The Motoring Organisations' Land Access & Recreation Association

Unsealed Unclassified Roads

Their History, Status, and the Effect of the Natural Environment & Rural Communities Act 2006

MOTORING ORGANISATIONS'
LARA
LAND ACCESS & RECREATION ASSOCIATION

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Foreword

Motorists, both everyday and 'sporting', have been driving on public roads since the birth of the motor vehicle and it is now well over one hundred years since the first reliability trials along the rough roads of the day attracted pioneer drivers, and manufacturers keen to improve their everyday road vehicles*.

The years between the two World Wars were a period of rapid change to many roads, with 'tarmac' becoming the favoured surface for roads in urban areas, and for roads between the major conurbations. But the final push for the tar gangs did not happen in rural areas until the late 1950s and early 1960s, and even in the late 1960s there were few drivers who did not, at some time, drive on 'stone' or 'dirt' roads and considered this as quite unremarkable.

Over the last forty years, as cars and motor cycles have developed on the assumption that roads will be smooth and have a sealed surface, the typical car driver or motorcycle rider has come to regard 'rough roads' as something to be avoided. But a considerable number of enthusiasts continue to derive a great deal of harmless pleasure from exploring the UK's superb network of ancient roads, many of which are still unsealed.

As driving on unsealed roads has changed from being an everyday occurrence experienced by the majority to a leisure activity enjoyed by a minority, there has been an inevitable increase in the friction between the various user groups. This has led many of those who choose not to drive on unsealed roads to question whether these are, indeed, 'roads' in their understanding of the term. The result has been a number of legal battles about the status and use of unsealed unclassified roads in England and Wales, despite the marginal legal distinction between whether a road is sealed or unsealed. We believe that, when properly researched, the origins and management of unsealed unclassified roads clearly point to them having vehicular rights.

The first version of this LARA report was published in March 2013. This first major revision incorporates some minor changes to the original text, and three additional sections dealing with the relationship between roads, as recorded on the highway authority's 'List of Streets', and byways open to all traffic (BOATs), as recorded on the 'Definitive Map and Statement' of public rights of way.

We welcome all comments, and suggestions for clarification or improvement. LARA and its Member Organisations are ready and willing to work with highway authorities, and the various non-motorised user groups, to preserve this important part of our national heritage.

Andrew Knightly Brown
Honorary Chairman of LARA
September 2018

* For more information on the evolution of off-tarmac motoring, see the Reference Document *The Origin and Evolution of Recreational Motoring on Unsealed Roads*.

Contents

1. Background

1.1. Anyone who regularly uses or manages unsealed unclassified public roads could probably tell you that they are recorded on each local highway authority's 'list of streets', are sometimes (but less often of late) called 'green roads' or 'green lanes', are at the bottom end of highway authorities' hierarchy of public roads, and are thereby doomed to receive little, if any, regular maintenance.

1.2. But such a description fails to say whether unsealed unclassified roads, as a particular type of public road, are conclusively or presumptively carriageways, or whether some are just bridleways, or footpaths. There is a considerable degree of polarisation of views here. A member of the public wishing to drive a motor vehicle on such roads would tend to the view that such roads are at least presumptively public carriageways; someone opposed to such motor use might tend to the view that any unclassified road is no more than a public footpath unless and until a higher status is proved in each case.

1.3. That argument has bounced back and forth for more than thirty years, but the effect of s.67 of the Natural Environment and Rural Communities Act 2006 (NERCA 2006) has been to introduce a further layer of complication. This paper seeks to address that uncertainty and clarify just what is known, and what might be presumed, about the humble unsealed unclassified road. And, while it is the unsealed variant of the unclassified road that generates most heat, much of what is set out here applies equally to minor sealed roads in the countryside, many miles of which are now deteriorating steadily back towards an unsealed condition.

1.4. This paper builds on and acknowledges *Unclassified County Roads: a study into their status. August 2004*, commissioned and published by the Trail Riders Fellowship (see *Reference Documents*).

2. What are unclassified roads?

2.1. 'Unclassified road', or its older variant 'unclassified county road', is not a defined statutory term. 'Classified road' is and has been a statutory term for a considerable period, stretching right back in concept, if not application, to the early days of the Ministry of Transport in 1919. 'Unclassified road' is a term used by most highway authorities in distinction from what is understood by 'classified road'.

2.2. Such a definition-by-distinction arose in the Agriculture (Improvement of Roads) Act 1955 where in s.5(1), "'*unclassified road' means a road which is a maintainable highway but is neither a trunk road nor a road classified under the Ministry of Transport Act, 1919.*"

2.3. The question of what characterises unclassified roads becomes in turn a question of identifying what are the characteristics of the larger set of roads, which set encompasses both unclassified roads and classified roads.

2.4. No legal consequences directly flow from a road being recorded by a highway authority as an unclassified road. Nothing obliges any authority to keep a list of unclassified roads as such. The fact that a route has been identified or referred to at any point as an unclassified road is no more than an evidential indication of its reputation, whereupon follows the complicated question of what this might indicate.

2.5. A metalled road is dictionary-defined: "*A metalled road has a level surface made of small pieces of stone; used especially of country roads and tracks.*" Road metal is stone. A sealed road is a

metalled road with a waterproof and smooth top layer (such as asphalt), which surface is sometimes known as 'blacktop'.

2.6. An unsealed road is usually a road that has never been sealed, although some sealed roads are breaking up and deteriorating so much that they are now better described as unsealed. An unmetalled road might be termed a 'green road', or 'green lane', even though the surface is more dirt than grass.

3. Road: its ordinary meaning and judicial discussion

3.1. According to the *Oxford English Dictionary*, the word 'road' is cognate with the verb 'ride'. Thus its original meaning seems to be that reflected in the first entry in the Oxford English Dictionary: "*The act of riding on horseback; also a spell of riding; a journey on horseback*' (with examples given from the 9th century to the 17th century). The fourth entry is '*An ordinary line of communication used by persons passing between different places usually wide enough to admit of the passage of vehicles as well as of horses or travellers on foot"* (with examples given from the 17th century onwards). Thus, the more modern meaning of 'road' seems to ordinarily connote a way which is capable of being used by vehicles.

3.2. This common understanding of the meaning of 'road' has been recognised judicially, in particular, in the context of the extended definitions of 'road' in the Road Traffic Act 1930, Road Traffic Act 1972 and Road Traffic Act 1988.

3.3. S.121 Road Traffic Act 1930, s.196(1) Road Traffic 1972 and s.192 Road Traffic Act 1988 each define 'road' as '*any highway and any other road to which the public has access, and includes bridges over which a road passes*.'

3.4. In Oxford v. Austin [1981] RTR 416, Kilner-Brown J said that the definition involved two questions, "*the first question which has to be asked is whether there is in fact in the ordinary understanding of the word a road, that is to say, whether or not there is a definable way between two points over which vehicles could pass. The second is whether or not the public, or a section of the public, has access to that which has the appearance of a definable way.*" No attention seems to have been paid in that case to the words '*any highway and any other road*' in the definition of 'road' under discussion (s.196(1) RTA 1972). The court was dealing with the question of whether a car park was a 'road' and, therefore, may have not been focussing on the possibility of non-vehicular highways being 'roads' within the definition. However, the case is useful for illustrating what the court interpreted the word 'road' as meaning.

3.5. In Lang v. Hindhaugh [1986] RTR 271, the court was again examining the definition of 'road' in s.196(1) RTA 1972, in the context of the offence of driving on a road while disqualified from driving under s.99 RTA 1972. The defendant had driven his motorcycle on a public footpath, where the alleged offence took place. Croom-Johnson LJ said "*I think there can be no doubt from the description of the place where the motorcycle was being ridden that the ordinary man in the street looking at it would have done what the Crown Court did and said 'That is not a road', but it was found to be a highway. It was a highway because it was a public footpath ...*" and then proceeded to determine the appeal by observing that the definition in s.196(1) RTA 1972 extended the ordinary meaning of the word 'road' to other public rights of way which would not ordinarily be understood to be roads. The important point for this analysis is not the interpretation of the extended definition contained in s.196(1) RTA 1972,

but rather the recognition that any ordinary man in the street would not regard a footpath as a road.

