

**12 Home Close  
Newlands Road  
CORSHAM  
Wiltshire  
SN13 0BE**

Mr R Cuthbert  
Definitive Map Team  
Hertfordshire County Council  
County Hall (CHN103)  
HERTFORD  
SG13 8DN

My ref.: EC1037

Your ref.: DAC

3 Jan 19

REC.  
21/01/2019.

Dear Mr Cuthbert,

**Wildlife and Countryside Act 1981  
Application for a definitive map modification order  
Flamstead: Half Moon Lane to Windmill Road**

Please find enclosed an application for a definitive map modification order to add public rights to the definitive map and statement for the area.

I would be grateful if you would kindly acknowledge receipt of this application, confirm by letter that it is fully compliant with the requirements of paragraph 1 to Schedule 14 of the 1981 Act, and advise which reference number you will be using to track the application.

I have been unable to determine all the owners and occupiers of the land crossed by the path. In particular, the land is unregistered at HM Land Registry. Please may I have permission to post notices as described in Schedule 14 to the 1981 Act? (An email will suffice.)

When the application is prioritised, as well as letting me know the score, please would you send me a scan of the completed prioritisation form for my records.

I would be grateful if you would quote my reference number on all correspondence (whether by letter or email) as after making well over two hundred modification order applications, it helps me identify the required file quickly.

Yours sincerely,

*Powder*



# Wildlife and Countryside Act 1981

## The Definitive Map and Statement of Public Rights of Way in Hertfordshire

To: Hertfordshire County Council  
Of County Hall  
HERTFORD  
SG13 8DN

I, Dr Philip David Wadey of 12 Home Close, Corsham, Wiltshire SN13 0BE hereby apply for an order under section 53(2) of the Wildlife and Countryside Act 1981 modifying the definitive map and statement for the area by:

Adding the restricted byway from Half Moon Lane to Windmill Road.

Adding to the particulars relating to the applied-for restricted byway from Half Moon Lane to Windmill Road by providing that the width is that shown excluded from the hereditaments on the Finance Act 1910 Valuation Plan and that there are no limitations or conditions on the use of the route by the public

and shown on the map accompanying this application.

I attach copies of the following documentary evidence (including statements of witnesses) in support of this application:

- Dury and Andrews' Map of Hertfordshire, 1766.
- Bryant's Map of Hertfordshire, 1822.
- Ordnance Survey 1<sup>st</sup> edition 25" extract from map Bedfordshire 33 - 13.
- Ordnance Survey 1<sup>st</sup> edition 25" extract from map Hertfordshire 27 - 1.
- Ordnance Survey Book of Reference ('Area Book') for Parish of Flamstead.
- Tithe map of Flamstead, Hertfordshire Archives.
- Bartholomew's half-inch map, sheet 25, 1903.
- IR126/8/20 Inland Revenue Valuation plan, The National Archives.
- IR126/8/58 Inland Revenue Valuation plan, The National Archives.
- INSPIRE land index polygon map, 2018.
- Applicant's statement.

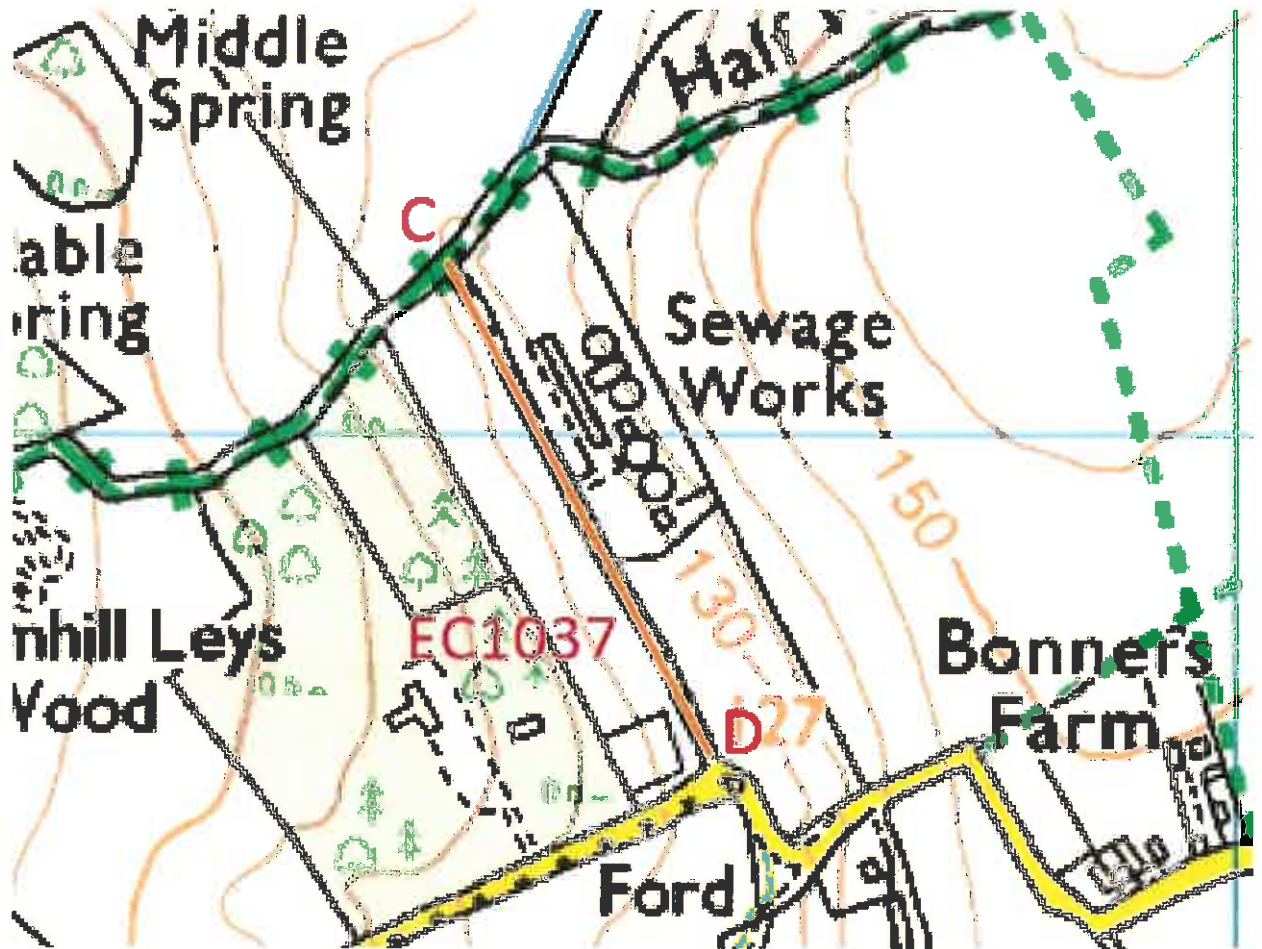
Dated: 3 Jan 19

Signature: 

