No. 19-1065

In the Supreme Court of Texas

CITY OF DOUBLE HORN, *et al.*,

Petitioners,

vs.

STATE OF TEXAS,

Respondent.

On Petition for Review from the
Third District Court of Appeals, Austin, Texas
No. 03-19-00304-CV

PETITION FOR REVIEW

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Defendants/Appellees/Petitioners

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Plaintiff/Appellant/Respondent

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STATEMENT OF THE CASE

Nature of the case:	This is a *quo warranto* case in which the State of Texas sought leave to challenge the municipal incorporation of the City of Double Horn and its elected officials' office holding. The district court considered certified public documents, concluded that the State had not met the statutory "probable ground" standard to proceed, and denied the State's petition for leave. The State appealed.
Trial court:	424th Judicial District Court; Burnet County; the Honorable Evan Stubbs presiding.
Trial court disposition:	The trial court denied the State's *Petition for Leave to File an Information in the Nature of Quo Warranto* and dismissed the case.
Parties in Court of Appeals:	The State appealed, the sole appellant before the Court of Appeals. Appellees were the City of Double Horn, Mayor Cathy Sereno, City Marshall John Osborne, and councilmembers R.G. Carver, Bob Link, James Millard, Larry Trowbridge, and Glenn Leisey.[1]
Court of Appeals and Justices:	Third District Court of Appeals; Justices Goodwin, Baker and Kelly.
Court of Appeals disposition:	On October 30, 2019 the Third Court of Appeals reversed and remanded for further proceedings in an opinion authored by Justice Baker.
Court of Appeals citation:	*State v. City of Double Horn*, No. 03-19-00304-CV, 2019 WL 5582237 (Tex. App.—Austin 2019).

[1] Appellees at the time of the appeal included the City of Double Horn, Mayor Cathy Sereno, City Marshall John Osborune, and council members R.G. Carver, Bob Link, James Millard, Larry Trowbridge, and Glenn Leisey. Subsequent to the State's appeal, Gwen Stirling replaced Larry Trowbridge as a city council member and the office of City Marshall was eliminated, although Mr. Osborne took Mr. Link's council position. Accordingly, Mr. Link and Mr. Trowbridge are no longer city council members and have been replaced by Ms. Stirling and Mr. Osborne.

STATEMENT OF JURISDICTION

This appeal presents a question of law that is important to the jurisprudence of the state and construction of a statute, and therefore, invokes the Court's jurisdiction. TEX. GOV'T CODE § 22.001(a); TEX. R. APP. P. 56.1(a)(3), (5) & (6). This Court last addressed a *quo warranto* suit challenging a municipal incorporation almost forty years ago, *State ex rel. Needham v. Wilbanks*, 595 S.W.2d 849 (Tex. 1980), and most of this Court's *quo warranto* cases involving municipal incorporation challenges are from the 1800s. *See State v. De Gress*, 53 Tex. 387 (Tex. 1880); *Largen v. State ex rel. Abney*, 13 S.W. 161 (Tex. 1890); *State et rel. Taylor v. Eidson*, 13 S.W. 263 (Tex. 1890); *State et rel. Taylor v. Eidson*, 13 S.W. 263 (Tex. 1890); *Hunnicutt v. State ex rel. Whitt*, 12 S.W.106, 108 (Tex. 1889); *State ex rel. Perrin v. Hoard*, 62 S.W.1054 (Tex. 1901).

This Court considers *quo warranto* to be an "extraordinary remedy." *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 490 (Tex. 1996). However, this Court has not provided necessary guidance on what the statutorily undefined "probable ground for the proceeding" standard in TEX. CIV. PRAC. & REM. CODE § 66.002 (d) means, or how lower courts should apply it when screening a *quo warranto* case. Indeed, the court of appeals acknowledged that "no caselaw specifically defines the phrase 'probable ground'…" in Section 66.002(d). *See* Op. p. 8. This case provides the Court with an opportunity to do so. Without guidance, the court of appeals

concluded that when screening a petition for leave to invoke jurisdiction under section 66.002, a district court may not consider evidence, the petition need not be verified, and that a district court must accept unverified and otherwise unsupported allegations as true—in the face of contrary, uncontested certified public documents.

The probable ground screening process under Section 66.002(d) is a determination "to invoke [a court's] jurisdiction in a *quo warranto* proceeding." *Bute v. League City*, 390 S.W.2d 811, 815 (Tex. Civ. App.—Houston 1965, no writ). While district courts may consider evidence when evaluating subject matter jurisdiction in other matters, *e.g., Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 805 (Tex. 2018); *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009); *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004); and *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000), it is unclear whether a district court may consider evidence such as certified public documents when applying the probable ground standard to invoke jurisdiction in extraordinary remedy *quo warranto* cases.

The Court should grant review to provide direction to district courts in applying the undefined probable ground standard, including whether district courts may consider evidence when making the determination. The Court should also grant review to clarify whether a petition for leave to file an information in the nature of *quo warranto* should be verified or otherwise supported factually, as that too is

unclear in *quo warranto* case law. Unless the Court provides guidance on these important questions, courts across the State will continue to apply the undefined "probable ground" *quo warranto* standard of review and pleading standards when determining jurisdiction for an extraordinary remedy.

ISSUES PRESENTED

1. A *quo warranto* proceeding is an extraordinary remedy. *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 490 (Tex. 1996); *In re Noble*, 05-19-01521-CV, 2019 WL 7046757, at *1 (Tex. App.—Dallas Dec. 23, 2019, no pet. h.); *City of Richmond v. Pecan Grove Mun. Util. Dist.*, 01-14-00932-CV, 2015 WL 4966879, at *3 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, pet. denied); *In re Lutz*, 03-11-00500-CV, 2011 WL 5335406, at *1 (Tex. App.—Austin Nov. 2, 2011, no pet.); *In re Hudson*, 14-11-00717-CR, 2011 WL 3805912, at *1 (Tex. App.—Houston [14th Dist.] Aug. 25, 2011, no pet.); *In re Miears*, 04-09-00713-CR, 2009 WL 3789914, at *1 (Tex. App.—San Antonio Nov. 11, 2009, no pet.); *City of Houston v. Guthrie*, 332 S.W.3d 578, 595 n.6 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Save Our Springs All., Inc. v. Lazy Nine Mun. Util. Dist. ex rel. Bd. of Directors*, 198 S.W.3d 300, 310 (Tex. App.—Texarkana 2006, pet. denied); *Scolaro v. State ex rel. Jones*, 1 S.W.3d 749, 753 (Tex. App.—Amarillo 1999, no pet.); *Ramirez v. State*, 973 S.W.2d 388, 390 n.1 (Tex. App.—El Paso 1998, no pet.). Most extraordinary remedies require a heightened standard to proceed. *See* Tex. R. Civ. P. 680; *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 560 (Tex. 1998). Texas Civil Practices & Remedies Code § 66.002(a), (d) addressing *quo warranto* proceedings requires a "probable ground" standard to proceed. The court of appeals found that no court, to date, has defined the "probable ground" *quo warranto* standard. Op. at 8. The court of appeals held that a trial court may not consider evidence and must accept unverified, unsupported pleadings as true when evaluating the "probable ground" *quo warranto* standard. Did the court of appeals err in failing to apply a heightened standard of review for the "probable ground" standard in § 66.002(a) & (d)?

