



# Video Renewal Course:

## Real Estate Made Reel™

**firstrtuesday**  
the California real estate educators



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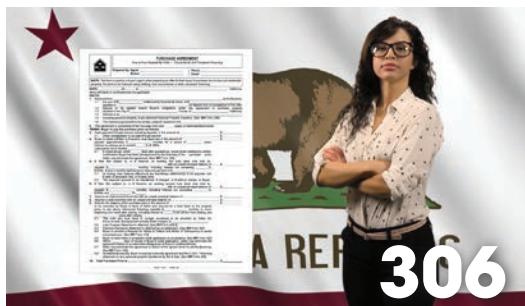
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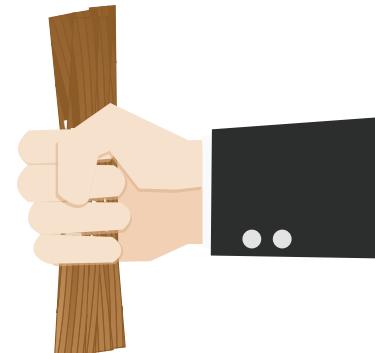
# Real estate = Immovable

## The Real Estate Exists

### 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.

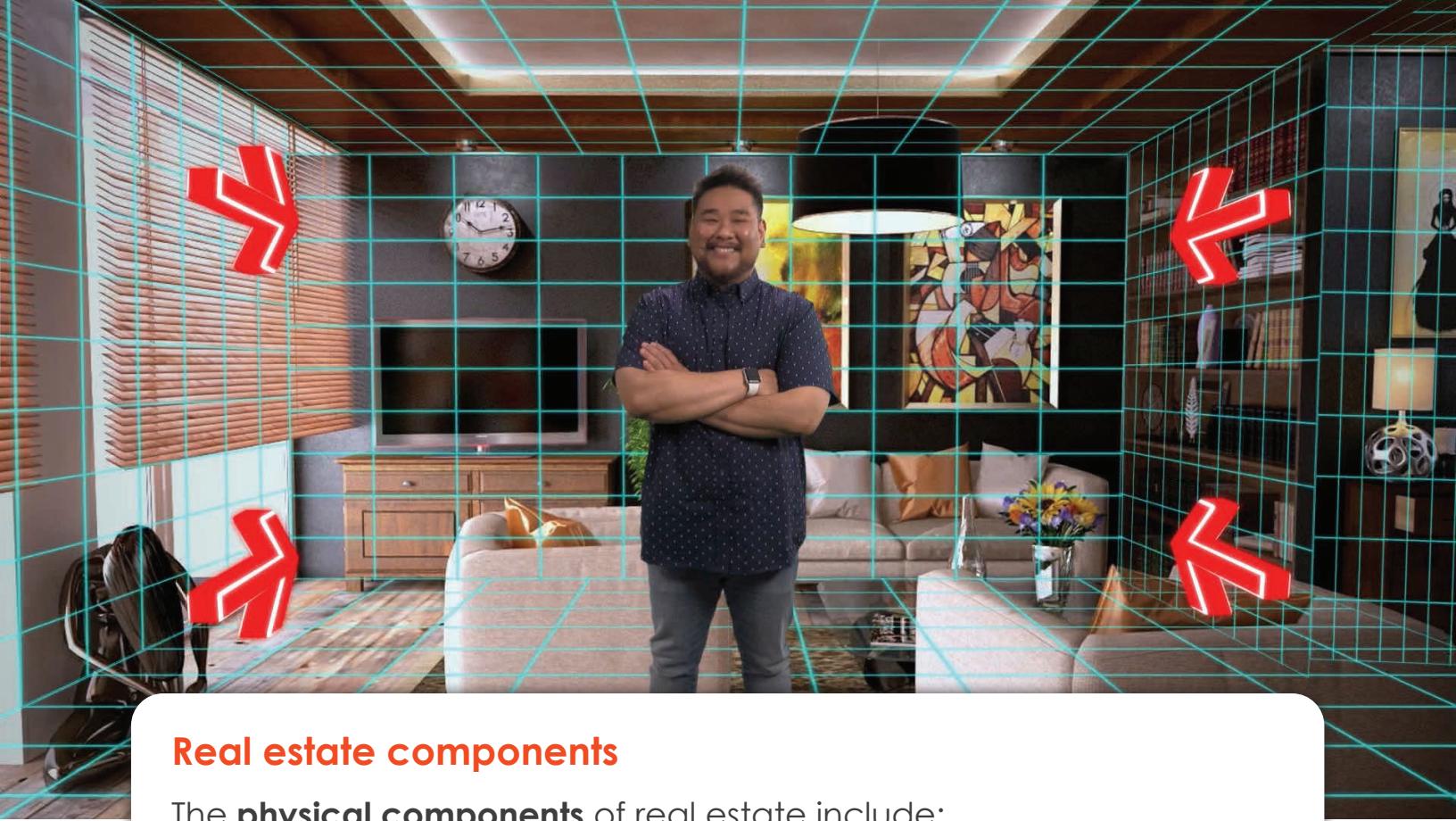
Thus, an owner's rights in a parcel of real estate extend beyond the mere physical aspects of the land, airspace and improvements located within the legally described boundaries of the property.





# QUIZ

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.
3. Personal property is best defined as:
  - a. all property which is less valuable than real estate.
  - b. all property which is not classified as real estate.
  - c. all property which may be personalized by the owner.



## Real estate components

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]



# QUIZ

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. In a condominium unit, the air space enclosed within the walls is considered:
  - a. common interest ownership.
  - b. an appurtenant right.
  - c. real estate.
3. In the instance of the rental of a boat slip, the total of the rented real estate includes:
  - a. the water below the boat slip.
  - b. the land below the boat slip.
  - c. both the water and the land below the boat slip.



## The boundaries of real estate

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]

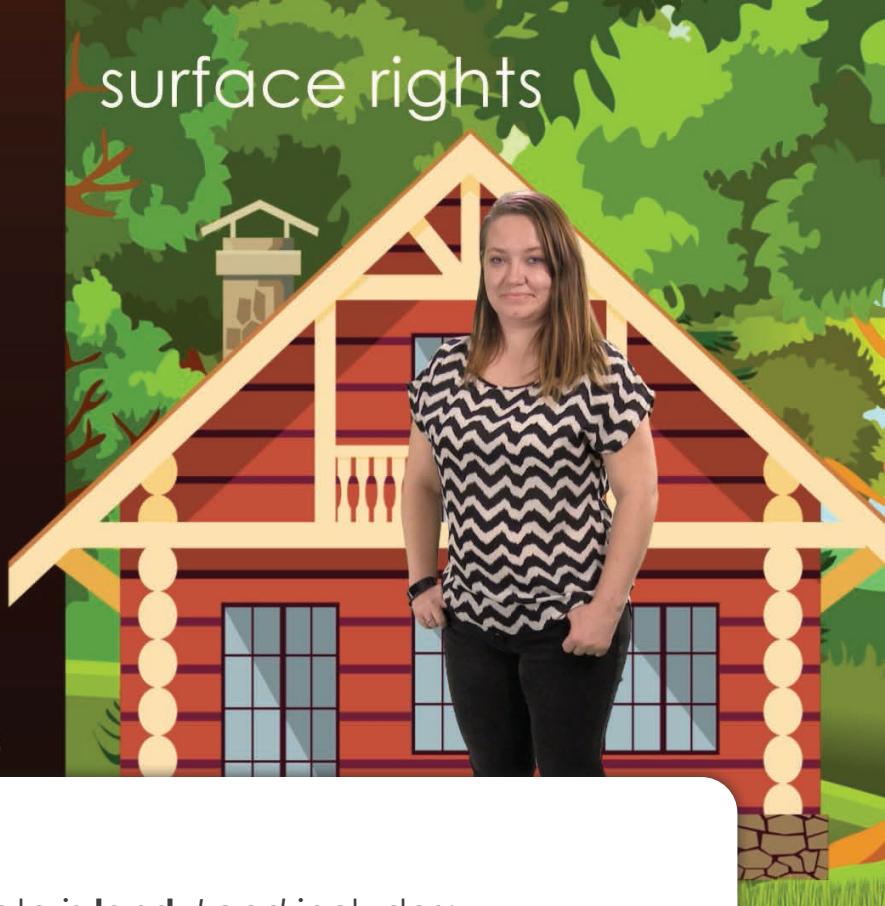


# QUIZ

1. Using a property's legal description, a surveyor locates and sets:
  - a. the property address and metes and bounds description of a parcel.
  - b. the baseline and vertical boundaries of a parcel.
  - c. the corners and horizontal boundaries of a parcel.
2. What shape best illustrates the classic definition of real estate?
  - a. Inverse pyramid.
  - b. Static sphere.
  - c. Convex rectangle.
3. The three-dimensional aspect of real estate has its source in:
  - a. Spanish civil law.
  - b. French Napoleonic law.
  - c. English common law



mineral rights



surface rights

## Land

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 à prendre**.

## **It's what's underneath that's important**

The usability of a piece of land is determined by many obvious factors, easily recognizable to the average homebuyer. For example, if a road runs through the middle of the property, this will cause the homeowner to deal with a whole new set of issues.

Less obvious, but just as important, zoning can also pose a problem, for example, if a property is zoned for residential use and the buyer wishes to build a commercial building.

But what's not visible to the naked eye (or even the county's office) is the land's most important characteristic: the soil.

Beyond whether or not a site has the ability to grow crops, the soil's characteristics determine whether a home can even be built in that spot. Further, just because a neighboring lot has a home does not mean the lot in question is also safe to build on.

Soil is identified by its:

- texture;
- grade;
- color;
- permeability; and
- density.

## **Soil types**

Three types of soil exist:

- *clay*, which has a fine texture, is extremely dense and limits the land's use;
- *loam*, which has a medium texture and has the fewest limitations for use; and

- sand, which has a coarse texture, is very permeable and is most susceptible to erosion.

The soil in your backyard is a mixture of clay and sand, as well as a smaller amount of silt (rock sediment). If it is majority clay, then it is considered *clayey*, and if it's mostly sand with a little bit of clay, it's considered sandy. If it is a mostly even mixture, your soil is loamy.

A soil's grade is measured by the size of its grain. For instance, gravel has a very high grade, while clay has a lower grade. The lower the grade, the less permeable and less susceptible to movement the ground is.

Light-colored soil is more susceptible to erosion and has fewer nutrients. Darker soil is more nutrient rich and has a smaller erosion factor.

How permeable the soil is also affects the building site. For instance, soil with high permeability — meaning water passes through the soil rapidly — causes difficulty for septic systems. On the other hand, septic systems cannot operate in soil with very slow permeability, such as clay, which can also cause problems for foundations.

Before beginning construction, the builder will ensure the soil is compact, or dense enough to establish a foundation. Compaction is completed by basically smashing down the soil, reducing the space between grains.

Finally, land with a shallow soil depth will make it hard to establish a foundation, landscaping and a septic system. Generally, the higher the depth — the distance from the topsoil to the bedrock or the water table — the easier it is to build the home and its required support systems.

All of this soil science matters not just for building, but for safety, as California is susceptible to earthquakes.

## Liquefaction zones

Liquefaction occurs when soft soil moves or collapses during an earthquake. The ground “liquefies” or behaves like sand at the beach, and the buildings on top lose all stability.

Areas susceptible to liquefaction — called *liquefaction zones* — are found mostly in low-lying areas along the coast. In the Bay Area, the U.S. Geological Survey claims most of San Francisco's residents live and work in a liquefaction zone.

Liquefaction can also occur on artificial landfill — common in urban areas — and other young deposits, such as those near streams and rivers.

A liquefaction zone is a type of *seismic hazard*. Thus, the presence of a liquefaction zone needs to be noted in the **Natural Hazard Disclosure Statement**, which is delivered by the seller or their agent to the buyer. The seller needs to disclose the presence of natural hazards, no matter the type of property. [CC §1103.1(b); see **RPI** Form 314]



# QUIZ

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. Mined gold is:
  - a. part of the real estate since it was embedded in the earth. The gold retains its status as real estate when it was immovable for a longer period of time than it was movable.
  - b. 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.
  - c. personal property since it can be sold with a bill of sale. The mined gold is considered personal property due primarily to the fact that it may be sold.
  
3. The right to remove minerals from another's real estate is called a(n):
  - a. lusus naturae.
  - b. profit a prendre.
  - c. emblemment.

# personal property



## Oil and gas

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*]

### **Does a tax deed conveying surface rights to a parcel of real estate also convey rights to the oil and gas beneath the parcel?**

**Facts:** A landowner leases oil and gas rights under their property to an oil company. Later, the owner defaults on a tax bill on the surface rights to a parcel of their real estate. The county forecloses and sells the parcel to a buyer. The tax deed conveying the parcel to the buyer does not include oil or gas royalties. Drilling operations commence to access the underground oil and gas.

**Claim:** The buyer seeks a percentage of royalties resulting from the drilling operation on the parcel, claiming they hold an interest in the oil and gas beneath the parcel since they own the land on which the drilling operation is to occur.

**Counterclaim:** The landowner claims the buyer holds no interest in the oil and gas beneath the parcel since the tax deed conveying the land to the buyer only conveyed the surface rights to the parcel, not oil and gas rights.

**Holding:** A California appeals court holds the buyer has no interest in the oil and gas beneath the parcel since the tax deed conveying the land to the buyer only conveyed surface rights to the parcel, not oil and gas rights. [**Leiper v. Gallegos** (November 20, 2019)\_CA6th\_]



# QUIZ

1. Oil and gas are referred to as being \_\_\_\_\_ since they are transitory.
  - a. a fungible asset
  - b. fascia matter
  - c. fugacious matter
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.
3. A landowner has the right to extract all the oil and gas brought up from their real estate:
  - a. even if it is taken from an underground pool extending into an adjoining owner's real estate.
  - b. even if owner slant drills onto another's property to reclaim the oil or gas that has flowed from their property.
  - c. only when the oil and gas are stationary below the owner's real estate and no percolating under the earth's surface.



## 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)]

## Solar easements and shady neighbors

A relatively recent type of easement is the **solar easement**. Solar easements were established with the intent of encouraging the productive use of solar energy systems as a matter of public policy.

A solar easement granted in a written instrument needs to state:

- the measured angles by which sunlight has to pass;
- the hours of the day during which the easement is effective;
- the limitations on any object which impairs the passage of sunlight through the easement; and
- the terms for terminating or revising the easement. [Calif. Civil Code §801.5; see **RPI** Form 322]

Solar easements are similar to easements of light, air or view since they restrict an adjacent property owner's ability to maintain any improvements interfering with a neighbor's solar energy system.

Consider a recorded restrictive covenant which limits the height of improvements on parcels within a housing development. A property owner's tree exceeds the height limitation and a neighbor successfully enforces the restrictive covenant requiring the owner to maintain the tree below the designated height.

In this instance, when the neighbor installs a solar collector on their property, they receive an incidental benefit from the height restriction since it limits the height of improvements on other parcels which hinder the passage of sunlight to their solar collector. [**Ezer v. Fuchsloch** (1979) 99 CA3d 849]

Also, a neighboring property owner who installs an active



## SOLAR SHADE CONTROL NOTICE

(California Public Resources Code §25982.1)

RPI FORM 322

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_ | Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** A building owner intending to install a solar collector may use this notice to notify all potentially affected adjacent property owners. This notice is to be sent by certified mail within 60 days before installation of the solar collector. After sending notice, if the actual installation date will be later than the date specified in the notice, the building owner must send a second notice with the corrected date to everyone who received the first notice.

DATE: \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.

### 1. TO:

Name \_\_\_\_\_  
Property Address \_\_\_\_\_  
  
Mailing Address \_\_\_\_\_  
  
Phone \_\_\_\_\_ Fax \_\_\_\_\_  
Email \_\_\_\_\_

### 2. FROM ADJOINING PROPERTY OWNER:

Name \_\_\_\_\_  
Property Address \_\_\_\_\_  
  
Mailing Address \_\_\_\_\_  
  
Phone \_\_\_\_\_ Fax \_\_\_\_\_  
Email \_\_\_\_\_

### NOTICE:

Under the Solar Shade Control Act (California Public Resources Code §25980 et seq.) a tree or shrub cannot cast a shadow greater than 10 percent of a solar collector absorption area upon that solar collector surface at any one time between the hours of 10 a.m. and 2 p.m. local standard time if the tree or shrub is placed after installation of a solar collector.

The owner of a building where a solar collector is proposed to be installed is providing this written notice to persons owning property that may be affected by the requirements of the act no more than 60 days prior to the installation of a solar collector.

The building owner is providing the following information:

Name of building owner: \_\_\_\_\_  
Address of building owner: \_\_\_\_\_  
Telephone number of building owner: \_\_\_\_\_  
Address of building where solar panel will be installed (including street number and name, city/county, and ZIP code): \_\_\_\_\_

Specific location on the property where a solar collector will be installed: \_\_\_\_\_  
\_\_\_\_\_

Assessor's book and page: \_\_\_\_\_  
Assessor's parcel number: \_\_\_\_\_

Installation date of solar collector: \_\_\_\_\_, 20\_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_\_\_\_

Building Owner's Signature: \_\_\_\_\_

*solar collector* is, by their conduct, granted a solar easement across adjacent properties under the **Solar Shade Control Act** without the need for a writing. The adjacent property owner may not later plant and maintain trees or shrubs which between 10 a.m. and 2 p.m. (standard time) shade an **active solar collector** previously installed by a neighboring property owner. [Calif. Public Resources Code §25982]

For easements created on an owner's property by a neighbor's conduct under the Solar Shade Control Act, trees or shrubs growing on the owner's property prior to the neighbor's installation of a solar collector may remain and are not subject to height restrictions. They were in place before the neighbor's solar collector was installed. Thus, no height limit on preexisting trees or shrubs exist, unless established by a recorded height restriction on improvements. [Pub Res C §§25980 et seq.]

Additionally, when a tree or shrub has been growing before a neighbor installs an active solar collector, the owner of the property containing the tree or shrub may replace it if it dies after the solar collector is installed. [Pub Res C §25984]



# QUIZ

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 if the existence of the intrusive entry was properly disclosed.
  - d.
3. \_\_\_\_\_ restrict an adjacent property owner's ability to maintain any improvements interfering with a neighbor's solar energy system.
  - a. Conservation easements
  - b. View easements
  - c. Solar easements

# 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]

Reasonable and beneficial uses include:

- domestic uses; and
- agricultural irrigation.

Whether a particular use of water is reasonable and beneficial is determined on a case by case basis. [Calif. Constitution, Article X §2]

While riparian land owners hold the same classification of legal rights to water, they need to share the water, giving priority to domestic uses over other uses, including agricultural irrigation.

The sharing of water between riparian land owners, with priority to upstream owners, is based on a tiered variety of priority and subordinate uses across the entire group of riparian owners, called **correlative rights**. Each land owner holds *correlative rights* within the riparian class of water rights.

### Water rights are usufructuary

Owners of land and water providers (appropriators) who hold water rights do not legally own water. They own rights to the reasonable use of the water. Their right-to-use is subject to change when circumstances controlling the use of water change, called **usufructuary rights**. It is a sort of “here today, gone tomorrow” approach to access and possession.

When a riparian land owner is not using water, downstream riparian land owners are entitled to the full flow of the water, subject to the upstream riparian owner's future reasonable use. Thus, the lack of use of the appurtenant right to water is not lost by mere nonuse alone.

However, an upstream riparian owner who is not using their allotment of water may not divert water to nonriparian land since the water does not percolate into the watershed. [Gould, *supra*]

## Competing water rights and allotments

In 1943, California established the **State Water Resources Control Board (Board)**. The Board acts as a referee for all disputes over water rights. The Board advises the California courts on the appropriate water allotment each of the disputing parties is entitled to take. Also, on a request from holders of water rights, the Board itself may hear legitimate disputes between the parties to determine the water allotment each party is entitled to take. [Calif. Water Code §2501]

When the Board determines the allotment of water to each holder of riparian rights, the needs of all riparian land owners within the watershed are taken into account. The amount of water allocated to a riparian owner is individually determined based on numerous factors, such as the need for domestic use, irrigation and generating power.

For example, an upstream owner of 66 acres of riparian land suitable for profitable irrigation is entitled to a smaller proportion of the water from a watercourse running through their land than a downstream owner of 96 acres of riparian land also suitable for profitable irrigation. [**Half Moon Bay Land Co. v. Cowell** (1916) 173 C 543]

## Riparian rights not lost by disuse

An owner of riparian land has water rights which are “part and parcel” of their land, called *appurtenant rights*. As appurtenant rights, riparian water rights cannot be lost by disuse.

For example, co-owners of riparian land partition the land, providing each with separate ownership of a pro rata portion. The partition is made by deeds which grant each owner their pro rata share of the original parcel's riparian right to the stream flow running through the parcels. Concurrently, the co-owner receiving the southern parcel is given an easement across the northern parcel to construct a pipeline to divert their share of the water from the stream to their parcel.

The southern owner never builds the pipeline and never diverts the water. Later, the northern owner begins to divert all the water from the stream to their parcel above the point where the pipeline easement meets the stream.

The southern owner claims the northern owner may not divert all the water from the stream since, as a riparian owner, the southern owner is entitled to their pro rata share of the stream's flow, whether or not they use their share.

The northern owner claims they may divert all of the stream water since the rights of the southern owner to divert the water were contingent on the construction of the pipeline and the diversion of the water, which was never done.

However, the northern owner may not interfere with the southern owner's riparian right to their reasonable share of the stream's flow. The riparian rights of the southern owner are "**part and parcel**" of their land, appurtenant rights which cannot be lost by disuse alone. The pipeline easement also cannot be lost by disuse alone. [**Parker v. Swett** (1922) 188 C 474]

Consider two appropriators who have no riparian rights appurtenant to any land but are allowed to withdraw water up to a set amount in the river. Additionally, both appropriators are entitled to take water unused by senior appropriators.

The senior appropriator fails to take their entitled amount of unused water during a five-year period. The junior appropriator seeks to reduce the amount of the senior appropriator's entitlement to the amount actually used each month during the prior five years, claiming the senior appropriator's nonuse forfeited the unused portion of their entitlement.

The senior appropriator claims they did not forfeit their right by nonuse since the amount of unused water available is unpredictable and therefore cannot be forfeited. Did the senior appropriator forfeit the unused portion of their entitlement to unused water?

Yes! The senior appropriator's nonuse forfeited their right to take unused water, entitling the junior appropriator to take the unused water up to the amount of their entitlement.

**[North Kern Water Storage District v. Ken Delta Water District (2007) 147CA4th 555]**

### **Public dedication by allowing use**

For example, a downstream riparian owner constructs a canal to divert a large portion of a river's flow. The water is diverted for the domestic and irrigation uses of towns which were established and grew in reliance on the diverted water. The extent of the diversion is known to an upstream owner who allows the diversion to continue uninterrupted for several years.

Later, the upstream owner begins to take water from the river for irrigation of their lands, diminishing the amount of water available for the public use. The downstream owner seeks to bar the upstream owner from diverting the water, claiming the diversion upstream now deprives the downstream riparian owner of the water they were accustomed to diverting for the public use.

The upstream riparian owner claims they are entitled to divert the water for irrigation of their riparian lands since, as a riparian owner, they are entitled to use a reasonable share of the river water.

The downstream riparian owner claims the upstream riparian owner is not entitled to divert water for irrigation since the water taken by the downstream owner is devoted to public use in reliance on the upstream owner's disuse.

In this instance, the upstream riparian owner may not now interfere with the downstream diversion of water. The diversion of water for public use was allowed to continue unchecked for a period of years. This non-interference conduct constituted a dedication of the upstream owner's water rights to public use. The upstream riparian owner's only recourse is to seek compensation for their lost riparian rights from the downstream owner. [**Miller & Lux v. Enterprise Canal & Land Co.** (1915) 169 C 415]

## Termination of riparian rights

Consider riparian land fronting a river or lake which is parceled. One of the parcels created has no frontage on the watercourse. The parcel is later conveyed without a provision in the deed transferring the riparian rights. Here, the parcel conveyed without reference to its riparian rights loses its riparian land status forever.

The conveyance of a parcel, severed from a larger parcel which has riparian rights, terminates the conveyed parcel's riparian rights unless the rights are transferred by the deed which severed the parcel. Even when the severed parcel is eventually conveyed to waterfront owners of portions of the original riparian tract, the severed parcel's status remains nonriparian. [Anaheim Union Water Co., *supra*]

## Appropriation by nonriparian owners

The right to the use of water located within the state of California may be acquired by appropriation by applying for a permit from the Board. [Wat C §102]

On the approval of an application for an appropriation permit by the Board, the permit is issued granting the appropriator the right to use water only to the extent and for the purpose described in the permit, called **appropriation rights**. [Wat C §1381]

Waters flowing underground or surface waters flowing in natural channels in excess of the entitlement of riparian, overlying and previously appropriated water rights are considered the public water of the State of California. These excess waters are subject to appropriation by anyone. [Wat C §1201]

## Rights of appropriator against others

An appropriator's rights against other appropriators are based on the "first in time, first in right" theory. Thus, prior appropriators may divert all the water allotted for use under their permit before later appropriators may divert water, a tiered condition called *priority*. [CC §1414]

The excess water previously allotted to later (junior) appropriators may not now exist after prior (senior) appropriators take their allotment, leaving no water to be taken by junior appropriators. Correlative rights to a parity share do not exist among appropriators since they are not riparian or overlying land owners.

Additionally, land owners possessing riparian and overlying rights have water rights which are superior to the rights of appropriators, called **priority rights**. Appropriators may only

appropriate water which is not presently being used by a riparian or overlying land owner and has not already been appropriated by anyone else, called surplus water.

In the event of a water shortage, appropriators have to yield to riparian and overlying land owners since land owners have priority rights to divert or pump water. These rights are appurtenant to their property. [City of Barstow, *supra*]

When a person licensed to appropriate water fails to use the water for a period of five years, their appropriation rights terminate and the water allocated to the appropriator reverts back to the public. Once the water reverts to the public, it is once again regarded as unappropriated. [Wat C §1241]

### Prescriptive rights by converting water

**Prescriptive rights** to the use of water may be established when a person appropriates nonsurplus water **openly and adversely** for an uninterrupted period of five years, and does so without documentation or evidence of a legal right, called a *claim of right*. Essentially, an adverse user is *converting water*, which riparian or overlying land owners have the right to withdraw, to their use without a good faith belief they hold any legal rights to its use.

Riparian and overlying owners may interrupt anyone trying to obtain prescriptive rights by continuing to use their allotment of water. Holders of riparian and overlying rights lose priority to those who obtain prescriptive rights to water, since their water rights have been lost to the extent taken by prescription. [City of Barstow, *supra*]

For example, an upstream riparian owner builds a dam which stops the flow of a stream to a downstream riparian owner. The downstream riparian owner is aware of the dam and

allows the upstream owner to divert the flow of the stream for over five years.

Later, the downstream riparian owner seeks to stop the upstream riparian owner from diverting the flow of the stream, claiming they are entitled to a portion of the stream's flow since they are a riparian owner.

The upstream riparian owner claims the downstream riparian owner may not stop the upstream riparian owner from diverting the stream since the upstream riparian owner have been openly and adversely diverting the water for over five years and now hold prescriptive rights in the water which may not be taken from them.

In this situation, the downstream riparian owner may not stop the upstream riparian owner from diverting the stream. The upstream riparian owner has been adversely diverting the water with the downstream riparian owner's knowledge for over five years. Thus, the upstream riparian owner now has prescriptive rights in the water which are superior to the riparian rights of the downstream riparian owner. [**Sibbett v. Babcock** (1954) 124 CA2d 567]

Prescriptive rights, like appropriation rights, may also be lost by **abandonment** after five years. [CC §811]

## Regulation of water rights by the Board

Riparian, overlying and appropriation rights are subject to the state's interest in conserving and regulating water use. The state government, under its Board, controls unclaimed water rights and partitions water for the highest and most beneficial use. [Wat C §101]

The state government regulates the use of water in California when disputes arise between riparian/overlying land owners and appropriators. The Board determines the respective

water rights of individuals and makes decisions by weighing the public interest versus the needs of individuals. [Wat C §2501]

Consider a city whose water supply is experiencing a shortage since the underground water basin is being overdrawn. A resolution is adopted by the city calling for those land owners and appropriators who agree to be bound by the solution to give up their water rights in exchange for an allotment of water. Each user agreeing to the allotment is given an amount they may pump without charge. The amount of the allotment is based on the highest quantity of water the user consumed annually during the last five years. A fee will be charged to pay for the purchase and replacement of water used beyond the allotted amount.

Additionally, the terms of the resolution are imposed on all land owners with overlying water rights even if they do not agree to the resolution, thus eliminating their priority water rights.

An overlying land owner subjected to the resolution claims a taking of their priority water rights has occurred without compensation since the city's allocation solution elevates the rights of appropriators and those without any water rights to the status of riparian owners.

The city claims placing the owner under the city's water resolution is not a taking since the state Constitution requires the water supply to be made available to the largest number of users the water supply can reasonably support.

However, placing the overlying land owner under the city's water resolution does constitute a taking. The city may impose a water resolution to achieve a practical allocation of water among those with competing interests in the water. However, the city's resolution may not ignore priority rights

of overlying land owners who assert them, change priorities among the class of holders of water rights nor eliminate vested water rights. Thus, the overlying land owners have priority over appropriators to the ground water and may pump to satisfy their domestic and agricultural irrigation needs which are reasonable and beneficial. [City of Barstow, *supra*]



# QUIZ

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
  
3. 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:
  - a. at least one year.
  - b. at least two years.
  - c. at least five years.



## Affixed to the land

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 industriaes**.

*Fructus industriaes* 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)]



# QUIZ

1. Trees, shrubs, grass and other natural fixtures to the land are examples of:
  - a. fructus naturales.
  - b. fructus industrials.
  - c. emblements.
2. Natural items planted and cultivated for human consumption and use are called:
  - a. fructus naturales.
  - b. fructus industrials.
  - c. iumentis.
3. Industrial crops and standing timber sold under a purchase agreement and scheduled to be removed are considered:
  - a. real estate.
  - b. personal property.
  - c. fructus naturales.

# constructively attached

## Fixtures

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.

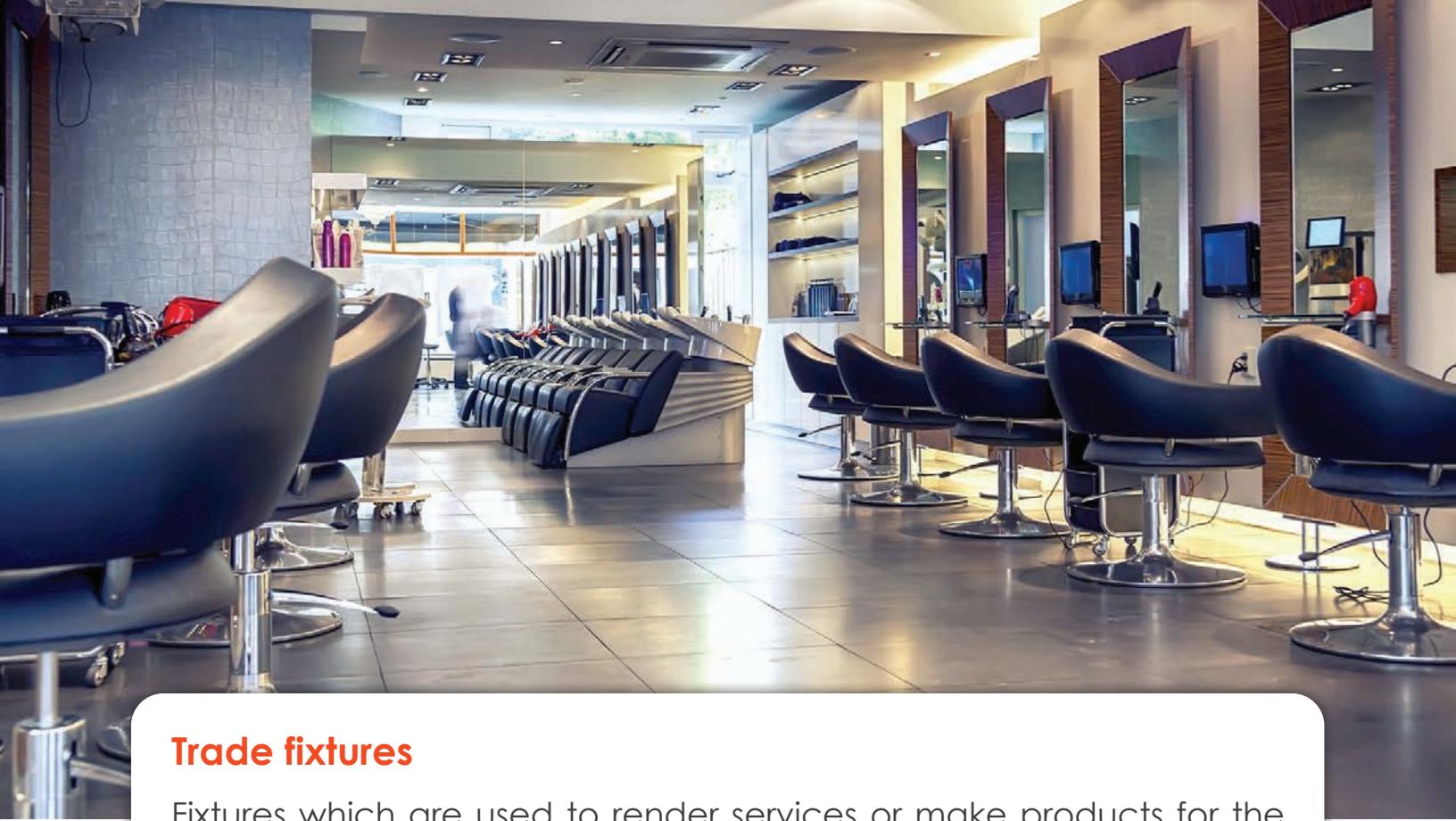
For example, when an item is attached to real estate by bolts, screws, cement or the like, the item is a fixture and part of the real estate. An item need not be attached to the real estate in this manner to be a fixture. Items of such weight and size that gravity maintains them in place are sufficient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



# QUIZ

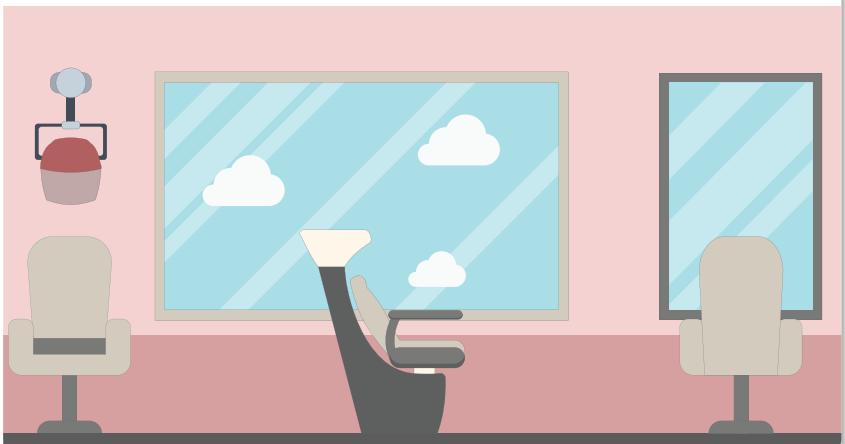
1. A fixture is personal property which has become permanently attached to real estate. Which of the following statements is most correct?
  - a. Nothing is inextricably attached, and thus a fixture always remains separate from the underlying real estate.
  - b. As it is permanently attached, it becomes part of the real estate and is conveyed separately using a bill of sale.
  - c. As it is permanently attached, it effectively becomes part of the real estate and is conveyed with it.
2. Intent to make an item a permanent part of the real estate as a fixture is determined by:
  - a. the manner of attachment; and
  - b. the use and purpose of the item in dispute.
  - c. Both a. and b.
3. When an item is attached to real estate by bolts, screws or cement, the item is generally:
  - a. a fixture and part of the real estate.
  - b. a trade fixture and subject to removal.
  - c. a permissive improvement which may or may not need to be removed.



## Trade fixtures

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]



# QUIZ

1. Fixtures which are used to render services or make products for the trade or business of a tenant are:
  - a. capital expenditures.
  - b. trade fixtures.
  - c. Appurtenant rights.
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.
3. Trade fixtures are considered:
  - a. real estate since they are not an essential part of the tenant's business.
  - b. personal property since they are an essential part of the tenant's business.
  - c. either real estate or personal property depending on the manner of attachment.



## 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.
3. An owner of real estate may not remove soil from their land:
  - a. if doing so causes the adjoining real estate to subside or collapse.
  - b. unless they obtain the written approval of the neighboring property owner.
  - c. without restriction since it is their real estate.



# civil law

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## Basics of California Real Estate Law

### The English and Spanish influence

Historically, California real estate law has been influenced by two key sources of human conduct:

- the English legal system, or **common law**; and
- the Spanish legal system, or **civil law**.

The *common law* of England has been the predominant influence on California real estate law. This legal framework was officially adopted by California soon after obtaining statehood in 1850. [Calif. Civil Code §22.2]

Under the common law, legal disputes are decided on a case-by-case basis before a judge. Even today, the common law is often called “judge-made” law. When similar legal disputes arise, the judges refer back to the logic of earlier decisions to decide current cases. The reliance on an earlier decision to decide a current case is called **stare decisis**. The earlier case relied on is called **precedent**.

Similarly, the *civil law* of Spain had a significant impact on California real estate law. Civil law establishes statutes to settle legal disputes

in advance, rather than on a case-by-case basis.

These legal traditions continue to exist today in the form of:

- statutes, regulations and ordinances; and
- case law.



## The role of the U.S. Constitution

The United States Constitution (U.S. Constitution) is the supreme law of the United States. [United States Constitution, Article VI, clause 2]

All powers which the state and federal governments possess are derived from the U.S. Constitution.

The U.S. Constitution lists and explains the powers of the federal government. All other powers not given to the federal government rest with the individual states or **with the people**. [U.S. Const., Amend. X]

The form of government in which individual states share powers with a national or central government is called **federalism**.

Under **federalism**, the individual states remain independent (sovereign) to regulate any matters within their own borders which are not already controlled by the federal government.

Each state has its own constitution to regulate state matters remaining under their control. A state may provide more constitutional protection than the federal government if it chooses, but it may not provide less.

## Separated powers

Both the federal and state governments created under the U.S. Constitution are separated into three branches:

- the **legislative** [U.S. Const., Art. I];

- the **executive** [U.S. Const., Art. II]; and
- the **judicial**. [U.S. Const., Art. III]

The state and federal *legislatures* enact the codes and statutes which regulate most aspects of real estate interests.

The *executive* polices the law and establishes *regulations* to carry out the administration of government as established by the legislature.

The *judiciary* settles disputes and issues *case opinions* regarding the application of the law and regulations.

No branch may exercise a power given to another branch.



# QUIZ

1. The common law of England has been the predominant influence on California real estate law. Under the common law, legal disputes:
  - a. are settled in advance through a series of statutes, regulations and ordinances.
  - b. are decided on a case-by-case basis before a judge.
  - c. are adjudicated by the third-party mediator who will guide the contesting parties to reach a meeting of the minds.
2. Under English common law, when similar legal disputes arise, the judge refers back to the logic of earlier decisions to decide current cases. The earlier case relied on is called:
  - a. law.
  - b. precedent.
  - c. precursor.
3. \_\_\_\_\_ establishes statutes to settle legal disputes in advance, rather than on an individual case-by-case basis.
  - a. Spanish civil law
  - b. Scandinavian civil law
  - c. Portuguese civil law



# Chain of Title (Ownership)

## American Rule

The Mexican-American War ended with the signing of the **Treaty of Guadalupe Hidalgo**. Under the treaty, the United States agreed to acknowledge the existing land grants conveyed by the Spanish and Mexican governments.

The United States set up a **land commission** to document the validity of the land grants.

The land commission established land titles and created the **chain of title** still used for all California real estate today.

After confirmation of a valid land grant, the land was surveyed by the federal government and conveyed to the rightful owner by a United States **patent deed**.

All land not under a valid claim became part of the public domain of the United States.

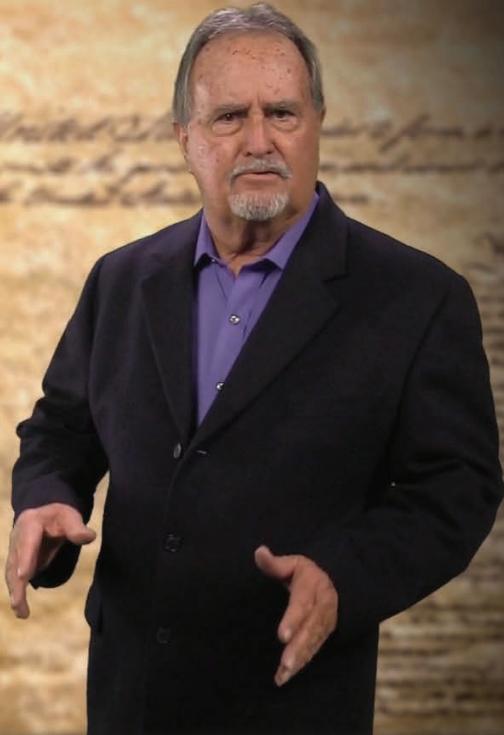
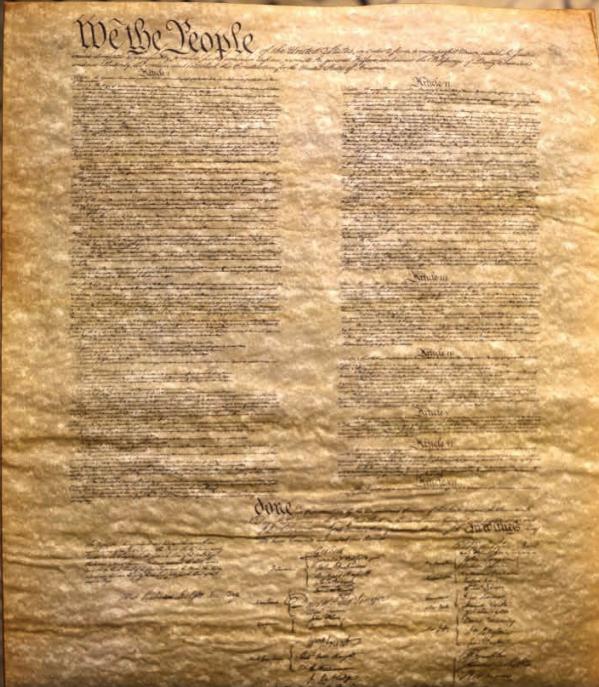
In 1850, the United States granted part of the unclaimed real estate to the State of California. The balance was retained by the federal government.

The federal and state legislatures as well as local governments enact laws they have been authorized to by the **United States Constitution** or the **California Constitution**.



# QUIZ

1. The Mexican-American War ended with the signing of the:
  - a. Treaty of Paris.
  - b. Treaty of Guadalupe Hidalgo.
  - c. Treaty of Versailles
  
2. The \_\_\_\_\_ established land titles and created the chain of title still used for all California real estate today.
  - a. state legislature
  - b. federal legislature
  - c. land commission
  
3. After confirmation of a valid land grant, land was surveyed by the federal government and conveyed to the rightful owner by a United States:
  - a. grant deed.
  - b. trust deed.
  - c. patent deed.



## Authority to legislate

The authority of the California legislature to enact laws regulating real estate activities comes from four main constitutional powers:

- **police power;**
- **power of eminent domain;**
- **power to tax; and**
- **escheat**, the reverting of property to the state when the owner dies and there are no capable heirs to inherit it.

These four powers can be memorized using the mnemonic device **PETE**.

