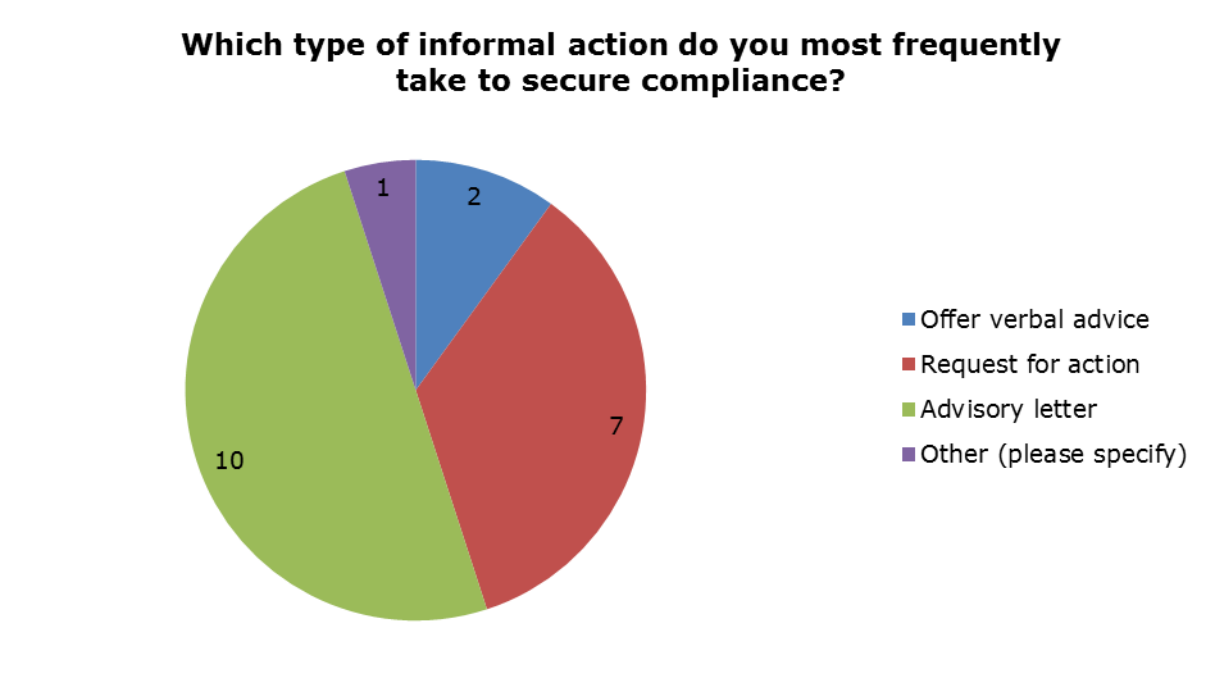


Figure 7.2: Informal approaches applied

Planning Contravention Notices and Section 272 Notices (requests for information on ownership of land) do not constitute 'taking enforcement action'. They were therefore included in this question. However, respondents rightly indicated that – because these are information-gathering tools – they would rarely be effective in securing compliance.

Figure 7.3, was a request for retrospective planning application. This was stated by nine of the 20 respondents. The second most frequently requested informal corrective actions were requests that unauthorised activities cease and / or remove any unauthorised development, and the negotiation of improvements or a request to the person responsible to make alterations or relocate a use. These were both noted by four respondents each.

The remaining three responses highlighted several other examples of informal corrective actions which were frequently employed, including the issuing of a letter to landowners / occupiers outlining all options available. In some cases these were used by the authority to highlight the preferred option. It was also noted that the actions requested were generally dependant on the case in question, with one respondent stating that planning applications were requested for development likely to be acceptable while alterations were often sought if the development was likely to be considered unacceptable.

Respondent quotes:

"Letters to the land owners/occupiers list all of the options available to allow for full disclosure of the possibilities. In some cases however we can highlight a more preferred option eg. indicate that submission of an application for planning permission is likely not to be viewed favourably."

"Planning applications are requested for development likely to be acceptable. Where the development is unlikely to be acceptable alterations are sought. In such circumstances, formal action will be considered should acceptable alterations not be made."

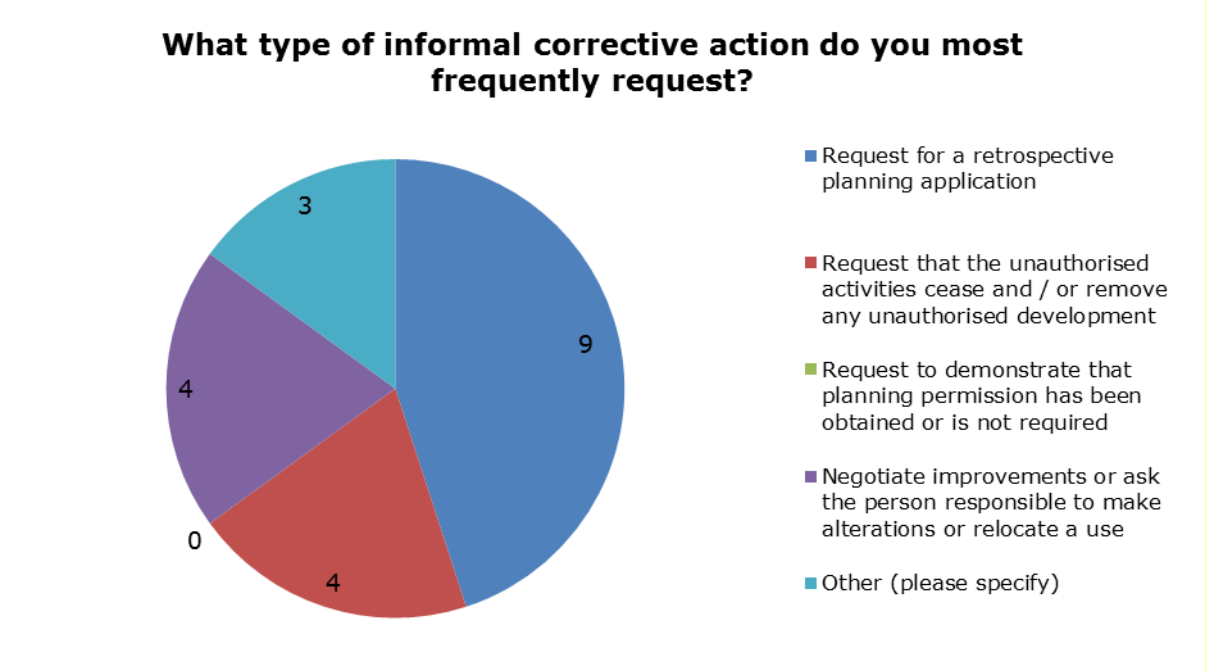


Figure 7.3: Informal corrective action requested

Effectiveness

Of the 18 respondents who provided a response to this section four felt that informal action was *'Very effective'*, with a further nine rating it as *'Generally effective'* in resolving breaches of planning control. Four respondents rated informal action as *'Somewhat effective'*, while only one felt that is was *'Not at all effective'*.

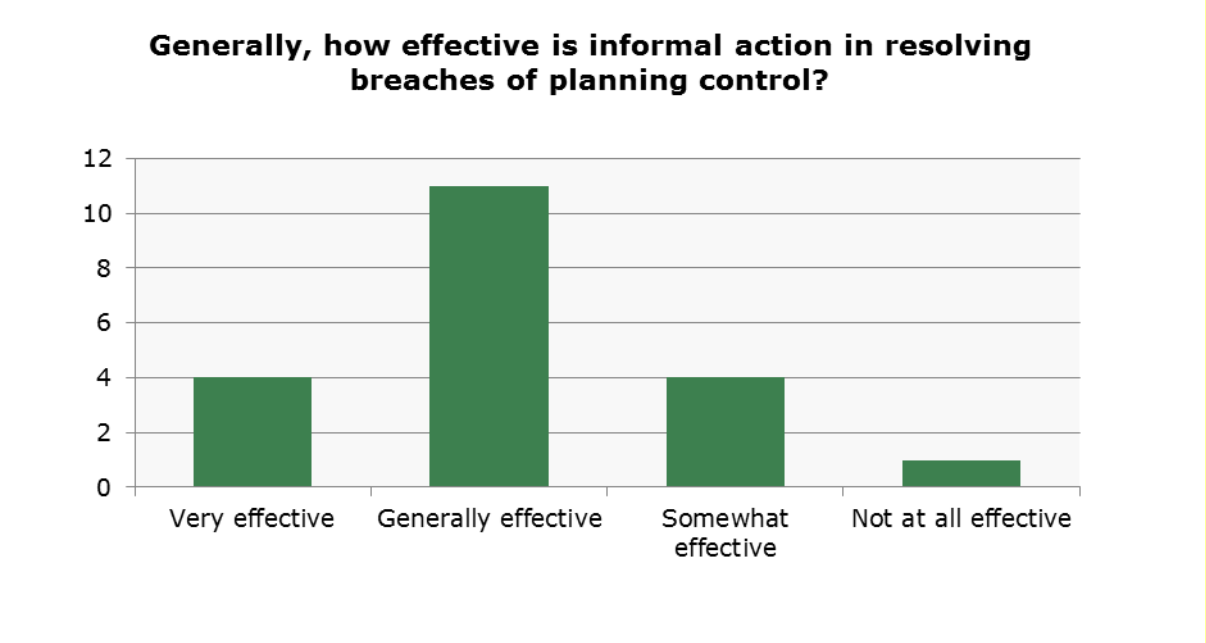


Figure 7.4: Officers' opinions on effectiveness of informal action

It is important to note however that the above reflects the individual respondent's perceptions of how effective informal action is.

However, 16 out of 20 (80%) respondents believed that informal action was either very or generally effective – suggesting that officers have considerable faith in the informal approaches they are able to apply. It should be noted that, as the vast majority of enforcement cases are resolved without recourse to formal means, the quantitative evidence at the national level supports this assertion.

This evidence also suggests that a range of approaches are considered appropriate and effective – and also that officers indicate that these means are attempted in the vast majority of cases, including those for which formal action is also necessary. This reinforces the importance of informal activity as the first step in an escalating process – and the need for this to be more effectively highlighted in national statistics and public-facing planning communications. (While this is covered in the 'cases taken up' and 'breaches resolved' statistics, that authorities are able to solve the majority of enforcement casework without recourse to formal measures could be hailed as a successful service.)

The flexibility of informal approaches is clearly valued by officers. It enables a 'light touch' approach that encourages developers to take relatively simple steps to resolve breaches; or alternatively, to clearly set out the pathway that will be followed in the event of non-compliance, providing an effective 'stick' to match the 'carrot' of avoiding formal action.

From a 'customer' perspective – particularly where a breach has occurred unknowingly – this is also likely to be valued, as the prospect of enforcement action can be daunting, particularly for developers for whom notification of a breach may have been wholly unexpected. For some developers that have knowingly breached planning control, this may still be effective in terms of prompting a response, and a valuable opportunity to avoid being the subject of formal action. For those that are likely to attempt to evade or postpone action, it is unlikely to have an effect either way.

A key consideration is that the enforcement process is not intended to be punitive or unnecessarily draconian – therefore the value of informal approaches that enable

officers to exercise their professional judgement and experience should not be underestimated.

Formal enforcement action

Types of action taken

In situations where informal action was unsuccessful, the serving of an Enforcement Notice was the most frequently-utilised formal action taken to resolve the breach (as stated by nine of the 18 respondents). The issuing of a notice requiring an application for planning permission for development already carried out was the second most frequently employed formal action taken, as stated by four respondents. In addition the serving of a Breach of Condition Notice was mentioned by one respondent as being the most frequently employed formal action.

- In follow-up interviews, respondents highlighted that they only use Section 33A Notices [requiring the submission of a retrospective application for planning permission] where there was a reasonable chance of that application being approved – liaising with Development Management colleagues where necessary. It was considered important not to give developers/landowners false hope where an unauthorised use or development was unlikely to be acceptable – or to '*waste DM colleagues' and developers' time*' with applications that could not be supported.

Clearly, the methods employed are strongly dependent on the nature and severity of the breaches encountered by individual authorities. The pattern of answers is unsurprising, given that Enforcement Notices are the most flexible tool available and apply to the widest range of breaches of control. Respondents' comments underline the diversity of approach between authorities.

Respondent quotes:

"…we use BOC [*Breach of Condition*], Section 33A [*Requiring retrospective applications*] and Enforcement Notices."

"Between 2011 and 2015, the Council used S.179 Notices [*requiring the proper maintenance of land*] most frequently, with similar numbers of Breach of Condition and Enforcement Notices issued."

As illustrated by the quantitative data discussed below, it is clear that each authority has its own processes and procedures, which give rise to a preference for particular types of action – based on the types of developers, breaches of control and types of resolution required.

Effectiveness

The most effective formal enforcement measure available, as perceived as a means of resolving breaches of planning, was the issuing of an Enforcement Notice (as stated by 12 of the 20 respondents). One further respondent noted the issuing of an Enforcement Notice and an accompanying Stop Notice as being the most effective, whereas another noted an Interdict and Interim Interdict as being the most effective. Again, this is

reflective of quite different practices – where some authorities feel confident in pursuing and obtaining court orders rather than using the more time-consuming (and potentially less effective) Stop Notice procedure. Clearly, it is difficult to compare the effectiveness of formal measures given that, with the exception of Enforcement Notices, they are all intended for narrowly-defined purposes.

One respondent, in a follow-up interview, confirmed that their authority had ceased to use Breach of Condition Notices (BCN); opting to serve Enforcement Notices (EN) instead. The rationale for this was that ENs have a wider range of possible options for resolution – while the only recourse to a contravention of a BCN is reporting to the Procurator Fiscal (which neither resolves the breach or – as indicated below – is not regarded as a viable option).

In addition it was noted that all types of notice are then reliant on the breach being resolved or a positive response or action. Further issues raised in relation to effectiveness included that the penalties for non-compliance are minimal. This was reiterated by the fact that 14 of 20 respondents classed fixed penalties as *'Not at all effective'*, as a deterrent to breaches of planning control, and the remaining five respondents classed them as only '*Somewhat effective'*. In addition 14 of 18 respondents classed fees for retrospective planning applications as *'Not at all effective'*, as a deterrent, and four respondent classed them as only *'Somewhat effective'*.

The timescales involved in reporting to the Procurator Fiscal were also mentioned as a barrier to the effectiveness of prosecution as a means of redress, with most of the notices being non effective as a result. One respondent concluded that there are limited effective ongoing powers or penalties to secure resolution through formal means.

Respondent quotes: [authors' emphasis for clarity]

"Direct Action - requires budget availability. There are also ongoing **difficulties in recovering monies**. Fixed Penalty Notices - involve a small one-off fine of £300. There is a cost to administer. The **fine payment does not secure compliance**. They can only be used after an enforcement notice or breach of condition notice has been served and then not complied with. **Prosecution - cases are unlikely to be taken up** which significantly reduces the power to enforce non-compliance with a notice."

"…Council has not previously pursued cases beyond the notice however are currently **considering Direct Action in a number of cases**."

"**Direct action and prosecution are the most effective**."

"Very few cases are unresolved after an enforcement notice is served however direct action is undoubtedly the most effective means of resolution. **FPNs do not resolve a breach and only withdraw the LAs option to prosecute**. Prosecution remains a somewhat **cumbersome and time intensive means of regularisation** and also takes the final decision on case progress outwith LA control."

