No. 03-19-00304-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

STATE OF TEXAS,

Appellant,

v.

CITY OF DOUBLE HORN, ET AL.,

Appellees.

On Appeal from the
424th Judicial District Court, Burnet County

REPLY BRIEF FOR APPELLANT

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy Attorney General for Legal Counsel

Office of the Attorney General
P.O. Box 12548 (MC 001)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

PATRICK K. SWEETEN
Associate Deputy for Special Litigation

DAVID J. HACKER
Special Counsel to the First Assistant Attorney General
State Bar No. 24103323
david.hacker@oag.texas.gov

KENT RICHARDSON
Assistant Attorney General

Counsel for the State of Texas

ORAL ARGUMENT REQUESTED

Table of Contents

Page

Index of Authorities

Page(s)

Cases:

Statutes:

Other Authorities:

Introduction

The State of Texas appeals the district court's refusal to allow it to file a quo warranto action against the newly incorporated City of Double Horn, Texas and its elected officials. Before the State may file an information in the nature of quo warranto, it must show the district court, during a pre-filing hearing, that it has a "probable ground" to proceed. Nearly a century of case law provides that a district court must accept the State's allegations as true during this probable-ground stage, and that the State satisfies the probable-ground standard by alleging facts that state a cause of action.

Double Horn asks the Court to ignore that precedent, just as the district court did. But by refusing to accept the State's allegations as true and by considering the merits of the State's claim and evidence offered by Double Horn, the district court applied an erroneous legal standard to deny the State's petition for leave to file. And by sustaining objections to the verification attached to the State's information and the exhibits to that pleading, the district court deviated from both the Rules of Civil Procedure and precedent, both of which allow the State to allege unverified quo warranto facts.

The Court should reverse the erroneous judgment of the district court and remand this case with instructions to file the information and issue process.

ARGUMENT

I. The State Satisfied the Probable-Ground Standard Necessary to File a Quo Warranto Lawsuit.

A. The probable-ground standard requires only allegations giving rise to a cause of action.

The State satisfied each of the statutory requirements to file a quo warranto lawsuit. The Attorney General represents the State, and he is one of three types of state officials who may file a quo warranto lawsuit. Tex. Civ. Prac. & Rem. Code § 66.002(a)–(b). The Attorney General determined "grounds for the remedy [of quo warranto] exist," so he "petition[ed] the district court of the proper county . . . for leave to file an information in the nature of quo warranto." *Id.* § 66.002(a). And the Attorney General demonstrated a "probable ground" for the proceeding, which, once established, required the district court to "grant leave to file the information, order the information to be filed [by the clerk of court], and order process to be issued." *Id.* § 66.002(d). This appeal focuses on the probable ground requirement.

When an authorized state official presents a quo warranto petition to a trial court, a district court must apply two clear standards. First, the court must "accept as true the allegations in the State's petition." *Ramirez v. State*, 973 S.W.2d 388, 393 (Tex. App.—El Paso 1998, no pet.); *see State ex rel. Manchac v. City of Orange*, 274 S.W.2d 886, 888 (Tex. App.—Beaumont 1955, no writ) ("the allegations contained in the petition sought to be filed must be taken as true for the purpose of passing on this appeal"); *State ex rel. Thornhill v. Huntsaker*, 17 S.W.2d 63, 65 (Tex. App.—Amarillo 1929, no writ) ("The allegations in the verified petition or information for quo warranto proceedings, the permission to file which was sought by the state of

Texas and relators, must be taken as true for the purpose of passing on the question presented by this appeal."). Second, with the first standard in mind, the court must ask if "the petition sought to be filed state[s] a cause of action." *City of Orange*, 274 S.W.2d at 888. Because the court takes the State's allegations as true, the probable-ground standard requires only notice pleading. When applying these two standards, defensive matters pleaded by a defendant are irrelevant. *Id.* at 890. If the State's information, taken as true, states a cause of action, then a trial court "err[s] in refusing permission to file it." *Id.* at 888. Thus, when an appellate court examines a trial court's decision to deny leave to file an information in the nature of quo warranto, it "look[s] to the petition to determine its sufficiency." *Id.*

