



COMMONS REGISTRATION ACT 1965

Reference Nos. 212/D/257 to 260
inclusive

In the matter of Gernon Bushes,
Theydon Gardon and Epping Town,
Epping Forest District, Essex

DECISION

These disputes relate to the registration at Entry no. 1 in the Land Sections of Register Unit No. CL.446 and No. VG.233 in the Registers of Common Land and Town or Village Greens) maintained by the Essex County Council and are occasioned by CL.446 Objection No. 84 and VG.233 Objection No. 85 both made by the Chisenhale Marsh Estates Company and noted in the Registers on 2 December 1980 and by these two registrations being in conflict.

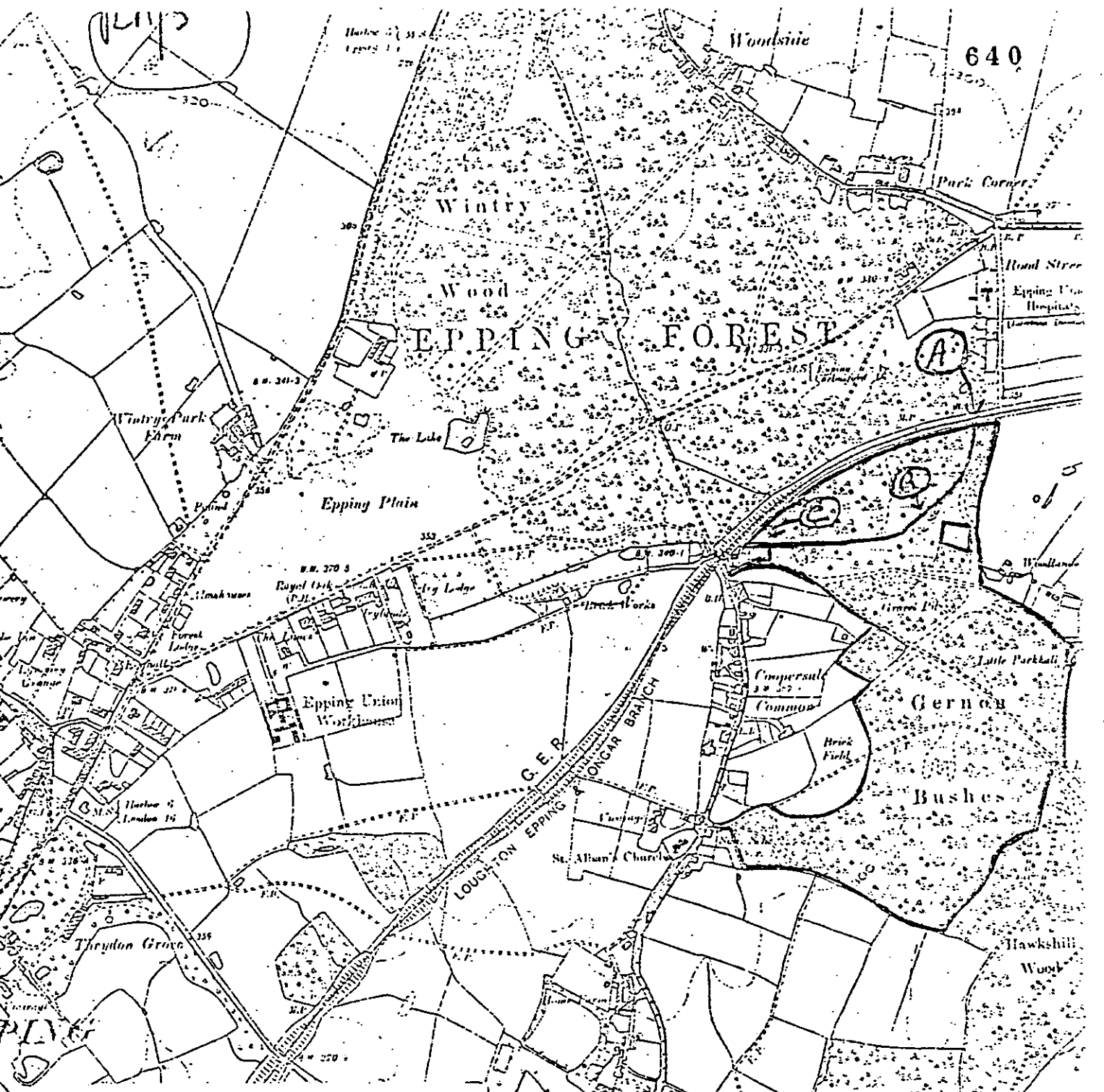
I held a hearing for the purpose of inquiring into the dispute at Chelmsford on 11 November 1981. At the hearing (1) The Ramblers Association on whose application both the registrations were made, were represented by Mr R J Carpenter, their Footpaths Secretary for the Chelmsford District; (2) Chisenhale Marsh Estates Company (incorporated under the Companies Acts) were represented by Mr H E T St John chartered surveyor of Cluttons, Chartered Surveyors of London SW1; and (3) Essex County Council as registration authority were represented by Mr S Gardner administrative assistant (countryside) in their Chief Executive and Clerk's Department.