"Direct action is not possible due to the **council not having financial resources to carry the costs and then claim back** if possible. We **do not use fixed penalty notices** as they do not resolve the breach. Prosecution is such a lengthy and time consuming process and any cases that have been successfully taken up by the

Procurator Fiscal have either resulted in a **miniscule fine** (£500) or a warning or the fiscal has decided not to take action."

"The mechanisms to resolve breaches are all **limited by either the financial implications of undertaking the direct action or the extended legal processes** involved in implementing them. Direct Action is really only realistic for minor issues such as removal of adverts. Otherwise the benefit of this method is **compromised by the potential exposure of the council to unrecoverable costs**. In regard to Fixed Penalty Notice this is in reality ineffective as there is no compulsion to pay as the penalty is low and if not paid more often than not it **isn't worth the council pursuing through its debtors process** and also as it is such a small sum relative to the scale of the works to remedy it doesn't act as an effective disincentive. The legal prosecution process is also an involved process and requires to meet the **public interest test of the procurator fiscal**."

"**Prosecution is not effective due to having to report matters to the Procurator Fiscal**. They are normally reluctant to take forward planning cases. Fixed Penalty Notices effectively **allow contraveners to buy immunity from prosecution and planning permission**. If the development can remain following a Fixed Penalty Notice, what is the point in taking enforcement action in the first place? Direct Action can be effective but places the onus on the Planning Authority to spend its time and finances and then try and recover costs. **Absentee land owners can avoid any responsibility where the expense of recovering costs outweighs the costs the Planning Authority is seeking**."

"We have not issued a fixed penalty notice due to the complexity involved and the lack of enforceability."

Officers' opinions provide a nuanced view on the effectiveness of the range of options available through the formal enforcement process. There appears to be agreement that they generally have the 'tools for the job' – but that the process is inherently weakened by the length of time required to take action and, ultimately, by the fact that prosecution is a cumbersome, inconsistent and insufficiently punitive final sanction on which authorities can rely. Consequently – as discussed below – there is an appetite for more effective, flexible solutions.

Fixed penalty notices were broadly described[15] as not only ineffective measures in fulfilling enforcement's primary function (to regularise breaches of planning control – which they do not achieve), but in fact often a burden on councils to implement with debt collection identified as being an issue.

[15] 14 respondents rated them as 'not effective at all'; 5 rated them as 'somewhat effective'

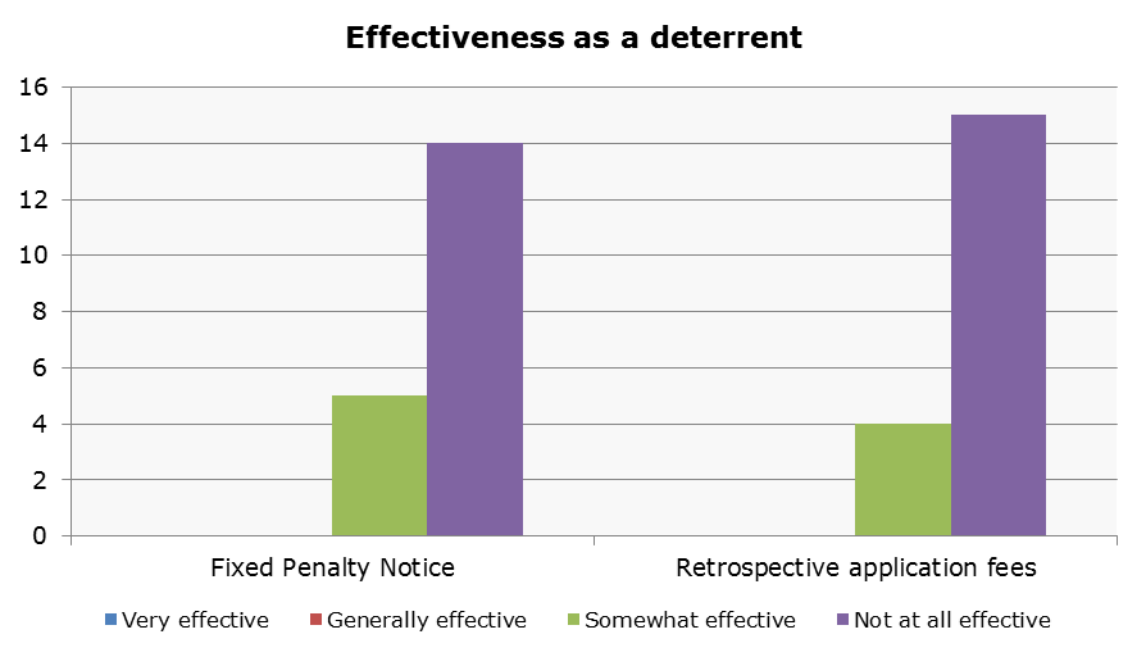


Figure 7.5: To what extent are FPNs / fees for retrospective applications a deterrent?

Aspiration for more active enforcement

A sense of frustration amongst respondents is readily apparent, citing an appetite for greater use of direct action – with at least one authority indicating that they were increasing the number of cases where this was being used or at least sought. Similarly, there is clearly a desire for a more consistent and effective means of seeking – and securing – prosecutions, with meaningful penalties that would both punish those found guilty and act as an effective deterrent.

As noted above, and confirmed by the quantitative data analysed, Fixed Penalty Notices (FPN) are neither widely used nor considered to be a viable option. (There was, however, some interest in a more robust FPN approach that introduced a 'sliding scale' of fines – with relatively low levels for householders, but more punitive charges for commercial / major developers and/or those that have knowingly and deliberately breached planning control.)

While the potential need for deterrence is acknowledged, it is unlikely that the majority of breaches could be prevented through the presence of stiffer penalties, as most are issues of ignorance or omission by householders – rather than a concerted effort to avoid planning processes. Instead, greater public awareness of and engagement with the planning system as a whole may be a more effective means of raising awareness of when planning permission is required. For the minority of deliberate avoiders of planning control, however, enhanced penalties could prevent, or at least reduce, the number of breaches.

Reasons for cases remaining unresolved

Where planning enforcement, both formal and informal, is unsuccessful, a minority of cases remain unresolved. Respondents listed a variety of common reasons why, in their experience, this occurs. The quoted reasons for unresolved cases could be broadly categorised as follows:

- **The role of the Procurator Fiscal**: Councils are unable to prosecute directly (as this has to be done via the Procurator Fiscal). The tests of public interest applied to bringing prosecutions and evidential standards are different, resulting in frequent rejection of cases. In turn, this leads to fewer authorities seeking prosecution both due to low probability of success.
- **Timescale / delay in process**: Where additional time has been allowed for compliance it can be difficult for authorities to adopt a more direct approach at a later date in proceedings, as significant time has elapsed. In addition the developer generally has a number of opportunities to delay the enforcement process; e.g. through the means of retrospective applications, appeals etc.
- **Difficulties in communication**: It is noted that the system is reliant upon negotiation and goodwill of developer to resolve. Difficulties in communication include a lack of cooperation or failure to comply from those who have committed the breach, a non-responsive or absent owner, or difficulties in identifying the individual responsible or landowner. Protracted negotiations may also be an issue.
- **Financial implications for the Council**: Next steps (e.g. direct action) require upfront payments by the Council, in order for pursuit to continue. The cost of direct action or prosecution is often not justified by the improvement in amenity which regularisation would produce.
- **Lack of resources:** Restrictions in resourcing (both staff and staff time) often acts as a constraint to the pursuit of enforcement. This is a particular issue in cases where out of hours investigation is required, or where large historical cases need a much longer time period to resolve.
- **Lack of information:** Prosecution cannot be pursued without the date of birth of the accused. Councils have no powers to obtain a date of birth in cases where this is withheld. Lack of information may also relate to difficulty in first witnessing the breach.
- **Incomplete application:** In some cases an application for retrospective planning permission may be submitted, without the payment of the appropriate fee, or submission of relevant plans. In cases such as this the application remains invalid and is then withdrawn. There is currently no penalty for failing to validate a planning application.
- **Severity of breach:** In situations where the breach is not serious enough to pursue action it may remain unresolved.
- **Public interest:** Local Planning Authorities (LPAs) often feel obliged to act on breaches simply to satisfy a public complaint or due to local member intervention. Upon further assessment it may be that the pursuit of the breach is not in the public interest. In situations where it is not in the public interests to pursue the breach further it was noted that this did not always mean the case was unresolved.

Perceived barriers to use of existing powers

The 19 respondents to this section of the survey were asked to select all options they perceived as being barriers or constraints, that affected the use of, or effectiveness of enforcement powers. The responses are shown below:

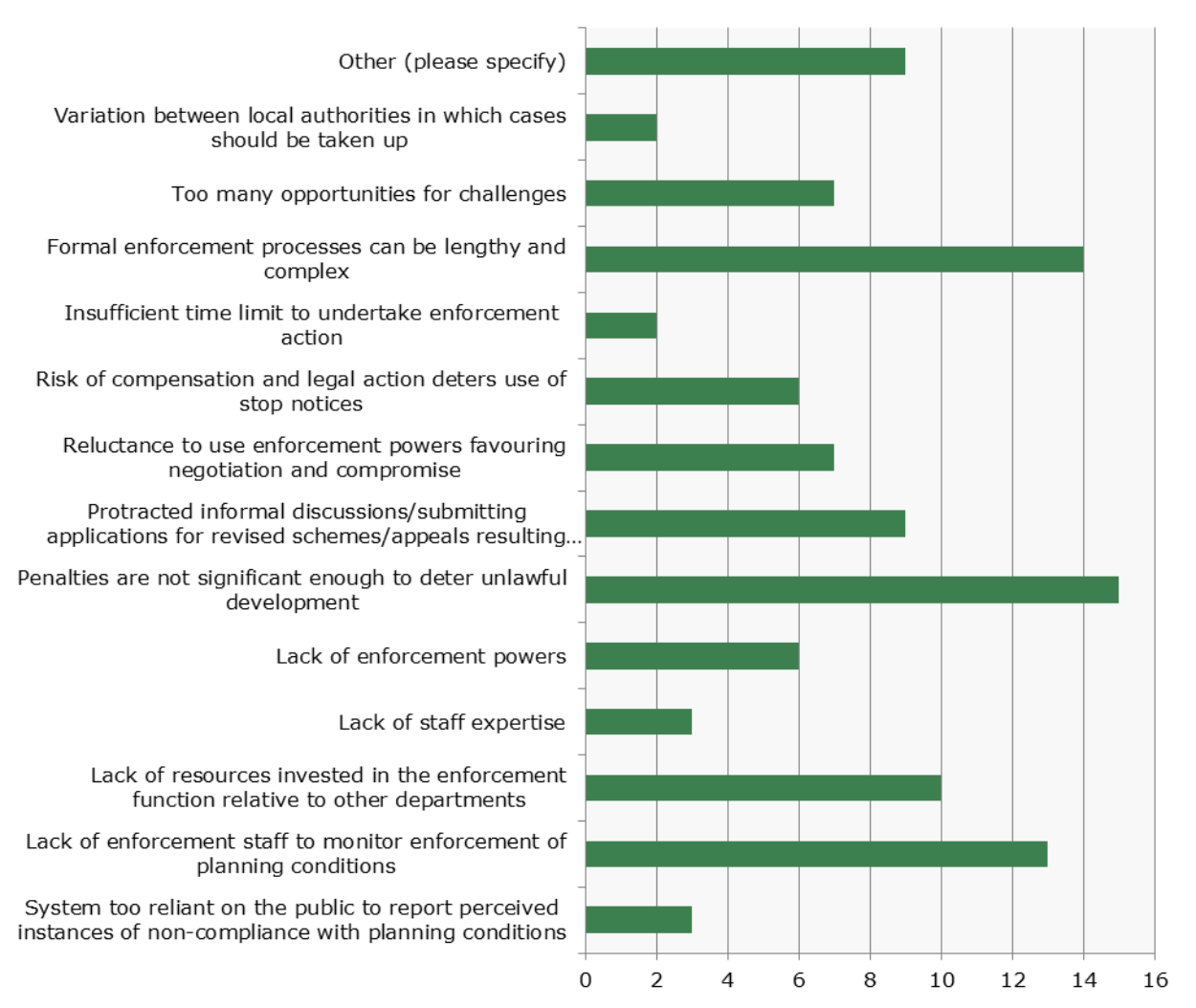


Figure 7.6: Barriers perceived by enforcement officers

Figure 7.6 above, the three most frequently selected answers, which were perceived as a barriers were:

1. Penalties are not significant enough to deter unlawful development.
2. Formal enforcement processes can be lengthy and complex.
3. Lack of enforcement staff to monitor enforcement of planning conditions.

It was highlighted that the current system provides too many opportunities for developer challenge, and resultant delays. The procedures involved, coupled with the [perceived] reluctance of LPAs to fully utilise the powers available, is not conducive to effective or speedy resolution. The system, particularly with regards to unauthorised advertising, is seen to be *'overly complex and open to abuse'*. It is unfortunate that, at least in some authorities, officers report a reluctance to make full use of the powers available –

apparently through a combination of resource issues and potentially a lack of management and Member will.

- Two interviewees noted that, in their authorities at least, enforcement was afforded a reasonable level of priority amongst Elected Members – as it is often of interest to constituents, and the subject of frequent enquiries. However, they suggested that Members – like members of the public – were supportive of more punitive measures.

Lack of resources was also noted as being a key barrier to the use of existing powers, in terms of both numbers of staff and levels of training. The potential cost to the Council if direct action is pursued is also seen to be a barrier to the use of existing powers. Financial constraints on budgets are perceived to seriously undermine actions which may result in costs being incurred to remedy breaches. It appears that enforcement's position as the 'Cinderella service' of planning departments is felt amongst some officers, with comments highlighting the internal struggle for resource especially in relation to development management.

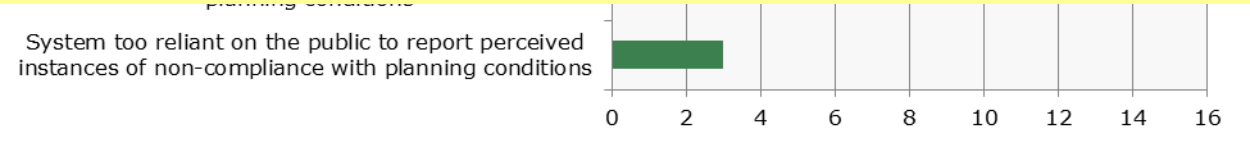


Figure 7.6 above, 13 respondents believed that insufficient resource was deployed in monitoring conditions – resulting in breaches occurring. Similarly, in comments (reproduced verbatim below) one respondent indicated that a lack of precision in the wording of conditions imposed created enforcement issues – presumably either because they were unenforceable or because they were too vague. In either case, this would appear to be a training issue for development management officers, to ensure that conditions both meet the relevant tests set by Circular 4/1998, are practicable in relation to the measures specified and have a clear reporting schedule built in to make it as easy as possible for developers to comply and for the authority to enforce if necessary.

Respondent quotes:

"**lack of expertise in specific circumstances** i.e. reporting to PF and recovery of costs from direct action and penalty notices"

"The system has always provided far **too many opportunities for developer challenge** and resultant delays. The **powers are simply not geared towards effective, speedy resolution** partly due to the procedures involved and partly due to **LAs being reluctant to fully utilise the powers for various reasons**. The system, particularly as regards unauthorised advertising, is ponderous, overly complex and open to abuse."