The district court's pre-filing review ensures that the pleading alleges facts that give rise to a quo warranto claim. *See, e.g., Town of Fairview v. Lawler*, 252 S.W.3d 853, 857 (Tex. App.—Dallas 2008, no pet.) (holding resident could not bring quo warranto action to challenge procedural irregularities of municipal annexation); *Reed v. Prince*, 194 S.W.3d 101, 105 (Tex. App.—Texarkana 2006, pet. denied) (holding resident did not have standing to bring quo warranto action to remove sheriff from office); *Gonzales v. Concerned Citizens of Webberville*, 173 S.W.3d 112, 119 (Tex. App.—Austin 2005, pet. denied) (holding citizens could not challenge the incorporation of the city of Webberville); *Am. Veterans, Dep't of Tex. v. City of Austin*, No. 03–03–00762–CV, 2005 WL 3440786, at *3 (Tex. App.—Austin Dec. 15, 2015, no pet.) (holding non-profit fraternal organizations did not have statutory authority to bring quo warranto action against city smoking ordinance).

Since the Attorney General seeks to bring this quo warranto action, which he is authorized to do, the district court's job at the pre-filing probable-ground hearing was straightforward. But the district court failed to apply the proper standards, which required the court to accept the State's allegations as true when determining if the State pleaded a cause of action. *Ramirez*, 973 S.W.2d at 393.

B. The probable-ground standard does not reach the merits.

The pre-filing probable-ground hearing is not an adversarial merits proceeding. *See* Tex. Civ. Prac. & Rem. Code § 66.002(d). The clerk does not even file the information or order the defendants to be served until *after* the court approves the pleading.

Double Horn asks the Court to deviate from these settled principles and hold that the district court did not error when it considered the *merits* of the State's cause of action. Rather than conducting a hearing to evaluate whether the State established a probable ground to file a quo warranto action, the district court skipped ahead to the merits of the State's claims.[1] *See* 2.RR.13 ("[I]f you read the response [by Double Horn] and you look at it and keep the *merits* in, at least, the back of your mind, you've—if there's not necessarily a probable chance of you being successful, then really you're just using your position with the State to put all of these people in a real bad spot. . . ." (emphasis added)); 2.RR.16 ("I'm going to find that there's not a probability of you *winning* this lawsuit or having the lawsuit." (emphasis added)).

[1] It is worth noting that because process does not issue until the district court grants leave to file the information, many district courts conduct the probable-ground hearing *ex parte*. *See* Tex. Civ. Prac. & Rem. Code § 66.002.

The fact that the State gave ample notice to Double Horn about the probable-ground hearing should not prejudice the nature of the proceedings against it and allow Double Horn to paper the record with irrelevant counter-allegations.

Double Horn erroneously compares the probable-ground standard to burdens in other contexts. Appellees' Br. 18–20. A more apt comparison is available in criminal law. In criminal cases, "[p]robable cause exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality of a crime or evidence pertaining to a crime will be found." *Hyland v. State*, 574 S.W.3d 904, 910–11 (Tex. Crim. App. 2019) (citation and quotation marks omitted). When determining whether probable cause exists, a court considers the four corners of the search warrant affidavit, as well as logical inferences based on it. *Id.* In a quo warranto case, the State must satisfy a lower standard. An information in the nature of quo warranto need not be based on a sworn affidavit. *See infra* Part II. But the court, as in a probable-cause review or any other civil case at the pleading stage, must confine its analysis to the four corners of the pleading. *City of Orange*, 274 S.W.2d at 888.

The documents Double Horn offered to the district court (and to this Court on appeal) are defensive allegations that go to the merits of the case and should not be considered in reviewing the sufficiency of the information. Double Horn's response to the State's pleading in the district court concerned almost entirely an attack on the municipal incorporation elements that the State would be required to prove *at trial*. *See* CR.54-70. Thus, before the Civil Practice and Remedies Code and the Rules of Civil Procedure even required Double Horn to file an answer, the district

court found its response to the State's pleadings (filed one day before the probable-ground hearing and before the State could submit its own evidence) dispositive of the entire proceeding.[2] That was an abuse of discretion.

