

# Wildlife and Countryside Act 1981

## Definitive Map Modification Order Application

### 1. Introduction

- 1.1. This Definitive Map Modification Order (DMMO) Application Statement and its associated covering letter are submitted by Ms S Hyden (MBA, MCIPS, BA Bus. Studies (Hons), BSc Psychology (Hons)) BHS Access and Bridleways Officer on behalf of The British Horse Society, of Abbey Park, Stareton, Kenilworth, CV8 2XZ.
- 1.2. The overall application comprises this document (DMMO Application Statement) and its associated covering letter. The **British Horse Society reference for this Application is SUS-1092.**
- 1.3. The location of the application route may be found on Ordnance Survey (OS) maps as follows:

OS Landranger 1:50000 map:	199 Eastbourne and Hastings
OS Explorer 1:25000 map:	124 Hastings & Bexhill
OS Grid References:	(A) TQ 6854 1676 to (C) TQ 6865 1650

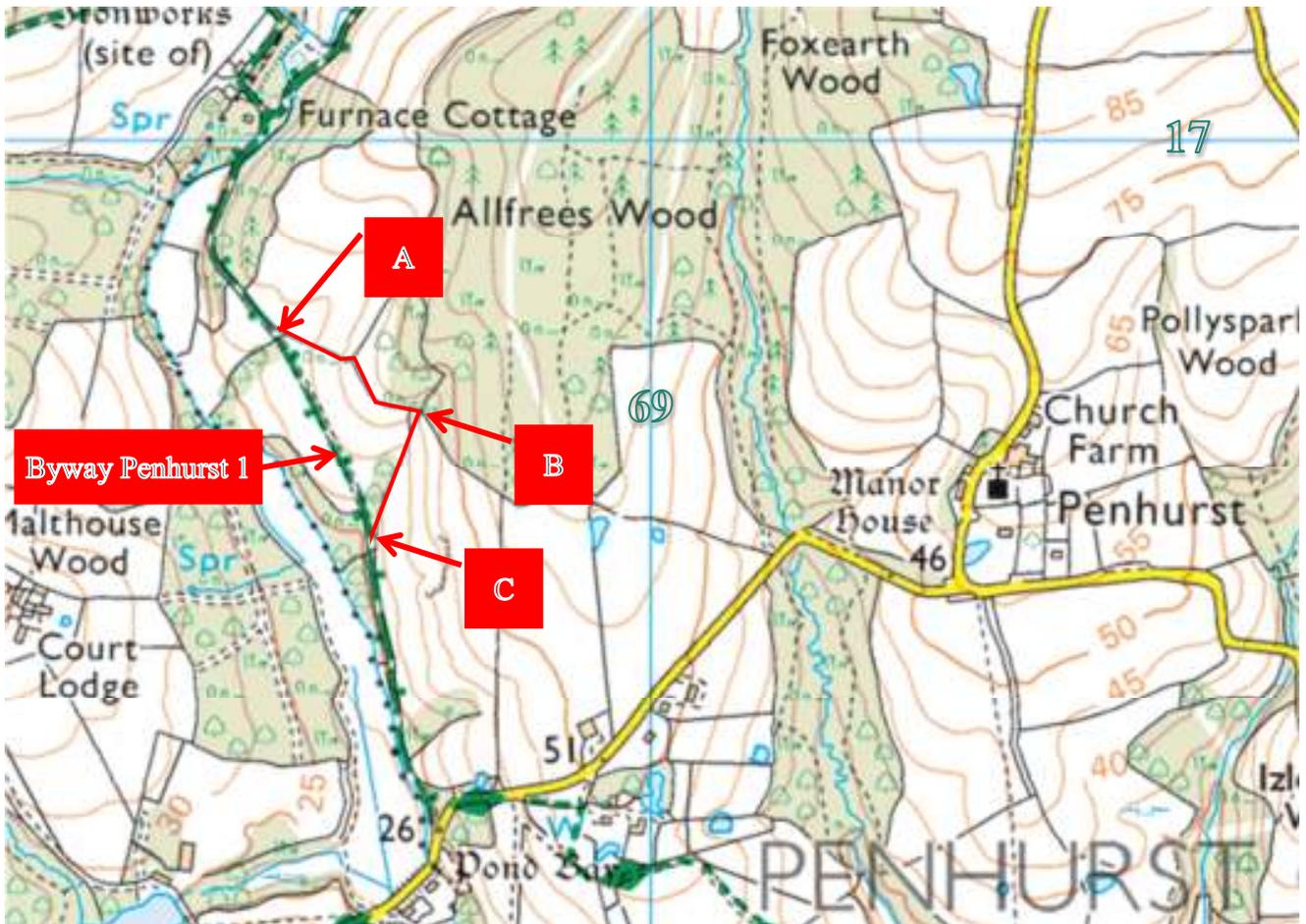


Figure 1 OS 1:25000 map showing the Application route as a red line

Map produced from extract of Ordnance Survey 1:25,000 scale mapping. When printed on A4 paper, the scale will be not less than 1:25,000 and thus meets the requirement of regulation 2 and regulation 8(2) of The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993.

Figure 1 is the map to accompany Definitive Map Modification Order application BHS SUS-1092 for the route in the Parish of Penhurst to be shown as a Bridleway, marked on the map as a solid red line and notated as A, B and C. Key points on the application route are:

- A** = Application route intersection with Byway Penhurst 1 (TQ 6854 1676)
- B** = Application route intersection with old Ashburnham Furnace to Penhurst road (TQ 6871 1666)
- C** = Application route intersection with Byway Penhurst 1(TQ 6865 1650)

- 1.4. The applicant’s legal experience was gained via professional qualifications (see above) and over 30 years as a Commercial Negotiator working at Senior Civil Service and Ministerial level. Her rights of way experience stems from having 40 years of riding experience in and around the area and the completion of Access training Stage 1, 2 and 3 provided for all BHS staff and volunteers.
- 1.5. This DMMO Application Statement requests that the Application route, shown in Figure 1, be recorded as **a Right of Way with a status of Bridleway** in accordance with its historical use, and in line with the principle ‘**once a highway, always a highway**’ [*Dawes v Hawkins* (1860)].

**Documentary Evidence of Highway Status**

- 1.6. 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 & Anor v Secretary of State for Environment Food & Rural Affairs Rev 2* [2004] EWHC 1450 (Admin).
- 1.7. The evidence discovered in this DMMO Application Statement includes (in chronological order):

Date	Documentary Evidence	Description
1795	Gardner & Gream map	Shown as Road
1813	OS Old Series (1 <sup>st</sup> Ed)	Shown as Road
1825	Greenwood & Greenwood map	Shown as Road
1834	Ashburnham Estate map	Shown as unnumbered Road
1840	Penhurst Tithe map	Shown as unnumbered Road
1875	OS 25’ County Series map 1 <sup>st</sup> Ed	Shown as Road
1875	OS 25’ County Series 1st Ed Reference Book	Referenced as Road
1898	OS 25’ County Series	Shown as Road
1910	Inland Revenue Valuation Record	Shown as White Road
1949<	ESCC Definitive map	Not shown as ROW. No stopping up or diversion orders found for this route.
2016	High Weald Historic Routeway Survey	Identified as Historic routeways – Road
2021	Photographs & Other media	Route shown as distinctive pathway

- 1.8. 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 Levinson LJ said, at paragraph 22:

*“In the nature of things where an enquiry goes back over many year (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”*

1.9. As Pollock CB famously directed the jury in *R v Exall (1866)*

[https://assets.cambridge.org/97811070/20337/excerpt/9781107020337\\_excerpt.pdf](https://assets.cambridge.org/97811070/20337/excerpt/9781107020337_excerpt.pdf) :

*“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.”*

1.10. In addition the Planning Inspectorate states in ROW/3186868

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/747891/row\\_3186868\\_interim\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747891/row_3186868_interim_od.pdf)

*“Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public”*

1.11. Whilst no single piece of evidence is conclusive, taken as a whole, the pieces of evidence demonstrate highway reputation for the application route over many years.

1.12. Where web pages have been accessed to provide information, the URLs used at the time are given as references in good faith, but such websites are beyond the author’s control and may change over time.

### **What is a Highway / Road?**

1.13. For the purpose of interpreting early maps, plans, road books etc. it is important that the usage of the period, when the document was made, is considered when deciding the rights belonging to any particular route. This is because the meaning of the words Highway, Road, Lane etc. have changed significantly over time. During the 17th Century and into the first quarter of the 18th century, Road and Highway were equivalent, both meaning general purpose ways for all manner of traffic. However from 1835, a number of Acts of Parliament specified that ‘highway’ could be applied to any type of way, including bridleways and footpaths (thereby losing its special significance as a vehicular route) whilst the definition of ‘Road’ remained as a general purpose vehicular route open to “all manner of traffic”.

1.14. It was not until the Local Government Act 1929, that a “road” was defined as a “highway repairable by the inhabitants at large” and thereby lost its unique distinction as a “general purpose way”<sup>1</sup>. Therefore a reference to “Road” prior to 1929 can with confidence be said to imply a general purpose vehicular way. After 1929 that is not the case. It is these interpretations which are applied within this DMMO Application Statement.

<sup>1</sup> Extract from *Road and Way - An analysis of these expressions in the Highways and related Acts of Parliament c1500 to 1929 (with notes on uses of these words in Dictionaries and Relevant Documents of the Period)* by AW Fry FCA 2003.

## **Table of Contents**

1.	Introduction .....	1
2.	Commercial County Maps Context and Evidence .....	7
2.1.	Introduction to Commercial County Maps .....	7
2.2.	1795: Gardner & Gream: “A Topographical Map of the County of Sussex” .....	8
2.3.	1825: Greenwood and Greenwood: “Map of Sussex” .....	11
2.4.	The significance of the evidence in Commercial County Maps .....	14
3.	Ordnance Survey Maps Context and Evidence .....	16
3.1.	Introduction to OS Maps .....	16
3.2.	1813: Old Series (1 <sup>st</sup> edition) .....	17
3.3.	1874: 1 <sup>st</sup> Edition Ordnance Survey: 25 inch to the mile .....	20
3.4.	1898: County Series: “Sussex XLIII.13 (Ashburnham; Penhurst)” .....	25
3.5.	The significance of the evidence in Ordnance Survey Maps .....	27
4.	Tithe Records Context and Evidence .....	28
4.1.	Introduction to Tithe Records .....	28
4.2.	1840 Penhurst Tithe Records .....	29
4.3.	The significance of the evidence in Tithe Records .....	32
5.	Estate maps .....	33
5.1.	Introduction to Estate maps .....	33
5.2.	Ashburnham Estate map .....	33
5.3.	The significance of the evidence in Estate Maps .....	37
6.	Inland Revenue (IR) Finance Act 1910 – Valuation Records .....	38
6.1.	Introduction to Inland Revenue Valuation Records 1910 .....	38
6.2.	1910 - IR: 124/4/227 Penhurst .....	38
6.3.	The significance of the evidence in IR Finance Act 1910 – Valuation records .....	42
7.	East Sussex County Council (ESCC) Definitive Map .....	43
7.1.	Introduction to ESCC Definitive Maps .....	43
7.2.	1949<: ESCC Definitive Maps .....	44
7.3.	The significance of the evidence of the ESCC Definitive map .....	45
8.	The High Weald Area of Outstanding Natural Beauty (HWAONB) Unit Historic Routeways Survey .....	46
8.1.	Introduction to the (HWAONB) High Weald Historic Routeways Survey .....	46
8.2.	2016: HWAONB Unit Routeways Survey – Penhurst Parish .....	49
8.3.	The significance of the evidence of the HWAONB Unit Historic Routeways Survey .....	51
9.	Modern Photographs of the Application route .....	53
9.1.	Introduction to Modern Photographs of the Application route .....	53
9.2.	The significance of the evidence in Modern Photographs .....	60
10.	Conclusion .....	61

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11. Request..... 64

## **Table of Figures**

Figure 1 OS 1:25000 map showing the Application route as a red line.....	1
Figure 2 Extract from Gardner and Gream map of 1795 .....	8
Figure 3 Extract from Greenwood and Greenwood Map of Sussex 1825 showing the application route .....	11
Figure 4 Extract from “Explanation” on Greenwood & Greenwood Map of Sussex 1825 .....	12
Figure 5 Extract from OS 1813 Old Series map showing the application route. ....	18
Figure 6 Book of Reference for 1875 1:2500 OS map for Penhurst Parish.....	21
Figure 7 Conventional Signs and Writing Used on the 1:2500 Plans of the Ordnance Survey. ( <a href="https://maps.nls.uk/view/128076891">https://maps.nls.uk/view/128076891</a> ).....	21
Figure 8 Extract from OS 1874 1:2500 map showing the application route and Byway Penhurst 1. ....	22
Figure 9 Magnified Extract from OS 1874 1:2500 map showing the application route which is notated as plot number 92 and the existing route – Byway Penhurst 1- which is included within plot 89.....	23
Figure 10 Extract from the Penhurst Book of Reference for 1874 showing the application route and plot number 92 and 89. ( <a href="http://dbooks.bodleian.ox.ac.uk/books/PDFs/555055185.pdf">http://dbooks.bodleian.ox.ac.uk/books/PDFs/555055185.pdf</a> ) .....	24
Figure 11 Extract from OS 1898 County Series Sussex 1:2500 showing the application route. ....	25
Figure 12 Extract from 1836 Lieutenant R K Dawson proposed standardised key for Tithe maps .....	28
Figure 13 Extract from Penhurst Tithe Map of c.1840.....	29
Figure 14 Magnified extract from Penhurst Tithe Map of c.1840 depicting points A to C. ....	30
Figure 15 Ashburnham Estate Map 1834 ESCC Reference Label.....	33
Figure 16 Extract from Ashburnham Estate Map 1834 showing the application route and the position of the current Byway Penhurst 1 .....	34
Figure 17 Extract from the south west corner of the Ashburnham 1840 estate delineating the Ashburnham estate (shown by red line). ....	35
Figure 18 Copy of Penhurst Inland Revenue map label IR 124_4_227 .....	39
Figure 19 Extract from 1910 IR map Penhurst IR 124_4_227 showing the application route .....	39
Figure 20 Magnified section of 1910 IR map Penhurst IR 124_4_227 showing the application route.....	40
Figure 21 Extract from the 1953 1 <sup>st</sup> ESCC Definitive map showing the application route (overlaid on OS 2.5 to the mile (1951)).....	44
Figure 22 Extract from the ESCC highway diversion showing the only diversion order for Penhurst Parish.....	45
Figure 23 High Weald Historic Routeways Key .....	49
Figure 24 Extract from High Weald Historic Routeways map for Penhurst Parish ( <a href="http://www.highweald.org/downloads/publications/parish-information.html">http://www.highweald.org/downloads/publications/parish-information.html</a> ) .....	50

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## **2. Commercial County Maps Context and Evidence**

### **2.1. Introduction to Commercial County Maps**

- 2.1.1. Although the Ordnance Survey had been preparing maps for government use for some years, it only began to publish maps for the public in 1801. Many other map makers and cartographers had produced maps for sale to the travelling public before this date. The depiction of a route on such a map suggests that it could be used by the map's purchaser on horseback or by vehicle; word would soon get round that a map was useless for navigation if it contained many apparent roads that were not open to the public.
- 2.1.2. The maps considered in this Application Statement show all relevant Turnpike and Cross Roads. Mapmakers from at least as early as 1675 through to 1912 used the following terminology:
- Mail Road, Mail Coach Road, Post Road: a direct road between two towns/cities, used by mail coaches in order to deliver mail as quickly as possible.
  - Turnpike: a toll road; turnpikes were maintained by turnpike trusts established by Acts of Parliament.
  - Cross Road: a road which ran between the main roads mentioned above, presented as a public highway available to all travellers.
- 2.1.3. Some maps of this period were created for specific landowners or for decoration and may not show public highways accurately but the maps used in evidence to support this Application Statement are not of that category.
- 2.1.4. Planning Inspectorate Consistency Guidelines comment on these maps as follows (under "Other post-1800 maps" (page 11) 12.43):
- "Commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. However, combined with evidence from other sources, they can tip the balance of probability in favour of such status".*
- 2.1.5. A number of Commercial County maps show evidence of the application route being a road in the past, as follows (in chronological order of publication):

**2.2. 1795: Gardner & Gream: “A Topographical Map of the County of Sussex”**

Date of publication: 1795	Scale: 1 inch to the mile	Date of Survey: 1778 - 1783
Cartographer: Gream	Publisher: Faden	Edition: 2nd
Surveyor: Gardner, Yeakell and Gream		
Source: <a href="http://digitalarchive.mcmaster.ca/islandora/object/macrepo%3A80922">http://digitalarchive.mcmaster.ca/islandora/object/macrepo%3A80922</a>		

2.2.1. The map does not have a key/legend.

2.2.2. Gardner & Gream’s “A Topographical Map of the County of Sussex Reduced from the Large Survey in Four Sheets” was produced as a result of a new survey by William Gardner, Thomas Yeakell, and Thomas Gream. It is, according to Kingsley’s classic record of Sussex maps<sup>2</sup> “the most important of all Sussex maps”. This is because it was commissioned by the 3rd Duke of Richmond, who became Master-General of the Ordnance in 1782. Gardner later followed the Duke to the Board of Ordnance, becoming Chief Draughtsman to the Board.

