



- Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today we are walking through our California real property bar exam question. Your Bar Exam Toolbox hosts are Alison Monaghan and Lee Burgess. That's me. We're here to demystify the bar exam experience so you can study effectively, stay sane and hopefully pass and move on with your life.
- Lee Burgess: We're the cocreators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website [Career Dicta](#). Alison also runs the [Girl's Guide to Law School](#). If you enjoy this show, please leave a review on your favorite listening app and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on [BarExamToolbox.com](#) and we'd love to hear from you. With that, let's get started.
- Lee Burgess: Welcome back. Today we are walking through a California real property question. This is part of our series of podcasts talking about how to approach questions on the California bar exam.
- Lee Burgess: Today we're dealing with how to draft conclusions. Don't forget to [subscribe](#) to our podcast so you won't miss any upcoming essay discussions.
- Lee Burgess: Bar examiners want you to state how you think an issue is going to come out. You must commit to a side one way or the other, even if you are unsure of how the analysis should be done. You must commit to an outcome and seem confident when you write it down. Even though the bar examiners won't mind if you come to the wrong conclusion in the end, you still need to draw one to round out your analysis. When you get short on time, oftentimes people will leave off the conclusion part of your IRAC and that is a huge mistake. You get points for making that conclusion, so don't leave those points on the table.
- Lee Burgess: Now, before we walk through today's question, we need to do a quick review of the law you're going to want to know. Here we go.
- Lee Burgess: Private nuisance is substantial interference with the ability to use and enjoy property to an unreasonable degree. For a finding of private nuisance, courts will balance harms and interest.
- Lee Burgess: Substantial interference is offensive, inconvenient or annoying to the average person in the community. A public nuisance is a substantial interference with the right of the public generally.
- Lee Burgess: Implied consent is when the plaintiff has consented to the objected to behavior. A trespasser is a person who enters or remains upon land in possession of



another without privilege to do so. Private necessity defense to trespass exists when exigent circumstances caused the trespass. Private necessity allows the trespasser to avoid nominal damages and ejection.

Lee Burgess: Conversion is intentional substantial interference with the right of another to control personal property. Prescriptive easements are established when there is continuous use of the subservient estate for statutory period that was open and notorious and hostile.

Lee Burgess: Takings. The Fifth Amendment of the US Constitution states that the government may not take private land for public use without paying just compensation. A taking can be physical or regulatory and just compensation equals market value of the land at the time of the taking.

Lee Burgess: So that's it. Not a lot of law that you need to know, although some people will find that some of this law they haven't studied since their 1L year, so it can take a while to commit it to memory again.

Lee Burgess: All right, let's move on to reading the Bar exam question. This is a question from the [February 2018 California bar exam](#). We will link to a webpage where you can find this question in the show notes. Here we go.

Lee Burgess: Len, an excellent chef, installed a smoke house in his backyard three years ago to supply smoked meats to his friends. Len's neighbor Michelle enjoyed the mild climate and spent most of her time outdoors. She found this smoke and smells from Len's property very annoying and stopped having parties outdoors after receiving complaints from some of her guests. She asked Len multiple times to stop using the smoke house, but he rebuffed her request.

Lee Burgess: Len has frequently invaded Michelle's patio to retrieve his dog when it wandered from home. Michelle put up a no trespassing sign and a wire fence between their parcels. After the dog dug a hole under the fence, Len cut some of the wires and entered Michelle's property anyway, telling her that he had been fetching his wandering dog from her patio for at least 10 years and wouldn't stop now.

Lee Burgess: Last week, the town filed suit to condemn Michelle's land for a public park. It tendered to the court as compensation substantially exceeding the prices of comparable parcels recently sold in the neighborhood. Michelle argues that the amount is insufficient because it is substantially less than a sum she turned down for her parcel a few years back and it does not include compensation for relocation costs.



- Lee Burgess: Number one, if Michelle sues Len regarding his continued use of the smokehouse, what claims if any, may she reasonably raise, what defenses, if any, may he reasonably assert? And what is the likely outcome? Discuss.
- Lee Burgess: Number two, if Michelle sues Len regarding fetching his dog, what claims, if any, may she reasonably raise? What defenses if any, may he reasonably assert? And what is the likely outcome? Discuss.
- Lee Burgess: Number three, is Michelle likely to prevail in her argument for additional compensation from town? Discuss.
- Lee Burgess: The first thing that you should do is mark up your exam paper to assess what is legally significant about each fact and the fact pattern. All right, so let's go fact by fact.
- Lee Burgess: Len, an excellent chef, installed a smokehouse in his backyard three years ago to supply smoked meats to his friends. Len's neighbor Michelle enjoyed the mild climate and spent most of her time outdoors. This is our basic setup for the first question. Michelle likes to be outdoors, and Len likes to supply smoked meats to his friends and set up a smoke house in the vicinity of Michelle's yard. They both have particular preferences for their outdoor space and the court is likely to have to balance these interests.
- Lee Burgess: The next fact is that she found the smoke and smells from Len's property very annoying and stopped having parties outdoors after receiving complaints from some of her guests. This fact goes to whether there was a private nuisance. Michelle will claim that Len's smoke and smells were substantially interfering with her ability to enjoy her property. Because her guests were complaining too, she might try to claim public nuisance, or she might claim that her guests' complaint tend to indicate what the average person in the community would think.
- Lee Burgess: She asked Len multiple times to stop using the smoke house, but he rebuffed her requests. By asking Len to stop, Michelle is demonstrating her lack of consent.
- Lee Burgess: Len has frequently invaded Michelle's patio to retrieve his dog when it wandered from home. Here Len is going into Michelle's property for a specific reason. The fact that she's entering goes to a possible trespass and the reason he's entering goes to a potential defense.



