

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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January 29, 2001

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GSBCA 15227-RELO

In the Matter of WILLIAM D. GENDA II

William D. Genda II, Berryville, VA, Claimant.

Michael C. Gidos, Comptroller, National Security Agency, Fort George G. Meade, MD, appearing for National Security Agency.

**WILLIAMS**, Board Judge.

The National Security Agency (NSA) requests an advance decision regarding the real estate transaction expense reimbursement to which claimant is entitled in conjunction with his permanent change of station. Specifically, the agency questions whether reimbursement may be made for expenses incurred as to the entire 107 acres of property which claimant purchased or a pro rata portion thereof.

Reimbursement of fees which are based on the sales price may be made on the pro rata portion of the value of the property which relates to the residential site, in this case three acres. Necessary real estate expenses for which a flat fee was charged without regard to the purchase price may be paid in full if the fee is reasonable and consistent with charges for similar services in the locality.

## Background

Claimant, a civilian employee of the Department of Defense, was transferred from Baltimore, Maryland, to Clarke County, Virginia. In April 1999, in conjunction with this permanent change of station, claimant purchased a farm in Clarke County, Virginia. The farm consisted of a 107-acre lot with a main house, a guesthouse which rents for \$400 per month, a pool, a barn with a silo, a chicken house used as shop and storage, and two corncribs. The area in which the Gendas' residence is located carries an agricultural zoning, and the Gendas' property is used to graze cattle and grow crops for feeding cattle. According to an appraisal performed in February 1999, the value of this

property using the cost approach was \$2500 per acre, and the value of the main residence was \$444,555.<sup>1</sup>

In support of his claim, claimant submitted a letter from Mr. Charles H. Schutte, a partner in Clarke County Properties, a real estate firm based in Clarke County which specializes in the sale and appraisal of rural properties in that area. Mr. Schutte was the real estate agent who represented both the Gendas when they purchased their farm and the sellers as a disclosed dual agent.

Mr. Schutte opined that the entire 107 acres was related to the residence site, explaining: "The prior owner subdivided the property before Mr. and Mrs. Genda purchased it, as permitted, with the house and one additional dwelling unit right on 107 plus acres. The former owner could not subdivide the property further, because the dwelling, its immediate dependencies, and the yard, including the drain field and well, alone account for more than five acres."

However, according to records of Clarke County, on November 9, 2000, the Gendas succeeded in further subdividing the property into two parcels, one over eighty acres and the other approximately twenty-five acres.

Health Department records indicate that the drain fields and well for the Gendas' residence are located within three acres of the residence. Zoning officials from Clarke County advised that currently the maximum lot size for new lots in the county is four acres and that two to three acres is considered the normal accompaniment for a house site. For zoning purposes the minimum lot size is one acre, but there is a proposal to increase this to two acres.

Claimant argues that the use of the property should determine whether it is reasonably related to the residential site. Because he and his family use all the outbuildings and land to park, store vehicles and equipment, plant gardens, play baseball and soccer, and have a two-acre driveway, he believes that all the acreage should be considered the residential site. Claimant acknowledges that he subdivided the property, but claims that he was not permitted to do this until one of his outbuildings burned down and he was given an exemption.

The price claimant paid for the property was \$568,500. Claimant seeks \$10,400 in real estate expenses. These are broken down as follows, with explanations by the Gendas' attorney:<sup>2</sup>

<u>Item</u>	<u>Charge</u>
Loan Origination fee (1%)	\$3,800.00

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<sup>1</sup>The appraisal also used another method, the sales comparison approach, then reconciled this with the cost approach to arrive at an overall valuation. Because the sales comparison approach did not segregate the value of the land from the residence and improvements, it could not be used here.

<sup>2</sup>The following list of items and charges is a quotation from the attorney's letter.

Comments: 1% is customary. Note, the lender, Bank of Clarke County, did not charge any additional amounts for credit report, application fees or other costs that are often charged in such financing.

Appraisal \$1,000.00

Comments: Appraisals required in Clarke County and the surrounding area are generally "narrative appraisals" that are more comprehensive than the typical residential appraisal required elsewhere. Narrative appraisals typically cost \$1,000.00 to \$1,500.00.

Attorney's Fee \$700.00

This fee was computed on the basis of an hourly rate of \$120.00 per hour.

Title Insurance \$600.00

This is determined by rates that are posted by the insurance company; this particular charge is the amount after the allowance of a 30% discount.

Charles Schutte (reimbursement) \$120.00

This charge was for out-of-pocket expenses of the realtor in obtaining health department approval of subdivision.

Recording fees \$37.00

This amount is established by state code.

County tax \$474.25

This amount is established by state code based upon amount of purchase price (for deed) and amount financed (for deed of trust).

State tax \$1,422.75

This amount is established by state code based upon amount of purchase price (for deed) and amount financed (for deed of trust).