The land ("the Unit Land") in these Register Units (the same in both cases) is an irregularly shaped tract situated between Coopersale Common (a village) on the west and the M11 newly constructed motorway on the east. From north to south it is a little over $\frac{1}{2}$ a mile long and from east to west nearly everywhere about $\frac{1}{4}$ of a mile wide.

The grounds of the Objection are: "That the land was not common land at the date of registration". At the beginning of the hearing under regulation 26 of the Commons Commissioners Regulations 1971, I allowed as an additional ground of objection that the land was not a town or village green at the date of registration.

Mr Carpenter in the course of his oral evidence produced the documents specified in Part I of the Schedule hereto, the letters (RA/9 and RA/10) from The Revd. R J Harding and Mr R J Willis being put in as written evidence by the writers. After producing the 1897 OS map (RA/5), he said that in his view a part of the Unit Land ("the North Part") which is comparatively small (about $\frac{1}{7}$ th of the whole) and near the north boundary, is not common land because it is historically part of Epping Forest, although it might be a town or village green. The plan (the "Decision Plan") at page 2 of this decision is an extract from this 1897 map and on it I have marked with black lines the boundary of the Unit Land and also so marked the division (the line ABC) between the North Part and the remainder of the Unit Land.

In support of the Objection, oral evidence was given by Mr H E T St John, in the course of which he produced the documents specified in Part II of the Schedule hereto; and also by Mr Michael Henry Clay who is now and has been since July 1952 the Farm Manager of Mr H A Chisenhale-Marsh.



COMMONS REGISTRATION ACT 1965

Re: Gernon Bushes, Theydon Garnon
and Epping Town, Epping Forest
District, Essex.

Ref:- 212/D/257-260

This is the Decision Plan referred
to in and being page 2 of the
decision dated 31 March — 1982
and made by the Commons
Commissioner in this matter.

a a. Bode Jelle

Commons Commissioner



On the day after the hearing, I walked over much of the Unit Land, it having been agreed by Mr Carpenter and Mr St John that I might do so unattended.

Mr Carpenter at the beginning of his evidence said that it maybe that part of the Unit Land has since the registration (26 February 1970) been buried under the M11 motorway and that he believed some exchange land was given. It maybe that some of the fenced motorway verge is over part of the Unit Land. My impression during my inspection was that this part, if it exists at all, is compared with the whole very small, and may in relation to the substantial questions raised in these proceedings be neglected. As regards this part and the exchange land if any, I assume that after my decision has become final an appropriate new registration or alteration in the Register will be made.

I am concerned to say whether the Unit Land is wholly or in part either (a) "town or village green" or (b) "common land" within the meaning of the 1965 Act; the definition of (a) being, so far as now relevant: "land on which the inhabitants of a locality have a customary right to indulge in sports and pastimes"; and of (b) so far as now relevant: "waste land of a manor not subject to rights of common but does not include a town or village green." Although for the purposes of registration under the 1965 Act, land cannot be both a town or village green and common land, apart from the Act, land may be both waste land of a manor and subject to a customary right of recreation. I consider first the manorial position.

