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Attorneys for Applicant

BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of the Application to Permit
Rebuilding Existing Permitted Boat
Garage, Walter Nevin,

Applicant.

AGENCY Case No. PH-2025-NAV-22-003

OACH Case No. 25-320-05

PREHEARING STATEMENT

Applicant has submitted an application for a permit to rehabilitate the boat garage previously permitted under the pre-Lake Protection Act permit #L95S0446B, which was issued to Walter Nevin on November 7, 2024. (See attached hereto). Applicant seeks to reconstruct the same structure with the same dimensions, while re-using as many of the same materials as possible, to restore functionality to the boat garage and update it to modern safety standards. Applicant wishes to continue the work to rehabilitate boat garage, to finish the restoration, and believes that doing so is permitted under the existing permit.

Under Idaho Admin. Code, the State of Idaho provides that “(n)o permit is required to clean, maintain, or **repair** an existing permitted encroachment, but a permit is required to **completely replace**, enlarge, or extend an existing encroachment.” IDAPA 20.03.04.020.04. The Code further states that “(e)xisting **permitted boat garages may be maintained or replaced** with the current square footage of their existing footprint and height.” IDAPA

20.03.04.015.05(c) (emphasis added). This is the rule that Applicant relied upon when commencing work.

The above-cited IDAPA rules show that the main distinction between the two is whether a “complete replacement”, is synonymous with a “replacement.” Applicant’s boat garage is recently being repaired and rehabilitated by T&B Dock, LLC (“T&B”), who have saved original materials, including the flotation logs, in order to appropriately rebuild and restore the boat garage with parts that are still in acceptable condition. Thus, T&B has purposefully not engaged in a “complete” replacement of the boat garage, but rather, rehabilitated and rebuilt according to modern building standards, with as many original materials as possible. The Supreme Court of Idaho, as many courts do, has customarily used Black’s Law Dictionary in its opinions for defining certain terms in legal and modern usage (See e.g., *State v. Dobbs*, 166 Idaho 202, 457 P.3d 854 (2020) and *Kenworth Sales Co. v. Skinner Trucking, Inc.*, 165 Idaho 938, 454 P.3d 580 (2019)). Thus, we have looked to certain meanings within Black’s Law Dictionary to define “Complete” and “Replace.” See below for their meanings:

- “Complete” is defined as “Full; entire; including every item or element of the thing spoken of, without omissions or deficiencies(.)”¹
- “Replace” is defined as “to place again, to restore to a former condition.”²

T&B is preserving all structurally sound parts of the original structure to rebuild it in its original condition, including all permitted dimensions. T&B’s expert opinion, as described

¹ *Complete*, Black’s Law Dictionary (rev. 4th ed. 1968) (citing *Bailey v. Martin*, 21 N.E. 346, 119 Ind. 103).

² *Replace*, Black’s Law Dictionary (rev. 4th ed. 1968) (citing *Illinois Cent. R. Co. v. Franklin County*, 56 N.E.2d 775, 779, 387 Ill. 301).

to Applicant, was that it was necessary to rebuild parts of the boat garage in order to rehabilitate it – as all Parties are aware, the boat garage was not in good condition. As provided in the Exhibit List, T&B is not replacing “every item or element of the thing spoken of [the boat garage], without omissions or deficiencies,” nor engaging in a “complete” replacement of the permitted structure. Applicant’s replacement of the boat garage is only partial. IDL’s Foregoing cited IDAPA rules do not require a permit for a partial replacement, but only for a “complete” replacement. IDAPA rules do not require additional permitting to partially replace Applicant’s boat garage. The replacement contemplated is instead permissible within the scope of the existing permit, which requires no further approvals, whether from KIBHA or IDL.

An important issue is therefore whether the owner of the littoral lands, or the HOA in control of the same, must approve the Applicant’s requested permit. The referenced Court order, attached hereto for convenience. Applicant’s pre-LPA boat garage predates the Court order. The order specifically provides that KIBHA has authority for “regulating the use and management of all real property described in Tax No. 12664.” However, IDL is vested with the authority “[t]o regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark thereof.”³ The State issues permits to littoral landowners.⁴ In circumstances where an HOA holds authority over the landowner’s littoral rights, such an HOA’s authority ends at the high water mark.⁵ Accordingly, KIBHA only has authority to manage the actual shoreline parcel. As documented on the attached letter from Wendy Van Orman, it is the Applicant’s understanding that KIBHA

³ See Title 58, Chapter 1, *et seq.*, Idaho Code and Idaho Code §§ 58-104(6) and 58-104(9).

