

TAGLaw International Lawyers

Susan E. Lovern  
Direct Telephone  
414-287-1286  
slovern@vonbriesen.com

October 7, 2024

**VIA CERTIFIED MAIL & FAX (608-264-9885)**

Division of Hearings and Appeals  
5005 University Avenue, Suite 201  
Madison, WI 53705-5400

Re: Request for Review Hearing on Disposition Decision – Froedtert Tract #2 – MI-0527/BMI-0076

To Whom it May Concern:

Our firm represents Froedtert Memorial Lutheran Hospital, Inc. (“Froedtert Hospital”) with regard to the Froedtert Burial Tract #2 (MI-0527/BMI-0076). On behalf of Froedtert, and pursuant to Wis. Stat. § 227.42, Froedtert Hospital writes to appeal the April 17, 2024 Memorandum of Disposition Decision issued by Wisconsin Historical Society Director Christian W. Overland and subsequent September 9, 2024 Memorandum Finalizing the April 17, 2024 Disposition Decision. Copies of both memorandums are attached for reference.<sup>1</sup> Froedtert Hospital respectfully requests a contested case hearing on this matter.

Director Overland’s Memorandum of Disposition Decision issued pursuant to § 157.70(6), Wis. Stats. approved the Descendent Community of Milwaukee County Grounds Cemeteries, Inc. application and plan for individual reburial of the 831 individuals in the assemblage, as well as construction of a \$250,000 associated memorial obelisk. The total cost of said reburial plan is estimated between \$3,490,200 and \$3,988,800 (not including the obelisk), nearly twice the approximate cost of the original exhumation in 2013.

Pursuant to Director Overland’s Memorandum of Disposition Decision, “Froedtert Hospital, as the disturbing entity, must pay the cost associated with the dignified reburial, including a marker with the names of the individuals.” It was Milwaukee County, however that bore the costs

---

<sup>1</sup> Froedtert previously filed a Request for Wisconsin Burial Sites Preservation Board Review, attached for reference, however the Burial Sites Preservation Board (“BSPB”) reportedly elected not to review the director’s decision at a meeting of the BSPB on August 8, 2024. Despite being an interested party and also a party on the registry of interested persons for the Froedtert Burial Tract, Froedtert was not provided with notice of the August 8, 2024 BSPB meeting, and because it was an off-schedule special meeting, no representative from Froedtert was present.

associated with the original exhumation of the human remains, as addressed in the April 18, 2013 Findings of Fact, Conclusions of Law, and Order (which is enclosed) granting Froedtert Hospital's request for a permit to disturb the subject burial site located on the Milwaukee County grounds.

As an interested party to this matter with a substantial interest injured by the agency's action, Froedtert Hospital respectfully requests review of the Director's Disposition Decision for the following reasons:

- The final disposition process did not follow a fair and prescribed process;
- Froedtert Hospital was not afforded adequate notice and due process during the final disposition decision process;
- The decision relies upon an erroneous interpretation of relevant law; and
- The decision exercises discretion outside the range of discretion delegated by law.

In addition, to date, the BSPB and the Wisconsin Historical Society ("WHS") have not responded to or complied with certain open records requests relating to the final disposition decision process and decision, the results of which are likely to further inform the issues on which Froedtert Hospital's request for hearing is based.

Very truly yours,

von BRIESEN & ROPER, s.c.

/s/ Susan E. Lovern

Susan E. Lovern  
SEL:jmp

Enclosures

cc: Jonathan J Whitney, Attorney for Burial Site Preservation Board, ([whitneyjj@doj.state.wi.us](mailto:whitneyjj@doj.state.wi.us))  
Sarah K Larson, Attorney for Wisconsin Historical Society, ([sarahk.larson@wisconsin.gov](mailto:sarahk.larson@wisconsin.gov))  
James G. Davies, Attorney for Milwaukee County, ([James.Davies@milwaukeecountywi.gov](mailto:James.Davies@milwaukeecountywi.gov))  
Angela Chaput Foy, Administrative Law Judge, ([angela.chaputfoy@wisconsin.gov](mailto:angela.chaputfoy@wisconsin.gov))

Burial Sites Preservation Board  
c/o Wisconsin Historical Society  
816 State Street  
Madison, WI 53706-1482

Wisconsin Historical Society  
816 State Street  
Madison, WI 53706-1482



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

---

In the Matter of the Burial Site Disturbance Permit  
Application of Froedtert Memorial Lutheran  
Hospital

