

COMMONWEALTH OF VIRGINIA

Rec'd  
3/21/22  
*[Signature]*



SUMMONS – CIVIL ACTION  
RULE 3:5; VA. CODE § 8.01-2

Case No. CL22000044-00

CRAIG COUNTY CIRCUIT COURT

PO BOX 185, NEW CASTLE, VA 24127

ADDRESS

TO:

VIRGINIA MARINE RESOURCES COMMISSION  
BUILDING 96, 380 FENWICK ROAD  
FORT MONROE, VIRGINIA 23651

The party upon whom this summons and the attached complaint are served is hereby notified that unless within 21 days after such service, response is made by filing in the clerk's office of this court a pleading in writing, in proper legal form, the allegations and charges may be taken as admitted and the court may enter an order, judgment or decree against such party either by default or after hearing evidence.

Appearance in person is not required by this summons.

Done in the name of the Commonwealth of Virginia.

MARCH 8, 2022

DATE

SHARON P. OLIVER

Clerk

by

*[Signature]*

DEPUTY CLERK

Instructions:

Hearing Official: CRAIG COUNTY CIRCUIT COURT

VIRGINIA:

IN THE CIRCUIT COURT OF CRAIG COUNTY

**BRIAR OAK PROPERTIES, LLC**

and

**BRIAR OAK FARMS, LLC**

**Plaintiffs**

Case No. CL 22-44

v.

**VIRGINIA MARINE RESOURCES COMMISSION**

and

**COMMONWEALTH OF VIRGINIA**

**Defendants**

Serve: Virginia Marine Resources Commission  
Building 96, 380 Fenwick Road  
Fort Monroe, Virginia 23651  
and  
The Honorable Jason S. Miyares  
Virginia Attorney General  
202 North Ninth Street  
Richmond, Virginia 23219

**COMPLAINT TO DETERMINE OWNERSHIP OF  
NON-TIDAL SUBMERGED LANDS**

COME NOW the Plaintiffs, Briar Oak Properties, LLC and Briar Oak Farms, LLC, by counsel, and file this Complaint to determine ownership of non-tidal submerged lands belonging to Plaintiffs and claimed by Defendants as property of the Commonwealth. In support, Plaintiffs respectfully represent as follows:

## I. PARTIES

1. Briar Oak Properties, LLC (“Briar Oak Properties”) is a Virginia Limited Liability Company whose members are all residents of Virginia.
2. Briar Oak Farms, LLC (“Briar Oak Farms”) is a Virginia Limited Liability Company whose members are all residents of Virginia.
3. Briar Oak Properties has fee simple ownership of a parcel of real estate in Craig County which includes part of the submerged lands at issue.
4. Briar Oak Farms has fee simple ownership of two parcels of real estate in Craig County which include parts of the submerged lands at issue.
5. The lands of Briar Oak Properties and Briar Oak Farms adjoin.
6. Together, Plaintiffs own all of the submerged lands at issue.
7. The Virginia Marine Resources Commission (“Marine Commission”) is an agency of the Commonwealth of Virginia (“Commonwealth”) authorized by Title 28.2 of the Code of Virginia.
8. The Marine Commission wrongfully claims that the Commonwealth owns Plaintiffs’ submerged lands.
9. The Commonwealth, through the office of its Attorney General, has supported the Marine Commission’s wrongful claims.

## II. SUBJECT MATTER

### Craig’s Creek

10. Craig’s Creek, also known as Craigs Creek and Craig Creek, is a natural, non-tidal stream that flows from Montgomery County near Blacksburg, Virginia through Craig County into Botetourt County, terminating as it merges with the James River near Eagle Rock, Virginia.
11. Craig’s Creek is located west of the Blue Ridge Mountains, in the western part of the Commonwealth.

12. According to Virginia Land Office Records at the Library of Virginia, at least 110,000 acres were granted as private property along and under the waters of Craig's Creek by at least 102 special grants from Colonial Governors and Governors of the Commonwealth from 1742 to 1802.

13. Plaintiffs' privately owned submerged lands at issue lie beneath Craig's Creek and on the shores along the Creek in Craig County, downstream of the Virginia Route 606 bridge and upstream of the Botetourt County line.

