



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE STUDY COMMITTEE ON THE PRESERVATION OF BURIAL SITES

FROM: Anna Henning, Senior Staff Attorney and Amber Otis, Staff Attorney

RE: Topics for Committee Discussion

DATE: September 1, 2016

This Memo summarizes potential topics for committee discussion for the September 8, 2016 meeting of the Study Committee on the Preservation of Burial Sites. Various topics summarized below were raised by committee members and presenters during the August 2, 2016 meeting of the committee. The Memo reflects a preliminary and non-exhaustive list of issues for consideration within the committee's charge and is intended to provide a starting point for discussion.

As background for the topics below, it is important to understand that s. 157.70, Stats., the burial sites preservation law, requires the Director of the Wisconsin Historical Society (WHS) to identify and record burial sites in a catalog. In addition, as is described in greater detail in Staff Brief 2016-04, *Preservation of Burial Sites*, the law provides separate procedures for disturbances of cataloged and uncataloged burial sites.

WIDTH OF "SUFFICIENT CONTIGUOUS LAND"

For cataloged sites that are not located in a platted cemetery, the WHS Director must include sufficient contiguous land necessary to protect the burial site from disturbance. For that purpose, "sufficient contiguous land" means land that is within **at least five feet** from any part of a burial site. [s. 157.70 (2) (a), Stats.] As a matter of practice, WHS typically works with landowners to include a buffer of contiguous land that is **15 feet** from the burial site.

The committee could discuss whether to codify WHS's current practice of typically requiring a 15-foot buffer in the cataloged area surrounding a burial site. Alternatively, the committee could discuss whether current law should be amended to modify that practice.

TIMELINES

Under current law, most of the procedural timelines are set forth in WHS administrative rules rather than in s. 157.70, Stats. For example, administrative rules provide a timeline by which the WHS Director must: make a decision regarding an application to disturb a cataloged burial site if no hearing is held (30 days); return an incomplete application to an applicant for cataloging (30 days); and remove a site from the catalog following a determination that no burials exist at the site (60 days). [s. HS 2.03 (2) and (6), Wis. Adm. Code.]

The committee may wish to discuss whether any timelines should be statutorily codified, and, if so, whether they should be modified. For example, at the August 2, 2016 meeting, DOT staff suggested that the timeline for authorization to disturb, which is currently one year, could be lengthened for longer-term projects.

INFORMATION FOR LAND PURCHASERS

At the August 2, 2016 meeting, committee members inquired whether information regarding the location of burial sites could be made accessible to developers and other interested parties. As a matter of practice, WHS staff stated that the database of burial sites is not available in a publicly searchable format because of a concern regarding possible looting or vandalism. Under current law, information related to the location of any burial site, the disclosure of which is likely to result in a disturbance, is statutorily exempt from Wisconsin's Open Records Law. [s. 157.70 (2) (a), Stats.] However, current law requires a landowner to disclose the existence of burial sites on the real estate disclosure form for vacant land. [s. 709.033, Stats.] In addition, WHS staff noted that they welcome inquiries from developers regarding particular properties.

The committee may wish to consider whether the location of burial sites should be made more accessible to potential land purchasers, and, if so, how such information would be accessed.

"CATALOGED" AND "UNCATALOGED" TERMINOLOGY

Although the burial sites preservation law applies to all burial sites in Wisconsin, the standards and procedures for disturbing a cataloged burial site are generally more rigorous than the standards and procedures for disturbing an uncataloged burial site. Which standards apply depends on whether the WHS Director has cataloged a site. Following the August 2, 2016 meeting, it has been suggested that the term "uncataloged" may create the false impression that a burial site receives no protection under the law.

The committee could discuss whether the terms "cataloged" and "uncataloged" are the appropriate terms for those two types of burial sites. For example, the committee might discuss alternative ways to distinguish between burial sites that receive the most protection and burial sites that receive lesser protection. If committee members are interested in a broader discussion, the committee could also discuss whether an alternative, third category of burial sites should be created.

