IN THE MATTER OF Fairbanks North Borough School District,
Applicant.

Docket No. 91-21-I
Impact Aid Proceeding

DECISION

Appearances: James D. DeWitt, Esq. of Guess & Rudd, Fairbanks, Alaska

Miriam Haverstock Whitney, Esq. of the Office of the General Counsel, United States Department of Education for the Assistant Secretary for Elementary and Secondary Education, Washington, D.C.

Before: Judge Allan C. Lewis

This is a proceeding instituted by the Fairbanks North Star Borough School District (Fairbanks) pursuant to 20 U.S.C. § 240(g) (1989) with respect to the Federal fiscal year 1990. Fairbanks seeks to set aside the administrative determination of the Assistant Secretary for Elementary and Secondary Education of the U.S. Department of Education (ED) that the school district qualifies for Federal Impact aid benefits under 20 U.S.C. § 238(b) for the children residing at Walden Estates, an off-base military housing complex, rather than a higher rate afforded by 20 U.S.C. § 238(a). In its determination, ED concluded that Walden Estates which is owned by the Dura Corporation and leased to the United States did not qualify as Federal property under 20 U.S.C. § 244(1) and, therefore, Fairbanks was not entitled to benefits under 20 U.S.C. § 238(a). In its appeal, Fairbanks argues that the fee simple interest held by the Dura Corporation represents an "other arrangement" under 20 U.S.C. § 244(1) and, therefore, this property qualifies as Federal property. For the reasons stated below, the tribunal holds that the Dura Corporation's fee simple interest is not an interest held under an "other arrangement" within 20 U.S.C. § 244(1). Therefore, Fairbanks is not entitled to Federal impact aid benefits under the higher rate afforded by 20 U.S.C. § 238(a).

I. STATEMENT

The pertinent facts are set forth in the opinion. The detailed findings of fact are set forth in the appendix, infra.

II. OPINION

In 1950, Congress recognized the responsibility of the United States for the impact of certain Federal activities on the local educational agencies in the areas in which these activities were conducted. 20 U.S.C. § 236 (1989)(hereinafter Section 236). The activities of the United States placed financial burdens on the local educational agencies by reason of the fact that--

(1) the revenues available to such agencies from local sources have been reduced as the result of the acquisition of real property by the United States; or

(2) such agencies provide education for children residing on Federal property; or

(3) such agencies provide education for children whose parents are employed on Federal property; or

(4) there has been a sudden and substantial increase in school attendance as the result of Federal activities.

Section 236.

Thus, Congress concluded--

the school district is faced not only with a loss of taxable property--sometimes very valuable property--but also with providing schooling for residents of that nontaxable Federal reservation as well as for an increased number of children living outside the Federal reservation.

H.R. Rep. No. 2287, 81st Cong., 2d Sess. at 4 (1950).

As a result thereof, Congress fashioned three financial aid packages for the affected local educational agencies to alleviate these concerns: Section 237 which deals with Federal acquisitions, Section 238 which governs educating children residing on Federal property or whose parents are employed on Federal property, and Section 239 which addresses sudden increases in school attendance due to Federal activities in the area.

The instant case concerns Section 238 which--

covers the situation in which the Federal Government, by owning tax-exempt property on which children reside or on which their parents are employed, has in effect imposed upon the school district the financial burden of educating these children while withholding from the district the opportunity to meet this burden by taxing the real property on which the children live or on which their parents are employed.

. . . .

The underlying philosophy of this section is that the

Federal Government, as a property owner, should pay to each local educational agency which furnishes education to children residing on or whose parents are employed on Federal property an amount per child roughly equivalent to the amount per child which other property owners in comparable communities pay toward the cost of educating children.

H.R. Rep. 2287, 81st Cong., 2d Sess. at 7, 11 (1950).

As a consequence, Congress devised two levels of Federal assistance in Section 238. Category A funding is available if the child resides on Federal property and the child's parent is either employed on Federal property or is on active duty in the uniformed services. Section 238(a). If only one of these requirements is met, i.e. either residence, or employment or active duty status, the school district may only claim the child as the basis for Federal funding at the lower

Category B rate which is one-half of the Category A rate. Section 238(b) and (d)(1).See footnote 1 1/

Fairbanks received funding for the children of Walden Estates under Category B on the basis that the children's parents were on active military status. It now asserts that these children should be considered under Category A on the theory that Walden Estates, where these children reside, constitutes Federal property under Section 244(1).

Since 1950, Congress amended the definition of Federal property periodically to further the goals of impact aid. During the period in issue, the general rule which determined whether real property constituted Federal property was set forth in Section 244(1) and provided--

(1) The term "Federal property" means real property which is owned by the United States or is leased by the United States, and which is not subject to taxation by any State or any political subdivision of a State or by the District of Columbia.

Thus, Federal property was real property (1) which was tax-exempt by virtue of Federal law, agreement, or policy and (2) in which the United States had a presence by virtue of ownership or as a lessee. 34 C.F.R. § 222.3 (1989).