2. Did the court of appeals err in holding that a petition for leave to file an information in the nature of a *quo warranto* does not need to be verified or factually supported under the "probable ground" standard of § 66.002(a) & (d)? The state sought to file a petition with a defective verification, to which the city objected. The district court sustained the objection. Although briefed, the court of appeals did not review this issue. Was this error? (unbriefed)

3. Did the court of appeals err in holding that a district court may not consider evidence when evaluating the "probable ground" standard in § 66.002(a) & (d)? The state attached hearsay evidence to its petition, to which the city objected. The district court sustained the objection, but the court of appeals did not review this issue even though it was briefed. And the city offered certified public records as evidence in rebuttal to the "probable ground" *quo warranto* standard. The state did not object to the city's certified evidence. The court of appeals did not review this issue even though it was briefed. Was this error? (unbriefed)

STATEMENT OF FACTS

After a lawful and proper petition to incorporate, voters passed a proposition for Double Horn to incorporate as a Type B general law city on December 11, 2018, and the county judge entered the incorporation into the Burnet County records. (CR 73-77, 97, 100). On February 12, 2019, Double Horn elected its mayor and aldermen pursuant to state law. (CR 108-111). Since that time, Double Horn has engaged in numerous governmental functions and has provided and set in motion plans to provide various governmental services to the entire corporate limits of the city. (CR 112-176; App. to Court of Appeals Brief Tabs 1-15). Double Horn's city council has met regularly and addressed important city issues. (App. to Court of Appeals Brief Tabs 6-15). For example, Double Horn has adopted a comprehensive plan for the development of the city, its extra-territorial jurisdiction and future growth areas

(*Id*. at Tab 1); adopted a comprehensive emergency management plan and appointed an emergency management coordinator (*Id*. at Tab 2); entered into an interjurisdictional emergency management program with Burnet County to address hazards shared by city and county residents (*Id*. at Tab 3); adopted two-year staggered terms of office for its councilmembers (*Id*. at Tab 13); provided an election site, an election officer, and polling locations (*Id*. at Tab 14); provided English and Spanish ballots (*Id*. at Tab 14-15); entered into a contract for election services with Burnet County (*Id*. at Tab 14-15); conducted an election on a uniform election date (*Id*. at Tab 13-15); adopted an official City map and an official city website (*Id*. at Tab 5, 12); implemented an air quality study and provided residents with results (*Id*. at Tab 9, 11); entered into a tax collection agreement with the Burnett County Appraisal District (*Id*. at Tab 8); and studied a law enforcement interlocal agreement with the Burnett County Sheriff's Office (*Id*. at Tab 11), among other things.

Double Horn consists of 1,226.63 acres, almost two square miles. (CR 115-122; App. to Court of Appeals Brief Tab 5). Double Horn contains 105 residences and approximately 238 residents within its city limits. (App. to Court of Appeals Brief Tab 1). The majority of the 1226 acres consists of residential housing constituting the nucleus of the town, containing numerous streets, with average lot sizes being in the range of medium density or estate lots. Double Horn's incorporation is no different than numerous other Texas' municipalities, which are

composed primarily of residences with no or little commercial businesses upon first incorporation.[2]

Included within the corporate limits of the City of Double Horn, and adjacent to the Double Horn Creek residential subdivision, are 281 acres of property owned by Spicewood Crushed Stone, LLC ("SCS"), which SCS plans to use for rock quarry operations. (CR 9, 17-18). SCS's property, at 281 acres, makes up roughly twenty-two percent (22%) of Double Horn's corporate limits. Double Horn's comprehensive plan indicates a planned use of SCS's property as industrial. (App. to Court of Appeal Brief Tab 1).

Double Horn's municipal actions benefit or are intended to benefit the entire area of Double Horn—including the SCS property.[3] Double Horn has taken action to provide governmental services such as interlocal government cooperation for the provision of law enforcement and emergency services, garbage and recycling pickup, monitoring and reporting of air quality and seismic activity, controlling traffic through monitoring and potential reduction of speed on roadways directly adjacent to SCS's property, among other things. (CR 147-176).

Double Horn has declared its intent to zone all property within the city, required buildings to comply with subdivision regulations and building codes, and

[2] Appellees' Brief to the court of appeals, p. 3, fn.6, identifies dozens of such municipalities.
[3] If SCS does, in fact, use the property as a quarry, Double Horn could potentially convert from a Type B municipality to a Type A municipality. *See* TEX. LOC. GOV'T CODE § 6.011(2).

regulated other issues within its city limits, including fireworks and sexually oriented businesses. (CR 149-153). Double Horn's governance, intentions, and expectations for the SCS property constitute proper municipal purposes. *Id.*

In March 2019 the State filed its petition under TEX. CIV. PRAC. & REM. CODE § 66.002, seeking leave of court to file an *Information in the Nature of Quo Warranto* to challenge the City's municipal incorporation and remove its officials from office. (CR 3-6). The State attached evidence and a verification in support of the petition. (CR 16-40).

Appellees answered (CR 177-178) and filed a response (CR 48-72). Appellees objected to the State's evidence and verification (CR 52-54) and provided a substantive response to the State's petition, with certified public documents attached as evidence opposing the State's verified allegations and evidence. (CR 48-176)

The district court held a hearing where it considered the pleadings, response, certified public records, and ultimately sustained the City defendants' objections[4] and denied the State leave to proceed on its *quo warranto* claim. (CR 180). The State then appealed. (CR 181-182).

[4] When asked if it had any objections to the City's certified evidence, the State did not object. (2RR 17: ln 6-14).

On November 5, 2019, Double Horn voters rejected a proposition to abolish its corporate existence, again making their desire for the City indisputably clear.