---

Case No.: SHS-13-0001

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

The parties in interest pursuant to Wis. Stat. §§ 227.47 and 227.53(1)(c) are and this decision is addressed and sent by email only to:

**State Historical Society of Wisconsin** by,  
Attorney Bruce Olsen  
Assistant Attorney General  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857  
(608) 266-2580  
olsenba@doj.state.wi.us

**Milwaukee County** by,  
Attorney Colleen Foley  
Office of Corporation Counsel  
901 North 9<sup>th</sup> Street  
Courthouse, Room 303  
Milwaukee, WI 53233  
(414) 278-4300  
colleen.foley@milwcnty.com

**Froedtert Hospital** by,  
Attorney Diane Welsh  
von Briesen & Roper, S.C.  
Three South Pinckney Street, Suite 1000  
Madison, WI 53703  
(608) 661-3961  
dwelsh@vonbriesen.com

Attorney Susan Lovern  
von Briesen & Roper, S.C.  
411 East Wisconsin Avenue, Suite 1000  
Milwaukee, WI 53202-4427  
(414) 305-1286  
slovern@vonbriesen.com

**Wisconsin Archaeological Survey** by,  
Stephen C. Wagner, President  
642 23<sup>rd</sup> Street North  
La Crosse, WI 54601  
(608) 354-8192  
Stephen@wisconsinarchaeology.org



This decision is addressed and sent by email only to the following participant:

**Barb Agnew**

2276 North 63<sup>rd</sup>

Wauwatosa, WI 53213

(414) 454-0222

barb@themonarchtrail.org

This decision is addressed and sent by U.S. Mail only to the following participant:

**Robert J. Felber**

8724 West Magnolia Street

Milwaukee, WI 53224

(414) 355-6252

Preliminary Recitals

On September 7, 2012, Froedtert Memorial Lutheran Hospital ("Froedtert Hospital") applied to The Wisconsin State Historical Society ("Historical Society") for a permit to disturb a catalogued burial site that is subject to Wisconsin's burial site preservation law. The burial site is known at the "Pauper Cemetery – Froedtert Hospital Tract" and is located in the City of Wauwatosa, County of Milwaukee, Wisconsin. The cemetery has been recorded by the Milwaukee County Register of Deeds and is designated by the Historical Society as archaeological site MI-0527 and burial site BMI-0076.

People with a registered interest in the burial site were notified of Froedtert Hospital's permit application. In response to that notice, the Historical Society received a hearing request from the Wisconsin Archaeological Survey. On January 8, 2013, the Historical Society issued an Order for Hearing, thereby formally requesting that the Division of Hearings and Appeals conduct a hearing. I was assigned as the hearing officer and conducted a hearing on February 15, 2013.

At hearing, several preliminary matters arose and were addressed. First, all parties stipulated and agreed to waive the closed session provision of Wis. Stat. § 157.70(5)(c)1 since the location of the subject burial site was already public knowledge. Second, Froedtert Hospital moved for reconsideration of its Motion to Clarify Roles of Interested Persons, from which I ultimately decided that Ms. Agnew and Mr. Felber were properly named as participants rather than parties based upon the arguments presented at hearing. Third, sequestration of witnesses was not requested or ordered. Fourth, and finally, Milwaukee County raised for the first time an issue of whether Froedtert Hospital's permit application could lawfully be granted under Wis. Stat. § 157.70(6m). The parties briefed this issue and on March 5, 2013, I issued an order declining to exercise jurisdiction over it.

The parties submitted a stipulation of facts and timely submitted post-hearing closing briefs. Pursuant to Wis. Stat. § 157.70(5)(c)2, a decision is due no later than April 22, 2013.