The general definition of Federal property was supplanted by secondary rules which addressed certain specific situations. The secondary rule pertinent in this case was modified in 1953 and again in 1967 and provided during the period in issue--

Such term [Federal property] also includes any interest in Federal property (as defined in the foregoing provisions of this paragraph) under an easement, lease, license, permit, or other arrangement, as well as any improvements of any nature (other than pipelines or utility lines) on such property even though such interests or improvements are subject to taxation by a State or political subdivision of a State or by the District of Columbia.See footnote 2 2/

Section 244(1).

Thus, this secondary rule permits real property to qualify as Federal property even though that property includes a taxable interest under an easement, lease, license, permit, or other arrangement held by a non-Federal party.

The dispute between the parties is whether the lease arrangement between the Dura Corporation, as the owner-lessor, and the United States, as the lessee, created an interest held by the non-Federal party (Dura Corporation) under an "other arrangement" within the purview of this secondary rule.

Fairbanks argues that the term "other arrangement" must be construed broadly such that it encompasses any non-Federal interest, including a fee simple interest, so long as the property has a non-taxable Federal interest in which the Federal government is either the lessee or the fee simple owner. This construction, according to Fairbanks, is consistent with the statute which

provides that the secondary rule "includes any interest in Federal property . . . under an . . . other arrangement." Section 244(1).

ED responds that, under the rule of ejusdem generis, the term "other arrangement" applies in a more limited context, namely to lesser or secondary real property interests and rights, and, therefore, does not include the primary, underlying interest of the fee simple owner in the real property.

Ejusdem generis is no more than an aid to construction and comes into play only where there is some uncertainty as to the meaning of a particular clause in a statute. Under this rule, "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." Harrison v. PPG Indus. Inc,, 446 U.S. 578, 588 (1980). It rests on the notion that statutes should be construed so that the "sense of the words . . . best harmonizes with the context and the end in view." Gooch v. United States, 297 U.S. 124, 128 (1936).

In the instant case, the term "other arrangement" is not defined or amplified in the statute or the underlying regulations.See footnote 3 3/ The term is vague and susceptible to more than one interpretation. The statutory language of this secondary rule permits the following specific taxable, non-Federal interests: an easement, license, or permit. These interests are nonpossessory interests in real property which allow an entry onto the land for a specific purpose. This secondary rule specifically permits, also, a taxable, non-Federal interest under a lease which is a nonfreehold possessory interest in real property. Thus, the term "other arrangement" is used within the context of nonpossessory interests and a nonfreehold possessory interest in real property. As such, the general phrase "other arrangement" under the rule of ejusdem generis is limited to instances which are akin to the aforementioned specific interests and therefore, may only include a taxable, non-Federal interest which is either a nonpossessory interest or a nonfreehold possessory interest in real property.

In the case at hand, Dura Corporation has a fee simple interest in Walden Estates subject to the 20-year lease which constitutes, under real property law, a reversionary fee simple interest. This is a freehold possessory interest--an interest in real property which is superior to a nonfreehold possessory interest as well as a nonpossessory interest. The reversionary fee simple interest holder is also the owner of the real property and responsible for the payment of the real property taxes levied on the property. Thus, Dura Corporation's interest is not akin to the specific interests set forth in the statute and, therefore, this interest does not constitute an "other arrangement" under the secondary rule.

Fairbanks cites the legislative history concerning the 1967 revision to this secondary rule as support for the proposition that this revision was so broad that Congress intended to eliminate the tax exempt status of the property as the threshold qualification and, therefore, even a fee simple interest held by a non-Federal party would qualify under the "other arrangement" terminology where the Federal government held a leasehold interest as a lessee. This construction, according to Fairbanks' main brief at 5, is further supported by the Section 238 requirement that the--

revenue generated from taxing the non-Federal interest would merely be subtracted from the full Impact Aid assistance the school district would have received if the non-Federal interest had not existed.

Under Fairbanks' construction, the secondary rule engulfs and negates the general rule in total. The 1967 legislative history does not purport to negate the general rule in total and does not address the present issue. Rather, it merely paraphrases or restates the proposed revision which was ultimately adopted. H.R. Rep. No. 188, 90th Cong., 1st Sess. at 11, 31 (1967) and S. Rep. No. 726, 90th Cong., 1st Sess. at 37, 92 (1967 U.S. Code & Cong. News 2730, 2768, 2802). Thus, it offers no assistance in resolving this issue.

In addition, the deduct or offset provision in Section 238(e) (1966) referred to by Fairbanks was not in force during the period in issue as Fairbanks implies. Section 238(e) was eliminated by the same 1967 legislation which enacted the modification to Section 244(1) upon which Fairbanks relies.See footnote 4 4/ Sections 201 and 204(d) of the Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783, 806, 808. This action suggests that Congress viewed these newly permitted taxable interests under this secondary rule as contributing relatively nominal sums to the local educational agencies and, therefore, did not warrant consideration in ascertaining the amount of Federal impact aid assistance due a local educational agency. As such, this supports ED's narrower construction of the term "other arrangement," i.e. its a lesser interest akin to an easement, license, etc., rather than the overly broad, fee simple interest construction advocated by Fairbanks.