⁴ See Title 58, Chapter 13, *et seq.*, Idaho Code

⁵ *Id.*

is in agreement with the continued rehabilitation of the boat garage project, as long as the Applicant's permit does not cause the boat garage to become part of the community dock permit under KIBHA, and that the boat garage will remain a private dock under the Applicant's permit (i.e., so long as the boat garage does not take away from KIBHA's approved square footage for their community dock, Applicant understands that KIBHA is in agreement with the requested rehabilitation).

The physical structure is personal property which belongs to Mr. Nevin, and it is not on the shoreline parcel. The submerged land on which the boat garage structure exists belongs to the State of Idaho and is governed by IDL. KIBHA has no authority over Mr. Nevin's permitted boat garage. KIBHA does not have authority over submerged lands over which Applicant's boat garage was already permitted. Those lands belong under the governance of the State (through IDL). The Court's order does not provide otherwise.

The Court's order does not give the KIBHA plenary power to take away property rights. On page 12 of the order, the Court provides that *"any lot owner of either class who presently has a legally existing docking facility, or an interest therein, dependent upon riparian rights derived from Tax No. 12664 shall have the right to keep and maintain, without enlargement, any such docking facility."* Mr. Nevin's boat garage, listed as Dock #15, has been in place, and a part of Lots 29 and 30, since 1967. This is before the Court ordered the formation of KIBHA. The additional language in the order that states that KIBHA has authority and rights over "placement and use of docking facilities" does not address docks or boat garages that preexisted the Court's order. Under the pre-existing permit issued and approved by IDL, the boat garage exists over submerged lands, under the IDL's authority and it is within the IDL's authority to allow the rehabilitation and repair to proceed.

Accordingly, IDL may allow Applicant's boat garage rehabilitation, by partial replacement, to continue. Further, this would not take away from IDL's primary goal of ensuring that boat garage structures remain within their permitted bounds over Idaho's submerged land. IDL can still inspect and police the structure for compliance with the original permit. Wherefore, the requested rehabilitation may proceed without the need for issuance of any new permit(s), with or without KIBHA's approval thereof.

If IDL takes the position that any replacement is a complete replacement, even under the foregoing described circumstances, then this would frustrate the IDAPA's plain language, and it would result in an effective taking from the Applicant and giving of that permitted structure to KIBHA. Surely, this cannot be IDL's intent. There is also no basis for it. Axiomatically, a replacement of most but not all of the parts (i.e., an incomplete replacement) cannot be a complete replacement. To argue otherwise would be to argue a logical contradiction.⁶ If that were the standard, then determining what sort of replacements are "complete" is an entirely subjective standard capable of manifest unfairness to the Applicant.

The condition of the boat garage is one of the main reasons that the Applicant sought proper permitting – mainly because KIBHA was asking Applicant to rehabilitate the structure. Also, as provided above in IDAPA 20.03.04.015.05(c), Applicant is permitted to "replace" the

⁶ Under the logical Principle of Non-contradiction, "opposite assertions cannot be true at the same time" (*Metaph* IV 6 1011b13–20). <https://plato.stanford.edu/entries/aristotle-noncontradiction/>. The Principle of Non-contradiction has been applied by courts including in cases such as *McCarthy v. Ritescreen Co.*, No. 2011-CA-000888-MR, 2013 Ky. App. Unpub. LEXIS 489, at *22 (Ct. App. June 14, 2013); *Olson v. State of Cal.*, 104 F.4th 66, 80 (9th Cir. 2024)(quoting *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008); *United States v. Hunt*, 99 F.4th 161, 192 (4th Cir. 2024)(citing *United States v. Mitchell*, 493 F. App'x 440, 441-42 (4th Cir. 2012) (citing *United States v. Curry*, 461 F.3d 452, 460-61 (4th Cir. 2006))).

boat garage, in the sense that they are in fact “placing again” and “restoring” the structure that was already permitted. If Applicant were entirely replacing the full structure, with new flotation logs and dock, Applicant would agree that a new permitting process was necessary. This is because at that point, the replacement would obviously be “Complete.” By analogy, just because you take a car apart to rebuild it does not mean the resulting product is a new car.

Applicant has been diligent in hiring counsel and ensuring that the process of obtaining permitting and obtaining IDL instruction for rehabilitation has been in accord with guidance of counsel and following IDL guidance. Applicant proceeded to retain T&B to engage in the rehabilitation, a dock builder who has many years of experience in maintaining, rehabilitating and rebuilding grandfathered encroachments.