- Lee Burgess: Next, Michelle put up a no trespassing sign and a wire fence between their parcels. Now, this is a pretty clear indicator that Michelle does not consent to Len's presence on her property.
- Lee Burgess: Next, after the dog dug a hole under the fence, Len cut some of the wires and entered Michelle's property anyway, telling her that he had been fetching his wandering dog from her patio for at least 10 years and wouldn't stop now. Because the fence is considered to be Michelle's personal property Len's destruction of it could be conversion. By continuously fetching his dog from her patio for that long, Len may have established a prescriptive easement and he may have the right to enter Michelle's property to get the dog despite the fence.
- Lee Burgess: Next, last week, the town filed suit to condemn Michelle's land for a public park. That means that the government wants to take Michelle's private land for public use. So, the town had tendered to the court as compensation a sum substantially exceeding the price of comparable parcels recently sold in the neighborhood. By exceeding the price of comparable parcels, the town is offering more than fair market value.
- Lee Burgess: Now, Michelle argues that the amount is insufficient because it's substantially less than a sum she turned down for a parcel a few years ago and it does not include compensation for relocation costs. But relocation costs are not part of the fair market value and are not required by the Fifth Amendment.
- Lee Burgess: All right, so now that we've gone through all the facts, let's look on how to actually answer this question. You would start any outliner answer by breaking up your paper into at least one section for each question.
- Lee Burgess: For the first and second question, it would be smart to break it down into cause of action and defenses. Draw a conclusion for each and then have a conclusion overall to answer each question.
- Lee Burgess: Number one, if Michelle sues Len regarding his continued use of the smokehouse, what claims, if any, may she reasonably raise and what defensive, if any, he may reasonably assert? And what is the likely outcome? Discuss.
- Lee Burgess: Number two, if Michelle sues Len regarding fetching his dog, what claims, if any, may she reasonably raise? What defenses, if any, may he reasonably assert? And what is the likely outcome? Discuss.
- Lee Burgess: Number three, is Michelle likely to prevail in her argument for additional compensation from town? Discuss.



- Lee Burgess: So, you can avoid becoming too conclusory in your writing, you may want to formulate your conclusions first so that you can keep track of what you want to say about each section of your essay and make sure that your analysis supports your conclusion. So, let's look at each question separately.
- Lee Burgess: Question number one, the issue is could Michelle sue Len for private nuisance? Now, the rule is private nuisance is substantial interference with the ability to use and enjoy property to an unreasonable degree. So, here's our analysis.
- Lee Burgess: Michelle has a possessory property right and will claim that continuous smoke and smells substantially interfere with her use and enjoyment. She will also claim that her guests' reaction indicate that this behavior is annoying to the community at large.
- Lee Burgess: But Len also has a right to use his property and the court will have to balance their interests here because he's just cooking on his property and that seems pretty reasonable.
- Lee Burgess: So our conclusion is because Michelle is no longer able to enjoy her property due to Len's smoke house, she could probably succeed in an action for private nuisance. Michelle could probably get an injunction to at least limit Len's use of the smokehouse.
- Lee Burgess: But because he has an interest in enjoying his backyard too, the injunction probably would not prevent him from using it all together. Maybe they're just going to tell him he has to do it during certain hours of the day.
- Lee Burgess: So this is one of those issues that could go either way because it's a balancing act. It would be easy to determine that the scales tip one way or the other. But remember the important thing is to make sure that your analysis supports your conclusions.
- Lee Burgess: Now, the next issue for this question is could Michelle sue Len for public nuisance? So, public nuisance is substantial interference with the right of the public generally.
- Lee Burgess: So here our analysis is although Michelle has friends who are annoyed, they would not constitute the public. And there is no mention of further public involvement here. So, a public nuisance action is not appropriate. This would be an issue that you would want to deal with quickly, not waste a lot of time on.
- Lee Burgess: So as a defense, could Len successfully assert a defense of implied consent? So implied consent is when the plaintiff has consented to the objected to behavior.