2.2.3. Few private roads were shown. The sheer volume of missed out private roads and tracks can be seen by comparing the number of roads shown on later maps such as the first edition of the Ordnance Survey 1:2500 series. The existence of a way on this map means that it was more likely than not, a public route.

**Evidence:**

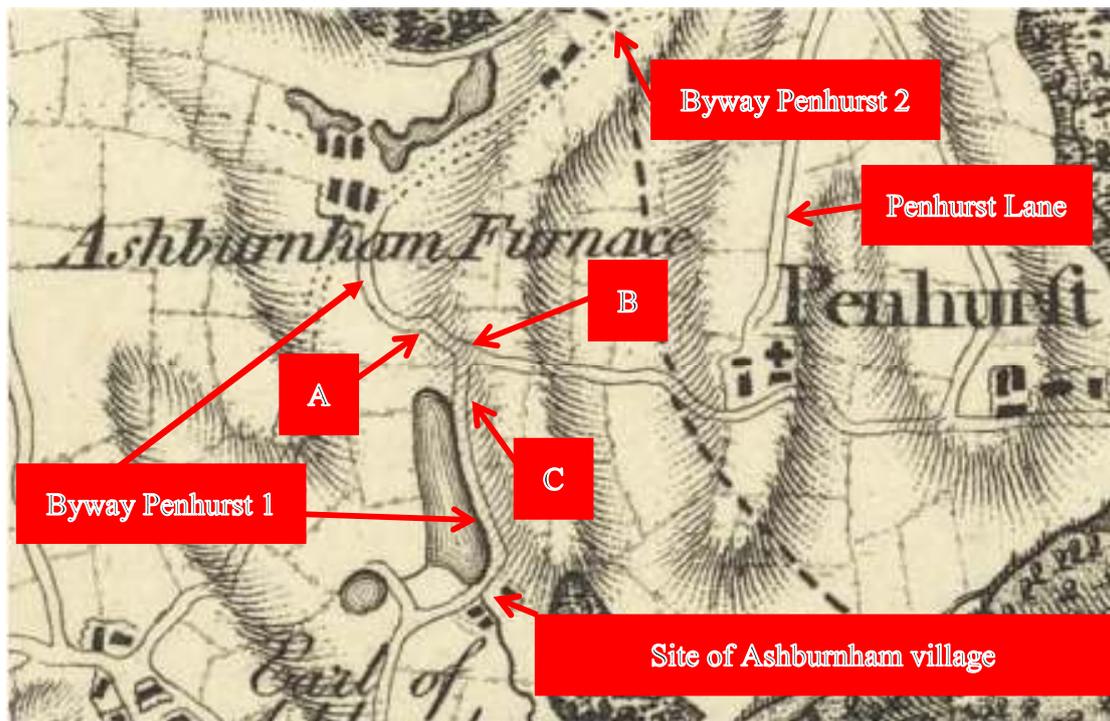


Figure 2 Extract from Gardner and Gream map of 1795

<sup>2</sup> “Printed Maps of Sussex 1575-1900” David Kingsley Published by Sussex Record Society, Lewes, 1982

**Analysis of evidence:**

- 2.2.4. Figure 2 shows the application route as a road, depicted by solid parallel lines, separate from any hereditament.
- 2.2.5. Section A, B and C of the application route is shown as part of the cross-roads between Ashburnham Furnace and Ashburnham village. It is the only road connecting these two settlements.
- 2.2.6. Section A to B of the application route is shown as part of the cross-roads between Ashburnham Furnace and Penhurst. It is the only road connecting these two settlements
- 2.2.7. The road which is now Byway Penhurst 1 (a straight line from point A to point C) is not shown on this map.
- 2.2.8. The application route is depicted in the same manner as other roads which now have a higher ROW status such as Penhurst Lane and Byways Penhurst 1 & 2.

**Significance of this evidence:**

- 2.2.9. The whole of the application route is depicted as a “Road”, depicted by solid parallel lines, in the same manner as other roads which now have a higher ROW status such as Penhurst Lane which is now an adopted county road and the northern and southern sections of Byway Penhurst 1.
- 2.2.10. The road is shown as the only cross-roads connecting Ashburnham Furnace to Ashburnham village and part of the cross-roads connecting Ashburnham Furnace to Penhurst. It is therefore more than probable that the application route was a public highway of a higher status than footpath.
- 2.2.11. Few private roads were shown. The sheer volume of missed out private roads and tracks can be seen by comparing the number of roads shown on later maps such as the first edition of the ordnance survey 1-2500 series. The existence of a way on this map means that it was more likely than not, a public route.
- 2.2.12. This piece of evidence demonstrates the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.
- 2.2.13. Paragraph 2.24 of the Planning Inspectorate’s Consistency Guidelines says
- “In modern usage, the term “cross road”/“crossroads” is generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term. These include a highway running between, and joining, other highways, a byway and a road that joined regional centres.”*
- 2.2.14. It is generally accepted that on older maps a ‘cross road’ generally, but not always, depicted a public road. These maps were expensive to purchase and as Judge Howarth commented in *Hollins v Oldham* [1995] there was:
- “...no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use.”*
- 2.2.15. This viewpoint was recently reinforced by the Planning Inspectorate in Appeal Ref: FPS/D0840/7/24M1 (D0840724 The Cornwall Council (Addition of Restricted byway (Penponds) Modification Order 2016

*([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725563/fps\\_d0840\\_7\\_24M1\\_final\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725563/fps_d0840_7_24M1_final_od.pdf))*

*“12. Such a map would be likely to show public routes rather than private ones, which could not be used by those purchasing the map”*

**2.3. 1825: Greenwood and Greenwood: “Map of Sussex”**

Date of publication: 1825	Scale: 1 inch to 1 mile	Date of Survey: 1823-1824
Cartographer: Greenwood and Greenwood	Publisher: Greenwood Pringle & Co, 13 Regent Street, Pall Mall, London	Edition:
Source: ESCC Archive Reference: AMS6008/1/1/29/28		

- 2.3.1. This map was made for sale to the public, and so is unlikely to show routes that the public could not use.
- 2.3.2. Although the Ordnance Survey sheets for Sussex were already available, Greenwood’s selection of detail and names demonstrates that he surveyed the county independently, supplementing his fieldwork from printed topographical and statistical sources.
- 2.3.3. The map is finely engraved in the manner of the best contemporary firms, although the representation of relief is poor.
- 2.3.4. Few private roads were shown on older maps. The sheer volume of missed out private roads and tracks can be seen by comparing the number of roads shown on later maps such as the first edition of the Ordnance Survey 1-2500 series. The existence of a way on this map means that it was more likely than not, a public route.

**Evidence:**

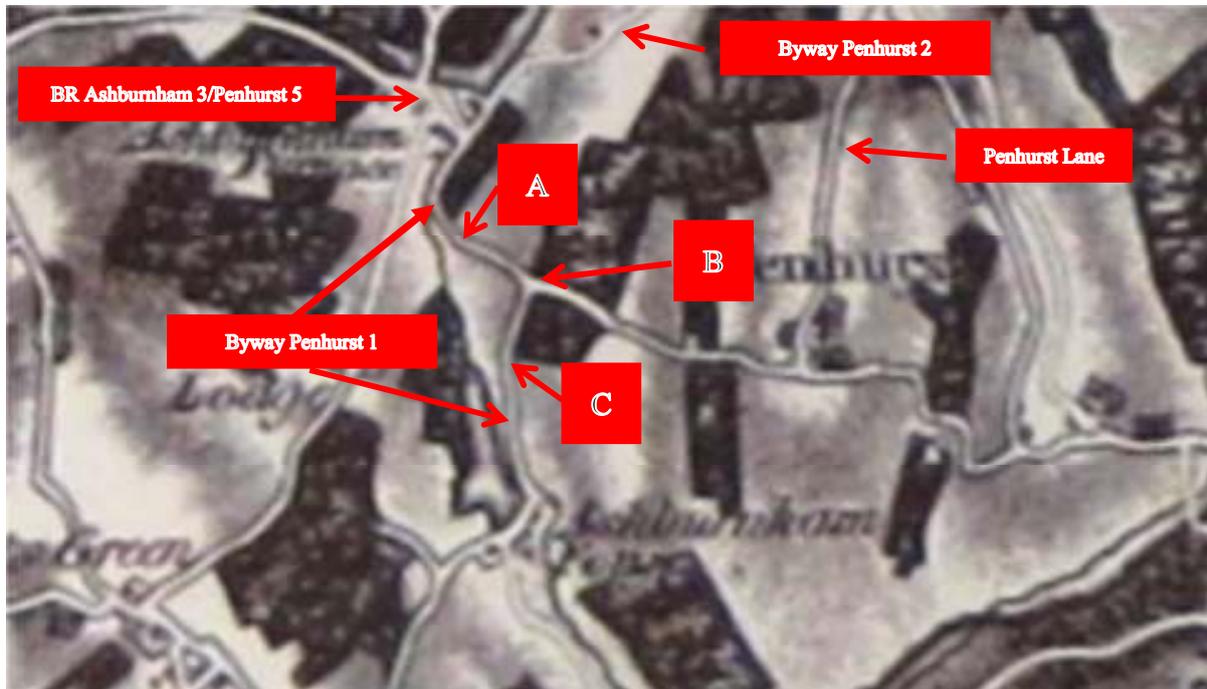


Figure 3 Extract from Greenwood and Greenwood Map of Sussex 1825 showing the application route

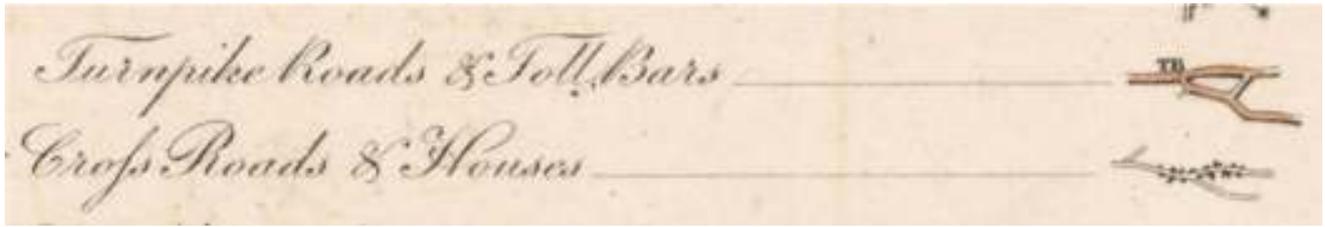


Figure 4 Extract from "Explanation" on Greenwood & Greenwood Map of Sussex 1825

**Analysis of evidence:**

- 2.3.5. Figure 3 shows an open-ended road, depicted by parallel lines, running from point A to point C via point B.
- 2.3.6. The site of Ashburnham village is shown on this map.
- 2.3.7. The application route is shown as part of the cross-roads (see Figure 4 - Explanation) between Ashburnham Furnace and Penhurst, and the whole of the application route is part of the cross-roads between Ashburnham Furnace and Ashburnham village.
- 2.3.8. The section of the road which is now Byway Penhurst 1 (a straight line from point A to point C) is not shown on this map
- 2.3.9. The application route is depicted in the same manner as other roads which now have a higher ROW status such as Penhurst Lane, Byways Penhurst 1&2, and Bridleways Ashburnham 3 & Penhurst 5.

**Significance of this evidence:**

- 2.3.10. Few private roads were shown. The sheer volume of missed out private roads and tracks can be seen by comparing the number of roads shown on later maps such as the first edition of the ordnance survey 1-2500 series. The existence of a way on this map means that it was more likely than not, a public route.
- 2.3.11. This map shows the whole of the application route as an open-ended "Cross Roads", depicted by solid parallel lines.
- 2.3.12. The application route "Road" is depicted in the same manner as other roads which now have a higher ROW status. This road is shown in the same manner as other roads on this map which are now adopted roads, Bridleway or Byways such as Penhurst Lane which is now an adopted county road, Byways Penhurst 1 & 2 and Bridleways Ashburnham 3 and Penhurst 5.
- 2.3.13. The road is shown as a cross-road connecting Ashburnham Furnace to Ashburnham village.
- 2.3.14. Additional details on the map, including the addition of Ashburnham village, indicate that the map was a result of a new survey carried out some 30-40 years after the survey used for the Gardner & Gream map of 1795.
- 2.3.15. This piece of evidence demonstrates the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.
- 2.3.16. Paragraph 2.24 of the Planning Inspectorate's consistency guidelines says

*“In modern usage, the term “cross road”/“crossroads” is generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term. These include a highway running between, and joining, other highways, a byway and a road that joined regional centres.”*

- 2.3.17. It is generally accepted that on older maps a ‘cross road’ generally, but not always, depicted a public road. These maps were expensive to purchase and as Judge Howarth commented in *Hollins v Oldham* [1995] there was:

*“...no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use.”*

- 2.3.18. This viewpoint was recently reinforced by the Planning Inspectorate in Appeal Ref: FPS/D0840/7/24M1 (D0840724 The Cornwall Council (Addition of Restricted byway (Penponds) Modification Order 2016 ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725563/fps\\_d0840\\_7\\_24M1\\_final\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725563/fps_d0840_7_24M1_final_od.pdf)))

*“12. Such a map would be likely to show public routes rather than private ones, which could not be used by those purchasing the map”*

## 2.4. The significance of the evidence in Commercial County Maps

- 2.4.1. Whilst depiction of a Road on a map is not in itself evidence of a right of way, Planning Inspectorate Consistency Guidelines for OS and other commercial maps state (in Section 12.43) that:

*“Commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. However, combined with evidence from other sources, they can tip the balance of probability in favour of such status.”*

- 2.4.2. These pieces of evidence demonstrate the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.
- 2.4.3. The conclusion that therefore must be drawn from the commercial map evidence is that the application route was shown on numerous commercial maps as a public road in the 18th and 19th Century and therefore should have a modern-day highway status of a Bridleway or Restricted Byway.
- 2.4.4. Certain parallels can be drawn between the application route and Planning Appeals. Particularly relevant to this Application are the following;
- 2.4.5. Planning Appeals Ref: ROW/3181626  
([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/705547/row\\_3181626\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705547/row_3181626_od.pdf))

Where the Inspector concluded that;

*“Given that they were prepared to assist travellers the routes appear to be related to public access. In objection it is argued that use would have been on foot to access Cuby church, situated to the north-west of point A. However, there is no evidence that such access would have only been on foot; given the small scale of these maps, it does not appear that footpaths would be likely to be depicted. I agree with the Ramblers that weight should be placed on the depiction..... as supporting higher rights over the Order route.”*

- 2.4.6. Order Ref: ROW/3200513 Heading 9  
([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/765369/row\\_3200513\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765369/row_3200513_od.pdf))

*“40. Whilst accepting that Postle’s Lane is visible on some of the maps, the objector contends that many of the maps have been misinterpreted. Rather than highway, he asserts that they show nothing more than farm tracks used by farmers and estate workers for daily farming duties on horseback with carts and to access stock. The objector maintains that there is no evidence to support the view they were used by the public and the main highways link communities whereas the tracks do not.*

*41. Although the presence of the route could be depicted on some maps as nothing more than a farm track, such as Faden’s map and possibly the OS maps, it is inconsistent with other documentation.*

*42. Trunch Tithe Map and Apportionment indicate that the Order route is a public road. This is supported by the OS ‘Object Name Book’ of 1906 which positively identifies Postle’s Lane as a ‘public road’. Bryant’s map further lends support to Order Decision ROW/3200513*

*<https://www.gov.uk/planning-inspectorate> 6 this being a road with public rights and the Ministry of Food Farm Survey map infers that it is a highway.*

*43. The exclusion of the Order route from adjacent hereditaments on the Finance Act map gives rise to a strong possibility of the existence of public carriageway rights in the circumstances where its status as a public road is supported in other historical plans.”*

- 2.4.7. During the extensive research for this DMMO Application Statement nothing was found to indicate that the above evidence was considered when evaluating the allocation of rights to the application route during the assessment under the National Parks and Access to the Countryside Act 1949 or thereafter and therefore the evidence should be considered “a discovery of evidence”.