Applicant believes that it is entirely within the IDL’s power to make this process reasonable and achievable (both financially and within a reasonable timeframe) for Applicants. Idaho Supreme Court caselaw supports this position, albeit by analogy, in cases where the IDL approved boat garages that were way outside of the scope of the IDAPA rules. In the attached *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 469 P.3d 23 (2020), IDL approved a boat garage that was larger in footprint and in height and was still approved by the IDL. As shown in *Newton*, the IDL was well within its authority to permit the two-story boat garage and such an approval would survive collateral attacks from neighboring interested Parties (Dock Owners), such as KIBHA. In this case, the Applicant requested that IDL lift its stop work to allow the Applicant to proceed with the completion of the boat garage rehabilitation. IDL had authority to do so under IDAPA 20.03.04.015.05(c). IDL refused to do so based solely on the reasoning that the rehabilitation was a complete replacement necessitating a permit. Because IDL would allow the rehabilitation to continue, this application has become necessary.

By granting this permit, with or without KIBHA's approval, IDL could still ensure that the project remained compliant with the applicable rules, such as observing the rebuild, and ensuring the previous materials are in fact used to rebuild the boat garage. IDL would retain the ability to ensure that its primary objective will be met – that the structure is in the same spot and occupies only the same space occupied by the previous structure.

Applicant has taken every measure to follow IDL's instruction and abide by the rules as they were described to them – Applicant's hope is that IDL will allow Applicant to proceed with the rehabilitation of their boat garage without further process. Accordingly, Applicant respectfully requests that IDL allow the rehabilitation to proceed, by lifting the stop work, without further permitting.

In the event that further permitting is deemed somehow necessary, the Applicant's request is proper. The requested rehabilitation is only to reconstruct the same structure that was already permitted. It is the same size and shape and comprised of many of the same materials. The request is to rehabilitate the structure within the scope of the permitted pre-LPA boat garage permit.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the rehabilitation be allowed to continue. If a permit must be issued to do so, then Applicant respectfully requests that the permit be issued to allow the rehabilitation of the boat garage to continue.

DATED this 2nd day of September, 2025.

RAMSDEN, MARFICE, EALY & DE SMET, LLP

By: /s/ Jack Mosby
Jack Mosby, Of the Firm
Attorneys for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of September, 2025 I served a true and correct copy of the foregoing by delivering the same to each of the following, by the method indicated below, addressed as follows:

Walter Nevin	<input type="checkbox"/>	U.S. Mail, postage prepaid
<i>Applicant</i>	<input type="checkbox"/>	Hand-Delivered
Wendy Van Orman	<input type="checkbox"/>	Overnight Mail
23306 E. Sharp Ave.	<input type="checkbox"/>	Facsimile
Liberty Lake, WA 99019	<input checked="" type="checkbox"/>	Email: qualityflrs@aol.com ;
(509) 220-1557		vanormanby5@gmail.com
<i>Agent for Applicant</i>		
Kidd Island Bay Homeowners	<input type="checkbox"/>	U.S. Mail, postage prepaid
Association	<input type="checkbox"/>	Hand-Delivered
PO Box 263	<input type="checkbox"/>	Overnight Mail
Coeur d'Alene, ID 83816	<input type="checkbox"/>	Facsimile
<i>Objector</i>	<input checked="" type="checkbox"/>	Email: board.kibha@gmail.com
Idaho Department of Lands	<input type="checkbox"/>	U.S. Mail, postage prepaid
John Richards,	<input type="checkbox"/>	Hand-Delivered
Kayleen Richter	<input type="checkbox"/>	Overnight Mail
300 N. 6th Street, Ste. 103	<input type="checkbox"/>	Facsimile
Boise, ID 83720	<input checked="" type="checkbox"/>	Email: jrichards@idl.idaho.gov ;
(208) 334-0200		krichter@idl.idaho.gov
<i>General Counsel for IDL</i>		
Amidy Fuson	<input type="checkbox"/>	U.S. Mail, postage prepaid
<i>Lands Resource Specialist -</i>	<input type="checkbox"/>	Hand-Delivered
<i>Navigable Waters</i>	<input type="checkbox"/>	Overnight Mail
Marde Mensinger	<input checked="" type="checkbox"/>	Email: afuson@idl.idaho.gov ;
<i>Program Manager - Navigable</i>		mmensinger@idal.idaho.gov
<i>Waters</i>		
Kourtney Romine	<input type="checkbox"/>	U.S. Mail, postage prepaid
Rachel King	<input type="checkbox"/>	Hand-Delivered
Kayla Dawson	<input type="checkbox"/>	Overnight Mail
<i>Service Contacts for IDL</i>	<input checked="" type="checkbox"/>	Email: kromine@idl.idaho.gov ;
		rking@idl.idaho.gov ;
		kdawson@idl.idaho.gov

OAH
General Government Division
P.O. Box 83720
Boise, ID 83720-0104
(208) 605-4300