Applicant's Reference: EC1037

# Wildlife and Countryside Act 1981

The Definitive Map and Statement of Public Rights of Way in Hertfordshire



**Wildlife and Countryside Act 1981****Definitive Map Modification Order Application****For a route from Half Moon Lane to Windmill Road in the Parishes of  
Flamstead and Markyate to be shown as Restricted Byway**

Applicant's Reference: EC1037

**1 Jan 19**

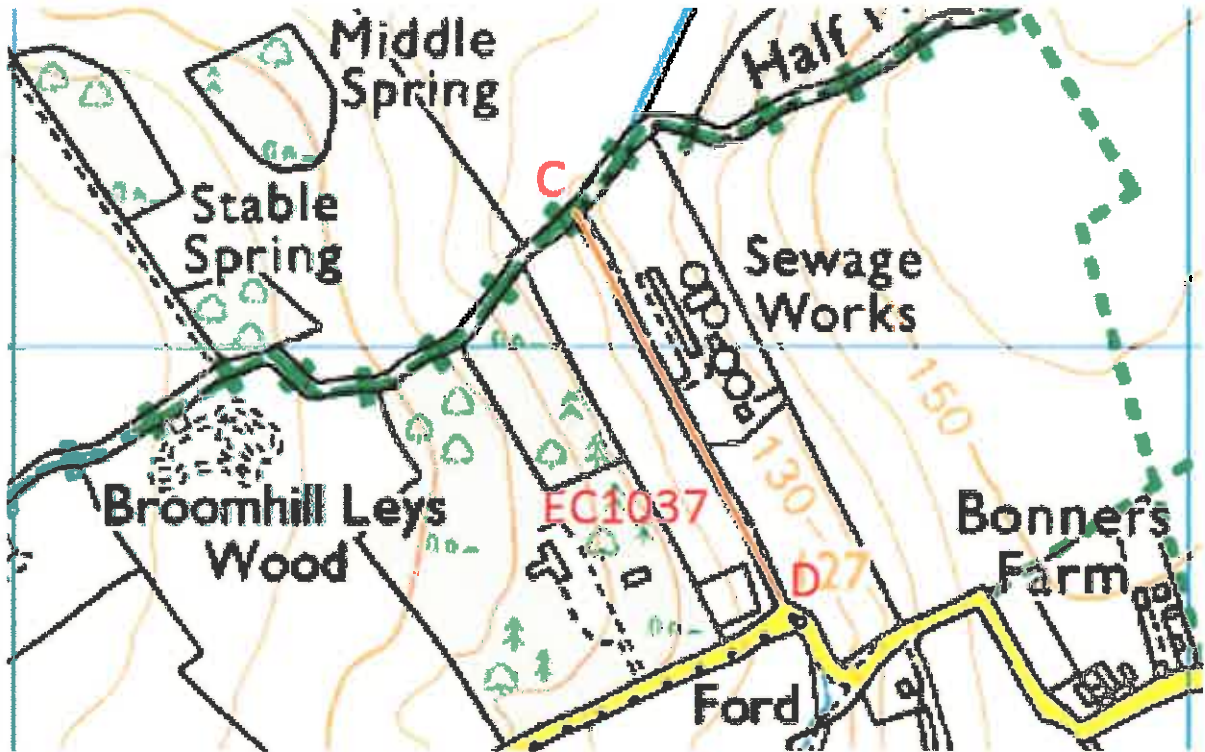
Quick reference path facts to assist the Surveying Authority in its investigation

OS County series map	Hertfordshire 19 – 13 and 27 - 1
Modern Definitive Map sheet(s)	40 (TL01NE)
Grid references of ends of route (approximate)	TL 0748 1711 to TL 0765 1678

1. My name is Phil Wadey. I am the applicant for the order. My rights of way experience stems from having been a volunteer access and bridleways officer for the British Horse Society since 1992, including 14 years as the Society's regional access officer for the East of England, and from my being a trustee of the Open Spaces Society.
2. This application is made because, on the cut off day,
  - a. The effect of s.53(1) and (2) Countryside and Rights of Way Act 2000 on a public path that existed prior to 1949, still exists on the cut-off date, and hasn't been a highway of a different description in between, and is not shown in the definitive map and statement at all is to extinguish all rights on that route. (This applies if the route is determined to be a footpath or bridleway.)
  - b. The effect of s.54A Wildlife and Countryside Act 1981 (as inserted by Sch 5 para 4 of the Countryside and Rights of Way Act 2000) on a route that carries public mechanically-propelled-vehicular rights and is not already on the definitive map as a highway of any description, is to prevent it from being recorded. (This applies if the route is shown to be a highway other than a footpath, bridleway or restricted byway.)
3. I believe this application will pass the planned Preliminary Assessment Test required by para 2 Sch 13A Wildlife and Countryside Act 1981 because:
  - a. This application statement includes explanations as to how the evidence applies to the application route, and
  - b. The application contains one or more of the following forms of supporting evidence:
    - (1) Legal document(s) relating specifically to the right of way that is the subject of the application (such as Railway Act, Inclosure Act and Award, Finance Act, Court Order or Main Roads Order evidence).
    - (2) Evidence of reputation in legal document(s), even though not written specifically about the right of way that is the subject of the application (such as Tithes Awards and Maps).
    - (3) Maps and other documents which, over a period of time, and taken together, provide evidence of reputation that the order route is part of the public road network.

