



WISCONSIN LEGISLATIVE COUNCIL

PRESERVATION OF BURIAL SITES

Legislative Council Large Conference Room
1 East Main Street, Madison

October 5, 2016
10:00 a.m. – 4:30 p.m.

[The following is a summary of the October 5, 2016 meeting of the Study Committee on Preservation of Burial Sites. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.wisconsin.gov/lc>.]

Call to Order and Roll Call

Chair Loudenbeck called the committee to order. The roll was called and a quorum was determined to be present.

COMMITTEE MEMBERS PRESENT: Rep. Amy Loudenbeck, Chair; Rep. Robert Brooks, Vice-Chair; Rep. Dave Considine; Sen. Jon Erpenbach; and Public Members Conrad Goodkind, William Green, David Grignon, Kira Kaufmann, Justin Oeth, E. Glen Porter, Bill Quackenbush, and Robert Shea, and Chad Wuebben.

COUNCIL STAFF PRESENT: Anna Henning, Senior Staff Attorney, and Amber Otis, Staff Attorney.

APPEARANCES: Ellsworth H. Brown and Chip Harry L. Brown III, Wisconsin Historical Society; and Thomas Larson, Wisconsin Realtors Association.

Approval of the Minutes of the September 8, 2016 Meeting of the Study Committee

Public Member Green moved, seconded by Public Member Porter, to approve the minutes from the committee's meeting held on September 8, 2016. The committee approved the motion by unanimous consent.

Description of Distributed Materials

Legislative Council Staff Attorney Amber Otis described the materials that had been distributed to study committee members prior to the meeting, including Memo Nos. 4, 5, and 6 prepared by Legislative Council staff, and a letter submitted by the Wisconsin Inter-Tribal Repatriations Committee.

Presentation by Invited Speaker

Thomas D. Larson, Senior Vice President of Legal and Public Affairs, Wisconsin Realtors Association

Mr. Larson summarized relevant information required to be disclosed on real estate condition reports under ch. 709, Stats. He explained that the condition report for vacant property currently includes a specific disclosure requirement for “burial sites, archaeological artifacts, mineral rights, orchards, or endangered species,” whereas the real estate condition report for real property that includes one to four dwelling units does not include a disclosure requirement specific to those features. He noted that both reports require a seller to disclose “other defects affecting the property.” He explained that as defined, “defect” includes a condition that would have a significant adverse effect on the value of the property, and may in some cases be interpreted to include a burial site. He emphasized that the real estate conditions reports only require sellers to disclose conditions of which they “are aware,” defined to mean that a seller has notice or knowledge of a condition. Thus, he said it is sometimes helpful if a condition report includes information regarding resources for obtaining additional information. He noted certain provisions in the real estate disclosure reports that may serve as examples if the committee chooses to amend the real estate condition reports.

Mr. Larson also mentioned that a case currently pending before the Wisconsin Supreme Court, *McKee Family I, LLC v. City of Fitchburg*, Case No. 2014AP1914, may have implications relevant to the committee’s discussion regarding options for private landowners whose land is affected by the burial sites preservation law. Among other questions, the Wisconsin Supreme Court will consider the legal standard to apply in suits based on a “regulatory takings” theory. In addition, Mr. Larson distributed a copy of a Florida statute that may provide a helpful example of an approach to compensating landowners whose property is affected by governmental actions.

Following his presentation, Mr. Larson responded to committee members’ questions regarding, for example: reasons for the difference between the two disclosure forms; whether the presence of a burial site qualifies as a “defect” in this context; the legal standard in suits based on regulatory takings; differences between cataloged burial sites, which would appear in a title search, and uncataloged burial sites; and disclosure provisions that may serve as useful models as the committee considers possible legislation.

Follow Up From the Wisconsin Historical Society

Ellsworth H. Brown, Ph.D., Director, and Chip Harry L. Brown III, Government Assistance and Training Specialist, Wisconsin Historical Society

Dr. Ellsworth Brown addressed various topics arising from committee discussion since the committee's initial meeting. He first addressed prior testimony before the committee regarding the potential for discovery of 20,000 to 30,000 new burial mounds in Wisconsin. He noted that most of those mounds are believed to have been lost or destroyed as they have been covered by urban development or agricultural uses. He said that approximately four or five new burial mounds are brought to the Wisconsin Historical Society (WHS)'s attention each year. Despite the presence of new technologies, he expressed that it is unlikely that large numbers of new sites will be discovered.

Next, he provided information regarding WHS's release of information concerning burial sites. He noted that WHS is legally obligated to protect that information. He mentioned that other government entities have access to WHS's database. He noted the amount of resources that may be needed to create a database. He also stated that WHS is currently working to create an alert system for potential building sites, which may be available to realtors and, perhaps, others involved in land transactions. WHS anticipates that the system will be operational within two or three months.