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Email: filings@oah.idaho.gov;
scott.zanzig@oah.idaho.gov

/s/ Jamee Pilmore

Jamee Pilmore

Exhibit A

07-10-03 11:34AM FROM-KC DISTRICT COURT

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Scott H. Read
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 (208) 664-2161

S. E. Anne Solomon
 Flammia S. Solomon
 Attorneys at Law
 P. O. Box 1117
 Coeur d'Alene, ID 83814
 (208) 667-3561

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

FREDERICK M. MILLER, JR., and JOAN)
 CANOLE MILLER, husband and wife,)
 RICHARD W. LINDELOF and CAROL M.)
 LINDELOF, individually and as)
 designated class representative,)

CASE NO. 57540

AMENDED ORDER

Plaintiffs,)

vs.)

KIDD ISLAND BAY DEVELOPMENT)
 CORPORATION, an Idaho corporation,)
 et al,)

Defendants.)

FREDERICK M. MILLER, JR., et al,)
 individually and as designated)
 class representative of Class I,)

Cross-Plaintiffs,)

vs.)

JAMES P. RUYF and CAROL L. RUYF,)
 husband and wife, et al, individ-)
 ually and as designated represent-)
 atives of Class II,)

Cross-Defendants.)

AMENDED ORDER

1

The Court having on August 28, 1987 entered an Order in Re: Cross-motions for Summary Judgment and Opinion on Stipulation for Compromise which directed further action by the Court and the attorneys for the parties having consulted and the Court having entered an Order on October 13, 1987 and the Class I plaintiffs having thereafter moved pursuant to Rule 50(a), I.R.Civ.P., to correct clerical error and the parties having stipulated thereto, Now Therefore

IT IS HEREBY ORDERED as follows:

1. Craig C. Kesenich, as court-appointed trustee, shall execute a deed granting and conveying all right, title and interest in and to Tax No. 12664 to the owners of Lots 1, through 39, Kidd Island Bay Lots, and Lots 1 through 22 First Addition to Kidd Island Bay Lots to be held as tenants in common. The owners of each of said lots shall have a one-sixty-first (1/61) interest in Tax No. 12664. The county assessor shall divide the assessed value of Tax No. 12664 by 61 and shall thereafter attribute such 61st proportion as being part of the assessed value of each of the described lots in Kidd Island Bay Lots and First Addition to Kidd Island Bay Lots. The county treasurer shall collect taxes in accordance with said division by the County Assessor.

2. Delinquent taxes paid by representatives of Class I plaintiffs are as follows:

1981	\$1,635.84 paid January 30, 1985
1982	\$1,688.04 paid January 27, 1986

AMENDED ORDER

2

These sums should bear interest at the rate of 12 percent as provided by Section 63-1117, Idaho Code, and shall be reimbursed by payment to Scott W. Reed Trust Account for distribution to Class I payers.

3. Delinquent taxes accruing and remaining unpaid with interest and penalties calculated to October 1, 1987 are as follows:

	Tax	Interest	Penalty	Total
1983	\$1,509.24	\$ 708.05	\$ 38.18	\$ 2,277.47
		<u>Warrant Cost</u>	\$ 20.00	
1984	\$1,336.17	\$ 463.99	\$ 36.76	\$ 1,828.86
1985	\$ 728.04	\$ 163.33	\$ 34.56	\$ 905.93
1986	\$1,249.98	\$ 127.43	\$ 35.00	\$ 1,402.41
1987 (Est)	\$1,250.00	\$ -0-	\$ -0-	\$ 1,250.00
				<u>\$ 7,664.67</u>

4. The total amount of taxes identified as paid in Paragraph 2 is \$1,635.84 plus 31 months interest at 12% of \$507.11 and \$1,688.04 plus 12 months interest of \$320.73 for a total of \$4,151.72 in paid delinquent taxes with those which are delinquent in Paragraph 3 of \$7,664.67 for a total of \$11,816.39 plus interest and penalties as accruing after October 1, 1987. One sixty-first of the present total is $\frac{11,816.39}{61} = \$194.00$. Said sum plus a pro-rata share of continuing interest and penalties shall be a lien upon each lot in Kidd Island Bay Lots and Kidd Island Bay First Addition. Counsel for the parties shall cause to be sent to each of the owners of said lots a notice

AMENDED ORDER.

3

cause to be sent to each of the owners of said lots a notice of court created lien for taxes together with a copy of the Order and a direction that payment to discharge the tax lien shall be made to the Kootenai County Treasurer. Upon receipt of each 61st pro-rata share from a lot owner the County Treasurer shall issue receipt and cause the lien as against that lot to be discharged and released.