14. The portion of Craig's Creek owned by the Plaintiffs has been claimed by the Marine Commission as owned by the Commonwealth.

15. Plaintiffs desire to keep all of their property, including the parts beneath and along Craig's Creek.

#### Hostile Claim

16. The Marine Commission wrongfully claims ownership of Plaintiffs' submerged lands on behalf of the Commonwealth as follows:

- a. The Marine Commission officially and erroneously states that it has "...proprietary authority...over...all submerged lands throughout the Commonwealth. This authority is based on the Commonwealth's ownership of submerged lands..."  
(VMRC Regulations, Subaqueous Guidelines, Section VII)
- b. The Marine Commission wrongfully claims that the extent of its jurisdiction within non-tidal waterways extends to "the ordinary *high water mark*." (emphasis added)  
(VMRC Regulations, Subaqueous Guidelines Section VII)
- c. The Marine Commission's official website erroneously claims that the Code of Virginia vests ownership of "all the beds of...creeks...in the Commonwealth to be

used as a common by all of the people of Virginia.” (Habitat Management Division Section) This quote fails to include the fact that the Virginia Code Section cited (28.2-1200) only applies to *ungranted beds* “...not conveyed by special grant...”

- d. The Marine Commission has instructed its Environmental Engineer for the VMRC Territory that includes Craig County and Plaintiffs’ lands to claim jurisdiction over Craig’s Creek from high water mark to high water mark.

17. The jurisdiction of the Marine Commission only applies to state-owned bottomlands in non-tidal streams under Virginia Code §28.2-101, which states: “The jurisdiction of the Commission shall include the Commonwealth’s territorial sea and extend to the fall line of all tidal rivers and streams *except in the case of state-owned bottomlands where jurisdiction extends throughout the Commonwealth.*”

18. The Marine Commission illegally claims ownership of Plaintiffs’ property by the Commonwealth when it asserts jurisdiction over that property.

19. The Marine Commission’s hostile claim of ownership by the Commonwealth threatens Plaintiffs with criminal prosecution for Plaintiffs’ use of their property, under Virginia Code §28.2-1203.

20. The Marine Commission threatens Plaintiffs when it makes the hostile claim of jurisdiction and ownership by the Commonwealth, as follows:

- a. “It shall be unlawful and constitute a Class I misdemeanor for anyone to...trespass upon...the beds of...creeks, which are the property of the Commonwealth, unless...pursuant to...a permit by the Marine Resources Commission.” VMRC Regulations, Subaqueous Guidelines, Section I(B).

- b. "The Permit does not confer upon the permittee any interest or title to submerged land. Fee simple interest in submerged lands always remains in the Commonwealth." VMRC Regulations, Subaqueous Guidelines Section I(C)(15).
- c. "Projects completed without a permit...are illegal and may be subject to prosecution." VMRC Regulations, Subaqueous Guidelines, Section I(D).
- d. The Marine Commission has law enforcement authority.
- e. "The Commission may also elect to consider civil charges not to exceed \$10,000 for each violation." VMRC Regulations, Subaqueous Guidelines, Section I(D).

21. The Marine Commission's hostile claim has resulted in the destruction of Plaintiffs' peaceful possession of their property and constitutes a direct and immediate interference with the enjoyment and use of Plaintiffs' land.

22. While the Marine Commission's claim of ownership by the Commonwealth has no validity, it does affect Plaintiffs' title and diminishes the value of their property.

23. The Marine Commission's claim of ownership by the Commonwealth conflicts with Plaintiffs' Deeds and with the boundaries shown on recorded Plats of lawful surveys.

#### Plaintiffs' Ownership

24. The Deed that recites the facts of ownership of a portion of the submerged lands of Craig's Creek by Briar Oak Properties is recorded in Craig County Circuit Court Clerk's Office as Instrument Number 200000442.

25. The metes and bounds recited in Instrument Number 200000442 are depicted on the Plat of lawful survey recorded in the Craig County Circuit Court Clerk's office as Instrument Number 200000443.

