



WISCONSIN LEGISLATURE

P. O. Box 7882 Madison, WI 53707-7882

July 21, 2020

Preston Cole
Secretary of the Wisconsin Department of Natural Resources
101 S. Weber St.
Madison, WI 53707

Dear Secretary Cole,

Over the past year, we have studied the three conflicting reports on the integrity of the observation tower at Potawatomi State Park. We have conferred with the Department of Natural Resources, Sturgeon Bay Historical Society and Wisconsin Legislative Council on both the engineering and legal challenges the tower presents. After very careful consideration, and with the safety of park visitors at the forefront, we have reached the conclusion that repairing the tower in situ is the most prudent course of action for the DNR to follow.

The second engineering report, issued by Dr. Dan Tingley of Wood Research and Development, determined that the main supports to the tower could be saved using a process he has developed and that the vast majority of the structure's components were in acceptable condition.

The third engineering report, commissioned by the Department of Administration and the DNR, agreed that the tower could be saved in this manner, although they were not confident that all of the other elements of the structure could be reused.

Throughout the course of this dialogue, it has been repeated continually that if more than 50 percent of the elements are replaced, the tower project would then be considered a rebuild and not a repair, which would trigger the need to comply with the Americans with Disabilities Act (ADA).

After conferring with Legislative Council Senior Attorney Anna Henning, we have concluded that the relevant question is not related to a percentage, but rather whether the repairs would alter the tower in a manner that affects its usability. Although "usability" is interpreted broadly, courts have stated that modifications do not trigger the stringent "technical feasibility" standard if they merely preserve a facility's existing condition. In addition, if the tower is eligible for listing on the National Register of Historic Places, alternative standards would then apply to the repairs.

In addition to being an iconic and beloved attraction that brings many visitors to the park, the tower is historically significant in the emergence of tourism in Wisconsin. It was among the first purpose-built recreational towers in our state and is one of the few remaining. The Potawatomi tower has also been recently nominated for listing on both the State and National Register of Historic Places. It is nearly certain to be approved.

While we support the intent of the ADA and want to expand opportunities for our disabled citizens, we know that allowing full access in this case is impossible and the alternative is the destruction of a structure that is invaluable from both an economic and historic standpoint. Furthermore, a fully

accessible tower will exist a short distance away when the new Eagle Tower is completed at Peninsula State Park.

It is impossible to say with absolute certainty that the repairs described would withstand a court challenge under the ADA, as there is no legal precedent within our federal circuit court jurisdiction. We believe, however, that many factors would make the DNR's case extremely strong. First and foremost, the repairs in no way change the usability of the structure. They merely maintain current use, which is the standard and central question any challenge would be judged against.

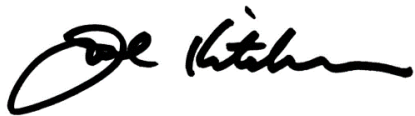
There is no feasible way to offer full access to the existing tower. In the case of historic lighthouses, video cameras have frequently been installed to allow people at the bottom to experience the view from the top. While this also does not guarantee a positive result in court, it strengthens the argument that all possible alterations have been made to accommodate those with disabilities. We highly recommend the installation of cameras on the tower to provide a more virtual experience.

Finally, the designation as a historic place would weigh heavily in favor of the DNR. Courts have been strongly inclined to allow flexibility in the implementation of ADA compliance when dealing with historically significant structures. It is our hope that the department can support the requested historical designation.

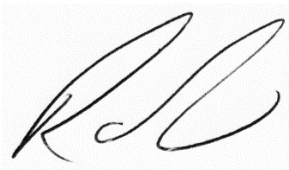
We are confident that when one considers the cost of demolition and the construction of a new tower – to which the DNR has committed – versus repairing the current structure, the latter option makes the most sense from a budgetary standpoint.

Our state parks were established by visionary leaders who came before us. When Potawatomi State Park was brand new, they built this tower, and the sublime views it offers have been enjoyed by a countless number of visitors ever since. We are now the stewards of this gift that was given to us. It is unconscionable that we would allow a vague and unwarranted threat of litigation to distract us from our duty to preserve this tower and pass it on to the generations that follow us.

Sincerely,

A handwritten signature in black ink, appearing to read "Joel Kitchens". The signature is fluid and cursive, with a large initial "J" and "K".

Rep. Joel Kitchens
Chairman of the Assembly Committee on the Environment

A handwritten signature in black ink, appearing to read "Robert Cowles". The signature is fluid and cursive, with a large initial "R" and "C".

Sen. Robert Cowles
Chairman of the Senate Committee on Natural Resources and Energy