3.6. Cutter v. Eagle Star Insurance Co. Ltd [1997] 1 WLR 1082 was a similar case to Oxford v. Austin, involving the question of whether a car park (or a route in a car park) could be a road. The Court of Appeal expressed themselves in language which again contemplated vehicular usage, although as in Oxford v. Austin the question of whether the route was available for vehicles was not an important point. As with Oxford v. Austin, the case is useful for illustrating what the court naturally interpreted the word road as meaning, although if the point had been in issue, it would have been clear that RTA 1988 in fact had an extended definition of road which included other highways.

3.7. These cases, Lang v. Hindhaugh in particular, seem to illustrate that the ordinary meaning of road connotes a vehicular highway, and that it is only by means of an extended definition in the Road Traffic Acts that 'road' acquires a meaning capable of encompassing other, non-vehicular highways, such as footpaths.

4. 'Road' in statute and practice

4.1. As regards unsealed unclassified roads, the issue here is simple: does the word 'road' denote, presume, or suggest that an unsealed unclassified road is *ipso facto* a public road for vehicles? This is not the same question as 'is an unsealed unclassified road a public road for vehicles by virtue of its being *recorded* as an unclassified road?' That issue is addressed later.

4.2. Most of the Highway Act 1835 stayed in force until supersession by the Highways Act 1959. S.5 remained in force until 1959, and it provides, "*... that the word 'Highways' shall be understood to mean all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements.*"

4.3. In Robinson v. Richmond Borough Council [1955] 1 QB 401, Lord Goddard CJ noted that "*... the Act distinguishes between roads and footpaths. It says that a road can be a highway and that a footpath can be a highway. They are not the same things; for one is a road and the other is a footpath.*" In the period 1835 to 1959, for the purposes of the Highway Act, 'road' meant a public road for vehicles; 'highway' was the generic term (as it generally was and is) for the different species of public right, including bridleways and footways.

4.4. In the Ministry of Transport Act 1919, road classification was introduced for the purposes of allocating advances from the Minister to local authorities for the construction of new roads and the improvement or maintenance of existing roads. The Act does not define 'road', but s.2 in specifying the powers and duties of the Minister, refers to "*roads, bridges and ferries and vehicles and traffic thereon.*" The Act of 1919 was a response to the enormous growth in private and commercial motor traffic in the 20th century.

4.5. In the Roads Improvement Act 1925, Parliament provided "*... to make further provision for the improvement of roads, including the prescription of building lines, and for purposes connected therewith.*" S.1 deals with trees, shrubs, margins, guardrails, and similar in publicly repairable 'highways'. S.2 amends the Development and Road Improvement Funds Act 1909, as regards trees, shrubs, margins and building lines along 'roads'. S.3 deals with the acquisition and exchange of land for building new 'roads'. S.4(1) deals with sight lines on 'highways'. S.4(8) deals with the improvement of 'roads'. There is a clear distinction in the Act between highways generally, and roads. In s.11, "'*road' includes any bridge, viaduct, subway, road, ferry and*

footway." For the purposes of this Act a road is a type of publicly repairable highway; highway and road are not synonymous.

4.6. In the Local Government Act 1929, s.29(1), "*The council of every county shall be the highway authority as respects every road in the county which at the appointed day is a main road or which would, apart from this section, at any time thereafter have become a main road, and every such road and every other road as respects which a county council become by virtue of this Part of this Act the highway authority, shall be termed a county road, and all enactments relating to main roads shall as from the appointed day have effect as if for references therein to main roads there were substituted references to county roads.*"

4.7. S.30(1) "*... every county council shall be the highway authority as respects such parts of the county as is for the time being comprised in a rural district ... Provided that nothing in this section shall affect the functions of rural district councils under the Local Government Act 1894, as respects rights of way and encroachment on roadside wastes ...*"

4.8. S.134 "*In this Act unless the context otherwise requires ... 'road' means a highway repairable by the inhabitants at large, and save as in this Act otherwise expressly provided includes any bridge so repairable carrying the road.*"

4.9. The Local Government Act 1929 (above) operated to transfer the role and duty of highway authority, in rural districts, from the rural district councils to the county councils. That transfer of generic highway authority status was effected by s.30, which raises the question, what was the purpose and effect of s.29?

4.10. S.29 operates to retain highway authority status for the county councils for all current and future 'main roads', in rural and urban districts. As regards all other roads, which are transferred from rural district councils by virtue of s.30, these will thereafter be known as 'county roads'. From the date of commencement, s.29 had a retrospective effect and substituted the term 'county road' for 'main road'.

4.11. The definition of 'road' in s.134 presents something of a difficulty in construction here. Where, as here, a 'road' is a publicly repairable highway, does this mean that 'road' encompasses all species of highway – to draw from s.5 of the Highway Act 1835, "*... all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements.*" If this wide range of types of highway are all 'roads' for the purposes of the 1929 Act, then every footpath, bridleway, causeway, etc., in a county is, by virtue of s.29(1), a 'county road', and will thereafter be known as 'county roads'. So far as is known, no county authority followed that path.

4.12. Reading s.29(1) with the definition of 'road' in s.134, "*unless the context otherwise requires... 'Road' means a highway repairable by the inhabitants at large*", seems to produce the result that any highway, including a bridleway or a footpath, which was transferred by this part of the Act becomes a county road: since the word 'road' in "*... every other road as respects which a county council become by virtue of this Part of this Act the highway authority, shall be termed a county road ...*" would seem to include a bridleway or a footpath. This seems to be the most obvious literal interpretation of s.29(1) read with s.134.

4.13. However, there is at least a respectable argument this is not how s.29(1) should be construed. The definition of 'road' in s.134 is not immutable: s.134 has an express saving for "*unless the context otherwise requires.*" Furthermore, it is not necessarily clear that the definition of 'road' is intended to expand 'road' beyond its natural meaning: it may be that all that was intended was to limit the meaning of the word 'road' only to highways which were

roads in the ordinary sense of the word and which were highways maintainable at public expense (cf. the discussion of the meaning of 'street' above by reference to Robinson v. Local Board of Barton-Eccles (1883) 8 App Cas 798). That is to say, a footpath would not be included because it is not a road; also, a road not maintainable at public expense would not be included because it is not maintainable at public expense. In favour of this interpretation is that were s.29(1) intended to include all highways maintainable at public expense which were transferred, it would be rather more natural to expect that the draughtsman would simply have used the word 'highway' to achieve that result. Contrast especially s.30 which does use the word 'highway'. In s.29(1), it is not unnatural to suppose that the draughtsman was thinking of 'roads' in the ordinary sense.

4.14. Further, the 1929 Act, unlike the 1835 Act, does not define 'highway', and states that the definition of 'road' in s.134 is subject to the context within the Act. Given that s.30 operates to make the county council the highway authority for the purposes of carrying out statutory duties contained within the Highway Act 1835 (with limited powers to deal with obstructions and encroachments reserved to the rural districts; and limited powers of improvement reserved to the rural parishes) the definition of 'highway' for the 1929 Act might reasonably be taken to be that in s.5 of the 1835 Act. 'Road' therefore, in the context of s.29 of the 1929 Act, should be construed as not being 'any type of highway', but rather as a 'road for the purposes of s.5 of the 1835 Act, which is a publicly repairable highway.' If this argument is accepted then a county road (whether classified or unclassified), by express definition, was and is a publicly repairable highway, and by construed definition was and is a publicly repairable s.5 Highway Act 1835 road. By s.30, a county council (with the reservations to rural district councils) also was the highway authority for non-publicly repairable highways of all types. The best contextual construction of the meaning of 'county road' in the 1929 Act is that it is a publicly repairable carriageway highway. But that must immediately be qualified by saying that there were 'handed over' in 1929, and again listed in (e.g.) 1959 and 1980, a relatively small number of surfaced urban paths and stairs that were plainly not vehicular highways.

4.15. In the 1929 handover process, most county authorities made or adopted a 'handover map' of public roads. This was not a statutory requirement, but in most counties encompassing former rural district highway authorities, these were usually the first county-wide map of 'admitted' publicly maintainable roads, and they formed the basis of non-statutory 'county road maps' in use at least until the commencement of the Highways Act 1959. Research indicates that most counties made and updated 'county road maps' until circa 1974 (a period of major local government reorganisation) when there was a general shift across to written lists. There was no statutory requirement for any form of 'list of streets' in rural areas until 1974. These handover maps can be significant evidence as to the reputation of a road as a publicly repairable road in 1929 (or slightly after) and also some evidence of the status of those roads. The mileage of roads shown in the handover maps can be compared to the mileage in statutory road returns.