Findings of Fact

1. Milwaukee County is the owner of the Milwaukee County Institution Grounds (“Grounds”), which have been used for a variety of purposes over the years. Historically, the Grounds included, among other things: an orphanage, an insane asylum, a sanatorium for tuberculosis sufferers, a hospital, an almshouse and a poor farm. The Grounds were also used to bury people who died while in the county institutions, as well as individuals who lacked resources to pay for their burial. (Stipulation of Facts ¶¶ 1, 2, 5) The cemetery was in use by 1882 and was ultimately abandoned in the 1920s. (Testimony of Chip Brown; Record Ex. 13) It is unmarked. (Record Ex. 13)
2. Currently, the Grounds are home to the Milwaukee County Research Park, the Technology Innovation Center, and the Milwaukee Regional Medical Center. (Stipulation of Facts ¶ 3) The Milwaukee Regional Medical Center is a consortium of six health care institutions that includes Froedtert Hospital, the Medical College of Wisconsin, Children’s Hospital and Health Systems, the Blood Center of Wisconsin and Blood Research Institute, the Curative Care Network, and the Milwaukee County Behavioral Health Division. (Stipulation of Facts ¶ 4) It also operates the Flight for Life air ambulance program, which serves eastern Wisconsin and northern Illinois. (Id.)
3. In approximately the 1970s, Milwaukee County entered into long-term leases with various Milwaukee Regional Medical Center member organizations, including Froedtert Hospital. (Balzer testimony; Stipulation of Facts ¶ 5)
4. In 1980, Froedtert Hospital opened as a not-for-profit organization, whose mission, in partnership with the Medical College of Wisconsin, “advances the health of the communities [they] serve through exceptional care enhanced by innovation and discovery.” (Stipulation of Facts ¶ 6.; Buck testimony; Froedtert Hospital Ex. 3)
5. In 1991, Milwaukee County undertook a roadway construction project on the Grounds and discovered a burial site. (Stipulation of Facts ¶ 36) The Historical Society permitted Milwaukee County to disturb the burial site to the extent necessary for the construction project. (Id.) Approximately 1,700 graves were exhumed and ultimately, the University of Wisconsin – Milwaukee acquired possession of the skeletal remains. (Testimony of Leslie Eisenberg; Froedtert Hospital Ex. 1) It was discovered that several bodies and/or coffins were stacked atop one another and that coffins contained multiple bodies and/or body parts. (Record Ex. 13) Milwaukee County conducted a survey of the remaining burial site, which estimated that approximately 1,300 graves were still there. (Stipulation of Facts ¶38; testimony of Leslie Eisenberg)
6. The remaining 1,300 graves are located along the southern boundary of the land leased to Froedtert Hospital, where the land meets with Doyne Avenue. (Froedtert Hospital Ex. 1, Figures 1 and 2) The majority of the burial site lies on what is currently vacant land near the hospital entrance and a parking garage. (Id.) However, a small portion of the burial site is already covered by one of Froedtert Hospital’s parking garages and about one-third of the burial site is already covered by Doyne Avenue. (Id.)



7. Froedtert Hospital has historically expanded its facilities in manners which avoided the remaining burial site. (Balzer testimony; Froedtert Hospital Ex. 4) However, Froedtert Hospital now feels it is necessary to expand in a manner that would require disturbing approximately 65 percent of the remaining burial site. (Id.; Froedtert Hospital Ex. 1) Specifically, Froedtert Hospital has proposed to construct a new building with underground parking. (Id.) The construction would not disturb the graves already covered by a parking garage and Doyne Avenue. (Id.)
8. In 1995, Milwaukee County and Froedtert Hospital entered into an Amended and Restated Lease Agreement. (See attachment to Milwaukee County Brief regarding (6m) issue, Amended and Restated Lease Agreement dated December 21, 1995; hereinafter "1995 Lease") As relevant here, the 1995 Lease includes the following provisions:
  - a. Froedtert Hospital's construction activities are not limited and Milwaukee County is obligated to bear the financial costs of any excavation of human remains that *would be required as a result of such construction activities.* (1995 Lease at p. 12)
  - b. Froedtert Hospital's annual rental payments to Milwaukee County for the leased land are based upon a percentage of Froedtert Hospital's annual operating cash flow. (1995 Lease at pp. 6-9)
  - c. Froedtert Hospital must use the premises consistent with the Land Use Plan. (1995 Lease at p. 11; 1995 Lease Exhibit E) The Land Use Plan provides as follows:

"Permitted uses of the Premises shall include:

    - (a) maintaining and operating a hospital currently known as the 'Froedtert Memorial Lutheran Hospital,' for the diagnosis, treatment, care, rehabilitation, and cure of persons requiring or requesting health care or medical services;
    - (b) maintaining and operating health care and medical services by Lessee or Affiliates of Lessee;
    - (c) medical or health-care education, research and teaching;
    - (d) training in all medical disciplines and techniques;
    - (e) inpatient, outpatient and ambulatory care facilities, and consultation rooms for use in connection therewith;
    - (f) for-profit activities which are consistent with and in furtherance of the charitable and educational purposes of Lessee;
    - (g) maintaining and operating within the Improvements, a chapel which may be known as the 'Kurtis R. Froedtert Memorial Lutheran