The U.S. Constitution confers on California the right to enact laws to protect public health, safety and welfare. [U.S. Const., Amend. X]

The California Constitution confers an equal power to local cities and counties to likewise protect the public good. [California Constitution, Article XI §7]

This power to protect the public well-being is called **police power**. Police power is the source of the state or local government's authority to act.

Police power is the basis for laws governing such things as highway construction and maintenance, rent control, zoning and traffic.  
**[Village of Euclid, Ohio v. Ambler Realty Co. (1926) 272 US 365]**

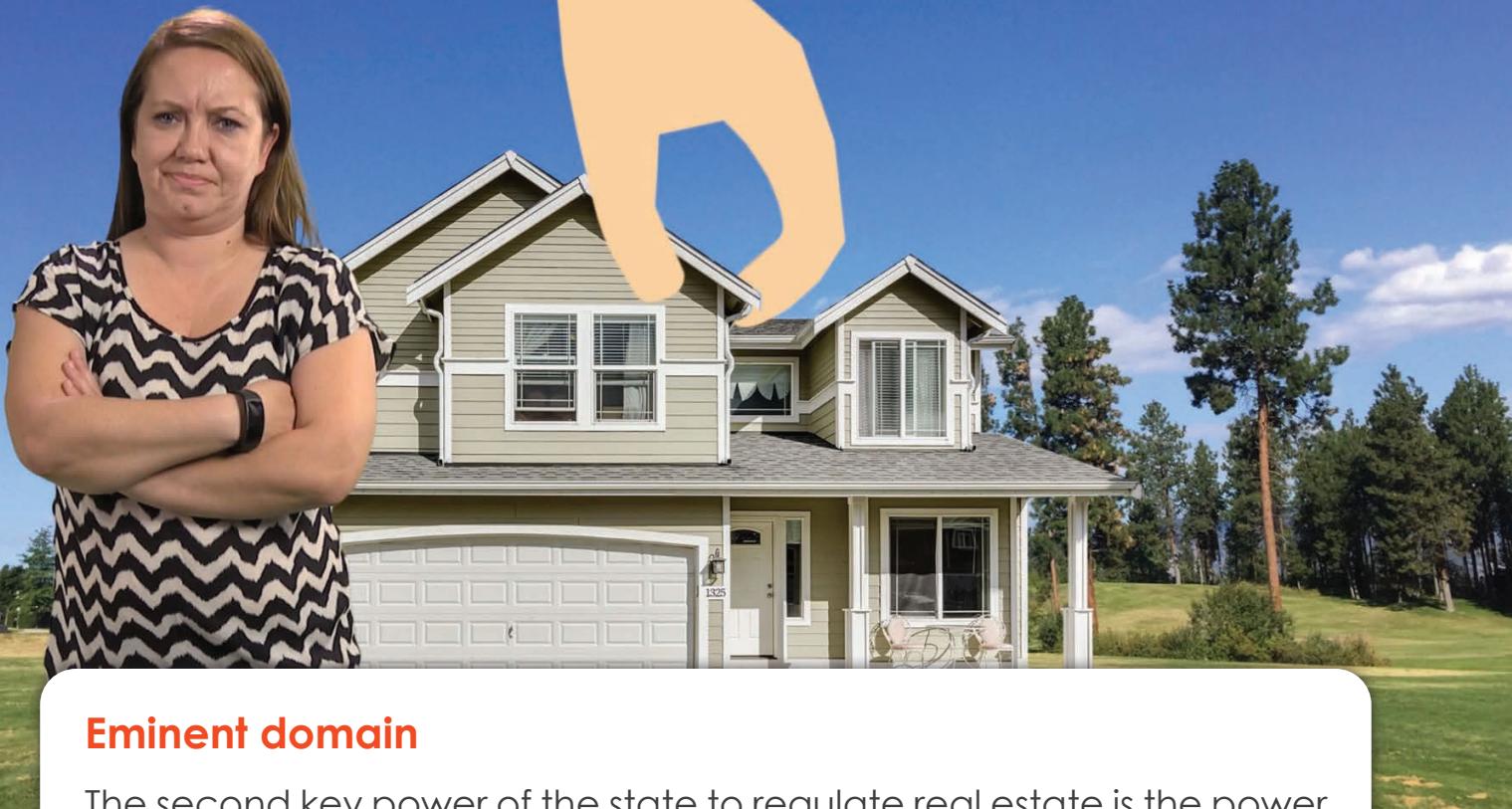
A statute or ordinance passed under the government's constitutional police power and affecting real estate-related activity is valid as long as the law:

- is fair and reasonable;
- addresses a legitimate state interest;
- does not unreasonably burden the flow of interstate commerce; and
- does not conflict with related federal law.



# QUIZ

1. The authority of the California legislature to enact laws regulating real estate activities comes from four main constitutional powers – police power, power of eminent domain, power to tax and:
  - a. escheat.
  - b. zoning.
  - c. ccode enforcement.
2. The constitutional power which is the source of the state or local government's authority to act to protect the public well-being is called:
  - a. police power.
  - b. power of eminent domain.
  - c. power to tax.
3. Police power is the basis for laws governing all of the following EXCEPT:
  - a. rent control, zoning and traffic.
  - b. local inspection fees placed on landlords renting residential properties.
  - c. highway construction and maintenance.



## Eminent domain

The second key power of the state to regulate real estate is the power of **eminent domain**. [Calif. Constitution, Art. 1 §19]

*Eminent domain* is the right of the government to take private property for public use. The process of using the power of eminent domain is called **condemnation**.

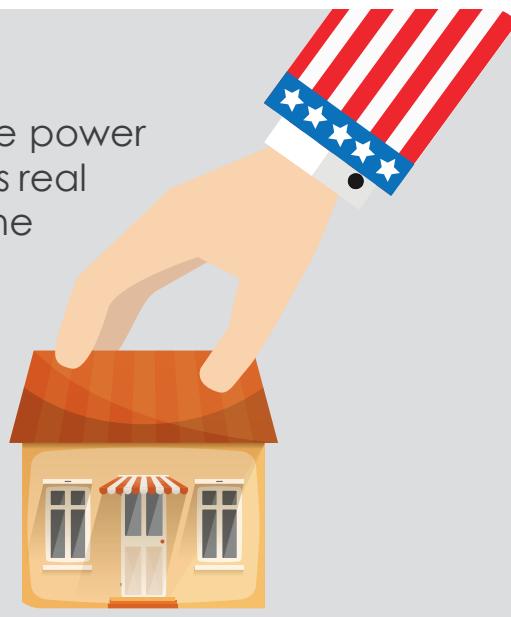
However, the government needs to pay the owner the fair market value of the property taken. [**Loretto v. Teleprompter Manhattan CATV Corp.** (1982) 458 US 419]

Examples of eminent domain include condemning property to provide highways and roads, establish parks, construct flood control levees and provide land for redevelopment.

## Inverse condemnation

The government's exercise of police power may become a **taking** of an owner's real estate by **inverse condemnation** if the government surpasses their power of eminent domain.

For example, an owner demolishes their beachfront bungalow. The owner intends to rebuild a better home and submits an application to the coastal commission which has jurisdiction over the use of beachfront property.



A public beach is located nearby, but not directly adjacent to the owner's real estate.

The coastal commission grants the owner a permit to build, conditioned on the owner granting to the public a frontage easement across their beachfront property. The coastal commission claims its goal is to allow better public viewing of the coastline.

The owner refuses to comply with the condition unless the coastal commission pays for the easement. The coastal commission denies the owner's application and permit to build, claiming it is reasonably exercising its police power.

Does the coastal commission have to pay for the easement across the owner's beachfront?

Yes! The coastal commission has not merely restricted the owner's use of their land, it has required the owner to deed an interest away in the form of a frontage easement. [**Nollan v. California Coastal Commission** (1987) 483 US 825]

Conditioning a permit to build on the granting of an easement to the public is a taking which requires **reimbursement** to the owner from the governmental agency. The coastal commission did not show the easement related to a legitimate state interest to constitute eminent domain. Instead, the government agency's action — in this case, demanding an easement as a condition of administratively granting a permit — leads to the taking of real estate and is **inverse condemnation**.

However, most California *inverse condemnation* cases filed by owners fail. California courts do not want to burden local governments with the obligation of paying for any diminution of property values which result each time it regulates or downgrades the use of real estate. [**First English Evangelical Lutheran Church of Glendale v. County of Los Angeles** (1989) 210 CA3d 1353]

## The power to tax

State and local governments also regulate the crucial **power to tax** real estate activities to generate revenue and fund state and local governmental functions under their police power. [Calif. Const., Art. XIII D §6]

For example, a city passes an ordinance which imposes an **inspection fee** on all landlords renting residential properties. The fee charged is based on a flat rate per unit, not on current property values.

A landlord subject to the ordinance claims the ordinance is unenforceable since the city must have voter approval before adopting an ordinance which imposes a regulatory fee on property.

The city claims the ordinance is enforceable without voter approval since the fee is imposed on a **use** of the property — renting — not on the mere ownership of the property, which requires voter approval.

Here, the ordinance imposing the inspection fee on landlords based on a flat rate per unit offered for rent is enforceable. Voter approval is only required when fees and taxes are imposed on owners simply because they own real estate. Fees and taxes imposed on the owner's exercise of his uses and rights which come with owning the property do not require voter approval. **[Apartment Association of Los Angeles v. City of Los Angeles (2001) 24 C4th 830]**

## The power of escheat

The last constitutional power is **escheat**.

Escheat occurs when the owner of a property dies, and they have no heirs to inherit it. When this occurs, ownership of the property reverts automatically to the state.

Escheat also refers to the process of transferring abandoned property to the state, whether or not the rightful owner is still alive.

For example, banks possessing an individual's property (read: money) have a duty to return the property to the owner after three years of inactivity. [California Code of Civil Procedure §1513(a)(a)(A)]

Intangible personal property escheats to the state when:

- the last known address of the apparent owner is in California;
- no address of the apparent owner appears on the records of the holder and:
  - the last known address of the apparent owner is in California; or
  - the holder resides in California and has not previously paid the property to the state of the last known address of the apparent owner; or
  - the holder is part of California's government and has not previously paid the property to the state of the last known address of the apparent owner;
- the last known address of the apparent owner is in a state that does not provide by law for the escheat of such property and

the holder is:

- domiciled in this state; or
- a government or governmental subdivision or agency of this state; or
- the last known address of the apparent owner is in a foreign nation and the holder is:
  - domiciled in this state; or
  - a government or governmental subdivision or agency of this state. [CCP §1510]

Holders of unclaimed property have a duty to notify owners of unclaimed property valued over \$50 before reporting it to the state. [CCP §1520(b)]

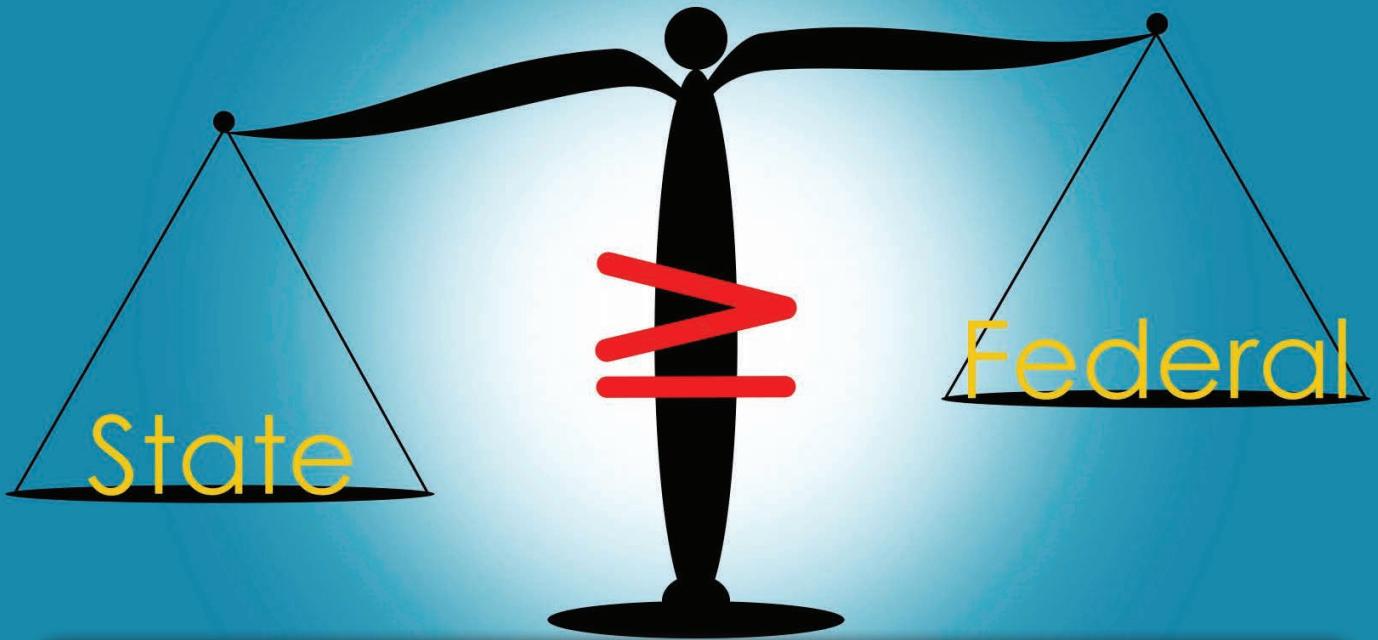
One can access the public interface on the website of the State Controller's office to determine whether the state holds any unclaimed property that has been escheated to the state after a period of inactivity.

Just as one regularly checks their credit score, brokers and other small business owners ought to make it a habit to periodically determine whether they have any unclaimed property with the state so they may get it back.



# QUIZ

1. Eminent domain is the right of the government to take private property for public use. The process of using the power of eminent domain is called:
  - a. reversion.
  - b. condemnation.
  - c. dedication.
2. An ordinance which imposes a regulatory fee on property is an example of the:
  - a. police power.
  - b. power of eminent domain.
  - c. power to tax.
3. Escheat occurs when an owner of a property dies:
  - a. and they have no heirs to inherit it, causing the property to revert to the state.
  - b. and their will indicates title to the property will be held by multiple heirs in unequal proportion.
  - c. and their heirs attempt to cheat the state out of the property taxes due on the property.



### When federal and state law conflicts

The federal government's authority to regulate real estate also comes from the U.S. Constitution.

Like the state, the federal government has the power to tax and the power to take private property for public use. [U.S. Const., Amend. XVI; Calif. Const., Art. 1 §19]

However, the federal government has no police power. In its place, the federal government has a powerful clause to regulate areas of national concern, called the **commerce clause**.

The federal government has the right to regulate all commercial enterprises which affect **interstate commerce**.

Originally, the clause was designed to combat attempts by local states to pass protectionist laws under their police powers which would inhibit the flow of goods between states — *interstate commerce*. [**Gibbons v. Ogden** (1824) 22 US 1]

Today, the clause also applies to local and intrastate activities which have an indirect effect on the flow of goods, services and people from state to state.

For example, the federal government's interest in the flow of commerce between states outweighs a motel owner's right to exclude specific classes of patrons. The owner's exclusion interferes with the flow of commerce – which includes the mobility of people. [**Heart of Atlanta Motel, Inc. v. United States** (1964) 379 US 241]

The federal government's ability to regulate a purely local activity even extends to local real estate brokers' activities within their trade unions.

For example, a broker sues the local board of realtors for federal **antitrust violations**, claiming the association **fixes rates** charged by its members for their services.

The association ostracizes brokers who refuse to comply with the fee-setting policies established by the association based on the maintenance of a minimum acceptable level of income for its union members.

The association claims the federal government may not regulate their activities as their services are purely local and have no effect on interstate commerce.

Do the federal antitrust laws cover local brokerage activities?

Yes! The association's fee-setting of the charges for their members' services affects housing locally, which in turn affects the desire to live in the area, which in turn affects the mobility of people in interstate commerce. [**McLain v. Real Estate Board of New Orleans, Inc.** (1980) 444 US 232]

Alternatively, states have the sovereignty to regulate within their own borders. At the same time, the federal government has the right to regulate local activities affecting commerce.



What happens when federal and state law conflict? Consider the following example.

An airport is established under the Federal Aviation Act of 1953. The airport expands its number of late-night and early-morning flights. The residents around the airport complain of the noise during late and early hours.

The city where the airport is located passes an ordinance restricting the number of flights between 11 p.m. and 7 a.m.

The airport objects, claiming it was established under the sole jurisdiction of federal law and the Federal Aviation Act of 1953 set forth by the Federal Aviation Administration (FAA) which has no restriction on flights between 11 p.m. and 7 a.m.

Does the federal law **preempt** (supersede) state law?

Yes! The goals of national flight service and the role of the FAA outweigh local laws inhibiting flight times. [**City of Burbank v. Lockheed Air Terminal, Inc.** (1973) 411 US 624]

A federal law will preempt state and local statutes and ordinances when:

- federal interests outweigh local interests;
- the federal law is so pervasive as to exclude inconsistent state law; and
- inconsistent treatment nationwide would result if state law controls.

Thus, it is possible for federal and state law to regulate the same real estate activity.

For example, federal and state **fair housing** laws prohibiting discrimination exist. Both the state and federal governments can regulate *fair housing*. The state may provide more, but may not allow less, protection than the federal law. [Calif. Civil Code §51]



# QUIZ

1. The federal government's authority to regulate real estate comes from:
  - a. the California Constitution.
  - b. the U.S. Constitution.
  - c. Treaty of Guadalupe Hidalgo.
2. The federal government has the right to regulate all commercial enterprises which affect:
  - a. interstate commerce.
  - b. local zoning and planning.
  - c. the price of available goods on the open market.
3. Which of the following statements is the most correct concerning the overlap of federal and state law?
  - a. Federal law always supersedes state law, unless the law is unique to the state.
  - b. The state may provide more, but may not allow less, protection than the federal law.
  - c. A federal law will preempt state and local statutes and ordinances when the state interests outweigh federal interests.



# NOTES



## Fee vs. Leasehold

### Ownership interests held in real estate

**Real estate**, sometimes legally called **real property** or **realty**, consists of:

- the land;
- the improvements and fixtures attached to the land; and
- all rights incidental or belonging to the property. [Calif. Civil Code § 658]

A **parcel** of real estate is located by circumscribing its **legal description** on the “face of the earth.” Based on the legal description, a surveyor locates and sets the corners and surface boundaries of the parcel. The *legal description* is contained in deeds, subdivision maps or government surveys relating to the property.

All permanent structures, crops and timber are part of the parcel of real estate. The parcel of real estate also includes buildings, fences, trees, watercourses and easements within the parcel’s boundaries.

A parcel of real estate is three dimensional. In addition to the surface area within the boundaries, a parcel of real estate consists of:

- the soil below the parcel's surface to the core of the earth, including water and minerals; and
- the air space above it to infinity.

In the case of a statutory condominium unit, the air space enclosed within the walls is the real estate conveyed and held by the fee owner of the unit. The structure, land and air space outside the unit are the property of the homeowners' association (HOA).

The ownership interests a person may hold in real estate are called **estates**. Four types of estates exist in real estate:

- **fee estates**, also known as *fee simple estates, inheritance estates, perpetual estates*, or simply, *the fee*;
- **life estates**;
- **leasehold estates**, sometimes called *leaseholds*, or *estates for years*; and
- **estates at will**, also known as *tenancies-at-will*. [CC §761]

In practice, these estates are separated into three categories: *fee estates, life estates* and *leasehold estates*. Estates at will are considered part of the leasehold estates category. Leasehold estates are controlled by landlord/tenant law.

## **Fee estates: unbundling the rights**

A person who holds a *fee estate* interest in real estate is a *fee owner*. In a landlord/tenant context, the *fee owner* is the *landlord*.

*Editor's note — If a sublease exists on a commercial property, the master tenant is the "landlord" of the subtenant.*

A *fee owner* has the right to possess and control their property indefinitely. A *fee owner's* possession is exclusive and absolute. Thus, the owner has the right to deny others permission to cross their boundaries. No one can be on the owner's property without their consent, otherwise they are trespassing. The owner may recover any

money losses caused by the trespass.

## Exclusive right to use and enjoy

A fee owner has the exclusive right to use and enjoy the property. As long as local ordinances such as building codes and zoning regulations are obeyed, a fee owner may do as they please with their property. A fee owner may build new buildings, tear down old ones, plant trees and shrubs, grow crops or simply leave the property unattended.

A fee owner may occupy, sell, lease or encumber their parcel of real estate, give it away or pass it on to anyone they choose on their death. The fee estate is the interest in real estate transferred in a real estate sales transaction, unless a lesser interest such as an easement or life estate is noted. However, one cannot transfer an interest greater than they received.

A fee owner is entitled to the land's surface and anything permanently located above or below it. [CC §829]

The ownership interests in one parcel may be separated into several fee interests. One person may own the mineral rights beneath the surface, another may own the surface rights, and yet another may own the rights to the air space. Each solely owned interest is held in fee in the same parcel.

In most cases, one or more individuals own the entire fee and lease the rights to extract underground oil or minerals to others. Thus, a fee owner can convey a leasehold estate in the oil and minerals while retaining their fee interest. The drilling rights separated from the fee ownership are called **profit a prendre**. [**Rousselot v. Spanier (1976) 60 C3d 238**]

*Profit a prendre* is the right to remove profitable materials from property owned and possessed by another. If the *profit a prendre* is created by a lease agreement, it is a type of easement. [**Gerhard v. Stephens (1968) 68 C2d 864**]



# QUIZ

1. A parcel of real estate is most precisely located by circumscribing its \_\_\_\_\_ on the face of the earth.
  - a. property address
  - b. legal description
  - c. satellite coordinates
2. In the case of a statutory condominium unit, what is the real estate that is conveyed and held by the fee owner of the unit?
  - a. The entirety of the property.
  - b. The entirety of the property and all shared communal property within the development.
  - c. The air space enclosed within the walls.
3. The right to remove profitable materials from property owned and possessed by another is called:
  - a. lis pendens.
  - b. fructus naturales.
  - c. profit a prendre.



## Life estates

A **life estate** is an interest in a parcel of real estate lasting the lifetime of an individual, usually the *life of the tenant*. Life estates, also known as **estates for life**, are granted by a deed entered into by the fee owner, an executor under a will or by a trustee under an inter vivos trust.

Life estates are commonly established by a fee owner who wishes to provide a home or financial security for another person (the life tenant) during that person's lifetime, called the controlling life.

For example, consider the fee owner of a vacation home who has an elderly relative who needs a place to live. The fee owner grants the relative a life estate in the vacation home for the duration of their lifetime. The relative may live there for the rest of their life, even if they outlive the fee owner who granted them the life estate.

Life estates terminate on the death of the controlling life. Life estates may also be terminated by agreement or by merger of different ownership interests in the property. The holder of a life estate may not impair the fee interest. [Calif. Civil Code §818]





# QUIZ

1. A(n) \_\_\_\_\_ is an interest in a parcel of real estate lasting the lifetime of an individual.
  - a. fee estate
  - b. freehold estate
  - c. life estate
  
2. Under a life estate, the individual who possesses a property owned by the fee owner is referred to as the:
  - a. holdover tenant.
  - b. life tenant.
  - c. adverse possessor.
  
3. Life estates terminate:
  - a. on the death of the controlling life.
  - b. on the death of the fee owner.
  - c. within 15 years from inception.

# Owner of the title and fee interest



# Owner of a leasehold with right to possess



## Leasehold estates held by tenants

**Leasehold estates**, or tenancies, are the result of rights conveyed to a tenant by a fee owner (or by the life estate tenant or master lessee) to possess a parcel of real estate.

Tenancies are created when the landlord and the tenant enter into a rental or lease agreement that conveys a possessory interest in the real estate to the tenant.

A lease is for a fixed term, for instance, one year. [See **RPI** Form 550]

A rental agreement concerns a term that is not fixed, but periodic. [See **RPI** Form 551]

Both create a *leasehold* estate held by a tenant. The tenant becomes the owner of a leasehold with the right to possess and use the entire property until the lease expires. The ownership and title to the fee interest in the property remains with the landlord throughout the term of the leasehold. The landlord's fee interest



is subject to the tenant's right of possession, which is carved out of the fee by the lease or rental agreement.

In exchange for the right to occupy and use the property, the landlord is entitled to rental income from the tenant during the period of the tenancy.



# QUIZ

1. Tenancies are created when the landlord and the tenant enter into a rental or lease agreement that conveys a(n) \_\_\_\_\_ interest in the real estate to the tenant.
  - a. ownership
  - b. possessory
  - c. fee
2. A rental agreement:
  - a. is for a fixed term, for instance, one year.
  - b. concerns a term that is not fixed, but periodic.
  - c. is used exclusively for transient occupancy units.
3. In exchange for a tenant's right to occupy and use a rental property, the landlord is entitled to:
  - a. rental income from the tenant during the period of the tenancy.
  - b. interest income from the tenant on all deposits held on expiration of the tenancy.
  - c. passive income from the appreciated value of the improved real estate.



## Types of leaseholds

Four types of leasehold estates exist and can be held by tenants. The interests are classified by the length of their term:

- a **fixed-term tenancy**, simply known as a lease and legally called an estate for years;
- a **periodic tenancy**, usually referred to as a rental;
- a **tenancy-at-will**, previously introduced as an estate at will; and
- a **tenancy-at-sufferance**, commonly called a *holdover tenancy*.

A *fixed-term tenancy* lasts for a specific length of time as stated in a lease agreement entered into by a landlord and tenant. On expiration of the lease term, the tenant's right of possession automatically terminates unless it is extended or renewed by another agreement, such as an option agreement. [See **RPI** Form 550]

**Periodic tenancies** also last for a specific length of time, such as a week or a month. Under a periodic tenancy, the landlord and tenant agree to automatic successive rental periods of the same length of time, such as in a month-to-month tenancy, until terminated by notice by either the landlord or the tenant. [See **RPI** Form 551]

In a **tenancy-at-will** (also known as an *estate at will*) the tenant has

the right to possess a property with the consent of the fee owner. Tenancies-at-will can be terminated at any time by an advance notice from either the landlord or the tenant or as set by agreement. Tenancies-at-will do not have a fixed duration, are usually not in writing and a rent obligation generally does not exist.

A **tenancy-at-sufferance** occurs when a tenant retains possession of the rented premises after the tenancy granted terminates.



The section header features the word "QUIZ" in large, bold, orange letters. Above the word are three blue speech bubble icons: one with a question mark, one with a checkmark, and one with an exclamation point.

1. An occupancy agreement that is entered into for a specific length of time is most likely a:
  - a. rental agreement.
  - b. lease agreement.
  - c. tenancy-at-will.
2. Which type of occupancy agreement is least likely to require the payment of rent?
  - a. Lease agreement.
  - b. Rental agreement.
  - c. Tenancy-at-will.
3. A(n) \_\_\_\_\_ occurs when a tenant retains possession of the rented premises after the tenancy granted terminates.
  - a. estate at will
  - b. tenancy-at-will
  - c. tenancy-at-sufferance

## Leaseholds conveying special uses

In addition to the typical residential and commercial leases, you will find *special use leases*.

*Oil, gas, water and mineral leases* convey the right to use mineral deposits below the earth's surface.

The purpose of an oil lease is to discover and produce oil or gas. The lease is a tool used by the fee owner of the property to develop and realize the wealth of the land. The tenant provides the money and machinery for exploration, development and operations.

The tenant pays the landlord rent, called a **royalty**. The tenant then keeps any profits from the sale of oil or minerals the tenant extracts from beneath the surface of the parcel.

A **ground lease** on a parcel of real estate is granted to a tenant in exchange for the payment of rent. In a ground lease, rent is based on the rental value of the land in the parcel, whether the parcel is vacant or improved. Fee owners of vacant, unimproved land use leases to induce others to acquire an interest in the property and develop it.

An original tenant under a ground lease constructs their own improvements. Typically, the tenant encumbers their possessory

interest in a ground lease with a trust deed lien to provide security for a construction loan.

**Master leases** benefit fee owners who want the financial advantages of renting fully improved multi-tenant property, but do not want the day-to-day obligations and risks of managing the property.

For instance, the fee owner of a shopping center and a prospective owner-operator agree to a master lease.

Another type of special-use lease is the **farm lease**, sometimes called a *cropping agreement* or *grazing lease*. Here, the tenant operates the farm and pays the landlord either a flat fee rent or a percentage of the value of the crops or livestock produced on the land.



# QUIZ

1. Oil, gas, water and mineral leases which convey the right to use mineral deposits below the earth's surface are an example of a(n):
  - a. prescriptive easement.
  - b. special use lease.
  - c. royalty agreement.
  
2. In a(n) \_\_\_\_\_, rent is based on the rental value of the land in the parcel, whether the parcel is vacant or improved.
  - a. farm lease
  - b. fixed-term lease
  - c. ground lease
  
3. Under a(n) \_\_\_\_\_, the tenant operates a farm and pays the landlord either a flat fee rent or a percentage of the value of the crops or livestock produced on the land.
  - a. land lease
  - b. ground lease
  - c. farm lease



## owner A

(easement holder)

### The rights of others in a property

**Easements** and **use licenses** are not real estate but they give a holder of the rights a limited and nonexclusive use of someone else's property.

An easement is a *right to use* another's property for a specific purpose. An easement is an interest held in someone else's real estate. It grants its holder the right to limit the activities of others on the property burdened by the easement, including the owner of the burdened property. [Calif. Civil Code §§801 et seq.]

For example, a landowner holds an easement allowing them to construct and have access to a pipeline across their neighbor's property. The neighbor's right to develop their own property is limited since the neighbor may do nothing to interfere with the easement owner's access to the pipeline.

A **license** grants its holder a personal privilege to use property, but no possessory right to occupy it to the exclusion of others. Unlike easements, licenses are not exclusive rights — an owner may give many licenses to perform the same or different activity in the same area.

Unlike an easement, a license may be revoked at the will of the

person who grants it, unless agreed to the contrary or it has become irrevocable.

## Rights in another's property

The most common easement is used for ingress and egress. An easement for ingress and egress creates a right of way allowing one property owner to traverse a portion of another's land to access their property.

An easement creates a tenement relationship between two parcels of real estate since it:

- benefits one property, referred to as the **dominant tenement**, whose owner is entitled to use the easement; and
- burdens another property, referred to as the **servient tenement**, the owner's use of which is subject to the easement.

When an owner whose property is burdened by an easement interferes with the use of the easement by a neighbor whose property benefits from the easement, the neighbor is entitled to have the use of the easement reinstated. The easement is reinstated by either removal, relocation or modification of the interference.

Further, the neighbor who holds the easement is entitled to compensation for their money losses caused by the servient tenement owner's obstruction of the neighbor's use of the easement. [**Moylan v. Dykes** (1986) 181 CA3d 561]

## Appurtenant or in gross: does the easement run?

An easement burdening an owner's property as an encumbrance on their title is classified as either:

- an **appurtenant easement**, meaning the allowed use belongs to and benefits an adjacent property and is said to *run with the land* as an interest the adjacent property holds in the burdened real estate; or
- an **easement in gross**, meaning it belongs to an individual, not

land, as their personal right to a specified use of the burdened real estate.

An appurtenant easement is incidental to the title of the property which benefits from its use. An easement is not reflected as a recorded interest on the title to the parcel of land it benefits. Nor is it a personal right held by a particular individual who may now or have previously owned the parcel benefiting from the easement.

Accordingly, an appurtenant easement is recorded as an **encumbrance** on title to the burdened property. The easement remains on the property's title after a conveyance to new owners of either the benefitting or burdened property. To be enforceable, the easement does not need to be referenced in the grant deed conveying either property to new owners since it runs with the land. [Moylan, Moylan, *supra*]

Conversely, an easement *in gross* benefits a particular person – not the real estate owned by that person. An easement *in gross* is personally held only by the individual who may use the easement. No parcel of real estate may benefit from an easement *in gross* since only the individual holding the easement can benefit.

An easement *in gross* is a personal right that is not transferred with the sale of real estate owned by the holder of the easement. However, the right can be transferred by the easement holder to another person by a writing — unless the transfer of the easement *in gross* is prohibited by a provision in the document creating the easement. [**LeDeit v. Ehler** (1962) 205 CA2d 154]

## Binding on all future owners

**Covenants, conditions and restrictions (CC&Rs)**, collectively called **encumbrances**, are recorded against title to a property and limit an owner's right to use their property. By recording restrictions against the title to real estate on a sale, a seller may prohibit certain uses of the property, or require the property be used for specific purposes only.

Regulations governing how a condominium owner may use their unit

and the rights and responsibilities of the common interest development (CID) are typically contained in a declaration of CC&Rs filed with the condominium subdivision plan.

The CC&Rs bind all future owners to comply with the CC&Rs since the use restrictions they contain run with title to the land.



# QUIZ

1. A(n) \_\_\_\_\_ grants its holder the right to limit the activities of others on the burdened property, including the owner of the burdened property.
  - a. encroachment
  - b. trespass decree
  - c. easement
  
2. A(n) \_\_\_\_\_ grants its holder a personal privilege to use property, but no possessory right to occupy it to the exclusion of others.
  - a. easement
  - b. license
  - c. lease
  
3. An easement for ingress and egress creates:
  - a. a right of way allowing one property owner to traverse a portion of another's land to access their property.
  - b. the right of the servient property owner to use the property of the dominant owner.
  - c. the right to use mineral deposits below the earth's surface.



# NOTES



## The Tenancies in Real Estate

### Tenancies as leasehold estates

Different types of tenancies and properties trigger different termination procedures for the landlord, and different rights and obligations for the tenant.

Leasehold estates, or tenancies, are possessory interests in real estate. Four types of **tenancies** exist:

- fixed-term tenancies;
- periodic tenancies;
- tenancies-at-will; and
- tenancies-at-sufferance, also called holdover tenancies.

To initially establish a tenancy, a landlord transfers to the tenant the right to occupy the real estate. This right is conveyed either in a writing, orally or by the landlord's conduct, called a grant. If the landlord does not transfer by grant the right to occupy, the person who takes possession as the occupant is a **trespasser**.

Fixed-term tenancies, periodic tenancies and tenancies at will have

agreed-to termination dates, or can be terminated by notice.

A *holdover tenancy* occurs when a tenant continues in possession of the property after their right to occupy has expired. This holdover of possession without a contractual right is called an unlawful detainer (UD).

A landlord needs to file a judicial UD action to have a holdover tenant evicted. To be evicted, a tenant's right of possession under the tenancy granted is to first be terminated either by service of the proper notice or expiration of the lease. Plainly speaking, the tenant needs to unlawfully retain possession of the property before the tenant can be evicted for unlawful detainer.

The type of notice required to terminate a tenancy, other than a fixed-term lease, depends on the period of the tenancy, length of the occupancy and location of the property (e.g., rent control). [**Colyear v. Tobriner** (1936) 7 C2d 735]



# QUIZ

1. When a landlord does not transfer the right to occupy a property to a person by grant, the person who takes possession as the occupant is classified as a(n):
  - a. short-term tenant.
  - b. trespasser.
  - c. subtenant.
2. A holdover of possession of real estate without a contractual right to do so is most accurately called a(n):
  - a. trespass.
  - b. nuisance.
  - c. unlawful detainer (UD).
3. Which of the following statements is most correct?
  - a. To be evicted, a tenant's right of possession under the tenancy granted is to first be terminated by unlawful detainer.
  - b. To initially establish a tenancy, a landlord transfers to the tenant the right to own the underlying real estate.
  - c. A tenant needs to unlawfully retain possession of the property before the tenant can be evicted for unlawful detainer.



## The fixed-term tenancy

A **fixed-term tenancy**, also called a lease or estate for years, is the result of an agreement between the landlord and the tenant for a fixed rental period, also called the lease term. If the rental period is longer than one year, the lease arrangement is required to be in writing and signed by the tenant to be enforceable under the Statute of Frauds.

The written document which sets the terms for rent and conditions for occupancy creating a fixed-term tenancy is called a **lease agreement**. [See **RPI** Form 550]

A *lease agreement* is required to have a commencement date and an expiration date. [Calif. Civil Code §§761, 1624]

During the term of the lease, the tenancy can only be terminated and the tenant evicted for good cause. Even then, service of a three-day notice to vacate the property (or if curable to cure the breach) is required. [See **RPI** Form 576]

*Editor's note – Different eviction rules apply if the property is subject to Just Cause eviction requirements. This content will be covered in a subsequent section.*

Without the tenant's exercise of any option to renew or extend, a



fixed-term tenancy automatically terminates on the expiration date, no notice required. [Calif. Code of Civil Procedures §1161(1)]

If a renewal or extension option exists, the lease is renewed or extended by the tenant's exercise of the option or the landlord's acceptance of rent called for in the option. [CC §1945]

### **Extended fixed-term lease is not a periodic tenancy**

A landlord and tenant orally enter into a six-month lease agreement. Rent for the period is payable monthly. On expiration of the six month lease, the landlord and tenant orally agree to extend the lease for another six-month period.

At the end of the extended term, the tenant refuses to vacate, claiming the landlord must first serve them with a notice to vacate.

Here, the tenant is not entitled to any further notice beyond the agreed-to termination date. The oral occupancy agreement did not create a periodic tenancy, even though it called for monthly rent payments. Instead, the agreement to extend the occupancy created a fixed-term lease with a set expiration date.

Thus, the tenant's right of possession terminated without further notice on expiration of the orally conveyed six-month period of occupancy, the rent for which was payable monthly. The oral lease agreement was enforceable since it was for a term less than one year. **[Camp v. Matich** (1948) 87 CA2d 660]

A fixed-term tenancy provides a tenant with several advantages:

- the right to occupy for the fixed term;
- a predetermined rental amount; and
- limitations on termination or modification.

However, a fixed-term tenancy also has disadvantages for the fixed-term tenant:

- the tenant is liable for the total amount of rent due over the entire term of the lease (less rent paid by any replacement tenant located by the landlord to mitigate losses);
- the tenant may not vacate prior to expiration of the rental period; and
- the tenant may not assign or sublet the premises to a new tenant if prohibited by provisions in the lease agreement.

## The lease agreement

The **Residential Lease Agreement** published by **RPI (Realty Publications, Inc.)** is a fixed-term lease agreement used by a leasing agent, property

manager or landlord when leasing a residential property on a fixed rental-rate basis for a specific period of time, to grant the tenancy and set the terms for rent and conditions for maintenance.

The Residential Lease Agreement:

- sets the amount of rents to be paid;
- identifies who will provide and pay for utilities; and
- allocates the maintenance responsibilities and their costs between the landlord and tenant. [See **RPI** Form 550]
- [Form 550]

## Conditions imposed on a residential occupancy

Residential tenants typically provide a security deposit to the landlord to cover any cost to clean the unit or remedy any damage caused to the unit beyond reasonable wear and tear. [See **RPI** Form 550 §2]



In return for the use and possession of the premises, the tenant pays the landlord rent until expiration of the lease. The tenant agrees to pay a *late charge* if rent is not paid on the due date, or within the established grace period. [See **RPI** Form 550 §4]

Also, a list of occupants who will reside in the property in addition to the named tenants is provided in the lease. Occupants are treated differently than guests. The number of guests the tenant may have in their unit, and the period of time over which their guests may visit, is limited. [See **RPI** Form 550 §§5.4 and 5.6]

The tenant agrees to comply with all building or project rules and

**RPI FORM 550****RESIDENTIAL LEASE AGREEMENT**Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is used by a leasing agent, property manager or landlord when leasing a residential property on a fixed rental-rate basis for a specific period of time to grant the tenancy and set the amount of rents to be paid, identify who will provide and pay for utilities, and the allocation of maintenance responsibilities and their costs between the landlord and tenant.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.  
*Items left blank or unchecked are not applicable.*

**FACTS:**

1. This lease agreement is entered into by \_\_\_\_\_, as the Landlord,  
and \_\_\_\_\_, as the Tenant(s),  
1.1 regarding residential real estate referred to as \_\_\_\_\_,  
1.2 including the following:
  - Garage/parking space #\_\_\_\_\_
  - Storage space #\_\_\_\_\_
  - Furnishings \_\_\_\_\_
- 1.3 The following checked attachments are part of this agreement:
  - Rent control disclosures  Option to Renew/Extend Lease [See RPI Form 565]
  - House/Building rules  Lead-Based Paint Disclosure [See RPI Form 557]
  - Brokerage Fee Addendum [See RPI Form 273]  Credit Application [See RPI Form 553]
  - Condition of Premises Addendum [See RPI Form 560]
  - Condition/Inventory of Furnishings Addendum [See RPI Form 561]
  -

**AGREEMENT:****2. DEPOSIT:**

- 2.1 Landlord acknowledges receipt of \$\_\_\_\_\_ as a security deposit.
- 2.2 The deposit is security for the diligent performance of Tenant's obligations, including payment of rent, repair of damages, reasonable repair and cleaning of premises on termination, and any loss, damages or excess wear and tear on furnishings provided to Tenant.
- 2.3 No interest will be paid on the deposit and Landlord may place the deposit with their own funds, except where controlled by law.
- 2.4 Within 21 days after Tenant vacates, Landlord to furnish Tenant with a security deposit statement itemizing any deductions, with a refund of the remaining amount.

**3. TERM OF LEASE:**

- 3.1 This lease will begin on \_\_\_\_\_, 20\_\_\_\_\_, and continue until \_\_\_\_\_, 20\_\_\_\_\_.
- 3.2 The lease terminates on the last day of the term without further notice.
- 3.3 Landlord's acceptance of rent after expiration of the lease term creates a month-to-month tenancy.
- 3.4 If Tenant holds over, Tenant to be liable for rent at the daily rate of \$\_\_\_\_\_.