In the event the payment is not made in full for any lot on such tax lien by June 20, 1988, the County Treasurer shall have the authority to seek foreclosure of the tax lien by appropriate manner approved by this Court.

5. Every lot in Kidd Island Bay Lots and Kidd Island Bay First Addition shall include an undivided one-sixty-first (1/61st) interest in Tax. No. 12664 which cannot be separated, alienated or transferred from ownership of one of the designated lots in the two platted subdivisions.

6. The owners of lots constituting Class I and Class II shall form a nonprofit membership corporation under the provisions of Chapter 3, Title 30, Idaho Code. Each lot within Kidd Island Bay Lots and Kidd Island Bay First Addition shall be entitled to one membership and one vote within the organization. The membership shall be inalienable from lot ownership. The nonprofit membership corporation shall regulate the use and management of Tax No. 12664 under such by-laws as it may establish in conformity with the order entered in the case on August 28, 1987 and in

AMENDED ORDER

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compliance with the provisions of the Lake Protection Act. Sections 58-142 to 58-153, Idaho Code.

The name of the non-profit membership corporation shall be Kidd Island Bay Tax No. 12664 Cooperative Association, Inc. Attorney for the parties shall take the necessary action to provide articles of incorporation, by-laws and the organization meeting and minutes.

7. The costs and attorneys fees incurred by each class other than tax payments as advanced shall be assessed pro-rata against Class I and Class II respectively. Application for costs and attorney's fees shall be submitted on behalf of the parties. Public hearing shall be provided with adequate notice to all property owners in each class. The Court shall thereafter enter an order fixing and determining such costs and attorney's fees and directing that the same be made a liens upon the lot divided pro-rata for each class upon the lots in the respective subdivisions.

Dated this 9th day of November, 1987.


Gary M. Haran, District Judge

AMENDED ORDER

5

LOCATION:12084481188

RX TIME

07/11 '03 12:21

FILED: 8-28-87

AT 1:05 O'CLOCK PM

CLERK, DISTRICT COURT

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DEPUTY

FREDERICK M. MILLER, JR., and JOAN)
CANOLE MILLER, husband and wife,)
RICHARD W. LINDELOF and CAROL N.)
LINDELOF, individually and as)
designated class representa-)
tives,)

Plaintiffs,)

vs.)

KIDD ISLAND BAY DEVELOPMENT)
CORPORATION, an Idaho corporation,)
et al,)

Defendants.)

FREDERICK M. MILLER, JR., et al,)
individually and as designated)
class representative of Class I,)

Cross-Plaintiffs,)

vs.)

JAMES P. RUYF and CAROL L. RUYF,)
husband and wife, et al, indi-)
vidually and as designated repre-)
sentatives of Class II,)

Cross-Defendants.)

Case No. 57540

ORDER IN RE: CROSS-
MOTIONS FOR SUMMARY
JUDGMENT AND OPINION ON
STIPULATION FOR
COMPROMISE

This litigation began on January 19, 1984, as a relatively straightforward action in which the Plaintiffs, Frederick M. Miller, Jr., and Joan Canole Miller, husband and wife, sought a judgment or decree declaring them to be the owners in fee simple of a parcel of real property situated in Kootenai County, Idaho. Such Plaintiffs are owners of real property in a platted subdivision known as "Kidd Island Bay Lots." The real property to which the Millers sought to obtain title is a rather narrow

strip of land lying between these platted lots and the mean high water mark of Lake Coeur d'Alene. The property is identified by the Kootenai County assessor as Tax No. 12664.

The lawsuit, as originally brought, seemed to be based upon theories of fraud and misrepresentation on the part of the Defendant, Kidd Island Bay Development Corporation. It was alleged that the Defendant made certain false representation concerning the strip of land to the Plaintiffs, and to all other purchasers of lots in the subdivision, at the time the plat was prepared, approved, and filed.

The plat of "Kidd Island Bay Lots" was filed on February 19, 1959. Subsequently, the Defendant corporation filed a plat for the "First Addition to Kidd Island Bay Lots" on January 26, 1960. The latter subdivision consists of secondary lots situated behind the "lakefront" lots in relation to the lake.

Thus, for clarity, the relationships of the properties involved in this case, with respect to proximity to the waters of Lake Coeur d'Alene are: (1) the strip; (2) the "Kidd Island Bay Lots"; and (3) the First Addition to Kidd Island Bay Lots."

On October 12, 1984, the Plaintiffs filed a Motion to Certify the Action as a Class Action under Rule 23(c)(2), IRCP; simultaneously, an Amended Complaint was tendered which added the Lindelofs as Plaintiffs, and added a second count to the complaint which sought to obtain judgment vesting title to Tax No. 12664 in all owners of Lots 1 through 39 of "Kidd Island Bay Lots" (all of the lots in that subdivision). Certification was ordered, and leave to file the Amended Complaint was granted on

October 23, 1984, after all of the then involved parties agreed that the Court should take such action.