Chapel,' which Chapel shall be made available to chaplains, patients, visitors and staff members of all faiths; and

(h) incidental activities whether necessary or merely desirable to accommodate the needs and goals of the patients, officers, directors, staff, including medical staff, employees and visitors of Lessee or Lessee's Affiliates, including, without limitation by reason of specification, pharmacy, supply rooms and shops for drugs, restaurants and coffee shops, gift, flower or notion shops, book, magazine and newspaper shops, vending machines, and telegraph and telephone offices and cash stations. The Land and Improvements shall be used for no other purpose except that, with the approval of Lessor, the Land and Improvements may be used for other purposes consistent with the objectives and goals of this Land Use Plan." (Id.)

9. Milwaukee County benefitted as a result of the 1995 Lease by, among other things, receiving approximately \$65 million in lease payments from Froedtert Hospital between 1995 and 2012. (See Froedtert Hospital Brief regarding (6m) issue, March 1, 2013 Affidavit of Eastham at ¶ 8; see also Milwaukee County closing brief, March 22, 2013 Affidavit of Manske)
10. On or about September 7, 2012, Froedtert Hospital submitted to the Historical Society a formal request/application for a permit to disturb part of the burial site. (Record Ex. 1)
11. On or about October 23, 2012, all persons on the Registry of Interested Persons for the Milwaukee County Medical Complex Paupers Cemetery or the catalogued burial site were notified of of Froedtert Hospital's permit application. (Record Ex. 2) Fifty-eight persons were listed on the applicable Registry of Interested Persons. (Record Ex. 2, pp. 5-6)
12. Of those 58 registrants, only one requested a hearing regarding Froedtert Hospital's permit application. Namely, on or about November 21, 2012, the Historical Society received notice from the Wisconsin Archeological Survey requesting a hearing. (Record Ex. 3)
13. Of those 58 registrants, only one opposed the permit. Namely, on or about October 31, 2012, the Historical Society received notice from George Garvin of the Ho-Chunk Nation asking the Historical Society to "say no" to Froedtert Hospital's request. (Record Ex. 4) Mr. Garvin declined the opportunity to participate in the instant proceedings.
14. After Froedtert Hospital's permit application, 6 more people applied to be on the applicable Registry of Interested Persons. (Record Exs. 5-10) However, none listed their interest as "preservation of the burial site." (Id.) Rather, all listed their interest as "providing for the reinterment or other appropriate disposition of the human remains and objects related to the burial in the burial site if the burial site is disturbed." (Id.)



### Discussion

The Director of the Historical Society maintains a list of catalogued burial sites and a registry of people who are deemed to have an interest either in preservation of a burial site or in providing for the reinterment of human remains and objects related to burial if the site is disturbed. Wis. Stat. §§ 157.70(2)(a) and (e). If someone wants to disturb a catalogued burial site, he or she must apply to the Director for a permit and must notify each person listed on the registry of the proposed disturbance and of a registrant's right to a hearing on whether the Director should grant the permit. Wis. Stat. §§ 157.70(5)(b). Froedtert Hospital properly executed these steps. Upon request of a registrant or the permit applicant, or at the Director's own behest, the Director may request the Division of Hearings and Appeals to conduct a hearing "on whether a permit should be issued to disturb the burial site or the land which is the subject of the request." Wis. Stat. § 157.70(5)(c). In this case, the Director referred the matter for hearing based upon a request by the Wisconsin Archeological Survey.

The Wisconsin Legislature explicitly set forth the legal test the Division of Hearings and Appeals must employ to determine whether a permit should be granted to disturb a burial site. Namely, it shall conduct a hearing to determine whether the benefits to the permit applicant in disturbing the burial site outweigh the benefits to all other persons shown on the registry to have an interest in not disturbing the burial site within the confines of certain enumerated categories. To the extent that the following classes of interest are represented in a hearing, the Division of Hearings and Appeals is required to consider them and to weigh them in this order of priority:

1. Direct kinship,
2. A cultural, tribal or religious affiliation,
3. A scientific, environmental or educational purpose,
4. Historical and aesthetic significance of the burial site,
5. Land use,
6. A commercial purpose not related to land use which is consistent with the purposes of the statute, and
7. Any other interest which the State Historical Society deems to be in the public interest.