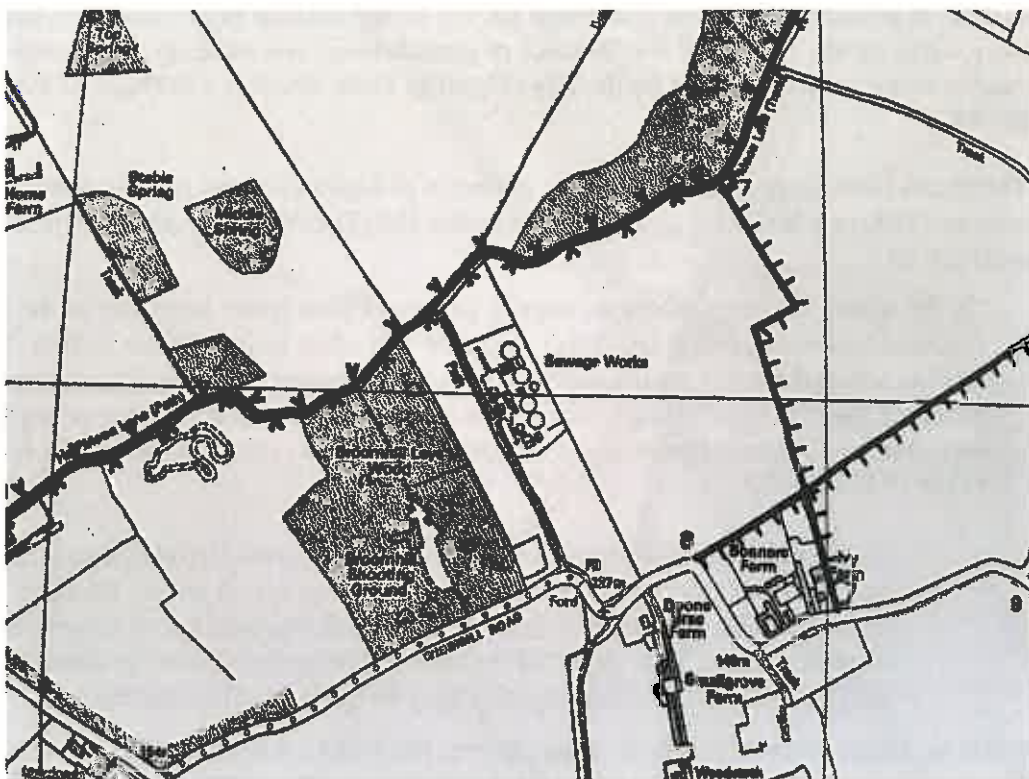
#### THE APPLICATION ROUTE

4. The application route is shown on the plan below:
  - a. Point C is the junction with Half Moon Lane (Markyate 3 BOAT).
  - b. Point D is the junction with Windmill Road (public road 2U132).



*Ordnance Survey 1:25000 scale map extract showing application route*

5. The application route is currently not shown on the definitive map of rights of way for Hertfordshire.



*Extract from 2010 Consolidated Definitive Map (no subsequent DM order found)*

6. The application route is currently not shown on the online Gazetteer.



*Extract from Online Gazetteer (accessed 30 Dec 18)*

7. The route's width is as shown uncoloured on the Inland Revenue Valuation Plan.

#### DOCUMENTARY EVIDENCE OF HIGHWAY STATUS

8. In order to be able to modify the definitive map and statement, the Surveying Authority needs to have a discovery of evidence which shows, on the balance of probabilities, that highway rights exist. The use of the 'balance of probabilities' test rather than 'beyond reasonable doubt' was confirmed by the High Court in *Todd, Bradley v SOS for EFRA* [2004] 4 All ER 497.

9. The courts have given guidance on how evidence of highway status is to be considered. In *Fortune and Others v Wiltshire Council and Another* [2012] EWCA Civ 334, Lewison LJ said, at paragraph 22,

'In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 922:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

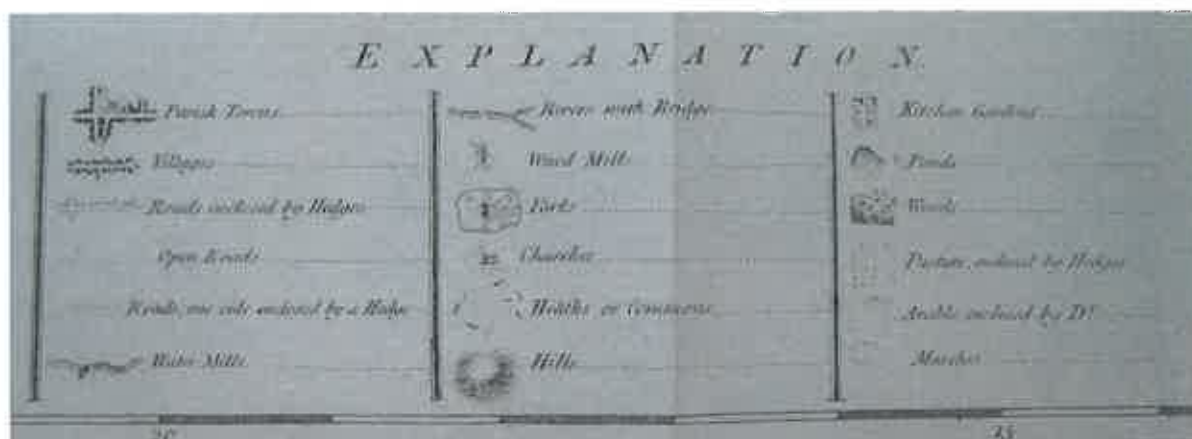
10. While no single piece of evidence is conclusive, the applicant believes that taken as a whole the pieces of evidence demonstrate highway reputation over many years, indicating that the



route does indeed have highway status, and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights.

