of the property. The rights and responsibilities which automatically convey are sometimes said to **run with the land**.

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**Figure 1-1 • Rights**

1. **LAND.**

   Most people think of *land* as the earth’s surface, the ground that we walk on and build on. Actually, as FIGURE 1-1 shows, it is three-dimensional. In an infinitely slender triangle, it starts at the earth’s center (subsurface rights), passes through the surface and extends into space above the surface (air rights) to an indefinite height.

2. **ATTACHMENTS.**

   Things permanently attached to the land, physically or legally, are called *tenements* and are immovable by law. They can be either products of nature (natural attachments) or man-made (artificial attachments).

   Growing things can be either real or personal property. Those grown naturally and requiring no annual cultivation, like shade trees, shrubbery, or perennial plants, are called *fructus naturales* and are considered to be real property. They automatically transfer with the land. Crops that are planted and harvested each year, such as corn, wheat, soybeans and tobacco, are called *fructus industriales* or *emblements*. They are generally considered to be personal property. To avoid confusion, when crop-producing land is sold during a growing season, the sales agreement should clearly state whether or not the crops are to be transferred with the land.

   Real estate includes any product of human planning or labor that is affixed to the land with the intent of being permanent. These artificial attachments are called *improvements* and include such things as buildings, fences, driveways, pipelines, swimming pools, and even mobile homes if they are attached to the land.
3. RIGHTS OF REAL PROPERTY OWNERSHIP.

Also included in the definition of real estate are the rights of ownership such as air, mineral and water rights. These can be sold or leased separately. An owner might sell the land but keep the mineral rights or keep the land but lease the mineral rights to someone else.

a. Water rights.

Underground water that is not confined to a specific waterway is called percolating water. In some states the right to tap percolating water is unrestricted, but in others it must be shared with neighboring owners. A perc test is used to determine the feasibility of installing a septic system by observing how quickly water is absorbed by the ground.

The level at which percolating water is found is called the water table. This water might be used for wells, irrigation or for filling a lake on the owner’s land. If the water is pure enough to drink it is known as potable water.

When a property borders a body of water, the real property rights include the right to use the water.

Riparian rights concern those properties that border a river or stream and the owner has the right to use the water for such things as swimming, boating or fishing. The riparian owner may even divert water, possibly for irrigation, but only if the natural flow is not interrupted or altered. The ownership rights are not exclusive because the rights of other owners whose properties border the same waterway must be respected.

Some states enforce a doctrine of correlative rights, which allows the owner only a reasonable share of the water during times of short supply. Other states, where water is scarce, have a doctrine of prior appropriation, the right to use is secured by a permit. In periods of drought, earlier permits establish priority of use. Such rights run with the land when ownership is transferred.

Navigable waters are rivers and oceans used for commercial shipping and are identified on government survey maps. They are open to the public. A riparian owner whose property borders a non-navigable waterway would typically own to the center of that waterway. In the event the waterway is designated as navigable, the ownership rights would only extend to the high water mark or riverbank, depending on state law.

Littoral rights concern properties which border large navigable lakes, oceans, or seas and typically involve the use and enjoyment of the shore. The owner would have the right to use the beach or the water but could not interfere with the public’s right of use.
Littoral owners have the same non-exclusive rights to use adjacent waters as riparian owners, but the ownership of such land does not extend to the middle of the waterway. Ownership stops at the high tide or high water mark.

b. Mineral rights.

Minerals on or below the earth’s surface are considered real property. Once they are removed, they become personal property. The land owner’s rights to such things as coal, oil, gas, and ores are called mineral rights.

They accompany the land when the land is sold, however, it is possible to sell or lease the mineral rights separately and retain the rest of the property. In this case, the person who acquires the mineral rights must have a means of extraction, or the rights would be worthless. Therefore, unless there is an agreement to the contrary, the law allows the individual who acquires mineral rights an implied right of access to extract the minerals. If the deed denies this right, the best alternative would be to seek access from an adjoining owner. In mining operations, adjacent owners are protected by the right of lateral support. This provides that the natural contour of adjoining land must not be damaged by efforts to extract minerals from below the surface. The right of lateral support also applies when making improvements to property and a landowner may be liable for damage caused to adjoining property.