**4. RENT:**

- 4.1 Tenant to pay, in advance, \$\_\_\_\_\_ rent monthly, on the \_\_\_\_\_ day of each month.
- 4.2 Rent to be paid by:
  - a.  cash,  check, or  cashier's check, made payable to Landlord or his agent and delivered to:  
(Name) \_\_\_\_\_  
(Address) \_\_\_\_\_  
\_\_\_\_\_

(Phone/Email) \_\_\_\_\_  
Personal delivery of rent to be accepted at Landlord's address during the hours of \_\_\_\_\_ to \_\_\_\_\_ of the following days: \_\_\_\_\_.

regulations established by any existing covenants, conditions and restrictions (CC&Rs) or the landlord. [See **RPI** Form 550 §6.1]

The landlord and tenant agree who will pay or how they will share the financial responsibility for the unit's utilities. Landlords of apartment buildings or complexes often retain the responsibility of providing water to the units. [See **RPI** Form 550 §6.2]

The tenant also agrees to hold the landlord harmless from all liability for damages caused by the tenant or their guests. For this purpose, the tenant is often required to provide insurance coverage. [See **RPI** Form 550 §7.1]

## Existing statutory rights and duties restated

Residential rental and lease agreements often contain provisions that restate the landlord's and tenant's statutory rights and duties which are not well understood. RPI's Residential Lease Agreement reiterates the landlord's statutory obligation to furnish a tenant with:

- a security deposit refund;
- a notice of the tenant's right to a joint pre-expiration inspection of the unit and delivery of an itemized statement of repairs and needed cleaning [CC §1950.5(f)]; and
- a statement of security deposit accounting and an itemization of any deductions. [CC §1950.5(g)(1); see **RPI** Form 550 §2.4]

Further, the lease agreement advises tenants of their limited statutory right to make necessary repairs to the premises and deduct the cost from the rent when the landlord fails to make the repairs the tenant has brought to the landlord's attention. [CC §1942; see **RPI** Form 550 §5.8]

The lease agreement prohibits a tenant from:

- using the premises for an unlawful purpose;
- creating a *nuisance*; and
- committing waste to the property. [See **RPI** Form 550 §§6.8 and 6.9]

Even if a lease agreement does not restate these statutory prohibitions, a tenant who conducts any of these prohibited activities may be evicted by the landlord with the service of a **three-day written notice to quit**. Here, no alternative performance is available to the tenant. [Calif. Code of Civil Procedures §1161(4); see **RPI** Form 575 and 575-1]

*Editor's note – Different eviction rules apply if the property is subject to Just Cause eviction requirements. This content will be covered in a subsequent section.*

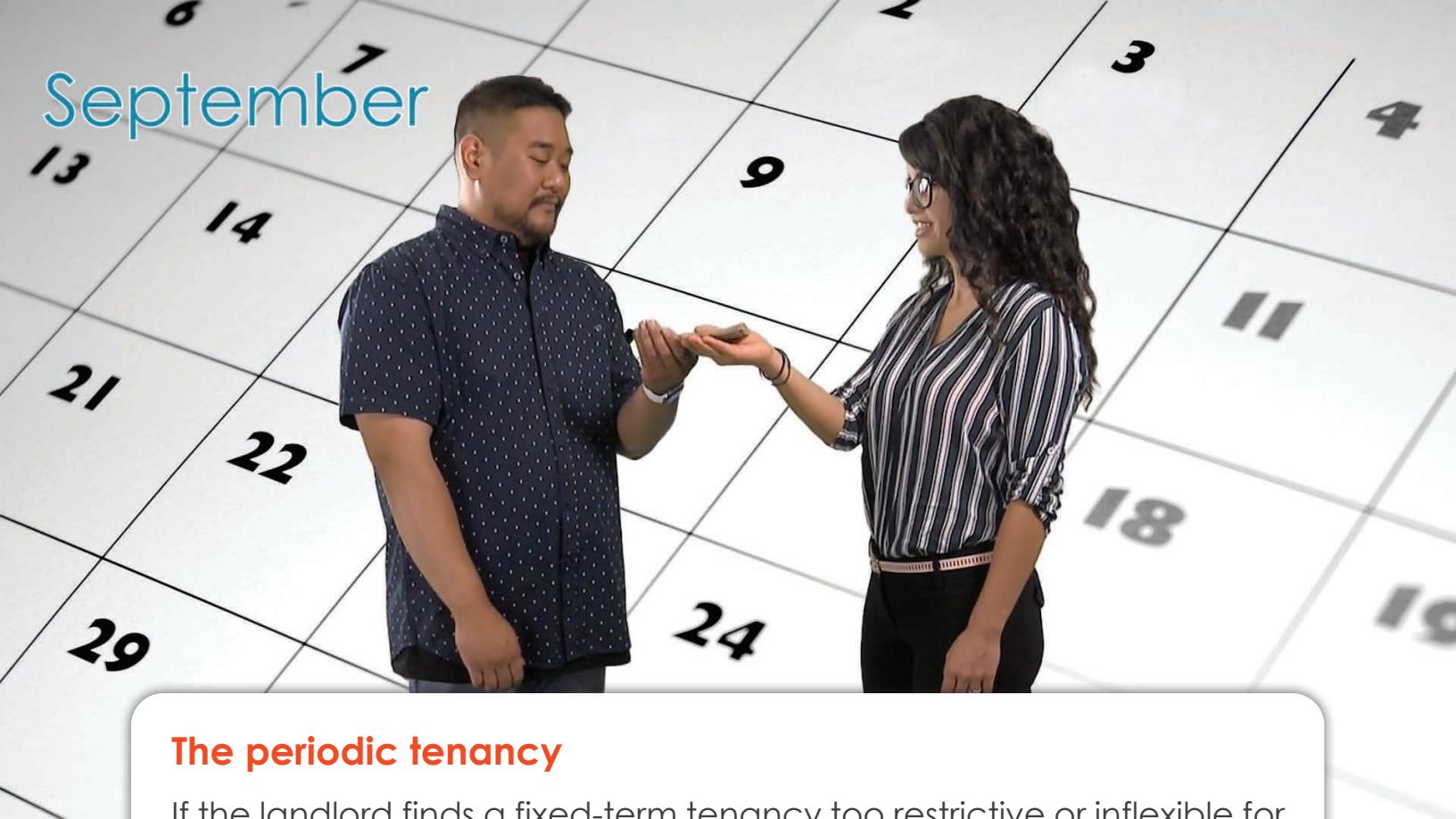
In the event the premises is totally or partially destroyed and becomes uninhabitable, either the landlord or tenant may terminate the lease by giving written notice. When the lease is not terminated, the landlord needs to repair the premises and prorate the rent for the period of time the premises is uninhabitable by the tenant. [See **RPI** Form 550 §8]



# QUIZ

1. A lease arrangement is required to be in writing and signed by the tenant to be enforceable under the Statute of Frauds if the rental period is longer than:
  - a. 90 days.
  - b. six months.
  - c. one year.
2. A lease agreement is required to have:
  - a. a commencement date.
  - b. an expiration date.
  - c. Both a. and b.
3. Without the tenant's exercise of any option to renew or extend, a fixed-term tenancy:
  - a. automatically terminates on the expiration date, no notice required.
  - b. terminates on the tenant's service of a 30-day notice to vacate in advance of the expiration date.
  - c. terminates on the landlord's service of a 60-day notice to vacate in advance of the expiration date.

# September



## The periodic tenancy

If the landlord finds a fixed-term tenancy too restrictive or inflexible for their requirements, a **periodic tenancy** may be more suitable.

A periodic tenancy is automatically extended for equal, successive periods of time, such as a week or a month, until terminated by notice. The length of each successive period of time is determined by the interval between scheduled rental payments.

Examples of periodic payment intervals include:

- **annual** rental payments, indicating a year-to-year tenancy;
- **monthly** rental payments, indicating a month-to-month tenancy; and
- **weekly** rental payments, indicating a week-to-week tenancy.

A periodic tenancy is intentionally created by a landlord and tenant entering into a *rental agreement*. A rental agreement is the agreement which sets the terms for payment of rent and conditions for possession under a periodic tenancy.

The **Residential Rental Agreement** published by **RPI (Realty Publication, Inc.)** is used by a leasing agent, property manager or landlord when renting a residential property on a month-to-month basis, to grant the



## RESIDENTIAL RENTAL AGREEMENT

Month-to-Month

RPI FORM 551

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_

Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is used by a leasing agent, property manager or landlord when renting a residential property on a month-to-month basis, to grant the tenancy and set the rent to be paid, identify who will pay which utilities, and allocate maintenance responsibilities between the landlord and tenant.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.  
*Items left blank or unchecked are not applicable.*

**FACTS:**

1. This rental agreement is entered into by \_\_\_\_\_, as the Landlord,  
and \_\_\_\_\_, as the Tenant(s),
  - 1.1 regarding residential real estate referred to as \_\_\_\_\_,
  - 1.2 including the following:
    - Garage/parking space #\_\_\_\_\_
    - Storage space #\_\_\_\_\_
    - Furnishings \_\_\_\_\_
  - 1.3 The following checked attachments are part of this agreement:
    - Rent control disclosures
    - House/Building rules
    - Condition/Inventory of Furnishings Addendum [See RPI Form 561]
    - Lead-Based Paint Disclosure [See RPI Form 557]
    - Brokerage Fee Addendum [See RPI Form 273]
    - \_\_\_\_\_

- Credit Application [See RPI Form 553]
- Condition of Premises Addendum [See RPI Form 560]

**AGREEMENT:**

2. **DEPOSIT:**
  - 2.1 Landlord acknowledges receipt of \$\_\_\_\_\_ as a security deposit.
  - 2.2 The deposit is security for the diligent performance of Tenant's obligations, including payment of rent, repair of damages, reasonable repair and cleaning of premises on termination, and any loss, damages or excess wear and tear on furnishings provided to Tenant.
  - 2.3 No interest will be paid on the deposit and Landlord may place the deposit with their own funds, except where controlled by law.
  - 2.4 Within 21 days after Tenant vacates, Landlord to furnish Tenant with a security deposit statement itemizing any deductions, with a refund of the remaining amount.
3. **TERM OF RENTAL AGREEMENT:**
  - 3.1 This rental will begin on \_\_\_\_\_, 20\_\_\_\_\_, and continue on a month-to-month basis.
  - 3.2 Tenant may terminate this agreement on 30 days' written notice. Landlord may terminate this agreement on 30 days' written notice if Tenant occupied the property for less than one year, or 60 days' written notice if Tenant occupied the property for one year or more. [See RPI Forms 569-1, 571, and 572]

**4. RENT:**

- 4.1 Tenant to pay, in advance, \$\_\_\_\_\_ rent monthly, on the \_\_\_\_\_ day of each month.
- 4.2 Rent to be paid by:

a.  cash,  check, or  cashier's check, made payable to Landlord or their agent and delivered to:

(Name) \_\_\_\_\_

(Address) \_\_\_\_\_

(Phone/Email) \_\_\_\_\_

Personal delivery of rent to be accepted at Landlord's address during the hours of \_\_\_\_\_ to \_\_\_\_\_ of the following days: \_\_\_\_\_.

b.  credit card # \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ issued by \_\_\_\_\_, which Landlord is authorized to charge each month for rent due.

tenancy and set the rent to be paid, identify who will pay which utilities, and allocate maintenance responsibilities between the landlord and tenant.

*The Residential Rental Agreement:*

- sets the amount of rents to be paid;
- identifies who will provide and pay for utilities; and
- allocates the maintenance responsibilities and their costs between the landlord and tenant. [See **RPI** Form 551]

A periodic tenancy can also result due to possession under a defective lease agreement. A tenant who takes possession under an unenforceable lease agreement (e.g., oral, or unsigned) and pays rent in monthly intervals that the landlord accepts has entered into a month-to-month periodic rental agreement.

A periodic tenancy continues until terminated by a notice to vacate. This right to terminate a month-to-month tenancy by either the landlord or the tenant giving the other a notice to vacate makes a periodic tenancy flexible. [**Kingston v. Colburn** (1956) 139 CA2d 623; Calif. Civil Code §1946]

To terminate a periodic tenancy, the notice period is to be at least as long as the interval between scheduled rental payments, but need not exceed 30 days. A residential property exception exists: a 60-day notice is required to terminate a periodic tenancy in a dwelling if the tenant has occupied the property for more than 12 months. [CC §1946.1; see **RPI** Form 569-1]

On a material breach of the rental agreement, a three-day notice to vacate can also be used to terminate a periodic tenancy. [See **RPI** Form 577]

*Editor's note – Additional rules for terminating a tenancy may apply if the property is subject to "just cause" eviction requirements under the **Tenant Protect Act**. This will be covered in a later section.*

## Safe, sanitary and fit for use

All residential rental and lease agreements carry an **implied warranty of habitability** regardless of the provisions in the lease agreements. However, commercial leases do not contain an implied warranty of habitability.

The *implied warranty* requires the residential landlord to care for the premises by maintaining it in a **habitable condition**. A *habitable condition* is the minimum acceptable level of safety and sanitation permitted by law. [**Hinson v. Delis** (1972) 26 CA3d 62; Calif. Code of Civil Procedure §1174.2]

Residential property which is not in a habitable condition cannot be rented or leased “as-is.” A property cannot be rented “as-is” even if defective property conditions have been fully disclosed and consented to by the tenant.

The public policy establishing the warranty of habitability was legislated due to landlord abuses during periods of scarcity in low-cost housing. This economic situation left residential tenants in lesser socioeconomic neighborhoods without the bargaining power possessed by more affluent and mobile tenants.

Landlords breach the implied warranty of habitability when they fail to comply with building and housing code standards that materially affect health and safety. [CCP §1174.2(c)]

A habitable place to live is a dwelling free of major defects which would interfere with the tenant's ability to use the premises as a residence. This definition does not include mere inconveniences.

A residential dwelling is uninhabitable if any features of the dwelling are:

- not properly maintained; or

- do not substantially comply with building and housing codes

To be habitable, a residential property needs to have:

- effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors;
- plumbing and gas facilities;
- a hot and cold running water system with appropriate fixtures connected to a sewage disposal system;
- heating facilities;
- electrical lighting; and
- floors, stairways and railings. [Calif. Civil Code §1941.1]

In applying these guidelines, a leaky faucet would not render a residential unit uninhabitable. However, *lack of running water* is a significant defect that materially interferes with the tenant's ability to use the property as shelter.

At the time the rental or lease agreement is entered into, the building grounds and appurtenances are to be clean and sanitary. This includes:

- the communal pool;
- laundry facilities;
- storage areas; and
- parking structures.



# QUIZ

1. If a landlord finds a fixed-term tenancy\_\_\_\_\_, a periodic tenancy may be more suitable.
  - a. poses too great of risk of tenant default
  - b. too restrictive or inflexible for their requirements
  - c. too unpredictable in terms of the monthly income the property is likely to command
2. A periodic tenancy:
  - a. needs to be in writing to be enforceable under the Statute of Frauds.
  - b. is automatically terminated on the expiration date, no notice required.
  - c. is automatically extended for equal, successive periods of time until terminated by notice.
3. To terminate a periodic tenancy, the notice period initiated by either the landlord or tenant is to be:
  - a. at least 30 days.
  - b. at least 60 days.
  - c. at least as long as the interval between scheduled rental payments.

# services rendered



## A closer look at a tenancy-at-will

Fixed-term and periodic tenancies are the most common type of leasehold estates. But there are others, such as a **tenancy-at-will**, also known as an **estate at will**.

The characteristics of a *tenancy-at-will* include:

- the tenant possesses the property with the landlord's knowledge and consent, frequently after the termination of a lease;
- possession is provided for an indefinite and unspecified period of time;
- there is no underlying rental or lease agreement, or the agreement has expired; and
- there is no provision for the payment of rent.

A common example of a *tenancy-at-will* is when a family member allows another family member to live in their property without any type of agreement whatsoever and without paying any rent.

This meets all the criteria: possession is mutually agreed to, possession is indefinite, there is no underlying agreement documenting the arrangement, and the family member does not pay rent to the other family member.

Situations giving rise to a tenancy-at-will include:

- when a tenant is granted the right to indefinitely occupy the property in exchange for services rendered [**Covina Manor Inc. v. Hatch** (1955) 133 CA2d Supp. 790; see **RPI** Form 591];
- when a tenant is given possession of property under an unenforceable lease agreement (e.g., a written lease not signed by either party or on terms orally agreed to) — unless rent is accepted which creates a periodic tenancy [**Psihozios v. Humberg** (1947) 80 CA2d 215]; or
- when a tenant is given possession of the property while lease negotiations regarding the rent amount are still in progress and rent is not accepted. [**Miller v. Smith** (1960) 179 CA2d 114]

For a tenancy-at-will, a written three-day notice to pay rent or quit is all that is required to implement any change in the right to continue to occupy the premises – for instance, change it to a different kind of tenancy or terminate the tenancy. Contrast this with the more onerous notice requirements for terminating a periodic tenancy.

### Periodic tenancy or tenancy-at-will?

Consider a property manager who rents an apartment to a tenant under a fixed-term lease. At the end of the leasing period, the tenant retains possession and continues to pay rent monthly, which the property manager accepts. Later, the tenant is served with an appropriate notice to vacate. On the running of the notice period, the tenant refuses to vacate.

The tenant claims the notice to vacate served by the landlord merely terminated the tenant's right of possession and made it a tenancy-at-will on expiration of the notice. As a tenant-at-will, they are entitled to an additional three-day notice to vacate before they are unlawfully detaining the property.

However, an occupancy agreement for an indefinite term with a monthly rent schedule is a month-to-month tenancy. Thus, a tenant is only entitled to one notice to vacate which needs to expire before a UD action may be filed to evict them. [**Palmer v. Zeis** (1944) 65 CA2d Supp. 859]

## A resident manager's occupancy

Relatedly, a *tenancy-at-will* situation often presents itself in the context of a **resident manager** whose right to occupy a property is granted in exchange for providing property management services.

Consider a broker who, retained to manage a residential income property, enters into an employment agreement with a *resident manager* to oversee the daily management of the property. This employment agreement is called a **resident manager agreement**. [See **RPI Form 591**]

Under the *resident manager agreement*, the resident manager:

- acknowledges employment by the property manager;
- accepts the occupancy and use of an apartment unit rent-free as compensation for the employment; and
- agrees to vacate the property on termination of employment.

The resident manager's job is to show vacant units, run credit checks, negotiate and sign leases, collect rents, supervise repairs and maintenance, serve notices and perform other non-discretionary administrative activities.

Later, the property manager terminates the resident manager's employment.

The property manager demands the resident manager immediately vacate the premises and relinquish possession of the unit.

However, the resident manager claims to be a tenant, entitled to a



## RESIDENT MANAGER AGREEMENT

RPI FORM 591

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_

Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is used by an owner or property manager when employing a resident manager to oversee the daily management of the owner's rental property, to document the resident manager's non-discretionary administrative duties, hours of work and the manager's occupancy of an apartment unit as part of their compensation.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California,  
*Items left blank or unchecked are not applicable.*

### 1. RETAINER PERIOD:

- 1.1 Employer hereby employs \_\_\_\_\_, as the Employee,
- 1.2 as Resident Manager of the rental property commonly referred to as \_\_\_\_\_,
- 1.3 located at \_\_\_\_\_ in \_\_\_\_\_, California,
- 1.4 commencing \_\_\_\_\_, 20\_\_\_\_ and continuing until terminated.

### 2. EMPLOYEE AGREES TO:

- 2.1 Collect all rents, security deposits or other charges due Owner and maintain collection records.
- 2.2 Advertise available rental units.
- 2.3 Screen and select tenants.
- 2.4 Show rental units to prospective tenants.
- 2.5 Negotiate, execute or cancel rental or lease agreements with tenants. No lease is to exceed \_\_\_\_\_ months.
- 2.6 Serve three-day notices as needed.
- 2.7 Clean, repair and maintain the rental real estate, inside and outside, as needed to promote the occupancy of the units.
- 2.8 Daily inspect the structure, grounds, parking lots, garages, and vacant units of the rental property for cleanliness and repairs.
- 2.9 Maintain receipt books, key racks and petty cash records in good order.
- 2.10 Conduct all minor maintenance and repairs not exceeding \$500 in cost or \$\_\_\_\_\_ if Employee holds a contractors license. All materials to be purchased out of petty cash.
- 2.11 Contact the material and labor suppliers retained by the Employer to conduct all major repairs and maintenance. Employer to approve all repairs in excess of \$\_\_\_\_\_.
- 2.12 Notify Employer immediately of any potential hazards to the tenants or property. Should an emergency situation arise placing tenants or property in jeopardy, Employee may immediately take action without further authority from Employer.
- 2.13 Conduct no other business on the premises nor solicit the tenants for any business other than the rental of the property.

### 3. BANKING:

- 3.1 Employee will place all rents, security deposits, and other funds received for the benefit of the Owner into an account maintained by Employer with \_\_\_\_\_ at their \_\_\_\_\_ branch.
- 3.2 On depositing funds into the Employer's account, Employee will deliver to Employer a copy of the bank deposit identifying the itemized deposits by the unit from which they were collected.

### 4. COMPENSATION OF EMPLOYEE AND HOURS WORKED:

- 4.1 As compensation for services, Employee will be paid a total monthly salary, from all sources, of \$\_\_\_\_\_.
- 4.2 In part, Employee's salary will be in the form of possession to rental unit \_\_\_\_\_, which is to be occupied as a condition of employment. The rental credit toward the monthly salary is \$\_\_\_\_\_. The utilities including gas, electricity, and trash removal  are,  are not, included with the occupancy.
- 4.3 The balance of the Employee's salary will be paid  monthly,  semi-monthly, on the \_\_\_\_\_ of each calendar month.
- 4.4 Employee will not work more than \_\_\_\_\_ hours per day and \_\_\_\_\_ hours per week.
- 4.5 Employee to have \_\_\_\_\_ days off weekly being the weekdays of \_\_\_\_\_.
- 4.6 Employee agrees to obtain Employer's consent if the hours required to carry out duties exceeds the agreed-to hours.
- 4.7 Employee will notify Employer within 48 hours of additional hours worked in an emergency situation.

notice and time to vacate, not just a notice terminating employment and their right of possession of the unit.

Is the resident manager entitled to a notice and time to vacate on termination of employment?

No! A resident manager who continues to occupy a unit after their employment is terminated becomes a holdover tenant. They unlawfully detain the unit and have no right to a notice other than the notice terminating their employment. A resident manager's occupancy is *fixed*, not periodic. It is established in the resident manager agreement that the resident manager's tenancy ends on the date their employment is terminated. [**Karz v. Mecham** (1981) 120 CA3d Supp. 1]

Also, the resident manager's eviction by an unlawful detainer (UD) action is not protected by rent control ordinances. Further, they may not defend their continued possession by demanding the property manager or landlord show good cause for terminating their employment. [**Tappe v. Lieberman** (1983) 145 CA3d Supp. 19]

If the resident manager does not relinquish possession on termination of the resident manager's employment, the property manager may immediately file a UD action, without further notice, to have the resident manager evicted.

However, a resident manager agreement may provide for the creation of a tenancy following the termination of a resident manager's employment. When a tenancy is agreed to, the resident manager's right of possession is not terminated on termination of the resident manager employment, but under landlord-tenant rules of notice before eviction. [Calif. Code of Civil Procedure §1161(1)]

A **resident manager** is an individual employed by the property manager or landlord to live on-site at the managed complex and see to its daily operations. A *resident manager's* duties may include:

- screening tenants and negotiating leases;
- cleaning vacated units;

- supervising landscaping, maintenance and repairs;
- serving notices; or
- attending to tenant inquiries.

Both residential income property and commercial property may have resident managers. However, apartment buildings with 16 or more units are required to have a landlord, resident manager or responsible caretaker living on the premises to manage the property. [25 Calif. Code of Regulations §42]

Resident managers do not need to be licensed as a real estate broker or agent to negotiate leases or collect rents. However, if a nonresident property manager is not the landlord, the nonresident property manager needs to be licensed by the Department of Real Estate (DRE) as a real estate broker. [Calif. Business and Professions Code §10131.01]



# QUIZ

1. A common example of a(n) \_\_\_\_\_ is when a family member allows another family member to live in their property without any type of agreement whatsoever and without paying any rent.
  - a. holdover tenancy
  - b. tenancy-at-sufferance
  - c. tenancy-at-will
2. Under a tenancy-at-will:
  - a. possession is not agreed to in advance, the tenancy is documented by an expired lease agreement and the tenant holds no option to renew or extend the duration of the possession.
  - b. the tenant's use has to be open, hostile and uninterrupted for a period greater than five years.
  - c. possession is mutually agreed to, possession and indefinite and there is no underlying agreement documenting the arrangement.
3. Under a tenancy-at-will, a \_\_\_\_\_ is required to implement any change in the tenant's right to continue to occupy the premises.
  - a. three-day notice to pay rent or quit
  - b. 30-day notice to pay rent or quit
  - c. unlawful detainer (UD)

## Rental Agreement

RESIDENTIAL RENTAL AGREEMENT Month-to-Month	
Prepared by Agent Broker	Phone _____ Email _____
<b>NOTE:</b> This form is to be used by a leasing agent, property manager or landlord when renting a residential property on a month-to-month basis. To grant the tenancy and set the rent to be paid, identify who will pay which utilities, and allocate maintenance responsibilities, attach a Residential Tenancy Addendum between the landlord and tenant.	
<b>DATE:</b> _____, at _____, California <small>Items left blank or underlined are not applicable.</small>	
<b>PARTIES:</b> 1. This rental agreement is entered into by _____ and _____ regarding residential real estate referred to as _____ as the Landlord, and _____ as the Tenant.	
1.2 including the following: Garage/parking space # _____ Storage space # _____ Furnishings	
1.3 The following checked attachments are part of this agreement: <input type="checkbox"/> House Condition Disclosure <input type="checkbox"/> Household Item Return <input type="checkbox"/> Condition Inventory of Furnishings Addendum [See RPI Form 561] <input type="checkbox"/> Lead-Based Paint Disclosure [See RPI Form 557] <input type="checkbox"/> Brokerage Fee Addendum [See RPI Form 273]	
<b>AGREEMENT:</b>	
2. <b>DEPOSIT:</b> 2.1 Landlord acknowledges receipt of \$ _____ as a non-refundable deposit. 2.2 The deposit is security for the diligent performance of Tenant's obligations, including payment of rent, repair of damages, reasonable repair and cleaning of premises on termination, and any loss, damage or excess wear and tear on furnishings provided to Tenant. 2.3 No interest will be paid on the deposit and Landlord may place the deposit with their own funds, except where required by law. 2.4 Within 21 days after Tenant vacates, Landlord to furnish Tenant with a non-security deposit statement itemizing any deductions, with a refund of the remaining amount.	
3. <b>TERM OF RENTAL AGREEMENT:</b> 3.1 This rental will begin on _____, 20_____, and continue on a month-to-month basis. 3.2 If Tenant fails to renew this agreement on 30 days written notice, Landlord may terminate this agreement on 30 days' written notice if Tenant occupied the property for less than one year, or 60 days' written notice if Tenant occupied the property for one year or more. [See RPI Forms 568-1, 571, and 572]	
4. <b>RENT:</b> 4.1 Tenant to pay, in advance, \$ _____ rent monthly, on the _____ day of each month. 4.2 Rent to be paid by _____ a. cash, check or cashier's check, made payable to Landlord or their agent and delivered to _____ <small>(Address) _____</small>	
<i>(Phone/Email)</i> Personal delivery of rent to be accepted at Landlord's address during the hours of _____ to _____ of the following day: b. credit card # _____ / _____ issued by _____ <small>which Landlord is authorized to charge each month for rent due.</small>	
<small>Page 1 of 2 - Form 51</small>	

[See RPI Form 51]



## The holdover tenancy

When a fixed-term or periodic tenancy terminates by prior agreement or notice, the tenant who remains in possession unlawfully detains the property from the landlord. Likewise, a tenant-at-will who receives the appropriate notice to vacate and who remains in possession of the property also unlawfully detains the property. These scenarios create a tenancy-at-sufferance, commonly referred to as a **holdover tenancy**.

A holdover tenancy also arises on termination of a resident manager when the resident manager's compensation includes the right to occupy a unit rent-free. When the landlord terminates the employment and the resident manager fails to vacate immediately, the resident manager unlawfully detains the premises as a holdover tenant. [**Karz v. Mecham** (1981) 120 CA3d Supp. 1; see **RPI Form 591**]

### What steps does a landlord take to serve an unlawful detainer on a holdover tenant?

**Facts:** An apartment landlord filed an unlawful detainer (UD) against a tenant who was unlawfully holding over. The landlord attempted to personally serve the UD on the tenant

at the apartment address numerous times but the tenant was out of state. The landlord posted the notice on the property and mailed a copy to the tenant's last known address, which was at the apartment. No other address for the tenant was available. The tenant did not receive or respond to the UD and the landlord took possession of the property.

**Claim:** The tenant sought to restore their tenancy claiming the landlord's attempts to serve the UD were deficient since all the attempts were executed at the apartment address while the tenant was out of state and no other actions were taken to reach the tenant.

**Counterclaim:** The landlord sought to prevent the tenant from restoring their tenancy, claiming sufficient actions were taken to notify the tenant of the UD since multiple attempts to notify the tenant were executed at the apartment address without response before posting the notice on the premises and no other address for the tenant was available.

**Holding:** A California Court of Appeals held the tenant may not regain possession since personal service was attempted and the notice was posted at the apartment address and no other address for the tenant was available for personal service or mailing. **[The Board of Trustees of the Leland Stanford Junior University v. Ham (2013) 216 CA4th 330]**

*Editor's note – A landlord is not required to expend an indeterminate amount of time and resources to track down an absent tenant in order to serve a UD. If the UD cannot be personally delivered, the landlord may leave a copy with a competent adult at the property or post it on the property, then send the documents by mail to the last known address of the tenant.*

A **holdover tenant** retains possession of the premises without any contractual right to do so. Their tenancy has been terminated. Thus, the landlord is not required to provide a holdover tenant with any additional notice prior to commencing eviction proceedings. [Calif. Code of Civil Procedures §1161]

A *holdover tenant* no longer owes rent under the expired lease or terminated rental agreement since they no longer have the right of possession. However, the rental or lease agreement usually includes a **holdover rent** provision which calls for a penalty rate of daily rent owed for each day the tenant holds over.

If the rental or lease agreement does not contain a *holdover rent* provision, the tenant owes the landlord the reasonable rental value of the property. This is a daily rate owed for each day the tenant holds over. [See **RPI Form 550**]

Holdover rent is not due and is not to be collected by the landlord until the tenant vacates or is evicted under an **unlawful detainer (UD)** action. On vacating, the holdover period is known and the amount owed can be determined, demanded and collected. If it is not paid on demand, rent can be collected by deducting it from any security deposit or obtaining a money judgment.

But a caution to landlords: acceptance of any holdover rent prior to a tenant vacating or being evicted by a UD action has unintended consequences.

### Is a landlord liable for unintentional damage to a holdover tenant's personal property?

**Facts:** A landlord leases a commercial property to a tenant. When the lease term expires, the landlord modifies the lease for a month-to-month tenancy, all of the other terms remaining the same. The tenant defaults on rent and is served with a three-day notice to pay rent or quit. The tenant fails

to pay rent or quit during the notice period and the landlord files an unlawful detainer (UD) action. The tenant vacates the property, but fails to remove their personal property from the premises. After the expiration of the three-day notice period and during the UD action, the tenant's personal property is damaged in a sewage spill. The tenant is later officially evicted under the UD action.

**Claim:** The tenant seeks money losses caused by damage to their personal property, claiming the landlord is responsible for its lost value since the tenant was in lawful possession of the property at the time of the sewage spill as the UD action was still pending.

**Counterclaim:** The landlord claims they are not responsible for the damage to the personal property since the tenant failed to remove it and had no right to possession of the premises when the sewage spill occurred due to their failure to pay rent under the three-day notice.

**Holding:** A California court of appeals holds the landlord is not responsible for the damage to the tenant's personal property since the tenant failed to pay the delinquent rent under the three-day notice and was not in lawful possession of the premises when the sewage spill occurred. [**Multani v. Knight** (2018) 23 CA5th 837]

*Editor's note — The landlord properly demanded the tenant pay delinquent rent or vacate and surrender possession of the property by serving a three-day notice to pay rent or quit. Further, the rental agreement and the tenant's right to possession were terminated on expiration of the three-day notice period, not when the UD action concluded.*



# QUIZ

1. Which scenario creates a tenancy-at-sufferance?
  - a. When a fixed-term tenancy terminates by prior agreement and the tenant remains in possession without the consent of the landlord.
  - b. When a tenant-at-will receives the appropriate notice to vacate and remains in possession without the consent of the landlord.
  - c. Both a. and b.
2. Prior to commencing eviction proceedings on a holdover tenant, the landlord is required to provide a holdover tenant:
  - a. a Three-Day Notice to Quit prior to commencing eviction proceedings.
  - b. a 30-Day Notice to Vacate prior to commencing eviction proceedings.
  - c. no additional notice prior to commencing eviction proceedings.
3. Most rental or lease agreements includes a(n) \_\_\_\_\_ which calls for a penalty rate of daily rent owed for each day the tenant holds over.
  - a. holdover rent provision
  - b. liquidated damages provision
  - c. attornment clause

## 30-Day Notice to Vacate



A woman with dark hair and glasses is pointing her right index finger towards a large, stylized blue clock graphic. The clock has white numbers from 1 to 12 and red hands. Behind the clock is a '30-DAY NOTICE TO VACATE' form. The form includes sections for 'Date', 'To Tenant', 'Facts', 'Notice', and 'Landlord'. It also contains a signature line and a note about legal costs if the tenant fails to leave. A yellow arrow points from the top left towards the notice form.

30-DAY NOTICE TO VACATE  
From Residential Landlord

NOTE: This form is used by a residential property manager or landlord when the landlord is terminating a month-to-month rental agreement and the tenant is not leaving the property for less than one month. Please indicate the day you require the tenant to vacate.

Date: \_\_\_\_\_ To Tenant: \_\_\_\_\_

Facts:

1. You are terminating the lease.
2. This notice is intended to give you time to move.
3. On or before \_\_\_\_\_, you must leave the property.
4. Rent due \_\_\_\_\_.
5. Landlord:

  - 5.1 Name: \_\_\_\_\_
  - 5.2 Address: \_\_\_\_\_
  - 5.3 City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_
  - 5.4 Telephone: \_\_\_\_\_
  - 5.5 Email: \_\_\_\_\_

Landlord will receive notice at least \_\_\_\_\_ days before the occupant of the property must leave.

7. Notice: State \_\_\_\_\_.

Tenant, if you do not leave the property on the date specified on the notice, you will be responsible for all reasonable attorney's fees, legal proceedings, court costs, and attorney's fees to be initiated to regain possession of the property.

8. If you do not leave the property on the date specified, you will be liable for \_\_\_\_\_ days rent.

9. The reason for terminating the lease is \_\_\_\_\_.

Date: \_\_\_\_\_ Landlord/Agent: \_\_\_\_\_ Signature: \_\_\_\_\_  
Address: \_\_\_\_\_ Phone: \_\_\_\_\_ Cell: \_\_\_\_\_  
Fax: \_\_\_\_\_ Email: \_\_\_\_\_

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[See RPI Form 569]



## Changing the type of tenancy

A landlord, by using a proper notice, can create a different tenancy relationship from the one they initially conveyed to the tenant. A tenant's possessory interest in real estate can shift from one type of tenancy to another due to:

- a notice;
- expiration of a lease; or
- by conduct.

A classic example involves a change in the type of tenancy which arises when a holdover tenant becomes a month-to-month (periodic) tenant.

A landlord who accepts any rent from a holdover tenant under an expired lease has elected by their conduct to treat the continued occupancy as a periodic tenancy. **[Peter Kiewit Sons Co. v. Richmond Redevelopment Agency (1986) 178 CA3d 435]**

Thus, the prerequisite to a UD eviction is the service of a proper notice to vacate on the holdover tenant who paid rent for the continued occupancy, rent the landlord accepted to create a periodic tenancy. **[Colyear v. Tobriner (1936) 7 C2d 735]**

If a landlord accepts rent from a holdover tenant after a fixed-term tenancy expires, the expired lease agreement is renewed on the same terms except for the period of occupancy, which is now periodic. [Calif. Civil Code §1945]

On expiration of a fixed-term lease, the landlord's continued acceptance of rental payments does not renew the tenancy for another term equal to the term of the original lease. Rather, the tenancy is extended as a periodic tenancy for consecutive periods equal to the interval between rent payments — hence, one month if rent is paid monthly. [Calif. Civil Code §1945]

A landlord who wants to terminate a periodic tenancy they created by accepting rent after expiration of a lease needs to serve the tenant with the proper notice to vacate and let it expire. On expiration of the notice, the tenant who remains in possession of the premises is unlawfully detaining the premises and the landlord may file a UD action to evict them.

## Transient occupants and their removal

Another type of occupancy is to be differentiated from the leasehold interests discussed in this course. **Transient occupancy** is the occupancy of a vacation property, hotel, motel, inn, boarding house, lodging house, tourist home or similar sleeping accommodation for a period of 30 days or less. This type of occupant is classified as a guest, also called a *transient occupant*.

A transient occupant occupies property known as lodging, accommodation or unit, not space or premises. The property is not called a rental. The term "rental" implies a landlord/tenant relationship exists. Further, landlord/tenant law does not control *transient occupancy*.

The guest's occupancy is labeled a stay, not possession. During a guest's stay in the lodging, the owner or manager of the property is entitled to enter the unit at check-out time even though the guest may not yet have departed.

*The contract entered into for the lodging is usually called a **reservation agreement**, but never a rental agreement or lease agreement. [See RPI Form 593]*

Guests pay a daily rate, not a daily or weekly rent. They arrive at a pre-set date and time for check-in, not for commencement of possession. Likewise, guests depart at an hour on a date agreed to as the check-out time. Unlike a tenant, a guest does not vacate the premises; they check out.

When a guest fails to depart at the scheduled check-out hour on the date agreed, no holdover tenancy is created. Thus, an unlawful detainer does not exist as with a tenancy conveyed by a rental or lease agreement. A UD action or court involvement is not required to remove the guest. [CC §1940(b)]

However, for the owner or manager to avoid the landlord-tenant UD eviction process, the guest, when checking in, needs to sign a notice stating:

- the unit is needed at check-out time for another guest who has been promised the unit; and
- if the guest has not departed at check-out time, the owner or manager may enter, take possession of the guest's property, re-key the doors and clean up the unit for the next guest. [CC §1865; see RPI Form 593]

### **Property manager's self-help to remove guests**

To remove a guest who fails to timely depart the unit and remains in the unit after a demand has been made to leave, the manager can intervene to remove the guest, a solution called self-help. If the manager's intervention might cause a breach of the peace, the manager may call the police. The police or the sheriff will assist, without the need for a court

order, to remove the guest and prevent a danger to persons or property during the re-keying, removal of possessions and clean up for the arrival of the next guest. [Calif. Penal Code §602(s)]

Transient occupancies include all occupancies that are taxed as such by local ordinance or could be taxed as such by the city or by the county.

Taxwise, the guest occupancy is considered a personal privilege, not a tenancy. Time share units when occupied by their owners are not transient occupancies and are not subject to those ordinances and taxes. [Calif. Revenue and Taxation Code §7280]

Transient units do not include residential hotels since the occupants of residential hotels treat the dwelling they occupy as their primary residence. Also, the occupancy of most individuals in residential hotels is for a period of more than 30 days.

Also, the operator of a residential hotel may not require a resident to change units or to check out and re-register in order to avoid creating a month-to-month tenancy which would place the occupancy under landlord/tenant law. A residential hotel operator violating this rule is liable for a \$500 civil penalty and attorney fees. [CC §1940.1]

A broker or any other person who manages “vacation rental” stays for owners of single family homes, units in a common interest development (condominium project), units in an apartment complex or any other residence subject to a local transient occupancy tax, is to maintain accounting records.

Further, the property manager needs to send a monthly accounting statement to each landlord they represent and make the records available for inspection and reproduction

by the owner. They need to also comply with the transient occupancy tax regarding collection, payment and record keeping. [CC §1864]



# QUIZ

1. A tenant's possessory interest in real estate can shift from one type of tenancy to another due to:
  - a. a notice, expiration of a lease or by conduct.
  - b. expiration of a lease, subordination or by operation of law.
  - c. operation of law, a notice or by an extension of a lease.
2. A landlord who accepts any rent from a holdover tenant under an expired lease has elected by their conduct to treat the continued occupancy:
  - a. as an unlawful holdover.
  - b. as a periodic tenancy.
  - c. as a fixed-term lease which runs from one year commencing on the date the landlord accepts payment.
3. On expiration of a fixed-term lease, the landlord's continued acceptance of rental payments:
  - a. renews the tenancy for another term equal to the term of the original lease.
  - b. does not renew the tenancy for another term equal to the term of the original lease.
  - c. creates an automatic holdover tenancy which may only be corrected by an unlawful detainer (UD) action.

# 90-Day Notice to Quit



90-DAY NOTICE TO QUIT DUE TO FORECLOSURE To Holdover Residential Tenant	
NOTE: This form is used by an owner-by-foreclosure, a successor owner or their agent when they have acquired ownership of residential property at or following a foreclosure sale and seek removal of a tenant who occupied the property at the time of the foreclosure sale, to notify the tenant to vacate within 90 days.	
DATE:	20 _____ at _____ California. TO FORMER RESIDENTIAL TENANT: Items left blank or unchecked are not applicable.
The attached notice means that your home was recently sold in foreclosure and the new owner plans to evict you. You should talk to a lawyer NOW to see what your rights are. You may receive court papers in a few days. If your name is on the papers it may hurt your credit if you do not respond or simply move out. Also, if you do not respond within five days of receiving the papers, even if you are not named in the papers, you will likely lose any rights you may have. In some cases, you can respond without hurting your credit. You should ask a lawyer about it.	
You may have the right to stay in your home for longer than 90 days. If you have a lease that ends more than 90 days from now, the new owner must honor the lease under many circumstances. Also, in some cases and in some cities with a "just cause for eviction law," you may not have to move at all. But you must take the proper legal steps in order to protect your rights.	
How to Get Legal Help If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Internet Web site ( <a href="http://www.lawhelpcga.org">www.lawhelpcga.org</a> ), the California Courts Online Self-Help Center ( <a href="http://www.courtinfo.ca.gov/seithelp">www.courtinfo.ca.gov/seithelp</a> ), or by contacting your local court or county bar association.	
FACTS: 1. You were a residential Tenant under a rental or lease agreement 1.1 dated _____, 20_____, at _____, California, 1.2 entered into by _____, as the Tenant, 1.3 and _____, as the Landlord, 1.4 regarding real estate referred to as _____	
NOTICE: 2. On _____, 20_____, the real estate you occupy was sold at a foreclosure sale which extinguished your interest in the property. 3. Within ninety (90) days after service of this notice, you are required to vacate and deliver possession of the premises to the new owner-by-foreclosure, or _____ 4. If you fail to vacate and deliver possession within ninety (90) days, legal proceedings will be initiated to regain possession of the premises and to recover money damages for wrongful possession and costs.	
Owner-by-foreclosure: See attached Signature Page Addendum. [RPI Form 251] Date: _____, 20_____ Name: _____  Signature: _____ Address: _____	



## Other rules for terminating a tenancy

A landlord and tenant can establish a shorter or lengthier notice period by agreement. However, the notice period cannot be less than seven days.

Other specialized rules exist for different types of properties and situations. For example, in a rent-controlled tenancy, terminating the right of possession is restricted by local ordinances.

In a tenancy-at-will in a mobile home park, the tenant needs to be given a 60-day written notice. [Calif. Civil Code §798.55(b)]

Industrial and commercial tenants typically require three months minimum notice due to the time spent receiving and responding to a notice since it goes through multiple tiers of corporate management before a decision can be made. [CC §1946]

In some instances, an extended 90-day notice is required to terminate residential tenancies in foreclosed properties.

## Terminating a tenancy under the Tenant Protection Act (ACT)

The **Tenant Protection Act (TPA) of 2019** made several significant changes to the rights of landlords and tenants of targeted properties including:

- **capping annual rent increases** at 5% plus the rate of inflation for much of California multi-unit residential properties; and
- requiring “**just cause**” to **evict** tenants in place for 12 months or more.

Requiring a just cause for eviction makes it harder for landlords to evict tenants in order to rent out their properties to new tenants at a higher rate. Further, if a tenant is being evicted at no fault of their own, the landlord may also be required to provide modest financial **relocation assistance**.

The changes enacted will be effective until they are repealed on January 1, 2030. [Calif. Civil Code §1946.2(j)]

The applicability of the TPA is comprehensive, covering most multi-unit residential real estate housing in California and **single family residential (SFR)** units owned by a real estate investment trust (REIT), a corporation or a limited liability company (LLC) in which at least one member is a corporation. However, there are numerous, sizable exemptions for multi-family units and conditions for SFRs to be excluded.

Multi-unit residential real estate **exempt** from “just cause” eviction procedures include:

- residential units that have been issued a certificate of occupancy within the previous 15 years;
- a duplex of which the owner occupied one of the units as their principal residence at the beginning of the

tenancy and remains in occupancy;

- units restricted as affordable housing for households of very low or moderate income, or subject to an agreement that provides subsidies for affordable housing for households of very low, low, or moderate income;
- dormitories constructed and maintained in connection with any higher education institution in California;
- units subject to rent or price control that restricts annual increases in the rental rate to an amount less than that set by the TPA;
- multi-unit transient occupancy housing like hotels and motels;
- accommodations in which the tenant shares kitchen or bathroom facilities with an SFR owner-occupant;
- SFR real estate that can be sold and conveyed separate from the title to any other dwelling unit, like in an SFR subdivision or condominium project, provided:
  - the owner is not one of the following:
    - a real estate investment trust (REIT);
    - a corporation; or
    - a limited liability company (LLC) in which at least one member is a corporation; and
  - the tenant has been given written notice stating the rental property is exempt from the rent increase caps under the TPA. [CC §1947.12(d); CC §1946.2(e); see **RPI** Form 550, 551 and 550-3]

To notify the tenant of the property's exempt status from the TPA, the landlord uses a **checkbox** in the rental or lease agreement to indicate whether the property is subject to just cause eviction requirements.