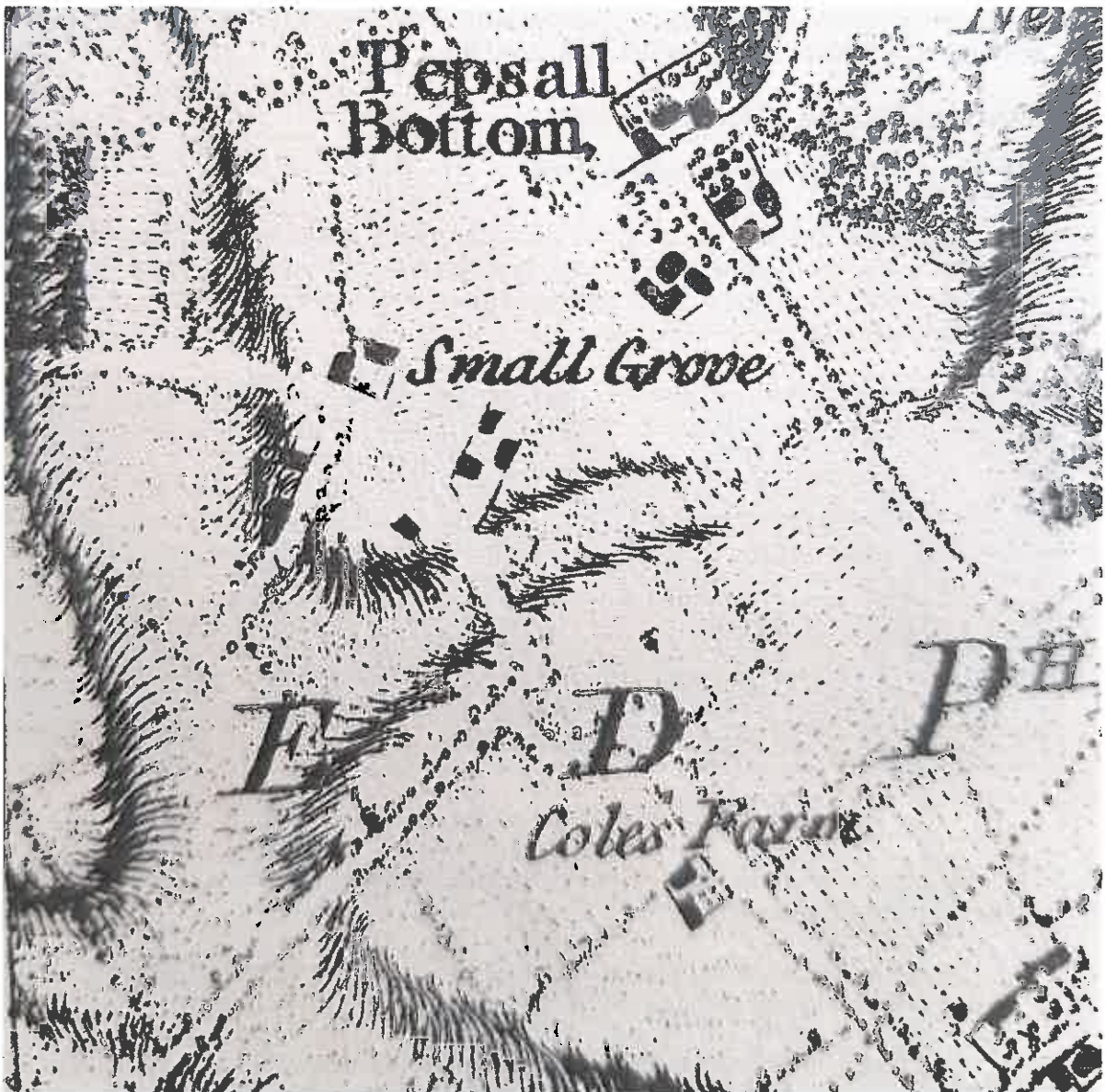
#### 11. Dury and Andrews' Map of Hertfordshire.

- a. **Date.** This map was produced in 1766.
- b. **Relevance.** The map was made for sale to the public, and so is unlikely to show routes that the public could not use. It has a key in which different types of route are distinguished. This enables us to draw conclusions from how routes are shown. It did not usually show footpaths or bridleways.



*Extract from Dury and Andrews' Map (1766) showing the Key.*

- c. **Archives.** An original map is held by the Hertfordshire Archives and Local Studies (HALS) under reference CM 26.
- d. **Meaning.** The route is shown in the manner of a 'Road enclosed by Hedges'. It is shown in the same way as the public vehicular roads to which it connects.
- e. **Assessment.** The depiction as a road is evidence in favour of the proposition that the application route was considered to have vehicular rights in 1766.



*Extract from Dury and Andrews' Map (1766) showing the application route.*

12. Bryant's Map of Hertfordshire.

- a. Date. This map was produced in 1822.
- b. Relevance. This was made for sale to the public, and so is unlikely to show routes that the public could not use. It has a key in which different types of route are distinguished. This enables us to draw conclusions from how routes are shown.



*Extract from Bryant (1822) showing the Key*

- c. **Archive.** An original is held by the Hertfordshire Archives and Local Studies (HALS) under reference CM 88.
- d. **Meaning.** The route is shown in the manner of 'Lanes and Bridleways'. The image below is made from two photographs, as the route crosses the cut in the HALS reprint of the map.
- e. **Assessment.** This is evidence in favour of the proposition that the application route was considered to have at least equestrian rights and probably vehicular rights in 1822.



