The Planning Inspectorate

Appeal Decision

by Helen Slade MA FIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 22 August 2018

Appeal Refs: FPS/Q2371/14A/19 and 20

- This appeal, dated 17 December 2017, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Lancashire County Council ('the Council') not to make an Order under 53(2) of that Act.
- Application 1 dated 17 September 2011 and Application 2 dated 28 January 2014 were both refused by the Council and the applicant was notified by letter dated 13 December 2017.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the appeal routes as Public Footpaths.

Summary of Decision: The appeal is allowed in part.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act.

2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

3. Principal submissions have been made by the appellant (Mrs G Chester); by Lancashire County Council; and by Ward Hadaway on behalf of the landowners, the Canal and River Trust ('the Trust') and British Waterways Marinas Ltd ('BWML'). Some other submissions have been received from third parties living locally and adjacent to the appeal routes.

4. Some disquiet has been expressed by the appellant on the way in which the location of the appeal has been referred to by the Council. For the avoidance of doubt I shall refer, where necessary, to the village as Glasson; the sea-water dock as Glasson Dock ('the Dock'); and the freshwater canal basin as Glasson Basin ('the Basin').

5. A considerable amount of material has been submitted by the appellant, both at the application stage and the appeal stage, which relates to government and local policy in relation spatial planning and environmental considerations. The Council indicated in its Regulatory Committee Report ('the Committee Report') that most of this material was irrelevant to the consideration of whether or not a public right of way subsists over the claimed routes.

6. I agree with that assessment and, whilst I accept that some of the information may demonstrate why there is a desire to walk over the claimed

routes and thus support why there is evidence of user, in coming to my decision I have not taken account of any of the government or local policy in relation to spatial planning or environmental issues.

The two appeals

7. The appellant made two applications to the Council for a Definitive Map Modification Order affecting paths adjacent to canal basin at Glasson. The first application was made on 17 September 2011 and was for a route which followed the western and southern perimeter of the Basin to a fence on the boundary of the Marina site, with a short spur to meet School Lane (formerly or alternatively known as Marsh Lane) at Glasson School.[1]

8. The second application was made on 28 January 2014 and was for a series of four identifiable routes which circumnavigate the Basin broadly following the same route which was the subject of the first application but extending it to complete a circular route with two spurs: a short additional one to School Lane at Glasson School and another longer one to School Lane along the access drive to the Marina.

9. The Council was directed by the Secretary of State to determine both applications, and considered them together in one report. Both applications were rejected in the same determination.

10. A similar route to the second application was also the subject of a claim made in 1999 by a Mr Wilson. That application was rejected by the Council in 2001. An appeal against that determination was made to the Secretary of State, and was dismissed on 14 August 2002 on the grounds that there was insufficient evidence to support the claim. The Council reconsidered the evidence submitted in respect of that claim as part of their determination of the two claims by Mrs Chester.

11. I propose to treat this as one appeal against the determination of both Mrs Chester's applications combined.

Discovery of evidence

12. Ward Hadaway, on behalf of their clients, has questioned whether or not there has been a 'discovery of evidence' in terms applicable to the 1981 Act provisions. I am satisfied that, since the 1999 application, additional evidence of use has been submitted such that an application under Section 53(3)(c)(i) was justified. Furthermore, an application under Section 53(3)(b) does not require there to be additional evidence (see paragraph 17 below).

The routes

13. The appellant has expressed concern that her application has been rejected by the Council on the basis that it was one circular route, and not four separate routes.

14. The Council has clearly identified the four routes in its Committee Report but I agree that their decision does not clearly distinguish between each one. I intend to examine the case for each route individually, reaching a separate conclusion on each section of the overall circular route.

[1] Full name: Thurnham Glasson Christ Church, Church of England Primary School

15. I have relied upon the map produced by the Council for their Committee Report for identification purposes, and use the notation on that plan to describe the routes of the paths below.

The Main Issues

16. The application was made under Section 53(2) of the 1981 Act which requires surveying authorities (such as the Lancashire County Council) to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).

17. Section 53(3)(b) of the 1981 Act provides that one of those events is the expiration of a period of time during which there has been enjoyment of the route by the public sufficient to raise a presumption that the way has been dedicated as a public path.

18. Another event is set out in Section 53(3)(c)(i) of the 1981 Act which provides that an order to modify the DMS should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994] 68 P & CR 402, and upheld in R v. Secretary of State for Wales ex parte Gordon Michael Emery [1997] EWCA Civ 2064:

    - Test A: Does a right of way subsist on the balance of probabilities?
    - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

    For the purposes of this appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

19. With respect to evidence of use, Section 31 of the Highways Act 1980 ('the 1980 Act') states that where there is evidence that any way over land which is capable of giving rise to a presumption of dedication at common law has been used by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to so dedicate during that period. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

20. It is also open to me to consider whether dedication of the way as a highway could have taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way could be shown to have occurred expressly or, alternatively, whether dedication could be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.

21. Section 32 of the 1980 Act provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances.

Reasons

Route 1

22. This route starts on the highway at Tithebarn Hill to the south of the swing bridge (Point A on the map) and runs along a passageway skirting a children's play area to Point B. It then passes a picnic area and runs along the western edge of the Basin in a generally southerly direction for 410 metres to meet the highway at School Lane at Point D, adjacent to Glasson School. It is currently obstructed by a fence at Point C (with no gate) which forms the boundary to an Eco Garden which is being developed on land next to the school and apparently managed by it. The exit to the road at Point D is now through a gate in the garden boundary fence. It does not pass through the school playground at any point.

Route 2

23. This route starts on the highway at Point D on the map and runs on a slightly different route through the Eco Garden to another gate in the boundary fence at Point E. It then follows the southern perimeter of the Basin through a Plantation and then across the boatyard to meet the Marina access road at Point G, at which point the 2014 Application map shows the route turning south-south-east along the Marina access drive to terminate on the highway at Point J. There is currently a metal palisade fence obstructing the claimed route at Point Y where it enters the boatyard. The Council describes this route in its Committee Report as terminating at Point G and gives the length of this section as about 350 metres. However it is clear from the application that the Appellant considers the route continues to meet the highway at Point J. This would add approximately 100 metres to the overall route. I shall consider the route by reference to the manner in which the appellant originally applied for it. This is important if all four routes are to be treated independently.