- Lee Burgess: Here Michelle actively and repeatedly objected to the use of the smokehouse. So, he could argue that by going outside anyway she was implicitly consenting to its use. But her vocal objections seem to cancel that out. So, this would not be a successful defense.
- Lee Burgess: So our overall conclusion for this one is based on a private nuisance theory. Michelle would probably be able to get an injunction to at least reduce Len's use of the smoke house.
- Lee Burgess: Now, question two deals with Len entering Michelle's property to get his dog. So, the issue is whether Len was trespassing. The rule is a trespasser is a person who enters or remains upon land in possession of another without the privilege to do so. A plaintiff can succeed in a trespass suit even if there is no actual harm done to the property.
- Lee Burgess: So the analysis is Michelle is the possessor of the patio. Len entered and remained on the property to get his dog and has been doing this for the past 10 years. Whether the Michelle has previously consented, is unclear. So, if Len will argue that he was a licensee and had privilege to enter. So, let me do that again.
- Lee Burgess: If so, Len will argue that he was a licensee and had privilege to enter. Once Michelle put up her no trespassing sign, however, she made it clear that she did not consent to Len entering her land and then any license she may have granted would have been revoked.
- Lee Burgess: So Len committed trespass every time he went and got the dog. If Michelle had previously consented, Len at least committed trespass after the sign and fence went up.
- Lee Burgess: Now, another issue is whether Len can assert a defense of private necessity. Private necessity exists when exigent circumstances caused the trespass. Private necessity allows the trespasser to avoid nominal damages and ejectment but does not prevent trespassers from being liable for actual damage caused.
- Lee Burgess: So here Len went onto Michelle's property only to get his dog. He needed to make sure his dog was safe and it did not damage Michelle's property.
- Lee Burgess: So the conclusion here is private necessity exists and Michelle cannot prevent Len from going to get his dog, but Len can still be responsible for the damage he did to the fence, because he did cut the fence.
- Lee Burgess: So we also have the issue of whether Len had a prescriptive easement to enter Michelle's property to get his dog. So, the rule here is prescriptive easements



are established when there's continuous use of the servient estate or a statutory period that was open and notorious and hostile.

Lee Burgess: So Len has been continuously fetching his dog from the patio for about 10 years. This very likely satisfies the statutory period. Michelle knew about Len's entering, so the use was open.

Lee Burgess: The question is whether it was hostile. The facts are not clear about whether Michelle allowed his behavior for a certain number of years and then revoked her permission by building the fence or if she was, for 10 years, trying to prevent men from entering the property. Given the general hostility between the neighbors, a license seems unlikely. So, Len had probably established a prescriptive easement for the limited purpose of fetching his dog.

Lee Burgess: The next issue is whether Len committed conversion when he cut the wires of the fence to enter Michelle's property. Conversion is intentional, substantial interference with the right of another to control personal property.

Lee Burgess: Len interfered with Michelle's property when he cut the wires of her fence. So, Len must pay for the damage that he caused.

Lee Burgess: So our overall conclusion for question number two is that Len probably did not commit trespass because he had a prescriptive easement. Even if he did trespass on Michelle's property, he would only be liable for actual damages because his entrance was permitted by private necessity. Either way, because Len committed conversion when he cut the wires on the fence, he is liable for the damage to Michelle's fence.

Lee Burgess: Now, question number three. The issue is whether the town provided Michelle with just compensation for her property. Now here's our rule for takings.

Lee Burgess: Takings. The Fifth Amendment of the US Constitution states that the government may not take private land for public use without paying just compensation. A taking can be physical or regulatory and just compensation equals market value of the land at the time of the taking.

Lee Burgess: So here fair market value is usually determined by looking at the price of comparable properties in the neighborhood. The town gave Michelle more than those comparable prices. The fact that Michelle had refused an equivalent offer is irrelevant. The Fifth Amendment also does not require relocation expenses, so Michelle probably will not succeed in her claim for additional compensation.



Lee Burgess: All right, so that's it. Again, number three is a very minor issue so you wouldn't want to take a lot of time doing a deep dive. You just wanted to state the rules of compensation and move on.

Lee Burgess: So that's it. Now, don't forget drawing the wrong conclusion isn't going to be as problematic as not drawing one at all. So please as you do your practice, make sure that you are writing clear and concise conclusions that are supported by your analysis. Basically, just answer the question asked by the prompt.

Lee Burgess: And with that we are out of time. I want to take a second to remind you to check out our blog at [BarExamToolbox.com](http://BarExamToolbox.com) which is full of helpful tips to help you prepare and stay sane as you study for the bar exam. You can also find information on our website about our courses, tools and one on one tutoring programs to support you as you study for the UBE or California bar exam.

Lee Burgess: If you enjoyed this episode of the [Bar Exam Toolbox podcast](#), please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. Be sure to subscribe so you don't miss anything.

Lee Burgess: If you're still in law school, you might also like to check out our popular Law School Toolbox podcast as well. And if you have any questions or comments, please don't hesitate to reach out to myself or Alison at [Lee@BarExamToolbox.com](mailto:Lee@BarExamToolbox.com) or [Alison@BarExamToolbox.com](mailto:Alison@BarExamToolbox.com). Or you can always contact us via our website contact form at [BarExamToolbox.com](http://BarExamToolbox.com).

Lee Burgess: Thanks for listening and we'll talk soon.

#### Resources:

- [February 2018 California Bar Exam Questions](#)
- [Podcast Episode 35: Tackling a California Bar Exam Essay: Corporations](#)
- [Podcast Episode 32: Tackling a California Bar Exam Essay: Wills and Community Property](#)
- [California Bar Exam Courses and Tools](#)