SCOPE OF THE REGISTRY

Current law requires the WHS Director to maintain a registry of all persons with an interest in a cataloged burial site or class of cataloged burial sites. [s. 157.70 (2) (e), Stats.] That directive does not refer to interests in uncataloged burial sites. However, the procedure for potential disturbances to uncataloged burial sites requires the Director to determine whether “the registry shows that any person has an interest” in an uncataloged site for which a disturbance is proposed. [s. 157.70 (4) (c), Stats.]

At the August 2, 2016 meeting of the committee, WHS representatives suggested that the scope of the registry could be clarified to address that discrepancy. In particular, the committee may wish to discuss whether the registry requirement should be modified to include persons with potential interests in uncataloged burial sites.

STANDARDS FOR DE-CATALOGING BURIAL SITES

WHS administrative rules provide for removing burial sites from the catalog in certain circumstances. Under the rules, upon presentation of evidence indicating that a cataloged burial site does not contain human remains or that all human remains have been removed in accordance with the statutory disturbance procedures, the WHS director must notify the owner, the applicant who initiated the catalog request, all persons on the registry for that burial site, county or local historical societies, and the local unit of government having jurisdiction over the burial site. These persons have 60 days within receipt of notification to respond to the Director regarding the new evidence. [s. HS 2.03 (6) (a), Wis. Adm. Code.]

After 60 days, if the WHS Director decides that **sufficient evidence** indicates that the cataloged site **does not contain** any burials, the Director must remove the site from the catalog and take certain other actions. [s. HS 2.03 (6) (b), Wis. Adm. Code.]

The committee may wish to discuss whether the authority and procedures for removing a site from the catalog should be codified in s. 157.70, Stats.; that authority and procedures currently appear only in the administrative rules. In addition, the committee may wish to examine whether the standard of “sufficient evidence” that a site “does not contain” any burials should be clarified. For example, the committee may wish to discuss whether any particular technology or expertise should be required.

LANDOWNER COMPENSATION

Current law does not provide for any direct compensation, other than a tax exemption, to a landowner as a result of cataloging a site on the landowner’s property. During the August 2, 2016 meeting, committee members suggested that the committee could consider providing for such compensation. Committee members also asked whether, in the absence of such compensation, the cataloging of a site could be interpreted to constitute an unconstitutional

taking of property under Article 1, Section 13 of the Wisconsin Constitution and the “Takings Clause” of the Fifth Amendment to the U.S. Constitution.¹

Those constitutional provisions generally prohibit governments from taking private property without paying “just compensation.” A key legal threshold for determining whether government action constitutes a “taking” of property is whether the action deprives a claimant of “all or substantially all” of the economic value of their property. [*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Hoepker v. City of Madison*, 563 N.W.2d 145 (1977).] The U.S. Supreme Court has held that in very limited circumstances, government regulation, such as a restriction on the use of land, may diminish a property’s value so significantly that the restriction amounts to a full taking of the property, triggering the constitutional requirement for payment of just compensation. However, the court has held that the U.S. Constitution does not generally require compensation for partial regulatory takings.

Whether a cataloging decision would be interpreted to constitute a taking is a fact-specific question. However, it is unlikely that cataloging would be interpreted to constitute a taking where only a portion of a land parcel is cataloged.

The committee may wish to discuss whether the law should be modified to provide a statutory requirement for compensation to landowners, and, if so, whether the amount of such compensation should be based on the fair market value of the property or should be a lesser amount, and how the funding would be structured.

FOUNDATIONAL CONCEPTS AND DEFINITIONS

During the August 2, 2016 meeting of the committee, presenters and others suggested that certain definitions in the burial sites preservation law could be created or modified to provide greater clarity. Certain other issues relating to the scope of the law were also raised.

Responsibility to Catalog Areas “Likely to Contain” Burial Sites

The WHS Director must identify and record in a catalog “burial sites in this state.” The director also must include in the catalog burial sites that are **likely to be** of archaeological interest and areas **likely to contain** burial sites. [s. 157.70 (2) (a) and (b), Stats.]