Route 3

24. This route starts on School Lane at Point J and runs north-north-west along the Marina access to Point G and then across the boatyard in a generally north easterly direction. It passes alongside the Marina buildings on the landward side and past Canal Cottage to Point I. It then turns in a south easterly direction running along the southern bank of the Glasson branch of the Lancashire Canal ('the Canal') to reach Brows Bridge via a small wooden gate at Point H, currently locked. There is a metal barrier or gate at Point X and the path is overgrown between that point and its termination on the highway at Brows Bridge. Canal Cottage appears to be derelict. The total length of the route is approximately 400 metres.

Route 4

25. This route starts on the highway at Brows Bridge to the north of the Canal at Point K and drops down some steps and a slope to meet the towpath. The

route then follows the towpath in a generally north westerly direction for about 490 metres to rejoin the highway at Tithebarn Hill at Point N to the north of the swing bridge.

Additional section

26. There is a short additional link running between Points C and E and the western end of Route 2, which was claimed as part of the 2011 application by Mrs Chesters, and which has a distance of about 15 metres. It runs along the fence line now formed by the boundary of the Eco Garden. At present, this route does not meet a highway at either end. This will need to be considered in conjunction with Route 1 or Route 2.

Historical Evidence

Mapping

27. The Councils Committee Report contains a tabulated summary of the historical evidence that has been examined, and I principally rely on that.

28. Unsurprisingly, the earliest mapping shows neither the Dock nor the Basin, and therefore provides no assistance to the Applicant. The earliest map to show a feature representing the Basin is Hennet's 1830 map of Lancashire, but the scale is too small to show the level of detail which would assist the appellant, and the Basin appears somewhat smaller than its present configuration. This is in line with its reported original function as a reservoir for the adjacent Docks.

29. The earliest Ordnance Survey ('OS') map of the area, the 1848 6-inch map surveyed during 1844/5 shows the Basin as it is today. This indicates that its potential as an interconnecting route to the Dock had been realised and that it had become a part of the onward transportation system inland. Two cranes marked along the stone edge are evidence of its function in this regard.

30. Part of two of the claimed routes (Routes 2 and 3) is shown to have existed at that time as forming the access to the Store House (Point J to approximately Point G on the 2014 claim, (and possibly Point D on the 1999 claim)). There would also clearly have been access available along Route 4 along the towpath, although it is not clear from the map that there was any access to that route from Brows Bridge.

31. By 1891, the earliest OS map at the scale of 25 inches to 1 mile showed that a path existed (marked *'FP')* along the western boundary of the Basin, clearly running south from Point B on Route 1, linking the growing community centred round the Dock to the village school. The link to Tithebarn Hill is not clear, although a route following the 1999 claim across the weir appears to be available. The route of the present claim at that point is less clear.

32. There is no path marked along the line of Route 2, but there appears to be some form of embankment[2] following the edge of the Basin between Points F and G which was followed by Route 2 of the 1999 Application (but is not on the line of the 2014 Application).

[2] I assume this to be the remnants of the uncompleted dry dock mentioned in some of the historical documentation

33. Part of Route 3 is visible as a path marked *'FP'* between Glasson Cottage (now called Canal Cottage) and reaching the road at Brows Bridge, in addition to the section between Points J and G along the access track. The Store House is no longer marked, but the railway has come into being.

34. As with the earlier maps, there must have been a clear route available along the towpath, but the Council indicates that, in their view, there was no link to the road at Brows Bridge[3]. I consider that the map evidence is less clear cut than that. The towpath at this point clearly widens in order to pass under the bridge nearer to the centre of the arch. There is clearly room for a route which might form the slope and shallow steps which are present today. Nevertheless I accept that there is no marking to suggest their presence at that time.

35. Although the railway had arrived and it will have had some effect on the width of the land available at that point, it would not have prevented passage along the towpath which was still necessary for canal purposes. The Survey Card for this claimed route in the 1950s (see paragraph 36 below) describes the route running *'alongside Canal Basin and railway line'* to the towpath proper.

36. This situation as a whole is similarly depicted on the 1913 edition of the same scale map, but the access to Tithebarn Hill on Route 1 is clearly not available on the line of the 2014 and 2011 claims, and this is clearer still on the later 1971 edition of the National Grid series at the same scale. The access to the path was across the weir on the line of the 1999 claim. The access to the towpath at Brows Bridge is not identified on the map. This link is first evidenced in terms of mapping sources in the aerial photograph dating from 1980, although I note that there is significant user evidence of the route which pre-dates this.

37. However, the towpath was one of the routes claimed during the 1950 Definitive Map procedures, as was the complete Route 1 as claimed by Mr Wilson in 1999.[4] The line of the towpath was claimed beyond Brows Bridge, but given a different number suggesting that there was access to the Bridge at that time. This is reinforced by the description of the path numbered 1 being *'Canal Basin to Brows Bridge'* and the notation on the survey map indicating a wicket gate ('WG'). The survey card records that the gate required renewal, which indicates that it had been there for some time. Regardless of the outcome of the Definitive Map process, I consider that the evidence does indicate that access to Brows Bridge was available both at that time and for some considerable time previously, despite the appearance of OS mapping evidence.

38. I note that the Council now considers (in its Committee Report) that the mapping evidence is evidence against accepting the claim. This is in contrast to its view on the mapping evidence in relation to the 1999 claim where mapping evidence was classed as evidence in support of significant parts of the claim (the equivalent of Routes 1 and 4, and parts of Routes 2 and 3).

[3] To which they refer as Jeremy Lane but this name is contested by the applicant. I see no significance in this discrepancy but I will merely refer to it as Brows Bridge to avoid any confusion.
[4] The Council appears to believe that the route did not reach the highway but only the school grounds. However the Survey Card records the path exiting onto the public road.