The party pursuing a permit application, and therefore a change in status quo, bears the burden of proving by a preponderance of the credible evidence that it has satisfied all criteria required by the permitting statute. Here, Froedtert Hospital bears this burden.

In this case, not all of the statutorily enumerated interests were represented at hearing; however, the following were. Froedtert Hospital represented the interests of scientific and educational purposes, historical significance, land use, and the public, arguing that each such interest would be advanced by granting the permit. The Wisconsin Archeological Survey was the only entity from the registry who participated in these proceedings as a party.<sup>1</sup> It took no position as to whether or not the permit should be granted but represented an interest in the proper land use of municipally-owned burial sites. Milwaukee County also represented this

---

<sup>1</sup> Ms. Agnew and Mr. Felber joined the registry of interested persons after Froedtert Hospital's permit application and their interests were limited to reinterment of remains if the burial site was allowed to be disturbed.



interest, in addition to a public interest against disturbance in light of its lease provision with Froedtert Hospital that obligates Milwaukee County (and correspondingly its taxpayers) to cover the costs of any excavation required as a result of a Froedtert Hospital construction project. The Historical Society took no official position as to whether the permit should be granted, but advanced arguments against disturbance in the interests of historical significance, land use and the public. The aforementioned represented classes of interest will be addressed below in order of their statutorily prescribed priority, leading to the conclusion that the benefits of granting the permit overwhelmingly outweigh the benefits of not granting it.

*A scientific or educational<sup>2</sup> purpose*

Froedtert Hospital represented an interest in scientific and educational purposes, both of which would be benefitted by the proposed expansion. The legislature put the highest priority on this interest category. Stipulations of fact by the parties and the credible un-rebutted testimony of Kathy Buck, Froedtert Hospital's President, established the following. Froedtert Hospital and the Medical College of Wisconsin combine to serve as eastern Wisconsin's only academic medical center. This means that it serves as a major educational training facility for the future generation of healthcare providers with more than 1,000 medical, nursing and health technical students in training each year. It is also a foremost scientific research facility where over 2,000 active clinical trials are conducted each year. Furthermore, it is on the leading edge of surgery, organ transplant and interventional (image-guided diagnostic and treatment procedures that do not require open surgery) technology. Finally, it offers the only adult level 1 Trauma Center in eastern Wisconsin. This means that the most seriously injured patients are brought to Froedtert Hospital for life-saving care.

Froedtert Hospital's ability to maintain its scientific advances and educational opportunities is being threatened by serious capacity challenges to its existing facilities. Again, this was established by stipulations of fact by the parties and by Ms. Buck's credible and un-rebutted testimony. For example, from 2001 to 2011, the number of surgeries performed at Froedtert Hospital increased by 72%, with more than 18,000 surgeries performed in fiscal year 2012 alone. Similarly, Transplant Center visits have nearly tripled in the past decade and this growth is expected to continue based upon the recent additions of internationally recognized transplant surgeons and the formation of a new pediatric and adult solid organ transplant program. Additionally, in the last fiscal year, Froedtert Hospital took in more than 6,000 patients from other facilities because the patients required an advanced level of care. This constituted a 27% increase over the previous year. Furthermore, since 2003, there has been a 60% increase in outpatient volume at the Heart and Vascular Center.

---

<sup>2</sup> In its closing brief, the Historical Society loosely asserted an educational interest in the catalogued site. (State Historical Society closing brief, pp. 11, 15) However, that interest was not established apart from its interest in the historical significance of the burial site. The Historical Society conceded as much when it stated that: "The Director's specific interest in the particular catalogued site at issue in this proceeding can be categorized as *either* or both of these [educational purpose and historical significance] separate priorities." (Id. at p. 15, emphasis added) The Historical Society did not develop or articulate a clear argument regarding an interest in educational purposes. Consequently, I consider its true interest to be one of historical significance only and that will be addressed in the following section.