*Extract from Bryant (1822) showing the application route*

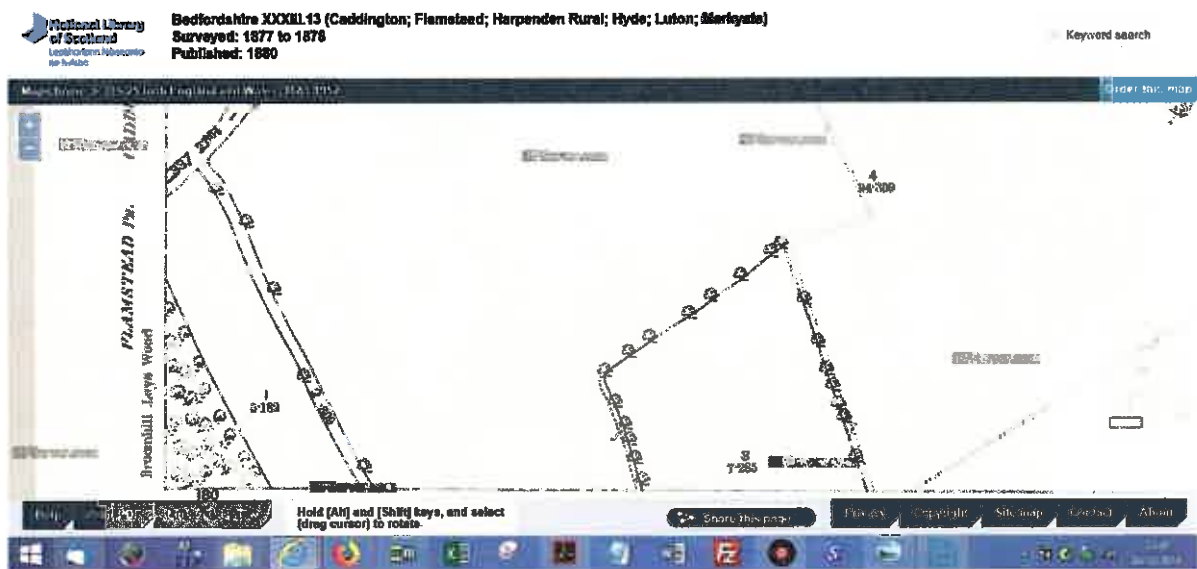
### 13. Ordnance Survey First Edition 25 inch.

- a. **Date.** OS sheet Bedfordshire 33 – 13 was surveyed between 1877 and 1878 and published in 1880. OS Sheet Hertfordshire 27 – 1 was surveyed in 1877 and published in 1879.
- b. **Relevance.** The early first edition county series (25 inch) OS maps provide evidence of the physical condition of the landscape. They contain valuable extra information when cross referenced to the Books of Reference, often called simply the 'Area Books', that were published to go with them. These are indexed by parish. The first edition were sold in black and white and in colour editions. Colouring was, amongst other things, used to denote roadways.
- c. **Archive.** Copies of the first edition Ordnance Survey 25" maps are held by the British Library. As well as originals, they have created microfiche copies, which can be inspected by the public. Copies can also be viewed at <http://www.old-maps.co.uk> and some sheets are available from the National Library of Scotland at <http://maps.nls.uk/os/25inch-england-and-wales/index.html>. These particular extract maps were obtained from the National Library of Scotland and so are only in black and white.

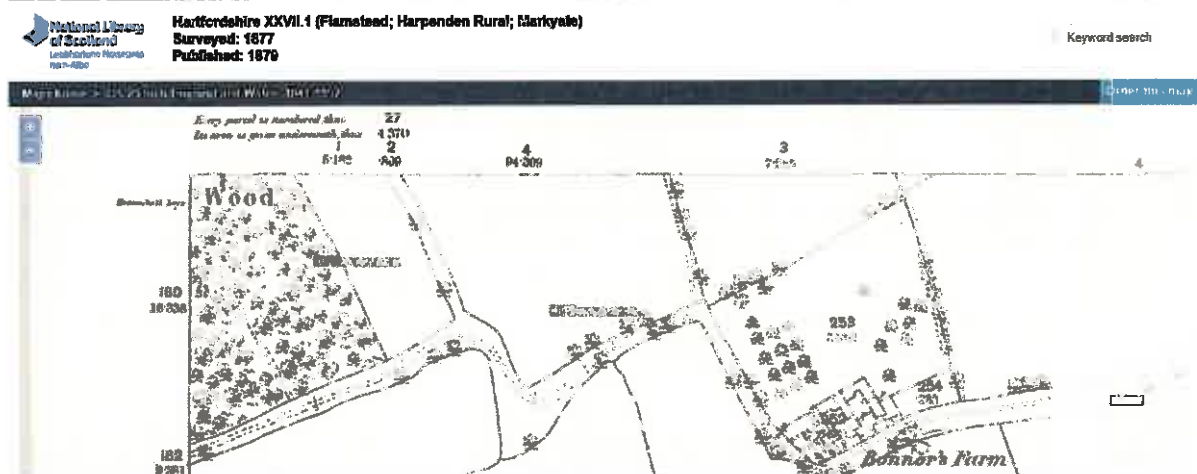
d. Meaning.

- (1) The route is shown as a well-defined strip of land, with parcel number 2 (in the parish of Flamstead) and area 0.809 acres.
- (2) There are no barriers at either end, or indeed at any point along the route.
- (3) In the entry for the Area Book for Flamstead there is a description for land parcel 2. The description reads, "Road".

e. Assessment. The showing of the route on the map and the description in the Area Book are evidence of reputation and appearance at the time the documents were compiled.



*Extract from the Ordnance Survey first edition 25" map of the area, sheet Bedfordshire 33 - 13.*



*Extract from the Ordnance Survey first edition 25" map of the area, sheet Hertfordshire 27 - 1*

# PARISH OF FLAMSTEAD,

IN THE

## COUNTY OF HERTFORD.

### HUNDRED OF DACORUM.

No. on Plan.	Area in Acres.	Remarks.	No. on Plan.	Area in Acres.	Remarks.
1	5.182	Arable.	40	9.426	Arable.
2	.809	Road.	41	22.992	Arable.
3	7.285	Pasture.	42	29.322	Wood.
4	94.309	Arable, &c.	43	159.194	Arable.
5	3.910	Road.	43a	6.725	Wood.
6	.990	Road.	44	1.378	Road.
7	20.279	Arable.	45	4.132	Pasture.
8	7.992	Pasture, &c.	46	.214	Houses and garden.
9	9.712	Wood.	47	5.280	Pasture.
10	.575	Brickfield.	48	2.324	Road.

*Extract from the Ordnance Survey first edition 25" Area Book for Flamstead*

#### 14. Tithe map for Flamstead

- a. Date. The map dates from c.1938. (Source: HALS tithe list.)
- b. Relevance.