"lack of resources- **cannot have effective enforcement without increased staff**…enforcement is often forgotten about because of huge focus on Development Management. Even if a successful prosecution is achieved fines are so small that there is absolutely no deterrent. Public are aware that penalites are minimal. Timescales involved are so lengthy and opportunity for appeals etc. means it can take several years to try and resolve a case."

"Ensuring accuracy. Competency. **Precision of conditions/reasons for refusal**. Also again the financial constraints on budgets seriously undermine actions which may result in costs being incurred to remedy breaches- lack of consistency in Local Authority budget account practices."

"Complexity and lack of enforceability of the Fixed penalty Notice system. … the **inability to use charging orders to cover direct action**, LA's do not have a high enough ranking in debt recovery proceeding (should be below HMRC and above the banks)…"

Officers' recommendations for improvements

It was noted within responses that *'the current limited and ineffective powers of enforcement are bringing the planning system into disrepute'*. While this is a strong statement, it does convey the depth of feeling amongst some officers that the system is not working as well as it could. However, most officers – including those interviewed in detail – believed that the right tools are generally available, up to the point that a notice is service. However, it was widely felt that in cases of non-compliance, authorities' hands were tied.

Possible aspects of the enforcement process and practices are grouped into the topics outlined below.

Streamlined administration

Reduction in timescales: At present the speed of the entire process (including the appeal process) is seen to be favourable to the case of the developer / landowner / operator, irrespective of the circumstances or severity of the breach. The timescales for taking action could be reduced, with notices served sooner in the process rather than the repeated use of letters [informal actions]. One respondent noted that, in their experience, DPEA was comparatively flexible in allowing last-minute or even late submission of Appeal documentation in recent enforcement case. (It should be noted that this has not been substantiated.) However, the time limits for immunity against enforcement were stringently applied – suggesting that authorities were not operating on a 'level playing field'.

Simplification of the enforcement process: The process could be improved through the restructuring of current advertising enforcement regulations. In addition, simplification of the process of issuing of Notices would help ensure that a matter cannot be delayed due to ownership which is unclear or complex.

On a practical level, respondents noted that it would speed up the process if Notices were not required to be sent in a manner by which proof of delivery can be obtained (Recorded Delivery was quoted as a particular issue – but hand-delivery by enforcement staff or Sheriff's Officers can also be used). [However, as non-receipt of a Notice is an applicable defence, this would be legally challenging.]

Improved system for following up the issuing of notices: Effective measures are required to ensure that developers comply with Planning Contravention Notices, s.272 Notices, Fixed Penalty Notices and Breach of Condition Notices when issued. In reality

these notices are often ignored as offenders are aware that they will not face prosecution. In cases of non-payment follow up action should be taken.

Enhanced penalties and improved deterrence

Increase in fees and penalties: The suggestion that additional, higher fees could be charged for retrospective applications, as a monetary incentive to achieve planning permission prior to the development, was a popular solution. It was also suggested that there could be an increase in fixed penalty fines, and FPNs could be extended e.g. to non-compliance with PCNs, non-submission of initiation/completion notices[16], non-compliance with conditions, and non-compliance with approved plans. It was suggested that fixed penalties should be ongoing (accruing on a daily basis) until compliance.

A further suggestion was that, if a breach is confirmed then the individual involved should be subject to higher fees for subsequent planning applications for new or different development. While this would likely be popular with the public, it is unlikely that this would be legal as previous conduct could not be taken into account in subsequent cases without potentially infringing developers' rights under Article 6 of the European Convention on Human Rights[17].

As noted previously, the relationship between planning authorities and the local Procurators Fiscal appears to be a key consideration. To counter the significant frustration that is clearly felt both with the administrative and evidential challenge of bringing prosecutions, there is a clear appetite for more specialist Fiscals or improved training to change the way in which planning offences are approached. In addition the process would benefit from a clear reporting agreement with the Procurator Fiscal, and the removal of the need to obtain a date of birth from the appellant. More frequent and effective prosecutions – as is understood by respondents to be the case in England – could certainly assist in improved deterrence for serious or persistent offenders.

- One interviewee suggested that Fiscals (and Sheriffs, when the authority sought interdicts) were of the opinion that, because authorities possess direct action powers, that should be the preferred approach – on the grounds that it more effective in resolving the breach, and potentially achieved more quickly. However, the interviewee was of the opinion that attitudes needed to evolve in line with the political and financial realities to which local authorities are subject – not least the lack of available funds to cover direct action.

Resourcing

Increase in resources: An increase in the funding of enforcement would allow direct action to become the principal means of resolution rather than reliance on the Courts to accept prosecutions. In addition an increase in staff to undertake condition monitoring would help improve the process.

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[16] Notice of Initiation of Development (NID); Notice of Completion of Development (NCD)

[17] Right to a fair trial – pre-judging a developer based on past conduct would undermine the presumption of innocence inherent in fair legal proceedings

Improved rates of debt recovery for Fixed Penalty Notices and direct action cases could assist in reducing the perceived risk to authorities – as well as helping the sustainability of enforcement action. However, care would be required to avoid the perception of enforcement as a revenue-raising process.

- One interviewee argued that a combination of Charging Orders [cf. the Building Standards enforcement regime, and notes below] and enhanced status for local authorities (and all public bodies) in insolvency debt recovery could assist in ensuring that direct action was viable and de-risked for authorities.
- While the latter suggestion has considerable merit, its feasibility and legality in terms of banking law has not been investigated in detail as this is outside the specialisms of the research team.
  Further research to establish the position of local authorities that have undertaken works to an insolvent property as the result of an enforcement notice in terms of the Insolvency Act 1986 will be required.

The monitoring of conditions is a widely-acknowledged weakness in the system, with virtually all officers surveyed highlighting this as a key concern (which is mirrored in community responses). Those interviewed suggested that somewhere between 75 and 90% of developments were unlikely to be subject to any checking on whether conditions had been discharged effectively 'on the ground' – as opposed to administratively.

The model employed for (mostly) wind energy developments, whereby an Ecological Clerk of Works (ECoW) is appointed to monitor compliance with environmental protection and habitat enhancement conditions, was suggested as a model of good practice – where the cost of the post is met by the developer. Discussions with SNH indicated their support for this approach, and suggested best practice would be cases where the ECoW was funded by the developer, but employed/contracted by the planning authority to avoid conflicts of interest both real and perceived.

As a natural extension of the 'polluter pays' principle, the ECoW model, and other conditions monitoring officer posts of a similar nature, is effective, well-developed and – importantly – has substantial developer buy-in, including through industry bodies such as Scottish Renewables[18]. While this model could not be applied equally across the hierarchy of development – and would likely be disproportionate for most householder and many local developments – major/National and EIA developments could reasonably be required to provide for conditions monitoring, in line with the number and complexity of conditions and the significance of likely impacts involved.

Nationwide consistency

Coordinated approach to enforcement process: it was suggested that the enforcement process could be improved through the adoption of a coordinated approach by all planning authorities.

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[18] See, for instance: Scottish Renewables, SNH, SEPA and Forestry Commission Scotland (2010) *Good practice during windfarm construction* *http://www.snh.org.uk/pdfs/strategy/renewables/Good%20practice%20during%20windfarm%20construction.pdf*

New or enhanced powers

A number of respondents noted that Building Standards legislation allows the use of charging orders on property and land for buildings standards enforcement, and that a parallel process for planning could aid in debt recovery.

Note: *Charging Orders*

When a local authority undertakes work in relation to compliance or enforcement, or in relation to a defective or dangerous building, it may recover any expenses reasonably incurred and normal methods of debt recovery apply.

The Building (Scotland) Act 2003 was amended on 24 January 2015 by the Building (Recovery of Expenses) (Scotland) Act 2014 to improve these cost recovery powers and further help local authorities recover their expenses.

The charging order provisions in sections 46A to 46H of the 2003 Act cover work and expenses recoverable by a local authority in relation to a notice served under sections 25-30, or urgent action undertaken on a dangerous building under section 29(3), from 24 January 2015[19].

The charging order provisions supplement normal methods of debt recovery and allow the local authority to make a charging order and register it in the appropriate land register. This means either registering in the Land Register of Scotland or recording in the Register of Sasines. A local authority entitled to their recoverable expenses is also entitled to the registration and administration fees associated with the charging order and its discharge, and interest at a reasonable rate. When a local authority makes a charging order it must register it in the appropriate land register. They must serve a copy of the charging order on the owner(s) of the building concerned and advise them of the effect of the charging order and the right of appeal.

The charging order will specify the building concerned and the repayable amount. The local authority can determine the most appropriate number of annual instalments between 5 and 30 and the date for payment of each instalment which, will be set out in the charging order.

Adapted from: Scottish Government (2015) *The Scottish Building Standards Procedural Handbook, 3rd ed.*

Clearly, such a model would require legislative change – likely insertions to the principal act, and additional secondary legislation to define the nature, scope and application of the new power – which could potentially be time-consuming and would require substantial political buy-in. Nevertheless, as a pre-existing model it would be useful to

[19] The notices are a Building regulations compliance notice, a Continuing Requirement Enforcement Notice, a Building Warrant Enforcement Notice, a Defective Buildings Notice and a Dangerous Buildings Notice.

understand how this regime is perceived and used by building standards officers (there is no scope to do this within the constraints of this project).

- One interviewee – also responsible for Building Standards enforcement – confirmed that this approach was generally very effective, and being attached to property titles ensured that prospective buyers' solicitors would always be aware of outstanding issues through standard searches of the Land Register and Register of Sasines. (Another interviewee noted that, in their authority area, it was relatively common for solicitors to miss outstanding enforcement notices on properties as they were only routinely checking for relevant applications, rather than looking at the enforcement register / property planning histories.)

A further regulatory change that was suggested – again mirroring practice in building standards – was to require completion and compliance certification and the end of development projects, ensuring that all relevant conditions had been discharged. Stronger links to land registration systems were also suggested; ensuring that outstanding enforcement actions impact upon the sale / use of development with planning permission being withdrawn or withheld in abeyance until the breach is resolved. Having these actions registered against the property in the Register of Sasines / Land Registry could potentially be a powerful means of ensuring that developers secure compliance prior to sale.

- One interviewee suggested that the NID / NCD process [introduced by the 2006 Act, as Section 27A-C of the principal act] was currently under-used and ineffective, and should be enhanced – and linked to land and property registration – to ensure that: a) conditions were complied with and signed off by the authority; and, b) property could not be sold on until the relevant requirements had been met.

  It was noted that this would carry potentially significant resourcing costs for authorities, so fees for applications for approval of matters specified in conditions should be charged on an appropriate scale – as part of the wider movement towards full cost recovery (also noted by a number of survey respondents – see below).

A further suggestion was the introduction of charges for enforcement investigations i.e. once a breach has been identified the property owner should be invoiced for the cost of investigating the matter, as a natural extension of authorities' power to recover costs.

Respondent quotes

"Implementation of **charging orders** on property and land would align planning system with Housing and Building Standards legislation."

"All developments to require to obtain a completion/**compliance certificate** similar to Building Control, which would be **registered with property papers and identified through solicitor searches**.

"'Immunity Clock' should stop when breach identified to allow for informal action/negotiation. This will avoid developers stringing enforcement process out and then securing immunity."

“More onus on developer to prove development is lawful. LPAs do not hold data in anticipation of a breach. Enforcement action cases fall due to lack of counter evidence being available to defend a case.”

“**Fees for submission of details to discharge planning conditions** and penalties for non-submission and non-compliance. Fees would encourage more information being submitted upfront with planning applications and less conditions required to be imposed and monitored.”

“Ideally **pro-active monitoring of all permissions / conditions** however the Council do not have the **resources** to carry out this function.”

“more **emphasis on enforcement** by councils, Scottish government, RTPI, **enforcement always seems to be forgotten about**.”

“involving more Development management officers in enforcement so not only enforcement officers can deal with complaints”

“control over which types of cases we get involved in- a lot of it is trivial neighbour disputes”

“Speed up process of enforcement with **more powers**”

"**Charging orders to expedite the debt recovery process** i.e. for direct action. Implementation of fines structure which is proportionate to the breach/circumstances of a particular case.”

“Review of Advertisement regulations, **Formalising the Completion Notice process with appropriate fee structure** to bring this into line with the Building Standards Completion Notices to ensure conditions and development are complied with and completed in line with consents.”

“Development of new type of planning consent where suspensive conditions are applied to a decision whereby it is issued only as a "Provisional Consent" pending the compliance with all suspensive conditions with a "Full" consent issued once all suspensive conditions are purified which would run alongside an enhanced status for Completion Notices."

“The fundamental problem with enforcement is the lack of clarity with the possibility of prosecution.

“Give LPA's the power to refuse to accept retrospective applications where unauthorised development is not acceptable or where an enforcement notice has already been served."

“**A dedicated Procurator Fiscal (similar to the one that SEPA can access)**”

Raising the profile of enforcement

Respondents indicated that they felt more could be done to raise the profile and highlight the value of enforcement within the planning profession – through the RTPI, Scottish Government and within local authorities – and with the public at large.

The suggestion that a wider range of officers within planning authorities (e.g. development management) be trained to deal with enforcement casework may be a useful solution to spreading the load. This may also help to reduce 'silo thinking', highlight the importance of precise, effective conditions and improve the integration of services – and also free up specialist officers to concentrate on more challenging and complex cases.

- Interviewees suggested that, across the planning profession, enforcement was viewed less favourably than other aspects of local authority planning services. "*It's viewed as 'techy', rather than 'professional'…but good and effective enforcement relies on as much – if not more – professional planning judgement* [as other aspects of practice in planning authorities]."

7.2 Barriers and opportunities

Legal powers

Barriers

The general perception amongst officers is that the current suite of powers is relatively effective, but that the lack of a credible threat of prosecution undermines the efficacy of the system and public confidence. Where prosecution is successful, the penalties imposed (rather than those available in statute) are universally regarded as being much too lenient – undermining the effectiveness of prosecution as a deterrent, reducing the business case for authorities in pressing for prosecution (in that the penalties will, currently, almost never justify the expense and risk) and potentially encouraging repeat breaches.

The relationship between planning authorities and the Procurator Fiscal service is highlighted as being a key barrier. The perception is that few Fiscals have an interest in prosecuting planning cases as they are regarded as being of a lower order than the majority of criminal casework. Similarly, there is a clear gap in understanding of the tests of public interest applied by authorities in determining whether prosecution is appropriate, and by the Fiscal in weighing whether there is a reasonable prospect of conviction. There are also key differences in evidential standards and tests that are highlighted as causing problems in bringing appropriately evidenced cases.

The Crown Office and Procurator Fiscal Service were invited to participate in this research, but at the time of writing no response had been received.

Officers were of the opinion that retrospective planning permission was generally too easy to obtain, with a clear appetite for significantly higher fees to act as a deterrent to unauthorised development and encourage the proper processes.

Concerns were noted about the speed and efficiency of the current system, with respondents highlighting the substantial time-lag that often occurs between the service of notices and receiving information or compliance from developers. Stop Notices were highlighted as being cumbersome and a potential risk to the authority.