39. I take the view that the mapping evidence, whilst it is not capable of demonstrating the status of the claimed routes as public rights of way, it does support the long-standing existence of the majority of the claimed route. The notation *'FP'* does not indicate a public footpath, but merely a route which appeared mainly to suitable for use on foot, as opposed to use with vehicles or on horseback.

Aerial Photographs

40. The aerial photographs are variable in what they show, but do not contradict any of the information provided by the mapping described above. Small points to note however are that the photograph from 2000 shows a route between Points A and B which, although crossing the same parcel of land as Route 1 between those points, does not follow quite the same line as is presently available and which has been claimed. The playground itself does not appear to be laid out; it seems to be a picnic area. The photograph also seems to show a walked line between Points F and G, but again not quite on the line now claimed. The Council did not comment on this in their observations.

The Definitive Map Records

41. The equivalent of Route 1 (as per the 1999 claim) and Route 4 were claimed by Thurnham Parish Council during the initial phase of preparing a draft DMS and shown as Footpaths 1 and 43 respectively. No part of the equivalent of Routes 2 and 3 was claimed. Footpaths 1 and 43 survived the initial consultation period and were shown on the Provisional DMS, which was not published until 1960. An objection at that stage by the British Transport Commission to the Lancashire Quarter Sessions resulted in Footpath 1 (i.e. Route 4) and Footpath 43 being included on a schedule of paths to be removed from the final map; a decision being taken accordingly on 14 March 1961 by a committee set up by the Quarter Sessions for the purpose of considering the objections. Despite that decision, due to what appears to have been an administrative error the two paths found their way onto the first DMS in 1962.

42. The revised DMS (First Review Relevant Date 1 September 1966) was published in 1975, the two paths having been removed as part of the overall process. But as a consequence of this, to all intents and purposes, two of the claimed paths (in the broadest sense) were shown on the DMS for a period of 13 years. Anyone who consulted the DMS during that time would have been entitled to understand that they were public rights of way, due to the conclusive nature of the DMS. However there is no evidence to suggest that the Appellant or any other witness had, in fact, consulted that document during the period that the paths were marked on it.

43. Both routes were very slightly different to those now claimed in that they started (or ended) immediately adjacent to either side of the Swing Bridge across the cut between the Basin and the Dock. This stretch of road appears to be part of Tithebarn Hill now.

British Transport Commission and their successors as landowners

44. The British Transport Commission ('the Commission') was established by the Transport Act of 1947 ('the 1947 Act') and was empowered to *'secure or promote the provision of an efficient adequate economical and properly integrated system of public inland transport and port facilities within Great Britain for passengers and goods and for that purpose to take such steps as they consider necessary for extending and improving the transport and port facilities within Great Britain in such manner as to provide most efficiently and conveniently for the needs of the public agriculture, commerce and industry:'*[5]

45. Section 57 of the British Transport Commission Act 1949 ('the 1949 Act') set out the following provision:

'As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.'

46. Following the 1999 Application, the successor body to the Commission, British Waterways ('BW'), objected to some of the routes applied for, but not all. The 2001 Committee report on the application records that they had no objection to the equivalent of Routes 1, 2, and 3, subject to the primary needs of the Lancaster Canal Navigation and such limitations as would have been apparent to comply with their statutory obligations. However their objection to the towpath section (Route 4) was based on their belief that use of that route was of a permissive nature and that no implied or presumed dedication at either common law or under Section 31 of the 1980 Act had occurred.

47. No basis for this belief is recorded in the Committee report, but the letter from the Government Office for the North West dated 14 August 2002 dismissing Mr Wilson's subsequent appeal refers to the reliance of BW on Section 57 of the 1949 Act. The 2002 letter also suggests that the attitude of BW appears to have altered such that they also objected, by that stage, to the equivalent of Routes 2 and 3, except for the section between the School House and the land at that time leased to the Glasson Basin Yacht Company Ltd (Point Y on the current claim map). With regard to Route 1 they objected to the northernmost section of the route across the weir which they stated had been obstructed by fences, hedges and locked gates.

48. On behalf of the Secretary of State, Mr Wilson's appeal was dismissed and considerable weight was attached to the provisions of the 1949 Act in respect of the equivalent of Route 4 but, for the remainder of the route claimed at that time (and forming Routes 1, 2, and 3 of the present claim) the appeal appears to have been dismissed in relation to insufficiency of evidence to support the claim.

49. I agree with the appellant that the 2002 decision writer appears to have relied on a test similar to that set out in in Section 53(3)(c)(iii) of the 1981 Act which relates to applications for deletions from the DMS, rather than to additions. Although the writer refers to the 'reasonably alleged' test in the

[5] As set out in the preamble to the British Transport Commission Act 1949

first paragraph of the Appraisal, they then go on to refer to the need for the appellant to prove 'that a mistake was made when those rights were first recorded' on the balance of probabilities. This is not the correct test to apply to an application such as this. Thus, although the letter is helpful in establishing an overall picture of the situation at that time, I do not consider I am bound by it. I have set out the tests that I consider are appropriate to this application at paragraphs 16 to 21 above.

50. With respect to the current applications and appeal, I note that the successor body to BW (The Canal and River Trust ('the Trust')) has chosen not to rely on Section 57 of the 1949 Act, despite the Council's reliance on it in their Committee Report.

51. Furthermore, the Council appears to have applied the provision to all sections of the claimed routes which are owned by the Trust. This seems to be on the basis of the proposed development of the Basin by British Waterways Marinas Limited ('BWML') which the Council considers will mean that the Basin will fall within the definition of a dock, given in 1947 Act.

52. Copious correspondence has been devoted to determining whether the Basin falls within the definition of a Dock, and thus whether the provisions of Section 57 of the 1949 Act apply. The Council states that the definitions are as set out in the 1947 Act and are as follows:

'**harbour**' means any harbour, whether natural or artificial and any port, haven, estuary, tidal or other river or inland waterway navigated by sea-going ships, and any dock

'**dock**' includes any pier, jetty or other place at which ships can ship or unship goods or passengers

53. I consider that the question of the status of the Marina and the Basin itself in terms of the 1949 Act is an arguable matter. The appellant has pointed out that the canal as a whole is now classed as a leisure route, and not a commercial route, and I find that the reliance apparently placed on Section 57 of the 1949 Act, and the definition of a dock in the 1947 Act, is insufficiently supported, particularly as the Trust does not seek to rely on those provisions.