(1) The Tithe Commutation Act 1836 enabled tithes (literally a tenth of the produce of the land) to be converted to a monetary payment system. Maps were drawn up to show the titheable land in order to assess the amount of money to be paid. The Act was amended in 1837 to allow maps produced to be either first class or second class.

(2) First class maps are legal evidence of all matters which they portray and were signed and sealed by the commissioners (Tithes Act 1847). They had to be at a scale of at least 3 chains to the inch. Second class maps, signed but not sealed, were evidence only of those facts of direct relevance to tithe commutation, and are often at 6 chains to the inch. There was a proposed convention of signs and symbols to be used, which included Bridle Roads and Footpaths, but this was not strictly adhered to.

(3) The tithe process received a high level of publicity as landowners would be particularly keen not to be assessed for more tithe payment than necessary. Non-titheable land deemed to be unproductive was usually excluded from the process. It is common therefore for no tithe to be payable on roads, although wide grass drovers' routes could carry a tithe as they were used as pasture. It was in the interest of the landowners for untithed roads to be shown correctly to minimise their payments. Footpaths and bridleways were more likely to be at least partially productive (for

example as pasture). Therefore, although the process was not directly concerned with rights of way, inferences can be drawn from tithe documents regarding the existence of public rights, and in particular, public vehicular rights. In some cases highways are coloured yellow or sienna to indicate public status.

c. Archive and Reference. The tithe map for Flamstead is held at the Hertfordshire Archives under references DSA4/38/2.

d. Meaning.

(1) The map is signed by the commissioners, but not sealed, so it is a second-class map. It can still provide valuable information for rights of way determination.

(2) The map shows the application route for its whole length. It is bounded by two solid lines and given reference number 1096. The public road known today as Pepsal End Road is also shown as bounded by two solid lines, and is given the reference number 1089. The byway, Half Moon Lane, is also shown in the same manner and is given reference number 1095. All of these numbers are similar, suggesting that they have been grouped together at the end of the apportionment rather than being included in individual owners' hereditaments, as might happen for private tracks.

(3) The apportionment has not actually been checked.

e. Assessment. This is a second class map and so is only conclusive of matters of relevance to the tithe commissioners. It nevertheless provides useful information from which inferences may be drawn. The application route is shown in the same way on the tithe map as other public roads in the area including the ones to which it connects. This depiction is consistent with the application route being a public vehicular highway at the time of the assessments.



*Extract from the Tithe Map for Flamstead Parish (geo-rectified).*

## 15. Bartholomew's Half-Inch Maps of England and Wales

- a. Date. This map was published in 1903.
- b. Relevance. The map was made for sale to the public, particularly for tourists and cyclists, and so is unlikely to show routes that the public could not use. It has a key in which different types of route are distinguished.
- c. Archive. An original of Sheet 25 (Bedfordshire and Hertfordshire) is held by the National Library of Scotland (NLS) and can be viewed via [http://maps.nls.uk/series/bart\\_half\\_england.html](http://maps.nls.uk/series/bart_half_england.html).
- d. Meaning. The application route is shown as an 'inferior' road. That is, according to the key, a road which 'is not to be recommended to cyclists'. The solid black dashes are the county boundary running near the route.
- e. Assessment.

(1) Although the map carries the standard disclaimer that the representation of a road or footpath is no evidence of a right of way, it remains the case that this map was produced for sale to the travelling and cycling public, and the roads were revised by the Cyclists' Touring Club. It seems likely that the disclaimer is to avoid the publishers from finding themselves in the midst of legal action, and that their true beliefs come from the fact that the CTC assessed the roads as suitable or 'inferior'. In addition, the application route was shown as this 'inferior' road rather than as a footpath or bridleway, and cyclists at the time of publication (1903) had no right to use bridleways, having been declared to be carriages by s.85 Local Government Act 1888, so it is appropriate that at least a little weight be given to this document as evidence of vehicular status.



(2) The PINS Consistency Guidelines suggest that little weight can be given to this source. However, in *Commission for New Towns and Another v J. J. Gallagher Ltd* [2002] EWHC 2668 (Ch), the judge stated at para 108:

"Bartholomew's Map of England, 1901 and 1911 editions, has three categories of coloured roads. They are "first class roads", "secondary roads (good)", and "indifferent roads (passable)". There are two other categories, namely uncoloured roads and "footpaths & bridlepaths". Beoley Lane is marked in each of the two editions as uncoloured road. The legend to each of the Bartholomew maps states that "the uncoloured roads are inferior and not to be recommended to cyclists". The implication of the demarcation of Beoley Lane on these maps appears to me to be that they are public carriageways. First, each of the other four categories is a public highway. Secondly, in a somewhat paradoxical way, the indication in the description of the uncoloured road is that they can lawfully be used by cyclists, which, as at 1901 and 1911, would have meant that they were public carriageways. However, it is important to mention that there is a note to the effect that "the representation of a road or footpath is not evidence of the existence of a right of way". I do not consider that that means that one can cast aside what one could otherwise glean from Bartholomew as being of assistance, but the disclaimer underlines the fact that one cannot place much weight on Bartholomew's Maps, or indeed on any map which does not have the positive function of identifying public carriageways."

(3) The conclusion is that at least some weight must be given to this source.



*Extract from Bartholomew's Map showing the application route as an 'inferior' road*

First Class Roads	=====	On all roads the sign  indicates dangerous hills
Secondary	(Good) -----	and  where caution is required
Indifferent	(Passable) -----	The uncoloured roads are inferior and not
Footpaths & Bridlepaths	.....	to be recommended to cyclists
<i>NB The representation of a road or footpath is no evidence of the existence of a right of way</i>		

*Extract from Bartholomew's Map showing the Key*

#### 16. Inland Revenue Valuation.

- a. Date. The valuation records were produced in the few years after 1910.
- b. Relevance. The Finance (1909–10) Act 1910 caused every property in England and Wales to be valued. The purpose was to charge a tax on any increase in value when the property was later sold or inherited. The valuation involved complicated calculations which are not relevant for highway purposes. However, two features do affect highways: public vehicular roads were usually excluded from adjoining landholdings and shown as 'white roads', and discounts could be requested for land crossed by footpaths or bridleways. This is known because s.35 of the 1910 Act provided,

"No duty under this Part of this Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority."