4.16. In the Restriction of Ribbon Development Act 1935, s. 24, 'road' means "*a highway and includes any part of a highway and any proposed road and any bridge or tunnel over or through which a highway passes or a proposed road is intended to pass, and "trunk road" shall be construed accordingly.*" On the face of it, the definition here of 'road' is wide enough to encompass all species of highway, including bridleways and footpaths. But in s.1(5), "*In determining the standard width to be adopted as respects any road, a highway authority and the*

Minister shall take into account the requirements of all classes of traffic, including foot passengers and cyclists likely to use the road, and shall consider the provision of margins for the accommodation of ridden horses and driven livestock." Clearly the application of the Act to 'roads' presumes that these are (or will be in the case of 'proposed roads') roads for all classes of traffic.

4.17. It is useful to consider the purpose of the Restriction of Ribbon Development Act 1935, which was simply to regulate built development along roads (in the ordinary sense). It was an early form of town and country planning legislation. Ribbon development was a direct consequence of the rapid proliferation of the private motor car and motor bus in the 1920s and 1930s. Immediately before the 'common motor age' significant residential development was primarily along railway corridors. Ribbon development affected public motor roads and roads proposed to be built – obviously 'estate roads' – but also bypasses and trunk roads (e.g. The East Lancs Road) which, by 1935, were being planned and built in many locations.

4.18. In the Agriculture (Improvement of Roads) Act 1955, under 'Proposals for improvement of roads', at s.1(1), "*The council of any county ... may submit to the Minister proposals for effecting an improvement to which this Act applies in respect of any unclassified road or unadopted road in the area of the council.*" S.1(5)&(6) provide that where funding is applied to unadopted roads, these will afterwards become publicly maintainable highways. The purposes for which such improvements may be funded are, by s.1(3)(a) "*that the road is situated in, or affords access to, a livestock rearing area, and, (b) that the improvement would promote the use, or the more efficient use, of land in that area for any purpose of agriculture or forestry.*"

4.19. In s.5, 'Interpretation',

"'*Improvement', in relation to a road, includes the widening of the road, the cutting off of corners of the road, and the provision for the road of a cattle grid and of any works required in connection with a cattle grid, and 'improve' shall be construed accordingly.*"

"'*Unadopted road' means a road which (whether it is a highway or not) is not a maintainable highway.*"

"'*Unclassified road' means a road which is a maintainable highway but is neither a trunk road nor a road classified under the Ministry of Transport Act 1919.*"

4.20. It would be difficult rationally to construe the Agriculture (Improvement of Roads) Act 1955 as applying to anything other than public carriageway highways and private carriageway roads. A construction that 'unclassified road' here means a non-classified county road in a rural district sits comfortably with construing s.29 of the Local Government Act 1929 to deal with carriageway highways, while s.30 deals with all highways.

5. Statutory references to publicly maintainable highways

5.1. The TRF's 2004 Report *Unclassified County Roads: a study into their status, August 2004* (see *Reference Documents*) used the term 'unclassified county road' (UCR). That was a legacy term of jargon, rather than a statutory definition, and was even by then increasingly inappropriate as 'the county' (in the context of two-tier local government) progressively ceased to be the highway authority for many places in England and Wales. According to the Local Democracy Think Tank (in 2017) there are in England 27 county councils and 125 single-tier unitary councils, which are all highway authorities. In Wales, the 1974 local government review merged many of the old counties, and the authorities became, and remain, single-tier county-unitary, or county borough-unitary. There are 22 such councils and all are highway authorities.

5.2. One consequence of the Local Government Act 1929 was to make county councils the highway authority for all publicly repairable highways in rural areas, and for main roads in urban areas. Previously, county councils were the highway authority for main roads, and district councils were the highway authority for other highways. This transfer gave rise to the term 'county road' (and is detailed in the TRF's 2004 Report), and 'unclassified' started to be used as a descriptive term for roads that were not classified (i.e., initially not Class I, Class II, for statutory purposes).

5.3. In the Agriculture (Improvement of Roads) Act 1955, 'unclassified road' is used as an express, albeit undefined in the Act, term, serving to define the scope of the Act as regards the improvement of some public roads.

5.4. The Local Government Act 1929 did not operate to transfer general responsibility for urban roads to county councils. That happened much later, and so, at least until 1974 in rural areas where most such roads are found, 'unclassified county road' was a reasonable descriptive term for a public highway at the bottom end of the roads hierarchy, and also (generally) not on the definitive map and statement of public rights of way. As a description, or as a term of jargon, 'unclassified county road' has over the past 15 years steadily been replaced by 'unclassified road': much the same, but not specific to any particular type of council.

5.5. Is it possible to frame a contemporary and adequate understanding of 'unclassified road'? Yes, but this requires a proper appraisal of the statutory and non-statutory systems of road classification. Road classification, in the sense of roads for vehicles (but this is not undisputed – although it seems probable that classification was intended to deal only with vehicular routes, this is not expressed in the statute) goes back to the Ministry of Transport Act 1919, from which came Class I and Class II roads. Class I and Class II have themselves (as a rather crude generality) evolved into A roads and B roads. Highway authorities generally 'classify' the other roads (as distinct from public rights of way) for which they are responsible as, e.g., C roads, D roads, *et seq*., with most authorities (but not all) using the term 'unclassified', and some also using a term that denotes 'unsealed', typically a 'G' (for green) prefix. Some authorities in the English Midlands use the term 'field road' for unmetalled public roads. 'Metal' as regards roads means stone, not a sealing coat such as asphalt; but a sealed-surface road is, by definition, metalled.

5.6. Any definition (in the loosest terms) for use now and beyond has to incorporate the terms and effect of current legislation, essentially the Highways Act 1980 and the Natural Environment and Rural Communities Act 2006.

5.7. S.36 of the Highways Act 1980 provides:

Highways maintainable at public expense.

(1) All such highways as immediately before the commencement of this Act were highways maintainable at the public expense for the purposes of the Highways Act 1959 continue to be so maintainable (subject to this section and to any order of a magistrates' court under section 47 below) for the purposes of this Act.

(6) The council of every county, metropolitan district and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.

5.8. S.67 of NERCA 2006 provides:

(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

But this is subject to subsections (2) to (8). Subsection 67(2) contains a number of exceptions, the exception for relevant purposes being:

(2)(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),

5.9. S.67 of NERCA 2006 came into force in England on 2 May 2006 and in Wales on 16 November 2006. The effect of s.67 is to freeze the s.36(6) list of streets at the relevant commencement date as regards unclassified roads. A working description of an unclassified road then becomes this:

'A minor road shown in the highway authority's s.36(6) list of streets on 2 May 2006 (England) or 16 November 2006 (Wales), which was not on that date shown in the definitive map and statement for the area as either a footpath, bridleway, or restricted byway.'

5.10. Why the reference to the definitive map and statement? S.36 requires 'all such highways' – i.e. publicly maintainable (maintenance includes repair) highways – to be shown in the s. 36(6) list of streets. In practice, few footpaths, bridleways or restricted byways (mainly former roads used as public paths (RUPPs)) are shown in the s.36(6) list of streets for an area; rather they are recorded in the definitive map and statement. Whether this failure to show 'all' qualifying highways in a s.36(6) list vitiates that list for the purposes of s.67(2)(b) was considered at length by the Court of Appeal in Fortune v. Wiltshire Council [2012] EWCA Civ 334; [2012] 3 All ER 797 (see below) where it was held that a list of streets not showing 'all' publicly repairable highways is still a valid list. But, for reasons now generally lost in time, in some places some roads (or parts of roads) on the list of streets are also shown in the definitive map as either footpath, bridleway or restricted byway (former roads used as public path). According to Fortune, the list of streets *should* include bridleways, footpaths and restricted byways; and so one should expect at least some 'roads' to be on both the list of streets and the definitive map.

5.11. Roads that are wholly (i.e. the whole length between termini) shown on both the list of streets and the definitive map are commonly referred to as 'dual status roads', and on the face of it these have, by virtue of s.67(1)(b), lost any public right of way for mechanically

propelled vehicles that existed before commencement. There may be limited exceptions to this general rule applicable in any case, such as where the 'dual status' occurs only along part of a road between its termini. It is necessary to distinguish these 'dual status' roads, each of which has a conclusive status by virtue of being in the definitive map and statement, from 'ordinary' unclassified roads, each of which retains its public right of way for mechanically propelled vehicles, if such a right existed before 1 May / 16 November 2006.