54. Even though all the land concerned may be owned by the successor body (or bodies) to the British Transport Commission, I consider there must be some doubt about whether or not the routes which are the subject of this appeal form an access or approach to a dock. Furthermore, I am not aware that the Trust is the owner of the Dock itself, and therefore there is further doubt in my mind that the provision is appropriate now. It may have been applicable in the 1950s when the Commission owned both the Basin and the Dock, but now that ownership is split it is arguable that the provision may no longer apply, particularly if the Basin is not shown to be a dock.

55. I therefore do not accept that there is any automatic or statutory reason preventing the dedication of public rights of way around the Basin as a result of Section 57 of the 1949 Act.

Other documentary evidence

56. A large number of other documents have been submitted, many of which I have already stated are irrelevant to my decision as they relate to spatial planning policy. However, some of the documents do provide some evidence of the existence of a route around the Basin and I particularly refer in this matter to the booklet 'A Walk Around the Village' produced in 1985 by Thurnham Parish Council. I agree with the appellant that this clearly describes a route which must have used almost the entire claimed route.

57. I also note the earlier document, 'Glasson Dock Village Plan', which was approved as policy by Lancaster City Council in 1977 and used to inform the development of the children's play area, among other things. The reference in that document to 'the existing footpath around the canal basin' is persuasive evidence that a route around the Basin existed, and was in use, at that time regardless of whether or not any plan to improve it was implemented.

58. I note the various photographs from the book 'Glimpses of Glasson Dock and Vicinity' which are interesting, but do not provide significant evidence of the existence of any part of the path, although I do recognise that the implication is that access to the Basin must have been possible at various locations, implying that there were paths to it. However the information is too vague for the most part to draw any useful inference.

Conclusions on Historical Evidence

59. I am satisfied that the mapping and historical evidence supports the physical existence of the claimed routes for varying periods of time. There is nothing in the historical evidence which I find, on balance, renders it impossible for public rights of way to have been dedicated, but none of the documentary sources provides evidence of express dedication.

Statutory Dedication: Section 31 of the 1980 Act

Route 1

Date on which the use of the path was brought into question

60. It appears from the evidence presented that the Eco Garden was commenced in about 2008, at which point the fence was erected around the boundary thereby obstructing the route of the path. The original 2011 application from the appellant included photographs of the fence taken in March 2009, but indicates that the fence was erected the previous year.

61. Although the application was not made until 2011 I consider that 2008 is the date on which the use of Route 1 was brought into question in respect of the present applications and the relevant period of 20 years during which to consider the user evidence is therefore 1988 to 2008.

62. The Council considers that the route was also brought into question in 1999 when Mr Wilson's application was made. I accept that the majority of the route claimed at that time was the same, but it took a slightly different route to reach Tithebarn Hill, passing via the weir. Nevertheless, I shall also examine the relevant period of 20 years dating back from 1999.

Whether there has been use of the way by the public during that period

63. There is no definition in the 1980 Act of what is meant by the term 'the public' in this context, and it is normal to adopt the usual dictionary definition. Use of the way should be demonstrable by a group of people who, collectively, can be taken to represent the public as a whole, or to be representative of the local community. I note that, in response to the 1999 application, two adjoining landowners in Pennine View acknowledged that most local people knew each other and that consequently they had not denied locals the use of the path, even though they claimed to have stopped others.

64. Taking the combined user evidence forms and identifying those people who clearly claim to have used the route between Tithebarn Hill and the School, there is claimed use of the route since the late 1930s through to the time of the obstruction at the school (2008) and beyond (presumably diverting round the obstruction or continuing on Route 2). Most of the witnesses are local to Glasson, or have connections to family in Glasson but a considerable number of people live further away. One or two of the witnesses appear to have had boats of one sort or another, and one witness's family had connections to Canal Cottage.

65. Given the long-standing identification of a path on the mapping evidence, and the evidence of the DMS claim in the 1950s, I am satisfied that use has been made of the path between Points B and D by a group of people who can be taken to represent the public. Prior to 1999, the path was accessed by a different route at the northern end but, subsequent to that time, the public has used the section of the Appeal route between Points A and B.

Whether there has been uninterrupted use as of right throughout the relevant period

66. Prior to 1999 the path was not accessed from Point A, but from a point nearer the Swing Bridge. This access appears to have been obstructed with a locked gate in about 2000. With respect to the section of the appeal route A-B therefore, the evidence does not support use of the route for 20 years prior to 2008.

67. For the remainder of the route, there is no unequivocal evidence that use of the path was ever interrupted and none of the witnesses report ever having been stopped or turned back. It may be that the residents of the adjacent properties did turn some people back, but there is no evidence to corroborate that.

68. There is no evidence of user by force or of user by stealth, and no permission has ever been sought by any of the user witnesses. I note that BW did not object to the application for this route made by Mr Wilson, so they must have been aware of the use that was being made of it and acquiesced to it.

69. In the absence of any evidence to the contrary, and given my findings in respect of Section 57 of the 1949 Act, I find no evidence of permission having been given to any of the witnesses. The only exception to this would be those people who may have had a boat on the marina, or lived on a houseboat (one witness). They may have had permission by way of a lease, fee, or a tenancy.

70. Given the brevity and the similarity of the evidence provided by the members of the canoe club, I have given it less weight, but I have not discounted is as there is no evidence that they had permission as a club to use the Basin.

71. Although the evidence of the Quarter Sessions in 1961 suggested that there had been no dedication of the route at that time, I am satisfied that there is no inherent reason why user since that time cannot have been as of right, particularly after the abolition of the British Transport Commission in the early 1960s.