When a residential property or tenancy does not meet any of the criteria for exemption, the landlord is to abide by the TPA limiting their ability to increase the rent or evict a tenant to regain possession.

### **“Just Cause” required for certain evictions**

For tenancies commenced or renewed on or after July 1, 2020, tenants are to be notified of the new “just cause” and rent cap protections extended to residential tenants by the TPA.

The following statutory language is to be a provision in all residential and lease agreements, written in no less than 12-point type:

California law limits the amount your rent can be increased. See Section 1947.12 of the Civil Code for more information. California law also provides that after all of the tenants have continuously and lawfully occupied the property for 12 months or more or at least one of the tenants has continuously and lawfully occupied the property for 24 months or more, a landlord must provide a statement of cause in any notice to terminate a tenancy. See Section 1946.2 of the Civil Code for more information.

This is incorporated as a boilerplate notice of tenant rights into **RPI** Form 550 §10 and Form 551 §9, our residential occupancy agreements.

Landlords of property exempt from the TPA need to notify the tenant in writing of their exempt status to qualify themselves for the exemption. The landlord notifies the tenant by using a checkbox in the rental or lease agreement to indicate whether the property is subject to rent limits and just cause eviction requirements. [See **RPI** Form 550 §10.1 and Form 551

## §9.1]

For tenancies entered into prior to July 1, 2020 which do not include the notice, the landlord will provide the notice and, if applicable, indicate their exempt status using the separate *Just Cause and Rent Cap Addendum*. [See **RPI** Form 550-3]

Landlords of non-exempt property seeking to evict tenants need to show **just cause** when:

- all tenants have continuously and lawfully occupied the unit for 12 months or longer; or
- at least one tenant has continuously and lawfully occupied the unit for 24 months or longer. [CC §1946.2(a)]

## **At-fault just cause evictions**

Just cause eviction notices fall under two categories, based on whether the tenant is:

- at fault, called an **at-fault just cause eviction** [CC §1946.2(b)(1)]; or
- not at fault, called a **no-fault just cause eviction**. [CC §1946.2(b)(2)]

An *at-fault just cause eviction* is further categorized as either:

- **curable**; or
- **incurable**.

To qualify for an *at-fault just cause eviction*, the tenant:

- defaulted on a *rental payment*;
- failed to enter into a landlord-requested *renewal* or *extension* of a lease which terminated on or after January 1, 2020 [See **RPI** Form 565];
- breached a *material term* of the lease;

- committed or permitted a *nuisance* or waste to occur on the property;
- conducted *criminal activity* on the premises or common areas, or used the premises for an *unlawful purpose*;
- assigned or sublet the premises in violation of the expired lease;
- refused the landlord's authorized entry into the premises; or
- failed to deliver possession after providing the landlord notice to terminate the tenancy or surrender possession. [CC §1946.2(b)(1); see **RPI** Form 576-1]

Also classified as an *at-fault just cause* eviction is a tenant's failure to vacate when the tenant was a 3or other employee of the landlord and their occupancy was provided in conjunction with their employment status and limited to the period of employment, and the employment has been terminated. [CC §1946.2(b)(1)(K)]

*Editor's note — When occupancy under a lease agreement expires, a landlord may require the tenant to enter into a written extension or renewal, rather than allow the tenancy to remain, converting the fixed-term tenancy to a periodic month-to-month tenancy. However, if the tenant fails to enter into a lease renewal or extension agreement and the landlord has not accepted rent for a holdover period, this is considered an at-fault just cause for eviction.* [CC §1946.2(b)(1)(E)]

When the tenant under an *at-fault just cause* tenancy breaches a nonmonetary performance provision of a rental or lease agreement, the landlord of a non-exempt property serves the tenant a *Three-Day Notice to Perform – For Properties Subject to Just Cause Eviction Requirements*. [See **RPI** Form 576-1]

When the failure to perform is **incurable** – such as when a tenant commits waste to the property or engages in overt criminal activity – the landlord uses the *Three-Day Notice to Quit*, requiring the tenant to vacate and deliver possession within three days of service. [Calif. Code of Civil Procedure §1161(4); see **RPI** Form 577-1]

However, when the failure to perform is **curable**, such as the breach of a lease term which may be fully corrected within a three day period, the landlord uses the *Three-Day Notice to Perform* to state what the tenant needs to do to rectify or cure the breach in order to remain in possession. [See **RPI** Form 576-1 §4]

Unique to properties subject to the just cause eviction requirements, when the tenant does not cure the breach by full performance within three days after service of the notice to perform, the landlord may not immediately begin legal proceedings to regain possession by pursuing an **unlawful detainer (UD)** action.

Rather, if the breach remains uncured on expiration of the Notice to Perform, the landlord is required to prepare and serve the tenant with the *Three-Day Notice to Quit*. [CC §1946.2(c); see **RPI** Form 577-1]

Here, the tenant who is served a notice to correct a curable breach and fails to fully perform or quit, is given three additional days to vacate — quit — after service of the final notice. When the tenant then fails to vacate and deliver possession, the landlord's remaining legal remedy is to file a *UD* action to regain possession based on the tandem quit notices and seek an award for rent owed and associated costs. [CC §1946.2(c)]

Related, when the tenant commits a curable monetary breach, in order to initiate the eviction, the landlord uses a

*Three-Day Notice to Pay Rent* (with or without related fees). These notices include sections which identify the tenant as being under a lease which requires just cause to terminate the tenancy and indicates their failure to pay rent constitutes just cause for eviction. [See **RPI** Form 575-3 and Form 575-4]

Once the three days have passed and the tenant has still not paid the appropriate amount(s) – a curable breach – the landlord may serve the tenant with a *Three-Day Notice to Quit* without the further opportunity to cure the violation. [See **RPI** Form 577-1]

## No-fault just cause evictions

A **no-fault just cause eviction** exists when the tenant is being evicted under no fault of their own for any of the following reasons:

- the landlord or their spouse, domestic partner, children, grandchildren, parents or grandparents intent to occupy the premises;
- the property is withdrawn from the rental market;
- the property is unfit for habitation as determined by a government agency and through no fault of the tenant; or
- the landlord intends to demolish or substantially renovate the property. [CC 1946.2 (b)(2); see **RPI** Form 569-2 §3]

An improvement qualifies as a **substantial remodel** or renovation when any structural, electrical, plumbing or mechanical system is replaced or substantially modified, requiring a permit from a government agency. This includes the abatement of *hazardous materials* like lead-based paint, mold or asbestos, which cannot be completed with the tenant residing in the unit, requiring the tenant to vacate for 30 days or longer.

Cosmetic improvements like painting or minor repairs that don't require the tenant to vacate to ensure their safety are not considered substantial remodels. [CC §1946.2 (b)(2)(D)(ii)]

In the **notice to quit** discussed above used in the context of an **at-fault eviction** — the tenant has materially breached the terms of a rental or lease agreement and the landlord is using the breach to terminate the lease or rental agreement. [See **RPI** Form 577-1]

Alternatively, a **notice to vacate** is used in the context of a no-fault eviction to terminate a rental agreement and interfere with the automatic renewal of the periodic tenancy when a breach of the rental agreement has not occurred or is not an issue. [See **RPI** Form 569-2]

## Relocation assistance

When a *no-fault just cause* eviction occurs for a non-exempt property, the landlord is required to provide **relocation assistance** to the tenant. Relocation assistance is equal to one month's rent and is to be made:

- as a direct payment within 15 calendar days of the notice to vacate; or
- in exchange for the landlord's waiver of the payment of rent for the final month before it becomes due. [CC 1946.2(d)(1); see **RPI** Form 569-2 §7]

Further, the landlord needs to **notify the tenant** of their right to relocation assistance in writing. This notice is provided within the body of the specialized 60-Day Notice to Vacate required for tenants who have resided in the property for 12 months or longer. [CC §1946.2(d)(2); see **RPI** Form 569-2 §7]

If the landlord **fails to provide relocation assistance**, the notice to vacate is void. [CC §1946.2(d)(4)]

Further, if the tenant receives the relocation assistance and then **fails to vacate** at the end of the notice period, the landlord is able to recover the relocation assistance as part of the damages in their action to retake possession. [CC §1946.2(d)(3)(B)]

If it was through the actions of the tenant that the property was rendered unfit for habitation, the tenant is not entitled to relocation assistance. [CC §1946.2(b)(2)(C)(iii)]

Tenants may not waive their rights provided to them under the just cause eviction laws. Any waiver made in the agreement is void as contrary to public policy.



# QUIZ

1. Though a landlord and tenant can establish a shorter or lengthier notice period by agreement, the notice period cannot be less than:
  - a. 30 days
  - b. two weeks.
  - c. seven days.
  
2. A(n) \_\_\_\_\_ is required to terminate residential tenancies in foreclosed properties.
  - a. 30-day notice
  - b. 60-day notice
  - c. 90-day notice
  
3. Under the Tenant Protection Act (TPA):
  - a. a tenant cannot be evicted within 12 months of moving into California from another state.
  - b. a landlord cannot increase the rent on a property for the first five years of occupancy in targeted properties.
  - c. a landlord needs "just cause" to evict tenants in place for 12 months or more in targeted properties.

# Tenant improvements



## Tenant Leasehold Improvements

### Ownership rights when a tenant vacates

**Tenant improvements** are improvements made to a leased property to meet the needs of the occupying tenant.

Consider a retail business owner who enters into a commercial lease agreement to occupy commercial space as a tenant. The leased premises do not contain **tenant improvements (TIs)** since the building is nothing more than a shell. [See **RPI** Form 552 through 552-4]

The tenant agrees to make all the tenant improvements needed to occupy the premises and operate a retail business (i.e., interior walls, flooring, ceilings, air conditioning, electrical outlets and lighting, plumbing, sprinklers, telephone and electronic wiring, etc.).

The lease agreement provides for the property to be delivered to the landlord on expiration of the lease "in the condition the tenant received it," less normal wear and tear. However, no lease provision addresses whether, on expiration of the lease, the TIs will remain with the property or the property is to be restored by the tenant to its original condition before the addition of the tenant improvements.

On expiration of the lease, the tenant strips the premises of all of the tenant improvements they placed on the property and vacates. The building is returned to the landlord in the condition it was found by the tenant: an empty shell, less wear and tear. To relet the space, the landlord replaces nearly all the tenant improvements that were removed.

Is the tenant liable for the landlord's costs to replace the tenant improvements removed by the tenant on vacating?

Yes! Improvements made by a tenant that are permanently affixed to real estate become part of the real estate to which they are attached. Improvements remain with the property on expiration of the tenancy, unless the lease agreement provides for the tenant to remove the improvements and restore the property to its original condition. [Calif. Civil Code §1013]

However, the landlord's right to improvements added to the property and paid for by the tenant depends upon whether:

- the tenant improvements are permanent (built-in) or temporary (free-standing); and
- the lease agreement requires the tenant to remove improvements and restore the premises.

All improvements attached to the building become part of the real estate, except for trade fixtures as discussed in a later section. [CC §660]

Examples of improvements that become part of the real estate include:

- **built-ins** (i.e., central air conditioning and heating, cabinets and stairwells);
- **fixtures** (i.e., electrical and plumbing);
- **walls, doors and dropped ceilings**; and
- **attached flooring** (i.e., carpeting, tile or linoleum).

In most circumstances, improvements attached to the building

become part of the real estate. However, there are critical exceptions.

Improvements that are unique to the operation of the tenant's business are called **trade fixtures**. Trade fixtures are retained by the tenant on expiration of the lease. They are also known as **trade improvements**.



# QUIZ

1. Improvements made to a leased property to meet the needs of the occupying tenant are referred to as:
  - a. upgrades.
  - b. trade improvements.
  - c. trade secrets.
2. In most circumstances, improvements attached to the building:
  - a. become part of the real estate, except for fixtures.
  - b. become part of the real estate, except for trade fixtures.
  - c. do not become part of the real estate and are to be taken by the tenant when they vacate.
3. Which of the following improvements would not become part of the real estate on expiration of a lease?
  - a. central air conditioning and heating, cabinets and stairwells.
  - b. hair washing stations, mirrors and salon chairs.
  - c. walls, doors and dropped ceilings.



## Leasehold improvement provisions and promises

Commercial lease agreements typically contain a **further-improvements provision** allowing the landlord to either:

- retain tenant improvements and alterations made by the tenant; or
- require restoration of the property to its original condition on expiration of the lease. [See **RPI Form 552**]

Further-improvement provisions usually include clauses stating:

- who will make the construction of improvements (landlord or tenant);
- who will pay for the construction of the improvements (landlord or tenant);
- the landlord's consent is required before the tenant makes improvements;
- any *mechanic's liens* due to improvements contracted by the tenant will be removed by the tenant;
- the condition of the premises on expiration of the lease; and
- whether and on what conditions the improvements are to remain or be removed on expiration of the lease.

## Improvements promised

A landlord under a lease agreement who agrees to make improvements to the rented premises is required to complete the improvements in a timely manner. If the landlord fails to make timely improvements, the tenant may cancel the lease agreement. [See **RPI** Form 552 § 10]

Conversely, lease agreement provisions can obligate a tenant to construct or install improvements on the property. The time period for commencement and completion is agreed to in the lease agreement. If not agreed to, a reasonable period of time is allowed. [Calif. Civil Code § 1657]

*Further-improvement provisions* typically call for the landlord to approve the planned improvements before construction is commenced. Alternatively, some lease agreement provisions allow a tenant to make necessary improvements without the landlord's further consent. These improvements are not specifically mandated, or required to be completed in exchange for a reduction in rent. This non-mandatory type of improvement is called a **permissive improvement**.

For example, a landlord and tenant sign a long-term lease agreement. Its further-improvements provision authorizes the tenant to demolish an existing building located on the property and construct a new one in its place without first obtaining the landlord's consent. The rent is based solely on the current value of the premises.

The further-improvements provision does not state a specific time period for demolition or construction.

The tenant makes no effort to tear down the old building or erect a new one. Ultimately, the landlord claims the tenant has breached the lease agreement for failing to demolish the existing building and construct a new one.

Here, the tenant has not breached the lease agreement. The agreement contained no promise by the tenant to build and the rental amount was not based on the construction. The tenant was authorized to build without need for the landlord's approval, but was

not obligated to do so. Thus, the improvements on the tenant's part were permissive, not mandatory. [**Kusmark v. Montgomery Ward and Co. (1967) 249 CA2d 585**]

## Mandatory improvements

A further-improvements provision that requires a tenant to construct improvements at a rent rate reflecting the value of the land, has different consequences.

If a date is not specified for completion of the improvements, the tenant needs to complete construction within a reasonable period of time since construction of improvements is mandated to occur.

For example, a landlord leases unimproved land to a developer who is obligated to build improvements, contingent on obtaining a construction mortgage. A time period is not set for commencement or completion of the construction. However, a cancellation provision gives the tenant/developer the right to cancel the lease agreement within one year if financing is not found to fund the construction. No provision authorizes the landlord to terminate the lease if the required construction is not completed.

Due to the onset of a recession, the tenant is unable to arrange financing within the one-year period. However, they do not exercise their right to cancel the lease agreement and avoid payment of future rents. Instead, the tenant continues their good faith effort to locate and qualify for construction financing. Ultimately, financing is not located and construction is not commenced.

A few years later, as the economy is showing signs of recovery, the landlord terminates the lease. The landlord claims the

lease agreement has been breached since the promised construction was not completed.

The tenant claims the landlord cannot terminate the lease as long as the tenant continues their good faith effort to locate financing and remains solvent to qualify for the financing.

Here, the tenant has breached the lease agreement. They failed to construct the intended improvements within a reasonable period of time. The original purpose of the lease was to have buildings erected without specifying a completion date. Following the expiration of the right to cancel, the landlord gave the tenant a reasonable amount of time in which to commence construction before terminating the lease.

When the original purpose for the lease was the construction of a building by the tenant, a landlord cannot be forced to forgo the improvements bargained for. **[City of Stockton v. Stockton Plaza Corporation (1968) 261 CA2d 639]**

## Surrender of improvements

All tenant improvements are to remain with the leased property on termination of a lease unless the lease agreement permits or mandates their removal by the tenant as a restoration of the premises.

Most lease agreements merely provide for the property to be returned in *good condition*, minus ordinary wear and tear for the years of the tenant's occupancy. Thus, the tenant is not required to restore the property to its actual condition when they took possession since tenant improvements are part of the real estate.

A provision calling for the tenant's *ordinary care* of the premises does not also require the tenant to remove their improvements or renovate the premises to eliminate deterioration, obsolescence or normal

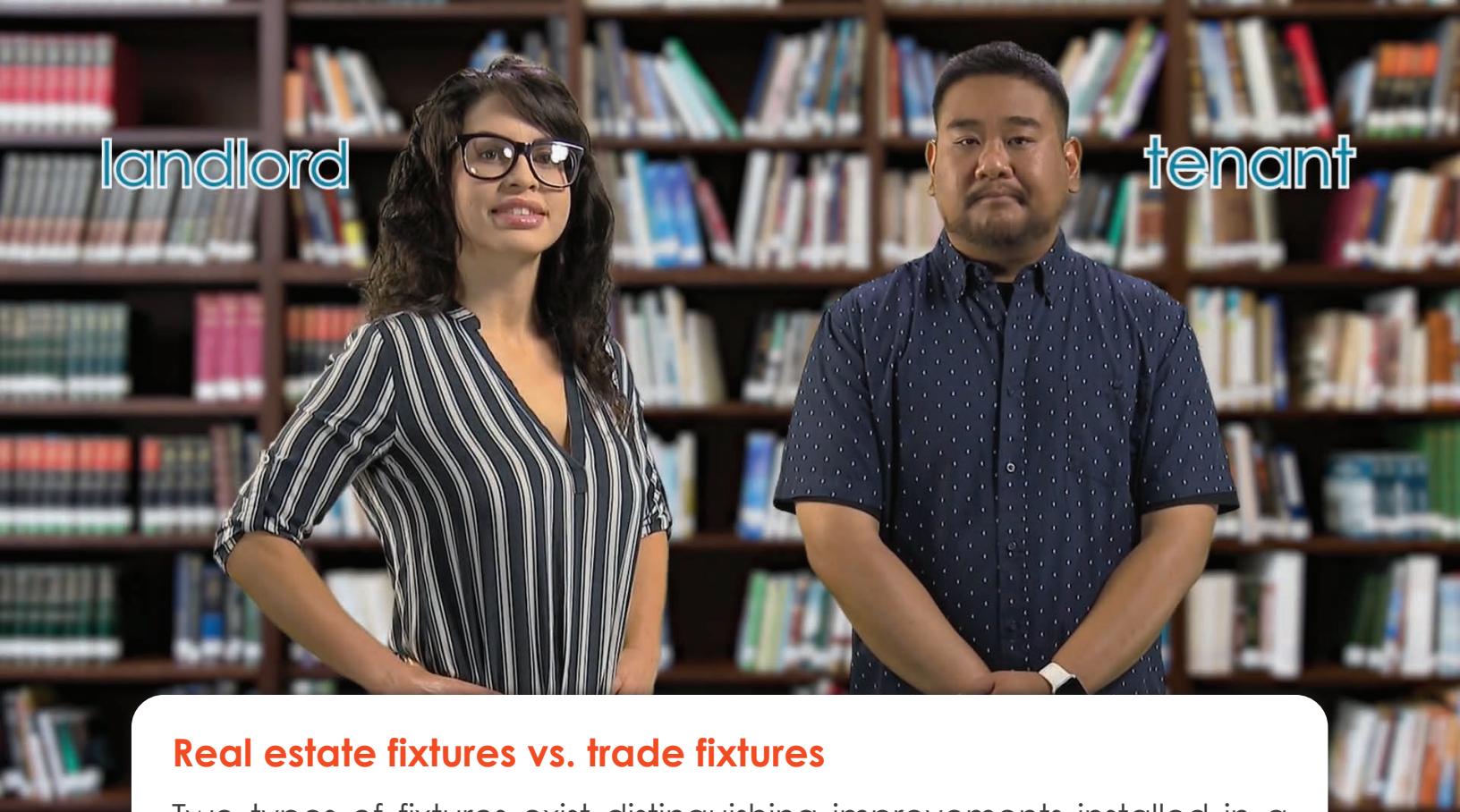
wear and tear caused by the tenant's permitted use of the property.  
**[Kanner v. Globe Bottling Co. (1969) 273 CA2d 559]**

If a lease does not require the tenant to restore the property to the condition it was in when received, the tenant may only remove their personal improvements, called **trade improvements** or **trade fixtures**.



# QUIZ

1. What is the lease provision which controls whether a landlord is to retain tenant improvements made by the tenant or require restoration of the property to its original condition on expiration of the lease?
  - a. Reversion and retention provision.
  - b. Mandatory-improvements provision.
  - c. Further-improvements provision.
2. Non-mandatory improvements which are not specifically required to be completed in exchange for a reduction in rent are an example of a(n):
  - a. permissive improvement.
  - b. mandatory improvement.
  - c. compulsory improvement.
3. The majority of lease agreements provide for a property to be returned:
  - a. in good perfect, with all evidence of the tenant's use for the duration of their occupancy corrected.
  - b. in good condition, minus ordinary wear and tear for the years of the tenant's occupancy.
  - c. in any condition, minus defects which render the property uninhabitable for future tenants.



landlord

tenant

## Real estate fixtures vs. trade fixtures

Two types of fixtures exist distinguishing improvements installed in a building:

- **real estate fixtures;** and
- **trade fixtures.**

A real estate fixture is personal property that is attached to the real estate. It becomes part of the real estate it is attached to and is conveyed with the property. [Calif. Civil Code §§660; 1013]

For example, if a tenant rents an office and builds bookshelves into the wall rather than merely anchoring them to the wall, the bookshelves become part of the improvements located on the real estate.

When the lease expires, real estate fixtures become the landlord's property. The landlord takes possession of the real estate fixtures as part of the real estate forfeited or surrendered to the landlord, unless the lease agreement provides for restoration or permits removal by the tenant. The conveyance of real estate fixtures from tenant to landlord on expiration of the lease is called **reversion**. [**City of Beverly Hills v. Albright (1960) 184 CA2d 562**]



Conversely, *trade fixtures* do not revert to the landlord on expiration of the lease. A trade fixture is an improvement that is attached to the real estate by the tenant and is unique to the operation of the tenant's business, not the use of the building.

Consider a tenant who leases property to operate a beauty salon. The tenant moves in work-related furnishings (i.e., mirrors, salon chairs, wash stations and dryers), necessary to run the business. The items are attached to the floor, walls, plumbing and electrical leads.

On expiration of the lease, the tenant removes the fixtures that were used to render the services offered by the business. The landlord claims the fixtures are improvements to the property and cannot be removed since they became part of the real estate when installed.

However, furnishings unique to the operation of a business are considered trade fixtures even though the furnishings are attached and built into the structure. Trade fixtures are removable by the tenant.

A tenant may, at the end of or anytime during the lease term, remove any fixture used for trade purposes if the removal can be done without damaging the premises. **[Beebe v. Richards (1953) 115 CA2d 589]**

Fixtures that have become an integral part of the building's structure due to the way they are attached or the general purpose they serve cannot be removed. Examples of fixtures which cannot be removed include toilets, air conditioners, vent conduits, sprinkler systems and lowered ceilings. [CC §1019]

### **Reimbursement for tenant improvements on wrongful eviction**

What compensation may be due to a tenant who has improved the property and is wrongfully evicted prior to expiration of a lease?

A tenant who is wrongfully evicted is entitled to the rental value of their improvements for the remainder of their unexpired lease term. Without reimbursement, the landlord receives a windfall profit for their use of the tenant's improvements until they revert to the landlord on expiration of the original lease.

The tenant is not, however, entitled to reimbursement for the market value or cost of the improvements.

Thus, a wrongfully evicted tenant is limited to collecting the reasonable value for the landlord's use of the improvements during the remainder of the term on the original lease. [**Asell v. Rodrigues** (1973) 32 CA3d 817]

### **Trade fixtures as security**

Lease agreements often contain a default provision prohibiting the tenant from removing the trade fixtures when the agreement is breached. The tenant (and their unsecured creditors) no longer has a right to the trade fixtures under a default provision.

Consider a tenant who signs a commercial lease agreement to use the

premises to operate a frozen packaging plant. The lease agreement states all fixtures, trade or leasehold, belong to the landlord if the lease is terminated due to a breach by the tenant.

The tenant later encumbers the existing trade fixtures by borrowing money against them. The tenant then defaults on their lease payments. While in default on the lease, the tenant surrenders the property to the landlord, including all trade fixtures.

Does the lender on the mortgage secured by the trade fixtures have a right to repossess them?

No! The tenant lost their ownership right to remove the trade fixtures under the terms of the lease agreement that was entered into before they encumbered the trade fixtures. Any right to the fixtures held by the secured lender is similarly lost since the lender is junior in time and thus subordinate to the landlord's interest in the fixtures under the lease agreement.

However, if the trade fixtures installed by the tenant are owned by a third party, or if a third party had a lien on them at the time of their installation, the landlord has no more right to them than the tenant.

[**Goldie v. Bauchet Properties** (1975) 15 C3d 307]



# QUIZ

1. Bookshelves built into a wall which have become part of the improvements located on the real estate are best classified as:
  - a. fixtures.
  - b. trade fixtures.
  - c. business ornamentations.
  
2. The conveyance of real estate fixtures from tenant to landlord on expiration of the lease is called:
  - a. ratification.
  - b. reversion.
  - c. restoration.
  
3. A tenant may, at the end of or anytime during the lease term, remove any fixture used for trade purposes:
  - a. if the removal can be done without damaging the premises.
  - b. if the removal is done in exchange for a renegotiation of the occupancy terms.
  - c. Both a. and b.



## Notice of Nonresponsibility protects against a mechanic's lien

Tenants occasionally contract for improvements to be constructed on the premises they have leased. Any **mechanic's lien** by a contractor for nonpayment initially attaches to the tenant's leasehold interest in the property. [Calif. Civil Code §8442(a)]

However, the mechanic's lien for unpaid labor and materials may also attach to the fee simple interest held by the landlord if the landlord or the landlord's property manager:

- acquires knowledge the construction is taking place; and
- fails to post and record a **Notice of Nonresponsibility**. [See RPI Form 597]

A Notice of Nonresponsibility is a written notice which needs to be:

- posted in a conspicuous place on the premises within ten days after the landlord or their property manager first has knowledge of the construction; and
- recorded with the county recorder's office within the same ten-day period. [CC §8444]

However, the landlord who becomes aware of the construction and

RECORDING REQUESTED BY

AND WHEN RECORDED MAIL TO

Name

Street  
AddressCity &  
State

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**NOTICE OF NONRESPONSIBILITY**

From Landlord (California Civil Code §8444)

**NOTE:** This form is used by a property manager or income property owner when a tenant commences construction of improvements on premises leased from the owner, to declare the property owner is not responsible for any claim arising out of the tenant improvements being constructed on the property.

DATE: \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.

**NOTICE IS HEREBY GIVEN:**

1. \_\_\_\_\_ is the vested and legal owner of real property located in the County of \_\_\_\_\_, State of California, identified as
  - 1.1 Common address \_\_\_\_\_
  - 1.2 Legal description \_\_\_\_\_
2. \_\_\_\_\_ is:
  - 2.1  The Buyer of the property under a purchase agreement, option or land sales contract, or
  - 2.2  The Tenant under a lease of the property.
3. Within 10 days before the posting and recording of this notice, the undersigned Owner or Agent of Owner obtained knowledge that a work of improvement has commenced on the site of the property involving  construction,  alteration, or  repair.
4. Owner will not be responsible for any claim arising out of this work of improvement.
5. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_, 20\_\_\_\_\_, Name: \_\_\_\_\_

Signature: \_\_\_\_\_  
 Owner, or  Agent of Owner

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA

COUNTY OF \_\_\_\_\_

On \_\_\_\_\_ before me, \_\_\_\_\_ (Name and title of officer)

personally appeared \_\_\_\_\_ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: \_\_\_\_\_  
(This area for official notarial seal) (Signature of notary public)

FORM 597

09-16

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fails to post and record the Notice of Nonresponsibility is not personally liable to the contractor. Rather, the contractor can only lien the landlord's interest in the real estate and foreclose on their mechanic's lien to collect for unpaid labor and materials delivered to improve the property under contract with the tenant. [**Peterson v. Freiermuth** (1911) 17 CA 609]

## Nonresponsibility on mandatory improvements

Further, if the lease requires the tenant to make *mandatory improvements*, a mechanic's lien attaches to the landlord's interest even when the landlord has posted and recorded a Notice of Nonresponsibility.

For example, a lease states the tenant is to make certain improvements as a condition of renting the property. Since the improvements are mandatory improvements rather than permissive improvements, the tenant is deemed to be the landlord's agent. The tenant is contracting for the construction of the mandated improvements on behalf of the landlord.

Thus, the mechanic's lien incurred by the tenant will attach to both the tenant's and the landlord's interest in the property, despite any posted and recorded Notice of Nonresponsibility. [**Los Banos Gravel Company v. Freeman** (1976) 58 CA3d 785]

Had the lease merely authorized the tenant to make nonmandatory (permissive) improvements, the tenant will not be acting as an agent for the landlord. In that case, the landlord's interest in the property is not subjected to a mechanic's lien if the Notice of Nonresponsibility is timely posted and recorded on discovery of the tenant improvements. [**Baker v. Hubbard** (1980) 101 CA3d 226]

## Removal of fixtures by contractor

A mechanic's lien cannot be recorded against the landlord if the improvements are removed by the contractor recording the lien.

For example, a tenant contracts to have air conditioning installed in the building the tenant rents. The contractor sells the equipment to the tenant under a conditional sales contract. The contractor retains title to the equipment as security until the sales contract debt is paid.

The landlord's consent to the improvements is not obtained by the tenant, but the landlord has knowledge the work has commenced. The landlord does not post a *Notice of Nonresponsibility*.

Later, after the air conditioning units are installed, the tenant vacates the property.

The contractor is not paid and files a mechanic's lien against the landlord's fee interest in the property. Further, the contractor repossesses the air conditioning units and resells them at a loss. The contractor then seeks to recover their losses under the mechanic's lien.

However, by electing to repossess the units, the contractor waived their right to pursue the mechanic's lien to foreclosure.

Whether the air conditioning units are considered a removable fixture due to the financing, or a property improvement permitting the recording of a mechanic's lien, is no longer an issue after their removal. The contractor removed the units and chose to treat the units as personal property. Thus, the contractor lost their lien rights for nonpayment. [**Cornell v. Sennes** (1971) 18 CA3d 126]

## Failure to perfect a lien

Consider the tenant who leases a property containing tanks for holding gasoline. The tenant negotiates a reduced rental payment in exchange for installing fuel pumps free of any liens.

The tenant purchases the pumps on credit and the pumps are installed. The supplier of the pumps does not receive a **Uniform Commercial Code (UCC-1)** financing statement from the tenant. Thus, the supplier does not file a UCC-1 with the Secretary of State, a requisite to perfecting the supplier's lien on the pumps. [See **RPI Form 436-1**]

Later, the pump supplier claims title to the pumps due to the unpaid installation debt and seeks to repossess them.

However, the landlord owns the pumps as fixtures which became part of the real estate. The landlord gave consideration in the form of reduced rent to acquire the pumps. More importantly, the pump supplier failed to perfect its lien on installation of the pumps. [**Southland Corp. v. Emerald Oil Company** (9th Cir. 1986) 789 F2d 1441]



# QUIZ

1. A lien entitling a contractor or subcontractor to foreclose on a job site property to recover the amount due and unpaid for labor and materials they used is referred to as a(n):
  - a. judgment lien.
  - b. mechanic's lien.
  - c. contractor's easement.
2. A Notice of Nonresponsibility needs to be:
  - a. posted in a conspicuous place on the premises within ten days after the landlord or their property manager first has knowledge of the construction.
  - b. recorded with the county recorder's office within ten days after the landlord or their property manager first has knowledge of the construction.
  - c. Both a. and b.
3. If the lease requires the tenant to make mandatory improvements:
  - a. a mechanic's lien does not attach to the landlord's interest so long as the tenant agrees to complete the improvements in writing in the underlying lease agreement.
  - b. a mechanic's lien does not attach to the landlord's interest so long as the landlord posted and recorded a Notice of Nonresponsibility.
  - c. a mechanic's lien attaches to the landlord's interest even when the landlord has posted and recorded a Notice of Nonresponsibility.

# holder of the listing



## Listings as Employments

### Authority to act on the client's behalf

A listing agreement is a written employment arrangement between a client and a licensed real estate broker regarding real estate services. On entering into a *listing agreement*, the broker and their agents are retained and authorized to diligently perform real estate related services on behalf of the client in exchange for payment of a fee. [Calif. Civil Code §1086(f); see **RPI** Forms 102-104 and 110-112]

The client retaining a broker may hold an ownership interest in real estate, which the client seeks to:

- sell [See **RPI** Forms 102 and 102-1];
- lease [See **RPI** Form 110]; or
- encumber as collateral for mortgage financing. [See **RPI** Form 104]

Further, the client retaining the services of a broker may be seeking to acquire an interest in real estate as a:

- buyer [See **RPI** Forms 103 and 103-1]; or

- *tenant*. [See **RPI** Form 111]

The person employed by a client to provide real estate services in expectation of a fee is a licensed real estate broker. Likewise, if a dispute arises with a client over the client's failure to pay an agreed-to fee, the broker needs to be employed under a written *listing* signed by the client may pursue collection.

A real estate agent employed by the broker may obtain a listing, but the agent does so while acting on behalf of the broker. The agent has no independent right to enter into or enforce the listing agreement in their name.



# QUIZ

1. On entering into a \_\_\_\_\_, the broker and their agents are retained and authorized to diligently perform real estate related services on behalf of the client in exchange for payment of a fee.
  - a. purchase agreement
  - b. listing agreement
  - c. finder's fee agreement
2. The person employed by a client to provide real estate services in expectation of a fee is:
  - a. a licensed real estate agent.
  - b. a licensed real estate broker.
  - c. either a licensed real estate agent or broker.
3. A real estate agent employed by the broker may obtain a listing:
  - a. and independently enforce it in their name.
  - b. though may not discuss the terms of the listing with the client.
  - c. but the agent does so while acting on behalf of the broker.



promise to use  
due diligence

### Right to a fee

The agent of a broker has a *right to a fee* on transactions based on the agent's written employment agreement with the broker, not under the separate listing agreement the broker has with the client. Through the broker-agent employment agreement, the agent is entitled to share in the fees actually received by the broker on transactions in which the agent participates. [See **RPI** Forms 505 and 506]

A licensed agent representing a broker acts as an *agent of the broker*. As the broker's agent, the agent performs on behalf of the broker (as well as the client) all the activities the broker has been retained by the client to provide. Further, an agent providing real estate related services on behalf of a client may not do so independently of their broker. Thus, an agent employed by a broker is referred to as "the agent of the (client's) agent," acting as an agent of their employing broker. [Calif. Civil Code §2079.13(b)]

The listing agreement sets the scope of services the broker is authorized to perform while representing the client. The listing



also authorizes the broker to serve as the client's representative in the negotiation of a real estate transaction with others.

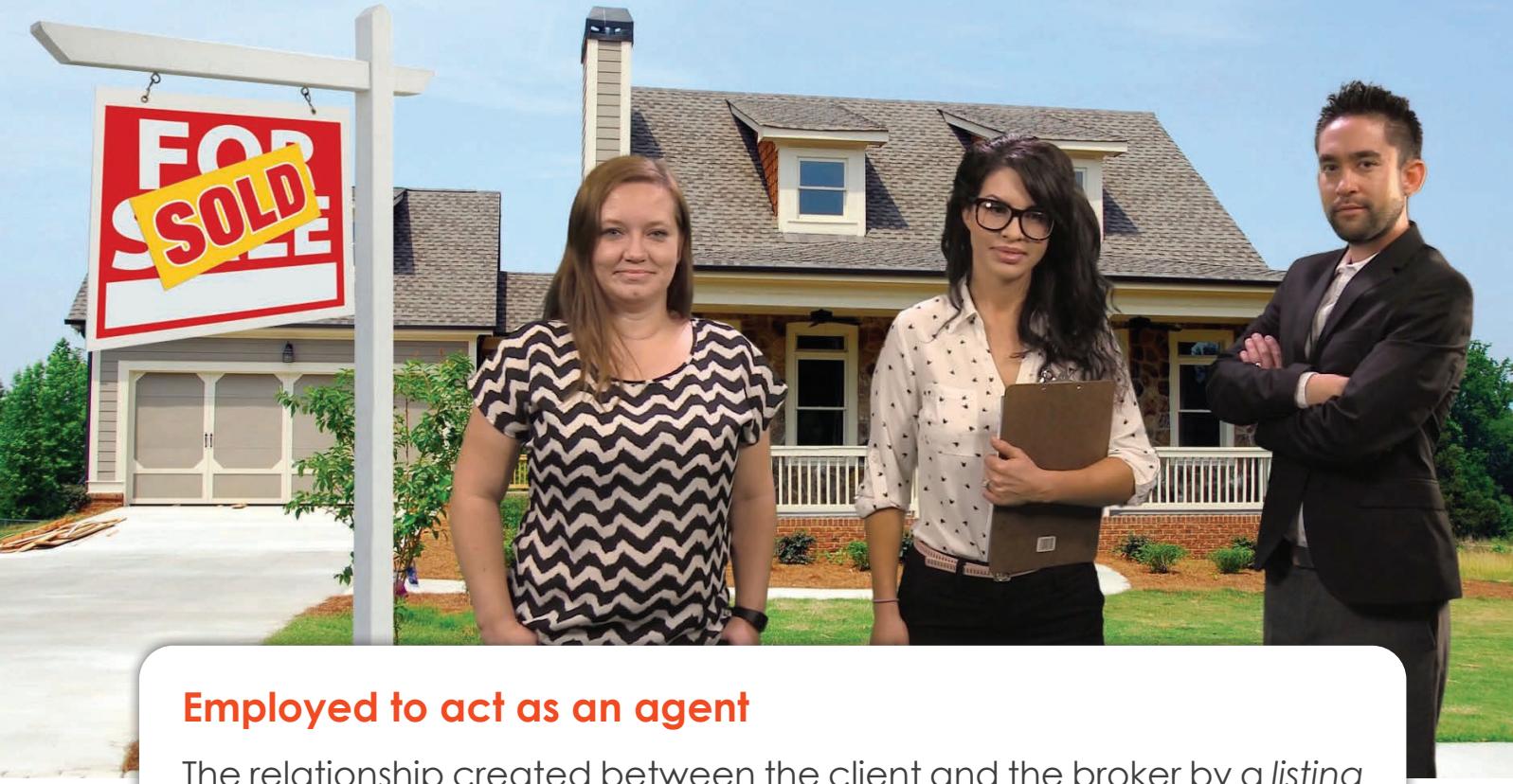
Further, the listing contains the client's promise to pay a fee to the broker. This promise is given in exchange for the broker's **promise to use diligence** in the broker's efforts to meet the client's objectives, known as their **fiduciary duty**.

*Editor's note — The use of diligence is distinguished from a "best efforts" standard for broker performance under an open listing.*



# QUIZ

1. Through a(n) \_\_\_\_\_, the agent is entitled to share in the fees actually received by the broker on transactions in which the agent participates.
  - a. listing agreement
  - b. purchase agreement
  - c. broker-agent employment agreement
2. A licensed agent representing a broker acts as a(n):
  - a. agent of the client.
  - b. agent of the broker.
  - c. agent of the principal.
3. A broker's promise to use diligence in their efforts to meet the client's objectives is known as their:
  - a. common law duty.
  - b. best efforts duty.
  - c. fiduciary duty.



## Employed to act as an agent

The relationship created between the client and the broker by a *listing agreement* has two distinct legal aspects:

- an **employment relationship**; and
- an **agency relationship**.

The *employment relationship* established on entering into a listing agreement specifies the scope of activities the broker and the broker's agents are to undertake in the employment and authorizes the broker to carry them out.

On the other hand, the *agency relationship* is imposed on the broker by law as arising out of the representation authorized by the employment. Agency carries with it the *fiduciary duty* of loyalty and full disclosure owed by the broker (and their sales agents) to the client. [See **RPI Form 305**]

As a *fiduciary*, the broker's and agents' conduct under the employment are equated to the conduct required of a trustee acting on behalf of a beneficiary. This fiduciary duty, also called agency, precedes commencement and survives the termination of the employment relationship. [Calif. Civil Code §2079.16]

Also, an oral agreement to perform brokerage services on behalf of a client imposes an agency law obligation on the broker and agents to act as fiduciaries — no differently than had a writing existed. However, the client's oral promise to pay a fee does not entitle the broker to enforce collection of the fee due from the client – buyer or seller – when working for a client without a written listing agreement.

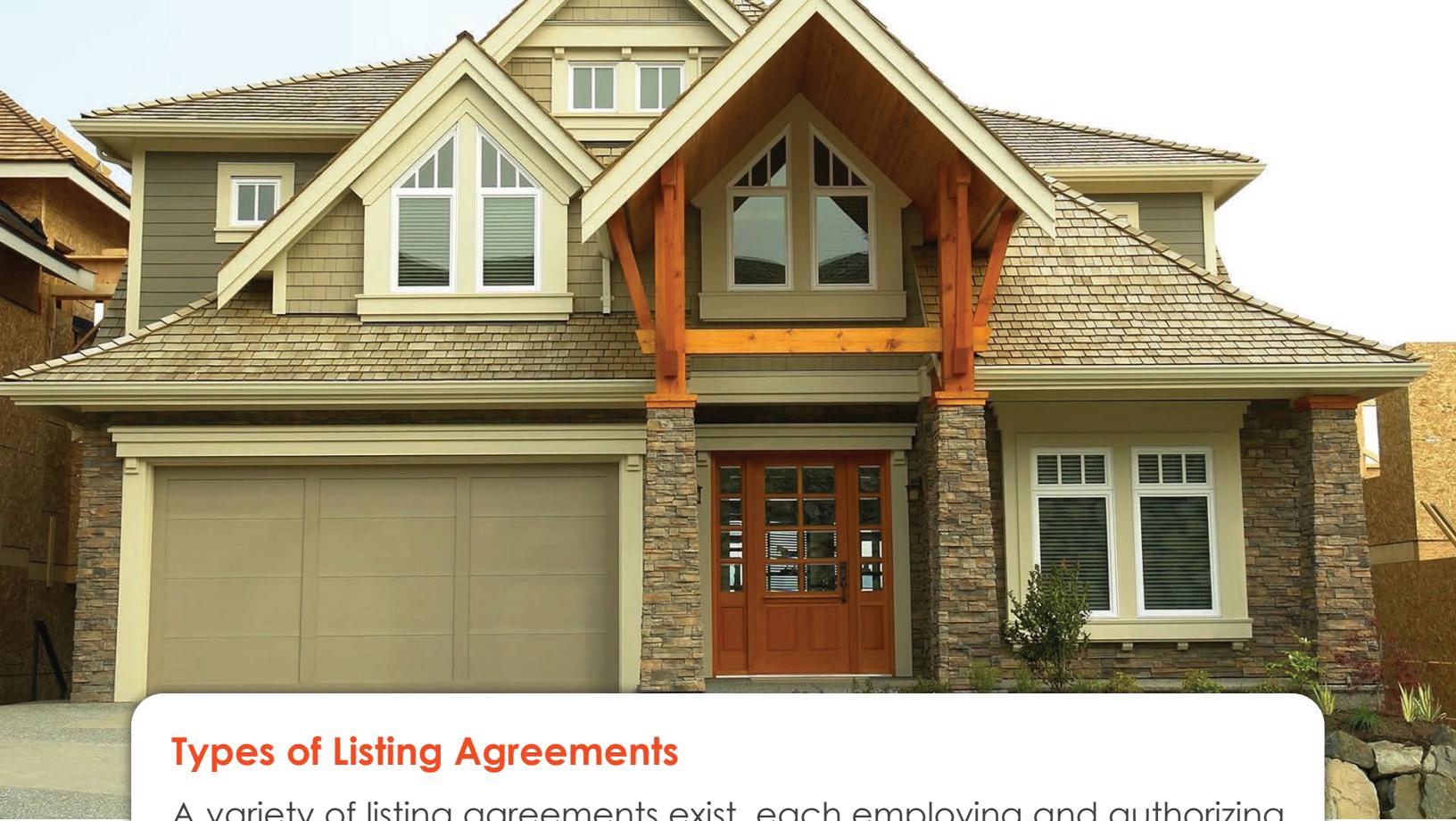
An agreement employing a broker to purchase or sell real estate, lease a property for over one year or arrange mortgage financing is controlled by *contract law*. For a broker to enforce a promise from a client to pay a fee, the fee agreement needs to be:

- in writing; and
- signed by the client. [CC §1624(a)(4)]



# QUIZ

1. The relationship created between the client and the broker by a listing agreement has two distinct legal aspects:
  - a. an employment relationship and an agency relationship.
  - b. an agency relationship and a unilateral relationship.
  - c. a bilateral relationship and an employment relationship.
2. An oral agreement to perform brokerage services on behalf of a client:
  - a. imposes no agency law obligation on the broker and does not entitle the broker to enforce collection of the fee due from the client.
  - b. imposes an agency law obligation on the broker to act as fiduciaries though does not entitle the broker to enforce collection of the fee due from the client.
  - c. imposes a contractual employment obligation for the client to pay the broker a fee if the broker performs any of the work agreed to.
3. For a broker to enforce a promise from a client to pay a fee, the fee agreement needs to be:
  - a. in writing.
  - b. in writing and signed by the broker.
  - c. in writing and signed by the client.