The bottom line is that Double Horn asks this Court to hold that during a quo warranto probable-ground hearing a district court should allow the defendant to litigate the merits of the State's case. This would allow a district court to consider what amounts to a motion for summary judgment without the benefit of any discovery. The Court should reject this request just like the courts did in *City of Orange* and *Huntsaker*. In those quo warranto cases, both the Beaumont and Amarillo Courts of Appeals said that the allegations in the State's pleadings are taken as true, and if the pleadings state a cause of action, then the district court must file it. *City of Orange*, 274 S.W.2d at 888; *Huntsaker*, 17 S.W.2d at 65. Strict adherence to these standards is even more important considering that some probable ground hearings are not adversarial. Because citation and notification of the suit do not even take place until after leave is granted to file the information, prospective defendants in such actions might not even participate in the determination.[3] The standards set out in *City of Orange* and *Huntsaker* are the only ones that accommodate all possible scenarios.

---

[2] The State had virtually no time to address the issues raised in the response. Given that it completely controlled the outcome of the hearing like a summary judgment, if it was going to consider evidence going to the merits, the trial court should have afforded a reasonable time for briefing or, if needed, amendment of pleadings.

[3] The State went out of its way to serve each of the Appellees with the petition and information, even though the Civil Practice and Remedies code and Rules of Civil Procedure do not require such service until citation issues *after* the probable-ground hearing.

The quo warranto statutory scheme is designed to ensure that a case brought by the State is one for which quo warranto is applicable. Disputes about facts are reserved to the normal process of the litigation after the district court finds grounds to file the petition. Here, the district court failed to accept the State's allegations as true and determine whether the State merely pleaded a cause of action. This Court should correct that error.

C. The Court should not contradict decades of quo warranto precedent.

Double Horn asks the Court to depart from settled precedent on the quo warranto pleading standard by importing doctrines from other areas of the law. Appellees' Br. 15–20. The Court should reject Double Horn's request. But even if it does not, the cases Double Horn cites favor the State's position.

First, Double Horn relies on *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004), to argue that the trial court properly considered evidence outside the State's pleadings during the probable-ground hearing. Appellees' Br. 15–17. But *Miranda* favors the State in this appeal. There, the Texas Supreme Court, while reviewing a decision on a plea to the jurisdiction, held that a determination of subject matter jurisdiction is a question of law that the appellate court reviews de novo. *Miranda*, 133 S.W.3d at 226. If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. *Id.* at 227–28. Nonetheless, when making such a determination, the court should liberally construe the pleadings in favor of the plaintiff and look to the pleader's intent. *Id.* at 227. And

only when a plaintiff's pleadings affirmatively negate jurisdiction should a plea to the jurisdiction be granted without opportunity to amend. *Id.* at 226-227.

Miranda does not apply to a quo warranto probable-ground hearing. But its principles, which are common throughout civil litigation in Texas, favor the State in this appeal. *Miranda* calls for de novo review of the district court's ruling, not abuse of discretion. *Compare Miranda*, 133 S.W.3d at 226 (holding subject matter jurisdiction is reviewed de novo); *with City of Orange*, 274 S.W.2d at 888 (holding courts review denial of petition for leave to file an information in the nature of quo warranto for abuse of discretion). *Miranda* also requires a court to liberally construe the pleadings in the State's favor, and deny a jurisdictional challenge if there is a fact issue (as Double Horn contends). And, under *Miranda*, the district court should have given the State leave to amend. Thus, *Miranda* favors reversal of the district court's ruling.