72. The Trust indicates that, in the light of their duties with regard to access to their land, the access which has been enjoyed by the public is user by permission and consequently not user as of right. They state that this duty was also laid on their predecessors, BW.

73. The legislation on which the Trust relies is Section 22(2) of the British Waterways Act 1995 ('the 1995 Act') as applied by the British Waterways Board (Transfer of Functions) Order 2012. I note that this places a statutory duty on the Trust, in formulating or considering any proposals relating to their functions[6] to have regard to:
'preserving for the public any freedom of access to towing paths and open land and especially to places of natural beauty' and *'to have regard to the desirability of maintaining the availability to the public of any facility for visiting or inspecting any building, site or object of archaeological, architectural, engineering or historic interest'*

74. The applications which are the subject of the appeal are not proposals which the Trust is formulating itself. They may be considered to be proposals which they are 'considering' but they do not appear to me to be ones which 'relate to their functions'. However, if they do fall into that category, it would seem that the Trust are obliged to 'have regard to preserving' any public access. The provisions do not seem to me to imply that public access is permissive *per se*. It simply indicates that they should seek to preserve any access which already exists.

75. Consequently I find that the use of the route between Points B and D has been as of right throughout the period of 20 years dating back either from 2008 or 1999.

76. With regard to the route between A and B, whilst the user may have been as of right, it has not been exercised for the requisite period of 20 years. Nevertheless, I have examined below in paragraphs 131-133 whether or not this section could have been dedicated at common law over a shorter period.

77. Since this appeal does not relate to the route in use at the northern end prior to the 1999 Application, it is not appropriate for me to reach a conclusion on whether there was use of that route for a period of 20 years and I make no finding on that. Several of the user witnesses do make reference, however, to the use of that route before it was obstructed.

[6] My underlining

Whether there has been sufficient evidence of a lack of intention to dedicate a highway during the relevant period

78. Since dedication of a highway can only be made by a landowner, it follows that any lack of intention must also be demonstrated by the landowner.

79. No incontrovertible evidence has been provided to demonstrate that there was a lack of intention to dedicate a highway over the appeal route between Points B and D until the use of it was brought into question in 2008, notwithstanding that the northern access to it was not in existence for the whole of the relevant period. The signs and locked gates referred to by the Trust and the BWML relate to other sections of the claimed routes, and there is no evidence that adjoining residents own the land across which the claimed route runs.

Route 2

Date on which the use of the path was brought into question

80. In the 2011 application, the equivalent of Route 2 did not reach the highway at its western end, but joined Route 1 at the equivalent of Point C on the reference map. At its eastern end, Route 2 did not go beyond the equivalent of Point Y. The 2014 application shows Route 2 slightly differently at its western end, joining the highway at Point D with no link to Route 1. (The link between Points C and E does not form part of the second application.) It also shows Route 2 as a through route going beyond Point Y to meet School Lane at Point J. The 1999 application also showed a through route (including access to the highway at the same point) but it took a slightly different path through the Marina.

81. It would appear, even at the time of the 2011 application that the route towards the Marina was obstructed by fencing at Point Y. Witness statements from employees of the Marina both suggest that the fence was erected by the previous owner in 1990 and that there was a lockable gate in it.

82. The appellant relies on user evidence to demonstrate that there was significant use of the route prior to 1990, and seems to suggest that users claimed to have continued to use Route 2 up until 2013. But a closer examination of the evidence produces a slightly different picture.

83. I note that the 2001 Committee Report relating to Mr Wilson's application of 1999 describes the condition of the claimed routes following a site visit. At the boundary of the Marina land, a wooden fence with a gap in it is described, together with a notice indicating that the land beyond was private. Visitors were requested to report to reception. This does not accord with the pictures attached to the statements of Mr Bostock and Mr Cunliffe which purport to show the fence and gate erected in 1990 but which show a metal palisade fence with a spiked top and a locked metal gate and not a wooden structure.

84. I note from the user evidence form of Mr Barry Hayes (2011 Application) that he describes a spiked fence having been erected during the tenancy of the previous owner which prevented access around the basin to the Marina access drive and I take this to be the same fence as in the photographs.

85. Looking at the evidence forms from the 1999 application I note that several people make mention of new gates across the Marina access drive having been erected in about 2000 (the forms are dated 2001, post-dating the

original application and must have been submitted slightly later) and describe it as being open during the day but closed from 5.00 pm.

86. Three user evidence forms (David Holmes, Mr and Mrs Marsden and Charmaine Roden) also refer to a fence having been erected at the boundary of the Marina 'recently'. Mr John Chester also refers to this same fence in his user evidence form for the 2011 application, and remarks that '*Residents can now not pass this point*'. He states that it was erected in 2000 and he includes a photograph of this location (Point Y). Mrs Gweneth Chester (the appellant) confirms the existence of this structure in her form and states that '*Only Marina card-holders can now pass beyond this point through a steel padlocked doorway*'. The existence of this fence is confirmed by several other witnesses.

87. I conclude that the fence at Point Y was originally wooden and had either an openable gate or a gap in it, and it was in position until at least 14 March 2000 (the date of the officer inspection in relation to the 2001 Committee report). Sometime later in 2000, the present metal fencing was erected and the locked gate in place possibly at about the same time as the gate across the Marina access drive.

88. This appears to be the structure in the photographs supplied by Mr Bostock and Mr Cunliffe so I must place more weight on the evidence of the users on this matter. I conclude that the use of Route 2 was brought into question in 2000.

89. I acknowledge that this route (with slight variations across the Marina land) was also brought into question by Mr Wilson's application in 1999 and so it would also be appropriate to consider a 20 year period dating back from his application.

Whether there has been use of the way by the public during that period

90. The user evidence in respect of this route requires careful analysis, not least because the user forms relate to the use of several parts of the four claimed routes. Nevertheless there are a number of witnesses who clearly refer to the use of a route from the School to the Marina or boatyard, and also refer to the newly erected gates across the access drive. This amounts to a smaller number of people than the number of people providing evidence for, say, Route 1 or even Route 4, but nevertheless is sufficient for me to conclude that they are representative of the public.