5.12. None of this makes any reference to byways open to all traffic (BOAT). BOAT is defined in s.66(1) of the Wildlife and Countryside Act 1981: "'*byway open to all traffic' means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used.*" And in s.56(1)(c), "*where the map shows a byway open to all traffic, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover at that date a right of way for vehicular and all other kinds of traffic;*"

5.13. There is no doubt regarding the conclusive nature of public rights with mechanically propelled vehicles on a BOAT for as long as that BOAT remains shown in the definitive map and statement. Should BOATs also be shown in the s.36(6) list of streets? BOATs should *prima facie* appear on the s.36(6) list of streets, but BOATs are not all publicly repairable just by virtue of their being BOATs. BOATs that were formerly RUPPs are publicly repairable (although there is a caveat here regarding some RUPPs reclassified under the Countryside Act 1968 processes), but BOATs added by a s.53 definitive map modification order are only publicly repairable as BOATs if they were already publicly repairable roads before the definitive map order was confirmed.

5.14. What about those unclassified roads (or, indeed, 'field roads', or 'G' roads, or whatever) that do not have a sealed surface? How might those be defined? NERCA 2006 provides a form of words that can be used in such a definition. In S.22BB Traffic regulation on byways etc. in National Parks in England and Wales:

(1) This section applies to a road—

(a) which is in a National Park in England or Wales,

(b) which is—

(ii) a carriageway whose surface, or most of whose surface, does not consist of concrete, tarmacadam, coated roadstone or other prescribed material ...

5.15. Borrowing from ss.(ii) provides a working non-statutory description of an *unsealed* unclassified road:

'A minor road shown in the highway authority's s.36(6) list of streets on 2 May 2006 (England) or 16 November 2006 (Wales), which was not on that date shown in the definitive map and statement for the area as either a footpath, bridleway, or restricted byway, and whose surface, or most of whose surface, does not consist of concrete, tarmacadam, coated roadstone or other prescribed material.'

5.16. Again, this necessarily leaves out any statement as to whether such an unsealed unclassified road carries a public right of way for mechanically propelled vehicles.

6. Evolution of highway authorities: the 'publicly maintainable highway'

6.1. This section is important because a proper knowledge of the evolution of the common law and statute as regards publicly repairable highways, and highway authorities, is the key to understanding how the s.36(6) list of streets has come about, and what evidential weight might properly be given to such a listing of a road. This chronology is necessarily simplified a little (there is a lot of arcane and complex administrative law in here), but it seeks to include everything relevant and material. The current term 'publicly repairable' is used throughout, even where, historically, the burden lay on the 'inhabitants', or the 'inhabitants at large.' It is not a crucial distinction. 'Repair' is essentially reactive, whilst 'maintenance' is proactive. but the terms tend to get used interchangeably, as in, 'keep in good repair.'

6.2. The position before 20 March 1836. In Glen's *Law of Highways* 1865, at page 158. "*It is a general rule of common law that highways, except in certain excepted cases, shall be repaired by the inhabitants of the territory wherein they are situated ...*" (12 Mod. 409; R v. St Giles, Cambridge, 5 M&S 260).

6.3. The Highway Act, 1835, s.5 provides, "*... that the word 'Highways' shall be understood to mean all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements.*"

6.4. S.23 provides, "*... no road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public shall give three calendar months previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner and of the width required by this Act, and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required, on receiving notice from such person, body politic or corporate to view the same, and to certify that such highway has been made in a substantial manner requiring such view, which certificate shall be enrolled at quarter sessions holden next after the granting thereof, then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate ...*"

6.5. Although the scope of s.23 looks to be confined to new roads that have been physically 'made' (in the sense of construction), it was held in Cababé v. Walton-Upon-Thames District Council [1912] 1 KB 481 that these provisions also apply to roads (within the scope of this section) that have come into being after 1835 by 'deemed dedication'. In Cababé there was evidence that the road, originally an awarded bridleway, and later a private road, had become a public highway (by inference a vehicular highway) by about 1862; certainly the right of way arose after 1835.

6.6. In Roberts v. Webster [1967] QBD 298 "*A street works authority served notices on the frontagers of a lane requiring them to undertake repairs under section 204 of the Highways Act, 1959. The frontagers objected that the lane was a highway repairable at the public expense and that section 204 did not apply. The authority conceded that at the present time the lane was a*

public highway having been used as of right by the public for a substantial period of time, but contended that it had achieved that status after 1835 ... There was no evidence of formal dedication or enrollment but maps showed that it had existed as a road since before 1835, and it was shown, inter alia, on an enclosure award made in 1859 under the Inclosure Act, 1845. No public money had ever been spent on it. Although largely built up, residential development had not taken place before 1900. Quarter sessions, concluding that the enclosure award of 1859 was such powerful evidence that they should infer from it that a highway existed over the lane in 1859 and that it was not shown that it had not existed before 1835, dismissed an appeal from a decision of the justices upholding the objections.

"*On appeal by the authority, Held, dismissing the appeal ... quarter sessions were entitled to infer from the evidence that a highway existed over the road in 1859 and the authority's onus of showing that it was not a highway in 1835 had not been discharged.*"

6.7. In Robinson v. Richmond Borough Council [1955] 1 QB 401, the full court considered the situation where a public footpath had been deemed dedicated, evidenced by recent user, in or around 1938. The council wished to apply the Private Street Works Act 1892 to the strip of land over which the footpath ran, but were barred if the footpath, i) existed, and, ii) was publicly repairable. Lord Goddard CJ noted (our emphasis) that s.23 of the 1835 Act did not apply to all highways, but only to the types of highway specified in that section. A s.23 'highway' does not include a 'footpath', and so the common law rule regarding public repairability still applied to footpaths after 1835 (and up to 1959). His Lordship observed (at page 407), "*... the Act distinguishes between roads and footpaths. It says that a road can be a highway and that a footpath can be a highway. They are not the same things; for one is a road and the other is a footpath.*" This distinction has a bearing upon the understanding of the 'handover provisions' in the Local Government Act 1929.

6.8. Highways Act 1862.

S.36: "*Where the inhabitants of any parish are desirous of undertaking the repair and maintenance of any driftway or any private carriage or occupation road, within their parish, in return for the use thereof, the district surveyor may, at the request of the inhabitants of such parish assembled in a vestry duly convened for the purpose, and with the consent in writing of the owner and occupier of every part thereof, apply to the justices in petty sessions to declare such driftway or road to be a public highway to be repaired at the expense of the parish; and upon such application being made, it shall be lawful for the justices to declare the same to be a public carriage road to be repaired at the expense of the parish.*"

S.42(1), "*This Act shall be construed as one with the principal Act so far as is consistent with the provisions of this Act.*" [The 'principal Act' is the Highway Act, 1835].

6.9. This 'adoption provision' in the 1862 Act does not replace s.23 of the 1835 Act. It is applicable by a 'district surveyor', which officer existed only in highway districts. It is notable that the outcome of such a dedication was a public carriage road, even if the way being dedicated was of a lesser traffic status.

6.10. Public Health Act 1875 (as amended), S.4 Definitions, "*Street includes any highway . . . and any public bridge . . . , and any road lane footway square court alley or passage whether a thoroughfare or not.*"

S.144, "*Every urban authority shall within their district exclusively of any other person execute the office of and be surveyor of highways …* [which provision, by s.25 of the Local Government Act 1894, then also applies to rural district councils].

S.146, "*Any urban authority may agree with any person for the making of roads within their district for the public use through the lands and at the expense of such person, and may agree that such roads shall become and the same shall accordingly become on completion highways maintainable and repairable by the inhabitants at large within their district; they may also, with the consent of two-thirds of their number, agree with such person to pay, and may accordingly pay, any portion of the expenses of making such roads.*"

S.149, "*All streets being, or which at any time become highways repairable by the inhabitants at large within any urban district ... shall vest in and be under the control of the urban authority.*"

6.11. Local Government Act 1888.

This Act operated to transfer main roads to the responsibility of county councils. Main roads were primarily former turnpike roads ('disturnpiked') but other roads could be declared to be main roads. Doing this (e.g. for a road to a railway station) spread the repair and improvement burden across a wider section of the inhabitants.