Second, Double Horn asserts that the probable-ground stage of a quo warranto action should be held to the same standard as a request for a temporary injunction. Appellees' Br. 18. But these remedies are different in scope and procedure. A litigant who seeks a temporary injunction must file a verified pleading and other evidence showing a probable right to relief. Tex. R. Civ. P. 682; *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). By contrast, the State need only show a probable ground—not a right to relief—based on allegations in an unverified information in the nature of quo warranto. Of course, once the trial court grants leave to file the quo warranto action, then a district court must proceed as with any other civil case and demand admissible proof for every allegation. But Double Horn fundamentally misunderstands that at this pre-filing stage the probable-ground burden is low.

Third, Double Horn asks the Court to replace the well-established quo warranto pleading standard with a standard based on the Federal Rules of Civil Procedure. But, once again, this argument does not help Double Horn's position on appeal. Even when a federal court examines a complaint under the Federal Rules, it accepts the allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is the same standard applicable to quo warranto pleadings. *Ramirez*, 973 S.W.2d at 393; *City of Orange*, 274 S.W.2d at 888; *Huntsaker*, 17 S.W.2d at 65. Federal courts also view motions to dismiss for failure to state a claim "with disfavor and . . . rarely grant[]" them. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (quotation marks and citation omitted). Federal precedent also supports the State's argument that the trial court here could review documents attached to the complaint to determine whether the State pleaded a cause of action. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F. Supp. 2d 504, 518 (S.D. Tex. 2011). Thus, *Enron* supports the State's argument that the district court erred by sustaining Double Horn's objections to the State's pleading exhibits. *Enron* also says that a trial court may review "documents attached to the motion to dismiss *to which the complaint refers* and which are central to the plaintiff's claim(s)." *Id.* at 518 (emphasis added). Here, because none of the State's allegations referred to the documents Double Horn proffered to the district court, the court should have ignored those documents. Thus, under the Federal Rules and case law, which do not apply here, a federal court accepts the State's allegations as true, disfavors motions to dismiss, and considers evidence attached to the pleadings when determining whether a plaintiff stated a claim.

These standards are similar to Texas's quo warranto precedent and further demonstrate why the district court erred in dismissing the State's petition for leave to file.

II. A Quo Warranto Pleading Does Not Need to Be Verified and its Exhibits Do Not Need to Be Admissible.

Not only did the district court apply an erroneous pleading standard to the State's information, it also abused its discretion by sustaining objections to the State's verification and exhibits. Double Horn claims the State needed to "offer some admissible support for its contentions." Appellees' Br. 45. This is incorrect.

The Civil Practice and Remedies Code and the Rules of Civil Procedure do not require an information in the nature of quo warranto to be verified. *See* Tex. Civ. Prac. & Rem. Code §§ 66.001–.003; Tex. R. Civ. P. 93, 779, 780, 781. Precedent confirms this conclusion. In *Alamo Club v. State*, the San Antonio Court of Appeals ruled that the Attorney General did not need to file a verified information to contest a corporate charter on quo warranto grounds. 147 S.W. 639, 640 (Tex. App.—San Antonio 1912, writ ref'd). In *McLeod Independent School District v. Kildare Independent School District*, the Texarkana Court of Appeals held that a trial court did not err in finding probable grounds to proceed even though the defendant objected to an affidavit filed by the attorney for the State on grounds that it did not support the quo warranto action. 157 S.W.2d 181, 184 (Tex. App.—Texarkana 1941, writ ref'd w.o.m.). The conclusion of these statutes, rules, and cases is that at the petition-for-leave-to-file stage of a quo warranto action, it simply does not matter if the State's pleadings are supported by admissible evidence or a verification. The law charges the trial court with the responsibility to test the pleadings to see if there are allegations

supporting a cause of action. Here, the State pleaded a probable ground to file the information. *See infra* Part IV; State's Opening Br. 9–21.

Double Horn asks the Court to apply a stricter standard to this pre-filing stage of a quo warranto case than the standard a normal litigant would need to meet if he simply filed a petition in district court. Texas is a notice pleading state. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000) ("Texas follows a 'fair notice' standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant."). We do not require plaintiffs to file petitions with admissible evidence. We should not hold quo warranto actions to a stricter standard. Double Horn asks the Court to upend this settled practice and issue a ruling that contradicts the law, the rules, and precedent.

