

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1087

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**TOWN OF BARTON, A WISCONSIN MUNICIPAL
CORPORATION,**

PETITIONER-APPELLANT,

v.

**DIVISION OF HEARINGS AND APPEALS, A STATE OF
WISCONSIN AGENCY,**

RESPONDENT-RESPONDENT,

CITY OF WEST BEND,

INTERESTED PARTY-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. The Town of Barton (Town) appeals from a judgment dismissing its WIS. STAT. ch. 227 (1997-98)¹ review proceeding. The issues are whether the trial court properly dismissed the action, and properly denied the petition to intervene filed by Russell L. Prust. We reverse the dismissal and remand for further proceedings on the Town's petition. We affirm on the intervention decision.

¶2 The City of West Bend asked the Town for permission to construct an interceptor sewer system within the Town's borders. When the Town refused, the City filed a notice of appeal with the Wisconsin Division of Hearings and Appeals, pursuant to WIS. STAT. § 86.16(5). The City prevailed on its administrative appeal, and the Division of Hearing and Appeals ordered the Town to grant permission for the sewer project.

¶3 The Town responded with a timely petition for judicial review. The City then moved to dismiss, supporting its motion with affidavits averring that the town board never authorized a judicial review proceeding. The Town answered with an affidavit of the town board's chairperson. He stated that in March 1999, shortly after the City commenced the administrative proceeding, the board held a special meeting. During that meeting, in closed session, the board met with the Town's attorney. "Many issues were discussed, not the least of which included the procedure or process the action was going to take. The Town Board understood that this litigation could end up in the Court of Appeals ... and everyone on the Town Board was in agreement to ... proceed, if necessary, to the Court of Appeals."

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 WISCONSIN STAT. § 60.22(2) provides that a town board “[h]as charge of any action or legal proceeding to which the town is a party.” In *Town of Nasewaupée v. City of Sturgeon Bay*, 77 Wis. 2d 110, 113, 251 N.W.2d 845 (1977), the Supreme Court interpreted the predecessor statute, WIS. STAT. § 60.29(4)(1977), to require that “authorization to commence an action must stem from the action of a town board officially convened and acting as a board.” Here, the trial court concluded that *Nasewaupée* and § 60.22(2) required proof of a “formal” action by the board to authorize the proceeding, and that the board could not take the necessary “formal” action without voting in an open session. Because the board provided only what the court characterized as “informal approval” at its March 1999 meeting, the Town’s petition was a legal nullity in the court’s view, and insufficient to confer authorization.

¶5 While the City’s motion to dismiss the action was pending, Russell Prust, a Town resident, petitioned to intervene on the Town’s side. The City objected and the trial court denied the petition.

¶6 The trial court erred by dismissing the Town’s petition. *Nasewaupée* requires authorization from a town board “officially convened and acting as a board,” to satisfy WIS. STAT. § 60.22(2). *Town of Nasewaupée*, 77 Wis. 2d at 113. We do not construe that holding, as the trial court did, to require a formal vote or resolution, nor an open session. The trial court found it undisputed that the board approved a judicial review proceeding during an officially convened meeting. That was sufficient under *Nasewaupée*, regardless of the formality of the approval.²

² Our decision makes it unnecessary to address whether the City had standing to challenge the procedures by which the board authorized the litigation.

¶7 We decline to review whether the trial court properly denied Prust's petition to intervene. Standing requires a personal stake in the outcome of a controversy. *See City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 350, 382 N.W.2d 52 (1986). The party who asserts standing must show an injury that is related to its stake in the outcome of the controversy. *See Sandroni v. Waukesha County Board of Supervisors*, 173 Wis. 2d 183, 188, 496 N.W.2d 164 (1992). The Town does not have standing to challenge the denial of Prust's petition.

¶8 On October 16, 2000, the Town moved to stay construction of the sewer project pending resolution of this appeal. Previously, the trial court had denied the stay based in substantial part on the Town's failure to show a likelihood of success on this appeal. Now that the Town has succeeded on the principal issue on this appeal, any further stay, until or beyond remittitur, should depend in substantial part on the likelihood of ultimate success on the merits. The trial court has yet to consider the stay in the context of that question. We therefore deem it appropriate to remand the stay motion to the trial court for its review, so that the trial court may give due attention to the merits of the reinstated petition. The Town may tax costs as the prevailing party on the principal issue on this appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