26. The Deeds that recite the facts of ownership of a portion of the submerged lands of Craig's Creek by Briar Oak Farms are recorded in the Craig County Circuit Court Clerk's Office as Instrument Numbers 210000700 and 190000309.

27. The metes and bounds recited in Instrument Numbers 210000700 and 190000309 are depicted on the Plats of lawful surveys and recorded in the Craig County Circuit Court Clerk's Office in Deed Book Number 183, page 43 and Instrument Number 190000308.

28. The metes and bounds of the real property of Plaintiffs that include the submerged lands of Craig's Creek at issue are shown unequivocally on the composite Plat of lawful surveys, by Lumsden Associates, P.C., Licensed Surveyors, attached as Exhibit A and recorded in the Craig County Circuit Court Clerk's Office as Instrument Number 220000071.

29. Plaintiffs and their predecessors in title have paid real estate taxes on the submerged lands at issue for many decades.

30. Several other recorded Deeds and Plats of lawful surveys unequivocally show that Plaintiffs' predecessors in title owned the submerged lands at issue.

31. The recitals of the facts of submerged land ownership in Plaintiffs' recorded Deeds and Plats are *prima facie* evidence of those facts under Virginia Code §8.01-389(C).

#### Special Grant

32. Plaintiffs' submerged lands under and along Craig's Creek were conveyed by a special grant as private property under Common Law and as recognized by Virginia Code §28.2-1200.

33. The special grant that conveyed the submerged lands at issue to Plaintiffs' predecessors in title is a Commonwealth Grant to John J. Mound of 790 acres on Craig's Creek recorded in Commonwealth Grant Book Number 38, page 122, of record in the Library of Virginia.

("Special Grant")

WHEN?

34. The metes and bounds of the Special Grant are shown in relationship to the current boundaries of the Plaintiffs' property by a dotted line on the Plat attached as Exhibit A.

35. The metes and bounds description in the Special Grant is *prima facie* evidence that the submerged lands at issue were granted for private ownership because the Grant is a record of this Commonwealth, recorded in the Library of Virginia, under Virginia Code §8.10-390.

### III. VIOLATIONS OF LAW

36. The Marine Commission has claimed the Plaintiffs' property as belonging to the Commonwealth without any authority to do so under the Virginia Code or at Common Law.

37. The Marine Commission and its Commissioner have no power or jurisdiction over Plaintiffs' property under Title 28.2 of the Virginia Code or Common Law.

38. The Marine Commission has no authority to claim that Plaintiffs' property belongs to the Commonwealth.

39. The Marine Commission provided no procedural due process respecting the deprivation of property rights of the Plaintiffs, claiming ownership of their property without notice or opportunity to be heard.

40. The claim by the Marine Commission that Plaintiffs' submerged lands are the property of the Commonwealth violates Article I, Section 11 of the Constitution of Virginia by depriving the Plaintiffs of their property without due process of law, damaging private property and taking private property for public use without compensation.

41. The claim by the Marine Commission that Plaintiffs' submerged lands are property of the Commonwealth violates the Fifth Amendment of the United States Constitution by depriving



the Plaintiffs of their property without due process of law and by taking private property for public use without just compensation.

42. The claim by the Marine Commission that the Plaintiffs' submerged lands are property of the Commonwealth violates the Fourteenth Amendment of the United States Constitution by depriving Plaintiffs of property without due process of law.

43. The claim by the Marine Commission that Plaintiffs' submerged lands are the property of the Commonwealth violates Virginia Code §25.1-417(A)(8) because the Marine Commission intentionally makes it necessary for the Plaintiffs to institute legal proceedings to prove the fact of the taking of their real property.

#### IV. JURISDICTION

##### Declaratory Judgment

44. The Court has the power to issue declaratory judgments under Virginia Code §8.01-184.

45. This action involves the interpretation of deeds and is a case of actual controversy, with actual antagonistic assertions and denials of rights.

46. The Court has jurisdiction over Plaintiffs' request for a declaratory judgment based upon self-executing provisions of the Constitution of Virginia and the Constitution of the United States.

47. Virginia Code §25.1-417 confers jurisdiction upon this Court to adjudicate Plaintiffs' request for declaratory judgment against a state agency.