At first blush, it might seem that a fraud action filed nearly a quarter of a century after the making of the alleged misrepresentations might potentially be jeopardized by problems with statutes of limitations. Possibly, but that has not created the primary problem in the case. This has largely been due to the fact that, by the time the suit was filed, Kidd Island Bay Development Corporation was defunct. Its interests in the property involved has been conveyed by quitclaim deed to E. B. and Frances Frushour in 1979. The Frushours were stockholders and officers in the corporation.

The Frushours paid real property taxes levied on the property in 1979 and 1980. They have not paid any such taxes since that date. The precipitating event leading to the filing of this litigation was the threatened tax sale by Kootenai County because of nonpayment of taxes. The Plaintiffs paid such taxes in 1981 and 1982.

After hearing, and on October 28, 1985, the Court entered an order denying the first motion by the Plaintiffs for Summary Judgment. The Plaintiffs, by this time, of course, consisted of all of those lot owners in "Kidd Island Bay Lots" who were included in the class. In deciding the motion for summary judgment, it was apparent to the Court that there were other Kidd Island Bay subdivisions which might be affected by the litigation. Thus, the Court ordered a further hearing at which time the parties were to show cause why lot owners in the First, Second and Third Additions to Kidd Island Bay should not be

joined as necessary parties. Following such hearing, the lot owners of the First Addition were ordered to be included as a part of the class action pursuant to stipulation.

As the litigation proceeded, it became painfully obvious that the Frushours, who had become the de facto defendants as successors in interest to "Kidd Island Bay Development Company," wanted nothing to do with the property in question. On February 26, 1986, they filed a motion seeking Court authorization to deed the property to the Clerk of the Court or some other person or entity to be held until the litigation was resolved. Hearing of such motions was held April 10, 1986. The motion to deed the property to the Clerk was denied. However, the Court reserved ruling on the remainder of the motion to allow the parties time within which to determine if they could agree upon a trustee who would hold the property pending resolution of the litigation.

On May 7, 1986, the parties filed a stipulation naming Craig C. Kosonen as such trustee. Order was entered to such effect. Eventually, Attorney Kosonen took title to the property as trustee.

The litigation thereafter was reduced to a dispute between the two classes of lot owners as to what should be done with the property. Each side has moved for summary judgment. Each side recognizes that summary judgment may not be appropriate, both because there may be material issues of fact in dispute, and because there may be no legal theory by which either side can obtain title to the property (for reasons that will subsequently be discussed).

Thus, the Class I owners of "Kidd Island Bay Lots," and the

Class II owners of the "First Addition to Kidd Island Bay Lots" have stipulated to an alternate method of resolution. It has been agreed that "each side shall submit a compromise proposal pursuant to Rule 23(e). Such proposals shall include a determination of ownership, access and use of Tax No. 12664. They have also stipulated that "the Court, using its equitable powers, shall make an adjudication and final determination which accepts the compromise proposed from cross-plaintiffs or from cross-defendants or any variation or modification thereof which may seem just and proper." Thus, the lot owners in the two classes have, in effect, agreed that the Court can resolve their dispute concerning the property, regardless of the lack of any legal basis upon which to do so.

Each side has submitted such compromise proposals. They do not agree. Essentially, the Class I owners want the Court to direct the trustee to convey the property to them, with the Class II owners to have access rights to use a ten-foot strip along the beach and certain docking privileges. The Class II owners want the property to be conveyed to all owners in each class, with certain restrictive covenants to be imposed; Class II owners also propose that the Court order that an association be formed consisting of all lot owners to maintain and regulate the property.

The problem in this case is created by the fact that "Kidd Island Bay Development Company," in retaining the strip of land along the beach, did not provide any method whereby the strip would be regulated, maintained, or eventually conveyed to any of the lot owners. The developer corporation did record what was entitled as being a "Resolution" on March 25, 1959, which

document purported to set forth various covenants which were to run with the land which it was developing, and which includes all of the properties now owned by the Class I and Class II lot owners.

Among the provisions contained in the "Resolution" is the following:

9. Any owner of said lot, or person lawfully in possession thereof, shall have the perpetual right to the use of all beach facilities, beach area, trail area, and road area designated upon the plat heretofore mentioned, it being understood and agreed that each lot owner similarly situated and such other persons as the vendor may from time to time designate shall have equal rights and privileges, providing that no person may use any of said facilities in a manner injurious to the use, occupation, and enjoyment of any other person."