The “likely to” language in the cataloging directive does not appear elsewhere in the law, including in an administrative code provision that allows for de-cataloging of sites in certain circumstances. (See discussion below for more information regarding standards for de-cataloging.) Instead, the law sets forth procedures applicable to cataloged and uncataloged “burial sites,” defined to mean “any place where human remains **are** buried.” [s. 157.70 (1) (b), Stats.] That definition does not appear to allow for the same degree of uncertainty applicable to the cataloging requirement. Thus, an arguable discrepancy exists between the scope of sites to be cataloged and the scope of sites to which the disturbance procedures apply.

¹ The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. [*Chicago, B. & W.R.R. v. Chicago*, 166 U.S. 226, 241 (1897).]

The committee may wish to discuss whether the law should be modified to clarify the level of certainty required for cataloging or the degree to which the disturbance procedures should apply to sites that are “likely to” contain burial sites.

Definition of “Human Remains”

As mentioned, current law defines “burial site” to mean “any place where human remains are buried.” “Human remains” is further defined to mean “any part of the body of a deceased person in any stage of decomposition.” [s. 157.70 (1) (b) and (f), Stats.] The law does not further define “decomposition.”

The committee may wish to discuss whether to clarify the definition of human remains. For example, the study committee might consider clarifying whether “any stage of decomposition” includes remains that were buried as ash. If the committee chose to clarify that the definition does not encompass cremated remains, it may wish to explore whether any alternative requirements or procedures should apply to a site in which human remains are fully decomposed but the site maintains sacred value or archeological interest.

That discussion may relate to the discussion above regarding the degree of uncertainty allowed with respect to the cataloging and preservation of a burial site. Information regarding credible scientific or technological methods for determining the presence of human remains may also be relevant to that discussion.

Definition of “Disturb”

With limited exceptions, no person may intentionally cause or permit the disturbance of a burial site or cataloged land contiguous to a cataloged burial site, except as provided under the uncataloged and cataloged procedures set forth in the law. [s. 157.70 (2r), Stats.] The term “disturb” includes “defacing, mutilating, injuring, exposing, removing, destroying, desecrating or molesting in any way.” [s. 157.70 (1) (e), Stats.]

At the August 2, 2016 meeting of the committee, representatives of the Department of Transportation (DOT) suggested that the definition of “disturb” could be modified to exclude certain activities with relatively minor impacts, such as sign replacement, which do not disturb the existing aggregate material.

The committee may wish to discuss whether the definition of “disturb” should be modified in that manner. Alternatively, the committee could consider whether a narrow exception to the general prohibition regarding disturbance of burial sites should be created.

LANDOWNER AGREEMENT REGARDING CATALOGING

As discussed above, the WHS Director must identify and record in a catalog burial sites, generally; burial sites likely to be of archaeological interest; and areas likely to contain burial sites. [s. 157.70 (2) (a) and (b), Stats.] WHS administrative rules also allow for persons other than the Director to request to add a burial site to the catalog. [s. HS 2.03 (1), Wis. Adm. Code.] In addition to third party applications, the WHS Director is authorized to use a special inspection warrant and catalog a burial site in the Director’s discretion. [s. 157.70 (2) (a), Stats.]

Current law does not expressly authorize WHS to take a landowner's wishes into account when deciding whether a particular site should be cataloged. As a matter of practice, however, WHS staff state that they generally do not catalog a burial site if the landowner is not interested in having the site cataloged.

The committee could discuss whether WHS's current practice should be codified, or, whether current law should be otherwise modified to clarify the extent to which the WHS Director may (or must) take a landowner's wishes into account when deciding whether a site should be cataloged.

MISCELLANEOUS PROCEDURAL CHANGES

The committee may also wish to discuss the following suggestions made by presenters and committee members during the August 2, 2016 committee meeting:

- Allow documents required to be submitted to WHS to be submitted electronically.
- Authorize a tribal organization to determine the appropriate disposition of remains approved for excavation.
- Modify notice requirements in the procedure for potential disturbances to cataloged burial sites to reflect WHS's current practice of providing notice directly to interested persons on the registry rather than requiring landowners to provide such notice.
- In the procedure for disturbances to cataloged burial sites, remove a requirement to provide an analysis during the disposition process and clarify that analysis is required during an earlier stage in the procedure.

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