Finally, he discussed WHS's approach to cataloging burial sites. He described the decision process, which includes a staff recommendation to the WHS director, followed by a decision by the director.

Throughout the presentation, Dr. Ellsworth Brown and Attorney Chip Brown responded to questions from committee members on the following topics: the number of cataloged and uncataloged sites; reasons for distinguishing between cataloged and uncataloged sites, and potential implications that may arise if that distinction were eliminated; WHS's approach of obtaining a landowner's consent before cataloging a site; the statutory "likely to contain burial sites" standard for cataloging; the priority list for various interests relating to an application for a permit to disturb a burial site; resources for gathering information regarding oral histories; resources that would be required to catalog the 600 or 700 burial sites for which WHS believes it has sufficient evidence to catalog; and buffer zones surrounding burial sites.

Continuation of Discussion of Memo No. 1, "Topics for Committee Discussion" (September 1, 2016)

Chair Loudonbeck and Legislative Council staff facilitated a continued discussion of Memo No. 1, *Topics for Committee Discussion*. First, the committee considered whether any modification should be made to the statutory definition of "human remains." Some committee members stated that they would not want to modify the definition so broadly that it would apply to cremated remains that are scattered. Other committee members suggested that no

clarification is necessary, because the current definition is sufficiently broad. Senator Erpenbach suggested that the statute should be modified to specify that burial mounds are burial sites for purposes of the burial sites preservation law. Committee members generally agreed to leave the definition of “human remains” unmodified.

Second, the committee discussed whether any change should be made to the definition of “disturb.” Some committee members suggested that the definition could be modified to exempt small borings for purposes of testing. After some discussion, Chair Loudenbeck took a straw poll. A majority of committee members indicated that the definition should not be modified.

The committee then discussed the directive to catalog sites that are “likely to contain” burial sites. Vice Chair Brooks suggested that the WHS director should have the authority to catalog a site in the following situations: (1) WHS has obtained physical evidence of human remains; or (2) the landowner consents to the cataloging. Alternatively, if the “likely to contain” standard is retained, he suggested that WHS should have the burden to prove such likelihood before an administrative law judge. Other committee members suggested that physical evidence should be defined to include evidence such as mounds and grave markers, or that limiting the parameters to physical evidence would be too restrictive. After considerable discussion, the committee directed Legislative Council staff to draft a bill for the committee’s consideration that would replace the “likely to” language with thresholds for evidence similar to those enumerated under s. HS 2.03 (2) (a) to (c), Wis. Adm. Code.

Next, the committee discussed whether WHS’s typical practice of obtaining a landowner’s consent before cataloging a site should be statutorily codified. Some committee members suggested that the practice should be codified, whereas other members argued that the law should remain unchanged. Various committee members suggested that, if a requirement for landowner consent were codified, there should be exceptions or an appeals process for circumstances in which a burial site is in danger of being harmed. After additional discussion, the committee directed Legislative Council staff to prepare two alternative bill drafts. One bill draft would do the following: (1) generally require WHS to obtain a landowner’s consent before cataloging a site; and (2) allow WHS to bring an action before an administrative law judge in instances in which a landowner withholds consent. The second, alternative bill draft would retain current law but specify that WHS may (or must) take a landowner’s wishes into account when deciding whether a site should be cataloged.

Discussion of Memo No. 4, “Options for Committee Discussion” (September 23, 2016)

Chair Loudenbeck initiated a discussion of Memo No. 4, *Options for Committee Discussion*. The committee discussed requirements for including “sufficient contiguous land” surrounding a burial site when cataloging a site. Mr. Quackenbush suggested that 15 feet should be the minimum width of the buffer zone. Mr. Shea suggested that 15 feet could be a maximum width. Committee members noted that some issues that have occurred within buffer zones may be an issue of enforcement. Chair Loudenbeck suggested that Legislative

Council staff could prepare a bill draft that provides a 10-foot minimum width but includes exceptions for special situations.

Other topics in Memo No. 4 were reserved for discussion at the November 10, 2016 meeting. However, before turning to final business, the committee directed Legislative Council staff to prepare a bill draft to incorporate suggestions made during the presentation of Tom Larson. Legislative Council staff will prepare a bill draft that would add a new disclosure requirement to the real estate conditions report for real property that includes one to four dwelling units.

Plans for Future Meetings

The committee's next meeting is scheduled for **Thursday, November 10, 2016**. The committee also tentatively scheduled a fifth meeting, to be held on **Thursday, December 8, 2016**.

Other Business

There was no other business brought before the committee.

Adjournment

The meeting was adjourned at 4:30 p.m.

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