The covenants and conditions contained in the "Resolution" applied to the First Addition to Kidd Island Bay Lots by reason of language on the filed plat and by provisions in the warranty deeds issued when such lots were conveyed.

As is obvious, this provision in the "Resolution" falls far short of being any type of conveyance of fee simple title to Tax No. 12664 to any of the lot owners. At best, it could be argued that the language in the provision might grant an irrevocable license to the lot owners to jointly use the described areas and facilities with others designated by the developer.

One can only guess that the terms "beach facilities" and "beach area" refer to the retained strip of land along the beach, and that the term "trail area" might refer to the fact that the plat displays four (4) walkways, placed at regular intervals, passing through the Kidd Island Bay Lots (Class I) and providing

access to the lake by secondary lot owners (Class II).

The original plan of the developer corporation was to plant grass on the beach area strip and install a sprinkler system to water the grass. Picnic tables and benches were to be placed on the strip, and docking and restroom facilities were to be constructed. In effect, it seems that the developers envisioned a little beachfront park for the benefit of the lot owners and any one else as they might designate.

A restroom and two docks were constructed. After the first five or six years, however, the developer corporation ran short of money, and the restroom and docks were removed. From then on, any maintenance of the area was done by the lot owners themselves, primarily those situated in the Class I area. In fact, many of those Class I lot owners who purchased their properties in recent years believed that they were buying waterfront lots which extended to the lakeshore. Many of these same owners have constructed various structures which encroach onto Tax No. 12664. Likewise, the access routes which were to serve the Class II secondary lot owners exist only on the plat. . .no actual pathways have ever been cleared.

As has been mentioned, the original obstacle facing both classes of Plaintiffs was that there appeared to be no legal way whereby any of them could obtain fee simple title to Tax No. 12664 despite the fact that the Frushours early on indicated that they wanted nothing further to do with the property. Thus, neither the Court nor any of the able attorneys involved in the case could discover a legal basis whereby any requested relief

could be granted.

In part, the Frushours solved that problem when they threw in the towel or, more accurately, when they threw in the deed. In effect, the Frushours have said, "here, Court, we can't figure out to whom to deed this property, so you do it." I say, "in part," because the Court is now faced with the same problem.

Although the only remaining litigants in the case are the two opposing classes of Plaintiffs, each of which has moved for summary judgment as against the other, still, neither side has been able to present any legal theory as to why such side should prevail. Consequently, the Court is of the opinion that both motions for summary judgment must be denied. Such denial is not based upon the existence of disputed material facts. Indeed, there are no material issues of fact in dispute as the same relate to the issue of ownership of Tax No. 12664, since there is no legal basis whereby the resolution of any disputed fact could afford a basis for granting relief to either class.

It is, therefore, clear that, if relief is to be afforded at all, it must be granted pursuant to the stipulation of the two competing classes of lot owners under which the compromise proposals have been submitted. These parties have, in effect, agreed to submit their competing claims to the Court for determination of the issues of ownership, access, and use much in the same manner as if they had agreed to submit those issues to an arbitrator.

Of course, the easy way to handle the matter would be to simply dismiss the entire action on the basis that there is no legal basis for granting the relief sought by the class action

Plaintiffs. That, however, would not solve the very real and pressing problems of the numerous property owners involved.

Consequently, the Court, acting somewhat as if it were the Court of King Solomon, will proceed to attempt to fashion a fair solution to the problem.

In arriving at a solution to the problem of ownership of the lakefront strip of land known as Tax No. 12664, it would seem prudent to primarily consider the following: (1) The original purpose to which the property was to be put as best that can be determined; (2) the reasons why such purposes were not attained and why this litigation became necessary; and, (3) the fact that, over the number of years following the initial development of the property, many rather innocent property owners have purchased what they believed was lakefront property and have, in some cases, constructed improvements which encroach upon Tax No. 12664.

In examining the proposals for compromise, it is obvious, as has previously been mentioned, that one of the major areas of disagreement concerns the proposal for ownership of the property. The Class I owners desire that the Court order that the property be conveyed to them, subject to certain rights of use in the Class I owners. The Class II owners want the Court to order that the property be conveyed to all lot owners in both classes.

I recognize that many of the Class I lot owners were not even aware of the existence of Tax No. 12664 prior to the filing of this litigation, and, in fact, thought that they owned their properties right down to the mean high water mark. However, no good reason has been advanced to support their proposal for

ownership, and the Court cannot find any reason which would justify a resolution which would grant sole ownership of the parcel to Class I owners, leaving the Class II owners with only certain rights of use.

Furthermore, paragraph 9 of the Resolution, as applied through plats and deeds, clearly evidences an intent on the part of Kidd Island Bay Development Corporation to reserve the property for the equal benefit of all of the lot owners, not just those in the Class I area.