## Types of Listing Agreements

A variety of listing agreements exist, each employing and authorizing a broker to perform real estate related services under different conditions.

The variations usually relate to:

- the extent of the broker's representation;
- the type of services to be performed by the broker and their agents; and
- the events which trigger payment of a fee. [See **RPI** Forms 102-104 and 110-112]

The purpose for most listing agreements is the sale or purchase of single-family residential (SFR) property. Others are for residential-income and commercial-income properties comprising industrial, retail, office, farm and motel/hotel or unimproved parcels.

Despite the application of various agreements to the type of property described in the listing, all listings fall into one of two general categories:

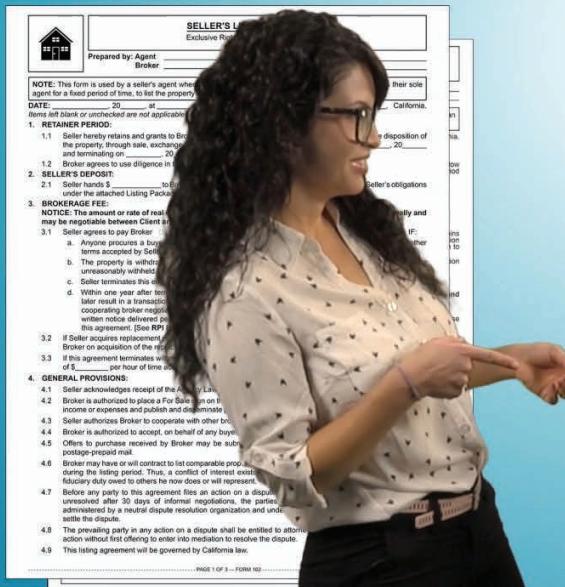
- exclusive; or
- open.



# QUIZ

1. A variety of listing agreements exist. The variations usually relate to the extent of the broker's representation, the events which trigger payment of a fee and:
  - a. the type of services to be performed by the broker and their agents.
  - b. the net sales proceeds the seller is expected to receive on the sale of their property.
  - c. the division of fees between the broker, their agents and the administrative staff.
2. The purpose for the majority of listing agreements is the sale or purchase of:
  - a. single-family residential (SFR) property.
  - b. residential-income property.
  - c. commercial-income property.
3. Listing agreements are divided into one of two general categories:
  - a. exclusive or limited.
  - b. triple-net or open.
  - c. open or exclusive.

# Exclusive Right to Sell or Buy



SELLER'S LISTING AGREEMENT  
Exclusive Right to Sell or Buy

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_

NOTE: This form is used by a seller's agent when he or she retains the services of another agent for a fixed period of time, to list the property.

DATE: 20 AT \_\_\_\_\_

ITEMS LEFT BLANK OR UNCHECKED ARE NOT APPLICABLE.

1. RETAINER PERIOD:

1.1 Seller hereby retains and grants to Broker the sole right to sell or buy the property, through sale, exchange and lease, during the period ending 20.

1.2 Broker agrees to use diligence to find a buyer.

2. SELLER'S DEPOSIT:

2.1 Seller hands \$200 to Broker as earnest money and deposit for Seller's obligations.

3. BROKERAGE FEE:

NOTICE: The amount or rate of real estate brokerage fees may be different between Client and Broker.

3.1 Seller agrees to pay Broker:

- a. Anyone procured a buyer by Broker;
- b. The property is withheld unreasonably withheld;
- c. Seller terminates this document;
- d. Seller fails to timely provide information which later result in a transaction;

3.2 If Seller acquires replacement property, Broker will receive a fee of 2% of the purchase price.

3.3 If this agreement terminates within 30 days of the signing date, Broker will receive a fee of \$200, per hour of time spent.

4. GENERAL PROVISIONS:

4.1 Seller acknowledges receipt of the *California Law*.  
Broker is authorized to place a For Sale sign on property and to make reasonable expenses for advertising and dissemination.

4.2 Seller authorizes Broker to cooperate with other brokers.

4.3 Broker is authorized to accept, on behalf of any buyer.

4.4 Offers to purchase received by Broker may be subject to postage-prepaid mail.

4.5 Broker is authorized to enter into a written contract to list comparable properties for sale or lease during the listing period. Thus, a conflict of interest exists. Seller understands that Broker has a fiduciary duty owed to others he now does or will represent.

4.6 Seller, any party under this document, and Broker, shall be bound by the California Dispute Resolution Act. Any dispute arising from this document, including any claim for damages, shall be submitted to arbitration before a neutral dispute resolution organization and under its rules.

4.7 The prevailing party in any action on a dispute shall be entitled to attorney's fees and costs.

4.8 Action without first offer to enter into mediation to resolve the dispute.

4.9 This listing agreement will be governed by California law.

PAGE 1 OF 3 - FORM 102



## Exclusive listings

Under an exclusive *listing*, a broker receives the sole right to represent:

- an owner by **marketing** a listed property for sale or lease and **locating** a qualified buyer or tenant [See **RPI** Forms 102 and 102-1];
- a buyer or tenant by **locating** property [See **RPI** Forms 103 and 103-1]; or
- an owner or lender to **mortgage** a property.

An exclusive *listing* requires an agent to use diligence in their efforts to fulfill the client's objectives to locate a buyer, tenant or lender for the property. An exclusive listing has a specified period of employment set by a mandated expiration date of the employment, such as 90 or 180 days after its commencement.

If the broker fails to include an expiration date in an exclusive listing, they face disciplinary action by the Department of Real Estate (DRE) on a complaint. [Calif. Business and Professions Code §10176(f)]

Two types of exclusive employment agreements for buying and selling real estate exist:

- an **exclusive agency listing** for a seller or buyer; and

- an **exclusive right-to-sell** or **right-to-buy listing agreement**. [See RPI Forms 102-104]

Both types of exclusive listings establish the broker and their agents as the sole licensed real estate representatives of the client. However, these variations are distinguished by whether or not the broker is entitled to a fee when the property is sold or located solely by the efforts of the client.

Under an exclusive agency *listing* fee provision, the broker does not earn a fee when the client, acting alone and independently of any other broker or the seller's broker, accomplishes the objective of the employment, i.e., selling the listed property or locating and buying the property sought.

Conversely, under the fee provision in an exclusive *right-to-sell/buy* agreement, the broker earns a fee no matter who produces the buyer or locates the property sought under the listing during the listing period.

This is the case whether it is the client, the seller's broker or another broker or representative of the client who produces a buyer or locates a property. [Calif. Civil Code §1086(f)(1)]

An exclusive employment is an example of a **bilateral contract**. The broker or agent agree to exercise due diligence to fulfill the client's real estate objectives. In exchange, the client, be they the buyer or seller, promises to pay a fee under various circumstances.

In the context of a contract, it means both parties are bound to act. Stated another way, it's a promise for a promise.





# QUIZ

1. If a broker fails to include an expiration date in an exclusive listing:
  - a. the client can obtain criminal penalties against the broker.
  - b. they face disciplinary action by the Department of Real Estate (DRE) on a complaint.
  - c. the broker is in violation of the statute of frauds.
2. Under an exclusive agency listing fee provision:
  - a. the broker earns a fee whether or not they accomplish the objective of the employment.
  - b. the broker earns a fee when the client accomplishes the objective of the employment.
  - c. the broker does not earn a fee when the client accomplishes the objective of the employment.
3. An exclusive employment is an example of a:
  - a. unilateral contract.
  - b. bilateral contract.
  - c. fixed-price contract.



## Exclusive right-to-sell listings: a closer look

An **exclusive right-to-sell listing agreement** affords a real estate broker the greatest fee protection for their efforts. It is also the most commonly used type of listing. [See **RPI** Form 102]

This listing employs the broker as the sole agent to act on behalf of the owner to market the property and negotiate any sale with all potential buyers and their agents. The broker is entitled to a fee regardless of who procures the buyer. [See **RPI** Form 102]

Under an *exclusive right-to-sell agreement*, the owner relinquishes their right to list the property with other brokers or defeat the seller's broker's entitlement to compensation by selling the property themselves, as occurs under an *exclusive agency listing* or *open listing*.

An owner of real estate, on entering into an exclusive right-to-sell listing agreement, grants a broker the *right to locate* a buyer for the property prior to the expiration of the period of employment specified in the listing agreement.

The broker is entitled to the fee agreed to in the listing if, during the listing period:

- the **property is sold** on any terms, no matter who produces the



## SELLER'S LISTING AGREEMENT

Exclusive Right to Sell, Exchange or Option

RPI FORM 102

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_

Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is used by a seller's agent when entering into the employment of an owner of a property as their sole agent for a fixed period of time, to list the property for sale, locate a buyer and sell the property.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.  
*Items left blank or unchecked are not applicable.*

### 1. RETAINER PERIOD:

- 1.1 Seller hereby retains and grants to Broker the exclusive right to market, solicit and negotiate for the disposition of the property, through sale, exchange or option, for the listing period beginning on \_\_\_\_\_, 20\_\_\_\_\_, and terminating on \_\_\_\_\_, 20\_\_\_\_\_.
- 1.2 Broker agrees to use diligence in the performance of this employment.

### 2. SELLER'S DEPOSIT:

- 2.1 Seller hands \$ \_\_\_\_\_ to Broker for deposit into Broker's trust account for application to Seller's obligations under the attached Listing Package Cost Sheet. [See RPI Form 107]

### 3. BROKERAGE FEE:

**NOTICE: The amount or rate of real estate fees is not fixed by law. They are set by each Broker individually and may be negotiable between Client and Broker.**

- 3.1 Seller agrees to pay Broker  \_\_\_\_\_ % of the purchase price, or  \_\_\_\_\_, IF:
  - a. Anyone procures a buyer, exchanger or optionee on the terms stated in this agreement or on any other terms accepted by Seller during the period of the listing;
  - b. The property is withdrawn from sale, transferred or leased without Broker's consent, which will not be unreasonably withheld, or otherwise made unmarketable by Seller during the period of the listing;
  - c. Seller terminates this employment of Broker during the period of the listing; or
  - d. Within one year after termination of this agreement, Seller or their agent enter into negotiations, which later result in a transaction contemplated by this agreement, with a prospective buyer whom Broker or a cooperating broker negotiated with during the period of this listing. Broker to identify prospective buyers by written notice delivered personally or electronically, or mailed to Seller within 21 days after termination of this agreement. [See RPI Form 122]
- 3.2 If Seller acquires replacement property in a transaction in which Broker negotiates, Seller to further compensate Broker on acquisition of the replacement property based on the fee amount stated in §3.1.
- 3.3 If this agreement terminates without Seller becoming obligated to pay Broker a fee, Seller to pay Broker the sum of \$\_\_\_\_\_ per hour of time accounted for by Broker, not to exceed \$\_\_\_\_\_.

### 4. GENERAL PROVISIONS:

- 4.1 Seller acknowledges receipt of the Agency Law Disclosure. [See RPI Form 305]
- 4.2 Broker is authorized to place a For Sale sign on the property, inspect the property's condition, verify any operating income or expenses and publish and disseminate property information to meet the objectives of this employment.
- 4.3 Seller authorizes Broker to cooperate with other brokers and divide with them any compensation due.
- 4.4 Broker is authorized to accept, on behalf of any buyer, an offer and deposit.
- 4.5 Offers to purchase received by Broker may be submitted to Seller personally or electronically, or by USPS postage-prepaid mail.
- 4.6 Broker may have or will contract to list comparable properties or represent Buyers seeking comparable properties during the listing period. Thus, a conflict of interest exists to the extent Broker's time is required to fulfill the fiduciary duty owed to others he now does or will represent.
- 4.7 Before any party to this agreement files an action on a dispute arising out of this agreement which remains unresolved after 30 days of informal negotiations, the parties agree to enter into non-binding mediation administered by a neutral dispute resolution organization and undertake a good faith effort during mediation to settle the dispute.
- 4.8 The prevailing party in any action on a dispute shall be entitled to attorney fees and costs, unless they file an action without first offering to enter into mediation to resolve the dispute.
- 4.9 This listing agreement will be governed by California law.

buyer; or

- the broker or their agent presents the seller with a **bona-fide offer** from a ready, willing and able buyer on terms sought by the seller under the listing, or on other terms accepted by the seller. [Calif. Civil Code §1086(f)(1)]

*Exclusive right-to-sell listing agreements* give a broker and their agents the greatest incentive to fulfill their fiduciary duty and work toward attaining the client's goal of locating a buyer who acquires the property. Here, the seller's broker does not compete with the client to sell the property — they work together to achieve the sale. [See **RPI** Form 102]

Buyer's brokers know that sellers who enter into exclusive right-to-sell listing agreements are fully committed to working with brokers. Also, sellers who retain competent agents are counseled on prices of comparable properties and current market conditions. Thus, the seller of a listed property is more likely to accept a reasonable offer.

In turn, buyer's brokers are comfortable exposing their clients to properties listed exclusively by other brokers.

## Termination of agency by the seller

Consider a seller of real estate who enters into an **exclusive listing agreement** with a broker to sell a property within, say, a three-month period. The fee provision in the listing contains a *termination-of-agency* clause addressing seller interference with the employment. It entitles the broker to a full fee if the seller terminates the broker's employment, without good cause, prior to expiration of the listing period. [See **RPI** Form 102 §3.1(c)]

The broker's agent, as agreed in the listing, promptly commences a diligent marketing effort:

- to properly present the property for sale; and
- to locate a buyer who is willing to acquire the property.

However, during the listing period before a buyer is located, the seller terminates the agency by acting to cancel the listing.

The broker makes a demand on the seller for a full listing fee, claiming the termination-of-agency clause in the fee provision of the listing calls for payment of a fee as earned when the seller prematurely terminates the agency. The seller claims the broker is not entitled to a full broker fee, but only to money losses based on an accounting for their time, effort and costs incurred to market the property, called **quantum meruit** – the amount deserved for work completed – since a seller has the right to terminate a broker's agency at any time.

Is the broker entitled to collect a full fee from the seller upon the seller's exercise of their right to terminate the agency at any time?

Yes! It is correct that a seller may terminate the broker's agency at any time. However, the seller cannot both terminate the agency during the listing period and avoid payment of a fee when a termination-of-agency clause exists in the listing agreement the seller entered. The termination-of-agency clause in the listing agreement couples the permissible cancelling of the listing with the obligation to pay a fee.

## Documenting the cancellation

When a seller, by word or by conduct, clearly indicates they no longer desire to sell the property or use the services of the broker/agent, the agent prepares a *Release and Cancellation of Employment Agreement* form for the seller to review and sign. [See Form 121 accompanying this chapter]

The **release and cancellation** agreement as prepared will initially call for immediate payment of the full broker fee agreed to in the listing in exchange for agreeing to a mutual cancellation of the listing agreement.

To garner agreement, it might be altered to call for payment at a later date when the property is sold, placed again on the market, exchanged, optioned, refinanced (if the broker

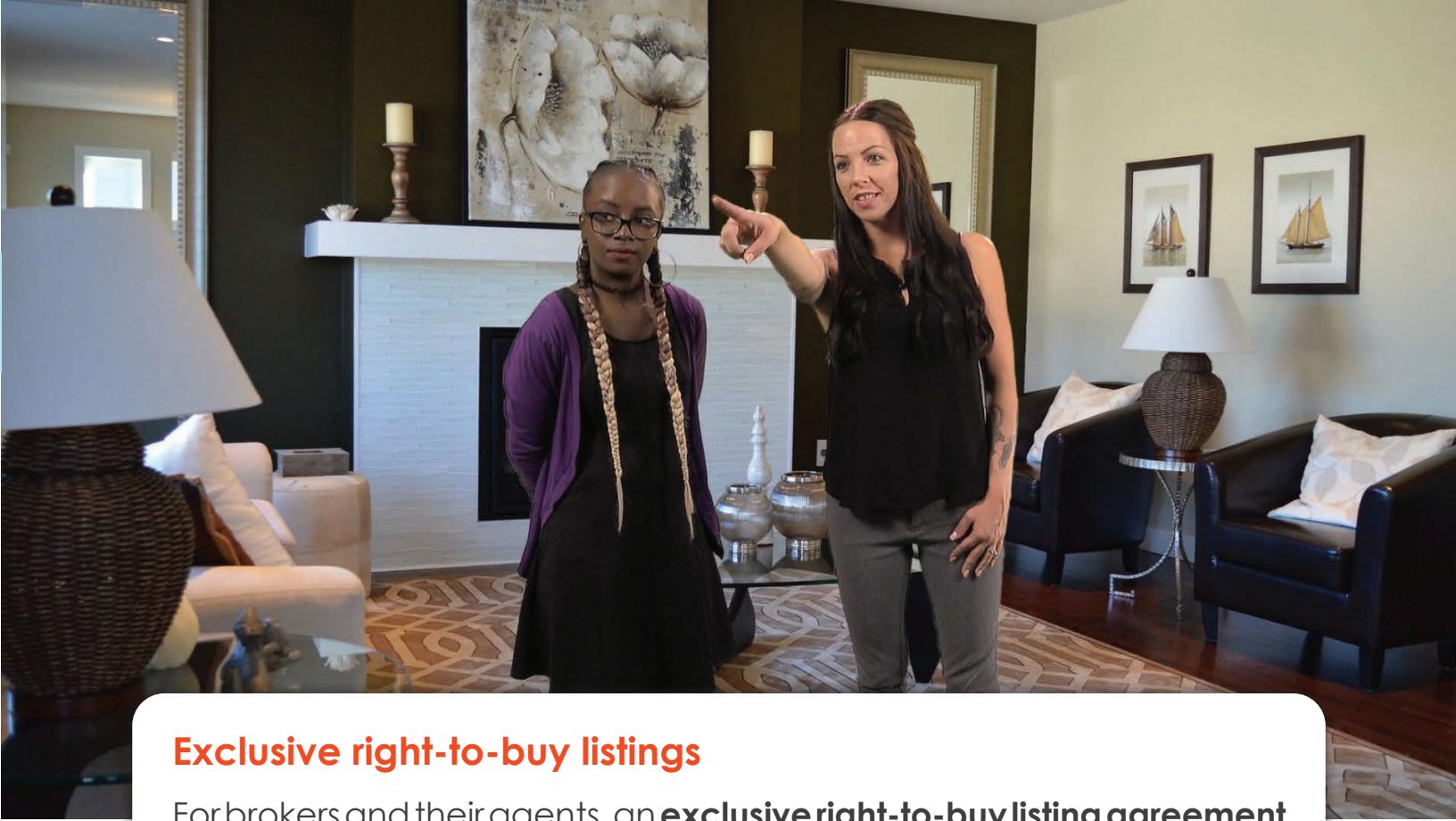
was retained to arrange new financing) or leased to anyone within a specified time period (for example, one year) after the date of the release agreement. A compromise might be the payment of a partial fee with the balance due if the property is sold within a stated time period after cancellation.

This release and cancellation agreement is also used when a buyer wants to cancel an exclusive *right-to-buy listing*. On cancellation, the broker is deprived of the opportunity they acquired under the listing and relied on to diligently earn a contingency fee.



# QUIZ

1. An \_\_\_\_\_ affords a real estate broker the greatest fee protection for their efforts.
  - a. exclusive agency listing
  - b. exclusive right-to-sell listing agreement
  - c. open listing
  
2. Under an exclusive right-to-sell listing agreement, the owner:
  - a. forfeits their right to list the property with other brokers but may sell the property themselves and avoid paying the broker a fee.
  - b. may list their property multiple brokers and only needs to pay a fee to the broker who produces a willing and able buyer but may not avoid payment of a fee by selling the property themselves.
  - c. relinquishes their right to list the property with other brokers or defeat the broker's entitlement to compensation by selling the property themselves.
  
3. When a termination-of-agency clause exists in the listing agreement, a seller may terminate the broker's agency without good cause at any time during the listing period:
  - a. and may avoid payment of a fee if they intend to terminate a broker's employment.
  - b. but may not avoid payment of the broker's fee.
  - c. but may be liable for up to three times the amount of the broker's typical fee.



## Exclusive right-to-buy listings

For brokers and their agents, an **exclusive right-to-buy listing agreement** creates a contrasting but parallel activity from listing and marketing property for sale. [See **RPI** Form 103]

Under a buyer's listing, a prospective buyer employs a broker to locate qualified properties of the type the buyer seeks to purchase.

As with an exclusive right-to-sell listing, the right-to-buy variation has provisions for a broker fee to be paid by the buyer — if not paid by the seller — when the buyer acquires property during the listing period of the type described in the buyer's listing.

Also, the *exclusive right-to-buy listing* provides greater incentive for brokers and their agents. The exclusive aspect and the due diligence provision imposes a duty to work *diligently and continuously* to meet their buyers' objectives.

The buyer benefits under an exclusive right-to-buy listing due to the greater likelihood the broker will find the particular type of property sought. Brokers also act as a safeguard for the buyer since they:

- have continuous access to all available properties;
- investigate and qualify properties as suitable before they are

**BUYER'S LISTING AGREEMENT**

Exclusive Right to Buy, Exchange or Option

**RPI FORM 103**Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is used by a buyer's agent when employed by a prospective buyer as their sole agent, to prepare an offer to render services on behalf of the buyer to locate and acquire property for a fixed period of time.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.  
*Items left blank or unchecked are not applicable.*

**1. RETAINER PERIOD:**

- 1.1 Buyer hereby retains and grants to Broker the exclusive right to locate real property of the type described below and to negotiate the terms and conditions for its purchase, lease or option, acceptable to Buyer, for the period beginning on \_\_\_\_\_, 20\_\_\_\_\_, and terminating on \_\_\_\_\_, 20\_\_\_\_\_.

**2. BROKER'S OBLIGATIONS:**

- 2.1 Broker to use diligence in the performance of this employment.

**3. GENERAL PROVISIONS:**

- 3.1 Buyer acknowledges receipt of the Agency Law Disclosure. [See RPI Form 305]  
3.2 Buyer authorizes Broker to cooperate with other brokers and divide with them any compensation due.  
3.3 Before any party to this agreement files an action on a dispute arising out of this agreement which remains unresolved after 30 days of informal negotiations, the parties agree to enter into non-binding mediation administered by a neutral dispute resolution organization and undertake a good faith effort during mediation to settle the dispute.  
3.4 The prevailing party in any action on a dispute will be entitled to attorney fees and costs, unless they file an action without first offering to enter into mediation to resolve the dispute.  
3.5 This agreement will be governed by California law.

**4. BROKERAGE FEE:**

**NOTICE: The amount or rate of real estate fees is not fixed by law. They are set by each Broker individually and may be negotiable between Client and Broker.**

- 4.1 Buyer agrees to pay Broker  \_\_\_\_\_ % of the purchase price, or  \_\_\_\_\_, IF:  
a. Buyer, or any person acting on Buyer's behalf, purchases, leases, exchanges for or obtains a purchase option on real property sought under this agreement during the retainer period.  
b. Buyer terminates this employment of Broker during the listing period.  
c. Within one year after termination of this agreement, Buyer enters into negotiations which result in Buyer's acquisition of an interest in any property Broker has solicited information on or negotiated with its owner, directly or indirectly, on behalf of Buyer prior to this agreement's termination. Broker to identify prospective properties by written notice to Buyer within 21 days after termination. [See RPI Form 123]  
4.2 Buyer's obligation to pay Broker a brokerage fee is extinguished on Broker's acceptance of a fee from Seller or Seller's Broker of property acquired by Buyer.  
4.3 In the event this agreement terminates without Broker receiving a fee under §4.1 or §4.2, Buyer to pay Broker the sum of \$\_\_\_\_\_ per hour of time accounted for by Broker, not to exceed \$\_\_\_\_\_.

**TYPE OF PROPERTY SOUGHT:**

GENERAL DESCRIPTION \_\_\_\_\_

LOCATION \_\_\_\_\_ SIZE \_\_\_\_\_

RENTAL AMOUNT/TERM \_\_\_\_\_

**I agree to render services on the terms stated above.**

Date: \_\_\_\_\_, 20\_\_\_\_\_

Buyer's Broker: \_\_\_\_\_

Broker's CalBRE #: \_\_\_\_\_

Buyer's Agent: \_\_\_\_\_

Agent's CalBRE #: \_\_\_\_\_

Signature: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Cell: \_\_\_\_\_

Email: \_\_\_\_\_

**I agree to employ Broker on the terms stated above.** See attached Signature Page Addendum. [RPI Form 251]

Date: \_\_\_\_\_, 20\_\_\_\_\_

Buyer's Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Buyer's Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Cell: \_\_\_\_\_

Email: \_\_\_\_\_

**FORM 103**

12-15

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presented to the buyer; and

- advise the buyer on the pros and cons of each property presented.

Importantly, a buyer's broker locating properties listed by other brokers does not become a dual agent or lose their status as the buyer's exclusive agent merely because the buyer's broker works with seller's brokers to obtain information on the listed properties.

Also, the buyer's broker's fee is typically paid by the seller — either directly or through the seller's broker — a fee activity which does not create a dual agency. As always, all compensation received by a broker and their agents arising out of a transaction involving their client is fully disclosed to the client.

A broker who seeks out and locates properties at their buyer's request does so and negotiates the purchase terms as the buyer's agent regardless of who pays the fee. Again, the fee is typically paid by the seller from the proceeds of the sales price paid by the buyer.

Alternatively, the buyer's broker fee is paid by the buyer as part of their purchase price. Here, the seller receives the remainder as their gross proceeds from the sale, and is responsible for any fees the seller's broker is to receive.

### **Fee agreement to buy a specific property – the buyer assures payment**

When acting as a buyer's agent, a large portion of the agent's time is spent assisting their buyer to locate qualifying properties. However, an agent is generally not involved in this initial step of locating a property when:

- they represent a buyer at a real estate auction;
- the buyer has already located a property to purchase independent of the agent; or



**BUYER'S LISTING AGREEMENT**  
Specific Property Acquisition

**RPI FORM 103-1**

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_

Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is by a buyer's agent when employed by a buyer as their sole agent to acquire a specific property for a fixed period of time.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.  
*Items left blank or unchecked are not applicable.*

**1. RETAINER PERIOD:**

- 1.1 Buyer hereby retains and grants to Broker the exclusive right regarding the real property described below to conduct a due diligence investigation and negotiate the terms and conditions for its purchase, lease or option, acceptable to Buyer, for the period beginning on \_\_\_\_\_, 20\_\_\_\_\_ and terminating on \_\_\_\_\_, 20\_\_\_\_\_.

**2. BROKER'S OBLIGATIONS:**

- 2.1 Broker to use diligence in the performance of this employment.

**3. BROKER'S PERFORMANCE:**

- 3.1 Broker will diligently perform, but not be limited to, the following checked acts:

- a.  Consultations with Buyer.
- b.  Evaluation of the economic suitability of the transaction.
- c.  Inspecting the property. [See **ft** Form 304]
- d.  Attending open houses at the property.
- e.  Developing an opinion of the property's fair market value. [See **ft** Form 318]
- f.  Examining and evaluating existing liens on the property.
- g.  Obtaining and analyzing a title profile on the property.
- h.  Investigating the availability and prices of hazard insurance.
- i.  Checking rental rates for comparable properties. [See **ft** Form 318-1]
- j.  Pest control report review.
- k.  Review of plat maps of the area.
- l.  Determine property's proximity to schools, markets, police/fire station(s), industrial zoning, etc.
- m.  Review of applicable zoning ordinances.
- n.  Confirm all necessary permits for property improvements have been obtained.
- o.  Assistance in arranging financing.
- p.  Market analysis for resale of the property. [See **ft** Form 318]

- q.  \_\_\_\_\_
- r.  \_\_\_\_\_
- s.  \_\_\_\_\_
- t.  \_\_\_\_\_
- u.  \_\_\_\_\_
- v.  \_\_\_\_\_
- w.  \_\_\_\_\_

**4. GENERAL PROVISIONS:**

- 4.1 Buyer acknowledges receipt of the Agency Law Disclosure. [See **ft** Form 305]  
4.2 Buyer authorizes Broker to cooperate with other brokers and divide with them any compensation due.  
4.3 Before any party to this agreement files an action on a dispute arising out of this agreement which remains unresolved after 30 days of informal negotiations, the parties agree to enter into non-binding mediation administered by a neutral dispute resolution organization and undertake a good faith effort during mediation to settle the dispute.  
4.4 The prevailing party in any action on a dispute will be entitled to attorney fees and costs, unless they file an action without first offering to enter into mediation to resolve the dispute.  
4.5 This agreement will be governed by California law.

- the agent and the buyer have already located a property of interest and no written employment agreement assuring a fee exists. [See **RPI** Form 103]

When a specific property has been selected by the buyer, the agent needs to enter into a written **single property fee agreement** with their buyer. The agreement safeguards the agent's time spent on behalf of the buyer by assuring collection of a fee if the buyer acquires the property. [See **RPI** Form 103-1]

The single property fee agreement is essentially a buyer's retainer agreement of the contingency fee variety, in contrast to an advance fee arrangement, setting the fee amount to be paid by the seller, and not by the buyer, contingent on the buyer acquiring the property.

Without the need to locate a suitable property, the single property fee agreement lists the specific tasks the buyer's agent is to do to receive a fee, such as:

- evaluating the economic suitability of the transaction;
- attending an open house with the buyer prior to auction and inspecting the property;
- obtaining and analyzing a title profile on the property;
- examining pest control reports;
- obtaining plat maps of the area surrounding the property;
- checking the property's proximity to schools, markets, financial institutions, etc.; and
- developing an opinion of the property's fair market value (FMV). [See **RPI** Form 103-1 §3.1]

If the buyer is already aware of a suitable property, or has located a suitable property prior to or after working with the agent, the agent is to enter into a single property fee

agreement with the buyer as soon as possible. With the writing in hand, the buyer's agent then holds an enforceable fee arrangement with the buyer, whether it is the seller or the buyer who is to pay the fee.

Once a suitable property has been selected for purchase, the agent is not to enter into a listing agreement with the seller to establish an enforceable right to collect a fee. Doing so with the seller unnecessarily creates a **dual agency** under circumstances not understood by many agents, and thus the dual agency goes undisclosed.

If the buyer's agent enter into a listing agreement with the seller, they will this be representing both the buyer and the seller, taking on an agency duty to each of the opposing parties in the transaction. This *dual agency relationship* needs to be disclosed and consented to by both clients.

When an agent has been working with a buyer to locate property and the buyer decides to acquire a specific property, the agent's prior conduct with that buyer has established a client relationship with them. Thus, it is the buyer who needs to sign a single property fee agreement. The writing formally employs the agent as the buyer's representation and assures payment of a fee if the buyer acquires the property, whether it is the buyer or the seller who is to pay the fee.

**[L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corporation (1991) 1 CA4th 300]**

After the buyer signs the single property fee agreement granting the agent the right to collect a fee, the agent can then prepare a purchase offer for signing and delivery to the seller. The terms of the purchase offer signed by the buyer include a fee provision calling for the buyer's agent's fee to be paid by the seller as part of the buyer's agreement to purchase the property. [See **RPI** Form 159 §16]

In the instance of a real estate auction, a buyer's agent has absolutely no assurance their buyer will be the highest bidder. Thus, under a regular buyer's listing agreement calling for a fee to be paid on the buyer's acquisition of the property, the agent runs the very real risk of receiving no compensation for their time, effort and talent conducting due diligence investigations and assisting in the bidding – the epitome of **sunk costs**.

Sunk costs are not recoverable under any present or future condition and are lost forever.

When the buyer does acquire the property as the highest bidder, the single property fee arrangement is structured as a percentage of the price paid, such as 3%, or a fixed dollar amount, to be paid by the buyer. [See **RPI** Form 103-1 §5.1]

However, the buyer's agent needs to be paid under some formula for handling auction situations when the buyer does not win the bidding contest.

When the buyer does not acquire the property, the fee under the single property agreement calls for compensation based on an hourly wage, such as a dollar amount per hour, for the agent's time spent investigating and assisting the buyer prior to completion of the auction. Alternatively, the buyer's agent can arrange to be paid a flat lump-sum fee for your services rendered. [See **RPI** Form 103-1 §5.3(a), (b)]



# QUIZ

1. Under an exclusive right-to-buy listing agreement, the fee itself is frequently:
  - a. paid by the seller from the proceeds of the sales price paid by the buyer.
  - b. paid directly by the buyer from fund reserved for this purpose.
  - c. bundled into an impound account to be paid to the buyer's broker incrementally after closing.
2. Compared to a buyer who does not have their own representation, a buyer under an exclusive right-to-buy listing:
  - a. has the advantage of obtaining the full duty of loyalty from the seller's agent at no further cost.
  - b. benefits by experiencing a much greater likelihood the buyer's broker or their agents will find the particular type of property sought.
  - c. frequently pays greater transactional costs despite not having access to the multiple listing service (MLS).
3. A buyer's broker under an exclusive right-to-buy listing agreement who locates properties listed by other brokers:
  - a. automatically becomes a dual agent.
  - b. does not become a dual agent.
  - c. is in breach of their fiduciary duties owed to their client.



# before the property is sold

## Introduction to open listings

An **open listing**, sometimes called a nonexclusive listing, allows the owner to market the property themselves while employing brokers to locate buyers and sell the property. The client may enter into *open listings* with as many brokers as they want to without becoming obligated to pay more than one fee, if any.

Thus, the owner under an open listing competes against the seller's brokers to locate buyers. If the owner does locate a buyer, the owner does not become obligated to pay a fee under any open listing. In contrast to other types of listings, an open listing does not grant exclusive rights to the seller's broker and their agents to be the sole representative of the client. This is true whether the client is a buyer, tenant, borrower, seller, landlord or lender.

A broker fee under an open listing to sell real estate is due a broker only if the broker or agent procures a ready, willing and able buyer and presents the owner with an offer from the buyer to purchase the listed property. The terms contained in the offer submitted by the broker are substantially the same as the terms sought by the owner under the listing to earn a fee, whether or not the seller accepts it, called a **full listing offer**. If other terms are offered by a buyer and accepted by

the owner, the broker earns their fee.

For a broker to be entitled to a fee under an open listing, the broker or agent will present the offer to the owner before the property is sold to some other buyer located by another broker or by the owner directly. Also, the offer will be submitted *before the listing expires* or is revoked by withdrawal of the property from sale or by the termination of the agency. [Calif. Civil Code §1086(f)(3)]



# QUIZ

1. A client may enter into open listings with as many brokers as they choose, but:
  - a. they are obligated to pay a fee to all brokers who submit a reasonable offer prior to expiration of the listing.
  - b. they need to delegate a managing broker through which all other brokers are to coordinate.
  - c. they are not obligated to pay more than one fee to the broker who procures a buyer who presents an offer on the terms sought in the listing.
2. A seller under an open listing:
  - a. has granted exclusive rights to the seller's broker and their agents to be their sole representative.
  - b. works in tandem with the seller's brokers to help them locate buyers.
  - c. effectively competes against the seller's brokers to locate buyers.
3. An offer submitted by a broker to a seller with substantially the same terms sought by the seller under the open listing is called a(n):
  - a. full listing offer.
  - b. option to purchase.
  - c. guaranteed offer.



## Open Listings: a Unilateral Contract

The broker employed under an open listing is not obligated to use diligence in their efforts to locate a buyer. The broker only has a best-effort obligation since the broker does not “accept” the employment until they produce a buyer for the property.

Thus, an open listing is legally classified as a **unilateral contract**. However, the agency duties of a fiduciary exist at all times under an open listing. Further, on locating a buyer the broker is to perform their due diligence efforts to make disclosures and close the transaction.

The first broker to submit an offer during this open listing period from a ready, willing and able buyer to purchase property on the listed terms, or on other terms accepted by the owner, has earned the agreed fee. No other broker holding open listings from the owner are entitled to a fee.

A broker may also represent a buyer to locate property under an open listing agreement. A broker assisting a buyer to locate a suitable property among multiple listing service (MLS) listings held by other brokers at least considers asking the buyer to sign an open listing if the broker chooses not to solicit an exclusive representation with its imposition of due diligence duties.

Further, an open listing does not need to contain an expiration date, unlike an exclusive agency or exclusive right-to-sell/buy listing which require inclusion of an expiration date.

## Cancellation of an open listing

The owner revoking an open listing that contains an expiration date owes a fee to the broker if:

- the owner later closes a sale with a prospective buyer located by the broker before the listing is revoked; or
- the owner revokes the listing in an attempt to escape payment of the agreed fee. **[Heffernan v. Merrill Estate Co. (1946) 77 CA2d 106]**

Conversely, an open listing *without* an expiration date may be terminated by the owner at any time without becoming obligated to pay a fee. Also, no fee is due under an open listing on:

- the good-faith withdrawal of the property from the market; or
- the premature termination of the employment before the broker has submitted a *full listing offer*. **[Tetrick v. Sloan (1959) 170 CA2d 540]**

## Fees for other services

An open listing may contain a provision calling for the owner to pay the seller's broker a set amount, at an agreed time, for services other than procuring a buyer. These services may include the preparation of disclosure documents needed by the owner to sell the property, such as:

- property disclosures (the Transfer Disclosure Statement (TDS), natural hazard disclosures (NHD), the Annual Property Operating Data sheet (APOD), etc.) [See **RPI Forms 304, 314 and 352**];

- carryback financing disclosures [See **RPI** Form 300];
- multiple listing service publications;
- property profiles [See **RPI** Form 306];
- termite/well/septic clearances; and
- occupancy certificates. [Calif. Civil Code §1089]

Although the broker does not have a due diligence duty under an open listing, the seller's broker owes a duty to prospective buyers they have contact with to make a full disclosure of the property's condition, as known to the broker. The TDS disclosure, based on the broker's visual inspection of the property, is to be made prior to the buyer and seller entering into a purchase agreement.



# QUIZ

1. A broker employed under an open listing has a \_\_\_\_\_ to locate a buyer.
  - a. due diligence obligation
  - b. best-effort obligation
  - c. bilateral obligation
2. Which of the following type of listing agreement does not need to contain an expiration date?
  - a. Exclusive agency.
  - b. Exclusive right-to-sell.
  - c. Open listing.
3. No fee is due under an open listing on:
  - a. the good-faith withdrawal of the property from the market.
  - b. the premature termination of the employment before the broker has submitted a full listing offer.
  - c. Either a. or b.



(price paid)  
-(seller's net figure)

---

# Broker fee

## Net Listings for Sellers

A **net listing** is used only with sellers, not buyers. It is structured as either an open or an exclusive type of listing. The *net listing* is distinguishable from all other listing arrangements due to the way a broker's compensation is calculated.

In a net listing, the broker's fee is not based on a percentage of the selling price.

Instead, the seller's net sales price (excluding broker fees and closing costs) to be received by the seller on closing is stated in the listing agreement. The broker's fee equals whatever amount the buyer pays in excess of the seller's net figure and closing costs.

However, the broker discloses to the seller the full sales price paid by the buyer and the amount of the broker's residual fee before the seller accepts an offer on a net listing. Failure to disclose to the client the benefits the broker receives on any transaction leads to loss of the entire fee. [Calif. Business and Professions Code § 10176(g)]

For example, if the seller enters into a net listing agreement with a real estate broker for a net sales price of \$500,000, the broker will not receive a fee if the seller accepts an offer selling the property for

**\$500,000 Listing Price**

**\$575,000 Purchase Price**

**\$75,000 Broker Fee**



\$500,000 or less.

On the other hand, if the property sells for \$575,000, the broker's fee is \$75,000, minus the seller's other transaction costs.

Net listings tend to be unpopular with the Department of Real Estate (DRE) and consumer protection organizations, and have been outlawed in some states, but not California.

Net listings are particularly prone to claims from buyers and sellers that the broker has been involved in misrepresentations and unfair dealings. These claims are generally based on an improper valuation of the property at the time of the listing or a failure to disclose the fee received by the broker when the property sells.

If the seller thinks the broker's fee is excessive, the seller is likely to complain they were improperly advised about the property's fair market value (FMV) when employing the broker.

Thus, net listings are used sparingly, if at all. If a net listing is used, sale documentation is to include complete disclosures stating:

- the property's value;
- the price paid by a buyer; and
- the resulting fee amount.



# QUIZ

1. The net listing is distinguishable from all other listing arrangements due to:
  - a. duration of employment anticipated under the listing.
  - b. inherent dual agency status created by the broker's conduct.
  - c. the way a broker's compensation is calculated.
2. In a net listing, the broker's fee:
  - a. is based on a percentage of the selling price.
  - b. is equal to whatever amount the buyer pays in excess of the seller's net figure and closing costs.
  - c. is a pre-established fixed dollar amount based on the extend of the broker's marketing activities and how many buyers submit an offer during the term of the listing.
3. If a seller enters into a net listing agreement with a real estate broker for a net sales price of \$800,000, the broker:
  - a. receives a fee if the seller accepts an offer selling the property for \$800,000 or less.
  - b. does not receive a fee if the seller accepts an offer selling the property for \$800,000 or less.
  - c. does not receive a fee if the seller accepts an offer selling the property for \$800,000 or more.

# Conflict of interest



## Option Listing Variation

An **option listing** is a variation of the exclusive right-to-sell listing.

Its unique feature is the additional element of a grant to the broker of an **option to buy** the property at a predetermined price, if the property does not sell during the listing period.

The broker wears two hats when holding an option listing: one as an agent, and the other as a principal.

The concurrent status of agent and principal is a *conflict of interest* for the broker. Here, the temptation for misrepresentation is apparent.

As a result, the seller's broker may fail to market the property aggressively, with a view toward buying it themselves, then reselling it at a profit. Likewise, the broker may neglect to inform the seller about all inquiries into the listed property by potential buyers.

As always, brokers are required to disclose any



outstanding offers or other factors affecting the seller's decision to sell when the broker exercises the option. [**Rattray v. Scudder** (1946) 28 C2d 214]

The broker's exercise of a purchase option contained in a listing agreement requires the broker to disclose to the seller the full amount of the broker's earnings (profit). Further, they need to obtain the seller's written consent to the earnings before or at the time the broker exercises the option. [Calif. Business and Professions Code §10176(h)]

A dilemma may arise when market prices rapidly increase after the seller's broker exercises their option to purchase, allowing for a quick resale by the broker at a profit. On discovery, the seller may claim the profit is theirs and demand it be paid to them under the belief they have been cheated by the broker.