### **3. Ordnance Survey Maps Context and Evidence**

#### **3.1. Introduction to OS Maps**

- 3.1.1. Ordnance Survey (OS) maps were originally produced for military purposes but quickly achieved widespread public sales and acceptance.
- 3.1.2. OS maps from before the 1950s are not usually of use for rights of way purposes because they usually purport only to show physical features and not legal rights. However the early maps in the Ordnance Survey 1<sup>st</sup> Edition contain valuable extra information when cross referenced to the Books of Reference that were published with them. These are indexed by parish. There are also books showing the derivation of names shown on the map and surveys of parish boundaries.
- 3.1.3. It is often said that the disclaimer on the early OS maps means that they are not evidence of public rights. This is not the case. Whilst before the 1950s it is not possible to say “It is on the OS map therefore it is a right of way”, earlier OS maps provide evidence from which inferences can be drawn. For example, if a route is over a single landowner’s land and leads only to a barn on that land, it can be inferred that this route was probably private. But if a route goes from one public highway to another and crosses the land of a number of owners or occupants or a number of occupants were dependent on the way to access their land then, in the absence of evidence of private rights or wayleaves, it can be inferred that public rights are likely to exist. Such evidence is unlikely to be conclusive on its own, but taken with other evidence, may support the existence of public rights on the balance of probabilities.
- 3.1.4. In addition, after observing that the Courts have determined OS maps are not evidence of the status of a way, the Planning Inspectorate Consistency Guidelines say at Section 12, page 9 & 10

*“12.35 Nevertheless, the inclusion of a route on a series of OS maps can be useful evidence in helping to determine the status of a route, particularly when used in conjunction with other evidence (Section 2.16 to 2.21 'Evidential Weight' refers)”*

And contemporary wisdom was that the disclaimer on the early OS maps was simply to avoid the potential of litigation, as declared in *The Countryside Companion* (1948 page 320):

*“In practice the qualifying statement of the Ordnance Survey may be regarded as a safeguarding clause to absolve them from being involved in any footpath litigation.....A path which is shown, may, however, generally be presumed public.”*

- 3.1.5. Whilst Ordnance Survey surveyors were instructed not to investigate public status the Instructions to Ordnance Survey Field Examiners 1905 is clear in its direction that:

*“Mere convenience footpaths for the use of a household, cottage or farm; or for the temporary use of workmen, should not be shown; but paths leading to any well-defined object of use or interest, as to a public well, should be shown. N.B. – A clearly marked track on the ground is not in itself sufficient to justify showing a path, **unless it is in obvious use by the public.**”*

- 3.1.6. It is generally considered that when horses were used for transport, prior to the motor age, all roads and bridleways and bridle roads, unless specifically denoted as “Private”, were regarded as public facilities and therefore carried all rights associated with Roads and Highways.

### 3.2. **1813: Old Series (1<sup>st</sup> edition)**

Date of publication: 1813	Scale: 1¼ inches to 1 mile	Date of Survey: c.1784-1869.
Cartographer: Lt. Col. Mudge	Publisher: Ordnance Survey	Edition: Sussex
Source: <a href="https://nla.gov.au/nla.obj-231917584/view">https://nla.gov.au/nla.obj-231917584/view</a>		

- 3.2.1. This map was the “Old series Ordnance Survey maps of England and Wales”. Published by Lt. Col. Mudge, Tower [and later] by Lt. Col Colby of the Royal Engineers; Sold by Jas. Gardner, Agent for the sale of the Ordnance maps, 163 Regent St.
- 3.2.2. It was engraved at the Drawing Room in the Tower by Benjn. Baker & Assistants and was printed by Ramshaw.
- 3.2.3. The maps for Sussex were first published between 1813 and 1819.
- 3.2.4. These maps were used for official planning, as the basis for index maps to larger scale map series and for military planning to inform the defence of the south coast if Britain was invaded by the French. A detailed network of roads is shown on this map.
- 3.2.5. Copies of the instructions given about the portrayal of private roads are given in correspondence held at the national archive under reference OS 3/260. Explanatory notes on these maps state that:

*“Roads are drawn by double lines, solid or dotted for fenced or unfenced. A line at right angles to the road at the end of a dotted edge, indicates a field boundary delimiting unenclosed land. Roads are drawn with slightly different widths; broader roads with one line bolder are turnpike roads, narrower roads are minor roads. Tracks are drawn by a single dotted line”<sup>3</sup>.*

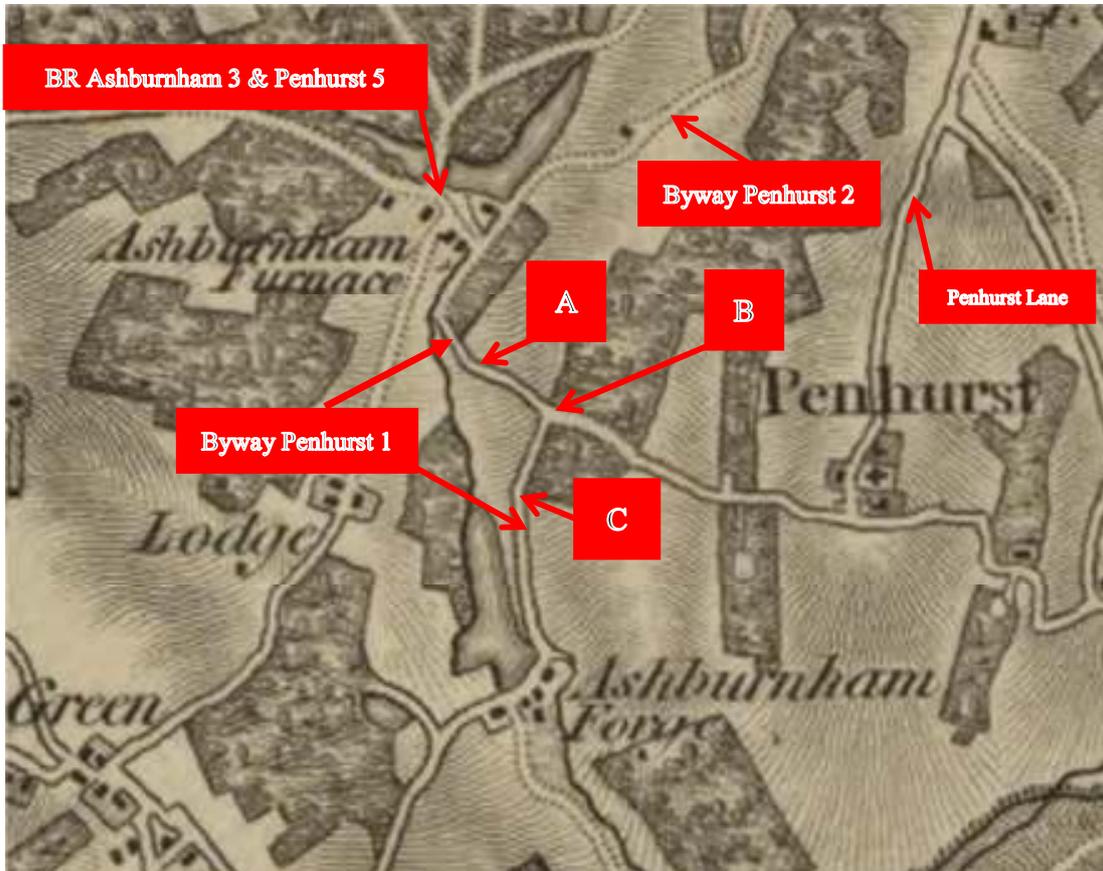
The following instruction was also given:

*“as these plans are intended for military purposes no existing roads should be omitted; but to distinguish those roads which are entirely on trespass the line of the main road from which they branch is not to be broken for them”*

- 3.2.6. Few private roads were shown. The sheer volume of missed out private roads and tracks can be seen by comparing the number of roads shown on later maps such as the first edition of the OS 1-2500 series.). Therefore if a road is shown on this map it was more likely than not, a public road.

<sup>3</sup> Extract from Old Series 1 inch maps Categorisation notes for 1810 OS maps  
<http://www.geog.port.ac.uk/webmap/hantscat/html/ordnce6.htm>

**Evidence:**



*Figure 5 Extract from OS 1813 Old Series map showing the application route.*

**Analysis of this evidence:**

- 3.2.7. Figure 5 shows the application route as an open-ended public cross-roads, depicted by parallel lines (as defined in the surveyors instructions outlined in 3.2.5) running from point A to point C, via point B, and shown as part of the highway from Ashburnham Furnace to Ashburnham Forge.
- 3.2.8. The section of the road which is now Byway Penhurst 1 (a straight line from point A to point C) is not shown on this map.
- 3.2.9. The application route is depicted in the same manner as other roads which now have a higher ROW status such as Penhurst Lane, Byways Penhurst 1&2, and Bridleways Ashburnham 3 & Penhurst 5.

**Significance of this evidence:**

- 3.2.10. When reviewed in light of the surveyors instructions outlined in 3.2.5 the application route is shown as a public road. This can be ascertained in that surveyors were instructed that roads were to be “drawn by double lines, solid or dotted for fenced or unfenced” and that public roads are to be notated as “broken” where they intersect with another main road. The application route has double lines and is broken where it intersects with another main road. It therefore can be determined that the claimed route was a public road.

- 3.2.11. The application route is shown as a “Road” in the same manner as other roads on this map which are now adopted roads, Bridleway or Byways such as Penhurst Lane which is now an adopted county road, Byways Penhurst 1 & 2 and Bridleways Ashburnham 3 and Penhurst 5.
- 3.2.12. This map indicates that in 1813 the application route was the connecting road between two points of local significance Ashburnham Furnace and Ashburnham Forge and it is therefore more than probable that this road would have been public.
- 3.2.13. This piece of evidence demonstrates the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.

### 3.3. 1874: 1<sup>st</sup> Edition Ordnance Survey: 25 inch to the mile

Date of publication: 1874	Scale: 25inch to 1 mile County Series	Date of Survey: 1872 (circa)
Cartographer:	Publisher: Ordnance Survey	Edition: Sussex XXIX.16 Rev1
Source: <a href="https://www.old-maps.co.uk/#/Map/566158/123222/12/100315">https://www.old-maps.co.uk/#/Map/566158/123222/12/100315</a>		

- 3.3.1. The Ordnance Survey 25 inch to the mile County Series (1841-1952) is commonly held to be the most accurate and most detailed map of the Ordnance Survey. The maps allow practically every feature in the landscape to be shown. They provide good detail of all buildings, streets, railways, industrial premises, parkland, farms, woodland, and rivers.
- 3.3.2. In 1855, the 25 inch was officially authorised as the basic scale for all cultivated rural areas. Their bold style and informative symbols and abbreviations allow easy interpretation which led to them being used for statutory undertakings for the production of the 1910 Finance Act valuation records and in 1941 for the Ministry of Agriculture Farm Survey.
- 3.3.3. For the 1:2500 map the whole country was initially surveyed between 1842 and 1893. These maps are considered of significant importance because they provided the most detailed OS mapping for most parts of England and Wales and as a result were used for land registration, conveyancing, land valuation, tithes and ratings (old title deeds often refer to specific numbered land parcels listed on these maps and detailed within the associated Books of Reference).
- 3.3.4. As a result of its importance to government and legal administration it is regarded as one of the most important OS maps produced. Sir Charles Trevelyan (regarded as the founder of the modern British Civil Service) stated in May 1855:
- “...as the relations of landlord and tenant apply to every part of town and country, to give certainty and facility to their transactions is an important item in that aggregate of public utility which constitutes the justification for the 1:2500 scale.”<sup>4</sup>*
- 3.3.5. Copies of the first edition of the OS 25 inches to the mile maps can be found online at <https://www.old-maps.co.uk/#/>

<sup>4</sup> “A History of the Ordnance Survey” Edited by W A Seymour p.168 <https://www.ordnancesurvey.co.uk/documents/resources/os-history.pdf>

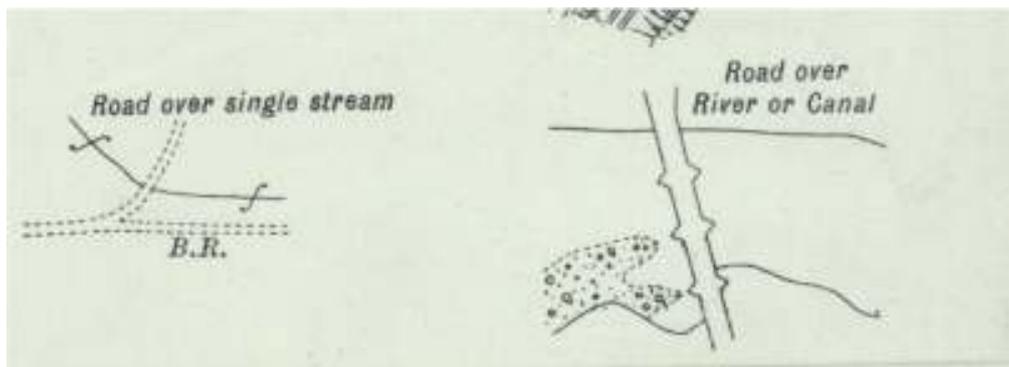
**Books of Reference /Area Books**



*Figure 6 Book of Reference for 1875 1:2500 OS map for Penhurst Parish*

- 3.3.6. Books of Reference (<http://dbooks.bodleian.ox.ac.uk/books/PDFs/555055185.pdf>) accompanied the 1st Edition OS 25 inches maps and contained land use information. Parcels of land were numbered on the maps and the Book of Reference can be used to determine land use. Details and descriptions of relevant plots are outlined as appropriate in this document. The Book of Reference for Penhurst (see Figure 6) can be accessed in the Bodleian Library in Oxford.
- 3.3.7. Considering the above it is therefore very likely that a road depicted on this map and defined as “Road” within the associated Book of Reference did exist and was likely to be a public road unless otherwise notated.

**Evidence:**



*Figure 7 Conventional Signs and Writing Used on the 1:2500 Plans of the Ordnance Survey.*  
 (<https://maps.nls.uk/view/128076891>)

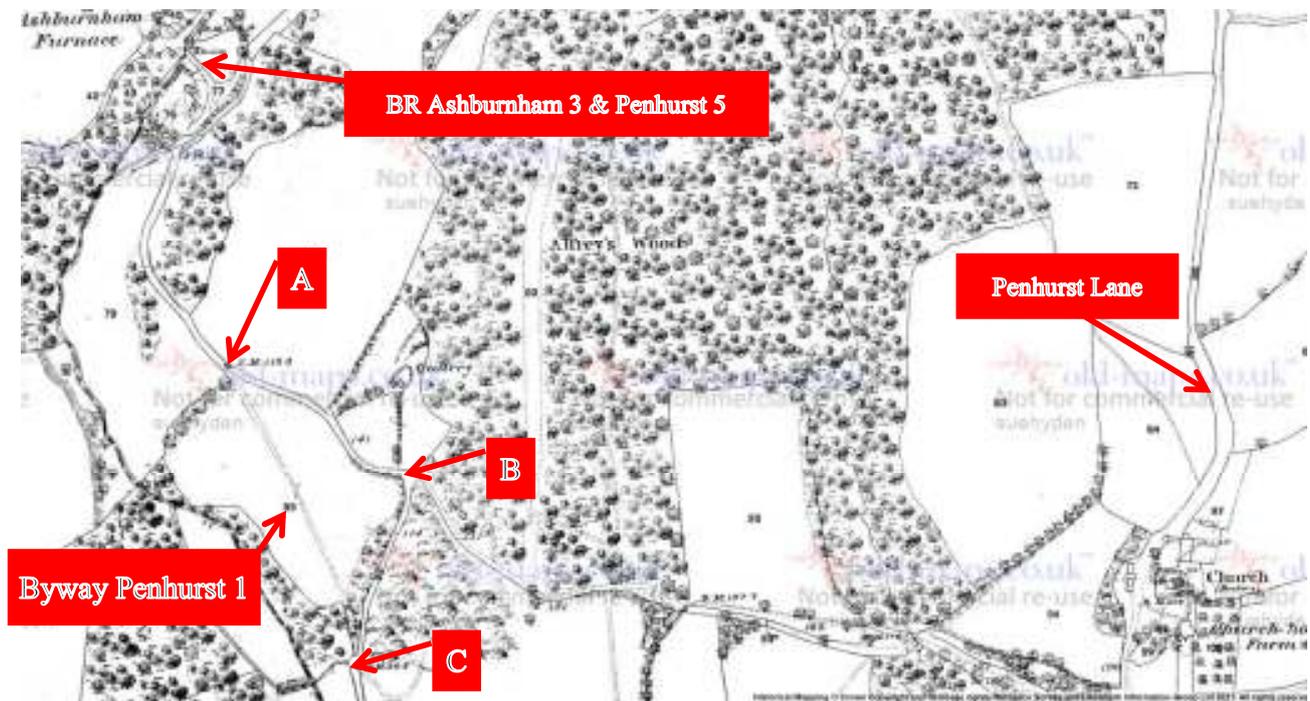


Figure 8 Extract from OS 1874 1:2500 map showing the application route and Byway Penhurst 1.