Consequently, it is the conclusion of the Court that the trustee should be ordered to convey Tax No. 12664 to all of the lot owners in Class I and Class II, as tenants in common, for their common use and benefit, subject to certain restrictions as will be set out hereinafter.

Furthermore, as concerns the real property taxes levied on Tax No. 12664, both those which are past due and those which will result from future assessments, it is the conclusion of the Court that these should be assessed to and paid by the individual lot owners on a pro-rata basis.

It is also apparent that ownership interest in Tax No. 12664 should not be separated from ownership interests in the various lots in the Class I and Class II subdivision. That being the case, any transfer of any lot owners common interest in Tax No. 12664 separate and apart from a transfer of ownership of any subdivided lot should be prohibited.

The Court is also of the opinion that an order should enter which will require the formation of a nonprofit corporation or association consisting of all of the lot owners in Class I and

Class II for the purpose of regulating the use and management of Tax NO. 12664. The formation of such an entity is, in my view, absolutely essential to provide for continued regulation of uses of the property by both classes of lot owners. It is contemplated that such regulation would extend to the placement and use of docking facilities as well as to the type of other uses or activities which would be permitted upon the property. The formation of the association would also provide an alternative to common ownership being vested in all lot owners, since the property could be conveyed directly to the corporation for the benefit of all lot owner members. Such alternate approach would be acceptable to the Court.

Additionally, a nonprofit corporation will obviate the necessity of requiring the Court to impose various restrictive covenants concerning the property. The actual year-by-year regulation of the property use should be left to the lot owners who will be utilizing the property. Frankly, the Court is reluctant to impose such restrictions as have been suggested, since such action is not necessary to the resolution of the primary problem, i.e., that concerning the ownership of Tax No. 12664, and can obviously be addressed outside of the arena of this litigation. The Class I lot owners have suggested that the Court consider imposing restrictive covenants which would apply outside of the boundaries of Tax No. 12664; the Court declines the invitation.

Similarly, it is not necessary to the resolution of the ownership issue to involve the Court in matters relating to surveys of the property or the walkways leading from the

secondary lots through the "Kidd Island Bay lots." Certainly the location of the walkways should be established, but matters relating to surveys or construction, or the costs thereof, are best left to the affected lot owners.

I depart from this noninterventionist policy in three (3) respects, however. First, I specifically decline to follow the proposal of the Class II lot owners that any encroachments or obstructions now existing upon the property be removed. Any order which will be entered by the Court herein, shall preserve the right of those Class I lot owners to keep and maintain without enlargement, any improvements now situated on Tax No. 12664, so long as such improvements do not prevent normal pedestrian movement along the beachfront. While I recognize that there are several such encroachments, I also recognize that the same have been constructed innocently. Having been asked to act as King Solomon, I intend to do so, and that intent is to preserve the status quo with respect to such improvements as long as people can still stroll along the beach and upon Tax No. 12664.

* Secondly, any lot owner of either class who presently has a legally existing docking facility, or an interest therein, dependent upon riparian rights derived from Tax No. 12664 shall have the right to keep and maintain, without enlargement, any such docking facility. The construction and placement of future docking facilities dependent upon Tax No. 12664 shall be left to the board of directors of the nonprofit association to be established, or their authorized representation, provided, however, that no lot owners of either class shall at any time be deprived of the use of reasonable docking facilities. By

"reasonable," I mean that any lot owner should be entitled to be able to have docking facilities for at least one average size boat of the type normally used on Lake Coeur d'Alene.

Thirdly, in keeping with the intent of the original developers, any commercial activity should be prohibited upon Tax No. 12664.

Each class of Plaintiffs shall be responsible for paying such costs and attorneys' fees as have been respectively incurred by the attorney representing such class in pursuing this action. The amount and manner of collection of such costs and fees shall be determined by the Court at a later time.

In summary, the Motions for Summary Judgment filed by each class of Plaintiffs are hereby denied, and it is so ordered.

Mr. Reed and Mr. Loats are requested to jointly prepare and submit a proposed Judgment which will contain the various provisions concerning Tax No. 12664 as are set forth in this opinion. The Court will expect to receive the same within 30 days. Post judgment proceedings shall be brought before the Court by motion in accordance with the Idaho Rules of Civil Procedure.

ENTERED this 28th day of August, 1987.



Gary M. Haman, District Judge

I HEREBY CERTIFY THAT true and correct copies of the above-entitled matter were mailed on the 28 day of August, 1987, to:

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SHIRLEY A. DEITZ, Clerk of Court

By: B A McCombs
Deputy Clerk