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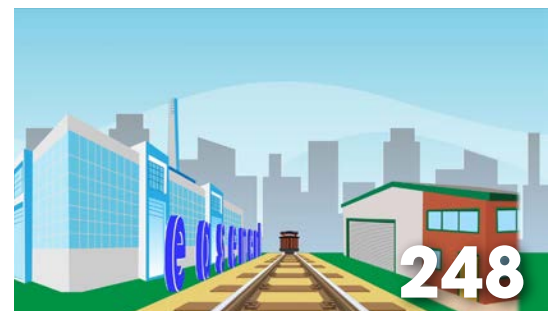
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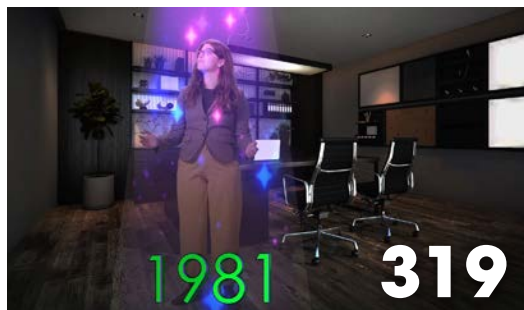
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Real estate = Immovable

Ownership Concepts

Physical and legal aspects of real estate

For most situations, the term “**property**” means a physical or tangible thing. However, property can be more broadly defined, focusing on the *rights* which arise out of the object. Thus, property is referred to as a **bundle of rights**, which for the purposes of this material is real estate.

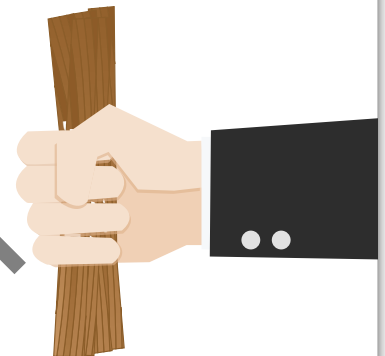
Further, property is anything which may be owned. In turn, *ownership* is the right to possess the property owned and use it to the exclusion of others. [Calif. Civil Code §654]

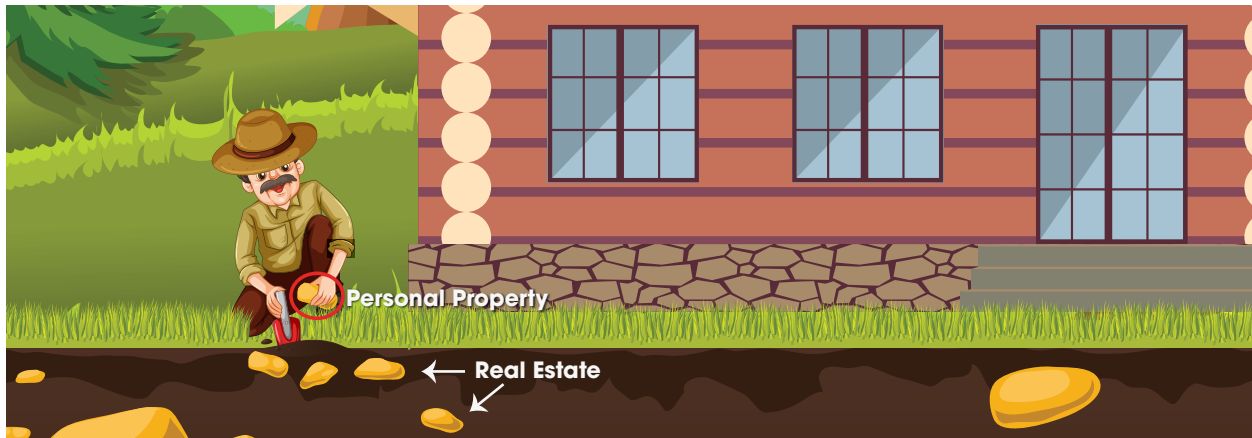
The *right to possess* and use property includes the rights to:

- occupy;
- sell or dispose;
- encumber; or
- lease.

Property is divided by types into two primary categories:

- **real estate**, also called *real property* or *realty*; and
- **personal property**, also called *personalty*. [CC §657]





Real estate is characterized as **immovable**, whereas personal property is **movable**. [CC §§659, 657]

Personal property is defined, by way of exclusion, as all property which is not classified as real estate. [CC §§658, 663]

While the distinction between real estate and personal property seems apparent at first glance, the difference is not always so clear.