Opportunities

Addressing the reported shortfall in prosecutions should be a priority, in terms of securing the legitimacy and robustness of the system.

However, this will likely require training and development on both sides: ensuring officers can provide the Procurator Fiscal with appropriately constructed and evidenced cases that meet the relevant tests; and, ensuring that the Fiscal is appropriately informed with regard to planning law. Ensuring proportional application will be important, establishing clear guidance for which cases should be pursued (e.g. those with significant impacts on the natural or cultural heritage, public safety or amenity; or persistent offenders).

Recommendation:	
4	**Work with the Crown Office and Procurator Fiscal Service to develop specific guidance for bringing effective planning prosecutions** ***Rationale****: improve the efficacy of cases brought for prosecution*
5	**Work with the Crown Office and Procurator Fiscal Service to deliver appropriate training in planning law and relevant tests for senior officers and Fiscal Service staff.** ***Rationale****: ensure that planning authorities and the Fiscal Service are working to a common purpose and shared framework of understanding. Clear 'gatecheck' parameters to test cases being brought for prosecution could help to increase rates of prosecutions brought.*

A more radical solution that was suggested by a number of respondents was a change in the approach to prosecution, mirroring that in place for the environmental and waste permitting systems regulated by SEPA. Access to specialist prosecutors, expert in environmental law, is widely regarded as being highly successful in bringing robust cases with a high rate of conviction.

Similarly, harmonisation with the Building Standards regime was suggested to aid in debt recovery through the use of Charging Orders.

Recommendation:	
6	**Commission comparative research into the process and effectiveness of prosecutions under environmental and planning law** ***Rationale****: understanding the benefits of both systems and identifying the need for legislative and/or procedural change*

7a	**Commission research into the use and effectiveness of Charging Orders under the building standards regime, drawing out opportunities to apply to planning** ***Rationale**: addressing an identified need to improve debt recovery for direct action and Fixed Penalty Notices*
7b	**Commission research into the potential costs and benefits of updating the process for discharging conditions to introduce charges for applications for matters specified in conditions and more rigorous processes to obtain 'completion certificates', ensuring all conditions are complied with.** ***Rationale**: bringing planning into line with building standards and shifting the burden for conditions monitoring and discharge more effectively on to developers. Expanding the role and effectiveness of existing NID/NCD procedures, which are currently under-used.*
7c	**Scope the need for research into the costs of the current enforcement process, to determine appropriate means of delivering full cost recovery. This could include:** • Local authority funds lost through non-recovery of direct action costs, particularly in cases of insolvency. • Losses to non-payment of Fixed Penalty Notices. • Cost/benefit analysis of prosecutions for non-compliance with notices. • Costs/benefits of introducing charges for applications for approval of matters specified in conditions. ***Rationale**: reducing costs to authorities and contributing to the delivery of full cost recovery in local authority planning services.*

Consulting on substantially higher fees for retrospective applications for planning permission would be a popular intervention with both authorities and communities. No respondents suggested removing the provisions made by Section 33 and 33A (enabling retrospective application for planning permission), in recognition of the complexity of planning law particularly with regard to what is, and what is not, permitted development. Raising fees retains the option, but could be an important means of driving early engagement with planning authorities on developments at all scales – helping to secure front-loading and ideally reducing the overall numbers of breaches of control. In addition, there is perhaps merit in considering minor technical alterations to the existing legislation that authorities currently find problematic to effective working – for example, stopping the 'immunity clock' once informal enforcement proceedings have begun.

Recommendation:	
8	**Consider consulting on the need for substantially higher fees for retrospective applications for planning permission, and technical amendments to the existing legislation to close loopholes** ***Rationale**: higher fees – potentially charged on a sliding scale in line with the scale of the breach / development – could act as a more effective deterrent to deliberate breaches; may also assist in increasing rates of pre-application consultation and reducing overall numbers of breaches of planning control.*

In terms of addressing the perceived lack of speed in the system, particularly where urgent action is required, issuing guidance on the use of applications for interim interdicts could add value – giving authorities greater confidence to use the courts to achieve their objectives when time is of the essence (in contrast to the perceived slowness of the Stop Notice process).

In addition, there is perhaps merit in considering minor technical alterations to the existing legislation that authorities currently find problematic

Recommendation:	
9	**Consider the development of guidance and best-practice examples on the use of applications for interim interdicts as a means of responding quickly and effectively to breaches of control.** ***Rationale**: addressing a perceived lack of speed through existing tools; providing authorities with greater confidence in accessing the powers available through the courts.*

Technical

Barriers

A lack of consistency within and between authorities was raised as a potential barrier to effective enforcement, with the development of a national enforcement handbook[20] suggested as a potential solution. Clearly, there are substantial differences between the type and scales of enforcement issues encountered across Scotland's 34 planning authority areas, but consistent guidance – particularly in terms of shared

[20] Respondents suggested basing this on the Highland Enforcement Manual, Commended at the Scottish Awards for Quality in Planning 2015

understandings of the public interest and the use and application of existing powers – could be beneficial.

Recommendation:	
10	**Consider consulting with planning authorities on the costs and benefits to developing and adopting shared principles and approach to enforcement.** ***Rationale**: addressing the perceived lack of consistency in enforcement practice; promoting greater collaborative working between authorities and sharing good practice; improving the consistency of approach and decision-making across Scotland.*

A number of respondents noted that the conditions imposed on planning permissions were often problematic: lacking in precision and often impractical for developers and unenforceable for the authority. Breaches of conditions are common and, although non-compliance is not an acceptable approach to inappropriate conditions, taking advantage of this easy win could improve efficiency – and deliver more robust decisions.

It would be useful to understand whether, in authorities where enforcement is covered by development management officers, rates of unenforceable conditions are lower – given the likely improved understanding of the requirements of enforcement. In any case, ensuring that development management officers have close regard to Circular 4/1998 and receive appropriate training to help draft better conditions should be an existing priority.

- On pressing interviewees, a perception that DM colleagues are applying an increasing number of conditions to planning permissions as a consequence of performance targets – necessitating faster handling, and the holding over of some matters that would previously have formed part of the main consent.

Recommendation:	
11	**Encourage planning authorities to deliver training to development management officers on robust, appropriate conditions that can be effectively and efficiently enforced.** ***Rationale**: ensuring that conditions are proportionate, effective and enforceable may help to cut rates of breaches; it will also make effective enforcement in the event of non-compliance more straightforward.*

Opportunities

There are opportunities for authorities to examine their internal structures, processes and protocols in dealing with enforcement casework. Where this is perceived as being slow or cumbersome by officers, an audit of the authority's approach and patterns of action could help to identify where streamlining could take place – for example operating a triage system for breaches, where cases meeting certain criteria move

directly to formal action, with authorities making more extensive use of applications for interdicts to restraint breaches quickly and effectively. Several officers stated that they felt that their authority did not make full use of the available powers; therefore taking a critical look at the way existing powers are applied could be helpful.

Recommendation:	
12	**Encourage planning authorities to audit their enforcement approach, processes and casework trends to identify opportunities for streamlining and delivering a more effective, responsive service.** ***Rationale**: addressing officers' perceptions of the system as slow and sometimes cumbersome; ensuring authorities are equipped to make full use of available powers.* *Likely links to Recommendation 10.*

Resource

Barriers

Resourcing was highlighted as a major issue by a significant number of respondents, reflecting the financial realities to which Scotland's local authorities are subject. Clearly, there is unlikely to be significant new funding available in at least the medium term, but there may be opportunities to make the case for enhanced resources for enforcement.

The ability to effectively monitor conditions was raised as a key concern, reflecting both the increasing application of a range of conditions and the difficulties authorities have in ensuring development complies. Although not explicitly mentioned by local authority respondents (but raised in detail by SNH), it is common practice for large-scale infrastructure projects – for example wind farms – to have conditions/S.75 obligations applied to secure funding for a 'conditions monitoring officer' to undertake inspections and report to the planning authority on performance. For most development, this is unlikely to be a feasible approach – however, for some larger or more complex developments (for example, multi-stage housing developments with large numbers of conditions) more use could potentially be made of this approach, where the Circular 4/1998 tests can be met. This could help to enable effective monitoring without additional resource implications as the cost could be passed to the developer.

Recommendation:	
13	**Work with HoPS and the Scottish Planning Enforcement Forum (SPEF) to develop guidance / decision-support tools to assist in the effective and proportionate securing of contributions from developers to monitoring compliance.** ***Rationale**: passing the cost of monitoring to the developer is a well-established principle and could reasonably be extended*

In terms of practical steps to resolve breaches of planning control, the ability to take direct action is highly valued by officers – however, lack of both staff resources and capital appear to be preventing this approach fulfilling its potential.

Opportunities

As noted in **Recommendation 8**, substantially increasing fees for applications for retrospective planning permission could contribute to resourcing enforcement.

A suggestion from respondents that could also reasonably be investigated – and noted in **Recommendation 7b** – is charging fees for applications for approval of matters specified in conditions, enabling recovery of more realistic fee income commensurate with the effort required to process and approve multi-stage consents. (This would, however, need to be carefully assessed and implemented as charging could potentially increase rates of non-compliance.)

Recommendation:	
14	**Work with HoPS and the Scottish Planning Enforcement Forum (SPEF) to consult on approaches to securing capital funds for direct action, and appropriate methods of cost recovery.** ***Rationale****: direct action is a powerful tool, but is currently under-used on account of local authority resource pressure. Understanding the range of options available to recover costs from developers could help to expand the use of the approach.*

Institutional

Barriers

Respondents frequently noted that enforcement was perceived to be a low priority within their authority, lacking support for action and generally neglected in favour of other aspects of the planning service. This comparatively low status is seen as carrying through to low levels of Elected Member buy-in for taking firm enforcement action. (Conversely, a minority indicated that enforcement was important to Members as it was a frequent topic of enquiries from constituents – but that this interest was not necessarily backed by a comprehensive understanding of the system and its limitations.)

Opportunities

Raising the profile of enforcement as a critical part of the planning triumvirate – with development plans and development management – and the backstop on which the legitimacy of the system rests. As suggested by respondents, a range of actors have a contribution to make, including:

- **The Royal Town Planning Institute:**
    - Raising the profile of enforcement in professional education, training and CPD.

- **Scottish Government:**
    - Improving the representation of enforcement in national policy and guidance, and highlighting the importance of the process to the legitimacy and effectiveness of the planning system as a whole.

- **Local authorities:**
    - Raising the profile of enforcement within the planning service and with Elected Members

Recommendation:	
15	**Work with HoPS, the Scottish Planning Enforcement Forum (SPEF) and the RTPI to develop a strategy to raise the profile of planning enforcement** ***Rationale****: raising the profile of enforcement within the profession, in policy and across local authorities to address misconceptions, articulate the benefits and secure enhanced political and management buy-in*

7.3 'Real-world' testing of research findings

Introduction

This section of the report unpacks the outcomes of a series of stakeholder conversations, drawing out issues identified in questionnaires and shedding light on how enforcement powers do – or do not – work in practice and officers' suggestions for improvements.

Resolving breaches of planning control

Informal approaches

It is clear that 'informal' approaches are informal in name only – with authorities applying defined processes, procedures and decision-support tools to investigating alleged breaches, approaching developers and seeking resolution. The key element built in in all cases was the ability of officers to apply professional judgement in establishing:

- Whether a breach had occurred;
- Whether the developer had made a genuine mistake;
- Whether the unauthorised use or development could easily be regularised (e.g. through a planning application), or whether formal action would likely be required.

These approaches were held to be a key element in ensuring the service operates efficiently – screening out the serious breaches, potentially problematic developers or issues that would likely require formal action (i.e. where use or development would be unlikely to be acceptable). Determining whether action would be in the public interest is clearly a key skill, and one where consistency and professionalism is clearly prized by officers.

As this is an area where public and professional understanding of the issue diverges, establishing a national policy on enforcing planning control was suggested as a means of both securing public understanding and building trust.

Effect of resourcing

Data analysis indicated that average resolution times across the sample authorities had increased over the study period. Respondents were asked why they thought this was.

Broadly, while resourcing was understood to be a systemic strategic issue for enforcement, respondents did not believe that there was a direct correlation between this and case duration. Instead it was suggested that, in some instances, landowners/developers are increasingly willing to challenge – or ignore – informal approaches, resulting in more protracted cases. However, respondents were keen to stress that the majority of recipients of informal approaches took steps to resolve the issue without further prompting.

Officers were concerned that they were frequently, and somewhat inevitably, drawn into neighbour disputes that were often only tenuously linked to planning issues. Such cases were highlighted as often being long-running, difficult to resolve (as planning issues were only part of the fundamental problem) and often required far more resource than was commensurate with the actual impact of the breach of control.

As highlighted in survey responses, officers confirmed the perception that enforcement was the 'poor relation' in terms of local authority planning services. One reported that their service was about to be merged with development management [as is the case in a number of authorities], and registered concerns that this could result in an erosion of the service they were able to provide. The same respondent suggested that there was perhaps a need to look nationally at staffing ratios between development planning, development management and enforcement – with some guidance issued on minimum numbers/proportions required to deliver an effective service (using caseload data to justify requirements).

Applying direct action

One interviewee indicated that their authority was supportive of direct action as a last resort, and had taken such action relatively recently. Echoing survey contributions, interest was expressed in investigating new ways of recovering costs – including mirroring the Building Standards' charging order approach, and the ability of English planning authorities to seek Confiscation Orders under the Proceeds of Crime Act [21]. The officer that made the latter suggestion indicated that their authority had persistent issues with the same developers repeatedly breaching planning control, and indicated that stiffer penalties were the only realistic way of preventing this type of issue. Linking to the profits from unauthorised development in this way was seen as a key deterrent as persistent 'offenders' are well aware that, even in the event of prosecution, penalties will be much less than the costs of delay to large projects.

A key issue for authorities appeared to be that there was no ring-fenced funding available for direct action, making certainty in seeking action challenging – and inherently problematic as funds would need to be diverted from elsewhere in authorities' (shrinking) discretionary budget.

Formal enforcement

Respondents were very clear that they believed that the enforcement process and the tools available were effective – but only up to the point that a notice is issued. Beyond this point, in line with survey responses, there was a strong feeling that there was little authorities could do to either compel developers to engage at an appropriate juncture and in a positive manner – or, failing that, secure swift and effective sanction through the courts.

One respondent indicated that interim interdicts were used by their authority as a means of halting development and forcing developers to negotiate (in appropriate cases). This was broadly thought to be effective, with some exceptions22. Interdicts were felt to have more impact than a stop notice, and were as favoured for their speed – both of service and withdrawal as required.

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[21] The latter is obviously contingent on a successful prosecution for a relevant offence – e.g. breach of an Enforcement Notice.

[22] The authority reported an issue with unauthorised development on Gypsy/Traveller sites, and difficulties in engaging effectively.

Prosecution was believed not to be a viable option and respondents indicated that some cases [a tiny number in the overall picture] ended up being closed instead of being taken to court due to the costs and lack of benefit likely to accrue.

Although the current Fixed Penalty Notice system was felt to be inadequate and ineffective, there was interest in some adjustments. Most notably, this centred on retaining the option to prosecute, adopting a staggered fee profile for the type and scale of breach (and developer[23]) and fines that increased with time elapsed between service of the notice and eventual payment. Perhaps more so than in the survey responses, there is strong synergy between officers' and communities' desire for greater natural justice – and stiffer penalties – for knowing and harmful breaches of control.