In the 1838 Tithe Award for the parish of Theydon-Garnon (RA/1) the Unit Land (except the North Part) is in the Schedule described (with other land): "(Owner and Occupier) John Rutherford Abdy Esq. Lord of the Manor; (No.) 51; (Description) Forest; (Cultivation) Waste; (Area) 102a. 3r. 10p". Mr Carpenter traced the Lordship of the Manor of Theydon-Garnon in 1848 to T N Abdy Esq (RA/3), in 1863 to Thomas Coxenhale Chisenhale-Marsh (RA/4), in 1915 to William Swaine Chisenhale-Marsh (RA/4), in 1937 to Hugo Atherton Chisenhale-Marsh (RA/6). Mr St John traced the ownership of the Unit Land (C-M/5) from Mr Thomas Coxhead Chisenhale-Marsh (he died 3 January 1875) who by his will (stating its effect shortly) devised his real estate to his son Mr William Swaine Chisenhale-Marsh (he died 7 October 1929) and from him under a vesting assent dated 12 July 1937 made by his personal representatives to Mr Hugo Atherton Chisenhale-Marsh. The Unit Land is included in the parcels of the 1937 assent under the words "... mansion house known as Garnes Park and ... lands ... delineated on the plan marked Gaynes Park Estate annexed hereto ... containing by estimation 969 acres or thereabouts ...".

For land to be within the words "of the manor" in the definition, it must at the date of registration be "connected" with a manor, see re Box 1980 Ch.180. The inclusion in the parcels of the 1937 assent of: "manor ... of Gaynes Park, Theydon Garnon and Hemmalls is evidence enough of this connection; a conclusion, I would perhaps have reached otherwise from the documents produced by Mr Carpenter. And this conclusion is not affected by the agreement dated 21 September 1937 by which Mr H A Chisenhale-Marsh sold the Unit Land and the said Manor (with the rest of the Gaynes Park Estate) to Chisenhale-Marsh Estates Company (although all the purchase money due has been paid there has been no conveyance of the legal estate).

As to the Unit Land being "waste land" within the said definition, Mr Carpenter relied primarily on its present appearance. Generally it is an area covered by trees of which the majority are pollarded hornbeam; it was agreed that they were pollarded or last pollarded before anyone now living could remember and that the appearance of the trunks showed them to be at least 200 years old (perhaps older). From



Coopersale Common (the village) there is easy access on foot to the Unit Land at its northwest and southwest corner; access from other places is possible but perhaps only by the tolerance of the landowners between the Unit Land and the highway. For those desirous of walking for pleasure over the Unit Land, the pollarded hornbeam are a striking feature, and the views and surroundings are nearly everywhere attractive. There are other trees: oak, mature or approaching maturity in numbers enough to add considerably to the value of the Unit Land and in places to break up the monotony of the hornbeam and in other places to be pleasurable as oak woodland. The few conifers and the considerable number of young birch although providing a welcome variety are not numerous enough or old enough to be of significance upon any question with which I am concerned.

As a general description of the Unit Land, Mr Clay said: "it is essentially a natural regeneration wood where the trees are already growing tall and clear"; the timber activities he mentioned were the seasonal cutting of holly (for St Margaret's Hospital, Epping) and the intermittent cutting down of mature oak trees. No tree had been planted during his time. He thought that historically the hornbeam had been cropped (above the pollards) for charcoal, when and by whom he could not say. In my view an attribute of waste land is that the trees and vegetation on it are self regenerated, and the circumstance that the trees in the course of time become valuable and worth felling for their timber does not change the land into something which is not waste land and I decline to infer that the Unit Land was not at the date of registration waste land merely because it is possible that many years ago the hornbeam have been cropped for burnt charcoal.

Rev. Harding who has lived in Coopersale as vicar for the past 20 years says: "all the years which I have been in Coopersale, riders have exercised their horses on the common land and also used the bridle paths which lead to Toot Hill etc. My wife and I and friends have frequently used common land for riding and walking and for exercising our dogs. People still do so to this day and so far as I know there has never been any doubt as to part of the forest being common land". (RA/9)

Mr Willis who has lived in Coopersale Common for 44 of his 53 years said he had always had the run of these woods and played in them with other children (RA/10). Quite apart from these statements, from the numerous well marked random footpaths and its easy access to Coopersale Common (the village) I infer that many people frequently walk over the Unit Land for pleasure. Mr St John contended that those who did this were tenants of the Estate or members of their families and that accordingly their activities were not considered objectionable by his clients and that such activities could not be as of right. I reject the suggestion that walkers were always tenants of the Estate or members of their families in the absence of any evidence pointing in this direction; many of them may have been, but the parts of Coopersale Common not included in the Estate and many from outside the village might come there for the pleasure of walking on the Unit Land. I am not I think concerned whether if assuming the Unit Land is waste land of the manor within the meaning of section 193 of the Law of Property Act 1925 the public have a right of access for air and exercise; nor am I, I think concerned to determine whether walkers on the Unit Land did so pursuant to any right; the relevant fact is that many people do and have walked over the Unit Land and such walking is one of the attributes of waste land. This and the appearance of Unit Land is I think enough to place on the Objectors the burden of proving to the contrary.