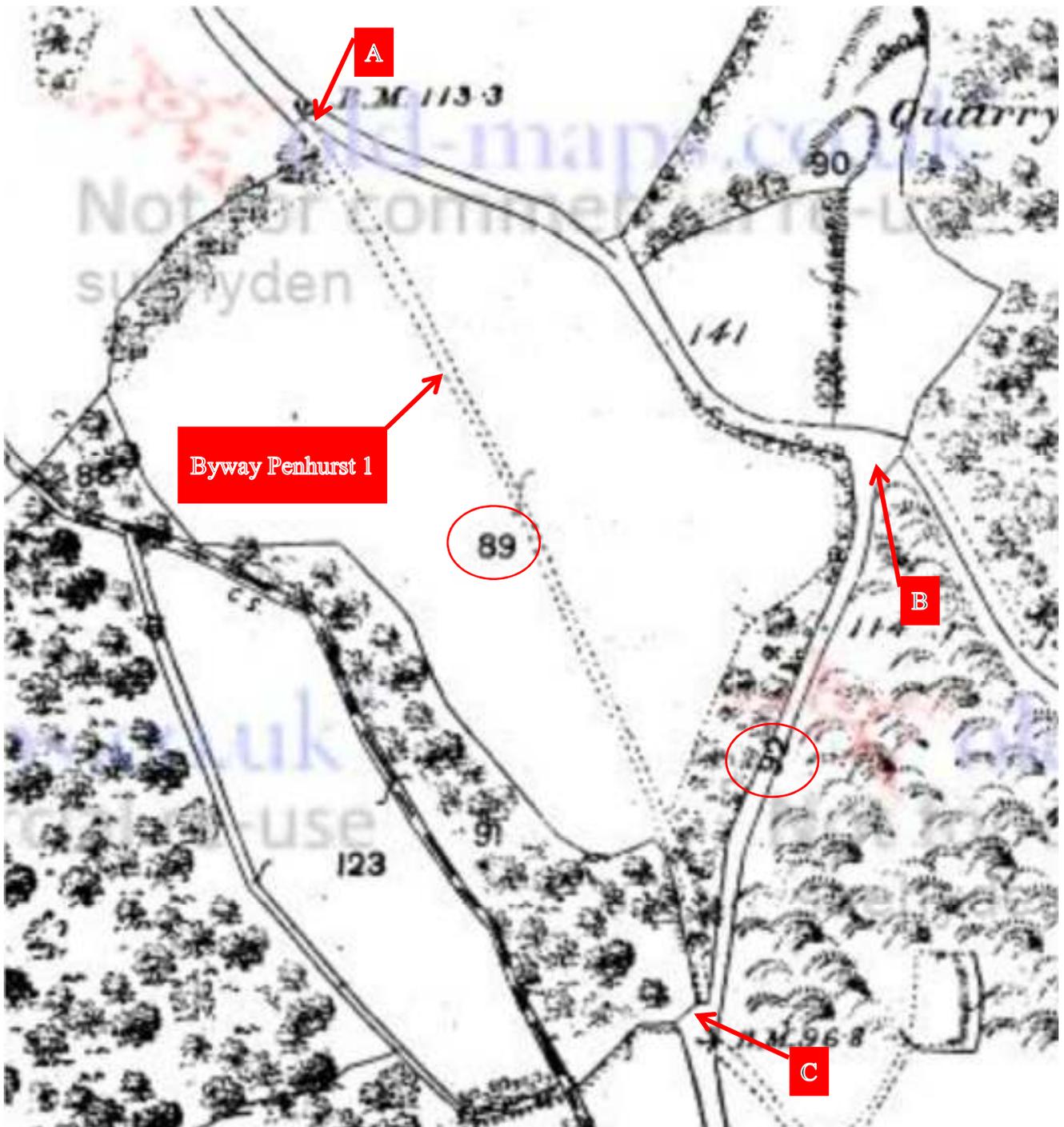


Figure 9 Magnified Extract from OS 1874 1:2500 map showing the application route which is notated as plot number 92 and the existing route – Byway Penhurst 1- which is included within plot 89

88	·239	Wood, &c.
89	7·172	Pasture, wood, &c.
90	2·653	Arable, pasture, &c.
91	1·683	Wood, &c.
92	1·699	Road.
93	7·680	Pasture, &c.

Figure 10 Extract from the Penhurst Book of Reference for 1874 showing the application route and plot number 92 and 89. (<http://dbooks.bodleian.ox.ac.uk/books/PDFs/555055185.pdf>)

#### **Analysis of evidence:**

- 3.3.8. Figure 8 and Figure 9 show the application route as an open ended, un-gated road, defined by parallel lines from point A to point C via point B (see map categorisation Figure 7)
- 3.3.9. This road is notated as Plot 92 which is defined as “Road” within the Penhurst Book of Reference for 1874 shown in Figure 10.
- 3.3.10. Figure 9 also clearly shows the route of the Byway Penhurst 1 shown in plot 89 as two parallel dotted lines which is defined by the map characterisation as “Road” even though Plot 89 (see Figure 10) is described in the Book of Reference as “Pasture, wood &c.”
- 3.3.11. The application route “Road” is depicted in the same manner as other roads which now have a higher ROW status. This road is shown in the same manner as other roads on this map which are now adopted roads, Bridleway or Byways such as Penhurst Lane (which is now an adopted county road), Byway Penhurst 1 & 2 and Bridleways Ashburnham 3 and Penhurst 5.

#### **Significance of this evidence:**

- 3.3.12. These maps confirm that at the time of this survey in 1874 the application route was regarded as a main access road from Ashburnham Furnace to Ashburnham Forge and is described as such by the map and within the associated Book of Reference. The route which is now Byway Penhurst 1 was defined as a minor road by the map categorisation (see Figure 7) but described as “Pasture, wood &c.” but not “Road” within the associated Book of Reference.
- 3.3.13. This piece of evidence demonstrates the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.

**3.4. 1898: County Series: “Sussex XLIII.13 (Ashburnham; Penhurst)”**

Date of publication: 1898	Scale: 1:2500	Date of Survey: Rev: 1898
Cartographer:	Publisher: Ordnance Survey	Edition:
Source: <a href="https://maps.nls.uk/view/103671316">https://maps.nls.uk/view/103671316</a> <a href="https://www.old-maps.co.uk/-/Map/567152/116282/12/100547">https://www.old-maps.co.uk/-/Map/567152/116282/12/100547</a>		

**Evidence:**

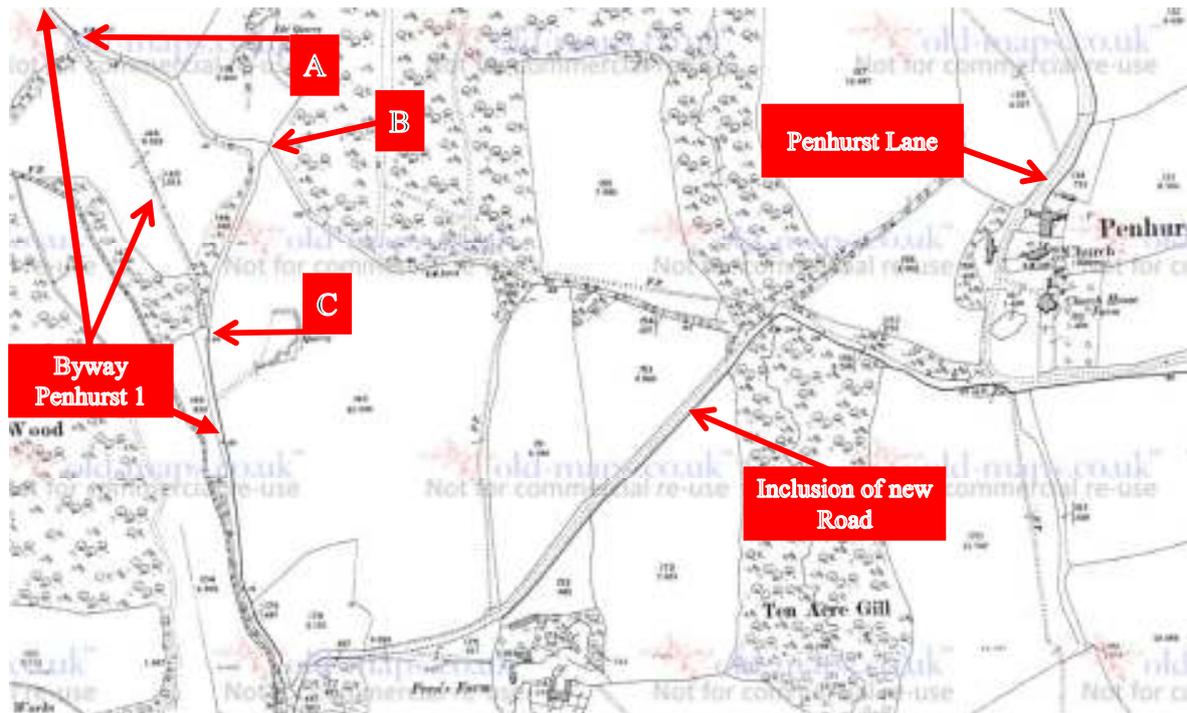


Figure 11 Extract from OS 1898 County Series Sussex 1:2500 showing the application route.

**Analysis of evidence:**

- 3.4.1. Figure 11 show the application route as an open ended, un-gated road, defined by parallel lines from point A to point C via point B (see map categorisation Figure 7 ).
- 3.4.2. The map also shows the route of the Byway Penhurst 1, currently the only route between Ashburnham Furnace and Ashburnham, as two parallel dotted lines which is defined by the map characterisation as “Road”.
- 3.4.3. The mapping of a new road connecting Ashburnham and Penhurst via Penn’s Farm indicates that the map was produced from a new survey, later than the survey used for the 1875 OS 1:2500 map discussed in section 3.2.
- 3.4.4. The application route “Road” is depicted in the same manner as other roads which now have a higher ROW status. This road is shown in the same manner as other roads on this map which are now adopted roads, Bridleway or Byways such as Penhurst Lane which is now an adopted county road, and Byway Penhurst 1.

**Significance of this evidence:**

- 3.4.5. The inclusion of the new road connecting Ashburnham and Penhurst, indicates that the map was a result of a new survey.
- 3.4.6. These maps confirm that at the time of this survey in 1897 the application route from point A to point C via point B was regarded as a main access road from Ashburnham Furnace to Ashburnham village.
- 3.4.7. The route which is now Byway Penhurst 1, and is currently the only route connecting Ashburnham Furnace and Ashburnham village, was at the time defined as a minor road (see Figure 7).
- 3.4.8. This indicates that the application route should indeed have highway status, and that prior to the Natural Environment and Rural Communities Act 2006, it had full vehicular rights, and therefore had carriage rights at the time the 1898 map was surveyed.

### 3.5. **The significance of the evidence in Ordnance Survey Maps**

- 3.5.1. The conclusion drawn from the OS map evidence above is that the application route was historically a public road and therefore should as a minimum have a modern-day highway status of a Bridleway.
- 3.5.2. These pieces of evidence demonstrate the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.
- 3.5.3. There are numerous Planning Inspectorate decisions which assist in assessing the importance and relevance of OS maps with respect to the application route. All of these orders are dated after the 1949 assessment and should therefore be considered as “a discovery of evidence”. Some of the most relevant to this DMMO Application Statement are:

- 3.5.4. Order Ref: ROW/3181626

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/705547/row\\_3181626\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705547/row_3181626_od.pdf)

*“OS surveys and maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey.”*

And with respect to Roads being open to public use:

*“The 1875 – 1901 and 1906 – 08 OS maps clearly show the Order routes without barriers or gates to prevent use .... I consider that the OS mapping demonstrates that the Order route sections were open and available for use at end of the nineteenth and beginning of the twentieth century. The OS maps do not show whether they were public or private but may assist in conjunction with other information.”*

- 3.5.5. Order Ref: ROW/3200513

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/765369/row\\_3200513\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765369/row_3200513_od.pdf)

*“17. The Order route is shown by solid parallel lines on the OS Old Series map of c1838. It is similarly shown on the OS County Series 1st edition map of 1885 along with the 1st edition 1886 and 2nd edition 1905. All depict the route in the same way as roads to the north and south which are public highways, including with colour wash on the 1885 edition.”*

- 3.5.6. During the extensive research for this DMMO Application Statement nothing was found to indicate that the above evidence was considered when evaluating the allocation of rights to the application route during the assessment under the National Parks and Access to the Countryside Act 1949 or thereafter and therefore the evidence should be considered “a discovery of evidence”.

## 4. Tithe Records Context and Evidence

### 4.1. Introduction to Tithe Records

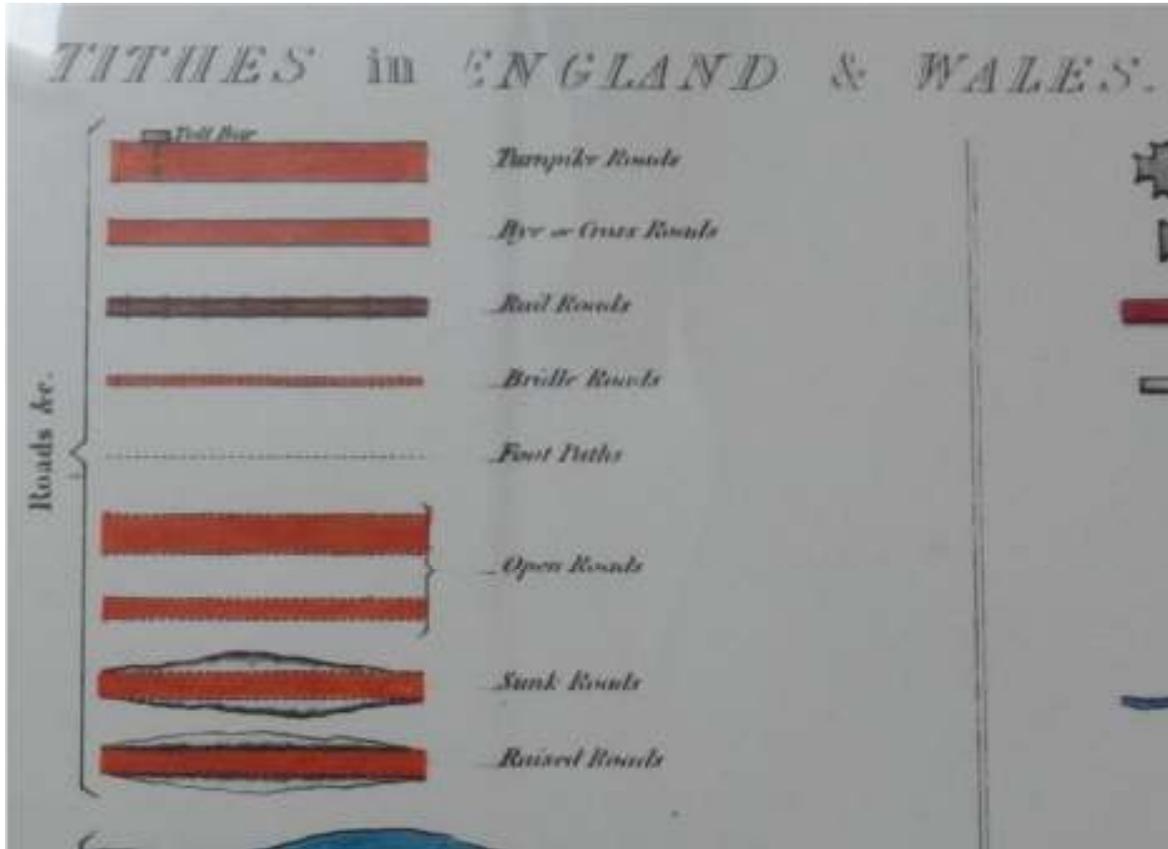


Figure 12 Extract from 1836 Lieutenant R K Dawson proposed standardised key for Tithe maps

- 4.1.1. The Tithe Commutation Act 1836 enabled tithes (a tenth of the produce of the land) to be converted to a monetary payment system. Maps were drawn up to show the tithable land in order to assess the amount of money to be paid. In 1836 Lieutenant R K Dawson proposed a standardised key for Tithe maps (see Figure 12) which was enthusiastically supported by the Board of Tithe Commissioners for England and Wales. Plots of land shown on tithe maps were given plot numbers, and these numbers were then referenced on the associated “Apportionment Records”. The recommended sienna or light brown colouring for “Roads” although widely used was not mandatory. The Act was amended in 1837 to allow maps produced to be either First Class or Second Class of which the First Class maps had to be at least 3 chains<sup>5</sup> to the inch and signed and stamped by the Commissioners. First Class maps are legal evidence of all matters which they portray whilst Second Class maps, which were required to be signed but not sealed, were evidence only of those facts of direct relevance to tithe commutation.
- 4.1.2. 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-tithable land deemed to be unproductive was usually excluded from the process. It is common therefore for no tithe to be payable on roads, although Bridleways, Footpaths and Green lanes were more likely to be at least partially productive (for example as

<sup>5</sup> A chain is 66 feet, or just over 20 metres

pasture or coppice). 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 in yellow or sienna to indicate public status.

4.1.3. In the text below details are given to show how the application route is displayed and of any relevant apportionments.

4.2. **1840 Penhurst Tithe Records**

Date of publication: c.1840	Scale: 16 in. to 1m.	Date of Survey: c.1840
Surveyor: W. Rider C.E	Publisher: Tithe Commission	Edition:
Source: All Tithe maps and Apportionments are to be found on the East Sussex County Council website: Ref TD/E109		
<a href="https://escc.maps.arcgis.com/apps/webappviewer/index.html?id=94d9d72603034a85bb68bce793fb5a59&amp;find=PENHURST&amp;showLayers=Tithe%20Maps;Labels;MajorARoads;ABRoads;MainRoadNames;AllRoadNames;PlaceNames;Large;LargeMedium;All;Locator;PENHURST">https://escc.maps.arcgis.com/apps/webappviewer/index.html?id=94d9d72603034a85bb68bce793fb5a59&amp;find=PENHURST&amp;showLayers=Tithe%20Maps;Labels;MajorARoads;ABRoads;MainRoadNames;AllRoadNames;PlaceNames;Large;LargeMedium;All;Locator;PENHURST</a>		

4.2.1. The Penhurst Tithe map is a 2<sup>nd</sup> Class map for although it is signed by the Commissioners it has a scale of 5 chains to the inch and not 3 chains to the inch as required by 1<sup>st</sup> Class maps.