Monitoring conditions

Clearly, conditions monitoring is a major concern to all stakeholders: communities, authorities and key agencies alike.

Respondents were very open that, in their authorities, there was very little direct follow-up of planning conditions – with estimates of between 75% and 90% of conditions not being checked. There was clear agreement that, in line with wider aspirations for the Scottish planning system, full cost recovery in enforcement was the only feasible way to monitor conditions effectively. Again, passing the costs on to developers, particularly for Major developments, was mooted as the only viable solution. Interestingly, one respondent – from a large, rural authority with substantial numbers of wind farms – indicated that, although developer-funding conditions monitoring was virtually standard industry practice, to their knowledge, the authority had never attempted to impose such a condition on a permission – despite developers' willingness to support this approach.

Dedicated monitoring officers within authorities were suggested as a means of freeing up enforcement time to concentrate on more complex casework was suggested. In parallel, charging fees for applications for approval of matters specified in conditions was identified as a way of funding this – along with cost recovery for cases where breaches of planning control are confirmed. Multi-stage consents appear to be a key issue; with the fees levied for the initial application being both insufficient in the first instance, and not taking the level of subsequent work generated by numerous, complex conditions into account.

Improving enforcement practice

Ongoing improvement

Respondents were asked how their authorities were seeking to understand and improve practice in enforcement. For the most part, they appeared confident that the service would continue at current levels (even where there were structural changes afoot), and that measures were being implemented to improve delivery. These included:

- Work on a handbook for officers to ensure consistency of practice and decision-making;

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[23] It was felt that, where the 'offender' was a commercial developer that both 'should know better' and could be shown to be prevaricating – in addition to profiting from the breach – that financial penalties should be severe.

- Developing streamlined decision-support tools to improve consistency of practice across a new, integrated enforcement team (created out of a number of area-based teams);
- Developing protocols to improve feedback to complainants, keeping them informed of progress and decisions;
- Increasing availability of planning advice within the enforcement team to provide greater certainty on acceptability of unauthorised development;
- More effective screening of complaints by service management before passing to case officers – reducing the number of non-planning issues investigated.

Suggestions for improvement to the system

Addressing the difficulties in working with the Courts and the Crown Office / Procurator Fiscal Service is a universal theme. Respondents indicated that maintaining good relationships with Sheriffs was critical in terms of securing interdicts – but that this was problematic and potentially daunting for inexperienced officers. Improving the level of understanding of evidential and public interest tests and their application by planning authorities in preparing cases was seen as an important means of improving perceptions amongst law officers – as well as driving improved effectiveness. Conversely, training in planning law – or access to specialist Fiscals – was suggested as a means of improving the understanding and priority given to planning cases. It was felt that both Sheriffs and Fiscals were sometimes dismissive due to the provision of direct action powers under the planning acts. However, officers felt that this did not fairly reflect the financial realities for local authorities, making direct action a less viable option in many cases.

Officers highlighted some structural issues that potentially contribute to the perception of enforcement as an under-valued service. One respondent noted that their authority's enforcement team is paid less (at the same grade) than colleagues in other parts of the planning service. Where staff are equally qualified (e.g. Chartered Planners), this has the potential to cause internal tension in addition to harming staff retention. The willingness of authorities to dispense with dedicated enforcement teams through restructuring was also perceived as a downgrading of authorities' commitment to delivering the service – and undermining the 'third pillar' of the planning system.

As noted above, introducing measures to contribute to full cost recovery were key suggestions, mirroring those put forward in survey responses, including:

- Developer-funded conditions monitoring;
- Dedicated conditions monitoring officers to separate this function from DM and enforcement;
- Fees for applications to discharge conditions;
- Financial liability for developers where a breach is confirmed following investigation;
- Investigation of measures to improve debt recovery where direct action has been taken on properties owned by insolvent companies / individuals.

Officers are, in the main, keen to develop and maintain open and positive relationships with the public – but there is a strong desire for better information on enforcement to educate and inform laypersons.

Respondents stressed that they would deliver whatever service national and local policy required – but that these were often at odds, and not strongly related to what the public often thought they 'should' be doing, or reflective of the financial context in which local authorities currently operate. It was therefore thought helpful to have a national steer on where planning services should be focussing their limited resources[24] for enforcement to improve transparency and accountability.

A key finding of the research – and a concern for community respondents – was that there is significant variance in practice between authorities. Published guidance on enforcement principles and practice could add substantial value in both providing consistency and certainty for developers facing enforcement action – as well as the authority taking action – and transparency for communities and stakeholders.

[24] Equally, this decision could be taken locally – although this was not directly suggested by respondents.

8 Perceptions of planning enforcement: community and civic society groups

8.1 Introduction

Contact was made with the Community Councils and civic society groups that responded to the Planning Review on enforcement issues to solicit more detailed contributions. In addition, an email invitation to participate was distributed to the Community Council network by the Improvement Service – as well as being shared on social media by some of the groups contacted.

16 organisations provided responses via the online survey. Not all respondents answered all of the questions: proportions given in relation to individual questions therefore relate to those respondents who provided answers, rather than of the overall total.

Background

Based on the community and individual representations to the Planning Review, there appears to be a generally negative perception of planning enforcement –in terms of its responsiveness, effectiveness and its overall credibility.

Planning Review Community Council / civic society respondent quotes:

"All too often breaches are accepted as a mistake or developer ignorance of the requirements of a permission. Any deviation from a permission should expressly approved and unauthorised deviations should be punished by remediation to ensure compliance with conditions / developer declaration in planning application."

"The fact that the penalties for unauthorised development and breach of planning conditions are minimal or, in most cases, non-existent encourages bad behaviour. Those who deliberately flout the rules know they stand to make significant gains at minimal risk. It's considerably more difficult to reverse a development than to prevent it in the first place. Enforcement powers are weak, time consuming, easily deflected and frequently defeated, with inadequate penalties for those who flout planning regulations."

"This is often the "Cinderella" service in planning and yet where people see planning conditions not enforced or unauthorized development taking place without effective sanctions, this reinforces a feeling of cynicism and disengagement." **[standard response submitted by several respondents]**

"Planning without Enforcement is meaningless. Too often neighbours and communities find conditions are not being adhered to. This undermines their faith in the system. Planning authorities must be given sharper enforcement teeth."

"Scottish Planning Enforcement Legislation is disgracefully 'weak'. Enforcement Charters of LA's are therefore 'weak'. A clued-up developer walks right through."

"…the public/Community looks to Planning Officers/Authorities to uphold the content and spirit of LDPs, Briefs and Masterplans. However, for reasons only known to the Planning Officers, such duties and responsibilities can be set aside and interpreted to fit a specific planning application. Why this happens seems to be dependent on how forceful the Developer is rather than anything to do with upholding the LDP/Briefs/Masterplans or simply adhering to the views of a community."

"While the powers granted under the enforcement regulations may well be adequate, we are concerned at the general reluctance by the…Council to apply the full extent of the rules and regulations, often instead seeking a weak compromise. The perceived inability of the Council to enforce its planning decisions adequately, through proper enforcement on developers who appear to flout the rules or worse, demonstrates contempt for the planning system. The government must make it clear that the Council will be expected to exercise its enforcement powers without fear or favour."

"Planning authorities appear to be extremely reluctant to provide effective monitoring and enforcement. This problem appears to go beyond simple under-resourcing, and seems to be another result of the planning system being weighted against the public interest and in favour of the developer. Commonly, a contentious application will only be given approval on the basis of planning conditions. Yet, those same planning conditions are either broken and this breach is not effectively monitored or enforced; or the developer applies to vary the conditions and this is approved: both situations result in the conditions on which approval originally hinged not being applied. This undermines public confidence that planning is fair, robust or effective."

"…the lack of oversight and enforcement on several local developments makes a mockery of the planning system. … Yet individual property owners will receive enforcements over very trivial matters. "Development creep" is also a big problem: storeys added on, flooding mitigation downgraded, more development added (all evidenced by local developments in our area)- without consulting the general public."

To some extent, there is a focus on the punitive elements of the enforcement process with a consequential lack of understanding or acknowledgement of the core purpose in terms of regularising breaches. However, a climate of substantial dissatisfaction and, in some instances, mistrust exists between community and civic society groups (including Community Councils) and planning authorities. While such organisations are necessarily sensitive to planning issues, having a strong amenity focus, the level of dissatisfaction is such that – quite apart from any changes to powers or approach – some level of action to provide reassurance and reset relationships is undoubtedly required.

Perceptions of caseload

Figure 8.1 illustrates. There is also perhaps a perception that a wider range of

breaches, derived from a wider range of development types, occur more frequently than is actually the case. This is perhaps unsurprising as the majority of cases that would likely be of interest are larger-scale, higher impact examples. However, it does suggest that public understanding of the nature and scale of the problem could contribute to hostile attitudes.

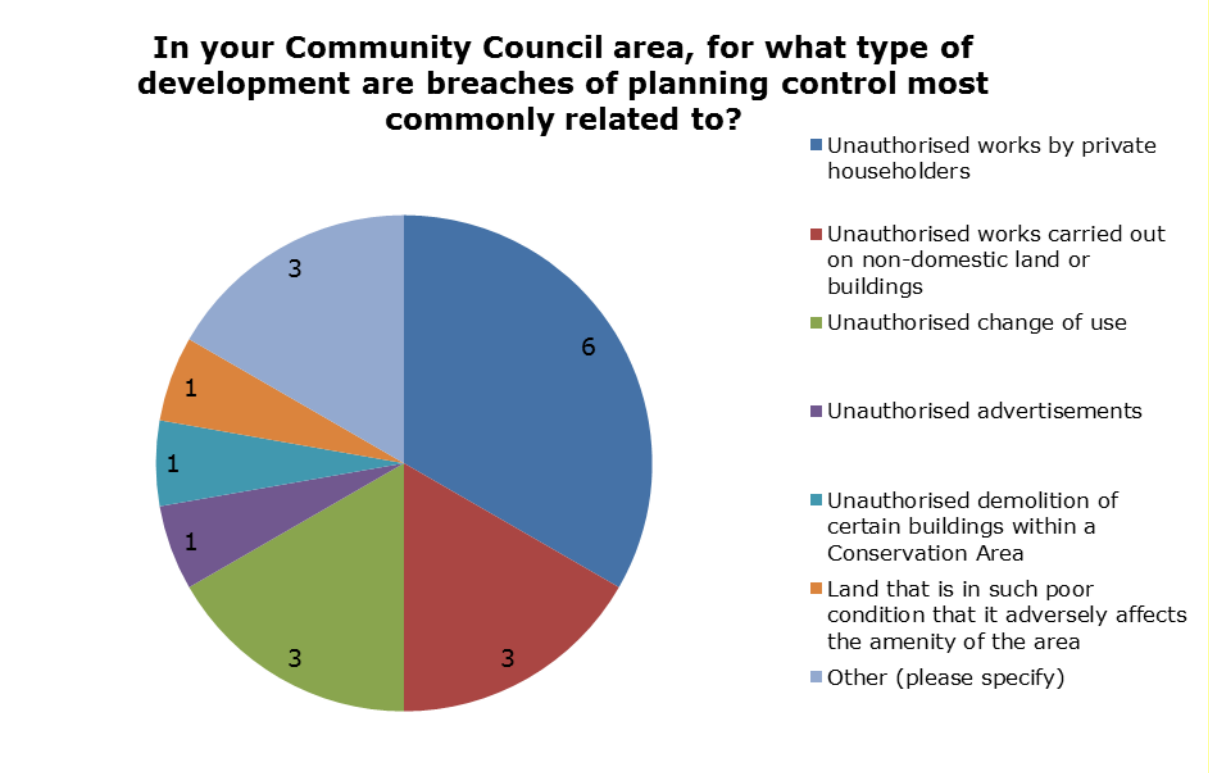

Figure 8.1: Community perceptions of caseload

Respondents also uniformly indicated that they believed enforcement to be almost entirely reactive.

Perceptions of effectiveness

Informal action

As illustrated in

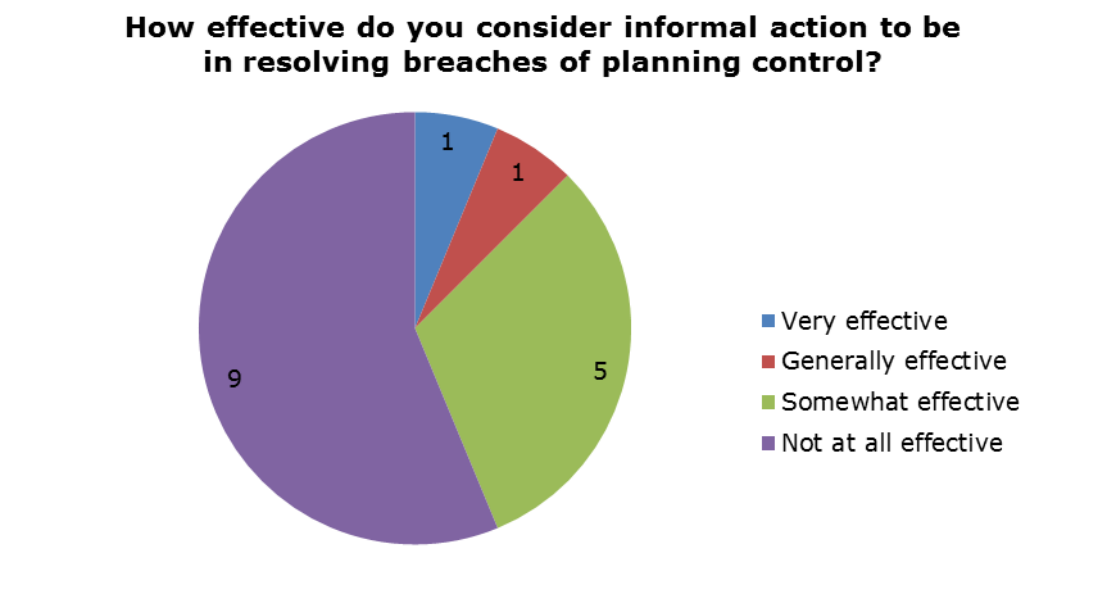

Figure 8.2 below the majority of respondents (nine of 16) considered informal enforcement action to be *'Not at all effective'* in the resolution of breaches of planning control.