SUMMARY OF THE ARGUMENT

This Court considers *quo warranto* to be an "extraordinary remedy," *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 490 (Tex. 1996), as do most courts of appeals. *In re Noble*, 2019 WL 7046757, at *1 (Tex. App.—Dallas Dec. 23, 2019, no pet. h.); *City of Richmond v. Pecan Grove Mun. Util. Dist.*, 2015 WL 4966879, at *3 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *In re Lutz*, 2011 WL 5335406, at *1 (Tex. App.—Austin 2011, no pet.); *In re Hudson*, 2011 WL 3805912, at *1 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *In re Miears*, 2009 WL 3789914, at *1 (Tex. App.—San Antonio Nov. 11, 2009, no pet.); *City of Houston v. Guthrie*, 332 S.W.3d 578, 595 n.6 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Save Our Springs All., Inc. v. Lazy Nine Mun. Util. Dist. ex rel. Bd. of Directors*, 198 S.W.3d 300, 310 (Tex. App.—Texarkana 2006, pet. denied); *Scolaro v. State ex rel. Jones*, 1 S.W.3d 749, 753 (Tex. App.—Amarillo 1999, no pet.); *Ramirez v. State*, 973 S.W.2d 388, 390 n.1 (Tex. App.—El Paso 1998, no pet.).

Before a *quo warranto* information may be filed, a district court must determine whether the movant has shown "probable ground" for its *quo warranto* proceeding. TEX. CIV. PRAC. & REM. CODE § 66.002(a) & (d). The statutory probable ground requirement is a question for a district court to determine *before*

exercising subject matter jurisdiction over a *quo warranto* proceeding. *See Bute v. League City*, 290 S.W.2d 811, 815 (Tex. Civ. App.—Houston 1965, no writ) ("As a general rule, it is necessary to obtain leave of the court *to invoke its jurisdiction in a quo warranto proceeding*.") (emphasis added).

As the court of appeals noted, no court has defined the "probable ground" standard in § 66.002. *See* Op. p. 8. The *quo warranto* statute is silent as to how a court should determine the probable ground standard or what the phrase "probable ground for the proceeding" means. In other words, courts must guess at the meaning. The statute is also unclear whether a petition for leave to file an information in the nature of *quo warranto* should be verified or otherwise supported by evidence. Here, the State filed a verified petition attaching supporting evidence, and did not object to the Double Horn's certified public records evidence.

This Court's classification of *quo warranto* as an extraordinary remedy and the statutorily heightened probable ground standard have little meaning if the State must do nothing more than baldly assert generic, conclusory allegations and the district court cannot consider certified public records that negate a probable ground for the *quo warranto* proceeding. The court of appeals erred when it concluded that the district court cannot consider evidence when making the probable ground determination under § 66.002. The court of appeals also erred when it found that a petition for leave need not be verified or otherwise supported by evidence and that a

district court is required to accept unverified, unsupported allegations as true—even in the face of contradictory certified public documents. The court of appeal's opinion dilutes the *quo warranto* extraordinary remedy standard. It also undermines the sanctity of the ballot box in which Double Horn's incorporation was twice affirmed by voters, on December 11, 2018 and November 5, 2019. These votes should remain untouched by the judiciary.

ARGUMENT

I. The court of appeals erred in guessing on the "probable ground" *quo warranto* standard of Section 66.002(d), Texas Civil Practice & Remedies Code

It is entrenched in Texas jurisprudence that *quo warranto* is considered an "extraordinary remedy." *Hardberger*, 932 S.W.2d at 490; *Save Our Springs*, 198 S.W.3d at 310 ("A writ of quo warranto is an extraordinary remedy"); *see* cases cited, *supra*.

The legislature created a screening process before such extraordinary writs can be filed and a court's jurisdiction over a *quo warranto* proceeding invoked. Texas Civil Practices & Remedies Code § 66.002 provides in relevant part:

> (a) *If grounds for the remedy exist*, the attorney general or the county or district attorney of the proper county may petition the district court of the proper county or a district judge if the court is in vacation for leave to file an information in the nature of quo warranto.
>
> ***

> (d) *If there is probable ground for the proceeding*, the judge shall grant leave to file the information, order the information to be filed, and order process to be issued.

TEX. CIV. PRAC. & REM. CODE § 66.002 (a), (d) (emphasis added). No statute specifies what the district court can consider in making the probable cause determination. No statute, or case for that matter, defines "probable ground for the proceeding." The court of appeals admitted as much. *See* Op. p. 8. Without guidance on the issue the court of appeals concluded that unverified and unsupported allegations in a petition must be taken as true for purposes of the probable ground standard—even if the allegations are contradicted by certified public documents. *Id*.

Similar to the court of appeals below, the Georgia Supreme Court considered the confusing standard for *quo warranto* when statutes do not prescribe the standard of review:

> The foregoing demonstrates a confused state of the law in reference to precisely what the judge to whom an applicant to file an information is authorized to do or consider in exercising the discretion which the law requires. We believe, therefore, that it will be beneficial to both the bench and the bar to here consider the basic purpose in providing for such rather cumbersome procedure, and thus arrive at a clear-cut and plain statement of precisely what the trial judge is authorized to consider in passing on such applications. If all that the law seeks to ascertain as a prerequisite to filing the information is whether or not it contains allegations sufficient to state a cause of action, this could be settled by a ruling on demurrer or motion to dismiss the same. We think it perfectly reasonable to assume that the object of the law is to avoid having title to a public office brought in question by false allegations. If such be the purpose or by false allegations. If such be the purpose of the law, then obviously the trial judge, who is responsible for upholding

> this purpose and who is required to exercise a sound discretion, should be entitled to hear and consider evidence as a basis for his judgment.

Walker v. Hamilton, 209 Ga. 735, 738, 76 S.E.2d 12, 14 (1953). The Court should grant review because the *quo warranto* standard is uncertain.

II. The court of appeal's opinion conflicts with guiding precedent that *quo warranto* petitions should be verified or factually supported

The court of appeals primarily relied on three cases to reach its holding: *Ramirez v. State*, 973 S.W.2d 388, 393 (Tex. App.—El Paso 1998, no writ.); *State v. Fischer*, 769 S.W.2d 619, 622 (Tex. App.—Corpus Christi-Edinburg 1989, writ dism'd w.o.j.); and *State ex rel. Manchac v. City of Orange*, 274 S.W.2d 886, 888 (Tex. Civ. App.—Beaumont 1955, no pet.). None of those cases hold, or suggest, that a court should rely exclusively on unsupported pleadings or that a district court cannot evaluate certified documents in making the probable ground determination for *quo warranto* proceedings. To the contrary, each of these cases involved factually supported *quo warranto* pleadings[5]—unlike this case.