##### Cloud on Title

48. The Court has jurisdiction over this matter under its inherent equity jurisdiction to quiet title to land and remove a cloud therefrom.

49. Plaintiffs' request that the Court quiet title to land and remove a cloud therefrom is also based upon self-executing provisions of the Constitution of Virginia and the Constitution of the United States.

50. The request that the Court quiet title to land and remove a cloud therefrom is also based upon the violation of Virginia Code §25.1-417, which specifically applies to agencies of the Commonwealth.

#### General Jurisdiction

51. The Court has original and general jurisdiction over all civil cases under Virginia Code §17.1-513.

#### V. VENUE

52. The wrongful seizure of Plaintiffs' lands by the Marine Commission and the claim that the lands belong to the Commonwealth, as set forth in Paragraphs 1 through 43, create a cloud on the title to Plaintiffs' land.

53. All of Plaintiffs' lands with a cloud on the title as a result of Defendants' actions are situated in Craig County, which makes venue in the Craig County Circuit Court both proper and preferred under Virginia Code §8.01-261(3)(i).

54. Plaintiffs' request for declaratory judgment involves review of actions by the Virginia Marine Resources Commission, which is an agency of the Commonwealth.

55. The Plaintiffs regularly conduct affairs and business activities in Craig County and own a portion of the submerged lands of Craig's Creek in Craig County claimed by Defendants, so that their property is affected by the actions of the Marine Commission, which also makes venue in the Craig County Circuit Court both proper and preferred under Virginia Code §8.01-261.1.a.(2)&(3).

COUNT 1  
REQUEST FOR DECLARATION OF OWNERSHIP

56. The Plaintiffs reallege Paragraphs 1 through 55.

57. The submerged lands of Craig's Creek at issue were conveyed to Plaintiffs' predecessor in title by special grant as contemplated by Virginia Code §28.2-1200.

58. The submerged lands at issue along and beneath Craig's Creek are comprised within the limits of more than one recorded lawful survey, as contemplated by Virginia Code §28.2-1202(A).

59. A recent composite Plat of lawful surveys showing Plaintiffs' submerged lands is recorded in the Circuit Court Clerk's office of the County of Craig, as required by Virginia Code §28.2-1202(B) to determine ownership. (Exhibit A)

60. Plaintiffs request that this Court apply Virginia Code §28.2-1202 to the property at issue and declare their ownership under the Court's jurisdiction to do so, in accordance with Virginia Code §8.01-184.

COUNT 2  
QUIET TITLE

61. Plaintiffs reallege Paragraphs 1 through 60.

62. The submerged lands at issue were conveyed by the Commonwealth to Plaintiffs' predecessor in title by the Special Grant.

63. Plaintiffs currently have title to the same submerged lands conveyed by the Special Grant.

64. Plaintiffs' title to the submerged lands at issue is uninterrupted, from the Special Grant to Plaintiffs' current deeds.

65. Defendants' claims that Plaintiffs do not have title to the submerged lands at issue in official state guidelines and on an official website operated by the Commonwealth constitute clouds on Plaintiffs' title to those lands, as does the Marine Commission's use of its agents to claim jurisdiction over Plaintiffs' submerged lands and to threaten Plaintiffs with criminal sanctions if Plaintiffs defy Defendants' wrongful claim of ownership.

66. Plaintiffs request that the Court exercise its equity jurisdiction to quiet title as to Plaintiffs' real estate by Decreeing that Plaintiffs own their submerged lands, claimed by the Marine Commission on behalf of the Commonwealth, and removing the cloud that Defendants' wrongful claims place on Plaintiffs' title.

COUNT 3  
DEMAND FOR COSTS

67. The Plaintiffs reallege Paragraphs 1 through 66.

68. Plaintiffs have incurred substantial costs due to the wrongful seizure of their private property by Defendants.

69. The Court has the discretion to award costs against the Commonwealth under its equity jurisdiction, according to Virginia Code §17.1-600.

70. The Court may tax costs for any matter and for every sum which the Court may deem reasonable under its equity jurisdiction, according to Virginia Code §17.1-626.

71. The Declaratory Judgment Act provides authority for the Court to award costs against any party, including the Commonwealth, as the Court may deem proper, under Virginia Code §8.01-190.