6.12. Private Street Works Act 1892.

S.5, "*The expression 'street' means (unless the context otherwise requires) a street as defined by the Public Health Acts and not being a highway repairable by the inhabitants at large.*"

S.19, "*Whenever all or any of the private street works in this Act mentioned have been executed in a street or part of a street, and the urban authority are of opinion that such street or part of a street ought to become a highway repairable by the inhabitants at large, they may by notice to be fixed up in such street or part of a street declare the whole of such street or part of a street to be a highway repairable by the inhabitants at large, and thereupon such street or part of street as defined in the notice shall become a highway repairable by the inhabitants at large.*"

S.20, "*If any street is now or shall hereafter be sewered, levelled, paved, metalled, flagged, channelled, and made good (all such works being done to the satisfaction of the urban authority), then, on the application in writing of the greater part in value of the owners of the houses and land in such street, the urban authority shall, within three months from the time of such application, by notice put up in such street declare the same to be a highway repairable by the inhabitants at large.*"

6.13. S.30 and Part 1 of Schedule 1 to the Local Government Act 1929 (below) gives county councils the powers of urban authorities under ss.19 & 20 (above) with regard to streets in rural districts. County councils could, after 1929 (until 1959), 'adopt' such private streets in rural areas. S.23 of the Highway Act 1835 remained in force until 1959, but adoption by the 'street works' process did not require certification by the justices and was less onerous on councils.

6.14. Local Government Act 1894.

S.25(1), "*As from the appointed day, there shall be transferred to the district council of every rural district all the powers, duties and liabilities of ... any highway authority in the district ...*"

This is the provision that transferred repair duties for highways from the parishes, highway boards, and highway unions, situated in rural districts, to the rural district councils. In urban areas the urban authority retained this duty.

6.15. Public Health Act 1925.

S.84(1) "*Every urban authority shall, within six months after the commencement of this Act, cause to be prepared a list of the streets within their district which are repairable by the inhabitants at large.*

"*(2) Any list prepared under this section shall be open to the inspection of any person, without payment, during the ordinary office hours of the urban authority.*"

6.16. Local Government Act 1929.

S.29(1), "*The council of every county shall be the highway authority as respects every road in the county which at the appointed day is a main road or which would, apart from this section, at any time thereafter have become a main road, and every such road and every other road as respects which a county council become by virtue of this Part of this Act the highway authority, shall be termed a county road, and all enactments relating to main roads shall as from the appointed day have effect as if for references therein to main roads there were substituted references to county roads.*"

S.30(1) "*... every county council shall be the highway authority as respects such parts of the county as is for the time being comprised in a rural district ... Provided that nothing in this section shall affect the functions of rural district councils under the Local Government Act 1894, as respects rights of way and encroachment on roadside wastes ...*"

S.134 "*In this Act unless the context otherwise requires ... 'road' means a highway repairable by the inhabitants at large, and save as in this Act otherwise expressly provided includes any bridge so repairable carrying the road.*"

6.17. Highways Act 1959.

S.38(6), "*The council of every borough and urban district shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense; and every list made under this subsection shall be kept deposited at the offices of the council by whom it was made and may be inspected by any person free of charge at all reasonable hours.*"

S.312(2) and Schedule 25 of the 1959 Act operated to repeal s.23 of the Highway Act 1823 (above).

6.18. Local Government Act 1972.

S.187(1), "*For the purposes of the Highways Act 1959 to 1971 the local highway authority for highways outside Greater London shall be the county council.*" This provision took away the highway authority role from urban authorities, but many urban authorities were, in the same process of local government reorganisation, merged into metropolitan counties. By virtue of s.15 of Schedule 21 to the Local Government Act 1972, effective 1 April 1974, s. 38(6) of the Highways Act 1959 was amended to read:

"*The council of every county and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense; and every list made under this subsection shall be kept deposited at the offices of the council by whom it was made and may be inspected by any person free of charge at all reasonable hours.*"

Thus the requirement for non-urban publicly maintainable highways to be shown in a highway authority's list of streets commenced on 1 April 1974.

6.19. Highways Act 1980.

S.36(6), "*The council of every county, metropolitan district and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.*" This provision was amended by s.8 and Schedule 4 of the Local Government Act 1985 to include 'Metropolitan Districts', but has not been updated on the legislation.gov website, so as to reflect the evolution to 'unitary authorities' in England (see reference the Local Government Act 1992, below).

6.20. Local Government Act 1985.

S.8(1) "*Schedule 4 to this Act shall have effect for amending the law relating to highways, streets and bridges, and Part I of Schedule 5 to this Act for amending certain enactments relating to road traffic, the principal purpose of the amendments being to transfer functions relating to those matters—*

"(b) from metropolitan county councils to metropolitan district councils."

6.21. Local Government Act 1992.

This Act paved the way for a sequence of changes whereby 'unitary authorities' (single-tier authorities) came into being. Some unitary councils have the same footprint as a previous county authority (and may still be called 'county of ...'), but most have been carved out of counties, tend to be places of considerable population density, but are not wholly urban in character. Unitary councils are the highway authority for the area and must maintain the list of streets in the same way as a county council.

7. Unsealed unclassified roads: relationship with the definitive map

The purpose and evolution of the definitive map and statement

7.1. The definitive map and statement of public rights of way (DMS) was created by the National Parks and Access to the Countryside Act 1949 (NPACA 1949). S.27 provided that the draft DMS be made to record all subsisting or reasonably alleged footpaths and bridleways. S.27(6) defined the 'road used as a public path' (RUPP), which roads were also to be surveyed, but is silent as to what conclusive rights were established by the recording of any RUPP on the DMS.

7.2. The surveys for making the draft DMS were carried out under the guidance of '*Surveys and Maps of Public Rights of Way for the purposes of Part IV of the National Parks and Access to the Countryside Act, 1949. Memorandum prepared by the COMMONS, OPEN SPACES AND FOOTPATHS PRESERVATION SOCIETY in collaboration with the Ramblers Association; recommended by the County Council's Association and approved by the Ministry of Town and Country Planning. January 1950.*' (MTCP).

7.3. It is sometimes said that there is no proof that this process was followed in any particular place, but it is hard to see that a DMS using standard notation could have come about otherwise and, in any case, a presumption that the Ministry guidance was followed should apply (see MTCP Circular No. 81 of 1950).

7.4. MTCP Circular No. 91 of 1950 provided some further guidance on RUPPs: "*(6) The phrase 'road used as a public path' which is defined in section 27 is intended to describe highways such as the Berkshire Ridgeway, and other 'green ways' which are now mainly used as footpaths and bridleways, although greater public rights of passage over them exist or are alleged to exist.*"

7.5. MTCP Circular No. 58 of 1953 returned to the question of RUPPs, and what the recording of a RUPP indicated."*The survey provisions of the Act are only directed to establishing the existence of such rights of way as are proper to footpaths and bridleways, and are not intended to settle the question of whether the public have any other rights over such ways (e.g. a right of way for wheeled traffic). The surveying authorities are also required to show any way which in their opinion was a [RUPP] that is to say a highway which is used mainly but not entirely for walking or riding (e.g. a Green Way such as the Berkshire Ridgeway).*'

7.6. In some counties some unclassified roads, or parts of some unclassified roads, were shown in the DMS as variously footpath, bridleway, or RUPP.

7.7. Once the first definitive maps and statements were made and published, deficiencies in the review procedures, and concerns about RUPP status, emerged. In 1968 the *Gosling Committee* reported to the government with recommendations for statutory changes to the 1949 Act, one of which was that the DMS should not be concerned at all with public vehicular rights of way. RUPPs ought to be recorded as either footpath, bridleway, or unclassified road and, if the latter, should not be recorded on the DMS.

7.8. The Countryside Act 1968 instead introduced the 'Special Review' and 'Limited Special Review' processes for determining the status of RUPPs and recording them on the DMS as either footpath, bridleway, or BOAT. This was the first time that the DMS had been expressly intended to record public vehicular rights of way.

7.9. The Special Review processes were completed in some places (incidentally with considerable wrongful loss of bridleways) but in other places became bogged down and intractable. By 1979 the initial moves were underway for what was to become the Wildlife and Countryside Act 1981 (WCA 1981) and any then-current Special Reviews were directed by the ministers to be variously abandoned, completed, or finished as far as they had got. One such was in Cumbria.

7.10. Cumbria had a part-finished Special Review when WCA 1981 commenced, where some of the RUPPs being reclassified were also shown on the list of streets (actually then the county highways map) as unclassified roads. There was considerable confusion at the time as to whether the unclassified road status 'trumped' the RUPP status and, of itself, sufficiently proved public vehicular rights on such a road. The Department of the Environment corresponded with the Rights of Way Review Committee about this, particularly in a letter of 9 June 1983. [Note: in that letter the suggestion that UCRs could be added to the DMS as RUPPs is wrong. The 1968 Act barred the addition of any 'new' RUPPs to the DMS.]