Cutting up the real estate

Real estate may be physically cut up by **severance** of a part of the earth (i.e., removal of minerals). **Title** to real estate may also be cut up in terms of time, providing sequential ownership.

For example, *fee ownership* may be conveyed to one person for life, and on their death, transferred by the fee owner to another. *Time sharing* is another example of the allocation of ownership by time, such as the exclusive right to occupy a space for only three weeks during the year.

Title to real estate may also be *fractionalized* by concurrently vesting title in the name of co-owners, such as tenants-in-common, who each hold an undivided (fractional) ownership interest in the real estate.

Possession to real estate may be cut out of the fee ownership and conveyed for a period of time. For instance, the fee owner of real estate acting as a landlord conveys possession of the property to a tenant under a lease agreement for a fixed term, called a *tenancy*. When the tenancy expires or is terminated, possession of the property *reverts* to the landlord. The landlord retains fee title to the real estate at all times, subject to the *lease*.

Possession may also be cut up by creating *divided interests* in a property, as opposed to undivided interests. For example, an owner may lease a portion of

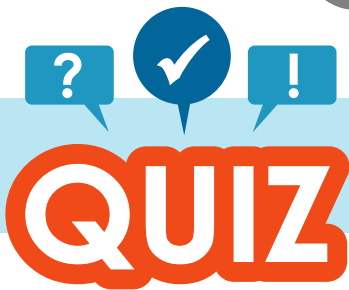
their property to a tenant. The tenant, in turn, may sublease a portion of their space to yet another person, known as a *subtenant*.

Other non-possessory interests in real estate may be created, such as **liens**. *Liens* are interests in real estate which secure payment or performance of a debt or other monetary obligation, such as a:

- trust deed lien; or
- local property tax lien.

On nonpayment of a lien amount, the lienholder may force the sale of the real estate to pay off and satisfy the lien.

Thus, an owner's rights in a parcel of real estate extend beyond the mere physical aspects of the land, airspace and improvements located within the legally described boundaries of the property.



1. Property is best defined as:
 - a. a moveable thing.
 - b. a trade secret.
 - c. a bundle of rights.
2. Property is divided by types into two primary categories:
 - a. real estate and personal property.
 - b. assets and liabilities.
 - c. residential and commercial.



Real estate components and the boundaries of real estate

The **physical components** of real estate include:

- the land;
- anything affixed to the land;
- anything appurtenant (incidental rights in adjoining property) to the land; and
- anything which cannot be removed from the land by law. [Calif Civil Code §658]

Real estate includes buildings, fences, trees, watercourses and easements within a parcel's horizontal and vertical boundaries. Anything below the surface, such as water and minerals, or above the surface in the air space, such as crops and timber, is part of the real estate.

For example, the rental of a boat slip includes the water and the land below it, both of which comprise the total of the rented real estate. Thus, landlord/tenant law controls the rental of the slip. [**Smith v. Municipal Court** (1988) 202 CA3d 685]

In the case of a condominium unit, the **air space** enclosed within the walls is the real estate. The structure itself, land and air space outside the unit are the property of the association or all the owners of the separate parcels of air space within the condominium project, creating what is called a **common interest development (CID)**. [CC §4125]

Defining the legal description

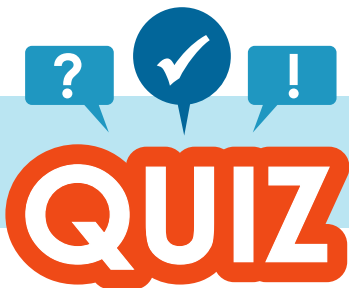
A parcel of real estate is located by defining its legal description on the face of the earth. Using the property's *legal description*, a surveyor locates and sets the corners and *horizontal boundaries* of the parcel.

The legal, horizontal boundary description of real estate is documented in numerous locations, such as:

- deeds;
- public records of the county where the parcel is located;
- subdivision maps; and
- government surveys relating to the property.

Real estate is three-dimensional and reaches perpendicular to the horizontal boundary. In addition to the surface area between boundaries, the classic definition of real estate consists of the soil below to the core of the earth as well as the air space above to infinity.

