



WISCONSIN LEGISLATIVE COUNCIL

PRESERVATION OF BURIAL SITES

Room 412 East
State Capitol, Madison

November 10, 2016
10:05 a.m. – 4:25 p.m.

[The following is a summary of the November 10, 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 not available due to technical difficulties.]

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.

COMMITTEE MEMBERS EXCUSED: Public Member Chad Wuebben.

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

Approval of the Minutes of the October 5, 2016 Meeting of the Study Committee

Representative Brooks moved, seconded by Public Member Conrad Goodkind, to approve the minutes from the committee's meeting held on October 5, 2016. The committee approved the motion by unanimous consent.

Description of Distributed Materials

Anna Henning, Senior Staff Attorney, Legislative Council staff, described the materials distributed to committee members prior to the meeting, which included six bill drafts and a memorandum from the Department of Transportation (DOT). Ms. Henning noted a letter from Ho-Chunk Nation dated November 9, 2016, was placed at each committee member's seat, and explained that the Wisconsin Historical Society (WHS) would provide handouts later in the meeting. WHS's handouts included memoranda titled "Documenting and Cataloging Extant Mounds" and "Status of Burial Mound Sites in Wisconsin," as well as two sample WHS files for cataloged burial sites.

Discussion of Bill Drafts

Chair Loudenbeck initiated discussion of the six bill drafts. WHS representatives were available to answer questions.

LRB-0401/P2, relating to cataloging land contiguous to a burial site

Ms. Henning described LRB-0401/P2, which increases the minimum width requirement for land contiguous to a cataloged burial site (also referred to as a "buffer zone") from five feet to 10 feet. The bill draft provides an exception to the minimum width requirement of 10 feet for situations in which the director determines, based on the unique characteristics of the land, that a shorter distance is sufficient to protect the burial site from disturbance.

The committee discussed the bill draft, with a majority of members expressing support for the bill draft as written. Some members expressed support for maintaining both the current minimum width of five feet and the current practice, in which WHS seeks landowner agreement for a 15-foot buffer zone.

LRB-0402/P2, relating to registry of and notice to persons having an interest in a burial site and submission of electronic documents to the State Historical Society and Burial Sites Preservation Board

Ms. Henning described LRB-0402/P2, which makes the following three changes to current law: corrects the scope of the registry of interested persons to include persons with an interest in uncataloged sites; requires WHS, rather than an applicant requesting a permit to disturb, to notify any interested person shown on the registry for the potentially disturbed burial site; and requires WHS and the Burial Sites Preservation Board to accept electronic submissions of documents required under s. 157.70, Stats.

In their discussion, committee members confirmed that the bill draft did not change any of the notice requirements to interested persons, but rather only changed the scope of those included in the registry. Committee members also discussed whether WHS had sufficient resources to accept electronic documents. The committee did not suggest any changes to the bill draft.

LRB-0404/P2, relating to disclosure of burial sites located on residential real estate

Amber Otis, Staff Attorney, Legislative Council staff, described LRB-0404/P2, which requires a seller of property that includes one to four dwelling units to disclose to a prospective buyer whether the owner is aware of one or more burial sites on the property, and further directs the prospective buyer to contact WHS for more information. The bill draft adds this disclosure to the "Real Estate Condition Report" form used in residential real estate transactions.

Committee members confirmed with WHS representatives that WHS would provide all information related to a property if a prospective buyer or a real estate agent contacted WHS pursuant to this disclosure. Committee members confirmed that this disclosure applied to all real estate transactions for property including one to four dwelling units, and that it is very rare for a seller to refuse to complete a "Real Estate Condition Report." Public Member Goodkind noted that the disclosure's contact information for WHS required revision. Committee members did not suggest any other changes to the bill draft.

LRB-0412/P2, relating to the preservation of burial sites

Ms. Henning described the bill draft, which changes current law governing the director's duty to catalog. First, the bill draft repeals the WHS director's duty to catalog sites "likely to be of archaeological interest" and areas "likely to contain burial sites." Second, the bill draft lists types of evidence for the director to consider when determining whether to catalog a burial site. Finally, the bill draft allows, but does not require, WHS to obtain a special inspection warrant to carry out its duties under s. 157.70, Stats.

The committee discussed various components of the bill draft, several of which resulted in requested changes. First, committee members analyzed the "grave marker" definition and the adequacy of the definition's non-exclusive list of specific indications of a burial. The committee directed the Legislative Council staff to remove "stone" and "prehistoric" from the definition.

Second, the committee discussed whether the director's consideration of the evidence should be discretionary or mandatory. The committee reached consensus that the director's review of all types of evidence should be mandatory.

Third, the committee discussed whether to require that oral forms of evidence come from a reliable informant, or whether the director inherently considers the reliability of all evidence when determining whether to catalog a site. After considerable discussion, a majority of the committee reached consensus not to amend the bill draft on this issue.