7.11. This letter of 9 June1983 was the first in a sporadic series of letters to and from the Secretary of State seeking clarification about the status of unclassified roads. These letters have been collated and published in the LARA Reference Document *The Status of Unsealed Unclassified Roads. Letters from Government Departments*: see the section *Reference Documents* in this report.

The effect of the Wildlife and Countryside Act 1981

7.12. Part III of WCA 1981 provides that surveying authorities can (and should) make definitive map modification orders on the discovery of evidence, and that persons can apply for such orders via an application process. Part III of WCA was made with the intention of completely and accurately recording in the DMS all those ways missed in the 1949 and

1968 Act surveys and reviews. The inclusion of BOATs as a category of potential route addition arose not so as to import all unsealed unclassified roads, but so as to record 'lost' minor vehicular highways which would have qualified as RUPPs under the 1949 Act process, but which were missed at the time.

Government guidance relating to WCA orders

7.13. The great majority of BOATs added to the DMS under s.53 of WCA 1981 were, until the intervention of NERCA 2006, ways that were not already on the list of streets. Some authorities made WCA s.53 orders for roads already on the list of streets, and this prompted correspondence with government departments, leading to further advice. This advice has been collated into LARA Reference Document 2008.08.03 *The Status of Unsealed Unclassified Roads. Letters from Government Departments*: see the section *Reference Documents* in this report.

Where are we now?

7.14. So this progressively amended government advice, 1983 – 2018, and still current, taken with the effect of s.67 of the Natural Environment and Rural Communities Act 2006 (NERCA 2006) comes down to this:

7.15. There is no statutory reason why any road on the list of streets cannot or should not be recorded in the DMS if it meets Part III WCA 1981 criteria. Such a road could potentially be recorded (according to all the evidence) as either:

BOAT,

bridleway,

footpath,

(but not as a restricted byway unless a 'new' road on the list of streets since 2 May 2006 (England)).

7.16. This potential for list of streets roads to be recorded on the DMS is not to be taken as a 'prompt' for authorities to make such orders.

7.17. The 'vast majority' of rural unsealed public roads are likely to be shown as carriageways on investigation.

7.18. It is open to anyone to make an application based on evidence to record any list of streets road on the DMS, but there is no burden on any person so to do: the rights on any road are a matter of evidence in each case, regardless of WCA 1981 provisions.

8. Ascertaining the status of unclassified roads: evidence and presumptions

8.1. The bare fact of a road's inclusion in the s.36(6) list of streets is not, of itself, 'conclusive' as to that road's status: footpath, bridleway or carriageway. Leaving aside the 'conclusivity of status' conferred by virtue of any route's being shown, for the time being, in the definitive map and statement, the status or traffic class of road is a matter of evidence, or to a limited degree of presumption.

The 'urban passages' argument

8.2. There is a commonplace argument put forward that it is unsafe to presume that roads shown in the s.36(6) list of streets are public vehicular roads because some shown there plainly are not vehicular routes. The examples given are flights of steps in towns, and paved church paths and other pedestrian ways in towns. The key to understanding the reason for this lies in the evolution of the list of streets as set out elsewhere in this report. These patently non-vehicular routes are generally found in urban areas. It is unsurprising that pedestrian passages, steps, paved ways, and other such urban routes would, as a consequence of the 19th century health and streets legislation, be listed (or mapped) as publicly repairable streets.

8.3. These urban streets, be they vehicular or not, are not the nub of the unclassified road status issue: almost invariably an argument about a public road's status concerns a rural unclassified road. It is essential to appreciate the evolution of the recording − statutory and non-statutory − of rural roads, because this helps in determining any such road's traffic status.

The rural road network

8.4. Consider a typical rural area in an historical county. In that area there will be a network of 'roads', and a network of public paths (footpaths and bridleways; there may also be restricted byways deriving from former roads used as public paths (RUPP)). The traffic status of the roads may be broken into three general areas:

8.4.1. Where the road is maintained and used as a general motor road: sealed surface, road signs, white lines, regular ordinary motor traffic: The status of the road is not likely to be in dispute.

8.4.2. Where the road is not used as a general motor road with a sealed surface, road signs, white lines, regular ordinary motor traffic, but has a clearly defined origin of status, such as its being set out in by an inclosure Act and award, or its being a former turnpike. This clear origin of status situation applies regardless of the current physical nature of the road, and its current traffic.

8.4.3. Where the road is not used as a general motor road, and has no clear root of status: it is simply recorded and used as part of the local network of minor roads. It is this type of road that gives rise to most argument about status. What can be said about such a road, both generally, and in its particular circumstances?

The list of streets and evidence of status

8.5. As a matter of law, should the list of streets only include highways which carry vehicular rights? The answer to this is no since it seems quite clear that the definition of street in s. 329 of the Highways Act 1980 includes, for example, 'footways'.

8.6. As a matter of evidence, is inclusion in the list of streets some evidence that the way carries vehicular rights? The answer to this is a qualified yes. It is a qualified yes since this is dependent upon the proposition that highway authorities generally, or particular authorities, misunderstood the extent of, or failed to comply with, their duties under s.38(6) of the Highways Act 1959 (as amended) and s.36(6) Highways Act 1980, and habitually only recorded vehicular highways on the list of streets. It seems that the proposition may well be true (either generally or in the case of particular authorities) and the complicated legislative background to s.38(6) of the Highways Act 1959 (as amended) and s.36(6) Highways Act 1980 (i.e. the evolution to, and through, the Local Government Act 1929) may explain why authorities only tended to include vehicular highways on their list of streets. An additional factor may well have been that the duty to maintain bridleways and footpaths was not so conspicuous to local authorities because the comprehensive process of recording public paths only commenced with the National Parks and Access to the Countryside Act 1949 and mostly continued into the early 1960s.

8.7. In the case of a particular authority, or authorities generally, the evidential weight of this inclusion might depend on a detailed analysis of the provenance of their particular list of streets against a tracing of the relevant legislation. The evolution of an authority's 'handover maps', through the various 'county road maps', to the lists of streets, all juxtaposed with the making of the definitive map and statement, has the potential to show the reputation of a road, or roads, within the authority's area.

8.8. The point which follows may serve to shortcut this analysis in most cases. As a matter of evidence, where a way is included in the list of streets but is not recorded on the definitive map, is this evidence that the way carries vehicular rights? The answer to this seems that, in a particular case, the inclusion in the list of streets of a way which is not recorded on the definitive map is fairly powerful evidence that the way carries vehicular rights (or is or was reputed so to do) since, on the premise that the list of streets should include all publicly maintainable highways, the only reason why a highway which is recorded on the list of streets should not also be recorded on the definitive map is that it is a vehicular highway (not being in character a BOAT).

8.9. This point has additional force if it can be established in the case of a particular authority that all minor highways recorded on the definitive map do not appear in the relevant list of streets. The point may also gain additional force from any further analysis of the provenance of the list of streets (see above) and, in particular, the sort of conclusions that it is suggested might be drawn from road mileage returns.

8.10. On this last point, there is an important further point: it may be that in the case of particular authorities the list of streets currently kept does include minor non-vehicular highways but at an earlier point in time did not. The fact that the list of streets now includes minor non-vehicular highways, does not necessarily destroy any inference which might be drawn from earlier versions of the list of streets, particularly if it can be shown that there was a particular point in time when all minor non-vehicular highways were added to the list of streets.

The list of streets and the presumption of regularity

8.11. There is sometimes an argument advanced that the inclusion of a road in the list of streets 'may well be a mistake, anyway.' This does not stand up to scrutiny. The Highways Act 1980 provides (our emphasis):

8.12. S.36(6), "*The council of every county, metropolitan district and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.*"

8.13. From 1 April 1974, and up to 1 January 1981, due to local government reorganisation, s. 38(6) of the Highways Act 1959 was amended to provide, "*The council of every county and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.*"

8.14. These councils were and are under a duty to keep this list up to date. There is a presumption that this duty was carried out properly: *omnia praesumuntur rite esse acta*, or the 'presumption of regularity'. In Calder Gravel Ltd. v. Kirklees Metropolitan Borough Council (1990) 60 P&CR 322, Sir Nicholas Browne-Wilkinson, V-C: "*The truth of the matter is, perhaps not surprisingly, that with the passage of time and given the confusion which must exist, given reorganisation as frequently as this, the necessary evidence for me to make a proper affirmative finding either one way or another that there was or was not a written document is simply not available. People have died; documents have been lost. It seems to me impossible on an ordinary judicial basis to make a firm finding in the absence of clearer evidence … "The same presumption of regularity can arise where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved; The presumption is that the statutory authority has acted lawfully and in accordance with its duty.*"

8.15. It is open to any person to show, as regards any road, that a mistake was made on that road's inclusion in the list of streets. In the absence of such evidence of mistake the list has to be presumed to be properly made, and that the council had reason to show that road in its list of streets. Mistakes may be proved, but they cannot lightly be presumed.