Ramirez is the most recent case involving a challenge to a city representative's right to office due to a residency requirement, in which a jury found the

[5] The State has judicially taken the position that for a petition for leave to file an information in the nature of *quo warranto* "all the case law and existing authority requires is that a *sworn petition* be filed." *Ramirez v. State*, 973 S.W.2d at 392. (emphasis added). Indeed, in this case the State's attorney verified the information—but it was admittedly not based on personal knowledge. (CR 16). The State also attached evidence to its pleading, although the evidence was inadmissible. (CR 16-40).

representative was not entitled to office. 973 S.W.2d at 390. Among many points of appeal, Ramirez argued that the district court abused its discretion in allowing the information to be filed. *Id*., at 392-93. Contrary to what the court of appeals below cited (Op. at 8-9), *Ramirez* expressly discussed that the district court in that case considered matters beyond the petition itself, including an affidavit in support. *Id*. at 393 ("**based on the evidence presented by the State**, the trial court believed probable grounds existed for proceeding.") (emphasis added). *Ramirez* did not hold that a court cannot consider evidence or that a court must accept unverified unsupported allegations as true when making the probable ground *quo warranto* determination. *Ramirez* actually supports Double Horn's position that evidence may be considered in making a *quo warranto* probable ground determination.

The second case, *Fischer,* involved a suit to have a county attorney declared ineligible for office due to residency restrictions. 769 S.W.2d at 620. The opinion noted that, when evaluating the probable ground standard, "we will accept as true the allegations contained in the State's petition." *Id*. at 622. But when read in its entirety the court went further in the following paragraph that the allegations accepted as true **were supported by evidence**—"[i]ncluded with the petition is the Hon. Lee Price Fernon's affidavit." *Id*. Citing the affidavit, the *Fischer* court concluded that Fernon's affidavit established that the appellee lacked continuous residence and that the petition, with affidavit attached, met the probable ground

standard. *Id*. *Fischer* at no point held that unverified unsupported allegations must be taken as true—the principle the court of appeals below cites *Ficsher* for. And the *Fischer* court did not hold, nor ever suggest, that a district court cannot consider evidence but is constrained to looking only at allegations in a petition when making the *quo warranto* probable ground determination.

Finally, *City of Orange* involved a county attorney's petition for leave to challenge a city's annexation ordinance. 274 S.W.2d at 887-88. The district court denied the petition, without a hearing or any other action. *Id*. at 888. On those facts, the court of appeals concluded, relying on *State v. Huntsaker*, 17 S.W.2d 63, 65 (Tex. Civ. App.—Amarillo 1929, no pet.), that "the allegations contained in the petition sought to be filed must be taken as true for purposes of passing on this appeal." *Id*. (emphasis added). However, *Huntsaker* involved **a verified pleading**. *Huntsaker*, at 65. So did *City of Orange*¸ wherein the opinion found that the petition "was **verified by the affidavit of the relator Manchac**." *City of Orange*, at 889 (emphasis added).

In sum:

- *Quo warranto* is an extraordinary remedy;
- To proceed, there must be a probable ground for a *quo warranto* remedy;

- In finding that a court should rely exclusively on unverified or unsupported pleadings in making a probable ground finding to proceed for *quo warranto*, the court of appeals cited three cases:
  - *Ramirez*, which was based on evidence presented by the State. *Ramirez*, 973 S.W.2d at 393;
  - *Fischer*, which was supported by an affidavit. *Fischer*, 769 S.W.2d at 622; and
  - the *City of Orange*, which was verified by an affidavit. *City of Orange*, 274 S.W.2d at 888 (citing *Huntsaker*, 17 S.W.2d at 65 which had a verified pleading. *Huntsaker* at 65).

Accordingly, *Ramirez*, *Fischer*, and *City of Orange* do not support that unverified or unsupported allegations in a pleading satisfy the probable ground standard or that a district court is precluded from considering matters of judicial notice or certified public records in making the probable ground determination. The court of appeals' reliance on these three opinions to hold that an unverified unsupported petition must be accepted as true in the face of certified public documents is flawed, and not certainly aligned with the established extraordinary remedy for *quo warranto*. *See State ex rel. Yelkin v. Hand*, 331 S.W.2d 789, 797 (Tex. Civ. App.—Houston 1960), *writ ref'd n.r.e. per curiam*, 333 S.W.2d 109 (Tex. 1960) (an information supporting a *quo warranto* proceeding should be sworn to or otherwise established by evidence).

The court of appeals opinion also cannot be squared with this Court's repeated precedent of invoking subject matter jurisdiction. The Court has held that when a lower court evaluates issues of subject matter jurisdiction, a lower court may, and in fact should, consider evidence appropriate to make its jurisdictional determination. *See, e.g.*, *Clark*, 544 S.W.3d at 805; *Miranda*, 133 S.W.3d at 227-29; *Kirwan*, 298 S.W.3d at 622; and *Blue*, 34 S.W.3d at 555 (court "is not required to look solely to the pleadings but may consider evidence *and must do so* when necessary to resolve the jurisdictional issues raised.") (emphasis added). In fact, in *Miranda*, this Court expressly referenced Federal Rule of Civil Procedure 12(b) and federal courts' reliance on evidence in adjudicating jurisdictional challenges under Rule 12(b). *Miranda*, at 227-28 and n. 6. This same analysis should apply to *quo warranto* proceedings, an extraordinary remedy that statutorily requires a district court to screen for jurisdiction before the case may be filed.

III. The court of appeal's opinion dilutes the *quo warranto* extraordinary remedy standard of review

Q*uo warranto* is on a short list of extraordinary remedies. In addition to *quo warranto*, Texas law recognizes the following as extraordinary remedies:

- Injunctive relief— *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) ("A temporary injunction is an extraordinary remedy;" applying a "probable right to recovery" standard based on evidence);

- *Habeas corpus— Ex parte Cruzata*, 220 S.W.3d 518, 520 (Tex. Crim. App. 2007) ("available only when there is no other adequate remedy at law.");

- Mandamus—*In re Poe*, 996 S.W.2d 281, 283 (Tex. App.—Amarillo 1999), citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) ("available only in limited circumstances" involving "manifest and urgent necessity");

- Receivership—*Benefield v. State*, 266 S.W.3d 25, 31 (Tex. App.—Houston [1st Dist.] 2008) ("[t]he appointment of a receiver, nevertheless, is a harsh, drastic, and extraordinary remedy, to be used cautiously");

- *Writ of certiorari—Ramsey v. Morris*, 578 S.W.2d 809, 812 (Tex. App.—Houston [1st Dist.] 1979, writ dism'd) (an extraordinary remedy by writ of certiorari ordinarily will not lie when ordinary remedies such as an appeal are adequate);

- *Writ of prohibition—Hebert v. Probate Court No. One of Harris County*, 466 S.W.2d 849, 851 (Tex. App.—Houston [14th Dist.] 1971, no writ) ("A writ of prohibition is an extraordinary remedy which is only granted in extreme cases of necessity and not for grievances which may be redressed in ordinary proceedings at law."); and

- *Procedendo—Mauzy v. Legislative Redistricting Bd.*, 471 S.W.2d 570, 575 (Tex. 1971); 38 Tex. Jur. 3d Extraordinary Writs § 408 ("Procedendo is a high-prerogative writ of an extraordinary nature.") (citations omitted); *Poultney v. LaFayette*, 12 Pet. 472, 473, 9 L.Ed. 1161 (1838) (an application for "a rule . . . to show cause why a mandamus, in the nature of a writ of procedendo, should not issue" must be supported by affidavit, under the decisions and practice of the supreme court of the United States, or its statements cannot be considered).

