



## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 3

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

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

RE: Appellate Procedure for Determinations Under Wisconsin's Current Burial Sites Preservation Law

DATE: September 1, 2016

This Memo summarizes the appellate procedures that apply to the following determinations under Wisconsin's burial sites preservation law: adding a burial site to the catalog; removing a burial site from the catalog; and granting or denying a permit to disturb a cataloged burial site.

### **APPELLATE REVIEW OF DECISIONS REGARDING THE ADDITION OF A BURIAL SITE TO THE CATALOG**

#### **Background**

The Wisconsin Historical Society (WHS) director is authorized to utilize a special inspection warrant to identify and record burial sites in a catalog.<sup>1</sup> 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.]

Administrative rules promulgated by WHS allow persons, other than the director, to request to add a burial site to the catalog. If an application is inaccurate, incomplete, or inadequate, the director must return the request to the applicant within 30 days of receipt with an explanation of the deficiencies. If the application is complete and accurate to the best of the

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<sup>1</sup> However, according to WHS staff, WHS's current practice is to not catalog a burial site against a landowner's wishes.

director's knowledge, the director is required to enter the site into the state catalog of burial sites. [s. HS 2.03 (3), Wis. Adm. Code.]

When a particular burial site has been cataloged and recorded with the county register of deeds, the director must notify the applicant, owner, all registered persons for that burial site or class of burial sites, the local unit of government, and the relevant historical societies. [s. HS 2.03 (5), Wis. Adm. Code.]

### **Procedure for Review**

Neither s. 157.70, Stats., the burial sites preservation law, nor corresponding administrative rules specifically provide for appellate review of the director's decision to add a burial site to the catalog or deny an application for the addition of a burial site to the catalog. Thus, in the event that a landowner contests the cataloging of a burial site on the landowner's property, the general procedure set forth in ch. 227, Stats., for review of agency decisions would likely be held to apply.

Chapter 227, Stats., sets forth an administrative procedure for a person to appeal a state agency's decision that adversely affects the person in a contested case hearing. Contested case hearings are often required in disputes with state agencies before relief can be sought in circuit court. Under ch. 227, any person filing a written request with an agency for a hearing generally has the right to a contested case hearing, if all of the following apply:

- A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction.
- There is no evidence of legislative intent that the interest is not to be protected.
- The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction.
- There is a dispute of material fact.

[s. 227.42 (1), Stats.]

General procedures regarding contested case hearings are set forth in ch. 227, Stats., and in administrative rules promulgated by the Division of Hearings and Appeals in the Department of Administration. Among other aspects of contested case proceedings, those procedures govern the selection of a hearing examiner, notice to parties, rules of evidence, and remedies.

Parties generally may seek judicial review following a final decision in a contested case hearing. A petition for judicial review typically must be filed within 30 days after the administrative law judge's decision has been served on all parties. Judicial review is subject to procedures set forth in ch. 227, Stats., and it is generally confined to the record developed during the contested case hearing. [ss. 227.52, 227.53 (1) (a) 2., and 227.57 (1), Stats.]

## **APPELLATE REVIEW OF DECISIONS REGARDING REMOVAL OF A BURIAL SITE FROM THE CATALOG**

### **Background**

The current administrative rules contain the procedure for removal of a burial site from the catalog. Upon presentation of evidence indicating that a cataloged burial site does not contain human remains or 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 director decides that sufficient evidence indicates that the cataloged site does not contain human remains, the director must do all of the following: (1) remove the site from the catalog; (2) submit a request to the register of deeds to delete or cancel the documentation for a burial site on that property; and (3) 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 of the decision to remove the burial site from the catalog. [s. HS 2.03 (6) (b), Wis. Adm. Code.]

### **Procedure for Review**

The administrative rules provide for review of the director's decision by the Burial Sites Preservation Board (the Board). A person has 30 days from the date of the director's decision to appeal the decision to the Board. The director's decision to remove a burial site from the catalog is suspended during the appeals process. [s. HS 2.03 (6) (c), Wis. Adm. Code.]

A party seeking to appeal the Board's review of the director's decision would need to invoke the procedures set forth in ch. 227, Stats., described above.

## **APPELLATE REVIEW OF DECISIONS TO GRANT OR DENY A PERMIT TO DISTURB A CATALOGED BURIAL SITE**

### **Background**

Either the WHS director or an administrative law judge, if requested, determines whether to grant a permit to disturb a cataloged burial site. [s. 157.70 (5), Stats.] Standards and procedures governing those decisions are set forth in the burial sites preservation law and corresponding administrative rules.

### **Procedure for Review**

The Board, as it deems necessary or by request of any party, may review determinations of the director or the administrative law judge regarding a permit to disturb a cataloged burial site. [s. 157.70 (2m) (d), Stats.] Section HS 1.04, Wis. Adm. Code, sets forth procedures for

appealing the director or administrative law judge's decision, including requirements for the form, notice, and answer in an appeal. [s. 157.70 (5) (c) 5., Stats., and s. HS 1.04 (1), Wis. Adm. Code.]

To appeal, a party must file a written petition for appeal to the Board within 15 business days of the director or administrative law judge's mailing of its notice of determination. [s. HS 1.04 (1), (2), Wis. Adm. Code.] The Board must provide notice to all other parties and respondents with 10 business days of receiving the petition for appeal. [s. HS 1.04 (4), Wis. Adm. Code.] The respondent must file a written response within 10 business days of receiving notice. [s. HS 1.04 (5), Wis. Adm. Code.]

On appeal, the Board reviews the existing record and may not accept evidence that was not introduced at a previous hearing. [s. HS 1.04 (6) (c), Wis. Adm. Code.] The vice-chair, rather than the chairperson, must preside if the chairperson is the director and the director's decision is the basis for the appeal. [s. HS 1.04 (6) (b), Wis. Adm. Code.]

If a party seeks relief from the Board's review of the director or administrative law judge's decision to grant or deny the permit, the party may petition for judicial review. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, are subject to review by the circuit court under procedures set forth in ch. 227, Stats. [ss. 227.52 and 227.53, Stats.]

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