Whether there has been uninterrupted use as of right throughout the relevant period

91. The site inspection made by the Council on 14 March 2000 reported that there was a clear walked route over the grassland and woodland to the east of the school. They report two slightly different routes at one point, which diverge for 25 metres and then re-join, and I take these to be the same route to all intents and purposes. The path is reported as passing through a gap in a wooden fence which appears to have been deliberately left to permit passage, since there was a notice indicating that visitors should report to the Marina reception.

92. The report also records that once on the Marina land, there was a route running slightly further south across infilled land in addition to the 1999

Application route. This would seem to accord with the route shown in the 2014 Application. There appears to have been no barrier on the equivalent of Route 2 until Point Z on the current claim map where the sliding metal barriers were recorded. They were open at the time of the inspection, but there is witness evidence from users that they were locked after 5 pm. each day. These are the gates which the user evidence suggests were erected in about 2000 but may have originated slightly earlier, since the site inspection was made quite early in the year.

93. There is no evidence that user of the route was by stealth, nor that it was by any form of force. I have already concluded that the evidence of permission being relied upon by the Trust is perhaps misplaced (see paragraph 74 above).

94. The existence of the notice at the gap in the wooden fence describes the land as private, but since most public rights of way cross private land this does not in itself justify the inference to be drawn that use of the path was by permission. The reference to visitors having to report to reception is likely to have been addressed to boat users who were using the Marina facilities. There is no evidence that anyone was prevented from walking across the boat yard or along the access drive, until the lockable gates were erected. I do not consider that the existence of the notice equates to user by permission.

95. The earliest use of a route equating to the majority of Route 2 dates from the 1930s, but I can place no weight on that evidence as also relating to the use of the access drive section. However, there are a number of witnesses who refer to use of the actual access drive and who mention the recently erected electric gates. The earliest of these is Mr Hayes (use from 1960s onwards) who, although providing an evidence form for the use of the route claimed in the 2011 Application,[7] makes clear reference to the fact that he was previously (i.e. before 2000) able to walk back to the road along the access drive. Relying only on other users whose forms make clear reference to the use of the Marina access drive, and to the gates, I can identify three witnesses who provide evidence of use of the claimed routes since the 1970s; three from the 1980s, and two from the 1990s.

96. That is not to say that other people have not used that route, but their evidence is not clear enough to say. Nor is it to possible to be absolutely sure that those witnesses who clearly did use the access drive actually used it from the beginning of the period of their claimed use.

97. Of the nine people I can identify with reasonable confidence, five of them claim to have used it for a period dating from at least 1980 (i.e. 20 years prior to 2000) and four of them for period dating from at least 1979 (i.e. 20 years prior to the 1999 Application. In both cases there are no gaps in the years of usage when the nine witnesses evidence is amalgamated to show total user.

98. Unfortunately the evidence does not allow me to confidently conclude that other people used the access drive, but it does allow me to conclude that the identifiable use of that section was user as of right throughout the relevant period of 20 years dating back either from 1999 or 2000.

[7] Which terminated at the equivalent of Point Y due to the 2000 obstruction

99. Nevertheless, I can only rely on the user between points Y and G as shown on the 2014 application by reference to the evidence of the 2014 user evidence forms. This is because the 2011 Application did not include this part of the route, and the 1999 Application followed a slightly different route across the boat yard.

100. Only six of the witnesses can be identified as claiming use of this section of Route 2 and the earliest claimed use is 1953 (Mr G Porter). Mr Miller claims use from 1960; Mr Marshall from 1970 and Mr and Mrs Chester from 1979. All of these periods of use commence more than 20 years before either of the two dates which I have identified as being the appropriate date that the use of the path was brought into question.

101. If one were able to consider the evidence of use from the 1999 Application, these figures would be considerably increased, but as the line of the path claimed at that time varied a little, without further investigation it would not be safe to rely on it.

102. Nevertheless I am satisfied that the use I have been able to identify confidently has been uninterrupted for a period of 20 years whether dating back from 2000 or 1999, and it has been exercised as of right.

Whether there has been sufficient evidence of a lack of intention to dedicate during the relevant period

103. The notice referred to in paragraph 94 above does not contain enough information to clearly evidence a lack of intention to dedicate a public right of way. It merely stated that the land was private, which is the case with the majority of land crossed by public rights of way.

104. The invitation to report to the marina reception would, in my view, be likely to remind boat owners to report and pay their mooring fees. Clearly the word 'private' would have reinforced the fact that the moorings were not public (i.e. free) ones.

105. I therefore find that this notice does not constitute sufficient evidence of a lack of intention to dedicate a public right of way on foot during either period.

Route 3

Date on which the use of the path was brought into question

106. The 2011 application did not include the line of Route 3. For evidence of use of this path I must look at the 1999 Application forms and the 2014 Application forms to identify an event which brought the use of it into question. This requires care as not all the users who have provided evidence in both cases have used all the paths which were the subject of the particular application. I have therefore relied only on those forms where it was clear enough for me to infer use of the equivalent of Route 3.

107. Many users simply refer to walking all around the basin, and whilst that is sufficient to show claimed use of Route 3 from the Marina to Brows Bridge, it is not helpful for that part of Route 3 from School Lane to the Marina via the access drive. However some users make specific mention of the erection of the gates on the drive in approximately 2000 as I have mentioned in relation

to Route 2 and I therefore conclude that the use of this route was also brought into question at that time.

108. In addition, Mr Wilson's 1999 claim also included this route as part of his route 2. It is therefore appropriate to consider a 20 year period dating retrospectively from that time.

Whether there has been use of the way by the public during that period

109. Given that so many of the witnesses refer to the fact that they used all the claimed routes to walk 'around the Basin' or words to that effect, it would be unreasonable to conclude that there had not been any use of Route 3 as part of that circuit. I am satisfied that the evidence shows that use of Route 3 has taken place, particularly that stretch between the boat yard and Brows Bridge. There is no evidence to suggest that the witnesses who have provided evidence of use are not representative of the public.