Fairbanks argues that the philosophy of the Federal impact aid statute mandates that Walden Estates qualify as Federal property so that it will receive Federal impact aid assistance as a result of the children who reside therein. In its view, one of the stated purposes of the Federal impact aid assistance is to relieve the increased financial burden of educating federally connected children by local educational agencies overburdened by reason of increased federal activities. Fairbanks asserts that Walden Estates adversely affects the school district in this manner as it is undervalued (it had an assessed valuation of $16.5 million in 1990 although its cost was over $20 million in 1988) and contains Federal housing with a disproportionately large number of school children. The interaction of these two factors, according to Fairbanks, results in a lower assessed value per student for Walden Estates, i.e. $69,000 per student, than the significantly higher assessed value per student for Fairbanks' total over-all property, i.e. $189,000 per student. Hence, Walden Estates produces significantly less local tax revenue per student than other properties in the district and, therefore, Fairbanks should be entitled to Federal impact aid assistance.

The exclusion of Walden Estates as Federal property rather than its inclusion harmonizes with the philosophy of Section 238. Section 238 provides assistance to the local educational agency where the Federal government has deprived the local educational agency of one or both of its two sources of taxes, i.e. the tax revenues from the residential property in which the child resides or the tax revenues from the commercial property in which the child's parent is employed. H.R. Rep. No. 2287, 81st Cong., 2d Sess. 7-11 (1950). Full funding under Category A is available where both sources of tax revenue are denied the local educational agency and lesser funding under Category B is available where the local educational agency is deprived of one of the two sources.

Here, Fairbanks received the lesser funding of the Federal impact aid assistance as it was denied the tax revenues from the commercial property in which the child's parent is employed. Fairbanks was not, however, denied the tax revenues from the residential property in which the children reside and, in fact, received approximately $200,000 of tax revenues from Walden Estates. Thus, the denial of full funding under the decision herein is fully consistent with the philosophy of Section 238 and precludes, in the view of Congress, an otherwise double benefit to Fairbanks, i.e. the receipt of tax revenues levied on the total property from the Dura Corporation as well as the receipt of Federal impact aid assistance.See footnote 5 5/

ED also argues, in effect, that the parenthetical phrase in this secondary rule--Federal property "also includes any interest in Federal property (as defined in the foregoing provisions of this paragraph) under an easement . . ."--requires that the non- Federal ownership interest in the real property comply with the definitional aspects of Federal property. That is, the real property must, as defined in the foregoing provision of Section 244(1), be (1) tax-exempt by virtue of Federal law, agreement, or policy and (2) owned by or leased by the United States. Under this approach and where, as here, the real property is leased by the United States, ED asserts that the definition requires that the ownership interest must be tax-exempt; otherwise, the real property does not qualify as Federal property.

It appears that ED's position has merit. The parenthetical language in this secondary rule incorporates the definition of Federal property which, in turn, has these two requirements.

In view of the above, it is concluded that Walden Estates does not constitute Federal property under Section 244(1) and, therefore, Fairbanks is not entitled to Federal impact aid assistance under Section 238(a).

III. ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is HEREBY ORDERED that Fairbanks' appeal is dismissed with prejudice.

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Allan C. Lewis
Administrative Law Judge

Issued: July 24, 1992
Washington, D.C.

Footnote: 1 1/ The initial Category B rate was subsequently reduced to one-fourth of the Category A rate by Section 2014(b) of the Impact Aid Reauthorization Act of 1988, Pub. L. No. 100-297, 102 Stat. 130, 294, effective July 1, 1988.

Footnote: 2 2/ Prior to the 1967 amendment, this secondary rule supplanted the general rule with respect to real property "owned by the United States and leased therefrom and the

improvements thereon even though the lessee's interest, or any improvement on such property, is subject to taxation." 20 U.S.C § 244(1) (1966). Thus, the 1967 amendment rewrote this secondary rule and, with the inclusion of an easement, license, permit and other arrangement, the 1967 revision expanded the scope of this secondary rule.

Footnote: 3 3/ 34 C.F.R. § 222.3 provides only that the term "other arrangement" does not include a non-possessory interest in Federal property, such as a mortgage. Thus, it offers no guidance in resolving this issue.

Footnote: 4 4/ Prior to 1967, Section 238(e) provided, in pertinent part, that--

[i]n determining the total amount which a local educational agency is entitled to receive under this section . . . for the fiscal year, the Commissioner shall deduct (1) such amount as he determines such agency derived from other Federal payments (as defined in section 237(b)(1) of this title) . . . .

Section 237(b)(1) defined the term other Federal payments as including "property taxes paid with respect to Federal property, whether or not such taxes are paid by the United States . . . ."

Footnote: 5 5/ While Fairbanks has a legitimate concern whether each taxable property within its jurisdiction produces an adequate tax revenue, this problem was outside the scope of matters addressed by Congress in the Federal impact aid assistance legislation. Thus, as ED argues, the degree of taxation of non-Federal property is not relevant in this case. Where there is, however, a sudden and substantial increase in school attendance as the result of Federal activities and the local educational agency is making a reasonable tax effort, Congress did provide for Federal impact aid assistance under Section 239. This provision is, apparently, inapplicable in the instant case.