



Lee Burgess: Welcome to The Bar Exam Toolbox podcast. Today we are walking through a Real Property MEE question that's part of the UBE. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We are 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 co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review or rating 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. And with that, let's get started.

Lee Burgess: Welcome back. Today we are walking through a Real Property question. This is another in our series of podcasts talking about how to approach questions on the UBE. And don't forget to subscribe to our podcast so you don't miss any upcoming essay discussions.

Lee Burgess: Now, before we walk through today's question, we need to do a quick review of the law that you'll want to know for this question. A warranty deed contains three present covenants that apply to all easements on the land unless they have been excepted by the terms of the deed. And these are: Number one, the covenant of seisin, which means that the grantor owns the land that the deed is supposed to convey to the grantee. Number two, the covenant of right to convey, which means that the grantor has a right to convey the land. And number three, the covenant against encumbrances, which means that no third party has an outstanding right or interest which would negate the title that the grantor is supposed to convey. An easement is such an encumbrance.

Lee Burgess: Now, even if the third covenant is breached, courts are divided as to whether the plaintiff can recover damages when the easement is plain or known to the plaintiff. Generally, a plaintiff can only recover to the extent that the easements reduce the value of the land. When easements are recorded, purchasers have constructive notice of them and cannot force them to be moved or changed.

Lee Burgess: Through caveat emptor applied at common law, it is now generally true that a builder of a new home impliedly warrants to the buyer that the home is habitable and fit for its intended purposes. This applies to defects that are discovered within a reasonable amount of time and that are due to the builder's negligence or failure to do the work properly.



- Lee Burgess: Okay, now let's move on to reading the bar exam question. This is a question from the [February 2018 bar exam](#). We will link to a web page where you can find this question in the show notes.
- Lee Burgess: "A developer acquired a 30-acre tract of land zoned for residential use. The developer thereafter marked out 60 building lots. The developer granted various utility providers appropriate easements to install underground sewer and utility lines. These utility easements were promptly and properly recorded. Subsequently, the developer contracted with a man to build a home for the man on one of the 60 lots. The contract provided that, at closing, the developer would convey the home and its lot to the man by a warranty deed excepting all easements and covenants of record. The home was completed nine months later. At the closing, the developer conveyed the home and the lot to the man by a valid warranty deed containing the six title covenants. Notwithstanding the language in the contract, the deed contains no exceptions to these six covenants. The deed was promptly and properly recorded.
- Lee Burgess: Two months later, following a heavy storm, the man discovered rainwater in the basement level of his home. Three bedrooms were located on this level, and the influx of rainwater made all of them unusable. An expert determined that the cause of the rainwater influx was a defect in the construction of the home's foundation.
- Lee Burgess: The man contacted the developer, who denied any responsibility for the influx. Rather than argue with the developer, the man contacted a plumber, who concluded that the problem could be solved by installing a sump pump in the basement. The plumber accordingly told the man that the usual cost of installing a sump pump was \$750, but that the location of the sewer lines coming into the home created more work, raising the installation cost to \$1,500. The man told the plumber to install the pump.
- Lee Burgess: Thereafter, the man sued the developer for \$5,000 in damages for the cost of the sump pump, its installation, and damage to the floors and carpeting in the basement. He also sought additional damages for breach of one or more title covenants."
- Lee Burgess: Alright, now on to the calls of the question. There are four of them. Number one: Which present title covenants, if any, did the developer breach with respect to the utility easements? Explain.



- Lee Burgess: Number two: Assuming that there was a breach of one or more of the present title covenants, can the man recover damages from the developer for the breach? Explain.
- Lee Burgess: Three: May the man force the utility company that installed the underground sewer lines to remove them from the land? Explain.
- Lee Burgess: And number four: May the man recover \$5,000 in damages from the developer? Explain.
- Lee Burgess: What's interesting here is that although this fact pattern is relatively short – and remember, you'll only have about 30 minutes to answer – there are four separate questions to answer here. At first glance, this might make the question look more intimidating. In fact, this is actually really helpful. Four questions will really help with your issue spotting, will help you divide up your essay more easily, and when you read the fact pattern you can easily decide which facts go with which questions.
- Lee Burgess: The first thing you should do is mark up your exam paper to assess what is legally significant about each fact in the fact pattern. So, "A developer acquired a 30-acre tract of land zoned for residential use, and marked out 60 building lots." These two facts would intend to indicate that the developer owns the land at issue. This relates to the present title covenants that are part of the first question.
- Lee Burgess: "The developer granted various utility providers appropriate easements to install underground sewer and utility lines. These utility easements were promptly and properly recorded." These easements are encumbrances. Recordation gives the buyer constructive notice of encumbrances, so this fact relates to the first three questions.
- Lee Burgess: "Subsequently, the developer contracted with a man to build a home for the man on one of the 60 lots. The contract provided that, at closing, the developer would convey the home and lot to the man by a warranty deed excepting all easements and covenants of record." This is the basic setup for the transaction between the buyer, who we already know will be the plaintiff, and the developer. Note that the deed expressly stated that the warranty deed would except all easements and covenants of record. This goes back to the first and second questions.