Thus, as with net listings, option listings are to be used with great care, if at all. The option is only exercised after full disclosure by the broker about:

- all material facts relating to the property not known or understood by the seller;
- the identity of all potential buyers and their offers ; and
- any market or use conditions relating to the property known to the broker which have a current positive effect on its value.



# QUIZ

1. An option listing is a variation of the:
  - a. open listing.
  - b. net listing.
  - c. exclusive right-to-sell listing.
  
2. Under an option listing, the broker:
  - a. is granted an option to buy the property at a predetermined price if the property does not sell during the listing period.
  - b. only has a best-effort obligation to locate a buyer for the property.
  - c. grants the seller the option to sell the property to the broker at a predetermined price.
  
3. The concurrent status of agent and principal under an option listing creates a \_\_\_\_\_ for the broker.
  - a. dual agency situation
  - b. conflict of interest
  - c. existential crisis



## Guaranteed Sale Variation

A **guaranteed sale listing** is also usually a variation of the exclusive right-to-sell listing. Brokers have been known to use the guarantee feature to boost sales activity during recessionary periods and when inventories of available properties are long.

A guaranteed sale listing is distinct from a regular, exclusive right-to-sell listing. Here, the broker grants their seller the option to sell, the broker agreeing to buy, called a *put*. The seller is given the right to call on the broker to buy the property at a predetermined price if the property does not sell during the listing period. In this respect, the guaranteed sale listing establishes a reverse role for the seller from the option listing when the property fails to sell during the listing period.

The difference with the guaranteed sale listing is that the seller, not the broker, has the right to exercise the option by accepting the broker's promise to buy the listed property.

The guaranteed sale variation is attractive to sellers who, on account of job transfers, sudden unemployment or other financial factors, are motivated to sell at all costs. The benefit to the seller is the assurance of a back-up, last-resort sale during recessionary periods of market uncertainty — a risk some brokers are willing to take.

As with the option listing, the broker may tend not to work the listing vigorously if the price they have agreed to pay under the guarantee (put option) is much lower than the amount the seller is able to net on a sale at current market prices. Thus, the broker stands to acquire the property at a bargain price if it does not sell during the listing period.

In practice, if a buyer is not produced during the listing period, a desperate seller may have no choice but to sell to the broker. The seller under the exclusive listing has delegated complete control to the broker to locate a buyer.

The broker's advantage, however, is lessened by a DRE regulation which prohibits the inclusion of **advance fee provisions** in a guaranteed sale listing. [Department of Real Estate Regulations §2970(b)(5)]

As always, the broker is required to disclose all offers and the status of potential offers during the listing period and at the time the seller exercises their option to sell to the broker.

## Other listings

Other listing variations contain provisions for the broker to:

- obtain a tenant for a landlord;
- lease a property for a tenant;
- arrange a mortgage on behalf of a borrower who owns real estate or holds a mortgage note offered as collateral; and
- find a borrower for a lender seeking to make a mortgage.

Unimproved real estate, business opportunities and mobile homes can also be the subject of the employment. All of these employment variations may be used with the open or exclusive type of listing agreements.



# QUIZ

1. Under a guaranteed sale listing:
  - a. the broker is granted an option to buy the property at a predetermined price if the property does not sell during the listing period.
  - b. the seller is given the right to call on the broker to buy the property at a predetermined price if the property does not sell during the listing period.
  - c. the amount of the broker's fee is guaranteed to be equal to or greater than a pre-established amount.
2. The guaranteed sale variation is most attractive to sellers who:
  - a. would like to sell within one year.
  - b. would like to sell within three months.
  - c. are motivated to sell at all costs.
3. The guaranteed sale variation is most similar to which other type of listing agreement?
  - a. Open listing.
  - b. Option listing.
  - c. Net listing.

# Exclusive Right-to-Buy Listing Agreement

	BUYER'S LISTING AGREEMENT Exclusive Right to Buy, Exchange or Option	
Prepared by: Agent Broker _____	Phone _____	Email _____
NOTE: This form is used by a buyer's agent when employed by a prospective buyer as their sole agent, to prepare an offer to render services on behalf of the buyer to locate and acquire property for a fixed period of time. Items left blank or unchecked are not applicable.		
DATE: 20 _____ at _____ 1. RETAINER PERIOD: 1.1 Buyer hereby retains and grants to Broker the exclusive right to locate real property suitable for purchase, lease or option, beginning on 20 _____ and terminating on 20 _____ 2. BROKER'S OBLIGATIONS: 2.1 To make reasonable efforts in the performance of this employment. 3. GENERAL PROVISIONS: 3.1 Buyer acknowledges receipt of the Agency Law Disclosure. (See RPI Form 305). 3.2 Buyer authorizes Broker to cooperate with other brokers and divide with them any compensation due. 3.3 Before any party to this agreement files an action on a dispute arising out of this agreement, either remains in mediation or arbitration, or settles the dispute through mediation or arbitration, non-binding mediation administered by a neutral dispute resolution organization and undertake a good faith effort during mediation to settle the dispute. 3.4 The prevailing party in any action on a dispute will be entitled to attorney fees and costs, unless they file an action without first offering to enter into mediation to resolve the dispute. 3.5 The agency agreement governed by California law. 4. BROKERAGE FEE: NOTICE: The amount of real estate fees is not fixed by law. They are set by each Broker individually and may be negotiable between Client and Broker. 4.1 Buyer agrees to pay Broker _____ % of the purchase price, or \$ _____ IF: a. Buyer, or any person acting on Buyer's behalf, purchases, leases, exchanges for or obtains a purchase option on real property sought under this agreement during the retain period. b. Within one year after termination of this agreement, Buyer enters into negotiations which result in Buyer's acquisition of an interest in any property Broker has sold or offered to sell to Buyer during the term of its ownership, acquisition or interest, on behalf of Broker prior to the termination of this agreement. c. Within one year after termination of this agreement, Buyer enters into negotiations which result in Buyer's acquisition of an interest in any property Broker has sold or offered to sell to Buyer during the term of its ownership, acquisition or interest, on behalf of Broker prior to the termination of this agreement. Broker to identify prospective properties by written notice to Buyer within 21 days after termination. (See RPI Form 123) 4.2 Buyer's obligation to pay a brokerage fee is extinguished on Broker's acceptance of a fee from Seller or Buyer's acceptance of property acquired by Buyer during the term of this agreement. 4.3 In the event this agreement terminates without Broker receiving a fee under §4.1 or §4.2, Buyer to pay Broker the sum of \$ _____ per hour of time accounted for by Broker, not to exceed \$ _____.		
TYPE OF PROPERTY SOUGHT: GENERAL DESCRIPTION _____ LOCATION _____ RENTAL AMOUNT/TERM _____ SIZE _____ I agree to render services on the terms stated above. Date: 20 _____ Buyer: _____ Broker's CalBRE #: _____ Buyer's Agent: _____ Agent's CalBRE #: _____  Signature: _____ Address: _____  Phone: _____ Call: _____ Signature: _____ Address: _____  Phone: _____ Call: _____		

broker



buyer's  
agent

## Operating Under a Buyer's Listing

### The exclusive right-to-buy listing agreement

When an owner decides to sell a property, they tend to first look for an agent to assist in disposing of the property and completing the work needed to field a buyer. Rarely do sellers attempt to find buyers themselves.

The cyclical exceptions are **for sale by owner (FSBO) sellers**, who venture out alone during boom-time seller's markets. FSBO sellers market their property in an effort to locate buyers, as do agents. Their sole intention is to avoid retaining brokerage services and paying fees.

In contrast, when an individual decides they might like to own a home, they start the search by driving through neighborhoods and visiting online *multiple listing service (MLS)* publications to see what is available. They do not first think about brokers and agents as helpers in this pursuit.

Their search is not initially for an agent who they might like to work with – retain – to locate a property. Instead, they investigate a listed property they have located (or drop in at an open house). That is typically their first encounter with a real estate agent.

Thus, by some sort of history or training, owners seeking to sell a property turn to real estate agents, while buyers seeking to locate a property do not. As a result, the first agent a buyer contacts is a seller's agent, a quasi-adversarial individual – their duty being honesty, not advice and assistance – with selling a property on their mind and not locating a property for the prospective buyer of the listed property.

During one of these contacts, an owner's agent may suggest to the buyer that they can help find them the property they are looking for. Here, the owner's agent transforms themselves into a buyer's agent. The triggering event is the buyer's lack of any further interest in the listed property the agent is giving them information on.

## **Opportunity first, then commitment**

A buyer who feels comfortable with the agent will talk and answer questions about their property requirements, size, location and pricing – property information sought by the agent. Here, the discussion has dramatically shifted from selling a property to finding a property, as described by the buyer.

At some point, with this agent or another, the buyer acquires the confidence to involve themselves with a particular agent in the search. For the moment, they have an agent.

A commitment? Possibly, but this is not yet known to the agent.

The agent lacks the solicitation by a thoughtful presentation of a written authorization – a buyer's listing agreement – to be entered into by the buyer before the agent starts the hunt.

So far, the agent has only enough information to determine whether they have a reasonable opportunity, if they go to work for this buyer, to locate a suitable property, make an offer which is accepted and receive a fee on closing. The agent may need to counsel the buyer more before asking for the commitment to retain the agent as their exclusive buyer's agent.

## The exclusive right to render services

An **exclusive right-to-buy listing agreement** is used by brokers and their agents to prepare and submit to prospective buyers their **offer to render services** on their behalf as the buyer's real estate agent. Under it, you are employed to locate property sought by the buyer in exchange for the buyer's assurance you will be paid a fee when the buyer acquires the type of property they seek. [See **RPI** Form 103]

A buyer who refuses to enter into a written listing agreement with a broker and their agent demonstrates a clear intention the buyer does not want them as their representative. What this unlisted buyer likely wants is an agent to act as a *locator* or *finder* of properties, providing valuable information without any obligation to compensate them for the assistance. Possibly, the buyer has not yet committed themselves to buy a property; "just looking, thank you very much."

Without the buyer's written promise to pay a fee, you're entitled to nothing when your buyer "goes around" you and acquires property on which you provided them with information.

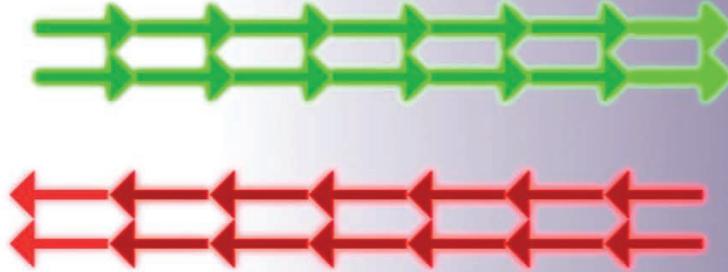
Without the buyer's written promise, no fee has been earned which is collectable from anyone, unless you arranged a fee-sharing agreement with the seller's broker documenting the buyer as your client, a condition which presents other risks. [See **RPI** Form 103]



# QUIZ

1. Under an exclusive right-to-buy listing agreement, the broker and agent are employed to:
  - a. originate a trust deed mortgage on the client's behalf.
  - b. locate property sought by the buyer.
  - c. solicit, identify and refer potential clients to other brokers.
2. Which of the following statements is most correct about a buyer's listing agreement?
  - a. A signed buyer's listing agreement produces the maximum financial return for the effort, money and talent invested when representing an individual interested in buying property.
  - b. Under California agency law, an orally negotiated buyer's listing agreement carries the same degree of fee protection as a written listing agreement.
  - c. A buyer who refuses to enter into a written listing agreement with a broker and their agent demonstrates a clear intention they want highest form of representation possible.
3. What other real estate participant is an unlisted buyer most similar to?
  - a. A sale by owner (FSBO) seller since both seek to avoid retaining brokerage services and paying fees.
  - b. A seller since both have the exclusive representation from a broker and agent.
  - c. An escrow officer since both perform real estate-related activities.

# bilateral employment agreement



## Agency duties owed to buyers

Special agency duties are owed to a buyer when a broker and their agents undertake to locate property on the buyer's behalf. The duty to the buyer first arises when the broker:

- enters into an exclusive right-to-buy agreement with the buyer; or
- presents property information to an unlisted buyer who they have agreed to assist by locating qualifying properties suitable to the buyer.

When representing a buyer under a written exclusive right-to-buy employment agreement, the broker (and their agents) has entered into a **bilateral employment agreement**.

Such an employment obligates the broker, through their agents, to exercise due diligence by way of a constant and continuing search to locate qualifying properties, while keeping the buyer informed of their progress.

Without an exclusive right-to-buy listing, the brokerage duties which exist to locate



properties for a buyer are *best-effort obligations* created by an oral (or written) open listing, called a **unilateral employment agreement**. A best-effort obligation requires no affirmative action (diligence) on the part of the broker's office to locate property.

However, under a buyer's listing, be it a written exclusive or oral open, the act of delivering property information to the buyer they are assisting obligates the broker and agents to use due diligence in their efforts to:

- *gather readily available data on the property under review;*
- *assist in the analysis and consequences of the property data gathered; and*
- *advise the buyer regarding the property and any proposed transaction in a conscientious effort to act honestly, and to care for and protect the buyer's best interests.*

When acting as the buyer's agent regarding the acquisition of a particular property, due diligence includes:

- disclosing facts about the integrity of the property; and
- recommending investigative activity which the agent knows might influence the buyer's conduct in negotiations.

Without an exclusive employment with a buyer on whose behalf the agent is locating properties, the agent is reduced to a mere "locator" or "finder." Worse, the buyer's agent is burdened with affirmative agency duties of utmost care and protection owed their buyer when reviewing properties listed with other brokers even if they are not acting under a written exclusive right-to-buy listing agreement with that buyer.

### The fee-payment bargain

Various working relationships and compensation arrangements may be struck between a prospective buyer and their agent.

Writings, by their nature, are intended by all who enter into them to be enforced. This includes a signed buyer's listing calling for payment of a fee when the buyer's objective of acquiring property is met.

*Editor's note — All assurances of a brokerage fee on a real estate transaction are required by contract law (Statute of Frauds) to be in writing and signed by the person who agreed a fee will be paid, regardless of whether the fee will be paid by that person or by another party to the transaction. [Phillippe v. Shapell Industries, Inc. (1987) 43 C3d 1247]*

The following situations demonstrate the various likelihoods of collecting a fee for assisting a buyer:

1. No *listing* exists. Neither the seller nor the buyer has formally employed a broker. Usually, the seller acting without a broker is an experienced real estate investor, subdivider, land speculator, **real estate owned property (REO)** lender or other well-seasoned owner capable of negotiating a real estate transaction without representation.
2. A "one-shot" seller's listing exists. A buyer is willing to make an offer through an agent who located an unlisted property (and other properties) at the buyer's request and brought it to the buyer's attention. [See **RPI** Form 103-1]

The agent fails to have the buyer enter into an exclusive *right-to-buy listing*. Before preparing and submitting an offer from the buyer, the agent solicits the seller for and obtains a "one-shot" right-to-sell listing containing a promise to pay a fee. On getting the listing, the agent prepares and submits an offer from the buyer.

3. *Customer turned client*. An agent employed by a broker in an office with numerous listed properties is contacted

by a prospective buyer. The buyer is exposed to all the relevant “in-house” listings, none of which are of immediate interest to the buyer. Having exhausted the in-house inventory of property for sale by clients, the agent may choose to see the buyer off. Or, the agent might better consider making arrangements with the buyer to locate qualifying properties listed by other brokers and unlisted properties (For Sale By Owners (FSBOs)), and present them to the buyer.

If the buyer agrees, the agent is to locate qualifying properties, the agent needs to first ask for and obtain a signed buyer's listing agreement. If the agent is to be assured payment of a fee when the buyer acquires property, the buyer needs to enter into a buyer's listing agreement.

4. A buyer's *listing agreement* exists. The agent's broker is employed by the buyer in a signed **exclusive right-to-buy** listing agreement to represent the buyer by locating and negotiating the purchase of suitable property of the type sought by the buyer. [See **RPI** Form 103]

A seller of suitable property may or may not have signed a seller's listing agreement with another broker. Either way, the buyer's broker controls the amount and destiny of their fee to be paid when their buyer buys.



# QUIZ

1. When representing a buyer under a written exclusive right-to-buy agreement, the broker and their agents have entered into a(n):
  - a. unilateral employment agreement.
  - b. bilateral employment agreement.
  - c. open employment agreement.
  
2. Without a formal exclusive right-to-buy listing, the brokerage duties which exist under an oral agreement or open listing to locate properties impose a:
  - a. best-effort obligation.
  - b. due diligence obligation.
  - c. monetary obligation.
  
3. When acting as the buyer's exclusive agent regarding the acquisition of a specific property, the agent's due diligence obligation includes:
  - a. disclosing facts about the integrity and physical condition of the property.
  - b. recommending prudent investigative activity such as home inspections or structural pest control inspections.
  - c. Both a. and b.



## Provisions for payment of a fee

An exclusive right-to-buy agreement contains the same operative provisions found in exclusive right-to-sell agreements. [See **RPI** Form 103]

In exchange for the broker's promise to use due diligence while rendering services to comply with their end of the employment bargain, the buyer promises in the exclusive right-to-buy listing agreement to pay the broker a specific fee.

Fees are either a fixed dollar amount or a percentage of the price paid, but may be set as an hourly rate. Fixed and percentage fees are contingent fees. They are earned when the buyer enters into a binding purchase agreement during the (buyer's) listing period to acquire the type of property described in the buyer's listing.

However, buyers, like sellers, often do not enter into a purchase agreement during the period of employment. Thus, on expiration of the listing, the buyer's broker has not earned a fee. An event triggering payment of the promised fee has not yet occurred.

The fee provisions in a buyer's listing agreement include a **safety clause** which provides added protection against a lost fee for services

rendered in regard to specific properties during the listing period. [See **RPI** Form 103-1 §5.1(c)]

Under the *safety clause*, the buyer's broker is entitled to collect a fee if, within an agreed-to period after the expiration of the buyer's listing:

- information specific to the property was provided to the buyer by the buyer's agent during the listing period;
- on expiration of the buyer's listing, the buyer is handed an itemized list which identifies those properties the buyer's agent brought to the buyer's attention needed to perfect the broker's right to a fee [See **RPI** Form 123];
- the buyer entered into negotiations with the owner of a registered property; and
- the safety-period negotiations ultimately resulted in the buyer acquiring an interest in the property.

## **Buyer's liability for the brokerage fee**

The buyer under a listing agreement promises to pay a full brokerage fee on the acquisition of property. However, in practice the buyer will nearly always close the purchase without directly paying the promised brokerage fee. It is the seller who typically pays the fee the buyer has promised their agent.

Further, when the property purchased is listed with another broker, the buyer's broker will typically accept a lesser amount for their fee than the fee amount the buyer agreed to pay under the buyer's listing.

Can the broker enforce the fee arrangement in the buyer's listing and recover the balance of the agreed-to fee from the buyer when the buyer's broker accepts a lesser fee from the seller or the seller's broker?

No! The buyer's obligation to pay the brokerage fee is *fully satisfied* when the buyer's broker agrees to accept a fee from the seller or the seller's broker, which is nearly always the case. [See **RPI** Form 103 §4.2]

## **Buyer's listing agreement**

Each section in the buyer's listing agreement has a separate purpose and need for enforcement. The sections include:

- *Brokerage services:* The employment period for rendering brokerage services and the broker's due diligence obligations are set forth in Sections 1 and 2. General provisions for enforcement of the employment agreement and broker fee-splitting arrangements are included in Section 3.
- *Broker fee:* The buyer's obligation to either pay a broker fee or assure payment of the broker fee by the seller or a seller's broker, the amount of the fee and when the fee is due are set forth in Section 4.
- *Property sought:* A general description of the type of property to be located for the buyer is then entered.
- *Signatures and identification of the parties:* On completion of entries on the listing form and any attached addenda, the buyer and the broker (or agent) sign the document consenting to the employment.

## **Preparing the buyer's listing agreement**

The following instructions are for the preparation and use of the Buyer's Listing Agreement — Exclusive Right to Buy, Lease or Option. This form is used by a buyer's agent when entering into the employment of a buyer as their sole agent retained for a fixed period of time, to locate and acquire property. [See RPI Form 103]

Each instruction corresponds to the provision in the form bearing the same number.

*Editor's note — Check and enter items throughout the agreement in each provision with boxes and blanks, unless*

the provision is not intended to be included as part of the final agreement, in which case it is left unchecked or blank.

## Document identification:

Enter the date and name of the city where the listing is prepared. This date is used when referring to this listing agreement.

### 1. Retainer period:

- 1.1 *Listing start and end date:* Enter the date the brokerage services are to commence.

Enter the expiration date of the employment period. The expiration needs to be set as a specific date on which the employment ends since an exclusive listing is being established.

### 2. Broker's obligations:

- 2.1 *Broker's/agent's duty:* The broker and their agents promise to use diligence in their effort to locate the property sought by the buyer. The agency duties a broker and their agents owe the buyer are always implied, if not expressed in writing.

### 3. General provisions:

- 3.1 *Agency Law Disclosure:* Acknowledges receipt of the Agency Law Disclosure – Real Estate Agency Relationships, which is to be attached as an addendum to this agreement. [See RPI Form 305]
- 3.2 *Authority to share fees:* Authorizes the broker to cooperate with other brokers and share with them any fee paid on any transaction.
- 3.3 *Mediation agreement:* States the parties agree to non-binding mediation after 30 days of informal negotiations prior to filing a court action.

- 3.4 **Attorney fees:** **Entitles** the prevailing party to attorney fees if litigation results from the buyer's failure to pay fees or the broker's breach of an agency duty.
- 3.5 **Choice-of-law provision:** **States** California law will apply to any enforcement of this employment.

## Fee provisions

4. **Broker fee:**
  - 4.1 **Fee amount:** **Enter** the fee amount negotiated to be paid as a percentage of the sales price or a fixed dollar amount. This amount will be paid when any one of the following conditions occur triggering payment:
    - a. **Fee on any sale:** **States** the broker fee is earned and due if the buyer acquires, exchanges for or options property during the listing period. [See **RPI** Form 103 §4.1(c)]
    - b. **Termination fee:** **States** the broker fee is earned and due if, during the listing period, the buyer terminates this employment or withdraws from pursuing the purchase of real estate.
    - c. **Safety clause fee:** **States** the broker fee is earned and due if, within one year after the listing expires, the buyer enters into negotiations for the purchase, option, or exchange of property the broker exposed them to during the listing period. Within 21 days after expiration of the listing period, the broker needs to provide the buyer with a list of the qualifying properties reviewed with the buyer during the listing period. [See **RPI** Form 123]
  - 4.2 **Fees paid by seller:** The buyer will not owe any fees if the seller pays a fee or the seller's broker shares a fee in an amount acceptable to the broker. If the seller or the seller's broker do not agree to pay or share a fee

with the broker, the buyer is to pay the broker fee in addition to the purchase price.

- 4.3 *Hourly fee:* **Enter** the negotiated dollar amount of the broker's per hour fee. The hourly fee is earned for time and effort spent on behalf of the buyer if property is not optioned or acquired by purchase or exchange after a diligent effort is made to locate property.

## Type of property sought and signatures

*Property description:* **Enter** a description of the type of real estate sought by the buyer, including its size, general location, purchase terms, and property requirements.

*Broker's/Agent's signature:* **Enter** the date the listing is signed. **Enter** the broker's name and Department of Real Estate (DRE) license number. **Enter** the agent's name and DRE license number. **Enter** the broker's (or agent's) signature. **Enter** the broker's address, telephone numbers and email address.

*Buyer's signature:* If additional buyers are involved, **check** the box, prepare a Signature Page Addendum form, reference this listing agreement, and enter their names and obtain their signatures until all buyers are individually named and have signed. **Enter** the date the buyer signs the listing and the buyer's name. **Obtain** the buyer's signature. **Enter** the buyer's address, telephone numbers and email address.



# QUIZ

1. An exclusive right-to-buy agreement contains the same operative provisions found in a(n):
  - a. exclusive right-to-sell agreement.
  - b. broker-agent employment agreement.
  - c. finder's fee agreement.
2. Fees that are earned only when the buyer enters into a binding purchase agreement are classified as:
  - a. contingent fees.
  - b. retainer fees.
  - c. Both a. and b.
3. The fee provisions in a buyer's listing agreement include a(n) \_\_\_\_\_ which provides added protection against a lost fee for services rendered in regard to specific properties during the listing period.
  - a. force majeure clause
  - b. safety clause
  - c. indemnity clause

# Prepared with honesty and in good faith



## Condition of Property: the Seller's Disclosures

### Mandated on one-to-four residential units

The seller of a one-to-four unit residential property completes and delivers to a prospective buyer a statutory form called a **Transfer Disclosure Statement (TDS)**, more generically called a **Condition of Property Disclosure Statement**. [Calif. Civil Code §§1102(a), 1102.3; see **RPI Form 304**]

The seller's mandated use of the TDS requires it be prepared with *honesty and in good faith*, whether or not a seller's agent is retained to review its content. [CC §1102.7]

When preparing the TDS, the seller sets forth any property defects known or suspected to exist by the seller.

Any conditions known to the seller which might negatively affect the value and desirability of the property for a prospective buyer are to be disclosed, even though they may not be an item listed on the TDS. Disclosures to the buyer are not limited to conditions preprinted for comment on the form. [CC §1102.8]

Also, the buyer cannot waive delivery of the statutorily-mandated TDS.

**RPI FORM 304****CONDITION OF PROPERTY**

Transfer Disclosure Statement (TDS)

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is used by the seller and their agent when marketing a one-to-four unit residential property for sale in compliance with mandated disclosures on the physical and environmental condition of the property, to provide prospective buyers as soon as possible on the commencement of negotiations with property information including known or suspected property defects affecting value.

This disclosure statement is prepared for the following:

Seller's listing agreement

Purchase agreement

Counteroffer

dated \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California,  
entered into by \_\_\_\_\_,  
and \_\_\_\_\_,  
regarding property referred to as \_\_\_\_\_

**REAL ESTATE TRANSFER DISCLOSURE STATEMENT**

THIS DISCLOSURE STATEMENT CONCERNSS THE REAL PROPERTY SITUATED IN

THE CITY OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_, STATE OF CALIFORNIA,  
DESCRIBED AS \_\_\_\_\_

THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE  
WITH SECTION 1102 OF THE CIVIL CODE AS OF \_\_\_\_\_, 20\_\_\_\_\_. IT IS NOT A WARRANTY OF ANY KIND  
BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A  
SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

**COORDINATION WITH OTHER DISCLOSURE FORMS**

This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zones and purchase-money liens on residential property).

Substituted Disclosures: The following disclosures and other disclosures required by law, including the Natural Hazard Disclosure Report/Statement that may include airport annoyances, earthquake, fire, flood, or special assessment information, have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same:

Inspection reports completed pursuant to the contract of sale or receipt for deposit.

Additional inspection reports or disclosures: \_\_\_\_\_

Any attempted waiver, such as an “as-is” provision in the purchase agreement, is **void** as against public policy.

## Controlled and exempt sellers

Unless a seller is exempt, sellers of one-to-four unit residential real estate are required to fill out and furnish buyers with a statutory TDS when entering into a purchase agreement. [CC §1102]

Transactions which exempt *the seller* (but not the seller's agent) from preparing and delivering the statutory TDS to the buyer include transfers:

- by court order, such as probate, eminent domain or bankruptcy;
- by judicial foreclosure or trustee's sale;
- on the resale of real estate owned property acquired by a lender on a deed-in-lieu of foreclosure, or by foreclosure;
- from co-owner to co-owner;
- from parent to child;
- from spouse to spouse, including property settlements resulting from a dissolution of marriage;
- by tax sale;
- by reversion of unclaimed property to the state; and
- from or to any government agency. [CC §1102.2]

The best property disclosure tool for exempt sellers is the preparation and delivery of the statutory TDS form (and a property inspector's report) to prospective buyers or buyer's agents on every type of transaction. If the transaction is exempt or concerns property other than one-to-four residential units, the form as a practical matter needs to be used.



# QUIZ

1. The seller of a one-to-four-unit residential property completes and delivers to a prospective buyer a statutory form called a(n) \_\_\_\_\_, more generically called a Condition of Property Disclosure Statement.
  - a. abstract of title
  - b. Agency Law Disclosure
  - c. Transfer Disclosure Statement (TDS)
2. When preparing the Transfer Disclosure Statement (TDS), the seller discloses:
  - a. any property defects known or suspected to exist by the seller.
  - b. any conflicts of interest which may alter their dealings with the buyer.
  - c. the existence of any financial judgements which may cloud the title to the property.
3. A buyer cannot waive delivery of the statutorily-mandated Transfer Disclosure Statement (TDS) on the sale of a nonexempt one-to-four unit residential real estate. Any attempted waiver is \_\_\_\_\_ as against public policy.
  - a. void
  - b. voidable
  - c. acceptable, so long as it is in writing



## Delivery of the disclosure statement

While it is the seller who prepares the **Transfer Disclosure Statement (TDS)**, the TDS is delivered to the buyer by the agent who directly receives the purchase agreement offer from the buyer. [See **RPI** Form 304]

The failure of the seller or any of the agents involved to deliver the seller's TDS to the buyer will not invalidate a sales transaction after it has closed. However, the seller and the seller's broker are both liable for the actual monetary losses incurred by the buyer due to an undisclosed defect known to them. [Calif. Civil Code §1102.13]

The TDS is handed to the buyer before the seller accepts a purchase agreement offer submitted by a buyer. If the TDS is delivered to the buyer *after* the seller enters into a purchase agreement, the delivery is untimely in violation of TDS rules, and the buyer may:

- cancel the purchase agreement on discovery of undisclosed defects known to the seller or the seller's agent and unknown and unobserved by the buyer or the buyer's agent prior to acceptance; [CC §1102.3]
- make a demand on the seller to correct the defects or reduce the price accordingly before escrow closes [See **RPI** Form 150];

or

- close escrow and make a demand on the seller for the costs to cure the defects. [**Jue v. Smiser** (1994) 23 CA4th 312]

### **Buyer's right to cancel on delayed disclosure**

The TDS is to be delivered to prospective buyer as soon as practicable on commencement of negotiations. As with the delivery of the Natural Hazard Disclosure Statement (NHDS), which has been dictated by the California Attorney General to be delivered ASAP, the TDS is delivered before entry into a purchase agreement. [Calif. Attorney General Opinion 01-406 (August 24, 2001)]

If the TDS is belatedly delivered to the buyer — after the buyer and seller enter into a purchase agreement — the buyer may *elect to cancel* the purchase agreement under a statutory three-day right to cancel. The buyer's statutory cancellation right runs for three days following the day the TDS is actually handed to the buyer (five days if delivered by mail). [CC §1102.3]

### **Demand to cure an undisclosed material defect**

As an alternative remedy to canceling the purchase agreement on receipt of an unacceptable TDS, the buyer may *make a demand* on the seller to cure any undisclosed material defect (affecting value) known to the seller or the seller's agent prior to entering into the purchase agreement. If the seller's agent knew or is charged with knowledge of the undisclosed defects at the time the buyer and seller entered into the purchase agreement, the buyer's demand to cure the material defect may also be made on the seller's agent. [See **RPI Form 269**]

If the seller will not voluntarily cure the defects on demand,

the buyer may close escrow and recover the cost incurred (or valuation lost) to correct the defect without concern for the purchase agreement contingency provision stating the alternative statutory right to cancel the transaction. Defects known and *undisclosed*, or inaccurately disclosed, by the seller or the seller's agent at the time the seller accepts the buyer's purchase offer impose liability on those who knew or are charged with knowledge. [Jue, *supra*]

Another alternative for the buyer is to perform on the purchase agreement by tendering a price reduced by the cost to repair or replace the defects known to the seller and untimely disclosed or discovered by the buyer while under contract. [See **RPI** Form 150]



# QUIZ

1. While it is the seller who prepares the Transfer Disclosure Statement (TDS), the TDS is delivered to the buyer:
  - a. by the buyer's agent upon the buyer's inquiry into the property.
  - b. by the seller's agent who receives the purchase agreement offer from the buyer.
  - c. by the seller when the buyer first voices legitimate interest in the property.
2. If the Transfer Disclosure Statement (TDS) is not timely delivered to the buyer:
  - a. the closed sale will be invalidated and the buyer and seller returned to their respective positions they held prior to entering into the transaction.
  - b. the seller and the seller's broker are both liable for the actual monetary losses incurred by the buyer due to an undisclosed defect known to them.
  - c. the seller is liable for three times of amount of the monetary losses incurred by the buyer due to the undisclosed defect, and the seller's broker risks disciplinary action from the Department of Real Estate (DRE).



# QUIZ

Cont'd

3. If the Transfer Disclosure Statement (TDS) is delivered to a buyer after the buyer and seller enter into a purchase agreement, the buyer may elect to cancel the purchase agreement under a statutory \_\_\_\_\_ right to cancel.
  - a. seven-day
  - b. five-day
  - c. three-day



## Include a home inspector

A competent seller's agent will aggressively recommend the seller retain a **home inspector** before they market the property. The inspector hired will conduct a physical examination of the property to determine the condition of its component parts, known as a **home inspection**.

On the home inspector's completion of their examination, a **home inspection report (HIR)** will be prepared on their observations and findings, which is forwarded to the seller's agent.

A **home inspector** often detects and reports property defects overlooked by the seller and not observed during a visual inspection by the seller's agent. Significant defects which remain undisclosed at the time the buyer goes under contract tend to surface during escrow or after closing as claims against the seller's broker for deceit. A home inspector troubleshoots for defects not observed or observable to the seller's agent's eye. [Calif. Business and Professions Code §7195]

To greatly reduce the potential of buyer claims, and eliminate to the extent possible the risk of negligent property improvement disclosures, the HIR is coupled with preparation of the seller's TDS. Both are presented to buyers before the seller accepts an offer.

## Hiring a home inspector

Sellers and seller's agents are encouraged by legislative policy to obtain and rely on the content of an HIR to prepare their TDS for delivery to prospective buyers.

The buyer's reliance on an HIR at the time a purchase agreement is entered into relieves the seller and their agent of any liability for property defects they did not know about or were not observable during the mandatory visual inspection conducted by the seller's agent.

However, for the seller's agent to avoid liability in the preparation the TDS by relying on an HIR, the seller's agent needs to select a competent home inspector to inspect and prepare the HIR. Thus, the seller's agent needs to exercise ordinary care when selecting the home inspector.

### A home inspector's qualifications

Any individual who holds themselves out as being in the business of conducting a home inspection and preparing a home inspection report on a one-to-four unit residential property is a **home inspector**. No licensing scheme exists to set the minimum standard of competency or qualifications necessary to enter the home inspection profession. [Calif. Business and Professions Code §7195(d)]

However, some real estate service providers typically conduct home inspections, such as:

- general contractors;
- structural pest control operators;
- architects; and
- registered engineers.

Home inspectors occasionally **do not hold** any type of

license relating to construction, such as a person who is a construction worker or building department employee. However, they are required to conduct an inspection of a property with the same “degree of care” a reasonably prudent home inspector would exercise to locate material defects during their physical examination of the property and report their findings. [Bus & P C §7196]

## The inspection and report

A home inspection is a **physical examination** conducted on-site by a home inspector. The inspection of a one-to-four unit residential property is performed for a noncontingent fee.

The purpose of the physical examination of the premises is to identify material defects in the condition of the structure and its systems and components. **Material defects** are conditions which affect the property's:

- market value;
- desirability as a dwelling;
- habitability from the elements; and
- safety from injury in its use as a dwelling.

Defects are material if they adversely affect the price a reasonably prudent and informed buyer would pay for the property when entering into a purchase agreement. As the report may affect value, the investigation and delivery of the home inspection report to a prospective buyer is legislated to precede a prospective buyer's offer to purchase. [Bus & P C §7195(b)]

The home inspection is a *non-invasive* examination of the mechanical, electrical and plumbing systems of the dwelling, as well as the components of the structure, such as the roof, ceiling, walls, floors and foundations.

Non-invasive indicates no intrusion into the roof, walls, foundation or soil by dismantling or taking apart the structure which would disturb components or cause repairs to be made to remove the effects of the intrusion. [Bus & P C §7195(a)(1)]

The *home inspection report* is the written report prepared by the home inspector which sets forth the findings while conducting the physical examination of the property. The report identifies each system and component of the structure inspected, describes any *material defects* the home inspector found or suspects, makes recommendations about the conditions observed and suggests any further evaluation needed to be undertaken by other experts. [Bus & P C §7195(c)]



# QUIZ

1. A home inspector's primary function is to:
  - a. inspect a property to arrive at an informed opinion of its fair market value (FMV) which will form the ceiling for what the buyer will offer for the property.
  - b. determine whether any natural hazards pose a significant risk to the property, such as flooding or excessive fire risks.
  - c. conduct a physical examination of a property to determine the condition of its component parts.
2. On a home inspector's completion of their examination, a(n) \_\_\_\_\_ is prepared on their observations and findings.
  - a. appraisal report
  - b. home inspection report (HIR)
  - c. Transfer Disclosure Statement (TDS)
3. The home inspection is a(n) \_\_\_\_\_ of the mechanical, electrical and plumbing systems of the dwelling, as well as the components of the structure, such as the roof, ceiling, walls, floors and foundations.
  - a. minimally invasive examination
  - b. invasive examination
  - c. non-invasive examination

# reasonably competent broker

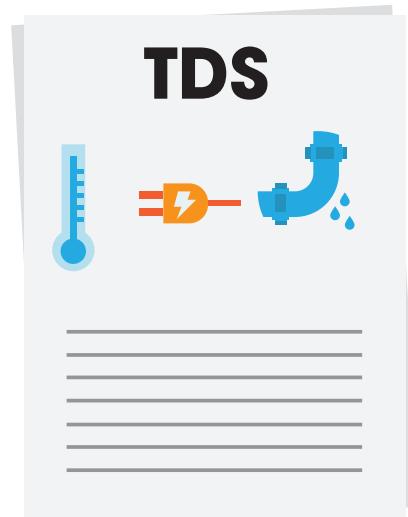


## Mandatory inspection by the seller's broker

A seller's agent (or seller's broker) is obligated to personally carry out a competent *visual inspection* of the property. The seller's disclosures and defects noted in the home inspection report (HIR) are entered on the Transfer Disclosure Statement (TDS) and reviewed by the seller's agent for discrepancies. [See **RPI** Form 304]

The seller's agent then adds any information about their knowledge of material defects which have gone undisclosed by the seller (or the home inspector).

A buyer has two years from the close of escrow to pursue the seller's broker and agent to recover losses caused by the broker's or agent's negligent failure to disclose observable and known defects affecting the property's physical condition and value. Undisclosed and unknown defects permitting recovery are those observable by a **reasonably competent** broker during a visual on-site inspection. A seller's agent is expected to be as competent as their broker in an inspection. [Calif. Civil Code §2079.4]



However, the buyer will be unable to recover their losses from the seller's broker if the seller's broker or agent inspected the property and would not have observed the defect and did not actually know it existed. [CC §1102.4(a)]

Following their mandatory visual inspection, the seller's broker or agent needs to make disclosures on the seller's TDS in full reliance on specific items covered in a home inspector's report the seller obtained on the property. If the HIR is relied on after the seller's agent property inspection when preparing the TDS and the TDS is later contested by the buyer as incorrect or inadequate in a claim on the broker, the broker and their agent are entitled to indemnification – held harmless – from the home inspection company issuing the report. [**Leko v. Cornerstone Building Inspection Service** (2001) 86 CA4th 1109]



# QUIZ

1. A seller's agent is obligated to personally carry out a(n) \_\_\_\_\_ of the property they list.
  - a. preliminary title search
  - b. competent visual inspection of the property
  - c. invasive mechanical inspection
  
2. A buyer has \_\_\_\_\_ from the close of escrow to pursue the seller's broker to recover losses caused by the broker's negligent failure to disclose observable and known defects affecting the property's physical condition and value.
  - a. one year
  - b. two years
  - c. five years
  
3. Undisclosed and unknown defects permitting recovery from the seller's broker are those defects which are:
  - a. observable by a reasonably competent broker during a visual on-site inspection.
  - b. only observable from inaccessible areas, such as a crawl space or attic.
  - c. Both a. and b.



# NOTES

# Ground Transportation Arteries



## Environmental Hazards and Annoyances

### Noxious man-made hazards

**Environmental hazards** are noxious or annoying conditions which are **man-made hazards**, not natural hazards. As environmental hazards, the conditions are classified as either:

- **injurious** to the health of humans; or
- an **interference** with an individual's sensitivities.

In further analysis, environmental hazards which affect the occupant in **use and enjoyment** of the property are either:

- located on the property; or
- originate from sources located elsewhere.

### Hazards on the property

Environmental hazards **located on the property** which pose a direct health threat on occupants due to construction materials, the design of the construction, the soil or its location, include:

- asbestos-containing building materials and products used for insulation, fire protection and the strengthening of materials

[Calif. Health and Safety Code §§25915 et seq.]:

- formaldehyde used in the composition of construction materials [Calif. Civil Code §2079.7(a); Calif. Business and Professions Code §10084.1];
- radon gas concentrations in enclosed, unventilated spaces located within a building where the underlying rock contains uranium [CC §2079.7(a); Bus & P C §10084.1];
- hazardous waste from materials, products or substances which are **toxic, corrosive, ignitable or reactive** [Health & S C §25359.7; Bus & P C §10084.1];
- toxic mold; [Health & S C §§26140, 26147]
- smoke from the combustion of materials, products, supplies or substances located on or within the building [Health & S C §§13113.7, 13113.8];
- security bars which might interfere with an occupant's ability to exit a room in order to avoid another hazard, such as a fire [CC §1102.16; Health & S C §13113.9]; and
- lead.

Environmental hazards **located off the property**, but which have an adverse effect on the use of the property due to noise, vibrations, odors or some other ability to inflict harm, include:

- military ordnance sites within one mile of the property [CC §1102.15];
- industrial zoning in the neighborhood of the property [CC §1102.17];
- airport influence areas established by local airport land commissions [CC §§1103.4(c), 1353; Bus & P C §11010(b)(13); see RPI Form 308]; and
- ground transportation arteries which include train tracks and major highways in close proximity to the property.



## **Formaldehyde gas emissions**

**Formaldehyde** is a colorless, pungent gas contained in most organic solvents which are used in paints, plastics, resins, pressed-wood fiberboard materials, urea-formaldehyde foam insulation (UFFI), curtains and upholstery textiles. Gas emitted from these materials and products contains formaldehyde.

Formaldehyde is a probable carcinogen which is likely to cause cancer in humans who inhale the gas emitted by formaldehyde-containing material.

The use of UFFI occurred in construction during the 1970s and was banned in residential property constructed after 1982. However, formaldehyde emissions decrease over time. As a result, properties built during the 1970s and early 1980s with formaldehyde-containing materials give off levels of formaldehyde no greater than newly constructed homes. Over time, emissions decrease to undetectable levels. However, an increase in humidity and temperature will increase the level of emissions.

## **Radon gas in soil**

Radon is a naturally-occurring radioactive gas. It is not visible, cannot be tasted and has no odor. **Radon gas** is located in soils with a concentration of uranium in the rock, e.g., granite or shale, beneath it.

Radon is a known human carcinogen and enters a building from the soil beneath the structure.

Radon is sucked into ground floor residential space by interior heating on cold weather days and the use of exhaust fans in the kitchen and bathrooms since these conditions create a vacuum within the lower area of the structure.

However, California residences rarely experience elevated and harmful levels of radon gas emission. Radon does appear in approximately **one percent of housing** in California. Proper ventilation avoids the buildup of harmful concentrations of radon in a home or other enclosed

space, a function of its design and operation.