Clearly, Texas' extraordinary remedies are actions that include heightened burdens. Of the extraordinary remedies, the *quo warranto* probable ground standard is most directly aligned with the standard for injunctive relief. A district court cannot issue a temporary injunction without first finding, *inter alia*, a "probable right to the relief sought." *Butnaru*, 84 S.W.3d at 204. The "probable right to the relief sought" for a TRO is quite similar to the *quo warranto* standard of "probable ground for the proceeding" in Section 66.002(d). In both extraordinary remedies, a verified petition and supporting evidence should be required to support relief. It is beyond peradventure that a court must consider evidence when applying the "probable right to the relief" standard for an injunction, as the applicant must present a verified pleading or other evidentiary support. *See* TEX. R. CIV. P. 680, 682; *Operation Rescue-National*, 975 S.W.2d at 560. But according to the court of appeals below, the "probable ground" standard for a *quo warranto* proceeding requires no verification, no evidentiary support, and the district court cannot consider evidence to make the determination. This constitutes error. The Court should grant review to correct the court of appeals' error to clarify how district courts should apply the *quo warranto* extraordinary remedy standard of review.

IV. The Court should grant review to clarify 1889 *dicta* relied on by the court of appeals

The court of appeals cited *Hunnicutt v. State ex rel. Whitt*, 12 S.W. 106, 108 (Tex. 1889) for the proposition that while a *quo warranto* filed on relation of another

should be verified, if the State files an information on its own behalf, then the State's unverified and unsupported word alone is sufficient. *See* Opinion, p. 7, citing *Hunnicutt* at 108.

As an initial matter, *Hunnicutt* stated that pleadings in the nature of *quo warranto* **should be sworn to**, despite the applicable statute not expressly requiring same. 12 S.W. at 108 ("Such relations or information should be sworn to. Although this is not made necessary by the terms of the statute, it has been the practice under similar statutes."). The pleadings in *Hunnicutt* actually involved a **verified information** and supplementations thereto. *Id*. at 107. Indeed, "the original information was sworn to by the relator before the county attorney, ... [and after it was filed] [t]he relation and information… were **again sworn to** by the relator before the clerk of the district court" *Id*. (emphasis added). So the petition was verified twice. This point, alone, demonstrates that the court of appeals erred.

While *Hunnicutt* addressed a case involving a *quo warranto* petition filed on relation of another, in non-binding *dicta* the opinion noted that "[t]he state's officer might file his information without relation, and in that case *it would seem that* his official statement, unsworn, would be sufficient to authorize a judge to direct an information to be filed." *Id*. (emphasis added). It is this non-committal quotation made 130 years ago that the court of appeals grabbed hold of to conclude—without explanation—that the State need not verify its pleading and its pleading must be

accepted as true, even in the face of uncontested certified public documents to the contrary.

Importantly, *Hunnicutt* provides no explanation as to why a *quo warranto* pleading must be verified when filed on relation, but not when the State sues on its own behalf. Petitioners are not aware of any other place in the law where one set of rules applies to some litigants, while the rules are relaxed for others. There is no basis, in *Hunnicutt* or otherwise, that the Attorney General should be cloaked with some unspecified presumption that other parties are unworthy of. This discrepancy should be corrected.

Nonetheless, this point of discussion in *Hunnicutt* was pure *dicta* that should not govern this case. Even if it did, the 1889 case in no way suggests that an unverified or otherwise unsupported petition or information is sufficient to meet the probable ground standard in the face of contrary evidence—regardless of whether the Attorney General brings suit on behalf of the State itself.

This Court should grant review in order to clarify the *Hunnicutt dicta,* as in one portion of the opinion *Hunnicutt* suggests that *quo warranto* pleadings should be verified despite the statute not requiring same, but then the opinion loosely suggests verification may not be necessary for cases brought by the State on its own behalf. There is no justification for the State being able to play by different rules. This Court's clarification on whether pleadings in a *quo warranto* proceeding should

be verified or factually supported is necessary because it affects courts across the state.

PRAYER

For the foregoing reasons, this Court should grant the petition for review, order full briefing on the merits, reverse the court of appeals' opinion and judgment, and render judgment affirming the trial court's order in favor of the Double Horn petitioners. Petitioners pray for costs and further relief to which they are entitled.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been sent via electronic service to all attorneys of record, in compliance with Rule 6.3 of the TEXAS RULES OF APPELLATE PROCEDURE, on January 15, 2020.

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/s/ Wm. Andrew Messer
WM. ANDREW MESSER

CERTIFICATE OF COMPLIANCE

This is to certify that, according to the computer program used to prepare this document, the document contains 4,222 words in compliance with Texas Rule of Appellate Procedure 9.4(i)(3), excluding those items that are not to be included in the word count pursuant to Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Wm. Andrew Messer
WM. ANDREW MESSER

APPENDIX

APPENDIX TAB

1

V.T.C.A., Civil Practice & Remedies Code § 66.002

§ 66.002. Initiation of Suit

Currentness

(a) If grounds for the remedy exist, the attorney general or the county or district attorney of the proper county may petition the district court of the proper county or a district judge if the court is in vacation for leave to file an information in the nature of quo warranto.

(b) The petition must state that the information is sought in the name of the State of Texas.

(c) The attorney general or county or district attorney may file the petition on his own motion or at the request of an individual relator.

(d) If there is probable ground for the proceeding, the judge shall grant leave to file the information, order the information to be filed, and order process to be issued.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

V. T. C. A., Civil Practice & Remedies Code § 66.002, TX CIV PRAC & REM § 66.002
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

APPENDIX TAB

2

CAUSE NO. 49209

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
v.	§	**424th JUDICIAL DISTRICT**
	§	
CITY OF DOUBLE HORN, TEXAS; CATHY SERENO; R.G. CARVER; BOB LINK; JAMES E. MILLARD; LARRY TROWBRIDGE; GLENN LEISEY; and JOHN OSBORNE,	§	
Defendants.	§	**BURNET COUNTY, TEXAS**

ORDER

After considering plaintiff's petition for leave to file an information in the nature of *quo warranto*, defendants' response in opposition to same, pleadings, certified copies of city acts and ordinances, and argument of counsel, the Court

DENIES plaintiff's motion for leave to file an information in the nature of *quo warranto*, SUSTAINS the objections of defendants and hereby DISMISSES this case with prejudice. Any relief not expressly granted herein is denied. This order disposes of all parties and all claims and is appealable.

