

“A Bottle of Tipex and a Crayon”

Good Practice in Highway Records Management?

Following the recent apparent demise of the Discovering Lost Ways Project, which failed not, as some suggest, because the Definitive Map system is cumbersome, and overly complicated etc (and broken), but because those with responsibility for the project did not listen to those professionals who knew better than them, there have been calls for a major overhaul of the system.

If such an overhaul were to take place it would, as we have seen from the recent attempts, at legislating away problems, rather than dealing with them, potentially result in a dumbing down of the system, and almost inevitably the further blanket loss of historic rights on a scale that, apart from NERC, we have not seen since late 1930's Germany!

The fact of the matter, of course, is that the system does work, and indeed works very well, although as with anything, it would benefit from relatively minor amendments and changes to improve it.

So, what has this to do with the List of Streets you ask? Well, it has been said, on more than one occasion, that in our little world of Public Rights of Way *“we have this complex system for recording public highways on the Definitive Map, whereas the highway maintenance records are managed by a system involving a bottle of tipex and a pack of multi-coloured crayons!!?”*.

I know a) which system I prefer, namely the one that best protects the rights of the public and is least open to abuse; and, b) that tipex and crayon management causes all sorts of problems and is the root of all evil!

Of course, the culture of “crayon management” has, in my experience, developed as a result of a lack of understanding, principally by those who both use and manage these documents, of the records themselves, and what they are meant to show. It is a widespread problem and I do not know of a single Highway Authority in England or Wales that actually manages these records correctly (a few may stick their heads above the parapet as a result of this article, but I doubt there will be many). If it is not misunderstanding, it can only be a gross dereliction of duty and a knowing disregard of statutory obligations. Whilst ignorance may be bliss, there is “something to be seen in the woodshed” and a serious problem to be addressed, especially as we are now seeing legislation being implemented (e.g. CROW & NERC), which is drafted on the premise that the records are being correctly maintained.

So, what is the List of Streets?

To answer this properly we do perhaps have to break the term down into its component parts, namely by defining what is meant by the term “street” and then identifying which of these “streets” are “maintainable at public expense”

What is a Street?

The legal concept of a “Street” is a creation of statute, with its modern definition deriving from the Section 4 of the Public Health Act 1875. However care must be taken to ensure its proper interpretation, depending upon when and in what context the term is used. This article does not cover every variation of the definitions, but does, I think cover the key points.

The common meaning of the word street is “*a road with houses on one or both sides of it*”, was approved by Jessel M.R in Taylor v Oldham Corporation(1876-7):

“The street itself is no doubt properly the paved or prepared road, that is, the street. It sometimes includes the houses along each side of it. But that is not its proper meaning. It is called a street even without houses. There are some streets with no houses. But the usual common meaning of the word “street” is a road with houses on one or both sides of it”.

The common definition is not, in any way restricted to public highways, it can, and does also include ways, which are not dedicated as public highways; and will apply wherever there is no alternative definition provided within a statute.

The Public Heath Act 1875 defined the term “street” as including any highway (not being a turnpike road), and any public bridge (not being a County Bridge) and any road, lane, footway, square, court, alley or passage whether a thoroughfare or not. Other Acts of the time provide the same definition.

In “The Law Relating to Highways” by A Glen (Barrister) Second Edition (1897) the author argues that the word “includes” was used within the definition of the term “street”, and not the word “means”; hence the term not only applied to a “highway...etc ”, but also to anything which is a street in the ordinary sense of the term.

The modern legislative definition of street, and which supersedes that within Section 329 of the Highways Act 1980, is perhaps more tightly defined and may be found within Section 48 of the New Roads and Street Works Act 1991 where “..a ‘street’ means the whole or any part of any of the following, irrespective of whether it is a thoroughfare-

- a) any highway, road, lane, footway, alley or passage,
- b) any square or court, and
- c) any land laid out as a way whether it is for the time being as a way or not.

Whilst, in some circumstances, there may be some uncertainty whether reference to a “street” can be interpreted as a reference to the existence of public rights, we can be certain that, by the inclusion within the definition, of the term “highway”, that it does apply to all classifications of routes recorded within the Definitive Map and Statement, provided of course that they are publicly maintainable.

What is Maintainable at Public Expense?

Firstly, on this particular issue, let’s get away from the concept that for something to be “maintainable at public expense” it has to be “adopted”. This is utter buncombe!! (that would be a technical term used only in polite consultant speak). If we must use the term “adopted” then use it in its proper context, i.e. a highway that has been subject to the process of adoption, thus making it maintainable at public expense; rather than applying it to everything that should be on the List of Streets, much of which may never have been subjected to such a process.