## Hazardous waste on site

Waste is hazardous if it has the potential to harm human health or the environment. **Hazardous waste** is released into the environment, primarily the soil, by the leaking of underground storage tanks, drum containers, poorly contained landfills or ponds, accidental spills or illegal dumping.

Hazardous waste materials include any product, material or substance which is **toxic**, **corrosive**, **ignitable** or **reactive**, such as is generated by oil, gas, petrochemical and electronics industries, and dry cleaner and print shops.

Information is available to prospective buyers on their inquiry into the location and status of hazardous waste sites in the vicinity of a home from the “Cortese list” maintained by the California Environmental Protection Agency (EPA).

## Mold: the rogue in vogue

**Mold** produces spores which become airborne. There are many different kinds of spores, each having differing effects, if any, on humans. Some may be a mere annoyance, irritating the sensitivities of an individual. Others might be a threat to the health of those who inhale them.

The uncertainty of the toxic nature of mold spores has led to a sort of intellectual moratorium on determining just what kinds of molds have an adverse or harmful effect on humans.

It has also spawned a number of lawsuits as the unknown nature of “toxic mold” has been allowed by politicians and lawyers to stir the fears of the general public.

Sellers are under no obligation to investigate whether the improvements contain mold. If it is known the structure does contain mold, the seller has no obligation to determine if the mold is a threat to human health.

The DHS has not yet set any **standards** for disclosures regarding the existence of mold or **guidelines** for the remediation of mold threats. However, the DHS has published multiple **consumer-oriented booklets** on mold on its website at [www.cdph.ca.gov](http://www.cdph.ca.gov).

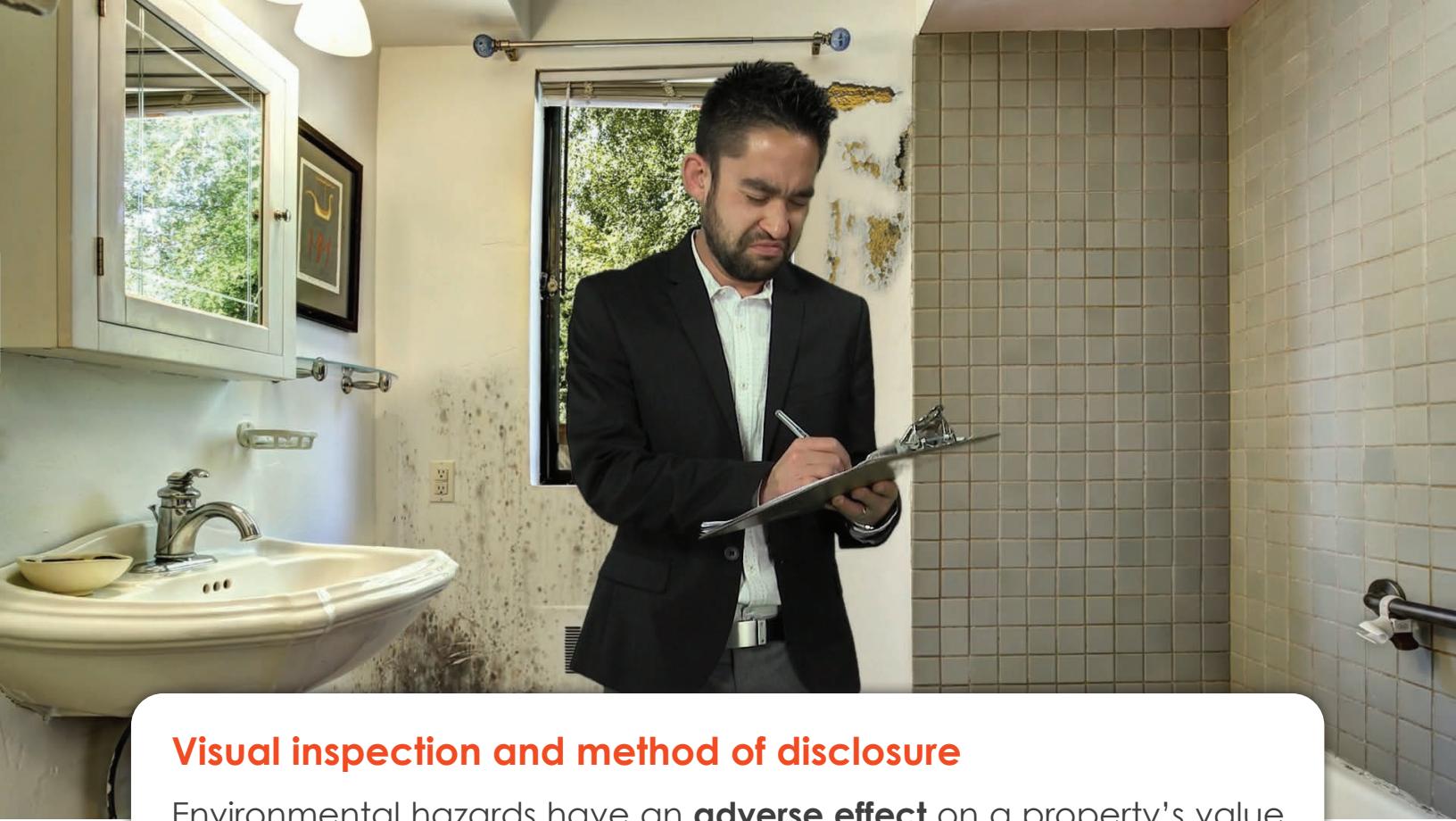
Until uniform disclosure standards are produced and implemented, the prospective buyer will receive only a generic informational brochure and a writing from the seller and the seller's agent in the form of a TDS advising the buyer of any awareness or knowledge the seller or the seller's agent may have that mold exists on the property. No common knowledge exists for sellers or seller's agents to visually distinguish between harmful and benign molds.

If the seller is aware of mold, regardless of type, the seller is to disclose any awareness of the mold's existence, as well as any other reports or knowledge about the variety of mold which exists.



# QUIZ

1. \_\_\_\_\_ are noxious or annoying conditions which are man-made hazards.
  - a. Natural hazards
  - b. Environmental hazards
  - c. Moral hazards
2. Environmental hazards which may affect an occupant's use and enjoyment of a property:
  - a. may be located on the property.
  - b. may originate from sources located off the property.
  - c. Both a. and b.
3. \_\_\_\_\_ may be contained in soils with a concentration of uranium in the rock.
  - a. Toxic mold
  - b. Radon gas
  - c. Asbestos



## Visual inspection and method of disclosure

Environmental hazards have an **adverse effect** on a property's value and desirability. Thus, they are considered defects which, if known, are disclosed as **material facts**: the hazards might affect a prospective buyer's decision to purchase the property.

The disclosure to prospective buyers of environmental hazards related to a property known to a seller's and seller's agent is required on the sale, exchange or lease of all types of property.

While the disclosure of an environmental hazard is the obligation of the seller, it is the seller's agent who has the agency duty of care and protection owed to the seller to place them in compliance with the environmental hazard disclosure requirements.

Further, and more critically, the seller's agent also has an additional, more limited duty owed to prospective buyers of the listed property. The seller's agent on taking a listing will personally conduct a *visual inspection* of the property for environmental hazards (as well as physical defects), and do so with a level of competence equal to that of their broker. In turn, the seller's agent uses a **Transfer Disclosure Statement (TDS)** form to advise prospective buyers of their observations (and knowledge) about conditions which constitute environmental

hazards. [Calif. Civil Code §2079; see **RPI** Form 304]

Further, a seller's agent uses **RPI** Form 308 to disclose the existence of unique environmental factors or conditions that were not referenced in the boilerplate language of the TDS which may adversely affect the property or its immediate vicinity, such as the close proximity of an industrial use zone. [See **RPI** Form 308]

To conclude the seller's agent's disclosure of environmental hazards and eliminate any further duty to advise the prospective buyer about the environmental hazards, the seller's agent delivers, or confirms the buyer's agent has delivered a copy of the **environmental hazard booklet** approved by the California Department of Health and Safety (DHS) to the buyer. Delivery of the booklet is confirmed in writing through a provision in the purchase agreement. [See **RPI** Form 150 §12.6; See **RPI** Form 316-1]

Included in the booklet is a discussion about the significance of hazardous materials and conditions, and tips for identifying, locating and mitigating the hazards. Also discussed are the symptoms experienced by humans that result from the hazards.

Delivery of the booklet — by hand or digitally — in conjunction with the TDS and its factual disclosures concludes the seller's agent's disclosure of **environmental hazards** and eliminates any further duty they have to advise the prospective buyer about the existence of environmental hazards. [CC §2079.8]

Thus, when a hazardous condition disclosed in the TDS is addressed in the booklet, the disclosure of the condition in the TDS together with the booklet covers the extent to which the seller's agent goes to provide a full disclosure about the existence and nature of that hazardous condition. For the purposes of the seller's side of the transaction, the agent and seller need to say nothing more to the buyer beyond timely providing them the TDS and the booklet to make the disclosures, unless the buyer inquires further — which requires an honest and complete response.

While the timely disclosure of an environmental hazard is the obligation

**UNIQUE FACTORS AND CONDITIONS AFFECTING PROPERTY****RPI FORM 308**

**NOTE:** This form is used by a seller's agent when preparing a marketing package for the sale, exchange, lease or option of a one-to-four unit residential property, to disclose the existence of unique factors or conditions which may adversely affect the property or its immediate vicinity.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.  
*Items left blank or unchecked are not applicable.*

**1. FACTS:** This disclosure statement concerns real estate situated in the City of \_\_\_\_\_,  
County of \_\_\_\_\_, California,  
referred to as \_\_\_\_\_.

*Check only those that apply. Use the space provided below to provide an explanation of any of the checked items.*

**2.  NOTICE OF AIRPORT IN VICINITY:**

This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

**3.  NOTICE OF RIGHT TO FARM:**

This property is located within one mile of a farm or ranch land designated on the current county-level GIS "Important Farmland Map," issued by the California Department of Conservation, Division of Land Resource Protection. Accordingly, the property may be subject to inconveniences or discomforts resulting from agricultural operations that are a normal and necessary aspect of living in a community with a strong rural character and a healthy agricultural sector. Customary agricultural practices in farm operations may include, but are not limited to, noise, odors, dust, light, insects, the operation of pumps and machinery, the storage and disposal of manure, bee pollination, and the ground or aerial application of fertilizers, pesticides, and herbicides.

These agricultural practices may occur at any time during the 24-hour day. Individual sensitivities to those practices can vary from person to person. You may wish to consider the impacts of such agricultural practices before you complete your purchase. Please be advised that you may be barred from obtaining legal remedies against agricultural practices conducted in a manner consistent with proper and accepted customs and standards pursuant to Section 3482.5 of the Civil Code or any pertinent local ordinance.

**4.  NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION:**

This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction.

**5.  NOTICE OF MINING OPERATIONS:**

This property is located within one mile of a mine operation for which the mine owner or operator has reported mine location data to the Department of Conservation pursuant to Section 2207 of the Public Resources Code. Accordingly, the property may be subject to inconveniences resulting from mining operations. You may wish to consider the impacts of these practices before you complete your transaction.

**6.  NOTICE OF INDUSTRIAL USE ZONE:**

The property is located in or next to an Industrial Use Zone which allows manufacturing or commercial uses, or is affected by a nuisance resulting from its proximity to an Industrial Use Zone.

**7.  NOTICE OF STATE OR FEDERAL ORDNANCE:**

The property is located within one mile of a former state or federal ordnance location, such as those used for military training purposes. An area used for military training may potentially contain explosive munitions.

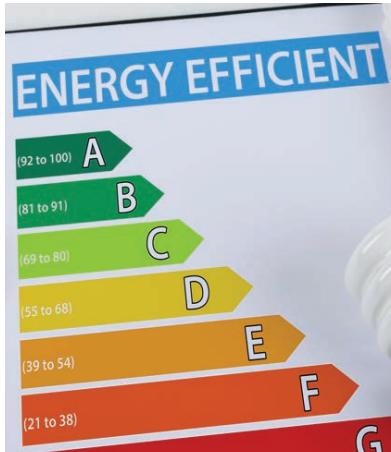
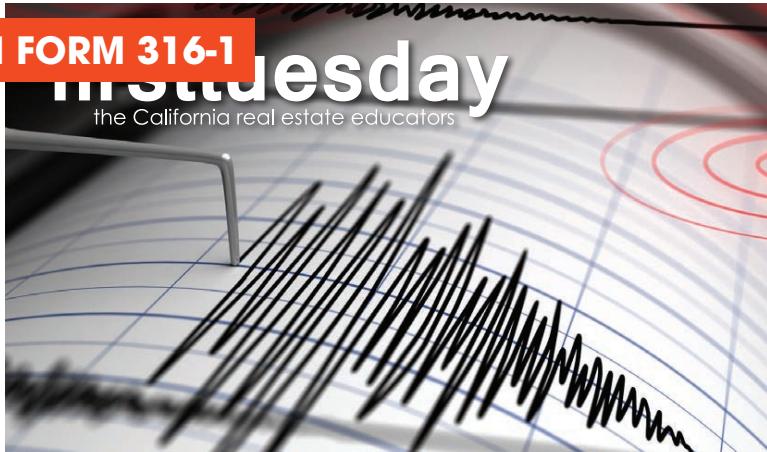
**8.  NOTICE OF CONTAMINATION OF A CONTROLLED SUBSTANCE:**

The property or immediate vicinity has been identified by a governmental health official as being contaminated by methamphetamine or another controlled substance in the prior three years.

RPI FORM 316-1

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the California real estate educators



## Hazards Disclosure Booklets

Residential Environmental Hazards: A Guide for  
Homeowners, Homebuyers, Landlords and Tenants

Protect Your Family From Lead in Your Home

The Homeowner's Guide to Earthquake Safety

What is Your Home Energy Rating?

of the seller, it is the seller's agent who has the **agency duty** of care and protection owed to their seller to see to it the seller is in compliance with the environmental hazard disclosure requirements.

## The buyer's agent's review as their risk mitigation

When the seller or seller's agent have not provided the buyer with the hazards booklet, the buyer's agent may deliver it to the buyer themselves, the preparation and delivery of the TDS being the exclusive domain of the seller, and in turn the seller's agent.

While the seller's agent is required to provide the buyer with the mandatory TDS, the seller's agent has **no duty to discuss** the effect of the hazards with the buyer after the documents have been delivered, unless the buyer inquires.

The buyer's agent reviews the booklet's explanation of the disclosed hazards with the buyer and notes the consequences of the hazards.

On delivery of the TDS by the seller's agent, it becomes the duty of the buyer's agent to point out the hazards disclosed. They then **review** the booklet's explanation of the disclosed hazards with the buyer, noting the consequences of the hazards and counseling the buyer on the alternatives available to mitigate the hazards should they make an offer to acquire the property.

Simply handing the buyer and booklet without directing attention to the specific contents of the booklet that directly relates to the hazard located on the subject property is insufficient.

Further, the buyer's agent's discussion about environmental hazards with the buyer provides the buyer with information necessary for setting the price and terms of any offer the buyer will make to acquire the property.

## Method of disclosure

The TDS and environmental hazard booklet is delivered by the seller's agent at the time a prospective buyer inquires further about a listed property. Alternatively, a counter offer may be needed to make the

additional disclosures covered by purchase agreement provisions.

Some environmental hazards are itemized in the TDS, such as a direct reference to hazardous construction materials and waste, window security bars and release mechanisms, and an indirect reference to environmental noise. [See **RPI** Form 304 §§A and C]

All other known environmental hazards are added by separate itemization in the TDS. As for environmental hazards emanating from off-site locations, they are disclosed through provisions in the purchase agreement since they are typically known to buyer's agents who are familiar with the area. [See **RPI** Form 150 §12.7]

*Editor's note — The environmental hazard booklet is not a disclosure of known defects on the property. The booklet merely contains general information on a few environmental hazards, none of which might actually exist on the property. [See **RPI** Form 316-1]*

Regardless of the method of delivery, the seller's agent is to give the environmental hazard disclosures to the prospective buyer as soon as practicable, meaning **as soon as reasonably possible**. As with the disclosure of natural hazards, the legislature intended for the environmental hazard disclosures to be made prior to entry into a purchase agreement. [Attorney General Opinion 01-406 (August 24, 2001)]

## **Need and motivation for disclosure**

For the seller's agent to properly anticipate the need to have the disclosures available to deliver to prospective buyers, the effort to promptly gather the information from the seller begins at the moment the listing is solicited and entered into.

The seller and the seller's agent have numerous good reasons to fully comply at the **earliest moment** with the environmental hazard disclosures (as well as all other property-related disclosures). The **benefits of a full disclosure**, up front and before the seller accepts an offer or makes a counteroffer, include:

- the prevention of delays in closing;

- the avoidance of cancellations on discovery under due diligence investigation contingencies;
- the elimination of likely renegotiations over price or offsets for corrective costs due to the seller's agent's dilatory disclosure or the buyer's discovery during escrow;
- the shortening of the time needed for the buyer to complete their due diligence investigation; and
- control by the seller of remedial costs and responsibilities by terms included in the purchase agreement, not by later offsets or demands by the buyer or a court.

## Inquiries documented

The seller's agent needs to document in writing (for the agent's file only) the agent's inquiry of the seller about environmental hazards which are known or may be known to the seller. The agent's list is to itemize:

- all the environmental hazards which might possibly exist on or about a property and the construction materials which contain them;
- the age or date of construction to elicit a review of probable hazardous construction materials used at the time of construction; and
- information known about the property on disclosures the seller received when the seller purchased the property or were brought to the seller's attention on any renovation of the property.

Also, the seller's agent's inquiry into hazardous materials ought to precede the seller's preparation of the TDS. Thus, the seller is mentally prepared to release information about knowledge of defects in the condition of the property. Finally,

the seller's agent's visual inspection needs to be conducted before the seller prepares the TDS so the observations may be discussed.

The seller has **no obligation to hire an expert** to investigate and report on whether an environmental hazard is present on or about the property. The seller is also not obligated to remove, eliminate or mitigate an environmental hazard, unless the seller becomes obligated under the terms of the purchase agreement with the buyer.

It is the seller's and the seller's agent's knowledge about the property which is disclosed on the TDS. The off-site environmental hazards which affect the use of the property are generally well known by the buyer's agent for inclusion in the purchase agreement. If not included in the TDS or the purchase agreement, a counteroffer by the seller is necessary to disclose — as soon as possible — the seller's and the seller's agent's knowledge of environmental hazards located both on and off the property.



# QUIZ

1. As part of the seller's agent's disclosure of environmental hazards and eliminate any further duty to advise the prospective buyer about the environmental hazards, the seller's agent delivers a copy of the \_\_\_\_\_ approved by the California Department of Health and Safety (DHS) to the buyer.
  - a. Transfer Disclosure Statement (TDS)
  - b. Natural Hazard Disclosure Statement (NHD)
  - c. environmental hazard booklet
2. On delivery of the Transfer Disclosure Statement (TDS) by the seller's agent, it becomes the primary duty of the \_\_\_\_\_ to point out and discuss the hazards disclosed with the buyer.
  - a. buyer's agent
  - b. seller's agent
  - c. Both a. and b.
3. As a matter of best practices, a seller's agent is to give the environmental hazard disclosures to the prospective buyer:
  - a. as soon as practicable after the close of escrow.
  - b. after a purchase agreement offer has been submitted to the seller.
  - c. as soon as reasonably possible.

# Friable



# Non-Friable



## Asbestos in construction materials

Asbestos is any of a diverse variety of *fibrous mineral silicates* which are commercially mined from natural deposits in the earth. In the 1940's manufacturers began mixing asbestos fibers with substances commonly used to produce materials for the construction of residential and non-residential real estate improvements. [Health & S C §25925]

However, asbestos is a known **carcinogen**. As an occupant of a building continues to inhale asbestos fiber, they increase their risk of developing negative health conditions.

Construction materials which contain *friable asbestos* are those that can be crumbled, pulverized or reduced to powder by hand pressure when dry.



Construction materials which contain *non-friable* asbestos cannot be crushed by hand pressure. Of course, on the removal of stucco or plaster, the asbestos may **become friable** since the material is disturbed and broken down for removal, creating particles which may become airborne and inhaled.

The seller of a property constructed with asbestos-containing building materials is under no obligation to investigate or have a survey conducted to determine the existence of asbestos on the property — whether friable or non-friable.

Further, the seller is not obligated to remove or clean up any adverse asbestos condition. However, the condition, if known, **will be disclosed**. As a result, a prospective buyer may well condition the purchase of a property containing friable asbestos on its clean up and removal by the seller.

## Nuisance: interference with use and enjoyment

Similar to the concept of an environmental hazard, a **nuisance** is anything which:

- is offensive to the senses;
- is *injurious* to health; or
- *obstructs* the use of property. [Calif. Civil Code §3479]

Simply, a nuisance is any activity which interferes with an owner's use and enjoyment of their property, including conditions which are unhealthy or offensive to the senses. A nuisance is broadly interpreted to encompass a wide variety of activities.

An activity becomes a nuisance based on either:

- a statutory provision identifying conduct that is a **nuisance per se**; or
- a **balancing of the conflicting rights** and interests of the

neighboring property owners.

A *nuisance per se* is any activity specifically declared by statute to be a nuisance. If an activity is a statutory nuisance, it can be ordered stopped by a court without proof of its harmful or offensive effect.

The list of nuisances per se is wide and diverse, including:

- fences of excessive height unnecessarily exceeding ten feet, called **s spite fences** [CC §841.4];
- the illegal sale of controlled substances [CC §3479];
- fire hazards [Calif. Public Resources Code §4171]; and
- swimming pools which do not comply with statutory health and safety standards. [Calif. Health and Safety Code §116060]

Conversely, some activities are declared by statute not to be nuisances.

Activities done or maintained under the express authority of a statute, called **statutory authority**, cannot be nuisances. For example, the activities of a commercial agricultural processing plant are maintained under *statutory authority* and cannot constitute a nuisance. [CC §§3482, 3482.6]



# QUIZ

1. \_\_\_\_\_ is any of a diverse variety of fibrous mineral silicates and is a known carcinogen which can increase the risk of developing a negative health condition if inhaled.
  - a. Formaldehyde
  - b. Lead-based paint
  - c. Asbestos
2. Construction materials which contain \_\_\_\_\_ are those that can be crumbled, pulverized or reduced to powder by hand pressure when dry.
  - a. water-soluble asbestos
  - b. friable asbestos
  - c. non-friable asbestos
3. The seller of a property constructed with asbestos-containing building materials:
  - a. needs provide the buyer with a list of vendors who can remove or clean up the adverse asbestos condition.
  - b. is obligated to mitigate the potential negative health effects caused by friable asbestos, though need not disclose the presence of non-friable asbestos.
  - c. is under no obligation to remove or clean up any adverse asbestos condition, though must disclose it.

# Lead-Based Paint Disclosure

<b>LEAD-BASED PAINT DISCLOSURE</b>	
On Sale of Real Estate	
<b>NOTE:</b> This form is used by an owner's agent when selling or leasing a residential unit built before 1978 and complying with lead-based paint disclosure laws, to notify the buyer or tenant whether lead-based paint or lead-based paint hazards are known to the owner to be present on the property and give the buyer and tenant an opportunity to conduct a risk assessment or inspection of the property.	
<b>PROPERTY ADDRESS:</b> Items left blank or uncheckered are not applicable.	
1. <b>Lead Warning:</b>	
1.1 Every Buyer of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage and other health problems, including intellectual, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women.	
1.2 Seller of any interest in residential property is required to provide Buyer with any information on lead-based paint hazards from risk assessments or inspections in Seller's possession and notify Buyer of any known lead-based paint hazards.	
1.3 A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.	
2. <b>Seller's Certification:</b>	
2.1 Presence of lead-based paint and/or lead-based paint hazards a. _____ are known to be present in the housing as explained: _____	
b. _____ are not known to Seller to be present in the housing.	
2.2 Records and reports available to Seller a. Seller has provided Buyer with all available records and reports listed below pertaining to lead-based paint and/or lead-based paint hazards in the housing: _____	
b. Seller has no records or reports pertaining to lead-based paint and/or lead-based paint hazards in the housing.	
Date: <u>                </u> 20      Seller: _____	
3. <b>Buyer's Acknowledgment:</b>	
3.1 Buyer has received: a. _____ Copies of all information listed above. b. _____ The pamphlet <i>Protect Your Family From Lead in Your Home</i> .	
3.2 Buyer: a. _____ Will receive a 10-day _____ day opportunity from acceptance of the purchase offer to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards. b. _____ Waives the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.	
3.3 I acknowledge that I have read and understood the attached lead warning statement in Section 1 of this form and received all information noted in Section 2 of this form.	
Date: <u>                </u> 20      Buyer: _____	
4. <b>Broker's Certification (When Applicable):</b>	
4.1 Broker certifies to have informed Seller of his/her obligation under 42 U.S.C. §4852d to disclose to Buyer and Broker any information known to Seller regarding lead-based paint and lead-based paint hazards within this target housing area and as information known to Broker regarding the presence of lead-based paint and lead-based paint hazards within this target housing as soon as that information has been disclosed to Buyer.	
4.2 Broker further certifies that Buyer has received the lead hazard information pamphlet <i>Protect Your Family From Lead in Your Home</i> and that Buyer has or will be given a 10 calendar day period (unless otherwise agreed in writing) to conduct a risk assessment or inspection for the presence of lead-based paint before becoming obligated under the contract to purchase the housing.	
Date: <u>                </u> 20      Broker: _____ CalBRE #: _____	



## Lead-based paint hazards

Lead-based paint, defined as any surface coating containing at least 1.0 milligram per square centimeter of lead, or 0.5% lead by weight, was banned by the Federal Consumer Product Safety Commission in 1978. [24 CFR §35.86; 40 CFR §745.103]

A **lead-based paint hazard** is any condition that causes exposure to lead from lead-contaminated dust, soil or paint which has deteriorated to the point of causing adverse human health effects. [24 CFR §35.86; 40 CFR §745.103]

An agent, prior to meeting with the owner to list an older single family residence (SFR) property for sale, gathers facts about the property, its ownership and its likely market value.

As the first step, the agent pulls a *property profile* on the SFR from a title company website. On receipt of the profile, the agent confirms their suspicion that the structure was built **prior to 1978**. The agent is now aware the property is the target of separate state and federal environmental protection disclosure programs designed to prevent the poisoning of children by the presence of **lead-based paint**.

The agent meets with the owner to review the requisite **listing and marketing** requirements laid down by the agent's broker. To prepare

for the meeting, the agent fills out the listing agreement and attaches all the information disclosure forms needed to properly market the property and locate a buyer, called a **listing package**.

## Disclosed on two forms

Among other informational forms for this pre-1978 SFR property, the agent includes two forms which address lead-based paint conditions on the property:

- the **Federal Lead-based Paint (LBP) disclosure** [See **RPI** Form 313]; and
- the California **Transfer Disclosure Statement (TDS)**. [See **RPI** Form 304]

On review of the listing agreement with the owner, the agent explains the **owner's legal obligation**, owed to prospective buyers and buyer's agents, to provide them with all the information:

- known to the owner or readily available to the owner's agent on observation or inquiry; and
- which might adversely affect the value of the property.

A full disclosure to the prospective buyer about adverse conditions on the property does not entail a review or explanation by the seller's agent about their effect on the buyer or the property once the facts are disclosed. Application of the facts disclosed and the potential consequences flowing from the facts which may affect the prospective buyer's use, possession or ownership of the property are not among the seller's agent's duties of affirmative disclosure.

## Seller's agent insures compliance

However, federal LBP rules do require the seller's agent to advise the owner about the requirements for disclosures to be made to prospective buyer before they enter into a purchase agreement. It is the seller's agent who insures compliance by the owner before entering into a purchase agreement.

*Editor's note — The owner has no obligation to have the property*

**RPI FORM 313****LEAD-BASED PAINT DISCLOSURE**

On Sale of Real Estate

**NOTE:** This form is used by an owner's agent when selling or leasing a residential unit built before 1978 and complying with lead-based paint disclosure laws, to notify the buyer or tenant whether lead-based paint or lead-based paint hazards are known to the owner to be present on the property and give the buyer and tenant an opportunity to conduct a risk assessment or inspection of the property.

**PROPERTY ADDRESS:***Items left blank or unchecked are not applicable.***1. Lead Warning:**

- 1.1 Every Buyer of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women.
- 1.2 Seller of any interest in residential property is required to provide Buyer with any information on lead-based paint hazards from risk assessments or inspections in Seller's possession and notify Buyer of any known lead-based paint hazards.
- 1.3 A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

**2. Seller's Certification:**

- 2.1 Presence of lead-based paint and/or lead-based paint hazards
  - a.  are known to be present in the housing as explained: \_\_\_\_\_
  - b.  are not known to Seller to be present in the housing.
- 2.2 Records and reports available to Seller
  - a.  Seller has provided Buyer with all available records and reports listed below pertaining to lead-based paint and/or lead-based paint hazards in the housing: \_\_\_\_\_
  - b.  Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Date: \_\_\_\_\_, 20\_\_\_\_ Seller: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_\_\_ Seller: \_\_\_\_\_

**3. Buyer's Acknowledgement:**

- 3.1 Buyer has received:
  - a.  Copies of all information listed above.
  - b.  The pamphlet *Protect Your Family From Lead in Your Home*.
- 3.2 Buyer:
  - a.  Will receive a  10-day,  \_\_\_\_ day, opportunity from acceptance of the purchase offer to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.
  - b.  Waives the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.
- 3.3 I acknowledge that I have read and understood the attached lead warning statement in Section 1 of this form and received all information noted in Section 2 of this form.

Date: \_\_\_\_\_, 20\_\_\_\_ Buyer: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_\_\_ Buyer: \_\_\_\_\_

**4. Broker's Certification (When Applicable):**

- 4.1 Broker certifies to have informed Seller of his/her obligation under 42 U.S.C. §4852d to disclose to Buyer and Broker all information known to Seller regarding the presence of lead-based paint and lead-based paint hazards within this target housing and that all information known to Broker regarding the presence of lead-based paint and lead-based paint hazards within this target housing has been disclosed to Buyer.
- 4.2 Broker further certifies that Buyer has received the lead hazard information pamphlet *Protect Your Family From Lead in Your Home* and that Buyer has or will be given a 10 calendar day period (unless otherwise agreed in writing) to conduct a risk assessment or inspection for the presence of lead-based paint before becoming obligated under the contract to purchase the housing.

Date: \_\_\_\_\_, 20\_\_\_\_ Broker: \_\_\_\_\_ CalBRE #:\_\_\_\_\_

inspected or a report prepared on the presence of lead-based paint or any lead-based paint hazards. Also, the owner need not perform any **corrective work** to clean up or even eliminate the lead-based paint conditions, unless agreed to with the buyer. [24 Code of Federal Regulations §35.88(a); 40 CFR §745.107(a)]

Thus, the owner cooperates in the LBP disclosure and their agent's other marketing efforts by:

- filling out and signing the federal LBP disclosure form required on all pre-1978 residential construction [See **RPI** Form 313];
- filling out and signing the TDS containing the lead-based paint, environmental and other property conditions [See **RPI** Form 304];
- making a physical home inspection report available to prospective buyers as an attachment to the TDS form; and
- providing the seller's agent with copies of any reports or documents containing information about lead-based paint or lead-based paint hazards on the property.

## LBP disclosure content

The **LBP disclosure** form includes the following:

- the *Lead Warning Statement* as written in federal regulations [See **RPI** Form 313 §1];
- the owner's statement *disclosing the presence of known lead-based paint hazards or the owner's lack of any knowledge of existing lead-based paint* [See **RPI** Form 313 §2];
- a *list of records or reports* available to the owner which indicates a presence or lack of lead-based paint, which have been handed to the seller's agent [See **RPI** Form 313 §2.2];
- the buyer's statement *acknowledging receipt of the LBP disclosure, any other information available to the owner and the lead hazard information pamphlet entitled **Protect Your Family From Lead in Your Home*** [See **RPI** Form 313 §3.1; see **RPI** Form 316-1];
- the buyer's statement acknowledging the buyer has received

a 10-day opportunity to inspect the property or has agreed to reduce or waive the inspection period [See **RPI** Form 313 §3.2];

- the seller's agent's statement noting the owner has been informed of the owner's disclosure requirements and that the agent is aware of their duty to ensure the owner complies with the requirements [See **RPI** Form 313 §4]; and
- the signatures of the owner, buyer and seller's agent. [24 CFR §35.92(a)(7); 40 CFR §745.113(a)(7)]

The owner and the seller's broker each keep a copy of the disclosure statement for at least *three* years from the close of escrow on the sales transaction. [24 CFR §35.92(c); 40 CFR §745.113(c)]

Further, the disclosure form is to be written in the language of the purchase agreement. For example, if the purchase agreement is in Spanish, then the LBP disclosure will also be in Spanish. [24 CFR §35.92(a); 40 CFR §745.113(a)]

## Opportunity to evaluate risk

A prospective buyer of a residence built prior to 1978 is put on notice of LBP conditions by handing them the disclosure forms before they make an offer. The disclosures advise them they have a *10-day period after their offer is accepted to evaluate the lead-based paint risks involved*. When *timely disclosed, the buyer may not later, when under contract, use the existence of lead-based paint as justification for cancellation*.

The buyer may agree to a *lesser* period of time or simply waive all their rights to the federally permitted risk evaluation period. However, disclosures about the SFR property cannot be waived by the use of an "as-is" sale provision or otherwise. [40 CFR §745.110(a); see **RPI** Form 313]

## Foreclosure sale exemption

Exempt from the Federal LBP disclosures are **foreclosure sales** of residential property. [24 CFR §35.82(a)]

Yet, a foreclosing lender still has a **common law duty** to disclose property defects known to them at the time of the foreclosure sale. A foreclosing lender is not protected from liability for intentional misrepresentation (negative fraud by omission – deceit) when the property is sold “as-is” at a foreclosure sale and the foreclosing lender previously fails to disclose a known defect to the bidders. [**Karoutas v. HomeFed Bank** (1991) 232 CA3d 767]

However, the LBP foreclosure exemption does *not apply* to the resale of housing previously acquired by the lender at a foreclosure sale, commonly called **real estate owned (REO)** property, or to the resale by a third party bidder who acquired the property at a foreclosure sale.

Thus, if a lender or other bidder who acquired property at a foreclosure sale is reselling it, the resale needs to comply with the lead-based paint disclosure requirements. [61 Federal Register 9063]



# QUIZ

1. A(n) \_\_\_\_\_ is any condition that causes exposure to lead from lead-contaminated dust, soil or paint which has deteriorated to the point of causing adverse human health effects.
  - a. lead-based insulation hazard
  - b. lead-based paint hazard
  - c. natural hazard
2. What is the date which controls whether a property is the target of state and federal environmental protection disclosure programs designed to prevent the poisoning of children by the presence of lead-based paint?
  - a. 1968.
  - b. 1978.
  - c. 1988.
3. On the sale of a property built prior to 1978, which form addresses lead-based paint conditions which exist on the property?
  - a. The Federal Lead-based Paint (LBP) disclosure.
  - b. The California Transfer Disclosure Statement (TDS).
  - c. Both a. and b

## Natural Hazard Disclosure Statement



The form is titled "NATURAL HAZARD DISCLOSURE STATEMENT". It includes fields for "Prepared by: Agent" and "Broker" with "Phone" and "Email" fields below. A note at the top states: "NOTE: This form is used by a seller, seller's agent and third-party contractor when a report on the natural hazards affecting a property is prepared for inclusion in a property marketing package, to disclose natural hazards of a property to prospective buyers for their review on commencement of negotiations as mandated." Below this is a "DATE:" field followed by "20 \_\_\_\_\_ at \_\_\_\_\_, California." A disclosure statement follows: "This disclosure statement is prepared for the following: [checkboxes for Seller's listing agreement, Purchase agreement, Counteroffer, and other options]. Dated \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California, entered into by \_\_\_\_\_, as the \_\_\_\_\_ regarding real estate referred to as \_\_\_\_\_." A "Natural Hazard Disclosure Statement" section follows, with a note: "Seller and Seller's Agent(s) or a third-party consultant disclose the following information with the knowledge that even though this is not a warranty, prospective buyers may rely on this information in deciding whether and on what terms to purchase the subject property." It also states: "Seller hereby authorizes any agent(s) representing any principal(s) in this action to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property." A large box contains the following text: "THE FOLLOWING ARE REPRESENTATIONS MADE BY SELLER AND SELLER'S AGENT(S) BASED ON THEIR KNOWLEDGE AND MAPS DRAWN BY THE STATE AND FEDERAL GOVERNMENT. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN SELLER AND BUYER." The box is divided into sections: "THIS REAL PROPERTY LIES WITHIN THE FOLLOWING HAZARDOUS AREA(S) (Check appropriate response)" with questions 1-6; "A SPECIAL FLOOD HAZARD AREA (Any type Zone 'A' or 'V' designated by the Federal Emergency Management Agency. Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know/information not available from local jurisdiction \_\_\_\_\_); AN AREA OF POTENTIAL FLOODING shown on an inundation map pursuant to Section 8587 of the Public Resources Code. Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know/information not available from local jurisdiction \_\_\_\_\_); A VERY HIGH FIRE HAZARD SEVERITY ZONE pursuant to Section 51178 or 51179 of the Government Code. The owner of this property is subject to the maintenance requirements of Section 51182 of the Government Code. Yes \_\_\_\_\_ No \_\_\_\_\_); A WILDLAND AREA THAT MAY CONTAIN SUBSTANTIAL FOREST FIRE RISKS AND HAZARDS pursuant to Section 4125 of the Public Resources Code. The owner of this property is subject to the fire protection requirements of Section 4207 of the Public Resources Code. Additionally, it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with the local agency for those purposes pursuant to Section 4142 of the Public Resources Code. Yes \_\_\_\_\_ No \_\_\_\_\_); AN EARTHQUAKE FAULT ZONE pursuant to Section 2622 of the Public Resources Code. Yes \_\_\_\_\_ No \_\_\_\_\_); and A SEISMIC HAZARD ZONE pursuant to Section 2696 of the Public Resources Code. Yes (Liquefaction Zone) \_\_\_\_\_ No (Landslide Zone) \_\_\_\_\_ Map not yet released by state \_\_\_\_\_".

## Natural Hazard Disclosures

### A unified Natural Hazard Disclosure for all sales

**Natural hazards** come with the location of a parcel of real estate, not with the man-made aspects of the property. Locations where a property might be subject to natural hazards include:

- special flood hazard areas, a federal designation;
- potential flooding and inundation areas;
- very high fire hazard severity zones;
- wildland fire areas;
- earthquake fault zones; and
- seismic hazard zones. [Calif. Civil Code §1103(c)]

The existence of a hazard due to the geographic location of a property affects its desirability, and thus its value to prospective buyers. Hazards, by their nature, limit a buyer's ability to develop the property, obtain insurance or receive disaster relief.

Whether a seller lists the property with a broker or markets the property themselves, the seller is to disclose to prospective buyers any natural



hazards **known to the seller**, including those contained in public records.

To unify and streamline the disclosure by a seller (and in turn the seller's agent) for a uniform presentation to buyers concerning natural hazards which affect a property, the California legislature created a statutory form entitled the **Natural Hazard Disclosure (NHD) Statement**. [See RPI Form 314]

Every agent aspires to be fully employed and working for good clients. Thus, the clients and the agent will both succeed in closing real estate transactions. The client's property and its surrounding environment are the focal point, the hub, from which all broker employment activities emanate.

For every party in any real estate related transaction to do well, it is critical that all data and information about a property cannot be limited in its quality, quantity and timing of release by the listing or leasing agent representing the property owner. A flood of property information is not a hazard in this occupation, but is the beneficial

antithesis of stark, reluctant releases of information to interested buyers. Reluctance to disclose upfront is a risk that is inconsistent with all the current and long-term aspirations of an agent providing real estate services as it interferes with closing and invites litigation. Simply put, hoarding property information is counterproductive and wrong.

Sellers of one-to-four unit residential property and their agents have an affirmative duty to disclose their knowledge about the existence of **natural hazards** to a prospective buyer at the earliest possible opportunity—when the buyer starts asking questions which demonstrate an interest in buying the property.

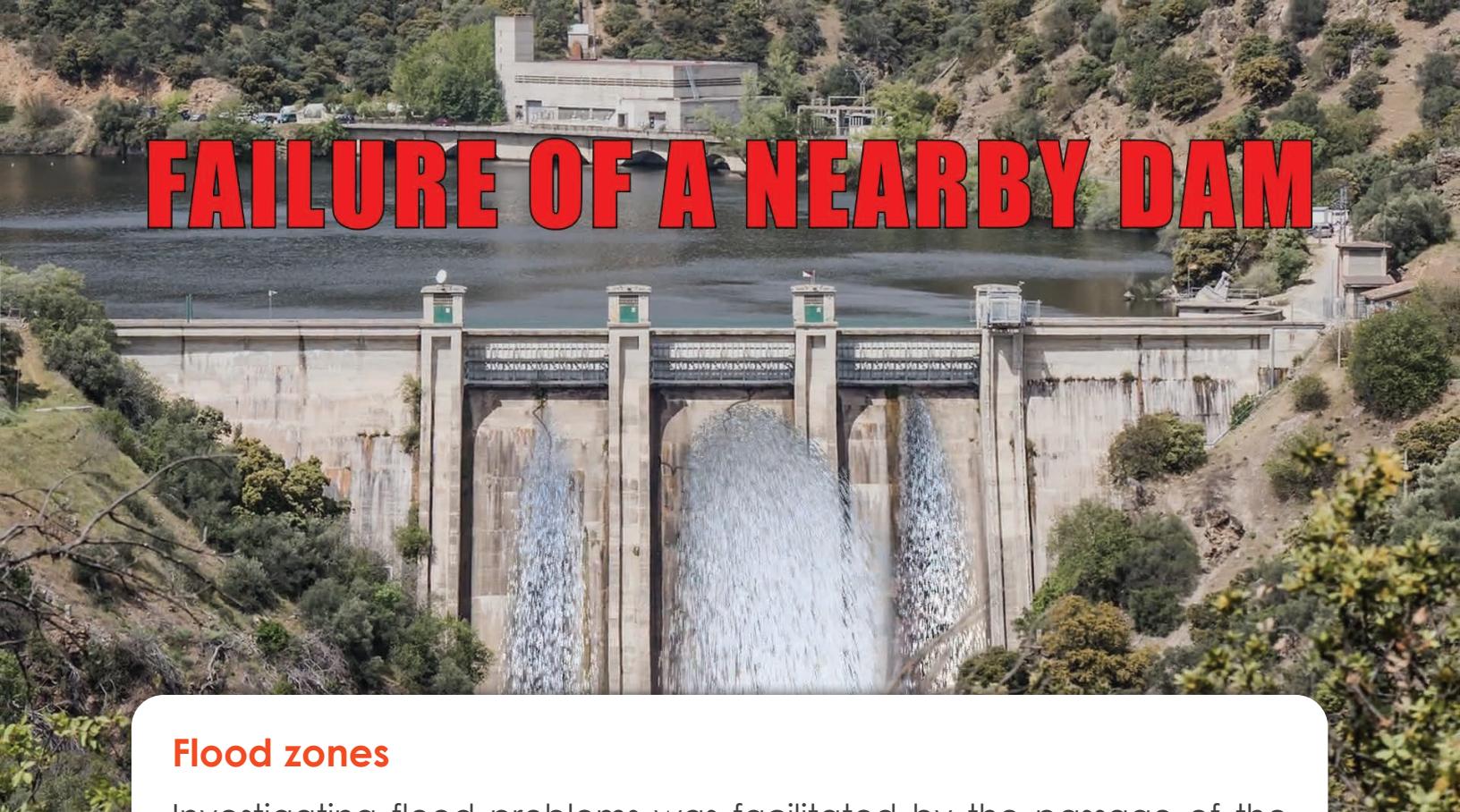
Natural hazards come with the location of a parcel of real estate, not with the man-made aspects of the property such as those covered in a **transfer disclosure statement (TDS)**. [See **RPI** Form 304]



# QUIZ

1. \_\_\_\_\_ come with the location of a parcel of real estate, not with the man-made aspects of the property.
  - a. Environmental hazards
  - b. Toxic hazards
  - c. Natural hazards
2. A seller is to disclose to prospective buyers any natural hazards known to the seller:
  - a. unless the seller is not represented by a broker and the natural hazards are readily visible on a visual survey of the property and surrounding area.
  - b. even when the seller is not represented by a broker and the hazards are contained in the public records.
  - c. unless the risk presented by the natural hazards have been mitigated by remedial action, such as retrofitting dams and sweeping the floors of a forest.
3. To unify and streamline the disclosure of natural hazards by a seller and the seller's agent, the California legislature created a statutory form entitled the:
  - a. Transfer Disclosure Statement (TDS).
  - b. Natural Hazard Disclosure (NHD) Statement.
  - c. Lead-Based Paint (LBP) Disclosure.