4.2.2. The extracts reproduced here are north-oriented.

**Evidence:**

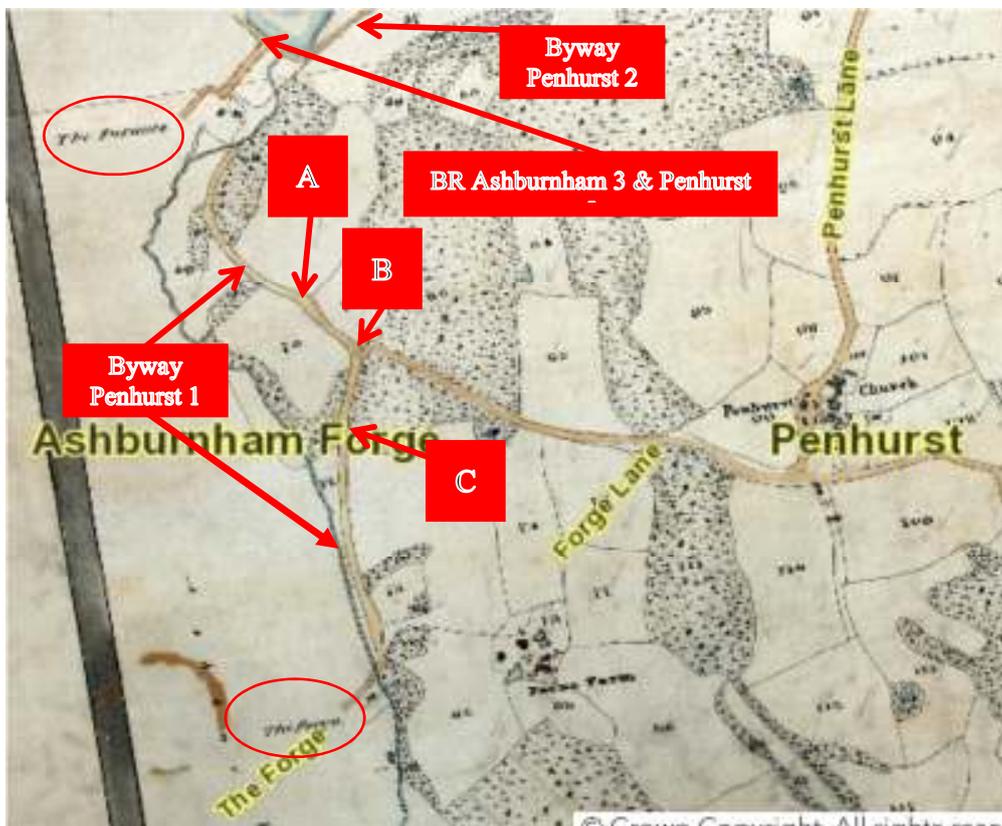


Figure 13 Extract from Penhurst Tithe Map of c.1840



Figure 14 Magnified extract from Penhurst Tithe Map of c.1840 depicting points A to C.

#### **Analysis of evidence**

- 4.2.3. The whole of the application route is shown as a distinct road separate from any hereditament.
- 4.2.4. The 1840 Tithe map (see Figure 14) was produced six years later than the Ashburnham 1834 estate map (see Figure 16). There are differences between the two maps. For instance on the 1840 Tithe map in plot 65 the section of road from Ashburnham Furnace to Penhurst appears to run through open fields whereas in the 1834 Ashburnham Estate map (Figure 16) it is depicted as wooded.
- 4.2.5. The application route is unnumbered and ungated and appears to be open to public use. It is also shaded sienna in the same manner as other public highways shown on the Tithe map. An example of this is Penhurst Lane.
- 4.2.6. Figure 13 shows on the North West corner of the map an inscription states the road is (to) “The Furnace” whereas the South West corner states the road is (to) “The Forge” (both circled in red). This is strong evidence that the road was considered a through road open to the public.
- 4.2.7. As these inscriptions do not appear on any other maps of the same era (e.g. Ashburnham Estate maps) this strongly indicates that this map was the result of a new survey.
- 4.2.8. The route of the modern Byway Penhurst 1 did not exist when this map was created and the application route is the only direct road between Ashburnham Furnace and Ashburnham Forge.

#### **Significance of this evidence**

- 4.2.9. The fact that there are differences between the 1834 Ashburnham Estate map and the 1840 Tithe map strongly indicates that the 1840 Tithe map was the result of a new survey and was not based on existing local maps as was sometimes the case. It is therefore more than likely that as the application route is shown as a road on this map it was considered a public road at the time the Tithe map was surveyed.

- 4.2.10. The application route is shown to be the only direct through route as it denotes a destination at each end of the road, namely “The Furnace” (Ashburnham Furnace) and “The Forge” (Ashburnham Forge). This strongly suggests that the route was for use by the public.
- 4.2.11. The application route is depicted in the same manner as other roads which now have a higher ROW status. It is shown in the same manner as other roads on this map which are now adopted roads, Bridleway or Byways such as Penhurst Lane (which is now an adopted county road), Byway Penhurst 1 & 2 and Bridleways Ashburnham 3 and Penhurst 5.

### 4.3. **The significance of the evidence in Tithe Records**

- 4.3.1. These pieces of evidence demonstrate the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.
- 4.3.2. The conclusion is that the application route was historically a public road and therefore should as a minimum have the status of a Bridleway or more likely a Restricted Byway.
- 4.3.3. There are numerous relevant Planning Inspectorate orders which assist in assessing the importance and relevance of Tithe maps. All of these orders are dated after the 1949 assessment and should therefore be considered as “a discovery of evidence”. Some of the most relevant to this DMMO Application Statement are:
- 4.3.4. Order Ref: FPS/D0840/7/24M1 D0840724  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725563/fps\\_d0840\\_7\\_24M1\\_final\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725563/fps_d0840_7_24M1_final_od.pdf)
- “15. It is acknowledged that tithe maps can only give an indication of whether a route is public or private..... I am satisfied that tithe map suggests, on the balance of probabilities, that the Order route was the main public route in this location at this time. As such, I consider it would have been used by all classes of user.”*
- 4.3.5. Order Ref: ROW/3181626 The Cornwall Council (upgrade of Footpath 2 Tregony to Restricted Byway and Additional of Restricted Byways in the Parishes of Tregony and Cuby) Modification Order 2016.  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/705547/row\\_3181626\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705547/row_3181626_od.pdf)
- “20. It is shaded sienna in the same manner as other public highways, I note the submission from the Ramblers that “Roads and Wastes” are unnumbered in this apportionment and the Order routes would have been numbered and recorded if they were private roads.”*
- “22. I agree with the Ramblers that “Public Roads” recorded in the apportionment are unnumbered.”*
- “23. There are no indications of gates or barriers of any type across any section of the Order routes or their junctions with public roads.”*
- 4.3.6. During the extensive research for this DMMO Application Statement nothing was found to indicate that the above evidence was considered when evaluating the allocation of rights to the application route during the assessment under the National Parks and Access to the Countryside Act 1949 or thereafter and therefore the evidence should be considered “a discovery of evidence”.

## 5. Estate maps

### 5.1. Introduction to Estate maps

5.1.1. Although Estate maps were prepared for different reasons, when taken in conjunction with other maps of the area, often made at different times, they can provide useful supporting evidence of Rights of Way status.

5.1.2. Estate maps made for landowners are unlikely to show the status of a route that the landowner did not agree with, so where estate maps show routes within an estate that are shown in the same way as public roads outside the estate then there is evidence of highway status.

### 5.2. Ashburnham Estate map

Date of publication: 1834 & 1840	Scale: Series	Date of Survey: 1834/1840
Cartographer: E & G.N Driver	Publisher: Ashburnham Estate	Edition: Sussex XXIX.16 Rev1
Source: ESCC The Keep ASH/4471/1		

#### Evidence:

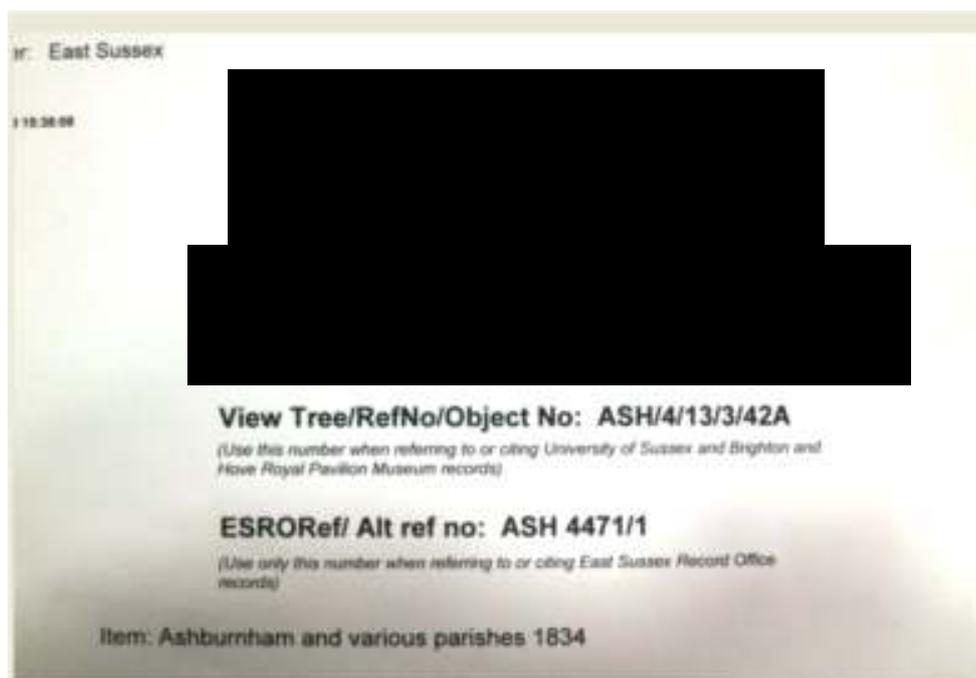


Figure 15 Ashburnham Estate Map 1834 ESCC Reference Label

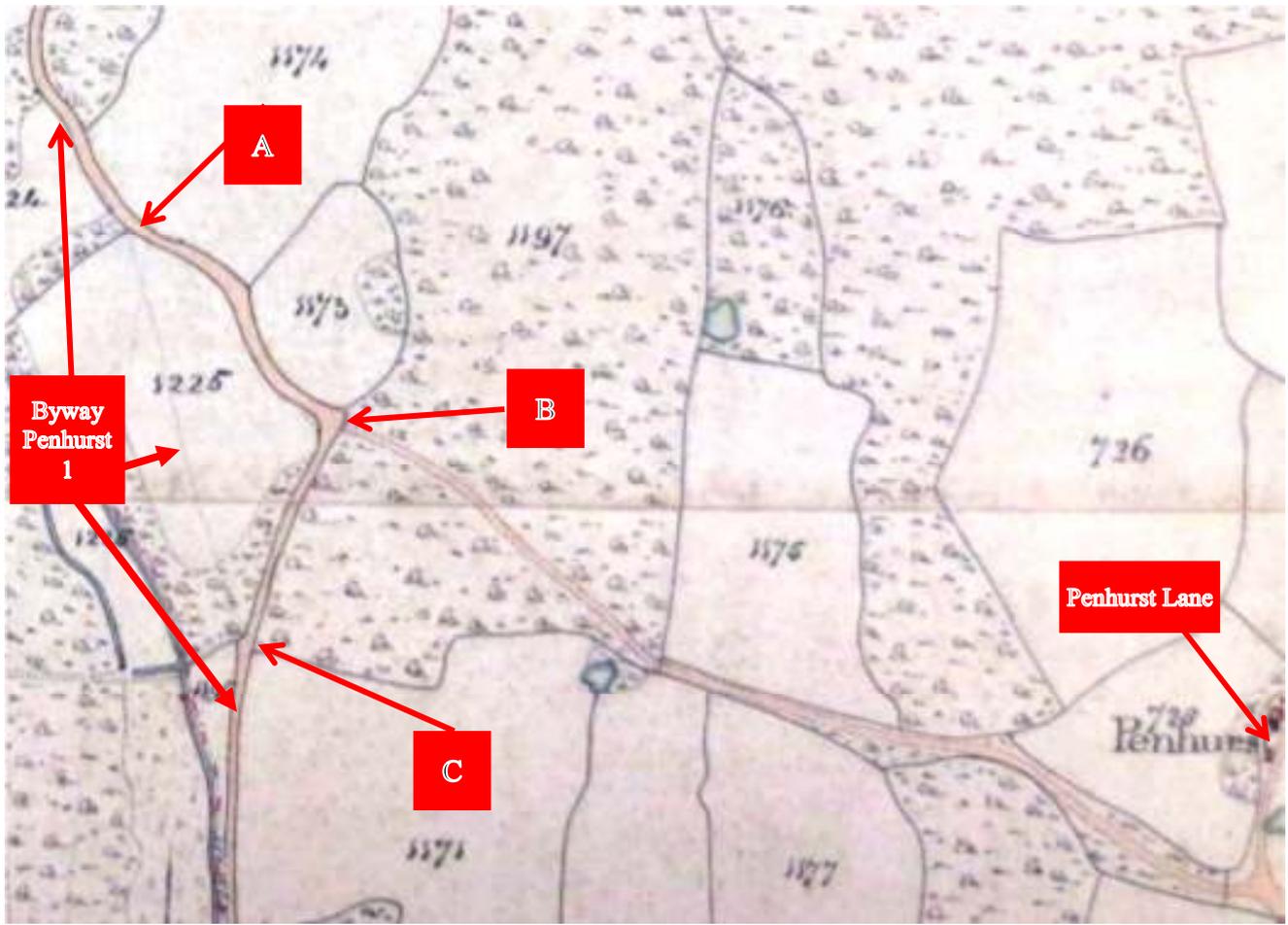


Figure 16 Extract from Ashburnham Estate Map 1834 showing the application route and the position of the current Byway Penhurst 1

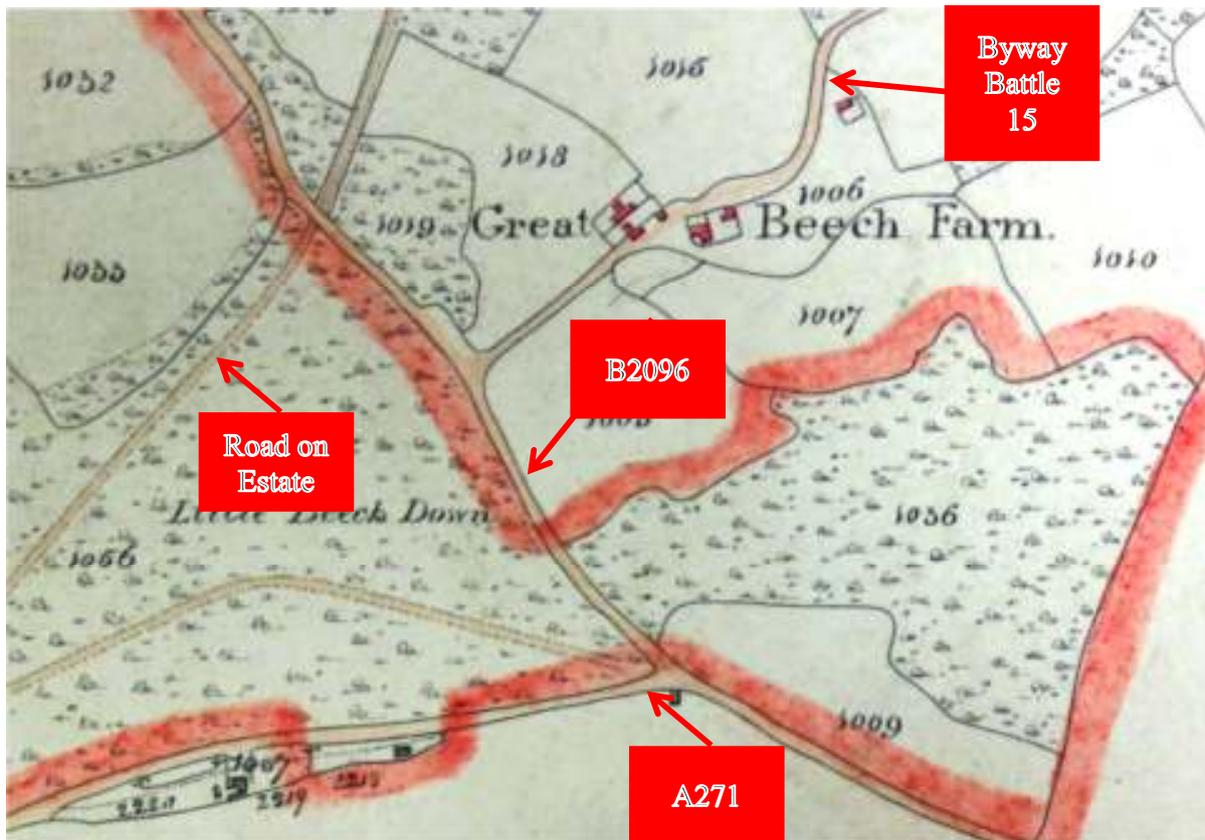


Figure 17 Extract from the south west corner of the Ashburnham 1840 estate delineating the Ashburnham estate (shown by red line).