It is not within the scope of this article to set out the history of highway maintenance responsibility. We can however list the circumstance/types of highway, which are maintainable at public expense (or as previously, by the inhabitants at large), and should therefore be on the List of Streets. These may be summarised as:

-
- Footpaths, awarded bridleways and carriageways ‘made’ prior to implementation of the Highways Act 1835 (i.e. Ancient Highways);
 - Awarded bridleways and carriageways ‘made’ after the implementation of the 1835 Act, which have been ‘adopted’ (e.g. Highways Act 1980, Section 38) ;
 - Footpaths and bridleways that existed upon implementation of the National Parks and Access to the Countryside Act 1949;
 - Footpaths and other bridleways ‘made’ prior to the implementation of the Highways Act 1959;
 - Reclassified RUPPs, as from their date of reclassification; and
 - Footpaths, bridleways and restricted byways created or diverted by Public Path Order or agreement.

How do we Add or Remove Routes form the List of Streets?

Whilst the List of Streets does not enjoy a process equivalent to Definitive Map Modification Orders, the circumstances under which routes can be added or removed are both limited and specific. Routes can only be added to the List of Streets if they satisfy one of the criterion listed above.

The circumstances for removal are even more limited, namely if:

- the public highway rights cease to exist (e.g. through due legal process);
- a Magistrates Court issues an Order under Section 47 of the Highways Act 1980 to remove the maintenance liability; or
- there is cogent evidence to suggest the route is recorded in error.

They cannot be removed simply at the whim of a Council Officer, or even because the route has never been maintained, as the latter certainly does not prevent it from being “maintainable”.

The Correlation between the Definitive Map and the List of Streets

As discussed above, the majority of public rights of way are highways maintainable at public expense and as such the Highway Authority is directly responsible for their maintenance, yet for some inexplicable reason Highway Authorities are most reluctant to record these routes on their List of Streets Maintainable at Public Expense.

Is it important you ask?

Well, failure to maintain the List of Streets correctly does constitute a breach of the statutory requirement to maintain this publicly available record. Similarly, failure to properly record “adopted estate paths” (for want of a better description) on the Definitive Map and Statement also constitutes a breach of the Statutory Duty to keep these records up to date. Both of these issues at very least must constitute maladministration, but that aside it results in poor customer service and misinformation being provided to the general public.

It would appear that this problem arises from a failure to either understand, or accept, what these sets of records are actually meant to record.

The Definitive Map and Statement are a record of the status and alignment (amongst other things) of the lower classes of public highway. It is not however a record of maintenance liability.

On the other hand, the List of Streets is supposed to record ALL public highways, which are maintainable at the public expense, not only those that have been “adopted”, and not only those which have a sealed surface, or only those that are actually maintained, but all publicly maintainable highways.

So what are the consequences of not maintaining these documents in a correct and lawful manner?

We have already concluded that it constitutes a failure of two Statutory Duties placed upon the highway Authority; and it can also lead to incorrect and misleading information being provided to the general public, who rely upon Highway Authorities to advise them correctly, and these factors alone should be sufficient to require change, but there is one other serious implication resultant of not keeping these recorded in a correct and proper manner.

On the first of January 2026, if the current legislation comes into force, all pre-1949 public footpaths and bridleways, which are not recorded on the Definitive Map will, by virtue of the provisions of the Countryside and Rights of Way Act 2000, be automatically extinguished, and that includes all such routes currently shown on the List of Streets Maintainable at Public Expense. The legislation provides no saving for these routes because it presumes that Authorities maintain their records in a correct and lawful manner. Unless action is taken to protect these ancient snickets, alleyways and ginnels etc the very character of some of our ancient cities may be lost.

And that is far more than maladministration, it is criminal!

Of course some will say that 2026 is a long way off, and we needn't worry, yet I would ask you to consider how many Authorities have completed Definitive Maps for their formerly excluded areas (the County Boroughs etc)? That duty has been in place for Twenty-five years and some Authorities have not yet even started that process!

Now, go and be controversial, send a copy of this article to your highway maintenance engineers and those responsible for maintaining the List of Streets, then start asking questions..... and watch out for the tipex bottle!!

Robin Carr Associates - Copyright 2008
Published in Waymark Summer 2008

Robin Carr Associates
Public Rights of Way Management and Consultancy Services
2 Friarage Avenue, Northallerton, DL6 1DZ
Tel/Fax: (01609) 781717 Mobile: (07976) 624029
Email: robin.carr1@btinternet.com Website: www.prow.biz