Record Survey \$16.00

Minimum fee established by Clerk's Office to record plat.

Survey \$2,200.00

Survey was required by lender. Amount of fee of surveyor reasonable for the area and for the services performed.

Courier \$30.00

Actual out of pocket cost to obtain courier service.

### Discussion

According to governing regulations, claimant may only be reimbursed for real estate expenses associated with the portion of his land which reasonably relates to the residence site. Specifically, Federal Travel Regulation (FTR) 302-6.1(f)(2)(ii) provides: "The employee shall be limited to pro rata reimbursement when he/she sells or purchases land in excess of that which reasonably relates to the residence site." 41 CFR 302-6.1(f)(2)(ii) (1998).<sup>3</sup> In Frank A. Sterbenz, GSBCA 13662-RELO, 97-1 BCA ¶ 28,871, we applied this proration rule by determining how much land "reasonably relates to the residence site" and how much land is "in excess." As we stated in Cecilia McNicoll, GSBCA 15111-RELO, 00-1 BCA ¶ 30,810, quoting Sterbenz: "This determination should initially be made by the agency to which the claim is submitted based upon the prevailing and customary practices in the locality of the official duty station." 00-1 BCA at 144,005; Larry D. Gatewood, GSBCA 15343-RELO (Nov. 28, 2000).

As the Comptroller General recognized, "the purchase of a 50-acre parcel generally requires proration of real estate expenses." James W. Thomas, B-212326 (Nov. 23, 1983). Further, in 54 Comp. Gen. 597 (1975), the Comptroller General articulated guidelines to apply in determining the proper pro rata reimbursement, including examination of zoning laws, appraisal by experts, and consideration of the location and topography of the land as ways of establishing reasonableness of the property size being sold. Accord John A. Byrd, 54 Comp. Gen. 58 (1984). The Comptroller General elaborated:

Absent any zoning laws or regulations for the building of residential dwellings or if the area is generally zoned for agricultural use and the sale or purchase involves a farm dwelling with appurtenant outbuildings, the [agency's] certifying officer should take into account such factors as the use to which the land has been put in the past, its present utilization and the potential for future use. That will include consideration of crop growing, standing timber, other income producing use, fencing, irrigation, etc. In cases of unimproved land which could be subdivided and sold as lots in the future, it is suggested that the officer take into account the size of the lots in other subdivisions in the area and the requirements of the local or State Department of Health which is usually concerned with the waste disposal systems and the percolation quality of the soils. . . .

. . . The valuation of the excess land for proration purposes would be the difference between the purchase or sale price less the valuation of the residence, the residence site and its appurtenant buildings.

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<sup>3</sup>The Joint Travel Regulations (JTR), at paragraph C14000-F.2(b), contain a similar provision.

54 Comp. Gen. at 598-99; accord Michael T. Matarrese, GSBCA 14769-RELO, 99-1 BCA ¶ 30,243; Byrd; Daniel J. Totheroh, B-204046 (Aug. 27, 1981); Franklin J. Rindt, B-199900 (Feb. 10, 1981). The Comptroller General has also stated that an appraisal can be used to determine the value of the residential site for reimbursement purposes. John T. Stanton, B-210474 (Aug. 29, 1983).<sup>4</sup>

Applying these standards, we conclude that the record in this case establishes that three acres was reasonably necessary for the residential site. The drain fields and well are within three acres of the residence, and one acre is currently the minimum size for a residential site in this county. Further, four acres is the maximum lot size for new lots, with two to three acres being a reasonable accompaniment for a residence, in the view of an official with the Clarke County Department of Planning and Zoning. Claimant's contention that the entire 107 acres relates to the residential site based upon his family's use of the property is without legal merit.

The appraisal indicates that the proper valuation of the residence and three acres is \$452,055. We do not include the value of the tenant house, barn, other outbuildings, or excess acreage as they are not reasonably related to the residence site, and are capable of generating income. See Gatewood, slip op. at 5 ("In determining whether there is land in excess of what reasonably relates to the residence, the land's potential for income production, not the current owner's actual use, is a determinative factor."). The appraisal states that the total value of the land and improvements is \$931,555, but this represents 157 acres, since the appraisal was done before the prior owner's subdivision which removed fifty acres. Subtracting the value of this acreage, \$125,000, using the \$2500 per acre figure from the appraisal, the total appraised value would be \$806,555.