Froedtert Hospital's ability to maintain its scientific advances and educational opportunities is also being threatened by inefficiencies presented by the layout and outdated nature of the existing facilities. Again, this was established by stipulations of fact by the parties and by Ms. Buck's credible and un-rebutted testimony. By way of example, operating rooms are currently housed in two completely different locations; one on the third floor of a hospital building and one on the ground floor of a separate specialty clinic. This leads to duplication of resources. Additionally, operating room sizes are outdated and therefore unsuited to house the advanced technology necessary for complex procedures. Namely, by today's standards, operating rooms are typically 600 to 800 square feet, yet nearly half of Froedtert Hospital's 29 operating rooms are less than 500 square feet.

As a result of these capacity and inefficiency challenges, Froedtert Hospital determined that a facility expansion was necessary to accommodate both short-term and long-term growth. The proposed facility expansion would result in a new building dedicated to surgery, cardiology and interventional (image-guided diagnostic and treatment procedures that do not require open surgery) services. It would house inpatient beds, the Heart and Vascular Center, and the Transplant Center. It would also accommodate parking underneath the building. This would ease the strain on all of its remaining facilities, allowing for continued efforts toward education and scientific advances in medicine.

Of the interests represented at hearing, the legislature has mandated that this one be given the most weight. It ranks in priority only below direct kinship and cultural, tribal or religious affiliation, none of which apply here. This means that when a burial site lacks connection to direct kin and has no cultural, tribal or religious affiliation, I must consider and place the most value on the scientific and educational interests in disturbing versus preserving the site. Froedtert Hospital made an extremely strong case in favor of disturbing the site for the advancement of scientific and educational interests. This was uncontested and there was no representation at hearing of a scientific or educational interest against disturbing the site.

#### *Historical significance*

The next most important interest to consider is the historical significance of the burial site. The Historical Society, through the testimony of Chip Brown on behalf of the Director, represented a general historical interest in not disturbing the burial site. The Historical Society's mission is to help people connect to the past by collecting, preserving and sharing stories; recognizing that subject burial sites helps to tell such stories. This burial site serves as a commentary on how less fortunate citizens were laid to rest in the late 1800s through the early 1900s. The bodies buried there include vulnerable citizens in the care of Milwaukee County who were sick and/or mentally ill and who died without resources for an alternative burial. The Historical Society argues that there is great value in giving current citizens an opportunity to be with those most vulnerable people in their final resting place, to imagine their stories and to remember that the county supported them at the ends of their lives.

Froedtert Hospital provided a persuasive countervailing perspective on the historical significance of the burial site, explaining that disturbing it would actually better situate it for posterity for several reasons. First, part of the burial site was already exhumed when it was



accidentally discovered in 1991 and of the graves remaining, many are underneath an existing parking structure or public roadway (Doyme Avenue). In other words, it is not as though the burial site is in its pristine or intact historical condition. Second, of the approximately 1,700 bodies exhumed in 1991, archeologists were able to learn much about them. For example, they learned the general manner in which the bodies were buried, including several bodies “stacked” within single graves and coffins containing multiple bodies and/or body parts. Additionally, they were able to analyze the bodies and personally identify more than 10 percent of them, which provided an additional layer of historical value to the information about the burial site and created the potential for direct kin to be identified. This same type of new information and kinship opportunity would be available if the remaining graves were disturbed. Third, as an unmarked cemetery existing somewhere between the shadows of a massive medical complex and underneath a public roadway, its historical value is neglected and essentially unknown to the public. Froedtert Hospital pointed out, however, that there is a grassy serene area on the grounds currently designated to a different cemetery which could incorporate the subject burial site, mark it, and post information about it, making it much more likely that the public would know about and learn of its historical significance. (See Froedtert Hospital Exs. 9-11)

#### *Land use*

Froedtert Hospital’s proposed expansion is consistent with way the land has been used since the cemetery was abandoned nearly a century ago. Namely, the land at issue has always been devoted to the care of vulnerable area residents, as Milwaukee County historically used the grounds as an orphanage, an insane asylum, a sanatorium for tuberculosis sufferers, a hospital, an almshouse and a poor farm. In the later part of the previous century, the land use remained consistent but Milwaukee County decided to privatize its functions by entering into long-term leases with medical providers such as Froedtert Hospital. In doing so, Milwaukee County gave Froedtert Hospital unfettered authority to alter and/or expand its facilities in furtherance of that land use. The applicable lease agreement between the parties includes a Land Use Plan, which Froedtert Hospital’s proposed expansion is perfectly in keeping with. That Land Use Plan makes clear that the entirety of the land leased to Froedtert Hospital is to be used by the hospital to care for patients who need health or medical care and for education, research and training.