110. Route 3 also includes the section of Route 2 between Points J and G, on which I have already concluded that there had been user by the public.

Whether there has been uninterrupted use as of right throughout the relevant period

111. Even though the route was somewhat overgrown in places at the time of the Council's site inspection in March 2000, the officer concluded that most of it could be followed apart from a short stretch which was, in their view, completely overgrown and blocked by a locked gate at Canal Cottage. I note that at that time, the gate at Brows Bridge, which is now locked, was open.

112. Since Canal Cottage is derelict and has not been lived in for several years (Mr Caton in his 2011 user evidence form states that he was refused a new lease on the cottage by BW prior to the sale of the land and property to the Marina), the path alongside the canal is likely to have become more overgrown since it was not being used regularly to access the cottage. It is not difficult for a route which is only used irregularly to quickly become overgrown and appear to be impassable.

113. I note that Mr R Wilson, on his evidence form from his 1999 application, indicated that the gate beside Canal Cottage and the gate at Brows Bridge were never locked, but that access had become a little restricted for the past two years.

114. Given the obviously difficult access by 1999, it is difficult to rely on evidence from the user evidence forms where the witnesses refer to one or more routes, especially where they claim use up to and beyond 2000. I think, given the condition of the route, it is unlikely to have received much, if any use, after 1999.

115. Neither Mr Cunliffe nor Mr Bostock, who provided evidence on behalf of the landowners, recalled ever having seen anyone use the path between the boat yard and Brows Bridge, but that is not the same thing as saying no-one ever used it. The evidence forms suggest that many people used to walk round the Basin on summer evenings and weekends, and those are the times when employees of the marina were much less likely to be present.

116. On balance, I am satisfied that there is more likely to have been a continuous use of Route 3 up to 1999, but not necessarily up to 2000.

117. There is no record of any user by force, and just because no-one was seen does not equate to user by stealth. Given my conclusions in paragraph 74 above about notices, and the absence of any other form of permission, I conclude that use has been exercised as of right.

Whether there has been sufficient evidence of a lack of intention to dedicate during the relevant period

118. Until the gates were locked beside Canal Cottage and at Brows Bridge, there is no other evidence of any actions taken by the landowner. I consider that there is insufficient evidence of a lack of intention to dedicate the route during the 20 years prior to 1999.

Route 4

Date on which the use of the path was brought into question

119. There is no evidence that use of this route has ever been brought into question, other than by the application itself. Therefore in respect of Route 4 I consider one appropriate date would be 2014 (the route did not form part of the 2011 claim). In the case of the earlier application by Mr Wilson, the appropriate date must be 1999, as before. The relevant 20 year periods are therefore measured retrospectively from 1999 or 2014.

Whether there has been use of the way by the public during that period

120. There has been no challenge to the evidence of use of this path. The user evidence suggests use of this route going back to at least the 1940s in some cases. I am therefore satisfied that the way has been used by the public during the relevant 20-year periods identified above and for many years prior to that.

Whether there has been uninterrupted use as of right throughout the relevant period

121. As above, there is no evidence that usage has been interrupted in any way during the relevant 20 year period. Neither is there any evidence of user by force or by stealth.

122. I have set out the arguments put forward on behalf of the Trust at paragraph 73 above. It is specifically claimed, in relation to those arguments, that use of the towpath is automatically permissive.

123. The Trust indicates that information on their website sets out the permissive basis on which the towpath can be used by the public, and that there is a 'Towpath Code' by which users must abide. The Trust also states that the towpath can be closed to facilitate maintenance works as required.

124. No evidence of any specific towpath closures has been provided to me.

125. The Trust has not submitted a copy of the information available on the website, nor a copy of the 'Towpath Code'; and neither have I been advised what information, if any, is available on site to indicate that use of the towpath is permissive in any way. I have no information as to how the

generic provisions of the 1995 Act apply in this specific case, where use of the path has been enjoyed for many years prior to 1995 according to the user evidence. As I have already indicated, it would seem that the duty set out in the paragraph on which they rely applies to the Trust when formulating or considering proposals relating to their functions, neither of which seems to me to be relevant in this instance. The provisions do not seem to me to automatically imply that public access is permissive.

126. The appellant has included in their latest submission some extracts from a publication entitled 'The Complete Guide to the Lancaster Canal'. I do not know the provenance of that document but I note that on page 18 of the publication there is a section on Walking the Lancaster Canal. It states:

'The use of the towpath by walkers is actively encouraged by British Waterways and others, despite the fact that much of it is not a public right of way.'

A few lines further on it states:

'North of Tewitfield the towpath continues all the way to Canal Head in Kendal, the section in Cumbria being a definitive footpath.'

127. In the absence of any details of its contents, I do not consider that the existence of a behavioural code necessarily renders use of the towpath permissive. From the above example it is clearly possible for the towpath to be a public right of way and I do not consider that the 'active encouragement' of walking can be necessarily construed as permission.

128. I agree with the appellant that any such permission needs to be communicated to the users of the path concerned.[8] That may or may not relate to notices displayed on the land, but in the absence of such information I consider that the matter is open to argument. On balance, therefore, I consider that, on the evidence available, the use of the path has been as of right.

<u>Whether there has been sufficient evidence of a lack of intention to dedicate during the relevant period</u>

129. In the absence of evidence of overt actions to inform the users of the way with regard to the intentions of the landowner, or lack of them, I cannot find that there is sufficient evidence of a lack of intention to dedicate the way as a public footpath during the relevant 20 year period dating back either from 2014 or 1999.

Additional route between Points C and E

130. As I have already mentioned, although this link was part of the 2011 application, it did not form part of the 2014 application, nor was it included in the 1999 application. I do not consider that there is sufficient clear evidence of use of that section for me to be satisfied that it has been used for a full period of 20 years dating back from 2014, particularly as I have already concluded that the use of both Routes 1 and 2 was brought into question in 1999 and 2008. It seems likely that the use of C-E only came about at the time of the 2008 obstruction to Route 1, and that consequently there is

[8] See decision in R (Godmanchester and others) v SSEFRA and others [2007] UKHL 28

insufficient evidence of use to reasonably allege that it is a public footpath under the statutory provisions or, indeed, at common law.