As to this mention was made of: (a) about 20 years ago some oak trees on the Unit Land were felled for the purpose of making a farm building elsewhere on the Estate (southeast of the Unit Land); (b) shooting rights have been exercised by the



owners; (c) the owners have granted electricity way leaves; (d) there was a gate and a notice "private road" (RA/11/3) discouraging unauthorised vehicular access over the Unit Land; (e) the Unit Land is included in the Tree Preservation Orders claimed by the Estate and dedicated woodlands owned by the Estate. As to (a) the stumps of the felled trees are still visible; the area (near the M11) is too small compared with the whole of the Unit Land to be significant. As to (b) the pheasants are reared in the wild on the Unit Land; I had no evidence about the shooting and land does not I think cease to be waste land merely because it is sometimes shot over. As to (c) I have no details and the circumstances that rent was received from Forest Cottage (not included in the registration) is I think irrelevant. As to (d), there is a track (usable by motor cars) which runs from the northwest corner of the Unit Land to almost due east and just south of the North Park and then turns southwards towards what was the Lodge and is now a newly constructed foot bridge over the M11 motorway; in my view the gate however obstructive it may have been to vehicles would not have deterred walkers. As to (e) Preservation Orders and Woodland Dedication Agreement (or Schemes) cannot by themselves change, although things done under them might change waste land into occupied and cultivated land; but of any such things I have no evidence.

My conclusion is that in accordance with its present appearance the Unit Land is and at all relevant times always has been waste land.

To be waste land of a manor within the meaning of the 1965 Act, I doubt whether it is enough for land merely to be waste land and to be owned by a person who happens to be lord of a manor unless it can also be inferred the land was in accordance with the customs of the manor treated when such customs were operative as regulated by such customs. But as regards this, from the Tithe Award, the manorial documents produced and the general appearance of the Unit Land I infer that the Unit Land except the North Part is historically waste land of the manor of Theydon Gernon and that to this extent at least the claim put forward by the Ramblers Association succeeds.

It may be that because the Unit Land (except the North Part) is waste land of a manor that the public have under section 193 of the Law of Property Act 1925 rights of access for air and exercise. There was some discussion at the hearing as to whether this land was at the commencement of this Act situated within an urban district or was immediately before 1 April 1974 within such a district so as to bring into operation section 188 of the Local Government Act 1972. I express no opinion as to this. Land to which the public have rights of access for air and exercise under the said section 193 is not within the definition of the 1965 Act of a town or village green for this reason only; walking over land for air and exercise is not a "pastime" within the meaning of the definition and even if it was, I am not satisfied that the walking such as was mentioned by the Revd Harding and can be inferred from the appearance of the Unit Land, can be ascribed to any customary right. I conclude therefore that the claim of the Ramblers Association that the Unit Land apart from the North Part is properly registerable as a town or village green fails.

As to the North Part Mr Carpenter drew my attention to the evidence given to Sir George Jessel MR in *Commissioners of Sewers v Glasse* (RA/2) that on this Part before the construction of the Ongar Railway there were gravel pits. The depressions I saw during my inspection on the North Part may have been due to former gravel pits. On it there were oak trees (no hornbeam). Unlike the rest of the Unit Land



there were few, if any, random footpaths and I am unable to infer that any significant use of it is made by walkers. The information put before me at the hearing by Mr Carpenter justified his abandonment of the claim of the Ramblers Association that the North Part is common land within the 1965 Act definition. In my opinion it is no more within the town or village green definition than the rest of the Unit Land.