The list of streets and earlier road records

8.16. The recording of a road in the list of streets in 1974 (or later) was probably not the first recording (by the highway authority at the time) of that road. The evolution of the way a council regarded its roads – and therefore regarded any of its roads – leading up to the making of the current s.36(6) list of streets, can be evidence of status of those roads or any of them.

8.17. In LARA Reference Document *Roads returns & records. Recording the mileage of roads since 1815* (see the section *Reference Documents*), the sequence and evolution of statutory road mileage returns, by county, since 1816, is set out. It is evident that, for almost every historical county, the highway authorities' count of the mileage of public vehicular roads is consistent, starting in 1816, through 1839, 1920, 1960/1 to 1973/3. There is a sequence of five returns, across over 150 years, with a small but steady growth, which is consistent with new road building, even in rural areas, and where the earliest two returns are expressly for vehicular roads.

8.18. It is sometimes argued that, because (almost) all footpaths and bridleways before 1959 were publicly repairable, that these returns after 1839 might include footpaths or bridleways, as might the 1929 'handover maps'. The post-1839 returns might include footpaths or bridleways, but based on the mileages successively recorded, the probability is that they do not.

The class of traffic is an indicator of the status of a road

8.19. Take the situation where an unclassified road in a rural area was shown in the 1929 handover map, and was on the s.36(6) list of streets on 2 May 2006 (England) or 16 November 2006 (Wales). There is no documentary evidence of the origin of the road's status (e.g. an inclosure award). The public uses the road with, variously, motors, pedal cycles, horses, and on foot. How does a tribunal set about determining the status of this publicly repairable public road?

8.20. In the absence of express, status-specific historical evidence, there are three types of evidence that can go to show the probability of public vehicular status:

8.20.1. Map evidence.

8.20.2. Through-route presumption.

8.20.3. The traffic that uses and has used the road.

8.21. These topics are explored in the LARA Reference Document *Evidence of public road status. The view of the courts* (see the section *Reference Documents*).

Traffic regulation orders as an indicator of status

8.22. S.15 of the Road Traffic Regulation Act 1984 provides maximum time periods for temporary traffic regulations orders, depending upon the class of highway to be regulated.

8.23. Orders in respect of footpaths, bridleways, restricted byways, and BOATs, shall not remain in force for more than six months (s.15(1)(a)). For highways of any other class, the limit is eighteen months (s.15(1)(b)).

8.24. This period as regards footpaths and bridleways is not limited to those paths recorded in the definitive map and statement.

8.25. In making a traffic order on an unclassified road the traffic authority must comply with the allowable time periods in s.15. In making an order for more than six months in respect of an unsealed unclassified road, the traffic authority is asserting that the road has a traffic status higher than footpath or bridleway.

9. Establishing status: a practical approach

9.1. The question of the status of unsealed unclassified roads is not a new issue. It was been a live topic since (at least) the Cumbria Special Review in the early 1980s, and was considered and consulted in the processes that led to the Countryside and Rights of Way Act 2000. This was the Government's view then:

Department of the Environment, Transport and the Regions. Improving Rights of Way in England and Wales 1999

[2.10] *The proposition that unclassified roads should be brought into the rights of way system would have advantages only if it could be achieved without a major increase in bureaucracy. Several practical problems would have to be overcome. Although section 36 of the Highways Act 1980 requires local authorities to maintain a list of highways maintainable at public expense, not all of these may be suitable for recording on definitive maps and it would be necessary to define more precisely which roads would qualify. Furthermore, the Government believes that the recording of these roads on definitive maps would place an unacceptable burden on highway authorities if, as we believe, this would require individual definitive map orders to be made on a case by case basis.*

The effect would be to place a duty on highway authorities similar to that presently imposed by section 54 of the Wildlife and Countryside Act 1981 to reclassify RUPPs.

An Economic Appraisal of the Proposals: Improving Rights of Way in England and Wales 2000

[49] *We estimated that around 6,000 miles of unsealed unclassified roads that might be available in England and Wales for recording on the definitive map. The cost of recording unclassified roads on the definitive map would vary depending on the ease of establishing the rights over them. Our survey suggested authorities anticipated this to be a costly process, requiring expenditure of £19m. A further cost of £2.3m could be incurred by central government as a result of the need for public inquiries.*

9.2. This assessment of the scale of a blanket screening-by-order approach to unsealed unclassified roads remains valid. Nothing has happened to displace or contradict it. Such a blanket exercise would be a massive administrative undertaking and would block the definitive map process for many years.

9.3. Nobody rationally disputes that the very great majority of screened-by-order unclassified roads would be found to carry public vehicular rights: "*We are prepared to accept that the vast majority of unsealed rural routes shown in the list of streets held by most highway authorities are likely to be shown to be carriageways on investigation.*" Dave Waterman, DEFRA, 11 June 2012.

9.4. Dave Waterman of DEFRA reiterates this view in an email letter of 11 July 2018: "*Defra's policy on UCRs is that we cannot make blanket assumptions about rights over unclassified roads because there are some cases where the rights are not clear. Should it be necessary, each road would have to be assessed on the evidence. Where any dispute about status occurs, the local authority should endeavour to ascertain what rights exist over that road, and make sure that it is properly recorded on the appropriate records, i.e. the Local Street Gazetteer, list of streets, and/or the DMS. This is not to suggest that all unclassified roads would all need to go through the DMMO process. There is no duty on local authorities to proactively screen and research the status of every unclassified road, but they are obliged to modify the DMS where this is requisite upon the 'discovery of evidence' in any case.*"

9.5. There are certainly attractions to testing the status of all UURs by way of DMMOs:

9.5.1. Certainty as to status and lawful user as a consequence.

9.5.2. The additional protections that DMS recording brings.

9.6. Set against this:

9.6.1. It was not the purpose of the legislation to use the DMS order process proactively to test the status of all UURs.

9.6.2. It would be a massive administrative undertaking and would block the definitive map process for years.

9.6.3. Derbyshire apart, the very great majority of orders to add UURs that were on the list of streets in 2006, and were not 'dual status', result in BOAT status, and so 'certainty' apart, the outcome of each exercise is still that these are public vehicular roads.

9.6.4. These applications/orders tend to attract objections and are often hard-fought. The potential workload is therefore high, and the period for undertaking such a task must realistically run beyond current lifetimes.

9.6.5. The numerical scope for orders can only get bigger as, variously, a consequence of inspectorial decisions, and the rapid degradation of minor roads.

9.7. It is sometimes argued that highway authorities should examine every unsealed unclassified road to 'screen' for those that do carry public vehicular rights. That is not a proper screening process. There is nothing to stop any person or council from resolving a disputed-status case by making, or applying to be made, an order for whatever status the historical evidence suggests is appropriate. If councils look to test the status of all unsealed unclassified roads in a 'screening' process, then:

9.7.1. Screening is not the wholesale examination of candidates in order to identify a relative few with particular characteristics.

9.7.2. Screening is the identification on a criteria basis of candidates which merit more-thorough examination.

9.7.3. Screening, having identified these candidates for more-thorough examination, will discard some and send others on for yet-deeper examination.

9.7.4. Examples of this screening approach are common in, e.g., airport check-in, and medical early diagnosis, according to, e.g. age, gender, weight, medical history, family history.

9.7.5. Screening of roads can only be aimed at identifying those without public vehicular rights, as (per DEFRA) *the very great majority* do carry public vehicular rights.

LARA proposes:

9.8. Where any person sets out an evidence-based case that a specified unclassified road is either a footpath or a bridleway, then LARA's member organisations will carefully assess that evidence, carry out further research if appropriate, and will present the evidence to the surveying authority under s.53(2)(b) of the Wildlife and Countryside Act 1981. If the evidence in the case points to the road being a footpath or bridleway only, then the surveying authority will make the appropriate order. It will be the surveying authority's decision.