**Analysis of evidence**

- 5.2.1. Figure 16 shows the whole of the application route is shown as a distinct open-ended road separate from any hereditament, with no indications of gates or barriers of any type across any section of the application route or their junctions with public roads.
- 5.2.2. Section A, B and C of the application route is shown as part of the cross-roads between Ashburnham Furnace and Ashburnham village. It is the only road connecting these two settlements.
- 5.2.3. Section A to B of the application route is shown as part of the cross-roads between Ashburnham Furnace and Penhurst. It is the only road connecting these two settlements
- 5.2.4. The application route is unnumbered, depicted by parallel lines and shaded sienna in the same manner as other public highways shown on the Estate map.
- 5.2.5. Elsewhere on the Estate map where Estate Roads adjoin adopted roads the estate roads are shown as closed roads (see Figure 17).
- 5.2.6. The application route is shown as a cross-roads between Ashburnham Furnace and Ashburnham Forge.
- 5.2.7. The section of the application route between points A and B is shown as part of the cross-roads between Ashburnham Furnace and Penhurst village.

5.2.8. The application route is depicted in the same manner as other roads which now have a higher ROW status such as Penhurst Lane and the northerly and southerly sections of Byways Penhurst 1.

5.2.9. The current route – Byway Penhurst 1 – is depicted as a single dotted line which could depict “footpath”.

#### **Significance of this evidence**

5.2.10. These maps are of use because they show how the landowner viewed routes on his estate at the time the maps were compiled. Figure 17 shows that estate roads are clearly identifiable and are depicted by dotted parallel lines which were barred at the junction with public roads. As the landowner could have had non-highway routes stated as “Private” and portrayed in any way that he wished, it is significant the Application route is shown in the same manner as neighbouring routes which are adopted county roads today and are unbarred where they meet other public roads such. This provides strong evidence that the landowner considered that the roads shown on the map had public highway status.

5.2.11. This Estate map shows that when the map was produced in 1840 the application route was the main road between Ashburnham Furnace and Ashburnham Forge and that the current access, now known as Byway Penhurst 1, was likely to have been no more than a track.

5.2.12. There are no indications of gates or barriers of any type across any section of the application route or its junctions with public roads. This indicates that the landowner had no means, or even thought, of restricting public access to the road. This is a strong indication that at the time of the map the application route was accepted by both the landowner and the general public as a public highway.

### 5.3. **The significance of the evidence in Estate Maps**

- 5.3.1. These pieces of evidence demonstrate the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway in the same manner as the existing Byway Penhurst 1.
- 5.3.2. The conclusion is that the application route was historically a public road and therefore should as a minimum have the status of a Bridleway or more likely a Restricted Byway.
- 5.3.3. During the extensive research for this DMMO Application Statement nothing was found to indicate that the above evidence was considered when evaluating the allocation of rights to the application route during the assessment under the National Parks and Access to the Countryside Act 1949 or thereafter and therefore the evidence should be considered “a discovery of evidence”.

## **6. Inland Revenue (IR) Finance Act 1910 – Valuation Records**

### **6.1. Introduction to Inland Revenue Valuation Records 1910**

- 6.1.1. 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 Section 35 of the 1910 Act provided:

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

- 6.1.2. If a route were a private vehicular way, then it could be developed, which would increase the value of the land and so be taxed. Accordingly, private tracks were not usually excluded from the assessable hereditaments. **Therefore where a route is shown as a white road the overwhelming likelihood is that it was a public road.** There are a few other possibilities, (for example the land was a waste, of no value) but they are very rare.

- 6.1.3. A Highway Authority was a rating authority. There was no obligation for a land owner to claim any of the discounts available (applying for discounts was entirely voluntary), but Section 25 authorised the discounts 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.]”*

- 6.1.4. 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 purposes 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 The significance of the evidence in conviction to imprisonment for a term not exceeding six months with hard labour.”*

### **6.2. 1910 - IR: 124/4/227 Penhurst**

Date of publication: 1910	Scale:1:2500	Date of Survey: Approx 1909
Surveyor: OS	Publisher: OS	Edition:
Source: The National Archives at Kew document ref: IR 124-4-227		

Evidence:

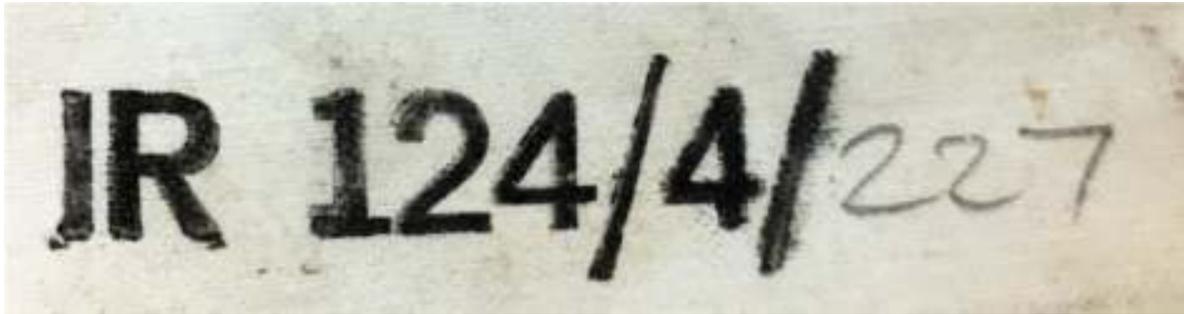


Figure 18 Copy of Penhurst Inland Revenue map label IR 124\_4\_227

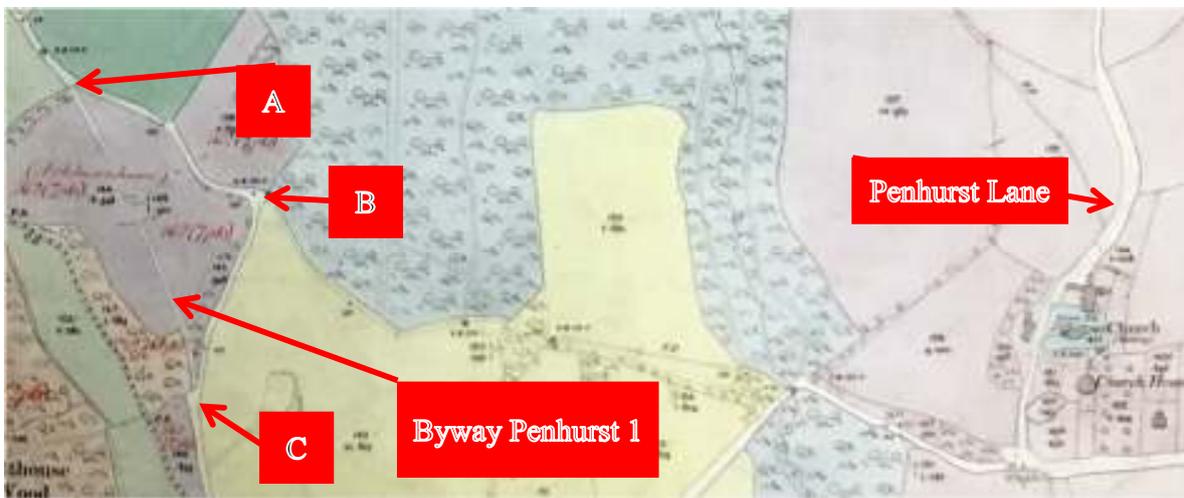


Figure 19 Extract from 1910 IR map Penhurst IR 124\_4\_227 showing the application route

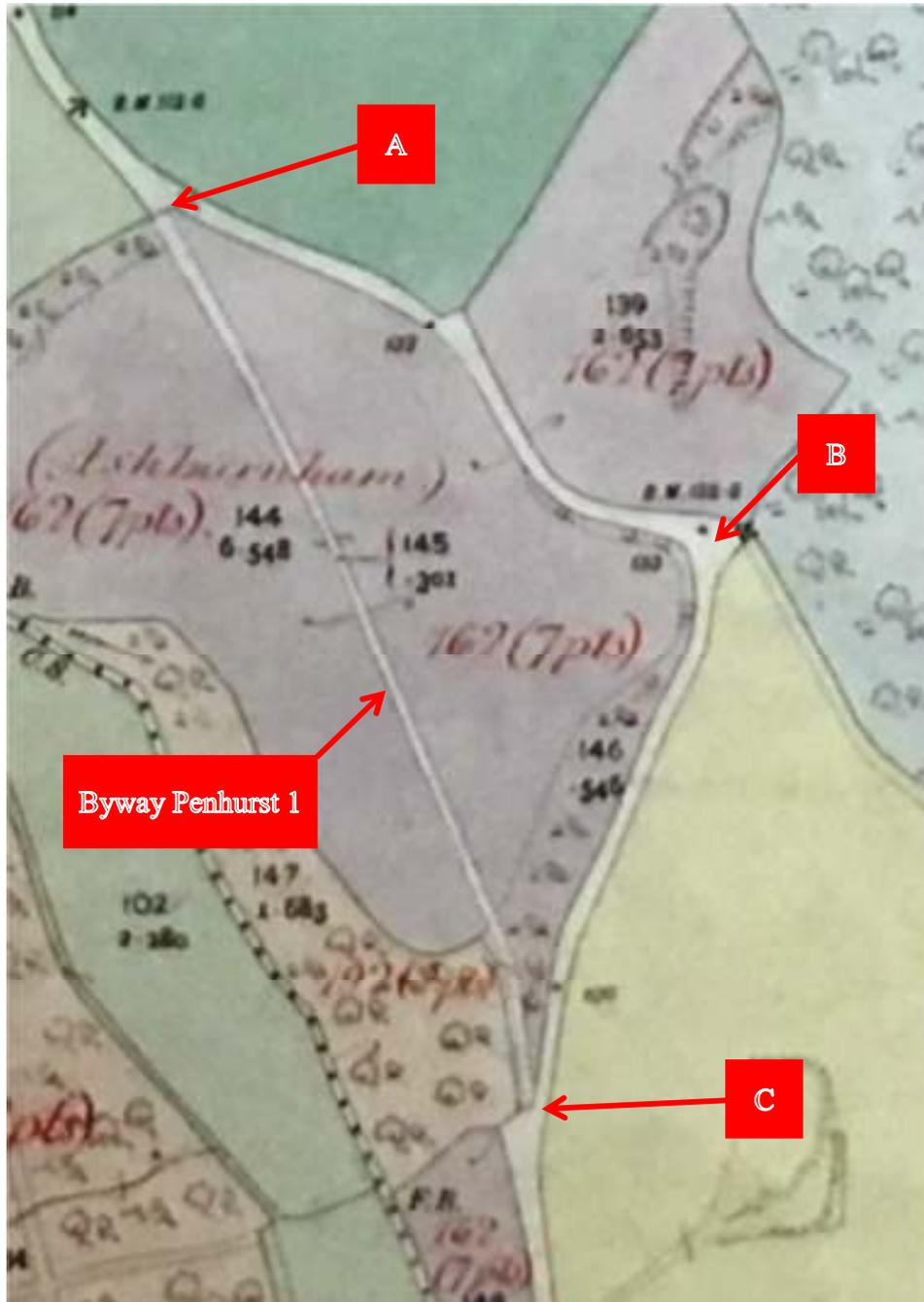


Figure 20 Magnified section of 1910 IR map Penhurst IR 124\_4\_227 showing the application route

**Analysis of evidence:**

- 6.2.1. The extracts shown in Figure 19 and Figure 20 show the whole of the application route as an open-ended unnumbered white road separate from the adjoining hereditaments.
- 6.2.2. Byway Penhurst 1 is shown as a lesser route, indicated by its reduced width.

6.2.3. The application route is depicted in the same manner as other roads which now have a higher ROW status such as Penhurst Lane and Byway Penhurst 1.

**Significance of this evidence:**

6.2.4. Both the route currently identified as Byway Penhurst 1 and the application route are shown on IR 124-4-227. However Byway Penhurst 1 is shown at a smaller width which indicates that it was not considered the main route and that the application route - via points A, B and C - was the primary road.

6.2.5. As the land is unnumbered and outside the coloured hereditaments it is unvalued. This suggests it belongs to the 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 the rating authority for another purpose there would be some evidence of that holding but none has been found.

6.2.6. The legislation is sufficiently clear that anyone arguing that white road status means something other than the route being a public vehicular highway route must show which other exception from valuation applies.

6.2.7. This evidence strongly indicates that the application route was considered to have highway status of a "Road" at the time of the survey.

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### 6.3. **The significance of the evidence in IR Finance Act 1910 – Valuation records**

- 6.3.1. This piece of evidence demonstrates the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.
- 6.3.2. The conclusion drawn from the Inland Revenue Valuation Records Finance Act 1910 evidence is that the application route was historically a public road and therefore should as a minimum have the status of a Bridleway or more likely a Restricted Byway.
- 6.3.3. The Inland Revenue Finance Act 1910 documents did not become available until 1967 and therefore could not have been considered when evaluating the allocation of rights to this application route during the assessment under the National Parks and Access to the Countryside Act 1949. This information should therefore be considered “a discovery of evidence”.
- 6.3.4. There are numerous relevant Planning Inspectorate statements which assist in assessing the importance and relevance of Inland Revenue Finance Act 1910 information. All of these orders are dated after the 1949 assessment and should therefore be considered as “a discovery of evidence”. Some of the most relevant to this DMMO Application Statement are:
- 6.3.5. Order Ref: ROW/3174351  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/709507/row\\_3174351\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709507/row_3174351_od.pdf)
- “20. The exclusion of a route from hereditaments in a Finance Act survey raises the possibility that it was regarded as a public highway and probably one of a higher status than footpath or bridleway, which were usually dealt with by deductions from value rather than exclusion”*
- 6.3.6. Order Ref: ROW/3200513  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/765369/row\\_3200513\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765369/row_3200513_od.pdf)
- “13. Under the 1910 Act all land was required to be valued unless exempted. Routes shown on the base plans which correspond with known public highways, usually vehicular, are not normally shown as included in the hereditaments. Instead, they will be uncoloured and unnumbered”*

## **7. East Sussex County Council (ESCC) Definitive Map**

Date of publication: 1953	Scale:	Date of Survey: 1949<
Cartographer:	Publisher: ESCC	Edition:
Source: ESCC The Keep		

### **7.1. Introduction to ESCC Definitive Maps**

- 7.1.1. ESCC Definitive maps were produced as a requirement of the National Parks and Access to the Countryside Act 1949.
- 7.1.2. Under the Rights of Way Act 1932 District Councils had made a survey of public rights of way in their area and had recorded them on maps.
- 7.1.3. The 1949 Act required County Councils to ascertain and record the existence of public paths – footpaths and bridleways – and of roads used as public paths as on 19<sup>th</sup> May 1953, the “relevant day”.
- 7.1.4. To fulfil this requirement each County Council carried out a survey, often based on the District Councils’ maps referred to in 7.1.2 and survey reports prepared by the Ramblers Association. It also referenced footpath evidence forms collected by Parish Councils. Once the draft was prepared it was publicised and objections relating to the inclusion, omission or routes of paths or to their status as shown were received. After hearing the objections the Council, through its Rights of Way Sub-Committee, made determinations which were incorporated in the provisional map and statement. Before the definitive map was prepared aggrieved objectors might appeal against the determination and the Minister of Housing and Local Government would hold a local inquiry or the Appeal Committee of quarter sessions would settle the issue.