Signed this 23 day of April 2019. 4/23/2019 11:05:57 AM

JUDGE PRESIDING

APPENDIX TAB

3

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00304-CV

The State of Texas, Appellant

v.

City of Double Horn, Texas; Cathy Sereno; R. G. Carver; Bob Link; James E. Millard; Larry Trowbridge; Glenn Leisey; and John Osborne, Appellees

FROM THE 424TH DISTRICT COURT OF BURNET COUNTY
NO. 49209, THE HONORABLE EVAN C. STUBBS, JUDGE PRESIDING

OPINION

The State of Texas complains of the trial court's order denying its petition for leave to file an information in the nature of quo warranto, seeking to challenge the City of Double Horn's incorporation as a municipality. *See* Tex. Civ. Prac. & Rem. Code §§ 66.001–.003 (governing quo warranto suits). Appellees are the City of Double Horn and its elected officials.[1] Because we conclude that the State's petition for leave stated a probable ground for a quo warranto proceeding, we will reverse the trial court's order dismissing the State's petition and remand this cause for further proceedings.

BACKGROUND

The State filed its "Petition for Leave to File an Information in the Nature of Quo Warranto" seeking to "declare the incorporation of the City of Double Horn, Texas, invalid and

[1] In this opinion, we will refer to the City of Double Horn as "the City" and the City and its officials, collectively, as "Double Horn."

void for failure to comply with statutory requirements for incorporation and to remove the officers of the City of Double Horn from office." The State alleged that the City's incorporation as a Type-B general-law municipality did not meet two statutory requirements: (1) that the community intending to incorporate constitutes an unincorporated town or village prior to incorporation, and (2) that the proposed boundaries include only the territory to be used strictly for municipal purposes. *See* Tex. Loc. Gov't Code §§ 7.001(1), .002(b).

The State attached to its petition an "Information in the Nature of Quo Warranto," verified by its counsel, and several exhibits. The State's petition and information alleged the following relevant facts:

- Prior to incorporation, the City of Double Horn was a subdivision of approximately 92 homes in Burnet County, west of Spicewood, Texas on the north side of Texas State Highway 71.
- The subdivision consists of homesites and a single common area that includes a community pool and covered outdoor pavilion.
- The subdivision has no wastewater utility; the homes rely on septic.
- The subdivision obtains its water from wells, and the water is delivered by the Double Horn Creek Water Supply Corporation, but water is not provided to the property owned by Spicewood Crushed Stone LLC (SCS).
- SCS owns approximately 281 acres of rural undeveloped land adjacent to the eastern boundary of the subdivision. SCS plans to use the tract for quarry operations after obtaining all required permits.
- Upon learning of the proposed use for the SCS tract, some residents of the Double Horn subdivision began considering incorporation as a means to stop SCS from operating a quarry on its land.
- The incorporated City of Double Horn includes within its boundaries the Double Horn subdivision and SCS's property.
- The Double Horn subdivision was just that: it was a residential subdivision, not a "town" or "village." It has no stores. The only businesses include a process service

company and a storage building located along State Highway 71. It has no churches. It lacks a school. It lacks a gas station with a convenience store. It even lacks a public building that the residents can use for city business. To conduct city business, officials are left to the choice of the open-air pavilion, the pool area, or someone's living room.

- Even if the subdivision could have been considered an existing town or village, SCS's property was not part of it. SCS's property is rural in character. It is agricultural land, not urban land. There is no unity between SCS's land and the Double Horn subdivision. SCS's land is not part of a compact center or nucleus of population.

- [L]and within the town must be susceptible of receiving some municipal services [to constitute a town or village]. . . . There is no evidence whatsoever that the City of Double Horn (or the residents of the prior subdivision) intends to provide its commercial residents any services typically provided by cities. There is no central wastewater facility to connect to SCS property. There is no stated plan to connect water service to SCS property. There is no stated plan to allow SCS to partake in the road improvement projects available to the subdivision or connect the property to the rest of the community. [Citation omitted.] There is no stated plan to create and provide police, fire, or other emergency services to the city or to SCS.

- Land cannot he included within a town solely for tax purposes. [Citation omitted.] If the city remains incorporated, and assuming the city will exercise its authority to tax the property within its boundaries, SCS will be subject to city taxes without receiving any corresponding public benefit. SCS will be the largest landowner (and taxpayer) in town. In fact, it will be in the position of funding the city's effort to block SCS's project. No one has any expectation that SCS's property will be developed as part of the city. In fact, the only apparent purpose of the city's incorporation is to prevent the development of the SCS property.

- This is not a case where the proposed town residents anticipate commercial development to serve the community. On the contrary, the residents have included land that they know will *not* be developed as part of the city. Texas case law since 1891 has stated that residents cannot include undeveloped land that they know will not eventually be developed for municipal purposes.

Double Horn filed a response in opposition to the State's petition for leave and, subject thereto, answered the lawsuit. After a hearing on the matter, at which the trial court admitted several exhibits offered by Double Horn, the trial court signed an order denying the State's petition for leave and dismissing its lawsuit.

STANDARD OF REVIEW

We review a trial court's denial of leave to file an information in the nature of quo warranto for an abuse of discretion. *State ex rel. Manchac v. City of Orange*, 274 S.W.2d 886, 888 (Tex. App.—Beaumont 1955, no writ) (citing *State ex rel. Eckhardt v. Hoff*, 31 S.W. 290, 290–91 (Tex. 1895)); *State ex rel. Thornhill v. Huntsaker*, 17 S.W.2d 63, 65 (Tex. App.—Amarillo 1929, no writ). A trial court abuses its discretion if it acts without reference to any guiding rules or principles or acts in an arbitrary or unreasonable manner. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). It also abuses its discretion if it either fails to analyze the law properly (e.g., uses an improper legal standard) or fails to apply the law properly to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

DISCUSSION

In its first issue, the State contends that the trial court erred in considering the ultimate merits of its case, rather than merely determining whether its pleadings showed a probable ground to file the information. The State's remaining three issues involve evidentiary rulings the trial court made sustaining Double Horn's objections to the State's verified information and attached exhibits and the trial court's admission and consideration of evidence offered by Double Horn at the hearing.