9.9. This initial informal inquiry could be facilitated by the Local Access Forum if parties prefer and agree.

9.10. Where there is persuasive evidence in any case, the motoring organisations will acquiesce in and publicise temporary traffic regulation provided there is no unreasonable delay in the process.

9.11. The '*very great [vehicular] majority*' of unsealed unclassified roads are thereby kept out of the order process, avoiding needless expenditure of public and volunteer resources.

10. Understanding the effect of NERCA 2006

The impact of the Natural Environment & Rural Communities Act 2006

10.1. This section does not (at this time) address 'dual-status' roads, where a road (or part of a road) is, and was at the relevant date, on the list of streets, and also recorded in the definitive map and statement as a footpath, bridleway, or restricted byway. The relevant date for NERCA 2006 is 2 May 2006 in England and 16 November 2006 in Wales.

10.2. NERCA 2006 operates first to extinguish all public vehicular rights of way (including 'roads') and then 'saves' some of these with express provisions. In s.67:

(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

But this is subject to subsections (2) to (8).

(2) Subsection (1) does not apply to an existing public right of way if—

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),

The list of streets on 2 May/16 November 2006

10.3. The government has issued guidance about the impact and consequences of NERCA 2006:

Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways. A guide for local authorities, enforcement agencies, rights of way users and practitioners. Version 5 - May 2008.

In this guidance at paragraph 32, "*Local authorities are strongly advised to ensure that they have retained a copy of their list of streets as of 2 May 2006 as this will be required in determining whether the 67(2)(b) exception is engaged in the future.*" What if a highway authority has not retained a copy of the list of streets as on 2 May 2006 in England, or 16 November 2006 in Wales?

10.4. If a road was a publicly repairable road shown in the s.36(6) list of streets at some date before 2 May / 16 November 2006, then that is indicative that the council in making the list and keeping the list up to date regarded the road as being publicly repairable. A publicly repairable road does not cease to be publicly repairable unless either, i) the road itself is stopped up (normally by s.116 of the Highways Act 1980, or, ii) the liability for the public to repair the road has been removed by a 'cessor order' made under the provisions of s.47 of the Highways Act 1980:

'Power of magistrates' court to declare unnecessary highway to be not maintainable at public expense.

'(1) Where a highway authority are of opinion that a highway maintainable at the public expense by them is unnecessary for public use and therefore ought not to be maintained at the public expense, they may, subject to subsections (2) to (4) below, apply to a magistrates' court for an order declaring that the highway shall cease to be so maintained.'

10.5. Where an order has been made by magistrates under s.116 or s.47, at a date since the road appeared in the s.36(6) list (by definition, after 1979) then there will be an enrolled court order to that effect. Short of very compelling evidence that such an order was made, and has been lost since, such as council minutes or a statutory newspaper notice, there cannot reasonably be any presumption of closure in such an administratively short timescale. The presumption of 'once a highway, always a highway' (Dawes Hawkins (1860) 29 LJ CP 343) holds as 'once a publicly repairable highway, always a publicly repairable highway'.

10.6. In the absence of a copy of the list of streets as advised by the Secretary of State, where a road was shown in the s.36(6) list before 2 May/16 November 2006, there is a rebuttable presumption that it was still shown in the list on that date.

What form must a list of streets take?

10.7. This issue was considered at length in Fortune v. Wiltshire Council [2012] EWCA Civ 334, where the Court of Appeal upheld the decision of Judge McCahill in the Administrative Court. The outcome may be summarised thus:

10.8. A s.36(6) list of streets for the purposes of s.67(2)(b) of NERCA 2006 is still a valid list even if it does not show all publicly repairable 'streets', including footpaths and bridleways, but shows only what are *prima facie* 'roads'.

10.9. There can be only one list of streets at any time. The council may also have earlier 'county road maps', but a more-recent list takes precedence over such records.

10.10. If a council does not have a written 'list', then a map of roads is capable of being a valid list as long as it has a sufficient key to identify the roads that it shows. But a valid list and a map cannot both comprise the list of streets.

10.11. The list of streets can be held in digital 'database' format and still be valid for s.36(6) and s. 67(2)(b) purposes.

10.12. A highway authority has some discretion about how it keeps its list of streets (per Fortune). In Slough Borough Council v. Secretary of State for Environment Food and Rural Affairs [2018] EWHC 1963 (Admin), held that the council could validly have a part of its list of streets recording 'private streets', but inclusion of a private street here did not of itself operate to save a public motor vehicular right of way for the purposes of s.67(2) of NERCA 2006.

10.13. In Trail Riders Fellowship v. Secretary of State for Environment Food and Rural Affairs [2017] EWHC (Admin) 1866, where Hertfordshire County Council had both a written list of streets and a GIS map, a drafting error in the GIS map did not of itself destroy the s. 67(2) saving provided by the road's recording in the written list.

11. Traffic signs and waymarks

11.1. The current traffics signs rules are set out in regulations:

2016 No. 362. ROAD TRAFFIC. The Traffic Signs Regulations and General Directions 2016.

11.2. In general, traffic signs that complied to the earlier 2002 Regulations remain lawful until replaced, when they must comply with the current regulations.

11.3. In the consultation phase for the proposed revisions to the 2002 Regulations, LARA and other organisations dealing with rights of way made submissions to the Department for Transport asking that it should be possible to:

11.3.1. Place a traffic sign identifying an unclassified road as being a public road, and / or,

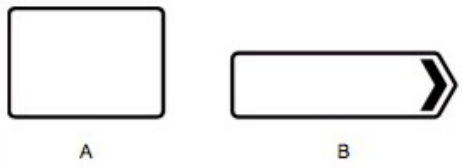
11.3.2. Place statutory waymark symbols indicating the route of an unclassified road.

11.4. These suggestions were not incorporated into the 2016 Regulations, but the Department for Transport told LARA that it now has the matter on its list for revisions.

11.5. As things stand with the 2016 Regulations, no waymark is available for unclassified roads, but two types of traffic sign can be used, both of which make it clear that the road so signed is a public road.

11.6. Part 2 of the Regulations has '*Sign background for directional signs for motorways, primary routes, non-primary routes, cyclists and pedestrians*' (page 266) and this sets out '*Sign table - Schedule 12, Part 2.*'

11.7. Item 3 in that table is '*Sign placed on or near a non-primary route (Type A and B)*', where Type B is the ubiquitous sign found at junctions, indicating a destination, and sometimes with a distance added.



11.8. The destination can be a place, or another road, with some other variations, and this is set out in '*Sign table - Schedule 12, Part 3*' (page 270). The legend on the sign cannot simply indicate the status of the highway, as the 'item 9' sign type can for, e.g., footpaths or bridleways.

11.9. The size of the legend on a traffic sign is prescribed by 'x height' of the characters, and the margin around the legend. There is scope to make an Item 3 sign on a minor unclassified road smaller than a usual sign found at crossroads to inform through motor traffic.

11.10. Part 2 of the Regulations has '*Advisory signs*' (page 185), and this sets out '*Sign table - Schedule 11, Part 2.*'

11.11. Traffic signs of a type not set out in the Traffic Signs Regulations and General Directions 2016 may be authorised under s.64(1)(b) of the Road Traffic Regulation Act 1984 by the relevant 'national authority', i.e. the Secretary of State in England, or the Welsh Ministers in Wales.

11.12. Item 23 is '*Diagram 820 Route unsuitable for type of vehicle indicated (Alternative types)*', which provides for the well-known 'Unsuitable for motor vehicles' rectangular sign, which has been in use since the 1950s in various colour combinations. This sign was and is expressly intended for unsealed public roads.

Reference Documents

The Reference Documents listed below are all available from the LARA website. The web links are to the version of each Reference Document current in September 2018. If the web link generates an error message, the most likely reason is that the Reference Document has been updated. Go to http://laragb.org, select 'Reference Documents', and follow the links or use the *Search* facility.

By LARA

LARA Document 2018.08.18	*Evidence of public road status. The view of the courts* *Link to document*
LARA Document 2018.08.15	*Roads returns & records. Recording the mileage of roads since 1815* *Link to document*
LARA Document 2018.08.03	*The Status of Unsealed Unclassified Roads. Letters from Government Departments* Link to document
LARA Document 2017.03.23	*The Origin and Evolution of Recreational Motoring on Unsealed Roads* *Link to document*

By Others

Trail Riders Fellowship	*Unclassified County Roads: a study into their status*, August 2004 Link to document