All permanent structures, crops and timber within this *inverse pyramid* are also a part of the parcel of real estate. The three-dimensional aspect of real estate has its source in the English common law. [Calif Civil Code §659]



1. The physical components of real estate include everything EXCEPT:
 - a. the land.
 - b. anything affixed to the land.
 - c. anything which can be removed from the land.
2. What shape best illustrates the classic definition of real estate?
 - a. Inverse pyramid.
 - b. Static sphere.
 - c. Convex rectangle.

personal property



Land, oil and gas

The first component of real estate is **land**. *Land* includes:

- soil;
- rocks;
- other materials of the earth; and
- the reasonable airspace above the earth. [Calif. Civil Code §659]

The soil and solid materials, such as ores and minerals, are considered land while they remain undisturbed as a part of the earth. For example, unmined gold dormant in the earth is real estate.

However, when the gold is mined, it becomes *personal property* since it is no longer embedded in the earth. The gold has been converted from something immovable — part of the rock below the soil — to something movable.

Minerals in the soil are *severable* from the earth. Also, fee ownership to the soil and minerals may be conveyed away from the ownership of the remainder of the land.

When ownership of minerals in a parcel of land is transferred, the transfer establishes two fee owners of the real estate located within the same legal description — an owner of the **surface rights** and an owner of the **mineral rights** beneath the surface.

These parties are not co-owners of the real estate, but individual owners of separate vertically-located portions of the same real estate. Both fee owners are

entitled to reasonable use and access to their ownership interest in the real estate.

For example, an owner sells and conveys the right to extract minerals to a buyer. On conveyance, there now exists:

- a surface owner; and
- a mineral rights owner.

Later, the surface owner conveys the real estate to a developer. The developer subdivides the parcel of real estate and plans to construct homes on the lots.

The mineral rights owner objects to the construction, claiming the homes, if built, will interfere with their right to enter the property and remove their minerals.

Is the mineral rights owner entitled to enter the property to remove the minerals?

Yes! But only as necessary to use their mineral rights. The rights of the surface owner and the mineral rights owner are thus *balanced* to determine the precise surface location to be used to extract the minerals. [**Callahan v. Martin** (1935) 3 C2d 110]

The right to remove minerals from another's real estate is called a **profit a prendre**.

Fugacious matter

Unlike solid minerals which are stationary, oil and gas are mobile. Oil and gas are referred to as being **fugacious matter** as they are transitory.

Oil and gas are perpetually percolating under the earth's surface. Due to their fleeting nature, a real estate owner does not hold title to the physical oil and gas situated under the surface of their real estate. At any given time, a real estate owner will have more or less oil or gas depending on the earth's movements. The ownership interest in unremoved oil and gas is referred to as a **corporeal hereditament**.

In California, oil and gas are incapable of being owned until they are actually possessed. Once they have been removed, they become personal property. [**Callahan v. Martin** (1935) 3 C2d 110]

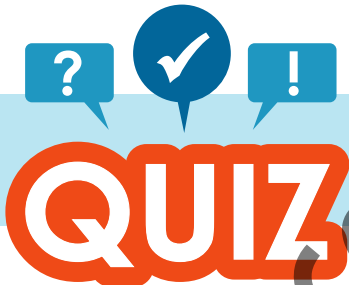
A fee owner has the exclusive right to drill for oil and gas on their premises, unless that right has been conveyed away to others.

Rather than owning the physical oil and gas, the fee owner has a right, called an *incorporeal hereditament*, to remove the oil or gas for their purposes. [**Gerhard v. Stephens** (1968) 68 C2d 864]

A land owner has the right to extract all the oil and gas brought up from their real

estate even if it is taken from an underground pool extending into an adjoining owners' real estate. [**Alphonzo E. Bell Corporation v. Bell View Oil Syndicate** (1938) 24 CA2d 587]

However, an owner may not slant drill onto another's property to reclaim the oil or gas that has flowed from their property. [Alphonzo E. Bell Corporation, *supra*]



1. The first component of real estate is land. Land includes all of the following EXCEPT:
 - a. soil and rocks.
 - b. reasonable airspace above the earth.
 - c. crops cultivated for harvest and sale.

2. In California, oil and gas are incapable of being owned until they are actually possessed. Once they have been removed, they become:
 - a. real estate.
 - b. personal property.
 - c. a license to possess property of another.



Airspace

Land also includes the airspace above the surface of a property. Under traditional English common law, the right to airspace continued to infinity. However, modern technological advances have altered the legal view on airspace.