Common Law dedication

131. Dedication at common law requires either that there be evidence of an express intention to dedicate a way as a highway, together with the acceptance of that dedication by the public; or alternatively, sufficient evidence from which it is possible to infer that a dedication must have taken place. Whilst user can be evidence that supports a dedication, it does not raise a presumption as such. The onus is on the person asserting that the right exists to show that the facts overall show that an inference can be drawn that there was an intention to dedicate a highway.

132. There is no evidence of an express dedication for the majority of the routes I have been considering. However the path between Points A and B, which has not existed for the full extent of either of the relevant 20-year periods, does appear from the photographs and the evidence to have been set out deliberately for public use, and to provide an access to the land beyond quite separately from the children's play area.

133. I think there is consequently an arguable case that the Route 1 between Points A and B has been dedicated as a public path at common law.

Conclusions on the evidence

134. I consider that there is some conflicting evidence and some legal points which are arguable either way. However, taking all the evidence together I consider that there is sufficient evidence of use that it is reasonable to allege that a right of way exists over each of the claimed routes (apart from C-E) and no incontrovertible evidence that it could not.

135. I do not consider that the evidence of use for the section between Points C and E is sufficient to permit a reasonable allegation to be made.

Conclusions

136. Having regard to these, and to all other relevant matters raised in the written representations I conclude that the appeal should be allowed in part.

Formal Decision

137. The appeal is dismissed in respect of the route between Points C and E.

138. The appeal is allowed in respect of the remaining routes.

139. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Lancashire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the Definitive Map and Statement for the area to show as Public Footpaths the following routes:

Route 1 from Point A through Points B and C to Point D;

Route 2 from Point D through Points E, F, Y, G, and Z to Point J;

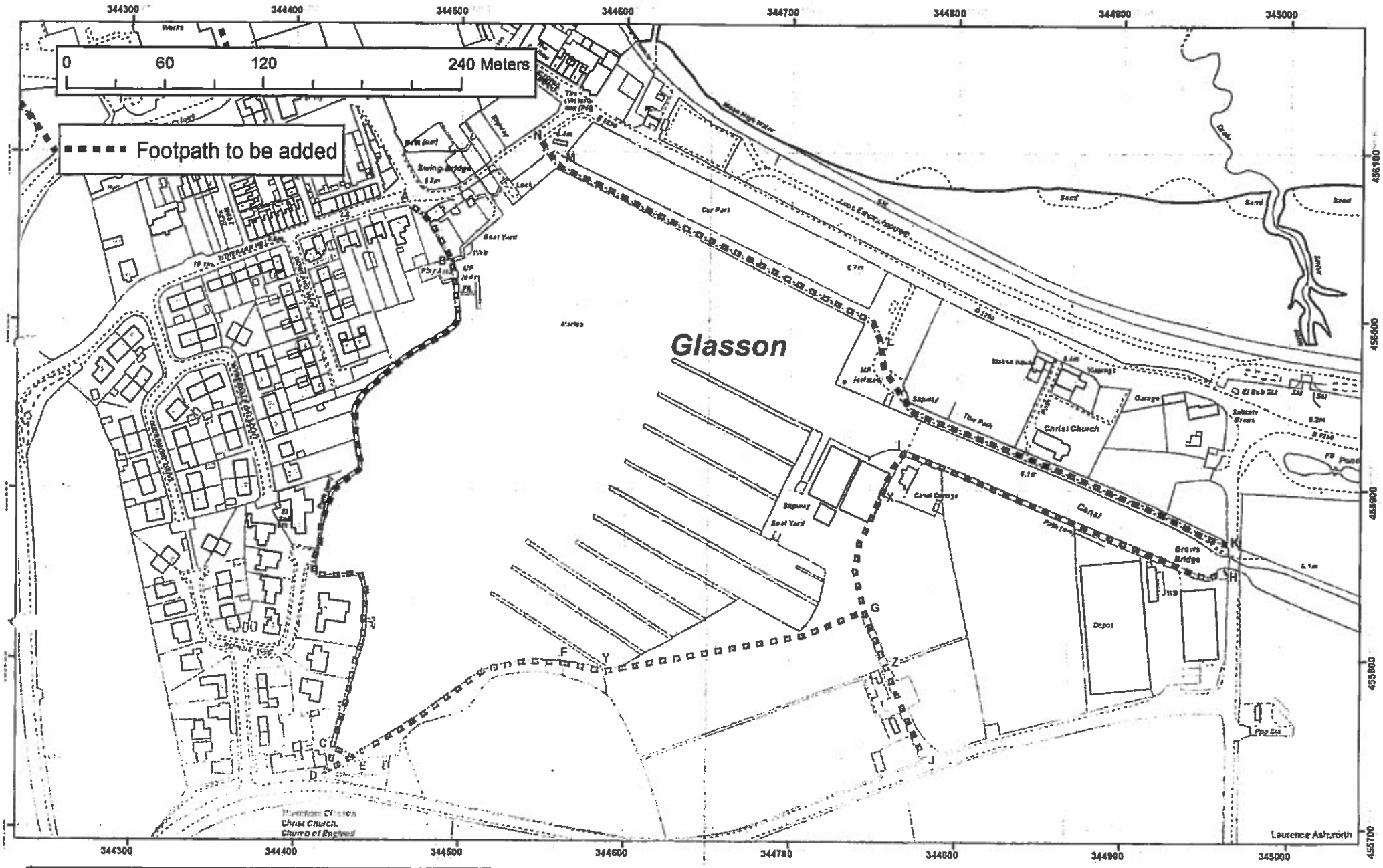
Route 3 from Point J through Points Z, G, X, and I to Point H;

Route 4 from Point K through Points L and M to Point N.

140. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Helen Slade

Inspector



Lancashire County Council	Andrew Mullaney Head of Planning and Environment	Wildlife and Countryside Act 1981 Addition of public footpath around Glasson Basin, Thurnham, Lancaster	1:2000

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