Quo warranto proceedings generally

A quo warranto lawsuit is one "through which the State acts to protect itself and the good of the public generally." *Fuller Springs v. State ex rel. City of Lufkin*, 513 S.W.2d 17, 19 (Tex. 1974); *see also Newsom v. State*, 922 S.W.2d 274, 277 (Tex. App.—Austin 1996, writ denied) ("In the modern context, the State uses quo warranto actions to challenge the authority to

engage in certain practices specifically enumerated by statute."). Quo warranto proceedings are authorized by statute, *see* Tex. Civ. Prac. & Rem. Code §§ 66.001–.003, and have existed under the common law for centuries, *see Banton v. Wilson*, 4 Tex. 400, 406 (1849) (recognizing quo warranto as "the ancient method of proceeding against those who exercised franchises in derogation of the rights of the crown"). Chapter 66 of the Civil Practice and Remedies Code governs quo warranto proceedings, and the State alleges that two of the nonexclusive reasons authorized thereunder are applicable here: (a) when "a person usurps, intrudes into, or unlawfully holds or executes a franchise or an office," including a municipal office; and (b) when "an association of persons acts as a corporation without being legally incorporated." *See* Tex. Civ. Prac. & Rem. Code § 66.001(1), (3).

The State commonly uses quo warranto proceedings against municipalities to challenge the validity of their incorporation. *See, e.g.*, *Fuller Springs*, 513 S.W.2d at 18 (challenging incorporation of city based on alleged prior annexation of land by adjacent city); *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722, 724 (Tex. 1971) (challenging municipal annexation); *Gonzales v. Concerned Citizens of Webberville*, 173 S.W.3d 112, 119 (Tex. App.—Austin 2005, pet. denied) (describing when quo warranto is necessary to challenge municipal incorporation); *Harang v. State ex rel. City of West Columbia*, 466 S.W.2d 8, 13 (Tex. App.—Houston [14th Dist.] 1971, no writ) (holding that trial court did not err in permitting State to file information on relation of neighboring cities to challenge municipal incorporation). The State also uses quo warranto proceedings to oust municipal officers who unlawfully hold office or exercise power. *See, e.g.*, *Largen v. State ex rel. Abney*, 13 S.W. 161, 163 (Tex. 1890) (holding that municipal officers were not entitled to hold office); *State v. De Gress*, 53 Tex. 387, 401 (1880) (holding that district court erred in dismissing quo warranto lawsuit

challenging right of city mayor to hold office); *State v. Fischer*, 769 S.W.2d 619, 622 (Tex. App.—Corpus Christi–Edinburg 1989, writ dism'd w.o.j.) (holding that probable ground existed for county attorney pro tem to challenge eligibility of candidate for office of county attorney).

The attorney general or county or district attorney of the proper county initiates a quo warranto suit by petitioning the district court "for leave to file an information in the nature of quo warranto." Tex. Civ. Prac. & Rem. Code § 66.002(a). The trial court "shall grant leave to file the information, order the information to be filed, and order process to be issued" if there is "probable ground" for the proceeding. *Id.* § 66.002(d); *see also* Tex. R. Civ. P. 780 ("When such information is filed, the clerk shall issue citation as in civil actions, commanding the defendant to appear and answer the relator in an information in the nature of a quo warranto."). A quo warranto suit is a civil proceeding governed by the rules applicable to all civil actions. *Gifford v. State ex rel. Lilly*, 525 S.W.2d 250, 252 (Tex. App.—Waco 1975, writ dism'd by agr.); *see* Tex. R. Civ. P. 781 (stating that defendant in quo warranto is "entitled to all the rights in the trial and investigation of the matters alleged against him, as in cases of trial in civil cases in this State").

Proper standard for determining whether the State showed a probable ground

In its first issue, the State contends that the trial court erred in dismissing its petition because the court considered the ultimate merits of the case rather than merely determining whether the State showed a probable ground to file its information. *See* Tex. Civ. Prac. & Rem. Code § 66.002(a) ("If grounds for the remedy exist, the attorney general or the county or district attorney of the proper county may petition the district court of the proper county . . . for leave to file an information in the nature of quo warranto."). The State contends that the trial court erred by applying "the wrong pleading standard and failing to accept its allegations

as true" in determining whether it had a probable ground to bring this action. "If there is probable ground for the proceeding, the judge *shall* grant leave to file the information, order the information to be filed, and order process to be issued." *Id.* § 66.002(d) (emphasis added).

Double Horn counters that quo warranto is an "extraordinary remedy," holding the State to a higher burden to obtain leave of the district court to file the information—a burden requiring the trial court to consider evidence submitted by the parties and to make a probable-ground determination based thereon. Double Horn argues that because the trial court properly sustained its objections to the State's verification and inadmissible evidence and properly admitted the evidence offered by Double Horn, the State failed to meet its evidentiary burden to show a probable ground to file its information.

Significantly, no statute, rule, or caselaw explicitly requires the State to verify its petition or support it with evidence. *Cf. id.* §§ 66.001–.003 (outlining no such requirements); Tex. R. Civ. P. 93 (not including quo warranto in list of pleadings that "shall be verified by affidavit"), 779–782 (outlining no such requirements); *Hunnicutt v. State*, 12 S.W. 106, 108 (Tex. 1889) (noting that if State files information in nature of quo warranto not on relation of another but on its own behalf, "it would seem that [the State's] official statement, unsworn, would be sufficient to authorize a judge to direct an information be filed"); *Alamo Club v. State*, 147 S.W. 639, 640 (Tex. App.—San Antonio 1912, writ ref'd) (noting that quo warranto statutes did not require verified petition). Rather, as contended by the State and determined by our sister courts, the trial court must accept as true the allegations contained in the State's petition in making its probable-ground determination and "need only find that the petition stated a cause of action to proceed." *Ramirez v. State*, 973 S.W.2d 388, 393 (Tex. App.—El Paso 1998, no pet.); *see Fisher*, 769 S.W.2d at 622 ("For the purpose of determining whether probable ground exists

to support this proceeding, we will accept as true the allegations contained in the State's petition. If the petition states a cause of action, then the trial court did not err in granting permission to file it."); *City of Orange*, 274 S.W.2d at 888 ("If the petition sought to be filed states a cause of action, the court was in error in refusing permission to file it. We therefore look to the petition to determine its sufficiency.").

While no caselaw specifically defines the phrase "probable ground" in this context, it follows from the above-cited authorities that specific factual allegations of conduct that, if true, would entitle the State to the relief it seeks qualify as adequately stating a cause of action under the probable-ground test. If the State's allegations, taken as true, state a cause of action for quo warranto, the trial court has no discretion but to grant leave to file the information. *See Ramirez*, 973 S.W.2d at 393; *Fisher*, 769 S.W.2d at 622; *City of Orange*, 274 S.W.2d at 888; *see also* Tex. Civ. Prac. & Rem. Code § 66.002(d).