For example, an owner runs a farm near a military airport with heavy air traffic. The government expands the military base by extending the runway to accommodate larger (and louder) aircraft. The aircraft, on their approach to the airport, now fly directly over the farmer's barn, scaring the animals and causing the farmer financial loss.

The farmer sues the government for trespass on their real estate since the airspace is being occupied by others — the military.

Can the owner keep the aircraft from flying into their real estate?

No! The common law doctrine regarding the ownership of airspace to the edge of the universe is obsolete. The owner only owns the airspace necessary to allow them a *reasonable use* of their real estate. The owner's real estate extends only so far above the surface of the earth as can be reasonably occupied or used in connection with the land. [**United States v. Causby** (1946) 328 US 256]

However, when the flight of airborne vehicles intrudes upon an owner's use and enjoyment of their real estate below, the intrusive entry may constitute a **taking** of the real estate. The continued noise and disturbance of low-flying aircraft has effectively *taken* something from the owner — the quiet use and enjoyment of their property. Thus, the owner needs to be compensated for their loss. [Causby, *supra*]

Other blue sky to be sold

The *airspace* portion of land has also been modernized with the concept of the **condominium**. An owner of a condominium unit legally owns the right to occupy the *parcel of airspace* they have acquired which is enclosed between the walls, ceilings and floors of the structure.

Included in these ownership rights are incidental rights of *ingress* and *egress*, called **appurtenances**. Also included is the *exclusive right* to use other portions of the real estate for storage and parking, plus an undivided fractional interest in the common areas, directly or through a homeowners' association (HOA). [Calif. Civil Code §4125]

Also, the installation of **active solar collectors** has led to the right of access to sunlight and air which passes through airspace above property owned by others. This right of access to the sun for a solar collector is considered an *easement*. [Calif. Public Resources Code §§25980 et seq.; CC §801.5(a)(1)]



1. A property owner owns the airspace above their property:
 - a. upward and into infinity.
 - b. to the extent necessary to allow them a reasonable use of their real estate.
 - c. to the height of the tallest improvement on the property.
2. When the flight of airborne vehicles intrudes upon an owner's use and enjoyment of their real estate below, the intrusive entry:
 - a. may constitute a taking of the real estate.
 - b. has no legal ramifications since the owner controls only a finite amount of airspace over the property.
 - c. may not be pursued by the owner of the existence of the intrusive entry was properly disclosed.

riparian right



Water

Water in its natural state is considered real estate since it is part of the material of the earth. While water is real estate, the right to use water is an *appurtenant* (incidental) right to the ownership of real estate.

Three key rights in water need to be separately understood:

- the right to use water;
- the right to take water by **appropriation** rights; and
- the right to take water by **prescriptive rights**.

The right to use water is called a **riparian right**. Riparian rights refer to the rights of a real estate owner to take surface water from a running water source contiguous to their land, such as a river or stream. [Calif. Water Code §101]

The right to take water may be acquired by *appropriation*. The appropriator of water diverts water from a river or watercourse to their real estate for reasonable use. [**In re Water of Hallett Creek Stream System** (1988) 44 C3d 448]

Also, an individual may obtain *prescriptive rights* in water by wrongfully appropriating nonsurplus water openly and adversely under a claim of right for an uninterrupted period of at least five years. [**City of Barstow v. Mojave Water Agency** (2000) 23 C4th 1224]

However, all water in the state of California belongs to the people based on a *public trust doctrine*. Riparian, appropriation and prescriptive rights are subject to the state's interest in conserving and regulating water use. [Wat C §101]

Water is used, not owned

Water belongs in one of two categories:

- **surface water**, consisting of watercourses, lakes, springs, marshes, ponds, sloughs and any other water flowing over the surface of the earth caused by rain, snow, springs or seepage; or
- **ground water**, consisting of percolating, subterranean bodies of water located in underground *basins*. [Restatement of the Law 2d Torts §§841, 845, 846]

Holders of rights to withdraw *surface waters* have **riparian rights**. Holders of rights to pump ground water have **overlying rights**.

The legal rights to extract and use water are based on priorities and are classified as:

- *land owner's rights* consisting of both riparian and overlying rights;
- *appropriation rights* to withdraw water under license from the state; and
- *prescriptive rights* to withdraw water legally entitled to be used by others.

Riparian rights refer to a land owner's appurtenant property right to withdraw water from an adjacent river or lake for beneficial use on their riparian land.