Double Horn cannot point to any statute, case, or rule that requires an information in the nature of quo warranto to be verified. Instead, it claims that the Attorney General must adopt the same (incorrect) legal argument that a district attorney made in a case over 20 years ago. Appellees' Br. 42 (quoting *Ramirez*, 973 S.W.2d at 392). But the Attorney General is not bound by such an argument, most obviously because it is clearly incorrect. The quo warranto statute, the Rules of Civil Procedure, and precedent do not require an information in the nature of quo warranto to be verified. *See* Tex. Civ. Prac. & Rem. Code § 66.002; Tex. R. Civ. P. 93, 779, 780, 781; *Alamo Club*, 147 S.W. at 640; *McLeod Indep. Sch. Dist.*, 157 S.W.2d at 184.

Of course, the State may choose to verify its pleading, as the State did in this case, but nothing requires it to be verified. For that reason, the district court erred in

dismissing the case based on what it viewed as an improper verification. It did not matter whether the State's information was verified or whether the verification satisfied the rules of evidence. The only thing that mattered was whether the State pleaded allegations showing Double Horn violated the law. And the State did so.

Double Horn's argument that the trial court properly sustained objections to the State's exhibits attached to its information is also incorrect. Appellees' Br. 46–48. The admissibility of these exhibits at the pre-filing probable ground stage of a quo warranto case was irrelevant. When a plaintiff attaches exhibits to a petition, the court may examine those documents for all purposes when evaluating whether he stated a claim. Tex. R. Civ. P. 59. While the State chose to attach exhibits documenting the illegality of the City's incorporation, the district court was not required to review those exhibits to determine that the State pleaded a probable ground to file a quo warranto action. But the district court was required to accept the allegations in the State's pleading as true. The district court failed to apply that standard. Moreover, once the case is filed, Double Horn may lodge whatever objections it has to those documents. But at this early stage of a quo warranto action, the State is not required to submit admissible evidence to the Court. It can rely on allegations on information and belief. Thus, the district court erred in sustaining Double Horn's objection to the State's verification and information exhibits.

III. The Court Should Not Take Judicial Notice of the "Evidence" Double Horn Submits for the First Time on Appeal, and, in any Event, These Documents Are Irrelevant.

The "evidence" Double Horn submits in its appellate brief appendices is not part of the record in the trial court. The State objections to the submission of these documents for the first time on appeal, and asks that the Court deny Double Horn's request to take judicial notice of these documents. But even if the Court takes judicial notice of these documents, they are irrelevant to whether Double Horn is a properly incorporated city.

"It is elementary that, with limited exceptions not material here, an appellate court may not consider matters outside the appellate record." *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 501 (Tex. App.—Austin 1991, writ denied) (citing *Sabine Offshore Service, Inc. v. City of Port Arthur*, 595 S.W.2d 840 (Tex. 1979); *Perry v. Kroger Stores, Store No. 119*, 741 S.W.2d 533 (Tex. App.—Austin 1987, no writ)). "The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record." Tex. R. App. P. 34.1. "Material outside the record that is improperly included in or attached to a party's brief may be stricken." *Carlisle*, 805 S.W.2d at 501 (citations omitted).

The State objects to the entirety of Double Horn's appellate appendices because none of the documents were presented to the trial court and none of them are contained in the record on appeal. Appendices 1–4 and 9–15 concern actions taken by Double Horn *after* it filed an opposition to the State's petition for leave to file an information and *after* the trial court held a hearing on that petition. Double Horn never moved to supplement the record in the trial court to include these materials,

and since the trial court never considered them, this Court should not consider them either. They are not part of the record on appeal. Appendices 5–8 concern actions taken by Double Horn *before* the filing of its response to the petition in the trial court and *before* the trial court's hearing on April 3, 2019. Thus, Double Horn could have presented these documents to the trial court, but chose not to. Additionally, the "facts" recited throughout Double Horn's brief are not in the record. *See, e.g.*, Appellees' Br. 1 n.3. The Court must disregard all of these extraneous materials because they are not part of the record on appeal.