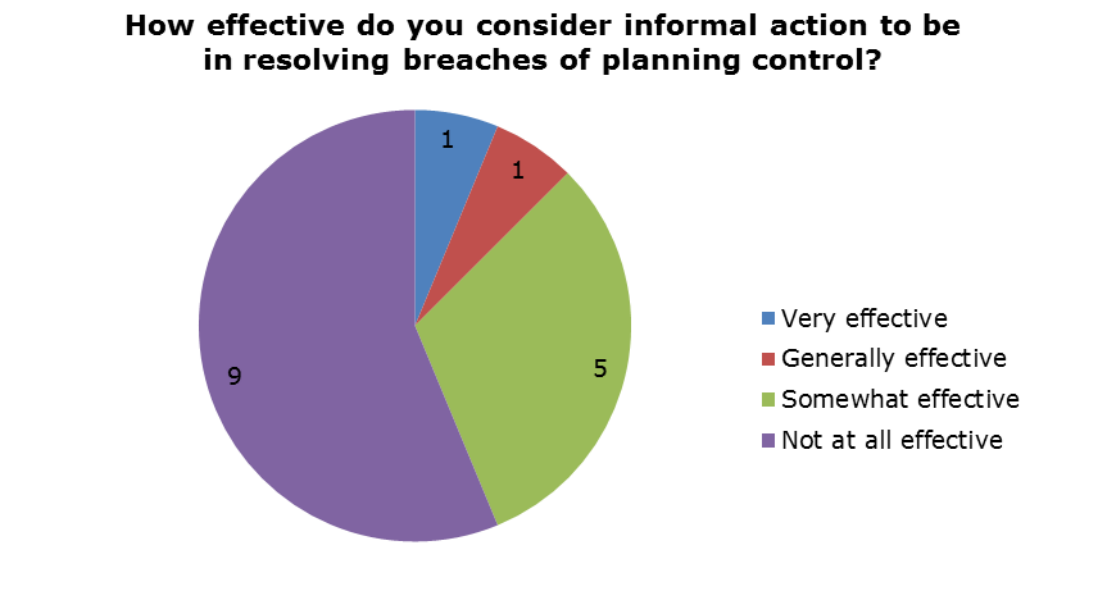

Figure 8.2: Community perceptions of informal enforcement

It was noted among the further six respondents who provided comment that informal actions are often only successful if the person responsible for the breach is cooperative, but that it is usually ineffective. It is notable that respondents felt that developers knowingly flouted planning control regularly, and with impunity – in some instances on the advice of builders/suppliers.

Respondent quotes:

"Informal enforcement action can work if the party in breach is compliant, but in our experience it is usually ineffective. Typically informal actions "resolve" the issue in favour of the party in breach, and not in the public interest nor achieving high standards of outcomes."

"Dependent on the issue - installation of uPVC Windows or unauthorised works in our two conservation areas the perception is the planning authority will not act. We are aware of anecdotal evidence that uPVC window suppliers and installers will tell property owners not to worry about the local authority as they won't take action."

"Often discussion with the offending party and then no action taken. The offending party then sees that they can make other breaches which will not be enforced."

"Too often individuals and builders will do unauthorised works knowing they would not get permission for them."

While this is doubtless the case in some instances, the evidence from local authority data suggests that, for the most part, ignorance – rather that deliberate deceit – results in the majority of breaches of planning control.

Similarly, it is likely that authorities and community organisations have quite different views of the public interest with regard to enforcement. While, strictly, breaches should be resolved, the constraints acting on officers – and authorities more generally – in terms of resource, finance and balancing the cost of action against the benefit is not acknowledged in this set of responses (although tacitly recognised by some respondents in relation to later questions).

Formal enforcement action

Respondents had a slightly more positive view of the effectiveness of formal processes and procedures – although still not especially positive.

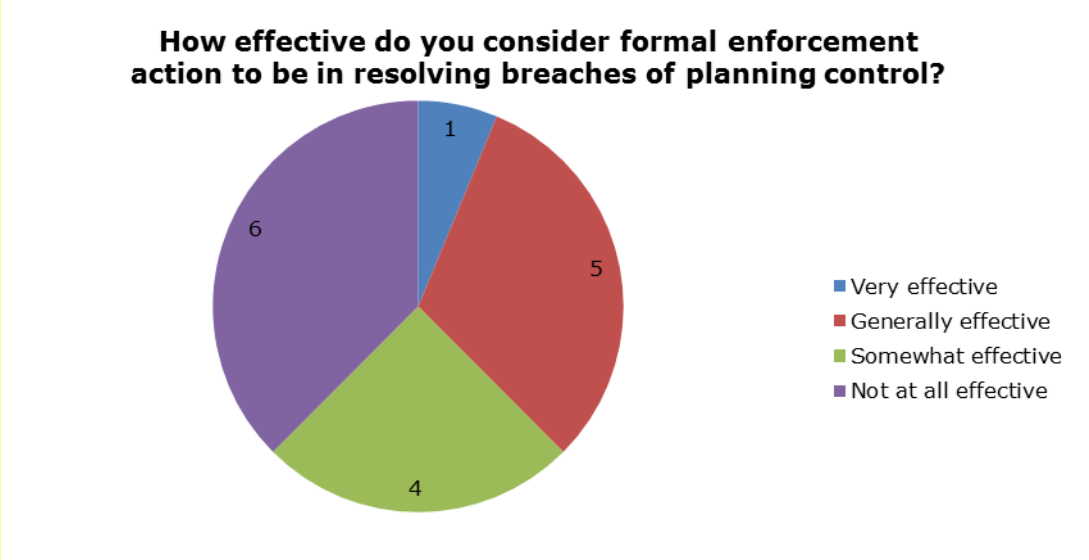

Figure 8.3: Community perceptions of formal enforcement action

As with informal action, the largest single group of respondents felt that formal action is *'Not at all effective'* (six of 16 respondents). However the same proportion of respondents described formal action as being either *'Very effective'* or *'Generally effective'.*

Eight further respondents provided comment on the effectiveness of formal action.

Respondent quotes:

"The attitude and resources of the party in breach can be critical. Politicians and the political climate appear to play a key role in the cases we know about."

"With some of the larger breaches in our two conservation areas the perception is that those breaching consent are usually rich enough that they think they can simply pay the fine and get away with it."

"…but rarely used because developers usually dodge the issue by making retrospective applications and the council lets them continue the breach until the application has been decided. In some cases this can take years when the developer makes multiple applications and appeals any refusal."

"[*Rated formal action 'generally effective'*] But, I understand, hugely labour-intensive with a determined offender"

Confirming the view of officers that local political will is important, one respondent indicated that Members and the complexion of local politics had a bearing on the willingness of the authority to enforce. More concerning is the impression that developers are able to 'buy their way out of trouble' (this is unlikely to be the case, as no authorities that provided data have ever used Fixed Penalty Notices); or that making retrospective applications is somehow 'dodging the issue'. The Act allows for retrospective applications – which authorities will generally only accept as a means of resolution where the unauthorised development has a realistic chance of being acceptable.

However, it is readily accepted that it is possible for developers to delay proceedings by making multiple applications and appeals. Similarly, respondents are correct in stating that formal enforcement powers are comparatively rarely used – although the data suggests that this is because the majority of breaches are resolved through informal means. The significant proportion of identified breaches that are not pursued because it is not expedient/in the public interest to do so clearly plays into this suspicion, along with the substantial numbers of issues that are reported but, on investigation, are found not to be breaches of planning control. Addressing this information and understanding gap must therefore be a priority in helping to restore confidence.

What is working?

Of the 12 respondents who answered *'Which aspects of the enforcement process do you consider work well?'* there were no significantly positive responses. It was noted that direct engagement can be effective, and that when communities mount a concerted campaign authorities are more likely to take notice.

Respondent quotes:

"In our experience we have never seen the enforcement process work well. We

experience the enforcement process as being weak from the outset, being powerless in practice against powerful vested interests that can apply pressure at various levels and in various ways."

"None - in my experience the local planning authorities give the strong impression that they are not interested in enforcing, even when strong evidence is presented."

"only when CC's [*Community Councils*] and residents get together to complain"

"Very rarely Enforcement Officers have a word with the developer/owner and this sometimes works"

The rest of the responses were overwhelmingly negative, with most respondents stating that none of the aspects of the enforcement process work well. The process was described as *'being weak from the outset'* and incapable of resisting '*powerful vested interests'.* Similarly, it is concerning that authorities give the impression – whether rightly or wrongly – of being uninterested in enforcement (although it is important to note that third party evidence is not admissible).

There is, however, an important distinction to be drawn between members of the public receiving a good and appropriate service, and getting the results they necessarily want.

- Interview respondents indicated that, where authorities made a concerted effort to keep complainants informed of progress and the reasoning behind decisions (e.g. not to enforce), this went some way to securing improved levels of trust.
- Authority D indicated that they had recently revised and formalised enforcement procedures to harmonise practice across a formerly area-based team. This had improved follow-up contact with complainants and ensured that they had better access to information – with a consequent reduction in complaints to the council about the enforcement service.

What is not working?

The enforcement process was described as *being 'the weakest point in the planning system'*, with lack of resources and an inconsistent approach highlighted as issues, and much of the legislation being open to interpretation by individual officers.

Lack of resources is understood to be an issue, particularly when enforcement is required to act quickly to halt a breach. One respondent provided the following anecdotal evidence in support of this view:

"For example in December 2015 we [*the Community Council*] were made aware of uPVC window installers replacing original timber sash and case Windows in a B listed Alexander 'Greek' Thomson tenement in …Conservation Area. Despite very quickly both filling in the online form and telephoning the enforcement team … there was no one available to visit the site until a week later by which point the installation was complete. Though this is a clear planning breach the situation is still not resolved 10 months later."

Other issues raised focussed on the speed of reaction from enforcement officers, and the range of options employed when breaches are identified.

As noted above, there is considerable variance in planning authority practice and preferences. This could potentially be perceived as unwillingness to employ 'harsher' measures – although evidence suggests that informal measures are often as – if not more – effective in securing compliance. It is recognised, however, that in some of Scotland's cities there have been issues around the level of assistance that planning authorities are seen to give to large developers on both enforcement and major applications. The pressure to deliver economic development is seen as a significant factor in officer and Member decision-making – but it is clear that public trust has been eroded as a consequence, and lack of prompt, rigorous enforcement action can be seen as a potentially exacerbating factor. The need to liaise closely with developers, generally via other planning professionals (e.g. at pre-application, design development or in negotiating a resolution to a breach) could readily be perceived as 'too cosy' a relationship – but in reality is generally little more than professional courtesy.

There is also an issue of scale that is not perhaps acknowledged in respondents' opinions – in that the vast majority of development (and indeed enforcement) across Scotland proceeds with little or no controversy and no recourse to the formal enforcement system.

Respondent quotes

"In our experience the planning **authorities are unwilling to use the enforcement process** beyond sometimes requiring a retrospective application where major breaches have been highlighted. In our experience the party in breach can secure backtracking by the planning authority if they want to. There can be a discrepancy between what the public is told is to happen in terms of redress, and what actually happens on the ground in practice, especially once any fuss has subsided."

"**Under resourced, too slow to act, seen as toothless and inconsistent** in approach."

"e.g. How did [*developer redacted*] get away with demolishing that listed building on [*redacted*].!? They should have been named, shamed & forfeited the site, with costs imposed."

"The Council is unable to take effective action because the **regulatory system is biased in favour of the developer**. The Council has to bend over backwards to be accommodating which merely encourages more bad behaviour by developers"

"**The average resident has no idea what the process is or how it is supposed to work**."

"Much of the legislation is down to **interpretation of the law by individual officers**"

"I think it is the **weakest point in the planning system**, and **needs more resources** if it is to uphold all the rest of the system - i.e. making sure that going through the proper channels ensures that we have better places to live."

The perception of a system biased in favour of developers is widespread. To a certain extent, this is something of a truism – as only developers and the planning authority are active parties to an application or enforcement case (with the public and relevant stakeholders afforded consultation rights for the former). Authorities inherently need

(and indeed are expected) to spend more time engaging with developers to help secure an appropriate scheme or, for enforcement, ensure that breaches are regularised effectively where possible. Clearly, this can create a perception of bias against the public. It may therefore be helpful for authorities and Scottish Government to restate the planning system's alignment with the public interest and what this constitutes (and the difference between this and *public opinion*).

Perceived barriers to use of existing powers

Identifying and Reporting a Breach

Key factors that respondents believed acted as barriers to the reporting and identification of breaches included:

- lack of resources; PAs do not have enough staff available to check up on compliance with planning conditions or 'police' their entire area;
- reliance on members of the public to report breaches. To those unfamiliar with the planning system it is not necessarily clear how to report a breach.
    - A barrier therefore exists in knowing exactly what constitutes a breach, and how to report it.

One respondent suggested that planning officers want to '*'look the other way' and avoid robust engagement*'; another noted that there was the impression that there can be a lack of support for enforcement at senior levels within an authority. This further underlines the impression that community councils and civic society groups have very little confidence in local authorities as a whole, and that dissatisfaction with enforcement is a comparatively small facet of this.

An interesting and perceptive observation from an urban community council was that resourcing issues and lack of monitoring was "*exacerbated when the same authority places heavy reliance on numerous, complex and sometimes challenging conditions when approving applications*". This mirrors enforcement officers' concerns around the appropriateness and enforceability of conditions imposed on development.

Taking Appropriate Enforcement Action

Perceived barriers to taking appropriate action included:

- Perceived 'loopholes' to enforcement:
    - Often if fact permitted development rights – for example for temporary uses and ancillary development;
- Again, lack of resources was highlighted as a major concern;
- A lack of transparent guidelines to help ensure consistency and certainty for officers and the public;
- Perception that enforcement officers are reluctant to take action without a reasonable prospect of success:
    - This is a potentially interesting point, in that enforcement officers confirm that informal approaches are attempted for all but the most serious – and likely to be unacceptable – breaches. It may therefore appear that the authority is 'doing nothing' because a notice has not been issued, while in reality contact has been made and negotiations are underway.

- Equally, the number of cases that authorities determine not to be in the public interest to pursue[25], due to their being of a technical or low-impact nature, could be seen as feeding into this perception of inaction.

Retrospective applications for planning permission

There appears to be a level of dissatisfaction with both the concept and administration of retrospective applications. To a certain extent, they do appear to be anomalous and contrary to good administration – and are not mirrored in other forms of environmental permitting. Similarly, retrospective applications can – and are – used as delaying tactics by agents to buy time following the issue of an Enforcement Notice (rather than appealing the notice as would be the proper approach)[26].

- Reluctance of authorities to refuse retrospective applications, even where the built scheme varies substantially from that originally consented:
    - In practice, this is likely to be conflating the issues of allowing non-material variation applications for developments that have deviated from the approved plan, and granting retrospective planning permission for unauthorised development.
      Either way, there is a perception that developers are 'getting away with it' – which, in a sense, they are – but only because the development is acceptable in planning terms (i.e. compliance with the development plan and other material considerations).
- Perception that requiring retrospective applications is the 'easy option', preventing more effective / forceful action.
    - In practice, authorities confirm that retrospective applications are only actively sought (either informally or via the issue of a Section 33A notice) for cases where there is a realistic prospect of a grant of planning permission – i.e. where the unauthorised development appears to accord with the development plan and other material considerations. Developers/landowners are, of course, free to submit such applications for any enforcement case.

There appears to be a need to clarify the purpose and scope of retrospective applications for planning permission – along with the primary function of enforcement being to regularise (rather than punish) breaches of planning control. This could help to reassure communities that, where retrospective applications are approved, this only occurs for development that would otherwise have been acceptable. To secure greater credibility, and act as more of a deterrent, there was strong support (echoed by officers) for substantially higher fees for retrospective applications for planning permission.

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[25] Shown to comprise an average of 35% of the sample authorities' caseload

[26] In England, Section 70C of the Town and Country Planning Act 1990 (introduced by the Localism Act 2011) empowers an authority to decline to determine a retrospective application for planning permission for the development if any part of the land relates to a pre-existing enforcement notice, or the application relates to matters specified in the notice as a breach of planning control. There is no parallel provision in Scotland.