Overlying rights refer to a land owner's right to the use of ground water below the surface of their land.

An overlying land owner has rights to an allotment of water which is measured by the ground water in the basin over which their land is located. Overlying land owners have equal rights against other overlying land owners to a basin's ground water percolating underneath their land, subject to their *reasonable use* of the water.

Overlying and riparian rights are legally analogous to one another, except for the limitations placed on overlying land owners to use ground water and riparian land owners to use surface water. [**City of Barstow v. Mojave Water Agency** (2000) 23 C4th 1224]

A land owner's use of water in the exercise of their riparian or overlying water rights has *priority* over water rights held by appropriators licensed by the state.

Riparian and overlying water rights are part of the ownership of land, and run with the title to the land when it is sold. Water rights are not personal property which may be assigned or used for the benefit of other property.

Land entitled to water rights

Riparian land is a parcel of real estate located both adjacent to a water source with surface water and within the *watershed* (basin) of the surface water.

A parcel is considered riparian land when it:

- touches the surface water; or
- was part of a larger riparian parcel and retained its riparian rights by reassignment when parceled.

The amount of frontage in actual contact with the surface water of a river or lake does not determine whether a parcel is considered riparian land. For example, a 40-acre tract of land, of which only 250 feet abuts a stream, is considered riparian land. [**Joeger v. Mt. Shasta Power Corp.** (1932) 214 C 630]

To constitute riparian land, a property also needs to be located within the watershed surrounding the watercourse. Should a portion of riparian land extend outside the watershed, only the portion within the watershed is entitled to use the water from the watercourse.

Surface water used on land located within its watershed will eventually return to the watercourse, minus the water consumed, in a natural process called **percolation**. Additionally, rain falling on lands within the watershed of a watercourse feeds the watercourse. Thus, a riparian land owner may only divert water to the portion of their land which allows the water to return to the watercourse.

Land lying within the watershed of one stream above the point where the two streams unite, called a **confluence**, is not considered to be riparian to the other. Further, the surface flow (river) below the *confluence* of two streams is a new and entirely different watershed, justifying a new name for the river below the confluence, as is the practice in Mexico to distinguish the watershed. [**Anaheim Union Water Co. v. Fuller** (1907) 150 C 327]

Riparian rights are appurtenant

The right to use riparian water is an **appurtenant** (incidental) right attached to and transferred with the ownership of real estate. [Calif. Civil Code §§658, 662]

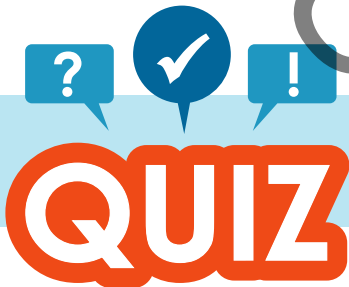
Each riparian land owner is entitled to a *reasonable use* of the natural flow of stream water running through or adjacent to their land. However, the quantity of the water withdrawn is subject to an upstream riparian land owner's *priority right* to first withdraw water for reasonable use on their upstream riparian land.

Additionally, a riparian land owner may not divert stream water to nonriparian lands, even when they are entitled to use the water on their riparian land, since

they are subject to the rules of percolation within the watershed. The land owner's riparian right to use the surface water is appurtenant to the land bordering the stream, not other lands without a border on the stream. [**Gould v. Eaton** (1897) 117 C 539]

Reasonable use and domestic priorities

Riparian rights are limited by the requirement that water taken from a stream needs to be put to a **reasonable and beneficial use**. Water is a state resource which, when used under a legal right, needs to be put to reasonable and beneficial use to the fullest extent possible. No one has a protectable interest in the unreasonable use of water. [Calif. Constitution, Article X §2]



1. _____ refer to the rights of a real estate owner to take surface water from a running water source contiguous to their land, such as a river or stream.
 - a. Overlying rights
 - b. Equitable rights
 - c. Riparian rights

2. The right to take water may be acquired by _____ when a land owner diverts water from a river or watercourse to their real estate for reasonable use.
 - a. prescription
 - b. appropriation
 - c. confluence

Practice tip



Affixed to the land and trade fixtures

Real estate includes things which are affixed to the land. Things may be affixed to the land by:

- roots (e.g., shrubs and trees);
- embedment (e.g., walls);
- permanently resting (e.g., structures); or
- physically attached (e.g., by cement or nails). [Calif. Civil Code §660]

Things attached to the earth naturally are real estate. Natural fixtures to the land, called **fructus naturales**, include:

- trees;
- shrubs; and
- grass.