Solid minerals like coal and ores can be removed without affecting adjacent properties, however, oil and gas are usually governed by the law of capture. This law allows a well drilled on one property to extract oil and gas from under adjoining properties. All land owners have an equal right to drill for oil and gas.

c. Air rights.

A land owner’s rights theoretically extend into the space above the land to infinity. These air rights may be sold or leased separately from the land itself. This practice is becoming increasingly important in major cities because of the scarcity and high cost of land. For example, numerous buildings have been erected in the air space above railroad tracks, like the World Congress Center in Atlanta.

Recently, air rights have been leased or sold for communication devices such as microwave antennas. Condominium ownership also involves air rights because each owner owns a block of air space measured from inside wall to inside wall, an air lot.

Later in this chapter we will discuss systems used for measuring and identifying property in terms of its height. Most air space,
however, is subject to government controls. We see this in federal and state regulations that allow airplanes to use navigable air space in spite of a particular owner’s air rights. Building height limitations are also restrictions commonly placed on air rights; the World Congress Center is one example.

C. PROPERTY CHANGES.

Real property is defined as “land plus appurtenances,” but personal property can be defined simply as “property that is not real.” This may sound simple, but problems do arise when property changes from real to personal or personal to real.

1. SEVERANCE.

The term severance describes the process by which an item of real property becomes personal property. For example, a tree grown on the land is real property, but when it is cut down and taken to a sawmill to be processed into dimensional lumber, it becomes personal property. Even a house can be “severed” from the land, loaded on a truck and moved to a new site. It was real property; then it became personal property while being moved; and finally becomes real property again when it is affixed to the new land.

2. FIXTURES.

A property that was once personal but has become real is called a fixture and, as such, would automatically be conveyed to the buyer with the purchase. Examples of fixtures include built-in appliances in the kitchen, wall-to-wall carpeting, major plumbing fixtures, built-in cabinets, etc. However, whether an item is or is not a fixture is not always clear. This can cause problems when the seller removes something from the house that the buyer expects to remain. Five tests that can help make the matter clear are modification, attachment, relationship of the parties, intentions of the annexing party and agreement. (As a memory aid, use the acronym MARIA.)

a. Modification.

When a building is modified to accept an article, or when the article is modified to fit the building, it is probably a fixture. For example, a window air conditioner just placed into the window and plugged in, is probably personal property. However, if a hole is cut in the wall for the unit and the opening is insulated and trimmed once the unit is in place, it is more than likely a fixture.

b. Attachment.

Items, such as shelves or drapery rods that have been screwed into a wall, are physically attached to a building and easier to identify as fixtures. We must also consider legal attachments, relating to use. A good example is the remote control that operates a garage
door opener. It is not attached, but relates to equipment that is attached. The key to the front door is also an example of a legal attachment.

c. **Relationship of the parties.**

The fixture question might also relate to what relationship the person placing the item in the property has to the property (seller, buyer, landlord, tenant, etc.). For example, built-in kitchen appliances are clearly fixtures in a house, but they are considered trade fixtures and personal property if placed in a restaurant kitchen by a restaurant operator. *Trade fixtures*, as long as they are new additions and not replacements for things that were already there, are the tenant’s personal property. The tenant can remove them, unless there is an agreement to the contrary, as long as they are removed before the lease ends and any damage caused by the removal is repaired. If the fixtures are not removed properly by the end of the lease, they become the landlord’s property by *accession*.

d. **Intentions of annexing party.**

The status of a fixture can also depend on whether the person who places it in the property does or does not intend it to be part of the real estate. Unfortunately, this is not always clear. For example, a seller might think it is obvious that he will keep the antique dining-room chandelier that has been in his family for generations. However, a buyer, who saw the chandelier and later discovers it has been replaced with something less attractive, is going to be furious. A prudent agent will make the replacement before the property goes on the market.

e. **Agreement.**

Obviously, it is often difficult to determine whether or not an item should be considered a fixture. Things such as ceiling fans, gas logs, window treatments, patio furniture, etc. are sometimes debatable. A wise real estate agent makes sure to list in writing any of these “doubtful” items the seller intends to remove or that the buyer expects to acquire in the sales agreement. The legal definition no longer matters as long as there is a contractual agreement.