7.2. 1949<: ESCC Definitive Maps

Evidence:

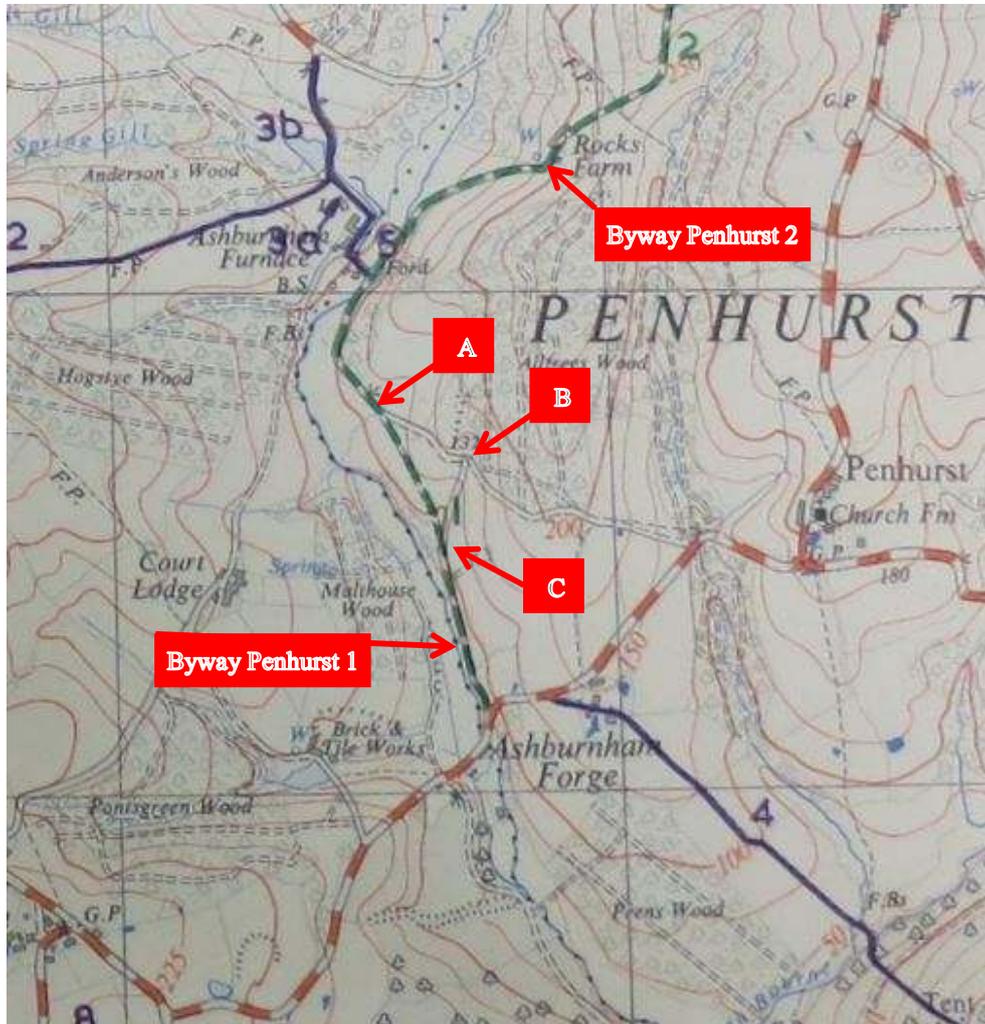


Figure 21 Extract from the 1953 1<sup>st</sup> ESCC Definitive map showing the application route (overlaid on OS 2.5 to the mile (1951))

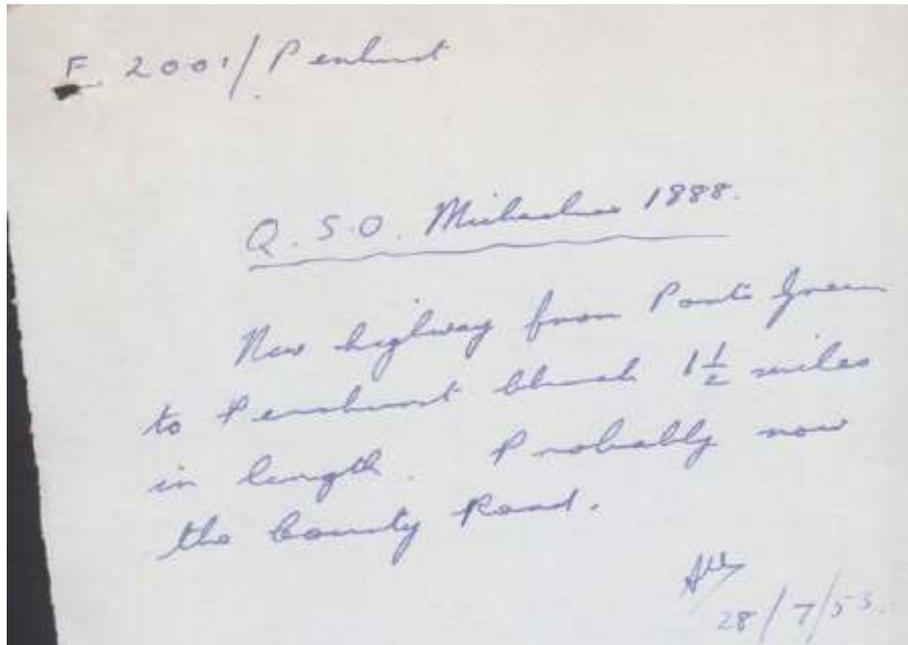


Figure 22 Extract from the ESCC highway diversion showing the only diversion order for Penhurst Parish

### Analysis of evidence

- 7.2.1. Figure 21 shows the extract from the 1<sup>st</sup> ESCC definitive map Penhurst (1953) where the application route is not shown as a Right of Way.
- 7.2.2. Figure 22 shows the single diversion for Penhurst parish found in the ESCC catalogue of Highway diversions held in the ESCC Archive at “The Keep”.

### Significance of this evidence

- 7.2.3. The ESCC catalogue of highway diversions (which goes up to the first definitive map) shows one diversion for Penhurst parish. This diversion is not for the application route.
- 7.2.4. The application route was not included on the 1<sup>st</sup> definitive map as a right of way, so diversion orders made after this are unlikely to be relevant. However the application route is clearly shown as a “Road” on the underlying OS map.

### 7.3. The significance of the evidence of the ESCC Definitive map.

- 7.3.1. During the extensive research for this DMMO Application Statement no stopping up or diversion orders, either in the quarter sessions or in other orders” have been found connected with the application route and therefore the application route still holds its highway status of “Road”.
- 7.3.2. This piece of evidence demonstrates the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.

## **8. The High Weald Area of Outstanding Natural Beauty (HWAONB) Unit Historic Routeways Survey**

### **8.1. Introduction to the (HWAONB) High Weald Historic Routeways Survey**

8.1.1. The High Weald Area of Outstanding Natural Beauty unit (HWAONB) Unit, which produced and published this survey, supports the High Weald Joint Advisory Committee (HWJAC) which was set up in response to the Countryside and Rights of Way (CRoW) Act 2000. The HWJAC is a collaboration of a number of High Weald County and Parish councils, with the East Sussex County Council (ESCC) being a primary member and one of its main financial sponsors. The HWJAC in turn delegates powers to the HWAONB Unit to carry out many of the core functions legally required by the CROW Act 2000.

8.1.2. In 2016 the HWAONB unit produced and published the High Weald Parish Survey, of which the “Routeway” survey is one element.

8.1.3. The aims of the High Weald Historic Routeway Survey were:

- To log and maintain the historic pattern and features of High Weald routeways
- To enhance the ecological function of routeways.

8.1.4. Some of the key papers relating to the High Weald Historic Routeway Survey are;

- The Routeways Story (<http://www.highweald.org/learn-about/landscape-stories/the-routeways-story.html>)
- The Making of the High Weald (2003) (<http://www.highweald.org/downloads/publications/uk-landscape-research-reports/120-the-making-of-the-high-weald-report/file.html>)
- Routeways survey pack (2011) (<http://www.highweald.org/downloads/publications/land-management-guidance/routeways/1094-routeways-survey-pack/file.html>)
- High Weald AONB Parish information: (<http://www.highweald.org/downloads/publications/parish-information.html>)

This web page provides access to the individual Parish information collated under the survey. The Parish information is contained in individual zipped folders which contain data regarding the different aspects of the landscape character and background information (metadata) on each Parish. **It is from this source that the maps referenced below can be obtained.** In addition each folder contains a copy of the High Weald AONB Management Plan 3<sup>rd</sup> Ed 2014-2019 which outlines the aims, methodology, analysis, definition of success and conclusions for the survey overall as of 2014.

- High Weald AONB Management Plan 4th Ed 2019-2024 (<http://www.highweald.org/downloads/publications/high-weald-aonb-management-plan-documents/2291-high-weald-management-plan-4th-edition-2019-2024/file.html>)
- Vision for routeways: (<http://www.highweald.org/look-after/438-high-weald-character-defined/1473-routeways-character-defined.html>)

## **Routeways:**

### **Routeways Definitions:**

8.1.5. The Collins English dictionary defines a “Routeway” as:

*“a track, road, waterway, etc., used as a route to somewhere”*

8.1.6. The definition of “Routeway” used in the HWAONB survey is;

*“Routeways – communication routes of roads, tracks, lanes and paths”*

(High Weald AONB Management Plan 3<sup>rd</sup> Ed 2014-2019 Glossary page 56 – found on the Parish Information website detailed in 8.1.4

### **“Routeways” - Historic Context:**

8.1.7. Since pre-history people and animals have, on an annual basis in the late summer, relocated from the Downs into the High Weald wood-pastures (named dens). Over time these “dens” became permanent, if isolated settlements. These pastures were detached (often by 20 miles or more) from their parent settlements and connected by a network of radial lanes (droves), which survive in the subparallel pattern of roads and tracks today. It is these droves and tracks which often latterly developed into our existing road system and Rights of Way paths.

8.1.8. The above pattern of behaviour has resulted in the High Weald having an enclosed agricultural landscape of small irregularly-shaped fields, small-scale underpopulated holdings and the absence of communal farming of large open fields. In essence, the High Weald landscape was enclosed before the post-medieval period of Enclosure and has changed little since the early fourteenth century

8.1.9. This view is supported by The High Weald AONB Management Plan 3<sup>rd</sup> Ed 2014-2019 (accessed from the Parish Information website detailed in 8.1.4) in that it states;

Section IV Routeways: character defined (page 7):

*“The dense and sub-radial pattern of narrow lanes and Rights of Way in the Weald represents a very visible survival of ancient transhumant routes – the droves. Along with the prehistoric ridge-top ways, these were one of the most distinctive characteristics of the High Weald in the fourteenth century and remain so. The narrowness of droves, their frequently deeply sunken form (a result of age-old wear into soft geologies), their increasing irregularity in response to the relief of the High Weald, and their boundary banks added, and continue to add, to their distinctive pattern”*

8.1.10. In addition The Making of the High Weald (2003) (page 7) states:

*“...ancient routeways (often now roads and Rights of Way) in the form of ridge-top roads and a dense system of radiating droveways. The droveways are often narrow, deeply sunken and edged with trees, hedges, wildflower-rich verges and boundary banks. Routes between natural resources (water, woods etc.) and settlements (farmsteads) would have developed and changed over time and remind us of peoples movements across the landscape.”*

8.1.11. The Routeways survey pack (page 1) also states:

*“Routeways are much more than the roads and paths we see today. Understanding them involves understanding settlements and the wider landscape. Routeways in the High Weald potentially developed in three ways:*

- 1. From the space left between enclosures (areas of owned land), which developed into paths or local routes between farms and small settlements.*
- 2. As routeways with a specific purpose from the outset, such as long distance ridge top routes, designed to move produce long distances heading to settlements like London.*
- 3. As routes from the coast to primary and secondary settlements inland.”*

### **HWAONB Routeways Survey Methodology:**

- 8.1.12. A detailed explanation of the Routeway Survey Methodology is outlined in the Routeways survey pack and the High Weald AONB Management Plan 3<sup>rd</sup> Ed 2014-2019 accessed from the Parish Information website detailed in 8.1.4
- 8.1.13. In summary the survey methodology was designed to help gather information about the physical features, natural features and local history of routeways.
- 8.1.14. It covered 3 parts, each using different techniques:
- Part 1: Fieldwork
  - Part 2: Historical Evidence
  - Part 3: Data Analysis

#### Part 1: Fieldwork

This part of the survey was observational and was predominantly carried out based on historic map evidence (see Part 2). The methodology gathered data regarding the character of the routeway with special attention being given to:

- a) Physical features of the routeway
- b) Ecological features (used as an indicator of the routeway age)

#### Part 2: Historical Evidence

This part of the survey highlighted lost and possible routeways, and was used to indicate how a route might have been used. Documents analysed included Tithe maps and their apportionments, Turnpike maps, routeways maps, road maps, title deeds, mortgage documents and other records of land sales or use and ownership. Quarter Sessions were evaluated to provide evidence of missing routes, enclosing or metalling. Key sources for the Survey were:

- Epoch 1 (1843-1893)
- Maps (1891-1912)
- Tithe maps (1837-1858)
- OSD maps (1780-1840)
- OS drafts from 1899

#### Part 3: Data Analysis & Next Steps

- 8.1.15. Once all the data had been gathered, the HWAONB Unit digitised the information and analysed the data. The analysis looked to generate statistics and discernible patterns in the data that would highlight links between routeways and the surrounding landscape.

8.1.16. The routes which emerged were then classified into two categories:

- Historic routeways – roads (R1)
- Historic routeways – PROW (R1)

8.1.17. (NB: PROW = Public Right of Way shown on the ESCC Definitive map 2016)

8.1.18. The results of this analysis were then overlaid onto the ESCC Definitive map (2016) to show the historical “communication routeways”.

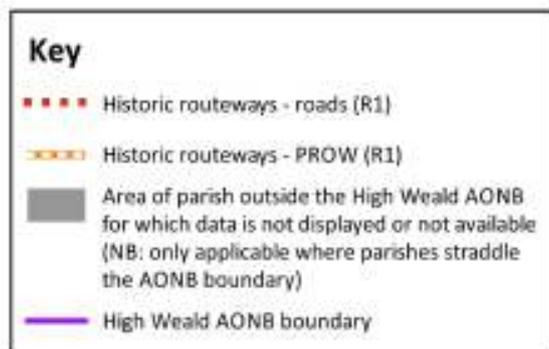
8.1.19. Where analysis shows that the historic routeway is both a “Historic routeways – roads (R1)” (red dotted line) and a “Historic routeways – PROW (R1)” (orange dotted line) the route is depicted with a red dotted line overlaid with an orange dotted line.

8.1.20. HWAONB have been contacted but are unable to provide maps which show each categorisation individually. In addition the HWAONB were unable to provide the applicant with detailed data for individual paths.

**8.2. 2016: HWAONB Unit Routeways Survey – Penhurst Parish**

Date of publication: 2016 (ongoing)	Scale:	Date of Survey: 2011 (ongoing)
Surveyor:	Publisher: High Weald AONB Unit	Edition:
Source: <a href="http://www.highweald.org">http://www.highweald.org</a>		

**Evidence:**



*Figure 23 High Weald Historic Routeways Key*

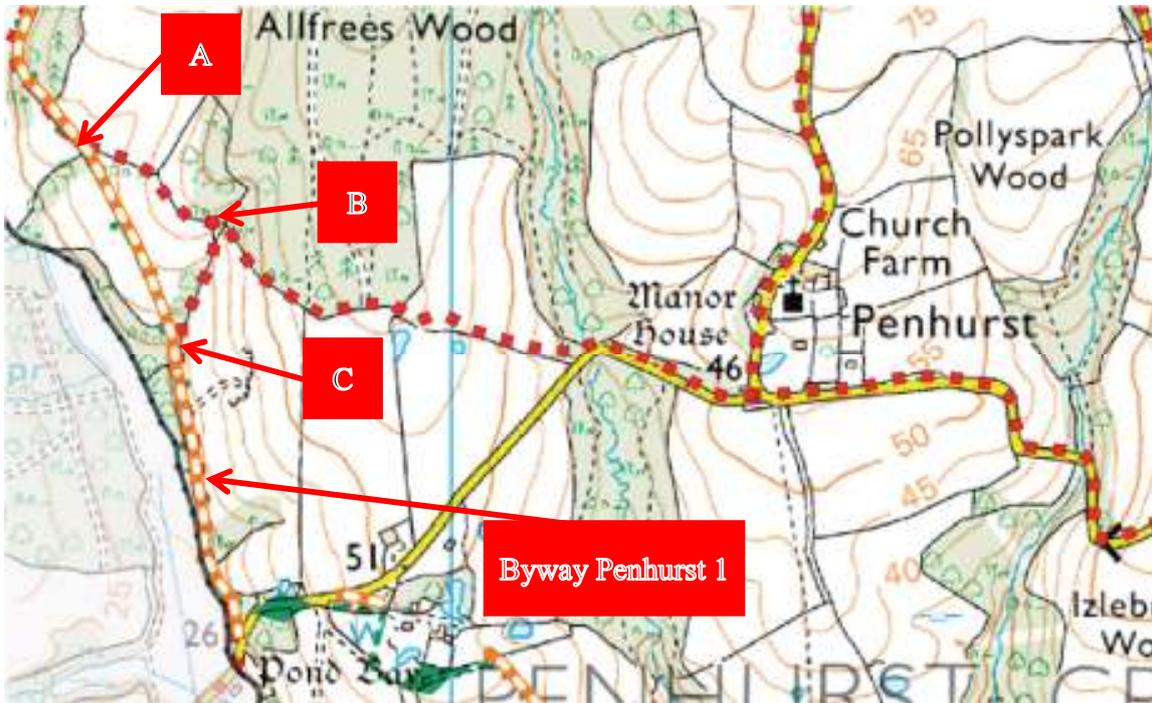


Figure 24 Extract from High Weald Historic Routeways map for Penhurst Parish  
 (<http://www.highweald.org/downloads/publications/parish-information.html>)

**Analysis of evidence:**

- 8.2.1. The application route is shown (Figure 24) as a “Historic routeways – roads (R1)” which means that the application route has been identified by the survey as an historic “Road” and “Historic Routeway”
- 8.2.2. The application route is not overlain by “Historic routeways – PROW (R1)” (orange dotted line) which means that the application route has not been identified as having a Public Right of Way.