However, natural items planted and cultivated for human consumption and use are fruits of labor, called **fructus industriales**.

Fructus industriales include such things as crops and standing timber. Crops and timber are ordinarily considered real estate. However, industrial crops and standing timber sold under a purchase agreement and scheduled to be removed are considered personal property. [Calif. Commercial Code §9102(a)(44)]

Personal property that is permanently attached

A **fixture** is personal property which has become *permanently attached* to real

estate. As it is permanently attached, it effectively becomes part of the real estate and is conveyed with it. [Calif. Civil Code §660]



Factors which determine whether an item is a fixture or removable improvement include:

- relationship of the parties;
- agreement between the parties;
- intention of the parties;
- manner of attachment; and
- adaptability of attachment to the real estate's use. [**San Diego Trust & Savings Bank v. San Diego County** (1940) 16 C2d 142]

Individuals most likely to dispute whether an item is a fixture include:

- buyers and sellers;
- landlords and tenants;
- a builder and an owner;
- a lender and an owner; and
- the county assessor and an owner.

The most important factor when determining whether an item is a fixture or improvement is the **intent of the parties**.

Intent to make an item a permanent part of the real estate as a fixture is determined by:

- the manner of attachment; and
- the use and purpose of the item in dispute.

For example, when an item is attached to real estate by bolts, screws, cement or the like, the item is a fixture and part of the real estate. An item need not be attached to the real estate in this manner to be a fixture. Items of such weight and size that gravity maintains them in place are sufficient to give the item the character of permanence and affixation to be real estate.

Also, the item may be *constructively attached* when the item is a necessary, integral or working part of improvements on the real estate.

Used to render services or make products

Fixtures which are used to render services or make products for the trade or business of a tenant are called **trade fixtures**.

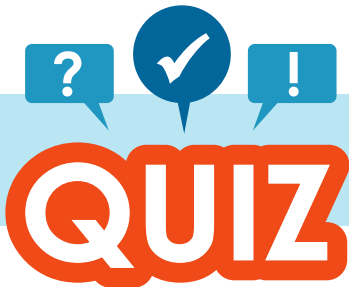
Trade fixtures are removed by the tenant on termination of the tenancy, unless agreed to the contrary with the landlord. The removal may not unduly damage the real estate. [Calif. Civil Code §1019]

Thus, trade fixtures are considered *personal property*.