Even if the Court took judicial notice of Double Horn's appellate appendices—and it should not—these documents are irrelevant. All evidence is subject to the test for relevance. Tex. R. Evid. 402. And all of the documents contained in Double Horn's appendices concern purported official acts of the city *after* it was *unlawfully* incorporated; thus, the State objects to the admission of this evidence on appeal.

The State alleged two reasons why Double Horn's incorporation was unlawful: it was not already a town or village, and it did not intend to use all territory strictly for municipal purposes. CR.5. None of the acts contained in Double Horn's appendices legitimize the unlawful incorporation. Only the nature of the community and the reasons for incorporation *before* incorporation are relevant. Thus, the Court should not take judicial notice of the items in Double Horn's appendices because they cannot provide useful information in making the court's decision and are irrelevant.

Moreover, by judicially noticing the documents in Double Horn's appendices, the Court will exacerbate the district court's error: considering anything beyond the

petition for leave to file an information and exhibits thereto. When making a probable ground determination, a trial court need only examine the information and exhibits attached to it. *City of Orange*, 274 S.W.2d at 890. During the probable ground determination, even purportedly relevant evidence offered by the defense should not be considered. Once leave to file the case is granted, all relevant evidence can be considered at any appropriate hearing or trial.

To allow Double Horn to argue for affirmance based on material outside the record on appeal prejudices the State. The Court should ignore Double Horn's appellate appendices. Moreover, these documents are irrelevant. By considering Double Horn's appendices, the Court would compound the error committed by the trial court—considering facts outside the petition and information when deciding whether the State has shown probable grounds to proceed with a quo warranto action. The Court should disregard Double Horn's appendices.

IV. The State Pleaded a Probable Ground to Challenge Double Horn's Incorporation.

As already discussed at length, it was improper for the trial court to consider the merits of this case during the pre-filing probable-ground hearing. The court should have looked at what was pleaded by the State, which was sufficient to state a claim.

A. Double Horn is not a village or town that qualifies for incorporation as a city.

Double Horn is not a town or village, and it is certainly not a city. As stated in the State's information, Double Horn is a subdivision of homes west of Austin along Texas State Highway 71. CR.9. Like many subdivisions, it has a community pool with

an outdoor pavilion. *Id.* Next to the subdivision along the highway there is a process service company and a storage building. CR.11. There are no schools, gas stations, churches, stores for residents, or anything else that would resemble a town or village. *Id.*

Quo warranto case law says that when proposed cities possess the characteristics of Double Horn, they do not qualify for incorporation. *See Harang v. State ex rel. City of W. Columbia*, 466 S.W.2d 8, 11 (Tex. App.—Houston [14th Dist.] 1971, no writ) (holding the incorporation of Wild Peach was invalid because the community did not constitute a town or village prior to incorporation, and even though it had a gas station and church); *Rogers v. Raines*, 512 S.W.2d 725, 727–28 (Tex. App.—Tyler 1974, writ ref'd n.r.e.) (holding town of Tucker was not urban or semi-urban in character and did not have a compact center around which a town has developed); *State ex rel. Mobray v. Masterson*, 228 S.W. 623, 631 (Tex. App.—Beaumont 1921, writ ref d) (finding towns or villages have businesses, schools, churches, etc.); *see also* State's Opening Br. 10–16.

Nothing in the State's pleading alleged that Double Horn was a town or village prior to incorporation. In fact, like *Harang*, *Rogers*, and *Masterson*, the State alleged that Double Horn does not have any schools, businesses, churches, or any compact center or nucleus around which a town has developed. Based on the State's allegations, Double Horn is nothing more than a grouping of homes. No one would ever call it a town or village, let alone a city.