We reject Double Horn's attempt to analogize the trial court's role at the petition-for-leave stage to its role in determining whether it has subject-matter jurisdiction, arguing that the trial court must "screen [a petition] for jurisdiction" by considering evidence and citing *Bland Independent School District v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000) ("[A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional questions raised."). The analogy is inapposite, as the question of whether a trial court must grant leave to file an information in quo warranto is not a jurisdictional question, and a court's jurisdiction does not turn on the sufficiency of evidence to support a claim. Rather, jurisdiction is a question of whether a court has "the constitutional or statutory authority to decide the case." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *see also State Bar of Tex. v. Gomez*,

891 S.W.2d 243, 245 (Tex. 1994) ("As a general proposition, before a court may address the merits of any case, the court must have jurisdiction over the party or the property subject to the suit, jurisdiction over the subject matter, jurisdiction to enter the particular judgment, and capacity to act as a court."). There can he no reasonable contention that the trial court does not have jurisdiction over quo warranto proceedings as the legislature has specifically authorized district courts to adjudicate the proceedings. *See* Tex. Civ. Prac. & Rem. Code § 66.002(a).

Accordingly, we hold that the proper standard for determining whether a petition for leave to file an information in the nature of quo warranto has stated a probable ground is whether the facts alleged in the State's petition, taken as true, state a cause of action for which the quo warranto statute provides a remedy. *See Ramirez*, 973 S.W.2d at 393; *Fisher*, 769 S.W.2d at 622; *City of Orange*, 274 S.W.2d at 888; *see also* Tex. Civ. Prac. & Rem. Code § 66.002(d). To the extent that the trial court applied a different standard, it erred.

Whether the State met its burden to show a probable ground

Having identified the proper standard a trial court must apply when ruling on a petition for leave to file an information in the nature of quo warranto, we consider whether the State's allegations, taken as true, stated a probable ground for this action.

To prevail on its claim that the City was invalidly incorporated, the State needs to prove that (1) the Double Horn subdivision did not "constitute[] an unincorporated town or village" prior to incorporation, *see* Tex. Loc. Gov't Code § 7.001(1); and (2) the boundaries of the incorporated area do not "contain[] only the territory to be used strictly for municipal purposes," *id.* § 7.002(b); *see State ex rel. Needham v. Wilbanks*, 595 S.W.2d 849, 851 (Tex. 1980) ("Thc purpose of the incorporation statutes is not to create towns and villages, but to allow

those already in existence to incorporate. Incorporation contemplates the existence of an actual village, town, or city.").

The State's petition alleged that the City lacked the characteristics of a village, town, or city prior to incorporation. As outlined in detail above, the State specifically alleged that the City was merely a rural subdivision of homes lacking any of the businesses or institutions typical of towns and villages and that the incorporated area is not susceptible to municipal services. *See Rogers v. Raines*, 512 S.W.2d 729–30 (Tex. App.—Tyler 1974, writ ref'd n.r.e.) (noting that village is "an assembly of houses less than a city, but nevertheless urban or semi-urban in its character, and having a density of population greater than can usually be found in rural districts" and has "compact center or nucleus of population around which a town has developed" and municipal services (citation omitted)); *Harang*, 466 S.W.2d at 11 (noting that, to constitute town or village, area should have "an urban character as distinguished from a rural character," "[t]here should be some degree of unity and proximity between the habitations so assembled . . . [, and] the area . . . should be susceptible of receiving some municipal services").

Additionally, the State's petition made specific factual allegations contesting that the City intended to use all of the territory included in the municipality for strictly town purposes. *See Harang*, 466 S.W.2d at 11 (affirming trial court's judgment on jury's verdict that "those who petitioned for the incorporation of the village of Wild Peach did not intend to use all of the territory incorporated for strictly town purposes" and, thus, that incorporation was invalid); *State ex rel. Mobray v. Masterson*, 228 S.W. 623, 630–31 (Tex. App.—Beaumont 1921, writ ref'd) (reversing trial court's finding that city was properly incorporated because evidence demonstrated that municipal area could not be used strictly for municipal purposes); *see also Noel v. State ex rel. Lufkin Indus., Inc.*, 545 S.W.2d 843, 845 (Tex. App.—Beaumont 1976,

writ ref'd n.r.e.) (noting that whether area sought to be included in incorporated city is intended to be used strictly for town purposes is question of fact (citing *State ex rel. Perrin v. Hoard*, 62 S.W. 1054, 1055–56 (Tex. 1901)). As outlined above, the State alleged that the City included the SCS property in its incorporation even though the SCS property would not be used strictly for municipal purposes, would not be developed as part of the City, and is not susceptible to receiving any municipal services such as water, wastewater, or road improvements.

Having reviewed the State's factual allegations, we conclude that the State sufficiently stated a claim for relief on its claim of invalid incorporation and, thus, a probable ground for a quo warranto proceeding. The State's allegations also support its claim at this petition-for-leave stage that the City officials are unlawfully acting as a municipal corporation, as the officials' authority necessarily flows from the City's authority. Therefore, we need not further discuss the State's second claim, alleging that the city officials are unlawfully holding office.

We sustain the State's first issue and hold that the trial court abused its discretion in denying the State's petition for leave to file its information in the nature of quo warranto. Because of our disposition of the State's first issue, we need not address its additional complaints about the trial court's evidentiary rulings and consideration of Double Horn's evidence. *See* Tex. R. App. P. 47.1, .4.

CONCLUSION

Because the State's petition for leave stated a probable ground for a quo warranto proceeding, we hold that the trial court erred in dismissing the State's petition for leave to file an information in the nature of quo warranto and remand this cause for further proceedings consistent with this opinion.

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, and Kelly

Reversed and Remanded

Filed: October 30, 2019

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED OCTOBER 30, 2019

NO. 03-19-00304-CV

The State of Texas, Appellant

v.

City of Double Horn, Texas; Cathy Sereno; R. G. Carver; Bob Link; James E. Millard; Larry Trowbridge; Glenn Leisey; and John Osborne, Appellees

APPEAL FROM THE 424TH DISTRICT COURT OF BURNET COUNTY
BEFORE JUSTICES GOODWN, BAKER, AND KELLY
REVERSED AND REMANDED -- OPINION BY JUSTICE BAKER

This is an appeal from the order signed by the trial court on April 23, 2019. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the order. Therefore, the Court reverses the trial court's order and remands the case to the trial court for further proceedings consistent with the Court's opinion. Appellees shall pay all costs relating to this appeal, both in this Court and in the court below.