**Significance of this evidence:**

- 8.2.3. This evidence shows that High Weald AONB Unit accepts that the application route has been a “Road” at some time in its history and that this “Road” was recognised as a “communications routeway”. As the surveys remit was to record “Roads” that were “communication routeways” to comply with this definition it would be manifest that such roads would have been public.
- 8.2.4. This piece of evidence demonstrates the existence of a highway reputation for the application route over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.

### 8.3. **The significance of the evidence of the HWAONB Unit Historic Routeways Survey**

- 8.3.1. This data shows that the HWAONB Unit's Routeways Survey, published in 2016 by the HWAONB unit on behalf of the HWJAC accepts that historically the application route has been depicted as a "Road" and is accepted by the survey as a "Historical Routeway".
- 8.3.2. However in this study "Historic Routeways - roads" is more than a cataloguing of historical roads. For example many old roads shown on historical maps are omitted, including some which are currently designated as Byways, and numerous roads defined as "Occupational Roads" - unless there is additional data indicating that the road had open public access at some time.
- 8.3.3. The omissions listed above are valid because the focus of the "Historic Routeways" section of the survey was not to identify old roads but to ascertain how people have communicated within the Weald since pre-history. It assessed,
- How societies' needs created "communication routes".
  - How these "communication routes" affected the physical and ecological aspects of the Weald.
  - How the physical and ecological indicators of these routes are evinced today.
  - How these ecological indicators can be used to identify these communication routes as "Historic Routeways".

Therefore for a "communication route" to be classed as a "Historic Routeway - road" the route had to:

- Be identified in historical data as a "Road".
- Be substantiated by the in-depth study and analysis of the physical, geological and ecological features of the way with the aim of identifying tell-tale remnants of social usage, often over many millennia.
- Comply with the statistical and discernible pattern analysis developed by the HWAONB unit to identify the existence of a "Historic Routeway – road".

These additional facets of the survey adds verisimilitude to the definition of "Historic Routeway - road" as an ancient "communication route" which must by definition have been freely and openly available for traverse by the public.

- 8.3.4. In addition, to qualify as a "Historic Routeway – road" the route must also have been identified by the survey as an historic road. The legal definition, both historically and in modern times of a "Road" is:

*"a general purpose vehicular route ... open to all manner of traffic".*

- 8.4. When these two strands of evidence are taken in conjunction this provides compelling evidence that any "Historic Routeway - road" shown within the survey carried public carriage rights at some time in the past.
- 8.4.1. This means that at least Bridleway rights exist over the application route and is also persuasive of Restricted Byway rights.
- 8.4.2. Acceptance of this route as a Bridleway would support the aims of the HWJAC.

This is because The High Weald AONB Management Plan 3rd Ed 2014-2019 (printed 2014) states (page 34) one of its aims is;

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*“e. An understanding of ancient routeways and their associated settlements informing rights of way planning and management including footpath diversions;”*

- 8.4.3. Also in The High Weald AONB Vision for routeways (ref: <http://www.highweald.org/look-after/438-high-weald-character-defined/1473-routeways-character-defined.html>):

*“A landscape in which the character of the distinctive lanes and Rights of Way is protected and a balance achieved between the comparative quietness and rurality of the roads of the High Weald and their function as communications central to the economic and social well-being of the area. The management will take account of, and indeed is partly stimulated by increasing road traffic, safety concerns, increased leisure activities (riding, cycling, walking and off-road driving), under use of many Rights of Way, and expanding development.*

*The vision can be realised through refinement of existing policies and designations that seek to protect archaeology and ecology, and that restrict ribbon development, and through refinement of policies and guidelines that seek to respect the character of lanes and Rights of Way by encouraging use of sympathetic surfacing materials and boundary types; reducing unnecessary use of highway furniture; and by promoting selected walking, cycling and riding routes.”*

- 8.4.4. As the Historic Routeways Survey was published in 2016 by the HWAONB Unit on behalf of East Sussex County Council its findings could not have been considered when evaluating the allocation of rights to the application route during the assessment under the National Parks and Access to the Countryside Act 1949 or thereafter and therefore the evidence should be considered “a discovery of evidence”.

## **9. Modern Photographs of the Application route**

### **9.1. Introduction to Modern Photographs of the Application route**

9.1.1. Aerial photo courtesy Google

9.1.2. Other photographs of the application route taken in October 2021 whilst standing on Byway Penhurst 1.

#### **Evidence:**



*Photo 1 An aerial view of the application route notated and shown by red parallel lines.*



*Photo 2 Photograph of Point A of the application route facing a south-easterly direction taken from Byway Penhurst 1. The claimed route would join Byway Penhurst 1 on the left.*



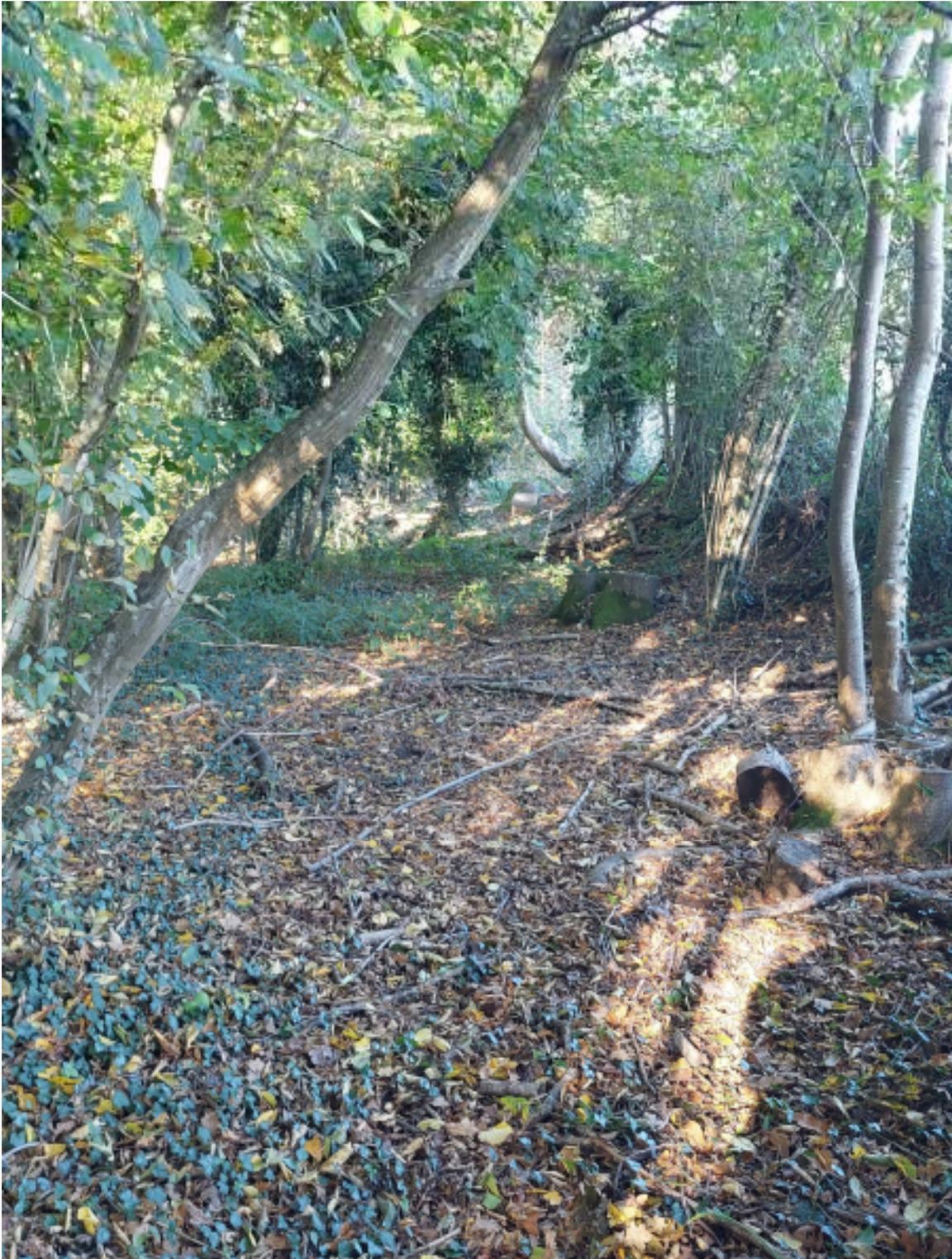
*Photo 3 A close up photograph of Point A of the application route where it would join Byway Penhurst 1. Taken from Byway Penhurst 1 facing a south-easterly direction.*



*Photo 4 Photograph of application route between Point A and Point B facing in a south-easterly direction. Taken from Byway Penhurst 1.*



*Photo 5 Magnified photograph of application route between Point A and Point B facing in a south-easterly direction taken from Byway Penhurst 1 showing the banked trackway.*



*Photo 6 Photograph of application route near Point C facing in a north-easterly direction taken from Byway Penhurst 1*



*Photo 7 Photograph of Point C of application route taken from Byway Penhurst 1 facing a northerly direction.  
The application route would join the current Byway on the right of the picture*

**Analysis of evidence:**

- 9.1.3. Photo 1 is an aerial view of the application route is provided for information. This example is provided as detailed photos of the application route could not be obtained as no ROW currently exists over the claimed route.
- 9.1.4. Photo 2 was taken near Point A of the application route and shows a well-defined track. At point A the verge alongside Byway Penhurst 1 widens to approximately 4 metres in width which could indicate where the claimed route veered off the existing ROW. The photograph shows that within 10 metres of point A the verge along the ROW reduces to a width of approximately 1 metre.
- 9.1.5. Photo 7 provides a closer view of Point A and the 4 metre verge.
- 9.1.6. Photo 4 provides a view of the application route approximately 30 metres from Point A intersection. On close inspection a sunken track can be seen (just in front of the hay pile) which may be indicative of long term usage by carts.
- 9.1.7. Photo 5 provides a closer view of the application route shown in Photo 4 which clearly shows evidence of a sunken track indicative of long term usage by carts.

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- 9.1.8. Photo 6 provides a view of the application route within the woods and approximately 10 metres from Point C intersection. It shows an open path lined by ancient trees. Any trees that are obstructing the path are, by their size, estimated to be less than 100 years old.
- 9.1.9. Photo 7 was taken within 5 metres of Point C where the application route joins Byway Penhurst 1. It shows a well-defined track, which merges into Byway Penhurst 1 verge. This widened verge of approximately 3 metres width runs parallel to Byway Penhurst 1 for approximately 30 metres and then tapers into a verge of approximately 1 metre.

**Significance of this evidence:**

- 9.1.10. As can be seen from the aerial photographs the application route follows long standing field boundaries.
- 9.1.11. At both point A and point C the verges along Byway Penhurst 1 widen to approximately 4 metres in width and in both sites there is evidence of the existence of a well-defined cart track leading away from the existing ROW. The normal verge width along Byway Penhurst 1 varies between 1-2 metres. The verges variation from the norm at these points could indicate that the additional verge width is the remnants of where the application route historically joined the existing ROW.
- 9.1.12. Photo 4, Photo 5 & Photo 6 all show residual evidence of the historic existence of a well-used sunken track of approximately 4 to 5 metres in width. Such evidence is indicative of the existence of an old roadway.

**9.2. The significance of the evidence in Modern Photographs**

- 9.2.1. At the time these photographs were taken an open trackway appears to follow to course of the application route.
- 9.2.2. During the extensive research for this DMMO Application Statement nothing was found to indicate that the above evidence was considered when evaluating the allocation of rights to the application route during the assessment under the National Parks and Access to the Countryside Act 1949 or thereafter and therefore the evidence should be considered “a discovery of evidence”.

## 10. Conclusion

- 10.1. The conclusion drawn from the evidence presented in this Application Statement is that the application route was for many years the route of the road but that gradually over the years the application route was superseded by the short cut without ever being formally extinguished. Therefore the evidence presented in this DMMO Application Statement supports the assertion that the application route should, as a minimum, be allocated the status of a Bridleway, but is also supportive of Restricted Byway status, which is the current status of the “short cut” now defined as Penhurst Byway 1.
- 10.2. In summary the evidence presented to support this claim is as follows:

Date	Documentary Evidence	Description
1795	Gardner & Gream map	Shown as Road
1813	OS Old Series (1 <sup>st</sup> Ed)	Shown as Road
1825	Greenwood & Greenwood map	Shown as Road
1834	Ashburnham Estate map	Shown as unnumbered Road
1840	Penhurst Tithe map	Shown as unnumbered Road
1875	OS 25' County Series map 1 <sup>st</sup> Ed	Shown as Road
1875	OS 25' County Series 1st Ed Reference Book	Referenced as Road
1898	OS 25' County Series	Shown as Road
1910	Inland Revenue Valuation Record	Shown as White Road
1949<	ESCC Definitive map	Not shown as ROW. No stopping up or diversion orders found for this route.
2016	High Weald Historic Routeway Survey	Identified as Historic routeways – Road
2021	Photographs & Other media	Route shown as distinctive pathway

- 10.3. Cumulative evidence (Commercial and OS maps produced over a number of years), and synergistic evidence (e.g. Tithe map, Estate maps and Inland Revenue 1910 evaluations etc.) show that on “the balance of probability” vehicular rights existed at the times the various pieces of evidence were created.
- 10.4. Whilst no single piece of evidence is conclusive,

*“...this co-ordination significantly increases the impact of these documents”<sup>6</sup>*

Taken as a whole, the pieces of evidence demonstrate the existence of a highway reputation over many years and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights. This indicates that the application route should have a highway entitlement of at least Bridleway but more probably Restricted Byway status.

- 10.5. This is substantiated by the view in R v Exall (1866) that [https://assets.cambridge.org/97811070/20337/excerpt/9781107020337\\_excerpt.pdf](https://assets.cambridge.org/97811070/20337/excerpt/9781107020337_excerpt.pdf) :

*“gives the quote slightly differently as: “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*

<sup>6</sup> Wildlife and Countryside Act 1981 Definitive Map Orders: Consistency Guidelines April 2003

*several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”*

- 10.6. Whilst there are possible, if often unlikely, alternative explanations for each individual piece of evidence, no explanation other than the existence of a right of way explains these pieces of evidence as a whole.
- 10.7. The test at this stage is only “Can it reasonably be argued that the right of way exists as suggested”.
- 10.8. The later test at confirmation of any order is “Is it more likely than not that the right of way exists as suggested”.
- 10.9. It is asserted that this DMMO Application Statement passes both of those tests.
- 10.10. There are numerous relevant Planning Inspectorate statements which assist in assessing the evidence presented in this DMMO Application Statement. All of these orders are dated after the 1949 assessment and should therefore be considered as “a discovery of evidence”. Some of the most relevant to this DMMO Application Statement are:

10.10.1. Order Ref: ROW/3181626

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/705547/row\\_3181626\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705547/row_3181626_od.pdf)

*“10. .... Most public highways have been accepted by the public since beyond memory. The law presumes that, at some time in the past, the landowner dedicated the way to the public either expressly, with evidence of such dedication now being lost, or impliedly, by making no objection to use of the way by the public. The evidence to show that such dedication has occurred may arise from documentary and/or user evidence.”*

And,

*“45. The documentary evidence shows that there has been a physical feature in the landscape from at least the mid-eighteenth century. The suggestion of higher public rights arises from a number of strands of evidence, in particular the Martyn map, the tithe records and the Finance Act records.*

*46. The evidence as a whole supports the dedication of the route in the past by an unknown landowner with acceptance by the public demonstrated through use, for which the evidence currently before me dates back to the early – mid twentieth century. Looking at the combination of documentary and user evidence submitted I am satisfied that public rights subsist on the Order route.*

*47. Taking account of the evidence as a whole I consider, on the balance of probabilities, it is sufficient to show that a public right of way subsists over the Order route. Given the effect of the Natural Environment and Rural Communities Act 2006 (“the 2006 Act”), I agree with the OMA that the vehicular rights have not been exempted, so saving the carriageway rights. The appropriate status is therefore restricted byway. The 2006 Act does not affect vehicular rights relating to private access to land and property.”*

10.10.2. Order Ref: ROW/3219390

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/827090/row\\_3219390\\_od.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/827090/row_3219390_od.pdf)

*“4. The physical existence of the Order route as part of a longer route between the county boundary and Woodlinkin is consistently shown on maps depicting the area from the 1830s onwards”*

## 11. Request

- 11.1. The evidence presented in this DMMO Application Statement shows that the application route has, on the 'balance of probabilities', been a highway in the past, and on the principle of '**once a highway, always a highway**' [*Dawes v Hawkins* (1860)] the applicant requests the Surveying Authority to add the application route to the Definitive Map and Statement with a minimum status of Bridleway.
- 11.2. The evidence presented in this DMMO Application Statement suggests that carriageway rights existed over the application route. However due to the current construction of the law and the proposed extinguishment of unrecorded rights in 2026, this DMMO Application Statement is being made for bridleway status with an acknowledgement that the surveying authority should make an order for Restricted Byway status if they consider it merited.