We note that a highway authority was a rating authority. There was no obligation for a land owner to claim any of the other discounts available (applying for discounts was an entirely



voluntary act), but Section 25 authorised the discount for footpaths and bridleways if they were claimed:

“The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and ... [other exclusions.]”

All land had to be valued unless it was exempted by the Act. There were harsh penalties for making false declarations, and Section 94 provided:

“If any person for the purpose of obtaining any allowance, reduction, rebate, or repayment in respect of any duty under this Act, either for himself or for any other person, or in any return made with reference to any duty under this Act, knowingly makes any false statement or false representation, he shall be liable on summary conviction to imprisonment for a term not exceeding six months with hard labour.”

As it appears to be a highway from other evidence, and no duty was assessed in the Inland Revenue Valuation, and the Inland Revenue were under a duty to collect all taxes applying, and hence value the land unless certain that an exemption applied, it is surely for anyone who argues that a different reason for the non-valuation of this white road to show which other exemption could have applied.

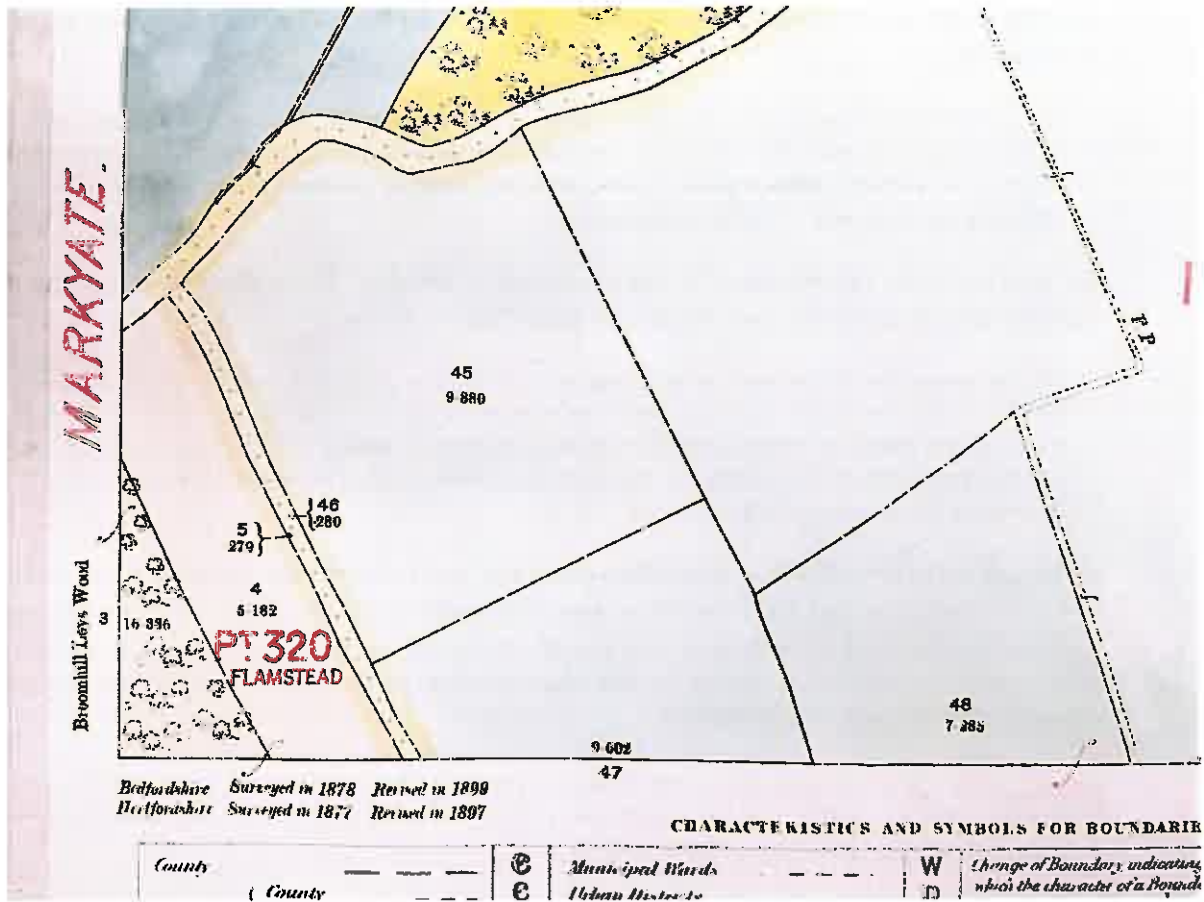
c. Archive. The extracts below are from the records that were passed from the IR Valuation Offices to The National Archives at Kew. The National Archives document references are IR 126/8/20 and IR 126/8/58.

d. Meaning. The extracts below clearly show the application route as a white road, separate from the adjoining hereditaments. The yellow colouring is the highlighting of the parish boundary rather than indicating a hereditament.

e. Assessment.

(1) As this land is unvalued, this suggests it belonged to a rating authority. As it is not held by a local authority or government department for any other known reason, this suggests that it belonged to a highway authority. Had it only been a bridleway, the Inland Revenue would have valued the land and allowed a deduction instead, since this would have resulted in a greater tax levy. Had it been held by a rating authority for another purpose there would be some evidence of that holding, yet none has been found.

(2) The legislation is sufficiently clear that anyone arguing that white road status means something other than the route is a public vehicular highway must show which other exception from valuation the route falls under.