Achieving a Resolution of the Breach on the Ground

Key barriers to achieving compliance were identified as:

- A lack of familiarity with the procedures and protocols involved in the process ('incomprehensible red tape');
- Lack of incentive / compulsion for developers to comply / resolve breaches;
- Difficulties in securing prosecution;
- Difficult developers who 'will do everything possible to avoid complying';

Like enforcement officers, community councils recognise the difficulties posed by the prospect of prosecution – principally with regard to the cost, and also the problematic issues of fulfilling legal requirements ('*…the courts expect them to bend over backwards to be accommodating before taking firmer steps.'*)

Community groups' recommendations for improvement

Identifying and Reporting a Breach

When identifying and reporting a breach recommendations for improvement included improving the clarity of the process, making it clear and simple for the layperson to follow. This includes clarity regarding what constitutes a breach. Public education on reporting, and prevention was also highlighted, along with the need to give the public confidence that it is worthwhile reporting alleged breaches which adversely affect them and that these alleged breaches will be investigated.

Respondents were keen on measures to improve the use and application of planning conditions and obligations, with suggestions including:

- national guidance to PAs on the use of planning conditions be improved, and a complete 'stop' put on conditions that are 'cosmetic' and cannot in practical terms be verified.
    - In theory, conditions that do not meet the tests set by Circular 4/1998 should not be applied by officers – but testimony from enforcement officers indicates that this is a relatively frequently-encountered issue.
- a strong presumption against allowing the variation of planning conditions, while conditions and Section 75 obligations should not be *'temporary stepping stones to achieving planning outcomes initially considered unacceptable'*.
- '*Conditions on planning consents should be published* [they should always be through reports of handling etc.] *and a formal sign-off of all conditions completed, documented and published* [again, discharge of conditions should be recorded on planning authority websites/registers]
    - This could be seen as paralleling officers' idea of a move to a formal 'completion certificate'
- '*Regular unannounced site visits'*

Adequate investment in training and support of officials was also indicated as being helpful to ensure that breaches are identified, along with greater legal powers of unannounced access for officials (it should be noted that authorities already possess powers of entry, and are able to obtain warrants where necessary). It was also

recommended that officers should be more proactive and responsive in noting and reporting breaches.

Communication was also an important issue, making the process and guidance easier for the layperson to use, to improve the accuracy of reporting – and ensuring that those reporting breaches are taken seriously.

Taking Appropriate Enforcement Action

When taking appropriate enforcement action recommendations for improvement included ensuring that there was adequate investment in training and in supporting officials, including providing qualified legal support. A named officer for each case, along with greater legal powers for officials (including unannounced access[27]) was suggested as a means of improving enforcement action.

It was also recommended that prompt enforcement action is taken, including the serving of notices at an earlier stage, appropriate to the seriousness of the breach or series of breaches, which ensures further breaches are discouraged. A further suggestion was that *'meaningful'* penalties should be introduced, especially financial penalties, to encourage compliance with the proper planning process.

As mentioned in response to numerous other questions resourcing is seen as a key issue, with authorities being under resourced in this area. It was noted that incentives (and resourcing) by the government may improve response times to complaints in the same way as there are targets to deal with planning applications.

In addition it was recommended that the introduction of safeguards against political interference may improve the undertaking of appropriate enforcement.

Achieving a Resolution of the Breach on the Ground

Generally, respondents sought a more proactive, faster approach from authorities. Key suggestions included:

- Adoption of a more rigorous '*zero tolerance*' approach and the need to '*make examples*'
- A rapid response to '*nip an evolving situation in the bud'*;
- More powers to '*take firm action and* [give] *developers less leeway*';
- One respondent made a particularly interesting suggestion, moving from an adversarial approach to a '*clear and defined mediation process*'. This could go some way to addressing the current pattern of 'battle by correspondence' that long-running and difficult cases can become.

[27] As noted above, authorities already possess powers of entry.

8.2 Barriers and opportunities

Legal powers

Barriers

Community respondents, in general, view the enforcement system as being relatively weak and lacking in both effective tools to restrain and remedy breaches and a willingness to deploy them. Similarly – and like enforcement officers – community respondents believe that prosecution is both too difficult and an ultimately ineffective sanction because of low penalties.

Respondents are also critical of retrospective applications as an 'easy way out' for developers and not an effective deterrent. There was substantial interest in increasing the punitive side of enforcement action – however, this would need to be balanced against the primary function of the enforcement process, in terms of resolving breaches of planning control.

Opportunities

There is substantial common ground between enforcement officers and community respondents in wanting a more responsive system, where the prospect of prosecution acts as an effective deterrent. **Recommendations 4 and 5** cover the same topics and are focussed on the same outcomes – albeit from slightly different perspectives.

An interesting idea raised by community respondents was the introduction of a formal mediation process as an alternate means of resolving challenging cases. This could be a valuable addition to authorities' toolbox and an intermediate step between notice non-compliance and prosecution.

Recommendation:	
16	**Consider consulting on the addition of binding mediation to the breach resolution process.** ***Rationale****: in cases where developers do not comply with notices, formal mediation could help to resolve cases where common ground can be reached and for which prosecution is not (yet) in the public interest*

Technical

Barriers

Like enforcement officers, some community respondents highlighted the perception that authorities are using ever more numerous and complex planning conditions, creating downstream compliance and enforcement issues. **Recommendation 11** covers the same subject and would have the same effect.

Resource

Barriers

Respondents were highly critical of the perceived lack of effective conditions monitoring amongst planning authorities. There was a recognition that authorities are under significant resource pressure – but no specific solutions were suggested. **Recommendation 13** could help to address the issue without the need for additional funding to local authorities.

Opportunities

Helping the public and community stakeholders to understand how the enforcement process works, and how resources are deployed, would be very helpful in addressing some of the potential misconceptions surrounding conditions monitoring.

Community Councils could potentially play a valuable role, as a locus for training and dissemination of accessible information.

Recommendation:	
17	**Work with the Improvement Service and Community Councils to develop training and guidance material to better explain the key principles and elements of the enforcement process** ***Rationale**: there is a significant interest in conditions monitoring as a perceived area of under-performance. Providing training could help improve understanding and address areas of misunderstanding*

Practical

Barriers

There is a broad mistrust of and lack of confidence in the informal approaches widely (and successfully) used to regularise breaches in most authorities. These approaches are perceived as being ineffective and a 'soft option' for both planning authorities and developers alike.

Respondents also noted a perception that, often, authorities and individual officers were broadly unwilling to act to restrain or rectify breaches. Here, there is a potential misunderstanding of the public interest tests applied in the investigation of cases – resulting in comparatively large number of cases not being pursued due to insufficient impact on public interest – and the very large numbers of cases that do not comprise breaches of planning control. Making better information available to the public, potentially through enhanced Planning Performance Frameworks, could help to build understanding of enforcement caseload, proportions of 'no breach' cases and those not pursued due to de minimis breaches.

Recommendation:	
18	**Consult with authorities on revising the approach to enforcement sections of Planning Performance Frameworks to more accurately reflect the complexion of caseload, resourcing and decisions supporting the issue of notices** ***Rationale**: better, richer information may help to address some areas of misunderstanding amongst community stakeholders*

A very valid point raised by a number of respondents was the reliance of the enforcement system on members of the public to recognise and report breaches of planning control. Clearly, this is problematic as the levels of knowledge and understanding of what constitutes a breach is often quite technical – in part resulting in the significant numbers of 'no breach' and de minimis cases.

Ensuring members of the public that report breaches are treated with respect and taken seriously is clearly a concern for respondents.

Opportunities

Given the success of ePlanning and web-based delivery of development plans, there may be advantages to moving to a web-based method of reporting breaches that could be linked to simple tools to aid in screening out lawful development and minor breaches.

It should be noted that web-based reporting is currently at a low level, but that improved support could drive a shift in route from email and telephone. Development of the necessary tools could be delivered through **Recommendations 3 and 17**

Institutional

Barriers

Substantial mistrust of local authorities in general is a significant problem, along with a general perception that the planning system is strongly weighted towards developers. This perception stretches well beyond enforcement and is an issue that potentially undermines much of the good work done by government and local authorities.

Opportunities

Addressing the lack of public confidence in the planning system as a whole will ideally be a key outcome of the Planning Review process. In relation to enforcement, this is particularly important with regard to its role in underpinning the legitimacy of the system as a whole.

9 Perceptions of planning enforcement: key agencies

9.1 Introduction

Scottish Natural Heritage (SNH) submitted a response to the Independent Review of Planning highlighting concerns related to enforcement. Along with Historic Environment Scotland (HES) and the Scottish Environment Protection Agency (SEPA), SNH was contacted through the Key Agencies Group to contribute to this research project.

SNH attended a discussion meeting; HES provided written submissions.

9.2 Roles in the planning system

SNH

As the statutory body responsible for the conservation and enhancement of Scotland's natural heritage, SNH's interests with regard to enforcement centre around ensuring development avoids or mitigates significant adverse effects on the natural heritage.

As a statutory consultee for some applications for planning permissions[28] and all environmental statements, in addition to managing the licencing regime for protected species, SNH plays an important role in the planning system.

SNH regularly advises on the design of development, in terms of avoiding or mitigating adverse effects, and on the form and content of appropriate planning conditions to safeguard key interests or secure specific mitigation or monitoring measures.

SNH has no formal role with regard to enforcement, but is often drawn in where it appears that conditions are not being adhered to.

HES

Historic Environment Scotland is the statutory body responsible for the conservation and enhancement of Scotland's historic environment. HES must be consulted on applications for planning permission affecting: category A-listed buildings and their settings; scheduled monuments and their setting; inventory battlefields; inventory gardens and designed landscapes; World Heritage Sites; and, Historic Marine Protected Areas.

HES must be also be consulted on applications for Listed Building Consent affecting Category A and B-listed buildings, demolition of any listed building andapplications for demolition of unlisted buildings in a Conservation Area (requiring Conservation Area Consent). HES is also a statutory consultee for all environmental statements.

While local authorities lead on listed building and conservation area enforcement, HES can be consulted by authorities on cases where unauthorised works have occurred to category A or B-listed buildings, or demolition of any listed building.

[28] Potentially affecting SSSI and/or Natura 2000 sites

SEPA

SEPA is Scotland's principal environmental regulator, responsible for a wide range of policy areas including:

- Waste management and licencing;
- Conservation and management of water quality, and licencing of controlled activities;
- Flood risk management;
- Control of Major Accident Hazards;
- Pollution prevention and control;
- Radioactive substances, including waste;
- Regulation of carbon emissions;
- Air quality management and regulation; and
- Managing contaminated land and its remediation.

There is substantial crossover between SEPA's areas of responsibility and the planning system; SEPA is a statutory consultee on certain applications for planning permission[29] and all Environmental Statements.

9.3 Concerns

SNH

Focus on impact of breaches

SNH's key concern regarding the current enforcement system is that enforcement activity is not necessarily focused on the cases that have the potential to have the greatest environmental impact. In the respondent's opinion, this is a consequence of the means by which potential breaches come to light.

As illustrated by the analysis of planning authority data, members of the public are by far the most common source of reports to enforcement services. This means that enforcement is largely urban-focused and reactive rather than pro-active, and may not prioritise cases where breaches could have a significant environmental effect. SNH has observed that a lack of monitoring of major developments in more isolated locations, such as wind farms, can sometimes lead to serious breaches of planning control with consequent significant effects on the environment.

By contrast, SNH considers it likely that the majority of the breaches dealt with by enforcement teams generally concern impacts on the amenity of a comparatively small number of individuals, rather than impacts on the wider environment or issues of more than local importance.

[29] Applications for fish farming, mining operations, oil storage, sewage treatment works, works in or to the banks of watercourses, cemeteries; any development that could materially increase the number of buildings at risk of flooding

Conditions monitoring

Like local authority officers and community representatives, SNH is concerned that conditions placed on planning permissions are not routinely monitored for compliance – particularly with regard to those required for environmental protection.

Given the substantial resource that statutory consultees such as SNH put into the review of planning applications, environmental statements and other supporting information, it is important that the value added to proposals through this effort – particularly where this is instrumental in securing changes or conditions that render development acceptable – is followed through.

9.4 Suggestions for improvement

Impact-focussed approach to enforcement

SNH is keen to see a shift in enforcement practice that prioritises:

- Enforcement against breaches of planning control, prioritised by environmental impact;
- The effective monitoring of conditions for higher impact / EIA development; and
- Improved transparency regarding frequency and detail of conditions monitoring of EIA development by local authorities.

Greater transparency is a particularly valuable suggestion, as Enforcement Registers are widely considered to be opaque and unhelpful. (As the research illustrates, these documents reflect only a tiny fraction of authorities' activities in investigating and remediating breaches of planning control, and are therefore also potentially counter-productive as they do not give an accurate impression of the work being done.) Online development management systems have greatly improved public and stakeholder access to planning information. While there is undoubtedly a balance to be struck in terms of securing landowner/developers' – and complainants – privacy[30], securing enhanced public trust in the system is an important outcome.

Developer-funded conditions monitoring

In relation to their key concern – conditions compliance and monitoring – SNH suggested that existing models of good practice could be drawn upon and applied more widely.

Notably, this focussed on the use of 'Ecological Clerks of Works' (ECoW) and conditions monitoring officers, as has become standard practice for larger-scale wind energy developments [and some minerals and infrastructure developments]. As noted at 0, p.78, the provision of a dedicated resource to monitor and secure compliance with the often complex and onerous planning conditions necessary to avoid adverse environmental effects from the construction and operation of infrastructure benefits from industry support and a considerable body of practice that can be drawn upon.

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[30] Further research into precise interactions with relevant legislation would be required to determine the lawfulness of publishing the locations / addresses of informal enforcement proceedings; protecting complainants' identity would, of course, remain important to maintain confidence and protect the public.

The research proposed by Recommendation 13 would seek to test the available body of practice and assess the costs/benefits to application to a wider range of development.

Research into conditions compliance

The SNH respondent indicated that student-led research had been commissioned/supported by the organisation that had looked at the compliance of a number of wind energy developments with relevant planning conditions. While the work was not published, it highlighted a substantial number of breaches of conditions – particularly relating to track formation and water/sediment management.

While a national focus on a single development type may not be instructive for the wider picture, systematic evaluation of conditions compliance for Major and EIA developments could be a useful addition to the evidence base.

It is clear from the quantitative and qualitative evidence gathered for this project that conditions monitoring represents a tiny fraction of breaches identified, and that members of the public are responsible for the overwhelming majority of reporting. Understanding the scale, nature and severity of the problem – and the social, environmental and economic impacts arising – would be valuable in informing an appropriate response.

Recommendation:	
19	**In partnership with the Key Agencies, scope evaluation of / research into conditions compliance of and breaches of planning control connected with Major and EIA development.** ***Rationale**: reactive, urban-focussed patterns of enforcement action have been highlighted as potentially missing larger-scale, extra-urban development with greater potential for significant adverse effects on the environment.*

Better conditions, easier enforcement

SNH highlighted the role of expert-developed, legally tested and industry-approved model conditions as a means of improving quality and enforceability. Again, the renewables industry provides a ready-made case study – with model conditions developed by SNH, Scottish Renewables and HoPS for Section 36 applications[31].

Clearly, such extensive conditions guidance may not be necessary or proportionate for all types of development – but for higher-impact schemes where significant effects are only rendered acceptable through mitigation secured by condition, widening the approach could be helpful.