- Lee Burgess: "The home was completed nine months later." It's interesting to note that the house took nine months to complete where it only took two months to discover the defect. This could be relevant to the fourth question.
- Lee Burgess: "At the closing, the developer conveyed the home and the lot to the man by a valid warranty deed containing the six title covenants. Notwithstanding the language in the contract, the deed contained no exceptions to these six covenants. The deed was promptly and properly recorded." This is where there is a disconnect between the contract, which stated the deed would include exceptions for the easements and covenants, and the deed, which did not include appropriate exceptions. Because there were easements on the property, this relates to the covenant against encumbrances, which is relevant to the first two questions.
- Lee Burgess: "Two months later, following a heavy storm, the man discovered rainwater in the basement level of his home. Three bedrooms were located on this level, and the influx of the rainwater made them all unusable." The fact that the three bedrooms are on this level indicates an implied warranty of habitability. Now, two months is not a particularly long time after closing. So this relates to the fourth question.
- Lee Burgess: "An expert determined that the cause of the rainwater influx was a defect in the construction of the home's foundation." A defect in construction means that the developer did something wrong in constructing the home. There is no information to indicate that there was a deterioration (this was a brand new home), or a change in the structure that would cause this defect. This also relates to the fourth question.
- Lee Burgess: "The man contacted the developer, who denied any responsibility for the influx." Now, although the developer denied responsibility, caveat emptor does not typically apply to a newly built home. This is also relevant to the fourth question.
- Lee Burgess: "Rather than argue with the developer, the man contacted a plumber, who concluded the problem could be solved by installing a sump pump in the basement. The plumber accurately told the man that the usual cost of installing a pump was \$750, but that the location of the sewer lines coming into the home created more work, raising the installation cost to \$1,500. The man told the plumber to install the pump." This is the cost for curing the defect, given the existing easements on the property. This is relevant to the fourth question and possibly also the third, since the sewer lines impeded curing the defect.



Lee Burgess: "Therefore, the man sued the developer for \$5,000 in damages for the cost of the sump pump, its installation, and damage to the floors and carpeting in the basement. He also sought additional damages for breach of one or more title covenants." This just sets up the calls of the question.

Lee Burgess: Now, notice how going through those facts already helps you formulate some of your answers. So, let's break down and answer this question. You should start any outline or answer by breaking your paper into one section for each of the four questions. So let's look at each question separately.

Lee Burgess: Number one: Which, if any, of the present title covenants did the developer breach? The rule here is: The three present covenants are a covenant of seisin, a covenant of right to convey, and a covenant against encumbrances. So our analysis here is that the developer owned the property and had the right to convey it. There are no facts stating otherwise. The developer had, however, conveyed certain easements or encumbrances for utilities, and the deed warranted that there were no encumbrances to the property. So the developer breached the covenant against encumbrances.

Lee Burgess: Now, may the man recover damages for the breach of the covenant against encumbrances? If a purchaser knows or should have known about encumbrances, he is less likely to be able to recover damages. Even if he did not know, the purchaser is likely to recover damages only to the extent that the easements reduce the value of the property. The contract for purchase mentioned the easements. The easements were also recorded. This means that the man had actual or constructive notice of the easements. Further, easements of this type are fairly typical for housing developments. Unless they are located strangely, they are unlikely to diminish the value of the property. So the man will probably not recover any damages for the breach of the covenant against encumbrances.

Lee Burgess: Now, may the man force the utility company to remove the sewer lines from the land? When an easement has been recorded, the purchaser has constructive notice of the easement. When the purchaser knows about the easement when buying the property, he may not force the easement owner to change or move the easement. That's our rule. So our analysis here is: The utility company properly recorded the sewer easement before the man purchased the property. So, the man took the property subject to the easements and cannot force the utility company to remove the sewer lines from the land.



Lee Burgess: Now, next issue: Can the man recover \$5,000 from the developer for curing the defect in the foundation and repairing the damage? Our rule here is that a builder of a new home impliedly warrants to the buyer that the home is habitable and fit for its intended purposes. This applies to defects that are discovered within a reasonable amount of time, and that are due to the builder's negligence or failure to do the work properly.

Lee Burgess: Our analysis here is: A defect in the foundation clearly breaches the implied warranty of habitability. The expert stated that the foundation was defective. This was discovered two months after the purchase, which is certainly a reasonable period of time, and the man notified the developer immediately. So in conclusion, the man should be able to recover all damages for losses resulting from the developer's breach of the implied warranty of habitability.

Lee Burgess: Now, seeing multiple questions on a short fact pattern for a short writing time may scare you. But try not to let it! Think back to this example and remember that you can use those questions to really streamline your planning and focus on your writing.

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, 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. And be sure to subscribe so you won't miss anything. If you're still in law school, you might also like to check out our [Law School Toolbox podcast](#) as well. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

RESOURCES:

[MEE & MPT Questions, February 2018](#)

[Preparing for the MEE](#)

[Private Bar Exam Tutoring](#)

[Brainy Bar Bank – UBE \(MEE + MPT\)](#)



[Podcast Episode 23: Tackling an MEE Corporations Question](#)

[Podcast Episode 27: Tackling an MEE Question: Wills and Trusts](#)

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