Froedtert Hospital has in the past been very proactive in managing to stay true to the Land Use Plan while also avoiding the burial site. However, in light of its previous growth and the finite plot of land leased to Froedtert Hospital which is entirely surrounded by major thoroughfares, there are few options to locate new facilities and the only truly viable one requires disturbing part of the burial site. This was established by stipulations of fact by the parties and by the credible testimony of John Balzer, Froedtert Hospital’s Vice President of Facilities and Planning Development. The plot of available land is already considerably dense as a result of existing structures. (Froedtert Hospital Ex. 11) At hearing, a few areas that were either vacant or surface parking lots were identified as potential sites for the new building, one of which is the vacant proposed expansion site that would require disturbing some of the burial sites. Mr. Balzer explained that Froedtert Hospital and its consultants carefully considered each and every option, but rejected the other sites for several legitimate reasons, such as building code setback requirements, healthcare requirements, interference with the ambulance route or flight for life



landing pad, awkward building configurations,<sup>3</sup> and lack of proximity to like services. As to the latter issue, Mr. Balzer explained that integration is the key to providing efficient seamless care and eliminating redundancies. For example, patient safety and dignity, infection control, and overall efficiency suffer if a transplant patient has to be rolled five city blocks away for a needed service because the patient cannot receive that service in his or her own building. To avoid such scenarios, the proposed expansion site would be closely aligned with existing surgical services immediately to its north. Additionally, services that are currently provided in multiple locations on different floors in the existing hospital facility (such as cardiac catheterization, interventional radiology and neurological interventional services) would be consolidated, thereby minimizing duplication of the equipment, infrastructure, clinical support services, and highly trained staff that are common among them. (See Froedtert Hospital Ex. 1) The expansion site also offers potential future growth while still meeting necessary building and healthcare code requirements.

Froedtert Hospital also attempted to find a way to build its proposed building on the proposed expansion site without disturbing the burial sites, such as by not providing underground parking. However, while that would avoid deep excavation to the site, it would not completely avoid disturbing the burial site *since a significant foundation still would be necessary for any building*. Alternatively, Froedtert Hospital considered using grade beam technology that would essentially suspend the building above the burial site. Again, however, this would not avoid disturbing the burial site because grade beams require deep foundations/footings.

The record established that Froedtert Hospital thoroughly considered alternatives that may have preserved the burial site. Mr. Balzer's testimony was credible, sincere and convincing in that he, along with Froedtert Hospital and its consultants who are experts in the field, seriously considered the few possible alternative locations and rejected them for legitimate and unavoidable reasons, as explained above.

As a final matter, Milwaukee County, the Wisconsin Archeological Society, and the Historical Society expressed interests in land use of *publicly-owned* burial sites in particular. This is because the legislature appeared to give special consideration to publicly-owned burial sites via Wis. Stat. § 157.70(6m) by prohibiting municipalities from transferring burial sites to private entities without approval from the Historical Society. However, this concern is not distinct from that already addressed above in the context of land use since Milwaukee County, the municipal owner of the land at issue, explicitly intended for the land to be used in exactly the manner Froedtert Hospital has and is using it. Further, the legislature provided that the Historical Society could approve the transfer of burial sites from municipalities and here, the Historical Society has effectively designated that approval power to the Division of Hearings and Appeals.

---

<sup>3</sup> For example, a building with a small square footprint could be built tall with many floors, but would defeat the purpose of increasing efficiency because time would be wasted moving from floor to floor and resources would be duplicated since patients on each floor would need access to the same things.



*The public interest*

The public's interest in permitting disturbance of the burial site greatly outweighs the public's interest against disturbance. First, the expansion would provide the public with more access to care, access to better quality of care, and access to lower cost care (in light of saved efficiency). This was undisputed. Froedtert Hospital is a not-for-profit organization whose staff and facilities provide enormous benefits to the public; benefits which will only be multiplied by permitting expansion. In addition to the direct patient care, medical field educational training, and scientific research Froedtert Hospital provides as a benefit to the community, Froedtert Hospital also provides care to those who cannot afford it, which, not incidentally, coincides with the purpose for which the grounds always existed in the first place more than a century ago. Although Froedtert Hospital provides care to patients with private insurance or Medicare/Medicaid, it also serves patients who are uninsured and/or lack the means to pay for the cost of their care. For example, in the fiscal year ending June 30, 2012, Froedtert Hospital provided approximately \$31.9 million in "charity care." As another example, in 2011, 17.1% of the patients cared for in Froedtert Hospital's Emergency Department had no insurance.

