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January 6, 1956  
Opinion No. 56-22

REQUESTED BY: Board of Regents of the  
University and State Colleges  
of Arizona.

OPINION BY: ROBERT MORRISON, The Attorney General  
D. Kelly Turner, Assistant Attorney General

QUESTION 1: Would a conveyance by the City of Tempe  
to the Board of Regents of the University  
and State Colleges of this tract of land  
violate the terms of the government's  
grant of land to the City of Tempe so  
that some sort of approval of the transfer  
by the National Congress would be necessary?

CONCLUSION: No.

QUESTION 2: In any event, what procedure by the  
authorities of the City of Tempe would  
be necessary for the municipality to make  
such conveyance to the Board of Regents  
for stadium facilities and parking facili-  
ties to be used by the State College at  
Tempe?

CONCLUSION: Conveyance by deed containing conditions  
as to use.

Congress granted to the City of Tempe, by Public Law No. 92,  
71st Congress, certain described lands in the area of the abolished  
Papago Saguaro National Monument. The act pertinent to this  
opinion provided that,

"There is hereby granted to the City of Tempe,  
Arizona for municipal, park, recreation, or  
public-convenience purposes,"

the described land with two provisions; the first, reserving  
mineral rights, and the second, stated as follows:

"That the lands hereby granted shall be used  
by \* \* \* the city of Tempe, Arizona, only for  
the purposes herein indicated, and if the said  
lands, or any part thereof, shall be abandoned  
for such use, such lands or such part shall  
revert to the United States; and the Secretary  
of the Interior is hereby authorized and  
empowered to declare such a forfeiture of  
grant and to restore said premises to the

public domain if at any time he shall determine that the \* \* \* city has abandoned the lands for the uses herein indicated, and such order of the Secretary shall be final and conclusive; and thereupon and thereby said premises shall be restored to the public domain and freed from the operation of these grants: \* \* \* "

Subsequent to the approval of this law, April 7, 1930, Patent No.1076186 was issued on September 25, 1935, to the Mayor of the City of Tempe. We are confronted here with the question of the effect of the Congressional grant and the Patent issued thereunder. The City of Tempe has the power to sell municipally owned land under Chapter 16, Article 8, ACA, 1939. See City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 195 P.2d 562.

The Board of Regents of the University and State Colleges of Arizona has the power to purchase land. See Section 54-1602a, ACA, 1939.

The question involved thus resolves itself as to whether or not the City of Tempe has a title under the Congressional grant which it may convey. At the outset, it is to be noted that the provisions of the Enabling Act granting lands to the State for school purposes and the limitations in the Constitution as to the disposition of such lands is not applicable to this subsequently granted land. We are only concerned with the effect of a Congressional grant of public-domain limited to a special use.

The cases and authorities show that a Congressional grant constitutes the highest form of title under the law and it is not necessary to such title that a patent issue. See Grignon v. Astor, 43 U.S. 319, 11 L.Ed. 283. The Congressional Act divests the government of all property in the land; the grantee becomes the absolute owner thereof; and the subsequent issuance of a patent only furnishes documentary evidence of such title. Morrow v. Whitney, 95 U.S. 551, 24 L.Ed. 456.

It is our opinion, therefore, that the City of Tempe holds a fee in the land in question and it may, therefore, convey such land to the Board of Regents.

The fee held under the terms of the grant is not, however, an absolute fee, since it is subject to termination upon a condition subsequent dependent upon the continued use of the land within the terms of the grant. The Restatement of the Law of Property describes such a grant as one conveying an "estate in fee simple, defeasible". Such a determinable or qualified fee has all the attributes of a fee simple, including the right to convey, except that it is subject to be defeated by the happening

of the condition with the grantor retaining a possibility of reverter. See Thompson on Real Property, Vol. 4, § 2171, Notes 1 and 2, and cases therein cited.

These determinations lead to the conclusion that the condition contained in Public Law No. 92 "that the lands hereby granted shall be used by the city of Tempe" is not a limitation upon alienation of the fee but is instead a condition subsequent to the grant of the fee. We conclude, therefore, that the City of Tempe may convey the land granted to it, provided that its conveyance contains the same limitation of use as in the grant to it; that is, the Board of Regents, as grantee of the City, must use the land for recreation or public convenience purposes. The construction of an athletic stadium with adjacent parking areas is clearly within the condition.

The Act granting the land gives absolute discretion to the Secretary of the Interior to declare a forfeiture of the grant. In order to avoid any question with respect to the exercise of this power, it would appear to be desirable to obtain advance approval of the Secretary of the Interior as to the intended use of the land upon its conveyance to the Board of Regents.

The terms and conditions of the Congressional grant are not unlike the general provisions of the Act of June 14, 1926, Ch. 578, 44 Stat. 741, as amended June 4, 1954, Ch. 263, 68 Stat. 173, Title 43, U.S.C.A., Sections 869-1 through 869-3. These provisions of the United States Code relating to public lands specifically authorizes the Secretary of the Interior to grant lands to political subdivisions for specified public purposes, and the statutes further authorize the Secretary of the Interior to approve transfers of title to grantees of the original grantees. It would appear reasonable to assume that the provisions of the general law, where applicable, would apply to the provisions of the specific law making the grant to the City of Tempe.

Upon the foregoing determinations, we conclude that a conveyance by the City of Tempe to the Board of Regents of the land in question upon condition that the land be used for recreation or public convenience purposes would not violate the condition of the Congressional Act and would not, therefore, require an approval of the transfer by congress.

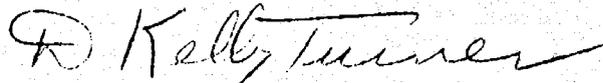
With respect to the procedure required, it would appear prudent to first obtain the approval of the Secretary of the

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Interior for such transfer and thereupon in accordance with  
State law, a transfer by deed conditioned as to use.

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