FREDERICK M. MILLER, JR., and JOAN CANOLE MILLER, husband and wife, RICHARD W. LINDELOF and CAROL N. LINDELOF, individually and as designated class representatives, Plaintiffs, vs. KIDD ISLAND BAY DEVELOPMENT CORPORATION, an Idaho corporation, et al, Defendants.	Case No. 57540 ORDER IN RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT AND OPINION ON STIPULATION FOR COMPROMISE
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, individually and as designated representatives of Class II, Cross-Defendants.	

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

OBJ-3A

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

OBJ-3B

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

OBJ-3C

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

OBJ-3D

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

OBJ-3E

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, trial 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

OBJ-3F

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

OBJ-3G

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

OBJ-3H

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

OBJ-3I

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

OBJ-3J

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

OBJ-3K

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

OBJ-3L

"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:

Scott W. Reed
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83814

OBJ-3 M

S. E. Anne Solomon
Flammia & Solomon
Attorneys at Law
P. O. Box 1117
Coeur d'Alene, ID 83814

Frederick G. Loats
Attorney at Law
P. O. Box 831
Coeur d'Alene, ID 83814

Herbert Nagel
Attorney at Law
P. O. Box 907
Coeur d'Alene, ID 83814

Herbert Sanderson
Attorney at Law
P. O. Box 488
Coeur d'Alene, ID 83814

SHIRLEY A. DEITZ, Clerk of Court

By: E A McComb
Deputy Clerk

OBJ-3N