In sum, based upon the record before us the agency may prorate reasonable real estate expenses based upon the percentage of the valuation of the residence plus three acres, \$452,055, divided by the total appraisal value of the property, \$806,555, or 56.05%.<sup>5</sup>

In addition, the attorney fees may only be reimbursed if customarily paid by the purchaser of a residence at the new official duty station and to the extent that they do not exceed amounts customarily charged in the locality of the residence. 41 CFR 302-6.2(c). In Stanley H. Levine, GSBCA 14909-RELO, 00-1 BCA ¶ 30,603 (1999), the Board denied reimbursement for attorney fees above \$650, the average attorney fee for a residential sale in the Ft. Monmouth, New Jersey, locality. Id. at 2 (citing Margaret Kasper, GSBCA 14411-RELO, 99-1 BCA ¶ 30,119). In Kasper, the Board denied reimbursement

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<sup>4</sup>In the absence of a legitimate appraisal, tax assessment records may be used. Monte W. Ausland, B-229368 (Sept. 20, 1988).

<sup>5</sup>We recognize that the Comptroller General has in some cases prorated expenses based upon a ratio of the employee residence area site value to the sale price of the property. Dikram Hazirjian, B-213385 (Mar. 23, 1984); Stanton, B-210474. However, in the instant case, we apply the ratio this Board approved in Gatewood, GSBCA 15343-RELO, that is, the residence site value divided by the total property value. Such a ratio is appropriate here given the large disparity in the appraised value and the purchase price.

of attorney fees above \$600, the average customarily paid in the locality. 99-1 BCA at 149,014 (citing Edward C. Brandt, GSBCA 13649-RELO, 97-2 BCA ¶ 29,054 (attorney fee of \$75 allowed as apparently within customary range paid in locality); Gregory A. Moore, B-249311, et al. (Feb. 4, 1993) (reimbursement limited to \$200, the amount of legal fees for real estate transactions customarily paid in Iowa City, Iowa)); accord David R. Petak, B-247860 (July 23, 1992) (denial of legal fees over and above the amount customarily paid in Atlanta, Georgia).

Regarding title insurance, the governing regulations provide that a premium paid for lender's title insurance is a reimbursable miscellaneous expense, although a premium paid for owner's title insurance is not reimbursable unless it was a prerequisite either to financing or to the transfer of the property. JTR C14002-A.4.a(8), (9); C14002-A.4.b(1). We do not know whether the title insurance premium paid by claimant was for lender's title insurance or owner's title insurance. In order for claimant to be reimbursed for the title insurance premium, he will have to provide the agency with further information concerning the insurance. Wayne E. Smith, GSBCA 14844-RELO, 99-1 BCA ¶ 30,247.

Applicable regulation permits the reimbursement of costs of making surveys, or preparing drawings or plats, when required for legal or financing purposes, if two conditions are met: the costs are customarily paid by the purchaser of a residence at the new duty station and the amount does not exceed that customarily charged in the locality of the residence. 41 CFR 302-6.2(c). In Michael T. Matarrese, 99-1 BCA at 149,590, the Board upheld the agency's decision to reimburse 29% of survey costs because only 5 out of 17.02 acres were reasonably related to the residence site.

The Comptroller General also addressed survey costs in 54 Comp. Gen. 597:

We understand that a surveyor's fee might be composed of a charge for the surveyor's search of the land records and a charge for the field work covering the actual measurement of the land necessary for the legal description of the property. In such cases careful consideration should be given to the charges. Those that are related to the field work should be prorated according to the size of the property and the same ratio formula determined as above while all charges attributable to work on the land records should be paid because a searcher could spend as much time working on the land records tracing the evolution of a small parcel of land as he/she would a large tract.

54 Comp. Gen. at 599-600. Here, the survey's field work charges should be prorated based upon three acres, not 107.

Claimant may recover the appraisal fee to the extent he demonstrates that the amount is customary for this area. 41 CFR 302-6.2(b); JTR C14002A.2; Albert L. Van Tuinen, GSBCA 14492-RELO, 98-2 BCA ¶ 30,091. We also point out that property taxes are not reimbursable. 41 CFR 302-6.2(d)(2)(i), (iii). However, mortgage taxes and transfer taxes are reimbursable. 41 CFR 302-6.2(d)(1)(iv); David G. Winter, GSBCA 14229-RELO, 98-1 BCA ¶ 29,631 (agency should reimburse claimant only if he provides proof that his tax was a mortgage or transfer tax and not a property tax). Thus, to recover, claimant must prove the taxes at issue were mortgage or transfer taxes.

The \$120 charge for "out-of-pocket expenses of the realtor in obtaining health department approval of the subdivision" is not reimbursable since this is not a cost of the property reasonably related to the residential site.

Nor is the courier fee reimbursable. Although a courier was used, there is no indication in the record that the use of a courier was a required service in the residence purchase process. As such, claimant may not recover the \$30. Gatewood; Stanley H. Levine, GSBCA 15065-RELO, 00-1 BCA ¶ 30,809.

#### Decision

Claimant's real estate expenses may be reimbursed in accordance with the above guidelines.

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MARY ELLEN COSTER WILLIAMS  
Board Judge