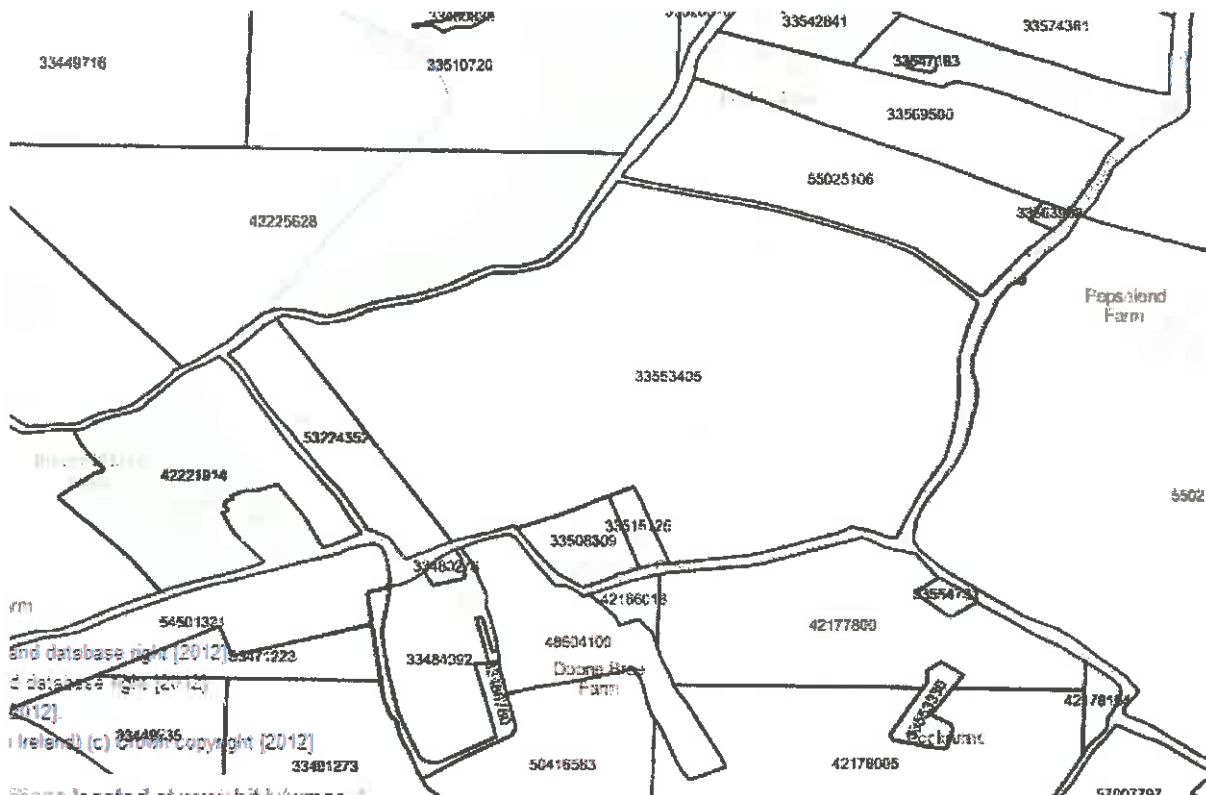
*Extract from the Inland Revenue Valuation Map IR 126/8/90*



*Extract from the Inland Revenue Valuation Map IR 126/8/58*

17. INSPIRE (2018).

- a. **Date.** This extract from the INSPIRE database was taken on 31 Dec 18.
- b. **Relevance.** The Land Registry INSPIRE Index Polygons Service is a Web Mapping Service which provides map images of HM Land Registry's INSPIRE index polygons. The INSPIRE index polygon dataset contains only freehold registrations, and the polygons indicate the location of registered land.
- c. **Archive.** The publicly accessible dataset is found at <https://data.gov.uk/dataset/land-registry-inspire-view-service-and-metadata>. The extract below is taken from a screen shot taken by the Applicant on the date stated above.
- d. **Meaning.** The application route is shown separate from any registered landholding.
- e. **Assessment.** Vehicular highways of ancient origin are often on unregistered land. Where the adjoining land on each side has been registered, but the ancient vehicular highway has not been claimed as part of either land ownership, this is supportive evidence of the ancient vehicular highway status. In the absence of any other explanation why neither adjoining landowner would lay claim to the land, the applicant draws the conclusion that this supports the view that the application route is a vehicular highway of ancient origin.



*Extract from the INSPIRE mapping showing application route unregistered*

## CONCLUSIONS

18. Each piece of evidence presented is either evidence of reputation of vehicular highway rights, or consistent with there being vehicular highway rights, or indicates that a civil servant thought that there were vehicular highway rights.

19. While each document could possibly be explained away by another reason, there is no other reason that explains what all of the documents show. It is therefore more likely than not that the explanation for the evidence as a whole is that public vehicular highway rights existed at the times that the various documents were compiled.

20. In examining the evidence as a whole, it will usually be found that the simplest explanation is the best. Suppose that there are three documents capable of being read as providing some evidence of highway status. Each of these documents might be able to be explained away by other reasons. The old map might have shown a private drive to a patron's residence, the tithe map may not have shown land held by the rector, and the Inland Revenue evidence may relate to land held by a rating authority in its local education authority role. However, it is unlikely that all of these alternative explanations to highway status will be true for the same path. In such circumstances, the explanation of what the evidence shows is much more likely to be highway status than that the route used to belong to a wealthy owner, was sold to the Church and then became a council-run school. In the absence of positive evidence that these diverse explanations are actually true (as opposed to mere possibilities), the single explanation of the facts that a highway existed is compelling.

21. As a result of the common law maxim 'Once a highway always a highway', in the absence of a stopping up order, it follows that vehicular highway rights existed immediately before the operation of the Natural Environment and Rural Communities Act 2006.

22. The antiquity of the route shows that the highway existed prior to 1835. It will therefore be a highway maintainable at the public expense, and so should be added to the List of Streets maintained by the Council under s.36(6) Highways Act 1980.

23. The applicant requests the surveying authority to add the route to the definitive map as a byway. The type of byway – restricted or open to all traffic – will depend on the application of the Natural Environment and Rural Communities Act 2006. In the event that motor vehicular rights have not been extinguished, the applicant notes that the route is clearly more used by the public for walking and riding than by motor vehicle, and so would meet the criterion for being recorded on the definitive map and statement.

Dr P D Wadey  
Applicant