Second, Milwaukee County taxpayers benefit as a result of Froedtert Hospital's success, since its lease payments are based upon its revenue. There were concerns raised that, as a result of the lease between Milwaukee County and Froedtert Hospital, Milwaukee County (and vicariously its taxpayers) may be required to fund the expansion to the extent it involves excavation of the burial site. The record demonstrated that the costs associated with excavation of the burial site that is required for Froedtert's construction project is estimated at \$1.5 to \$2 million. Milwaukee County may incur this cost or Froedtert Hospital will cover the excavation costs and offset those costs against future lease payments to Milwaukee County. (Eastham Aff. ¶ 8) Regardless of which option is ultimately pursued, given that the lease payments Froedtert Hospital makes to Milwaukee County are based on a percentage of its revenue and that the construction project is certainly likely to result in significant increased revenue, Milwaukee County will easily recoup its lost funds and then some.<sup>4</sup> The proposed expansion, therefore, would actually provide a significant long-term benefit to the public taxpayer interest.

Finally, the Historical Society, through the testimony of Chip Brown on behalf of the Director, represented a general public interest against disturbing the burial site. He conceded, however, that in the last 5 years, the Historical Society has received 17 applications for permits to disturb a catalogued burial site and all but 4 were granted. The remaining 4 include the instant action and are currently pending. In other words, the Historical Society has not denied a single application for a permit to disturb a catalogued burial site, which tells me that the Historical Society's concern for a general public interest in preservation is often legitimately trumped by any number of circumstances favoring disturbance.

---

<sup>4</sup> To put this point into context, Froedtert Hospital made lease payments to Milwaukee County from 1995 to 2012 in the amount of approximately \$65 million. (See Froedtert Hospital Brief regarding (6m) issue, March 1, 2013 Affidavit of Eastham at ¶ 8; see also Milwaukee County closing brief, March 22, 2013 Affidavit of Manske)

Conclusions of Law

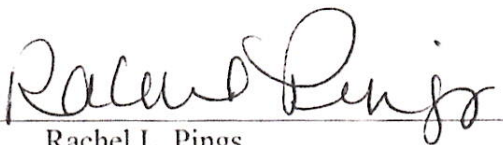
1. The subject burial site is a catalogued burial site within the meaning of Wis. Stat. § 157.70(1)(c).
2. The Division of Hearings and Appeals has authority to issue this order pursuant to Wis. Stat. § 157.70(5)(c).
3. Froedtert Hospital, the Wisconsin Archeological Survey, the State Historical Society, and Milwaukee County appeared as interested persons as defined by Wis. Stat. § 157.70(1)(g).
4. Interested persons represented the following classes of statutory interests as defined by Wis. Stat. § 157.70(5)(c)(2): scientific and educational purposes; historical significance; land use; and the public's interest.
5. *Interests in scientific and educational purposes weigh in favor of disturbing the burial site.*
6. *Interests in historical significance weigh in favor of disturbing the burial site.*
7. *Interests in land use weigh in favor of disturbing the burial site.*
8. *Interests of the general public weigh in favor of disturbing the burial site.*

ORDER

IT IS HEREBY ORDERED THAT Froedtert Hospital's request for a permit to disturb the subject burial site be granted.

Dated at Milwaukee, Wisconsin on April 18, 2013.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
819 North 6th Street, Room 92  
Milwaukee, Wisconsin 53203-1685  
Telephone: (414) 227-1872  
FAX: (414) 227-3818  
E-mail: Rachel.Pings@Wisconsin.gov

By:   
Rachel L. Pings  
Administrative Law Judge



### **NOTICE**

*Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.*

1. Any party to this proceeding adversely affected by the decision attached hereto has the right to petition the Burial Sites Preservation Board for review of the decision as provided by Wisconsin Administrative Code HS 2.04(5)(k). A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Historical Society of Wisconsin a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is made for the Historical Society of Wisconsin, any petition for judicial review shall name the Historical Society of Wisconsin as the respondent and shall be served either personally or by certified mail upon the Director at 816 State Street, Madison, WI, 53706. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.