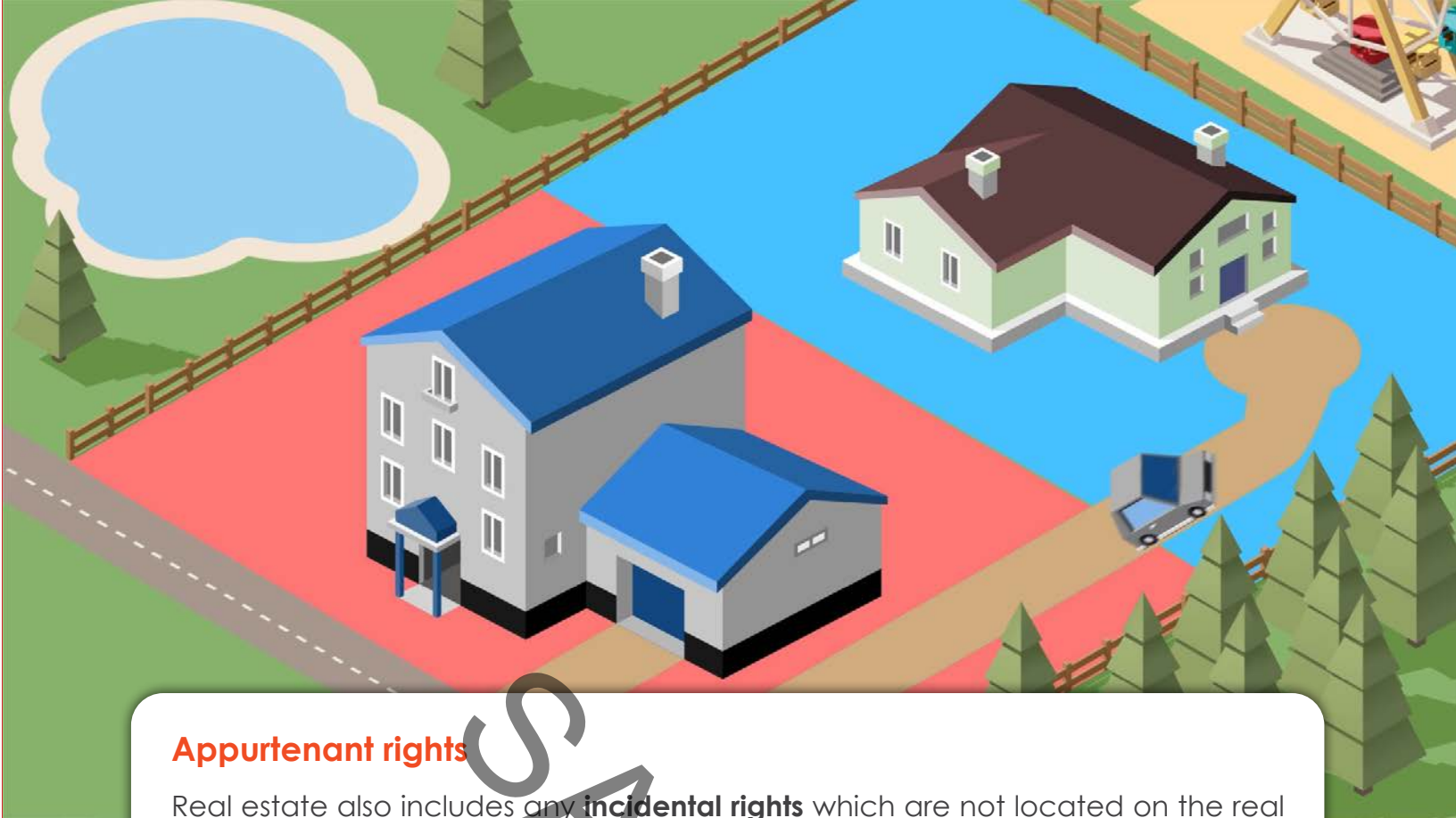
To be considered a trade fixture, a fixture needs to be an essential part of the tenant's business and its removal may not substantially damage the real estate.

In the instance of a beauty salon, trade fixtures include:

- mirrors;
- sink bowls;
- dryers; and
- installed wash stations. [**Beebe v. Richards** (1953) 115 CA2d 589]



1. Intent to make an item a permanent part of the real estate as a fixture is determined by:
 - a. the manner of attachment
 - b. the use and purpose of the item in dispute.
 - c. Both a. and b.
2. On the termination of a tenancy, trade fixtures are generally:
 - a. removed by the tenant when their removal does not unduly damage the real estate.
 - b. removed by the landlord when their removal poses the risk of damage to the real estate.
 - c. retained at the property and become the property of the landlord through reversion.



Appurtenant rights

Real estate also includes any **incidental rights** which are not located on the real estate nor reflected on its title, called **appurtenant rights**. *Appurtenant rights* include the right of **ingress and egress** (entry and exit) across adjoining properties. [Calif. Civil Code §662]

An *appurtenant easement* is an interest held by an owner of one parcel of real estate to use adjoining real estate.

Under an appurtenant easement, an owner's **right to use** adjoining real estate is part of their real estate, although it is not reflected on the title to the real estate. This right to use adjoining property *runs with the land* and is automatically conveyed with the real estate when the owner sells it. Appurtenant rights remain with the real estate they benefit and do not transfer from person to person.

Other appurtenant rights to real estate include the right to the *lateral and subjacent support* provided by the existence of adjoining real estate. For example, the owner of real estate may not remove soil from their land if doing so causes the adjoining real estate to subside or collapse.

Appurtenant rights held by an owner of one property are a recorded encumbrance on title to the adjacent property burdened by the appurtenant rights, such as an easement.



QUIZ

1. Incidental rights in a property which are not located on the real estate nor reflected on its title are:
 - a. inalienable rights.
 - b. assignable rights.
 - c. appurtenant rights.
2. Which of the following statements about appurtenant is most correct?
 - a. Appurtenant rights can include the right to license a specific portion of an adjacent property for a specified use.
 - b. Appurtenant rights can include the right of ingress and egress across adjoining properties.
 - c. Appurtenant rights can include the right to take private property for public use.