# FAILURE OF A NEARBY DAM



## Flood zones

Investigating flood problems was facilitated by the passage of the National Flood Insurance Act of 1968 (NFIA).

The NFIA established a means for property owners to obtain flood insurance with the National Flood Insurance Program (NFIP). The Federal Emergency Management Agency (FEMA) is the administrative entity created to police the NFIP by investigating and mapping regions susceptible to flooding.

Any flood zone designated with the letter "A" or "V" is a **special flood hazard area** and is to be disclosed as a natural hazard on the NHD Statement. [See **RPI** Form 314 §1]

Zones "A" and "V" both correspond with areas with a 1% chance of flooding in any given year, called 100-year floodplains, e.g., a structure located within a special flood hazard area shown on an NFIP map has a 26% chance of suffering flood damage during the term of a 30-year mortgage.

However, Zone "V" is subject to additional storm wave hazards.

Both zones are subject to mandatory flood insurance purchase requirements.

Information about flood hazard areas and zones come from:

- city/county planners and engineers;
- county flood control offices;
- local or regional FEMA offices; and
- the U.S. Corps of Engineers.

Another flooding disclosure which needs to be made on the NHD Statement arises when the property is located in an area of **potential flooding**. [See Form 314 §2]

An area of potential flooding is a location subject to partial flooding if sudden or total **dam failure** occurs. The inundation maps showing the areas of potential flooding due to dam failure are prepared by the California Office of Emergency Services. [Calif. Government Code §8589.5(a)]

Once alerted by the seller's agent to the existence of a flooding condition, the buyer's agent is to inquire further to learn the significance of the disclosure to the buyer.

### **Marketing a property in a special flood hazard area**

Consider a seller of a single family residential property (SFR) located in a special flood hazard area who wants to list their property for sale.

The agent prepares an *Exclusive Right to Sell Listing Agreement* for review by the seller. [See **RPI** Form 102]

The agent also prepares a cost workup for the seller estimating the cost of third-party **investigative reports** needed to provide prospective buyers with information on the property. The reports include those either statutorily mandated or demanded by prudent buyers and protective buyer's agents for their information and approval.



## MARKETING PACKAGE COST SHEET

Due Diligence Checklist

RPI FORM 107

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_

Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is used by a seller's agent as an addendum when entering into the employment of an owner who lists a property for sale, to disclose the itemized costs the owner can expect to incur during the marketing and sale of the property as anticipated by the employment agreement.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.  
*Items left blank or unchecked are not applicable.*

### 1. FACTS:

- 1.1 This is an addendum to an employment agreement referred to as a Seller's Listing Agreement [See RPI Form 102]
- 1.2  of same date, or dated \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California,
- 1.3 entered into by \_\_\_\_\_, as the Broker,  
and \_\_\_\_\_, as the Seller,
- 1.4 regarding real estate referred to as \_\_\_\_\_,
- 1.5 for a period beginning on \_\_\_\_\_, 20\_\_\_\_\_, and expiring on \_\_\_\_\_, 20\_\_\_\_\_.

### 2. BROKER'S DISCLOSURE AND PERFORMANCE:

- 2.1 The items listed below with estimated costs constitute a disclosure of the reports and activities Seller can reasonably expect will be required to either bring about or close a transaction under the employment agreement, and if acquired early, will assist Broker to provide prospective buyers with property information Broker anticipates he will need to effectively perform under the employment agreement.

- a. Natural hazard disclosure report [See RPI Form 314] ..... \$\_\_\_\_\_
- b. Local ordinance compliance certificate ..... \$\_\_\_\_\_
- c. Structural pest control report and  clearance ..... \$\_\_\_\_\_
- d. Smoke detector and water heater anchor installation ..... \$\_\_\_\_\_
- e. Home inspection report ..... \$\_\_\_\_\_
- f. Homeowners' Association (HOA) documents charge ..... \$\_\_\_\_\_
- g. Lead-based paint report [See RPI Form 313] ..... \$\_\_\_\_\_
- h. Mello-Roos assessment notice ..... \$\_\_\_\_\_
- i. Listing (transaction) coordinator's fee ..... \$\_\_\_\_\_
- j. Well-water quality and quantity report ..... \$\_\_\_\_\_
- k. Septic/sewer report ..... \$\_\_\_\_\_
- l. Soil report ..... \$\_\_\_\_\_
- m. Survey of property (civil engineer) ..... \$\_\_\_\_\_
- n. Appraisal report ..... \$\_\_\_\_\_
- o. Architectural (floor) plans ..... \$\_\_\_\_\_
- p. Title report:  property profile,  preliminary report,  abstract ..... \$\_\_\_\_\_
- q. MLS and market session input fees ..... \$\_\_\_\_\_
- r. Sign deposit or purchase, installation and removal ..... \$\_\_\_\_\_
- s. Advertising in newspapers, magazines, radio or television ..... \$\_\_\_\_\_
- t. Information flyers and postage (handout or mailing) ..... \$\_\_\_\_\_
- u. Open house — food and spirits ..... \$\_\_\_\_\_
- v. Photos or video of the property ..... \$\_\_\_\_\_
- w. Credit report on prospective buyer ..... \$\_\_\_\_\_
- x. Travel expenses ..... \$\_\_\_\_\_
- y. Other \_\_\_\_\_ ..... \$\_\_\_\_\_
- z. Other \_\_\_\_\_ ..... \$\_\_\_\_\_

2.2 **TOTAL ESTIMATED COSTS** ..... \$\_\_\_\_\_ 0.00

2.3  Broker is hereby authorized and instructed to incur on behalf of Seller the cost estimated above.

The seller's agent presents this listing package cost sheet to the owner as a "seller's budget," also called a **marketing package cost sheet**. It sets out the costs of all third-party reports the seller will inevitably incur on a sale of the property. [See **RPI** Form 107]

The **cost sheet** prepared by the agent estimates the cost of investigative reports prepared by other professionals or government agencies which will help put a face on the property so it can be better evaluated by prospective buyers – transparency communicated by disclosures. The recommended reports include an NHD statement. The agent estimates the cost of the NHD will be no more than \$100. [See **RPI** Form 107 §2.1(a)]

After reviewing the estimated costs and marketing strategy with the seller's agent, the seller gives the seller's agent authority to hire a third-party **NHD expert** of known competence to prepare an NHD report on the property. [See **RPI** Form 131]

The seller's agent, acting on behalf of the seller, orders an NHD from an **NHD expert**. The NHD expert employed by the seller at the agent's suggestion gathers information about the geographic area surrounding the seller's property from the public records and prepares the NHD report which they sign and deliver to the seller and their agent for a fee of \$90.

On receipt of the report prepared by the **NHD expert**, the seller and the agent review it for accuracies or differences between their knowledge and the information contained in the report. The seller and the agent observe no discrepancies. Accordingly, both the seller and agent sign the third-party NHD report as mandated. [See **RPI** Form 314]

The NHD, signed by the expert, seller and agent, is included in the agent's **marketing package** used to provide maximum

information on the listed property. The agent is aware the best way to market property and avoid further price negotiations during escrow is to fully disclose the condition of the property when first dealing with the eventual buyer.

A buyer's expectations about a property are established based on their impression of the property developed by the time they enter into a purchase agreement, not later after the price has been set, a binding purchase agreement entered into, escrow opened and then, for the first time, the true condition of the property is dilatorily revealed to the buyer. [**Jue v. Smiser** (1994) 23 CA4th 312]

Here, when asked to authorize the ordering out of the NHD report, the seller had to choose when to incur the expense of the third-party reports; either:

- **now**, when they list the property for sale, so a purchase agreement entered into with a prospective buyer has a greater likelihood of closing since deception about the property's existing NHD condition is eliminated by the prior delivery of the reports; or
- **later**, after entering into a purchase agreement with a buyer who has already developed expectations about the property which may well differ from the reports and, unless the seller eliminates the defects or adjusts the price, will likely result in the buyer cancelling the purchase agreement or closing escrow and demanding a return of the overpayment in price or the cost incurred for corrective action. [Jue, *supra*]

Beneficially, the disclosures provide the seller and agent with a competitive sales advantage for the seller's property over other apparently qualified properties which are marketed without reports to corroborate their condition.

A prospective buyer, having seen the property, indicates

they have an interest in purchasing the property by asking for information. In response, they are given a copy of the marketing package containing the NHD.

After reviewing the NHD (and all the other disclosures) in the marketing package, the buyer, now aware the property is located within a flood zone, submits an offer to purchase the property. It is eventually accepted and escrow is opened. The sale closes and the buyer takes ownership and possession.

During the spring, the property is flooded, resulting in significant damage not covered by insurance. The buyer demands compensation from the seller and the agent for money losses due to the flooding, claiming the NHD disclosure lacked information about the extent of the flooding or the property damage that could occur.

Can the seller or agent be held liable to the buyer for the cost to repair the property that was damaged by the flood?

No! Due to the seller's delivery of the NHD prior to contracting to sell the property, the buyer was notified of the material fact that the property was located in a special flood area, and thus was at greater risk of flooding. Without conducting a further due diligence investigation into the disclosed risk, the buyer set the price to be paid in his purchase offer to acquire the property knowing full well it was located in a special flood area. Neither the seller nor the agent had any duty to the buyer to advise further about the type or extent of losses the risk of flooding presents (unless the agent also represented the buyer).

On the other hand, the **buyer's agent** had a responsibility to assure their buyer understood the extent of these hazard risks prior to setting a price and submitting an offer.



# QUIZ

1. The \_\_\_\_\_ is the administrative entity created to police the National Flood Insurance Act of 1968 (NFIA) by investigating and mapping regions susceptible to flooding.
  - a. Federal Emergency Management Agency (FEMA)
  - b. U.S. Department of Housing and Urban Development (HUD)
  - c. Civil Rights Act of 1968
2. Any flood zone designated with the letter \_\_\_\_\_ is a special flood hazard area and is to be disclosed as a natural hazard on the Natural Hazard Disclosure (NHD) Statement.
  - a. "A" or "B"
  - b. "A" or "V"
  - c. "V" or "X"
3. An area of potential flooding is a location subject to partial flooding if:
  - a. it is rainy for an extended period of time.
  - b. sudden or total dam failure occurs.
  - c. the area has experienced any flooding in the prior 100 years.



## Disclosure of very high fire hazard severity zones

Areas in the state which are subject to significant fire hazards have been identified as very high fire hazard severity zones. If a property is located in a very high fire hazard severity zone, a disclosure needs to be made to the prospective buyer. [See **RPI** Form 314 §3]

The city, county or district responsible for providing fire protection have designated, by ordinance, very high fire hazard severity zones within their jurisdiction. [Calif. Government Code §51179]

The fire hazard disclosure on the NHD form mentions the need to maintain the property. Neither the seller nor the seller's agent need to explain the nature of the maintenance required or its burden on ownership. Advice to the buyer on the type of maintenance and the consequences of owning property subject to the maintenance are the duties of the buyer's agent, if they have an agent.

## Preparing for wildfires

Costly and dangerous wildfires are quickly becoming the norm here in California. As wildfires continue to make headlines, homebuyers are weighing the risks more heavily and homeowners are taking action. Real estate professionals need to be prepared to answer questions

and make recommendations on wildfire safety for both homebuyers considering property in these high-risk areas and sellers who may need to make fire safety improvements before selling.

Homebuyers will first learn if their potential new home is located in a fire hazard zone by receiving a completed **Natural Hazard Disclosure (NHD)**. [See **RPI** Form 314]

But being located in a fire hazard zone isn't necessarily a deal breaker — particularly since homebuyers aren't likely to shift their search outside the zone, when zones can cover whole cities and counties. But what *might* be a deal breaker is a home that is not retrofitted or maintained with fire safety in mind.

For example, new homes are always safer from wildfires, since their construction adheres to updated building codes. But homeowners of older homes can gradually replace parts of the building with fire-safe materials as maintenance and improvements are needed.

**Landscaping** to reduce a home's chances of being destroyed in a wildfire is also important, including:

- trimming and cutting down unsafe or clustering trees;
- trimming shrubs to a maximum height of 18 inches;
- removing any vegetation within three feet of the home;
- clearing leaves and branches from the yard;
- cleaning gutters and roof debris;
- moving wood piles away from structures; and
- replacing grass or vegetation near the home or other structures with gravel.

Planning a home's landscape to protect the structure from wildfires is part of creating **defensible space zones**. Properties located in very high fire hazard severity zones require at least 100 feet of defensible space surrounding the home or structure. [Calif. Gov C §51182(a)(1)]

Likewise, agents showing homes to **buyers** in fire-prone areas can keep an eye out for these hazards that increase the chance of wildfire

damage, such as:

- tall grass and weeds;
- dead or dry leaves, pine needles and tree branches;
- vegetation beneath decks and porches;
- tree limbs within ten feet of the chimney;
- shrubs within a few feet of the home; and
- trees clustered within ten feet of each other on or near the property.



# QUIZ

1. Areas in the state which are subject to significant fire hazards have been identified as:
  - a. hot zones.
  - b. severe drought regions.
  - c. very high fire hazard severity zones.
2. The fire hazard disclosure on the Natural Hazard Disclosure (NHD) Statement mentions the need to:
  - a. live in an area that is less prone to fire risk.
  - b. store large quantities of water on the property in the event a fire breakout.
  - c. maintain the property and surrounding area to reduce a home's chances of being destroyed in a wildfire.
3. Advice to the buyer on the type of maintenance and the consequences of owning property subject to the maintenance are the duties of the:
  - a. buyer's agent.
  - b. seller's agent.
  - c. Both a. and b.



# State Fire Responsibility Area

POWERED BY  
**esri**

## State Fire Responsibility Area

If a property is in an area where the financial responsibility for preventing or suppressing fires is primarily on the state, the real estate is located within a **State Fire Responsibility Area**. [Calif. Public Resources Code §4125(a)]

Notices identifying the location of the map designating State Fire Responsibility Areas are posted at the offices of the county recorder, county assessor and the county planning agency. Also, any information received by the county after receipt of a map changing the State Fire Responsibility Areas in the county needs to be posted. [Pub Res C §4125(c)]

If the property is located within a **wildland area** exposed to substantial forest fire risks, the seller or the seller's agent is to disclose this fact. If the property is located in a wildland area, it requires maintenance by the owner to prevent fires. [Pub Res C §4136(a); see **RPI** Form 314 §4]

In addition, the NHD Statement advises the prospective buyer of a home located in a wildland area that the **state has no responsibility** for providing fire protection services to the property, unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with the local agency. No further disclosure

about whether a cooperating agreement exists need be made by the seller or seller's agent. [See **RPI** Form 314 §4]

However, if property disclosures place the property in a wildland area, the buyer's agent has the duty to advise the buyer about the need to inquire and investigate into what agency provides fire protection to the property.



# QUIZ

1. If a property is in an area where the financial responsibility for preventing or suppressing fires is primarily on the state, the real estate is located within a(n):
  - a. very high fire hazard severity zone.
  - b. State Fire Responsibility Area.
  - c. Incorporated Fire Zone.
2. If a property is located within a \_\_\_\_\_ exposed to substantial forest fire risks, the seller or the seller's agent is to disclose this fact to the buyer.
  - a. wildland area
  - b. rural area
  - c. arid area
3. Unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with a local agency, \_\_\_\_\_ for providing fire protection services to the property located in a wildland area.
  - a. the state has no responsibility
  - b. the federal government has full responsibility
  - c. the homeowner has no responsibility



## Earthquake fault zones and seismic hazards

To assist seller's agents in identifying whether the listed property is located in an earthquake fault area, maps have been prepared by the State Geologist.

The State Mining and Geology Board and the city or county planning department have maps available which identify special studies zones, called **Alquist-Priolo Maps**. [Calif. Public Resources Code §2622]

The maps are used to identify whether the listed property is located within one-eighth of a mile on either side of a fault.

Also, the NHD Statement requires both the seller and the seller's agent to disclose to a prospective buyer or the buyer's agent whether they have knowledge the property is in a fault zone. [See **RPI** Form 314 §5]

A **Seismic Hazard Zone** map identifies areas which are exposed to earthquake hazards, such as:

- strong ground shaking;
- ground failure, such as liquefaction or landslides [Pub Res C §2692(a)];
- tsunamis [Pub Res C §2692.1];

- dam failures. [Pub Res C §2692(c)]

If the property for sale is susceptible to any of the earthquake (seismic) hazards, the *seismic hazard zone* disclosure on the NHD Statement is to be marked "Yes." [See **RPI** Form 314 §6]

Seismic hazard maps are not available for all areas of California. Also, seismic hazard maps do not show *Alquist-Priolo Earthquake Fault Zones*. The California Department of Conservation creates the seismic hazards maps.

If the NHD indicates a seismic hazard, the buyer's agent is to then determine which type of hazard, the level of that hazard and explain the distinction to the buyer, or be certain someone else does. The seller's agent has no such affirmative obligation to explain the impact of the disclosures to the buyer.

For example, property located in Seismic Zone 4 is more susceptible to strong ground shaking than areas in Zone 3. But which zone the property is located in is a question the buyer's agent needs to answer. Most of California is in Zone 4, except for the southwest areas of San Diego County, eastern Riverside and San Bernardino Counties, and most of the Northern California Sierra Counties.

Homes in Zone 4 are able to be damaged even from earthquakes which occur a great distance away.

### Insurance against disaster

Normal **homeowners insurance** does not cover earthquake damage. However, earthquake insurance exists to provide coverage to homeowners in the event of a tremor. But does it pay off?

For most, earthquake insurance is rarely worth it.

Following the Northridge Earthquake of 1994, when insurance companies had to pay out unexpectedly enormous sums

to cover their clients, premiums and deductibles rose and paybacks decreased. Now, a homeowner has to really get "lucky" (read: your home has to be totally destroyed) for the amount of premiums paid to pay off. Even then, homeowner deductibles are higher than most saving's accounts. Therefore, it may end up being a total loss anyway.

A better investment is to take the money you may spend on earthquake insurance premiums and use it to pay for retrofitting, if the home is not built to withstand a large quake.

This includes:

- bolting the home to its foundation (this costs a few thousand dollars depending on the state of the home's foundation);
- bracing or reinforcing walls for older homes or those that were built improperly (another few thousand dollars); and
- homeowner fixes like strapping heavy appliances, furniture and televisions to walls (hundreds of dollars at most but usually less).

Homeowners are encouraged to hire an experienced retrofitting company to inspect the property and provide estimates for the work to be completed. Easy fixes like bolting furniture and moving heavy objects from top shelves to bottom shelves ought to be done as soon as practical, and by homeowners in both outdated and brand new homes.

Even with the extra cost to retrofit or insure homes against earthquake damage, California's home values are hardly suffering from earthquake fears. Some of the most expensive real estate around is located practically on top of California's most active fault lines — in San Francisco and Los Angeles.

That being said, if a homeowner chooses to retrofit their

home, when they eventually sell they need to include that information in their home's marketing package. Buyers will appreciate the fact that they won't have to worry about making these improvements and it may even make them aware of other properties that haven't been retrofitted, making the retrofitted home stand out.



# QUIZ

1. The State Mining and Geology Board and the city or county planning department have maps available which identify whether a listed property is located in an earthquake fault area called:
  - a. Alquist-Priolo Maps.
  - b. Seismic Hazard Zone Maps.
  - c. Meridian-Baseline Maps.
  
2. A(n) \_\_\_\_\_ identifies areas which are exposed to earthquake hazards.
  - a. Topographical map
  - b. Seismic Hazard Zone map
  - c. Environmental Hazards Statement
  
3. If a property for sale is susceptible to \_\_\_\_\_ of the seismic hazards, the seismic hazard zone disclosure on the NHD Statement is to be marked "Yes."
  - a. any
  - b. greater than one
  - c. greater than three

# Tsunami



## Manifestations of seismic hazards

When an earthquake occurs, one fault slides against, underneath or on top of another. This direction can be vertical, horizontal or somewhere in between.

The San Andreas Fault is a *transform fault*, meaning it does not subsume land to another fault, nor is it subsumed. Rather, the two plates — the North American and Pacific Plate — move past each other, in a horizontal fashion. When this occurs, observers on the ground may not notice the evidence the fault movement leaves behind, but from the air it is clearly visible.

In addition to the initial shaking of the ground and potential damage to buildings and property, earthquakes cause a lot of *indirect damage* as well. Earthquakes can manifest and cause:

- **ground failure**, which refers to landslides and liquefaction (when loose, wet or sandy soil shifts during the shaking and causes building foundations to sink or move);
- **tsunamis**, large waves caused by earthquakes, volcanic eruptions or underwater landslides; and
- **dam failure**, which results in localized flooding.

Areas susceptible to inundation due to dam failure caused by an earthquake are also noted on the NHD Statement as a potential flooding area. [See **RPI** Form 314 §5]

Therefore, even if a property is not located near a fault, it may be located in an area where an earthquake may indirectly damage it. These areas are identified in geologic maps, available at local city planning departments.

## The ground shakes

There have been 54 major earthquakes in California since 1900, defined as an earthquake of at least magnitude 6.5, and/or causing loss of life or property damage greater than \$200,000, according to the California Geological Survey.

The last major earthquake was a magnitude 6.5 and occurred on December 22, 2003 in San Simeon, causing substantial damage in nearby Paso Robles.

With 54 major earthquakes over the past 115+ years, one major earthquake occurs on average every 2.1 years. Therefore, it appears California is well overdue for a major earthquake.

## Where will the next big earthquake occur?

Statistically, the next “big one” (of around magnitude 8.0) will likely occur along the southern end of the San Andreas Fault.

Most of California’s populated areas are located in or near an earthquake hazard zone. The exception is California’s Central Valley, encompassing cities like Fresno and Sacramento (property lying east of I-5 north of Delano and south of Redding). Here, you are as safe as you can be (in California) from earthquakes.

The West Coast of the United States is particularly susceptible to earthquakes, as it lies alongside the western edge of the North American Plate, where it butts up against the Pacific Plate. Students of Geology may recall the *Ring of Fire*, which encircles much of the Pacific Ocean. California makes up a significant portion of the ring,

though its main symptom is earthquakes, rather than the volcanoes experienced in much of the Pacific.

## Can scientists predict earthquakes?

The ability to predict earthquakes does exist, but the warning time is short and California has yet to fully implement an alert system.

It works like this: There are two types of waves that occur when an earthquake strikes. The shear waves or “**S**” **waves** cause the shaking that is so destructive to property. However, several seconds before the “S” wave hits, a mostly silent primary wave, or “**P**” **wave**, arrives. Dogs and other animals sensitive to sound can detect P waves, but human ears usually cannot.

Earthquake predicting technologies alert the user when a “P” wave is detected. This gives the user a few seconds to head for cover, turn off a gas stove, exit an elevator or complete any last-second preparations. The warning time depends on how deep the quake is and how far the epicenter is from the user.



# QUIZ

1. \_\_\_\_\_ is a seismic hazard which refers to landslides and liquefaction.
  - a. Tectonic failure
  - b. Ground failure
  - c. Friable collapse.
  
2. A large wave caused by an earthquake, volcanic eruption or an underwater landslide is referred to as a:
  - a. tidal wave.
  - b. tsunami.
  - c. sashimi.
  
3. \_\_\_\_\_ results in flooding when an earthquake ruptures a dam which serves as a reservoir.
  - a. Dam failure
  - b. Erosion
  - c. Ground failure

# "as-is"



## Natural Hazard Disclosure Statement

	NATURAL HAZARD DISCLOSURE STATEMENT	
Prepared by: Agent Broker	Phone	Email
<small>NOTE: This form is used by a seller, seller's agent and third-party contractor when a report on the natural hazards affecting a property is prepared for inclusion in a property marketing package, to disclose natural hazards of a property to prospective buyers for their review on commencement of negotiations as mandated.</small>		
<small>DATE: _____, 20____ at _____ California. The disclosure statement is prepared for the following: Seller's listing agreement [See RPI Form 102] Purchase agreement [See RPI Form 150-159] Counteroffer [See RPI Form 180]</small>		
<small>dated _____, 20____ at _____ California, entered into by _____ as the regarding real estate referred to as _____</small>		
<small>Natural Hazard Disclosure Statement: Seller and Seller's Agent(s) or a third-party consultant disclose the following information with the knowledge that even though it is not certain, prospective buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this action to provide a copy of this statement to any person or entity in connection with the actual or anticipated sale of the property.</small>		
<small>THE FOLLOWING REPRESENTATIONS ARE MADE BY SELLER AND SELLER'S AGENT(S) BASED ON THEIR KNOWLEDGE AND MAPS DRAWN BY THE STATE AND FEDERAL GOVERNMENT. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN BUYER AND SELLER.</small>		
<small>THIS REAL PROPERTY LIES WITHIN THE FOLLOWING HAZARDOUS AREA(S): (Check appropriate response)</small>		
<small>1. A SPECIAL FLOOD HAZARD AREA (Any type Zone "A" or "V") designated by the Federal Emergency Management Agency. Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know/Information not available from local jurisdiction _____</small>		
<small>2. AN AREA OF POTENTIAL FLOODING shown on an inundation map pursuant to Section 8589.5 of the Government Code. Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know/Information not available from local jurisdiction _____</small>		
<small>3. A VERY HIGH FIRE HAZARD SEVERITY ZONE pursuant to Section 51178 or 51179 of the Government Code. The owner of this property is subject to the maintenance requirements of Section 51182 of the Government Code. Yes <input type="checkbox"/></small>		
<small>4. A WILDLAND AREA THAT MAY CONTAIN SUBSTANTIAL FOREST FIRE RISKS AND HAZARDS pursuant to Section 4125 of the Public Resources Code. The owner of this property is subject to the maintenance requirements of Section 4291 of the Public Resources Code. Additionally, it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with the local agency for those purposes pursuant to Section 4142 of the Public Resources Code.</small>		

## The NHD form for uniformity

Whether a seller lists the property with a broker or markets the property themselves, the seller is to disclose to prospective buyers any natural hazards known to them, including those contained in public records.

The seller and seller's agent prepare the statutory Natural Hazard Disclosure (NHD) Statement to disclose their awareness of natural hazards. Alternatively, the NHD form can be prepared by a natural hazard expert, then verified and used by the seller and their agent. [See RPI Form 314]

The form is to include information known to the seller and seller's agent (and the NHD expert) and readily available to them as shown on maps in the public records of the local planning department. [Calif. Civil Code §1103.2; see **RPI Form 314**]

Actual use of the NHD Statement by sellers and their agents is mandated on the sale of all types of properties, with some sellers (but not agents) being excluded. While some sellers need not use the form when making the NHD disclosures, agents are never excluded. Thus, the form, filled out and signed by the seller (unless excluded) and the seller's agent (never excluded), is included in marketing packages handed to prospective buyers seeking additional information on



## NATURAL HAZARD DISCLOSURE STATEMENT

RPI FORM 314

Prepared by: Agent \_\_\_\_\_  
Broker \_\_\_\_\_

Phone \_\_\_\_\_  
Email \_\_\_\_\_

**NOTE:** This form is used by a seller, seller's agent and third-party contractor when a report on the natural hazards affecting a property is prepared for inclusion in a property marketing package, to disclose natural hazards of a property to prospective buyers for their review on commencement of negotiations as mandated.

**DATE:** \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California.  
This disclosure statement is prepared for the following:

Seller's listing agreement [See RPI Form 102]

Purchase agreement [See RPI Form 150-159]

Counteroffer [See RPI Form 180]

dated \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, California,  
entered into by \_\_\_\_\_, as the \_\_\_\_\_,  
regarding real estate referred to as \_\_\_\_\_

### Natural Hazard Disclosure Statement:

Seller and Seller's Agent(s) or a third-party consultant disclose the following information with the knowledge that even though this is not a warranty, prospective buyers may rely on this information in deciding whether and on what terms to purchase the subject property.

Seller hereby authorizes any agent(s) representing any principal(s) in this action to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY SELLER AND SELLER'S AGENT(S) BASED ON THEIR KNOWLEDGE AND MAPS DRAWN BY THE STATE AND FEDERAL GOVERNMENT. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN SELLER AND BUYER.

THIS REAL PROPERTY LIES WITHIN THE FOLLOWING HAZARDOUS AREA(S): (Check appropriate response)

1. A SPECIAL FLOOD HAZARD AREA (Any type Zone "A" or "V") designated by the Federal Emergency Management Agency.

Yes \_\_\_\_ No \_\_\_\_ Do not know/information not available from local jurisdiction \_\_\_\_

2. AN AREA OF POTENTIAL FLOODING shown on an inundation map pursuant to Section 8589.5 of the Government Code.

Yes \_\_\_\_ No \_\_\_\_ Do not know/information not available from local jurisdiction \_\_\_\_

3. A VERY HIGH FIRE HAZARD SEVERITY ZONE pursuant to Section 51178 or 51179 of the Government Code. The owner of this property is subject to the maintenance requirements of Section 51182 of the Government Code.

Yes \_\_\_\_ No \_\_\_\_

4. A WILDLAND AREA THAT MAY CONTAIN SUBSTANTIAL FOREST FIRE RISKS AND HAZARDS pursuant to Section 4125 of the Public Resources Code. The owner of this property is subject to the maintenance requirements of Section 4291 of the Public Resources Code. Additionally, it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with the local agency for those purposes pursuant to Section 4142 of the Public Resources Code.

Yes \_\_\_\_ No \_\_\_\_

5. AN EARTHQUAKE FAULT ZONE pursuant to Section 2622 of the Public Resources Code.

Yes \_\_\_\_ No \_\_\_\_

6. A SEISMIC HAZARD ZONE pursuant to Section 2696 of the Public Resources Code.

Yes (Landslide Zone) \_\_\_\_

Yes (Liquefaction Zone) \_\_\_\_

No \_\_\_\_

Map not yet released by state \_\_\_\_

every type of property.

Editor's note — Any attempt by a seller or seller's agent to use an "as-is" provision or otherwise provide for the buyer to agree to waive their right to receive the seller's NHD statement is void as against public policy. [CC §1103(d)]

However, sellers who are excluded from using the form still need to make the disclosures referenced in the NHD. Use of the NHD form to make property disclosures is not required on:

- court-ordered transfers or sales;
- deed-in-lieu of foreclosures;
- trustee's sales;
- lender resales after foreclosure or a deed-in-lieu;
- estates on death;
- transfers between co-owners;
- transfers to relatives/spouses; or
- transfers to or by governmental entities. [CC §1103.1(a)]



# QUIZ

1. A Natural Hazard Disclosure (NHD) Statement may be prepared by a(n) \_\_\_\_\_ then verified and used by the seller and their agent.
  - a. attorney-in-fact
  - b. natural hazard expert
  - c. home energy inspector
2. A Natural Hazard Disclosure (NHD) Statement constitutes:
  - a. a warranty or guarantee by the seller or seller's agent of the natural hazards affecting the property.
  - b. an affirmative representation of man-made hazards which may affect the desirability of the property.
  - c. the seller's, seller's agent's or the NHD expert's knowledge of any natural hazards affecting the property.
3. A seller is not required to use the Natural Hazard Disclosure (NHD) Statement form on:
  - a. court-ordered transfers or sales.
  - b. trustee's sales.
  - c. Both a. and b.



## Natural hazards are to be disclosed

Delivery of the hazard information, whether disclosed by the use of one form or another, is not optional. Disclosure of a natural hazard is **mandated on all types of property**. [Calif. Civil Code §1103.1(b)]

All sellers, and any seller's or buyer's agents involved, have a general duty owed to prospective buyers to disclose conditions on or about a property which are known to them and might adversely affect the buyer's willingness to buy or influence the price and terms of payment the buyer is willing to offer.

Natural hazards, or the lack thereof, irrefutably affect a property's desirability, and thus value to a prospective buyer.

If a hazard is known to any agent (as well as the seller) or noted in public records, it is to be disclosed to the prospective buyer before they enter into a purchase agreement on the property. If not disclosed, the buyer may cancel the transaction, called **termination**.

Alternatively, if the transaction has closed escrow, the buyer may rescind the sale and be refunded their investment, called **restoration**. [**Karoutas v. HomeFed Bank** (1991) 232 CA3d 767]

The need for an NHD when a prospective buyer is located, an

anticipation held by every seller's agent on taking a listing, requires the NHD to be prepared, signed and part of the property marketing package.

The NHD Statement handed to a prospective buyer is unrelated to the **environmental hazards** and **physical deficiencies** in the soil or property improvements. These hazards are disclosed by use of the Transfer Disclosure Statement (TDS) and provisions in the purchase agreement. [See **RPI** Form 304 §C(1)]

The NHD Statement discloses risks to life and property which exist **in nature** due to the property's location, risks known and readily available from the public records (planning department).



# QUIZ

1. If a natural hazard is not disclosed prior to closing escrow, the buyer may cancel the transaction, called:
  - a. waiver.
  - b. retribution.
  - c. termination.
  
2. If a natural hazard has not been disclosed and the transaction has closed escrow, the buyer may rescind the sale and be refunded their investment. This is called:
  - a. reversion.
  - b. treble damages.
  - c. restoration.
  
3. Which of the following is the Natural Hazard Disclosure (NHD) Statement handed to a prospective buyer most likely to comment on?
  - a. Physical deficiencies in the soil or property improvements.
  - b. Potential flooding and inundation areas.
  - c. Lead-based paint identified within the property.



## Investigating the existence of a hazard

Natural hazard information is obtained from the **public records**. If not retrieved by someone, the seller and seller's agent cannot make their required disclosures to prospective buyers.

To obtain the natural hazard information, the seller and the seller's agent are required to exercise **ordinary care** in gathering the information. They may gather the information themselves or the seller may employ an NHD expert to gather the information. When an expert is employed, the expert prepares the NHD form for the seller and the seller's agent to review, add any comments, sign and have ready for delivery to prospective buyers. [Calif. Civil Code §1103.4(a)]

Thus, the seller and seller's agent may obtain **natural hazard information**:

- directly from the public records themselves; or
- by employing a **natural hazard expert**, such as a geologist.

For the seller and the seller's agent to rely on an NHD report prepared by others, the seller's agent need only:

- **request** an NHD report from a reliable expert in natural hazards, such as an engineer or a geologist who has studied the public records;

- **review** the NHD form prepared by the expert and **enter** any actual knowledge the seller or seller's agent may possess; and
- **sign** the NHD Statement provided by the NHD expert and **deliver** it with the NHD report to prospective buyers or buyer's agents. [CC §1103.2(f)(2)]

When prepared by an NHD expert, the NHD report needs to also note whether the listed property is located within two miles of an existing or proposed airport, an environmental hazard zone called an *airport influence area* or *airport referral area*.

The buyer's occupancy of property within the influence of an airport facility may be affected by noise and restrictions, now and later, imposed on the buyer's use as set by the airport's land-use commission. [CC §1103.4(c)]

Also, the expert's report is to note whether the property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission.

## **Broker uses experts to limit liability**

The Natural Hazard Disclosure scheme encourages brokers and their agents to use natural hazard experts to gather and report the information available to all from the local planning department rather than do it themselves. The use of an expert to gather information from the public record and prepare the report **relieves** the seller's agent of any **liability for errors** not known to the agent to exist.

While an agent is not mandated to use of an expert, the practice is prudent as a risk mitigation step undertaken to manage liability on sales listings. The other NHD risk for seller's agents is eliminated by the timely delivery of the NHD to prospective buyers before going under contract.

Neither the seller nor any agent, whether the seller's or the buyer's agent, is liable for the erroneous preparation of an NHD Statement they have delivered to the buyer, if:

- the NHD report and form is prepared by an **expert in natural**

**hazards**, consistent with professional licensing and expertise; and

- the seller and seller's agent used **ordinary care** in selecting the expert and in their review of the expert's report for any errors, inaccuracies and omissions of which they have **actual knowledge**. [CC §§1103.4(a), 1103.4(b)]

Caution: The seller's agent's **dilatory delivery** of an expert's NHD to the buyer or the buyer's agent, after the offer has been accepted, will not protect the broker from *liability* for the buyer's lost property value due to the nondisclosure before acceptance. If the agent **knew or ought to have known** of a natural hazard noted in the readily available planning department's parcel list, the agent is exposed to liability.



# QUIZ

1. Natural hazard information is best obtained from the:
  - a. planning department.
  - b. public records.
  - c. title company.
2. The use of a natural hazard expert to gather information from the public record and prepare the report:
  - a. relieves the seller's agent of any liability for errors not known to the agent to exist.
  - b. relieves the seller of any liability for failure to note a material fact in the Transfer Disclosure Statement (TDS).
  - c. imposes an additional burden on the seller's agent to locate a qualified expert, creating a greater degree of liability.
3. While an agent is not mandated to use a natural hazard expert, the practice is:
  - a. generally more expensive than it is worth since the seller needs to pay for the natural hazard expert.
  - b. prudent as a risk mitigation step undertaken to manage liability on sales listings.
  - c. required under the California Business and Professions code.



## three-day right when handed

### Documenting compliance with NHD law

**Compliance** by the seller and seller's agent to deliver the NHD Statement to the buyer is required to be documented by a provision in the purchase agreement. [See **RPI** Form 150 §12.5; Calif. Civil Code §1103.3(b)]

However, when the seller's agent fails to disclose a natural hazard and then provides in the purchase agreement for the compliance to be an untimely "in escrow" disclosure, the seller is **statutorily penalized**.

The buyer on an in-escrow disclosure after entering into a purchase agreement and as an alternative to a money claim, has a statutory remedy allowing them to terminate the purchase agreement and avoid the transactions by exercising:

- a **three-day right of cancellation** when the NHD Statement was handed to the buyer; or
- a **five-day right of cancellation** when the NHD Statement was mailed to the buyer. [CC §1103.3(c)]

Further, delivery of the NHD after acceptance of an offer imposes liability on the seller and seller's agent, but not the buyer's agent. Liability is based on any money losses (including a reduced property

value) inflicted on the buyer by an untimely in-escrow disclosure for those buyers who chose not to exercise their right to cancel and instead proceed with performance of the agreement and close escrow before demanding restitution. [CC §1103.13; **Jue v. Smiser** (1994) 23 CA4th 312]



The section header features the word "QUIZ" in large, bold, orange letters. Above the word are three blue speech bubble icons containing white symbols: a question mark, a checkmark, and an exclamation point.

1. Compliance by the seller and seller's agent to deliver the Natural Hazard Disclosure (NHD) Statement to the buyer is:
  - a. required to be documented by a provision in the purchase agreement.
  - b. required to be documented by a provision in the listing agreement.
  - c. not required, so long as the seller and the seller's agent act in good-faith and are not aware of any natural hazards which may affect the property.
2. The buyer on an in-escrow disclosure of natural hazards after entering into a purchase agreement may terminate the purchase agreement by exercising:
  - a. a three-day right of cancellation when the Natural Hazard Disclosure (NHD) Statement was handed to the buyer.
  - b. a five-day right of cancellation when the Natural Hazard Disclosure (NHD) Statement was mailed to the buyer.
  - c. Either a. or b.



Cont'd

3. If the buyer chooses not to exercise their right to cancel when the seller delivers the Natural Hazard Disclosure (NHD) Statement after accepting an offer, the buyer may:
  - a. recover money losses including a reduced property value inflicted on the buyer by an untimely in-escrow disclosure.
  - b. collect the seller's agent's share of the fees due to their failure to properly dictate the behavior of the seller.
  - c. sue the seller for emotional distress if a natural disaster occurs within five years of their purchase of the property.



## Delivery of the NHD to the buyer

It is the **buyer's agent** who has the duty to hand the buyer the NHD Statement the buyer's agent receives from the seller or the seller's agent, called **delivery**. [Calif. Civil Code §1103.12(a)]

The **buyer's agent**, on receiving the NHD form from the seller's agent, owes the buyer a **special agency duty** to care for and protect the buyer's best interest. This is accomplished by reviewing the NHD Statement themselves for any disclosure which might affect the property's value or its desirability for the buyer. The buyer's agent then delivers the NHD to the buyer and makes any **recommendations or explanations** they may have regarding the adverse consequences of its content. [CC §§1103.2, 1103.12]

If the buyer does not have a broker, the seller's agent is responsible for delivering the NHD Statement to the prospective buyer.

The task of explaining the consequence of living with a natural hazard is the duty of a buyer's agent. If the buyer is not represented by an agent, the buyer undertakes the duty to protect themselves and investigate the consequences of the NHD information handed to them.

Delivery may be in person or by mail. Also, delivery is considered to have been made if the NHD is received by the spouse of the buyer. [CC §1103.10]

Sellers occasionally act as “For Sale By Owners” (FSBOs) and directly negotiate a sale of their property with buyers and buyer’s agents. Here, the seller is responsible for preparing or obtaining an NHD statement and delivering the NHD Statement to the prospective buyer – prior to entering into the purchase agreement.

## No warranty, just awareness

A seller’s NHD Statement is **not a warranty or guarantee** by the seller or seller’s agent of the natural hazards affecting the property. The NHD Statement is a report of the seller’s and seller’s agent’s (or the NHD expert’s) knowledge (actual and constructive) of any natural hazards affecting the property.

As a matter of proper practice, the purchase agreement offer includes a copy of the seller’s NHD Statement as an addendum (along with all other disclosures), noting the transaction was entered into in compliance with NHD (and TDS) law.

## Other disclosure statements distinguished

The NHD Statement handed to a prospective buyer is unrelated to the **environmental hazards** and **physical deficiencies** in the soil or property improvements. These hazards are disclosed by use of the Transfer Disclosure Statement (TDS) and provisions in the purchase agreement. [See **RPI** Form 304 §C(1)]

The NHD Statement discloses risks to life and property which exist **in nature** due to the property’s location, risks known and readily available from the public records (planning department).



# QUIZ

1. On receiving a Natural Hazard Disclosure (NHD) Statement from the seller's agent, buyer's agent owes the buyer a \_\_\_\_\_ to care for and protect the buyer's best interest.
  - a. general duty
  - b. special agency duty
  - c. dual agency duty
2. After the buyer's agent reviews the Natural Hazard Disclosure (NHD) Statement provided by the seller's agent, the buyer's agent is to deliver the NHD to their buyer:
  - a. and make any recommendations or explanations they may have regarding the adverse consequences of its content. speak no further on the topic as doing so constitutes providing prohibited legal advice.
  - b. speak no further on the topic as doing so constitutes providing prohibited legal advice.
  - c. recommend the buyer seek a different property if the NHD contains anything adverse.
3. If a buyer is not represented by an agent:
  - a. the seller's agent is required to make recommendations regarding the adverse consequences of the Natural Hazard Disclosure (NHD) information.
  - b. the seller and seller's agent are no longer required to provide a copy of the Natural Hazard Disclosure (NHD) Statement to



Cont'd

the buyer, though they do need to verbally inform the buyer of any obvious hazards like an active fire burning in immediate proximity of the property.

- c. the buyer undertakes the duty to protect themselves and investigate the consequences of the Natural Hazard Disclosure (NHD) information handed to them.



# NOTES