At the hearing Mr Gardner pointed out that the North Part is within the area of Epping Town Council and this was confirmed in a County Council letter dated 16 November 1981. There is nothing in the Register to suggest that any part of the Unit Land is or might be the concern of Epping Town Council, and for this reason no notice of my November 1981 hearing was sent to them in accordance with the usual practice in the office of the Commons Commissioners. Under the Commons Commissioners Regulations 1971, the Epping Town Council had no right to any such notice, see regulation 14; although they had under regulation 19 an entitlement to be heard at the hearing and regulation 21 gives the person entitled to be heard a right to apply to set aside the decision made in his absence. In these unusual circumstances, I consider it would be unjust if this decision became final as regards the North Part until Epping Town Council have had an opportunity of setting it aside and re-opening the hearing. Accordingly I give to Epping Town Council liberty to apply within two months of a copy of this decision being sent to them, to have the hearing re-opened and this decision set aside. Any such application should be in writing (it may be by letter) to the Clerk of the Commons Commissioners and a copy of it sent to Cluttons Chartered Surveyors of 5 Great College Street, London SW1 as agents for Chisenhale-Marsh Estates Company and to Essex County Council as registration authority.

For the above reasons, I refuse to confirm the registration at Entry No. 1 in the VG.233 Land Section and I confirm the registration at Entry No. 1 and the CL.446 Land Section with the modification that there be removed from the Register the part of the land in this Register Unit in this decision called the North Part being the part north of the line ABC marked on the Decision Plan. But such refusal and modification so far as it relates to the North Part is conditional upon no application has been made by Epping Town Council to re-open the November 1981 hearing and to set aside this decision pursuant to the liberty hearing before granted to them.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

TURN OVER for
pages 7 and 8 (SCHEDULE)



SCHEDULE
(Documents Produced)

Part I. On behalf of the Ramblers Association

RA/1	1838	Extract (certified by County Archivist) from Tithe map and Award for the parish of Theydon Garnon.
RA/2	—	Extract from evidence of George Hine in proceedings before Sir George Jessel in the case of Commissioners of Sewers of the City of London v Glasse (Vol 1 of report at page 745: original two volumes in County Records folio size about 8 inches thick). Note: Judgement reported in Law Reports: (1872) 7 Ch.456 and (1874) 19 Eq. 134.
RA/3	1848	Extract from History of County of Essex by William White pages 440 and 441 "THEYDON GARNON or Theydon Gernon.
RA/4	—	Extract certified by County Archivist of the Court Book of the Manor of Theydon Garnon.
	10 February 1865	First General Court Baron of Thomas Coxhead Chisenhale-Marsh, Lord of the Manor.
	21 February 1865	General Court Baron ditto
	11 November 1902	Jane Hannah Smith admitted as a tenant of two enclosures.
	5 March 1915	Licence by William Swaine Chisenhale-Marsh as Lord of the Manor to Harry Adam Smith to erect posts and chains at the entrance of Bridge Farm.
	28 July 1925	Licence by William Swaine Chisenhale-Marsh to Cyril Freshwater pass and repass over parts of Waste of Manor.
RA/5	1897	OS map 2nd edition, surveyed 1872-1874, revised 1893.
RA/6	1937	Kelly's Directory of Essex, pages 515 and 516, Theydon Garnon.
RA/7	1956	Extract from Victoria History of the County of Essex with letter dated 14 December 1970 from Editor, being pages 258 to 261.
RA/8	8 February 1973	Copy report to Secretary of State for the Environment by Inspector at a public local inquiry held on 24 January 1973 as to acquisition of land for M11 motorway.



RA/9	9 Marsh 1981	Letter from Revd R J Harding, vicar of the Coopersale Parish.
RA/10	8 November 1981	Statement by Mr R J Willis.
RA/11	—	Photographs of the Unit Land taken by the witness Nos. 1 to 5 and 8 to 11.
RA/12	—	Map indicating position from which photographs were taken.
RA/13	1976	OS: 1/25,000 series; Epping Sheet TL40.

Part II. On behalf of Chisenhale-Marsh Estates Company

CM/1	—	Plan showing present boundaries of the Gaynes Park Estate comprising about 1,135 acres.
CM/2	—	Statement of evidence of Mr H E J St John.
CM/3	22 May 1970	Letter from Mr Roger Kemsley to Mr P L H Hills (then a partner of Cluttons).
CM/4	13 May 1963	Order amending Tree Preservation Order No. 3/50 11 November 1964.
CM/5	194-	Abstract of the Title of Chisenhale-Marsh Estates Company to freehold property known as the Gaynes Park Estate commencing with the will dated 19 May 1974 of Thomas Coxhead Chisenhale-Marsh and ending with an agreement of receipt dated 21 September 1937.
CM/6	—	Plan about 6 ft x 6 ft. on scale of 25" = 1 mile, showing the Estate.

Dated this 31st — day of March 1982.

a. a. Baden Fuller

Commons Commissioner