Double Horn tries to distinguish cases like *Harang* and *Rogers* based on actions it has taken *after* incorporation. Appellees' Br. 27, 29–32. This is laid plain by Double

Horn's argument that these *post*-incorporation actions "and those that continue to date" justify its classification as a town or village *pre*-incorporation. *Id.* at 32–33. Double Horn's argument goes like this: "after incorporating illegally, we've acted like a city, so we should not be punished for incorporating illegally." But Double Horn's argument is no different than an unlawfully elected official relying on his actions while in office to justify the lawfulness of his election. That later evidence is simply irrelevant. What matters is whether Double Horn met the statutory qualifications for incorporation in the first place, and on the facts pleaded by the State, it clearly does not.

Rather than confront the well-pleaded allegations in the State's information, Double Horn, both in the district court and now on appeal, relies on allegations outside the record to argue that its incorporation was valid. These allegations are irrelevant at this stage of the case when the only question before the district court was whether the State pleaded a probable ground to proceed with the quo warranto action. The State did so.

B. Double Horn did not incorporate for strictly municipal purposes.

Double Horn would have the Court believe that its residents gathered together to form a new city with the intention of fostering community growth and development. But the State's understanding, which must be accepted as true, tells a different story. The residents of Double Horn sought to incorporate as a city because they wanted to stop Spicewood Crushed Stone LLC ("SCS") from building a rock crushing business next door. CR.9 ¶9. Residents even created a group to oppose SCS's

development. CR.10 ¶ 11. Incorporating to stop a business is not a municipal purpose.

Double Horn also claims—based on actions taken *after* incorporation—that it intends to regulate SCS's property for municipal services. But this was not the residents' intent according the State's information, CR.9–10, nor is it Double Horn's intent now based on its brief. According to Double Horn: "SCS's property can and is subject to a comprehensive plan and zoning, which involves the exercise of Double Horn's police powers." Appellees' Br. 40. Double Horn also admits that it wants to "monitor[] and report[] air quality and seismic activity." *Id.* at 36. Thus, Double Horn included SCS's property so that it can exercise its police powers to stop SCS from utilizing the property as a mine.

This case is no different than *Masterson*, where a new city tried to include oil fields in its city limits. 228 S.W. at 624, 628–29. The Beaumont Court of Appeals rejected the notion that the city included the oil fields for municipal purposes. *Id.* at 631. Double Horn lacks a similar municipal purpose. SCS's property is not uninhabited land that Double Horn can later develop. The land, as far as we know at this pleading stage, will be used by SCS for its business purposes. Unlike *City of Waco v. Higginson*, 243 S.W. 1078, 1079 (Tex. Comm'n App. 1922), there is no farm land that will give way to a "large adjoining cit[y]" and it is doubtful Double Horn will have any "skyscraper[s]" in the near future. Thus, inclusion of SCS's property did not

constitute a reasonable amount of uninhabited land because Double Horn will not be able to develop it for municipal purposes.[4]

The State's information included a well-pleaded claim to challenge Double Horn's municipal incorporation.

[4] The allegation that Double Horn is providing municipal services to SCS's property now is irrelevant. But even if the Court considered it, Double Horn is not providing anything that SCS couldn't already receive from other State and county services.

Prayer

The State properly pleaded a quo warranto action against the City of Double Horn and its elected officials. Thus, the Court should reverse the judgment of the district court and remand the case with instruction to file the information and order the clerk to issue process.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy Attorney General for Legal Counsel

Office of the Attorney General
P.O. Box 12548 (MC 001)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Patrick K. Sweeten
Associate Deputy for Special Litigation

/s/ David J. Hacker
David J. Hacker
Special Counsel to the First Assistant Attorney General
State Bar No. 24103323
david.hacker@oag.texas.gov

Kent Richardson
Assistant Attorney General

Counsel for the State of Texas

Certificate of Service

On September 25, 2019, this document was served electronically on Wm. Andrew Messer, lead counsel for Appellees, via andy@txmunicipallaw.com.

/s/ David J. Hacker
David J. Hacker

Certificate of Compliance

Microsoft Word reports that this brief contains 5,352 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ David J. Hacker
David J. Hacker