72. The Marine Commission has no jurisdiction or authority to claim and seize Plaintiffs' land.

73. The right to private property is a fundamental right under the Virginia Constitution, Article 1, Section 11 which states: "That no person shall be deprived of his...property without due process of law." A limited liability company is a "person" under Virginia Code §§13.2-1002 and 13.2-603, and at common law.

74. The Virginia Code, in §1-219.1, also recognizes the right to private property as a fundamental right.

75. Defendants have violated Plaintiffs' fundamental rights under the Constitution of Virginia, the Constitution of the United States and the Virginia Code.

76. Defendants have intentionally made it necessary for Plaintiffs to institute legal proceedings to prove the fact of the taking of their real property in violation of Virginia Code §25.1-417.

77. Defendants had notice that Plaintiffs' property included the portions of the submerged lands of Craig's Creek claimed by Defendants because Plaintiffs' ownership is a clear matter of public record, including several lawful surveys.

78. The circumstances of this case make it proper for the Court to award costs to Plaintiffs, which the Plaintiffs request on the basis of their allegations in this Complaint in accordance with Virginia Code §§17.1-600 and 8.01-190.

79. The costs requested include surveyor's fees, filing fees, and all other litigation related expenses in this case.

COUNT 4  
DEMAND FOR ATTORNEYS' FEES

80. The Plaintiffs reallege Paragraphs 1 through 79.

81. Plaintiffs request that the Court, using its inherent equity jurisdiction or, if appropriate, its statutory jurisdiction to award payment of Plaintiffs' attorney's fees by the Defendants.

82. Each basis upon which Plaintiffs rely in requesting attorney's fees follows, as required by Supreme Court Rule 3.25:

- a. The violation of Plaintiffs' fundamental rights under the Constitution of Virginia, the Constitution of the United States and the Virginia Code, as alleged above.
- b. The Defendants' intentionally making it necessary for the Plaintiffs to institute legal proceedings to prove the fact of the taking of their real property in violation of Virginia Code §25.1-417.
- c. The claim made by the Marine Commission that Plaintiffs' submerged lands are owned by the Commonwealth without any jurisdiction to do so.
- d. The fact that Defendants have claimed and seized Plaintiffs' private property when the ownership of the submerged lands is a clear matter of public record.
- e. Defendants' position in this case is not warranted by existing law nor by a good faith argument for the extension, modification or reversal of existing law.
- f. A balancing of the equities, when Plaintiffs have not engaged in any wrongdoing, while Defendants have committed multiple violations of both the law and of Plaintiffs' fundamental rights, so that the equities and the interests of justice require recovery of attorney's fees by Plaintiffs.

WHEREFORE, Plaintiffs, BRIAR OAK PROPERTIES, LLC and BRIAR OAK FARMS, LLC, pray that this Court enter an Order declaring that the property of Plaintiffs located under and along the waters of Craig's Creek is their private property and not the property of the Commonwealth and that the Marine Commission does not have jurisdiction over Plaintiffs' submerged lands. Plaintiffs also pray for the Court to Decree that the cloud on Plaintiffs' title be

removed and for the Defendants to pay the costs and attorney's fees incurred by Plaintiffs in this matter, and for such further relief as the Court may deem necessary or proper.

Respectfully submitted,

BRIAR OAK PROPERTIES, LLC

By: 

Lenden A. Eakin, Of Counsel

BRIAR OAK FARMS, LLC

By: 

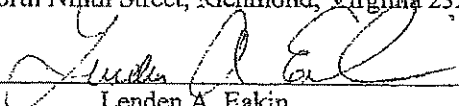
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CERTIFICATE OF MAILING

I certify that on the ~~9th~~ <sup>March</sup> day of ~~February~~, 2022, I mailed or caused to be delivered a true and correct copy of the foregoing Complaint to the Virginia Marine Resources Commission, Building 96, 380 Fenwick Road, Fort Monroe, Virginia 23651 and to the Honorable Jason S. Miyares, Virginia Attorney General, 202 North Ninth Street, Richmond, Virginia 23219.

  
Lenden A. Eakin