Next, the committee discussed the bill draft's discretionary special inspection warrant procedure. The committee instructed the Legislative Council staff to modify the bill draft to require WHS to obtain a special inspection warrant when a landowner denies consent for WHS to enter property to identify and inspect a burial site.

Finally, for consistency with defined terms, the committee directed Legislative Council staff to replace the word “bones” with “remains” on page 4, line 7 of the bill draft.

LRB-0413/P2, relating to the preservation of burial sites, and LRB-0414/P2, relating to the preservation of burial sites

Ms. Otis described, and the committee addressed, LRB-0413/P2 and LRB-0414/P2 jointly, as they constitute two, alternate bill drafts in response to previous committee discussion regarding landowners’ consent.

LRB-0413/P2 creates an exception to the WHS director’s duty to catalog burial sites in situations where the landowner does not consent to cataloging. Under the bill draft, if the owner denies consent, the director may not catalog the burial site without a declaratory judgment, which the director may pursue in circuit court. If the director seeks a declaratory judgment, the director would bear the burden of proof in that proceeding. The committee discussed the public policy implications of requiring a judicial, rather than administrative, determination. The committee also discussed the need for transparency for and input from the landowner throughout process of deciding whether to catalog a burial site. After robust discussion, the committee reached general consensus for the Legislative Council staff to prepare a revised bill draft that would provide the landowner the right to request a hearing prior to the director’s decision to catalog a burial site.

LRB-0414/P2 creates an exception to the director’s duty to catalog by permitting, but not requiring, the director to refrain from recording land in the catalog if cataloging is against the wishes of the landowner. The committee’s discussion did not focus on this bill draft.

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

Chair Loudonbeck and Legislative Council staff facilitated continued discussion of the options set forth in Legislative Council staff Memo. No. 4.

First, the committee discussed whether terms other than “cataloged” and “uncataloged” would better describe the distinction between the different levels of protection afforded to burial sites. Public Member Green offered “verified” and “unverified” as a set of alternate terms, which would highlight that cataloged sites generally have more verified information. The committee also contemplated whether the current levels of protection for each category should be modified or whether the distinction should be removed entirely. The committee did not reach consensus on this issue.

Second, the committee discussed the option to increase tribal involvement in decisions relating to excavation and disposition of tribal human remains and objects related to the burial. Public Member Quackenbush identified current tribal groups that could be vested with the power to make such decisions. Ultimately, the committee directed the Legislative Council staff to prepare a bill draft granting such power to the Wisconsin Inter-Tribal Repatriations Committee, or its designee. On a related topic, the committee discussed the distributed letter

from Ho-Chunk Nation, which suggests modifying the selection process for tribal members of the Burial Sites Preservation Board. The committee requested a bill draft conforming to the letter's second option, which would allow all Wisconsin-resident tribes or bands to submit names for selection as the three tribal board members.

Third, the committee discussed whether to codify in statute a provision allowing for removal of a burial site from the catalog in certain circumstances. The committee reached general consensus that a removal provision should be codified, but discussed whether to amend the standard and procedure for removal from that which is currently provided in the administrative code. Committee members discussed several situations that may justify de-cataloging, such as excavation, natural disasters, or new technology. After ample discussion, the committee requested a bill draft that codifies a removal procedure similar to that which currently exists in administrative code, but would require an applicant to present evidence of an excavation or a natural disaster, or newly discovered evidence that would undermine the credibility of the evidence supporting the decision to catalog the site.

Next, the committee discussed the option to compensate landowners if a burial site is cataloged on the landowner's property. Chair Loudenbeck and Ms. Henning briefed the committee on research related to potential funding sources, all of which had several described limitations. Committee members suggested establishing public-private partnerships, or a fund that would accept private donations with a tribal or state matching donation. Chair Loudenbeck noted that WHS has a duty under current law to make recommendations concerning burial sites on private property for acquisition by the state or other public agencies to preserve the burial sites. She suggested that WHS could be required to include those recommendations in its biannual budget request or in an annual report to the Legislature.

Finally, the committee briefly discussed the DOT memorandum. Chair Loudenbeck sought committee members' input on three topics: defining the term "notify" to include several forms of communication; allowing for existing infrastructure improvements that do not disturb the human remains or surface characteristics of a burial site; and specifying a 30-day time period in which the WHS director must respond to a request to disturb an uncataloged burial site. The committee agreed to review bill drafts at the next meeting pursuant to the first and third suggestions.

Plans for Future Meetings

The committee's next meeting is scheduled for **Thursday, December 8, 2016**.

Other Business

There was no other business brought before the committee.

Adjournment

The meeting was adjourned at 4:25 p.m.