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[31] Applications for generation consent under Section 36 of the Electricity Act 1989 – required for wind energy developments of 50MW or greater installed capacity, and accompanied by deemed planning permission under Section 57 of the 1997 Act – to which conditions can be applied.

It should be noted that a range of model conditions are currently in use by some authorities – for example those related to archaeology and development, produced and circulated by the Association of Local Government Archaeology Officers (ALGAO).

Recommendation:	
19	**In partnership with HoPS, the Law Society of Scotland and key development industry representatives, identify opportunities for development and application of model conditions and/or updated guidance to supplement Circular 4/1998** ***Rationale**: enforceability of conditions is a key concern for authorities, communities and key agencies alike. Developing guidance and, where appropriate, model conditions could aid enforceability and reduce uncertainty for all parties.*

10 Conclusions and Recommendations

10.1 Introduction

This section of the report draws together and summarises the key findings from the surveys and data analysis, and collates the recommendations made throughout the report.

10.2 Conclusions on effectiveness

Broadly, the data analysed suggests that the enforcement process is generally effective, with the overwhelming majority of cases resolved through flexible, informal means. Where notices are served, again these are generally effective with comparatively few long-running or problematic cases necessitating further action.

Unfortunately, due to data limitations, it is not generally possible to track the progress of individual cases – making drawing accurate conclusions in this regard difficult. (One authority's data, however, illustrates a pattern of strong action based on seeking interim interdicts to restrain breaches of listed building control where service of notices has proven ineffective.)

Currently, the system is potentially something of a victim of its own success. Because informal means of resolution are so commonly effective, it can appear that authorities are under-using their formal powers – contributing to the perception of inaction. However, where cases cannot be resolved, prosecution is currently proving to be a sub-optimal sanction as prosecutions are notoriously difficult to bring and, on conviction, penalties are very low. This inherent weakness undermines confidence in the system and erodes any potential role in deterrence.

10.3 Conclusions on barriers to use of existing powers

The suite of existing powers are considered to be broadly adequate by officers, but weak and somewhat ineffectual by community respondents.

Key barriers to use of existing powers can be summarised as follows:

- **Legal issues:**
    - Difficulties in preparing cases and securing prosecutions;
    - Problematic relationship between planning authorities and the Procurator Fiscal service;
    - Ease of securing retrospective planning permission, and the lack of significantly higher fees to act as a deterrent;
    - Comparatively slow process of service notices and statutory time periods for compliance make the system less responsive.
- **Technical issues:**
    - Lack of consistency between authorities in terms of approach and practices;
    - Variation in understanding and definitions of the public interest;

- Issues arising from a lack of precision in the application of planning conditions.

- **Resource issues:**
  - There is a general perception that enforcement is under-resourced, which is adversely affecting the service. Evidence for this is less clear-cut as Full-Time Equivalent (FTE) figures do not necessarily reflect the realities of day-to-day working.
  - Conditions monitoring is a particular concern for both authorities and community respondents.
  - Direct action, although a highly valued means of resolving breaches, is now comparatively rarely used as the capital costs and risk of non-recovery are considered to be too significant.
- **Practical issues:**
  - The widespread and significant mistrust of enforcement, and the planning system in general, is a major problem.
  - The reliance on members of the public to report breaches of planning control is inherently problematic as this results in large numbers of cases in which either no breach has occurred, or the breach is so minor as to render action disproportionate.
- **Institutional issues:**
  - Officers perceive enforcement to be a lower priority for their authorities compared to development plans and development management.
  - Securing management and Elected Member buy-in for enforcement action – particularly more interventionist approaches – is frequently challenging.
  - Enforcement is considered to have a lower profile in terms of professional bodies and national policy[32].

10.4 Recommendations

The recommendations below are collated from throughout the document, addressing the key issues identified above.

Recommendation:	
1	**Consider the development of national data standards for planning data collection** ***Rationale****: improve the ease and consistency of recording information; enable effective tracking of cases and provide richer, more meaningful performance statistics.*

[32] There is, for instance, only a single reference to enforcement in SPP.

2	**Consider the value of guidance and best practice worked examples to encourage the use of Stop Notices and the use of interim interdicts to restrain urgent breaches of planning and listed building control.** ***Rationale**: learning from the experience of authorities that routinely take a stronger and more interventionist approach to restraining key types of breach (particularly unauthorised works to listed buildings)*
3	**Consider the development of simple, accessible guidance to planning enforcement for communities and stakeholders** ***Rationale**: improve the level of public knowledge and understanding of the purpose, process and outcomes of planning enforcement; potentially reduce rates of over-reporting.*
4	**Work with the Crown Office and Procurator Fiscal Service to develop specific guidance for bringing effective planning prosecutions** ***Rationale**: improve the efficacy of cases brought for prosecution*
5	**Work with the Crown Office and Procurator Fiscal Service to deliver appropriate training in planning law and relevant tests for senior officers and Fiscal Service staff.** ***Rationale**: ensure that planning authorities and the Fiscal Service are working to a common purpose and shared framework of understanding. Clear 'gatecheck' parameters to test cases being brought for prosecution could help to increase rates of prosecutions brought.*
6	**Commission comparative research into the process and effectiveness of prosecutions under environmental and planning law** ***Rationale**: understanding the benefits of both systems and identifying the need for legislative and/or procedural change*
7a	**Commission research into the use and effectiveness of Charging Orders under the building standards regime, drawing out opportunities to apply to planning** ***Rationale**: addressing an identified need to improve debt recovery for direct action and Fixed Penalty Notices*
7b	**Commission research into the potential costs and benefits of updating the process for discharging conditions to introduce charges for applications for matters specified in conditions and more rigorous processes to obtain 'completion certificates', ensuring all conditions are complied with.** ***Rationale**: bringing planning into line with building standards and shifting*

	the burden for conditions monitoring and discharge more effectively on to developers.
8	**Consider consulting on the need for substantially higher fees for retrospective applications for planning permission, and technical amendments to the existing legislation to close loopholes** ***Rationale**: higher fees – potentially charged on a sliding scale in line with the scale of the breach / development – could act as a more effective deterrent to deliberate breaches; may also assist in increasing rates of pre-application consultation and reducing overall numbers of breaches of planning control.*
9	**Consider the development of guidance and best-practice examples on the use of applications for interim interdicts as a means of responding quickly and effectively to breaches of control.** ***Rationale**: addressing a perceived lack of speed through existing tools; providing authorities with greater confidence in accessing the powers available through the courts.*
10	**Consider consulting with planning authorities on the costs and benefits to developing and adopting shared principles and approach to enforcement.** ***Rationale**: addressing the perceived lack of consistency in enforcement practice; promoting greater collaborative working between authorities and sharing good practice; improving the consistency of approach and decision-making across Scotland.*
11	**Encourage planning authorities to deliver training to development management officers on robust, appropriate conditions that can be effectively and efficiently enforced.** ***Rationale**: ensuring that conditions are proportionate, effective and enforceable may help to cut rates of breaches; it will also make effective enforcement in the event of non-compliance more straightforward.*
12	**Encourage planning authorities to audit their enforcement approach, processes and casework trends to identify opportunities for streamlining and delivering a more effective, responsive service.** ***Rationale**: addressing officers' perceptions of the system as slow and sometimes cumbersome; ensuring authorities are equipped to make full use of available powers.* *Likely links to Recommendation 10.*
13	**Work with HoPS and the Scottish Planning Enforcement Forum (SPEF) to develop guidance / decision-support tools to assist in the**

	effective and proportionate securing of contributions from developers to monitoring compliance. ***Rationale**: passing the cost of monitoring to the developer is a well-established principle and could reasonably be extended*
14	**Work with HoPS and the Scottish Planning Enforcement Forum (SPEF) to consult on approaches to securing capital funds for direct action, and appropriate methods of cost recovery.** ***Rationale**: direct action is a powerful tool, but is currently under-used on account of local authority resource pressure. Understanding the range of options available to recover costs from developers could help to expand the use of the approach.*
15	**Work with HoPS, the Scottish Planning Enforcement Forum (SPEF) and the RTPI to develop a strategy to raise the profile of planning enforcement** ***Rationale**: raising the profile of enforcement within the profession, in policy and across local authorities to address misconceptions, articulate the benefits and secure enhanced political and management buy-in*
16	**Consider consulting on the addition of binding mediation to the breach resolution process.** ***Rationale**: in cases where developers do not comply with notices, formal mediation could help to resolve cases where common ground can be reached and for which prosecution is not (yet) in the public interest*
17	**Work with the Improvement Service and Community Councils to develop training and guidance material to better explain the key elements of the enforcement process** ***Rationale**: there is a significant interest in conditions monitoring as a perceived area of under-performance. Providing training could help improve understanding and address areas of misunderstanding*
18	**Consult with authorities on revising the approach to enforcement sections of Planning Performance Frameworks to more accurately reflect the complexion of caseload, resourcing and decisions supporting the issue of notices** ***Rationale**: better, richer information may help to address some areas of misunderstanding amongst community stakeholders*
19	**In partnership with HoPS, the Law Society of Scotland and key development industry representatives, identify opportunities for development and application of model conditions and/or updated**

	guidance to supplement Circular 4/1998 ***Rationale**: enforceability of conditions is a key concern for authorities, communities and key agencies alike. Developing guidance and, where appropriate, model conditions could aid enforceability and reduce uncertainty for all parties.*

Additional recommendations

As securing prosecutions and recouping costs were identified as such significant issues, looking to the UK's other administrations could provide some potential lessons.

- In England, planning authorities are not reliant on the Crown Prosecution Service to bring enforcement prosecutions. This potentially addresses issues relating to priorities or understanding of technical issues – although tests of public interest and evidence remain.
    - Planning authorities in England may also apply for Confiscation Orders under the Proceeds of Crime Act 2002, enabling profits arising from development to be targeted.
    - SEPA has made use of Confiscation Orders in relation to prosecutions for environmental offences.
- In England, Section 70C of the Town and Country Planning Act 1990 (introduced by the Localism Act 2011) empowers an authority to decline to determine a retrospective application for planning permission for the development if any part of the land relates to a pre-existing enforcement notice, or the application relates to matters specified in the notice as a breach of planning control. This closes a commonly-exploited loophole that enables developers to avoid taking action specified in an enforcement notice by submitting a retrospective planning application.

10.5 Discussion

The recommendations set out in this report should be viewed in the wider context of the Planning Review and tested for compatibility against the review recommendations / actions.

Enforcement, more than any other element of the planning system, is poorly understood by the public, stakeholders and, to a certain extent, the planning profession. Many of the perceived issues with the system could be addressed through more effective communication and clear articulation of the purposes and principles underpinning it. This needs to be part of a positive framing of the reformed planning system and the place of communities within it – otherwise, technical and procedural amendments will do little to counteract negative public perceptions.

Appendix 1: Briefing note and data specification

The Use of Planning Enforcement Powers – Barriers and Scope for Improvement

About the project

The Scottish Government has commissioned LUC to research the implementation of current planning enforcement powers and to identify barriers to the effective use of these powers.

The research intends to provide evidence to support the Scottish Government's consideration of Recommendation 30 of the independent review of planning report, Empowering Planning to Deliver Great Places. It will provide a comprehensive view of enforcement activity in Scotland, gauging both enforcement officers' and stakeholders' views on the barriers to effective enforcement, perceptions and the potential opportunities for improving the system.

The research will focus on a two-stage process:

- Obtaining and assessing planning authorities' enforcement data to establish a comprehensive picture of current activity across Scotland; and
- Gathering enforcement officers' and stakeholders' views on the effectiveness of enforcement action in resolving planning breaches, the specific barriers to the use of enforcement powers, and the scope for improving the efficiency of current system.

Role of planning authorities

Planning authorities have primary responsibility for taking whatever enforcement action may be necessary in the public interest. We understand the pressures faced by enforcement officers in balancing the need to take enforcement action and meeting the needs and aspirations of communities.

In this project

In delivering this research, **we need your help** to provide a valuable insight into the performance, opportunities, and barriers to the current enforcement system.

Benefits of participation

The research, which will set out clear messages and recommendations, will help to drive understanding and improvement of the enforcement system. It presents an opportunity for enforcement officers to express to the Scottish Government the specific barriers you experience in implementing enforcement actions, and where you believe improvements could be made to enhance the effectiveness of the current system.

We also intend to highlight examples of good practice, bringing wider recognition to the work of enforcement officers in taking effective enforcement action commensurate with the breach of planning control.

Research outputs

The output from this research will be a concise report setting out the method and process; presenting findings and recommendations for government and local authorities.

Participation request

Online survey

We invite you to complete an online survey which explores issues around enforcement. Significant care has been taken in the design of the survey to ensure that sufficient data is gathered, without undue impact on respondents' time. Following analysis of the surveys, we propose to conduct a number of follow-up interviews with enforcement officers who have suggested examples of either good or poor practice in planning enforcement.

The link to the survey is https://www.surveymonkey.co.uk/r/planningenforcement_officer . We would like to receive responses to the survey by **14th October 2016**.

Enforcement Register data

We would also like to make use of your Enforcement Register data to help inform the analysis of the extent of enforcement activity throughout Scotland.

We would like to request an Excel spreadsheet of the raw data for all **formal and informal** enforcement activity between 1st January 2011 and 31st December 2015, for the following headings:

Case reference

Date received

Date closed

Breach type

Description

How the breach was received

Notice type served (including a record of where no breach)

Reason for the decision

Case status

Date notice issued

Please provide full descriptions for any abbreviations used in the data, this will help us to ensure comparison between data across the planning authorities.

We would like to receive the enforcement register data by **14th October 2016**. If you are unable to provide this data under all the headings, or within the time frame requested, please get in touch:

Susanne.underwood@landuse.co.uk

Telephone: 0131 202 1616

Appendix 2: Phrase recognition analysis

Sample authority B breach descriptions, drawn from the Uniform database used to record planning casework, were analysed using JMP13 ‘text explorer’ functions. Common phrases were extracted and collated by type.

Instances of phrases with four or more occurrences

Phrase	Count	N
erection of fence	22	3
garden ground	22	2
shipping container	20	2
siting of shipping container	18	4
siting of shipping	18	3
storage unit	18	2
shipping container storage unit	17	4
storage unit on land	17	4
container storage unit	17	3
shipping container storage	17	3
unit on land	17	3
within conservation area	17	3
container storage	17	2
erection of shed	14	3
condition of land	13	3
erection of timber	9	3
solar panels	9	2
fence has been erected	8	4
garden ground of property	8	4
ground of property	8	3
satellite dish	8	2
maintenance of land	6	3
dish has been erected	5	4
erected in garden ground	5	4
installation of solar panels	5	4
erected in garden	5	3
installation of solar	5	3
agricultural building	5	2
boundary fence	5	2
car park	5	2
car sales	5	2
shop front	5	2
static caravan	5	2
within garden	5	2
consent for meteorological mast	4	4
erected within conservation area	4	4
garden ground without planning	4	4

ground of property without	4	4
meteorological mast ref 09	4	4
temporary consent for meteorological	4	4
within conservation area without	4	4
within the conservation area	4	4
consent for meteorological	4	3
erected within conservation	4	3
erection of signage	4	3
garden ground without	4	3
ground without planning	4	3
meteorological mast ref	4	3
within garden ground	4	3

Collated development / issue types

Term	Instances
Fence	44
Garden	69
Shipping container	176
Conservation Area	33
Solar panels	19
Meteorological mast	20