[Cite as *State ex rel. Jones v. Athens*, 2017-Ohio-7370.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO EX REL. SEAN JONES,	:	Case No. 16CA15
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
THE CITY OF ATHENS,	:	**RELEASED: 08/10/2017**
Defendant-Appellee,	:	

APPEARANCES:

John P. Lavelle and Robert R. Rittenhouse, Lavelle and Associates, Athens, Ohio, for appellant.

Lisa Eliason, Athens Law Director, Athens, Ohio; and Steven G. Carlino and Kaitlin L. Madigan, Weston Hurd, LLP, Columbus, Ohio, for appellee.

Harsha, J.

{¶1} Following a bench trial the Athens County Court of Common Pleas denied landowner Sean Jones's petition for a writ of mandamus to compel the city of Athens to initiate appropriation proceedings for the city's taking of his property in 2011. Subsequently, the trial court dismissed all of his additional claims.

{¶2} Preliminarily, we conclude that the trial court's judgment dismissing "all counts" constitutes a final appealable order. The judgment, which denied all of Jones's requested relief, affected his substantial rights and determined the action. The entry indicates that it resolved all of the multiple claims raised by the parties; in the alternative the court made an express determination that there was no just reason for delay under Civ.R. 54(B). Thus, we have jurisdiction to address the merits of Jones's appeal.

{¶3} Initially, Jones asserts that the trial court erred in denying his first mandamus claim, which addressed the city's 2011 entry upon his property and

replacement of a drainage pipe. We agree. The trial court denied his mandamus claim because "[n]o third party proof of interference with sale was provided and [Jones] was not otherwise using the land." The trial court erred because there is no requirement that a relator must introduce "third-party proof" or evidence that he was "otherwise using the land" to support a takings claim. Moreover, the city's activity constituted a physical invasion of his property—entering on his land, replacing pipe located on his land, and continuing to use the pipe for a public purpose as part the city's sewer system. In effect the city's actions were consistent with creating or maintaining an easement on Jones's property. Jones did not need to establish interference with potential sales or other uses of his land to prove that a taking occurred. Ultimately, the issue of whether Jones agreed to grant the city an easement for its repair and continued use of the drainage line on his property in return for the city's agreement to tie that line to another line existing on Jones's property goes to the amount of compensation that Jones is due from the city, rather than whether a taking occurred. We sustain his first assignment of error.

{¶4} Next Jones contends that the trial court erred in dismissing his second mandamus petition based on res judicata. This contention is correct because the second mandamus claim was based on the city's actions in 2015, not in 2011. Res judicata does not bar a subsequent action between the same parties when the facts giving rise to the second action were not in existence at the time of the commencement of the first action. We sustain his second assignment of error.

{¶5} Jones also claims that the trial court erred in dismissing the remaining constitutional claims in his second amended complaint. Res judicata does not bar Jones's constitutional claims, which were based on the city's 2011 entry onto his

property, because the quantum of proof for these claims is less than that for his first mandamus claim. And we have now determined that the trial court erred in denying his initial mandamus claim.

{¶6} And in the third assignment of error Jones claims the trial court erred in applying the wrong legal standard to decide the motion to dismiss. The city argues that "unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss." However, the Supreme Court has held that this fact-pleading requirement is an exception to the general rule that a plaintiff need only give reasonable notice of the claim. The fact pleading exception only applies in a few carefully circumscribed cases; this is not one of those exceptional cases. We sustain Jones's third assignment of error.

{¶7} Finally Jones argues that the trial court erred in dismissing his breach of contract and promissory estoppel claims because they were not the subject of the city's motion to dismiss. The city agrees that its motion did not address these claims, so the trial court erred in dismissing them. We sustain Jones's fourth assignment of error.

{¶8} Accordingly, we reverse the judgment of the trial court and remand the cause for further proceedings.

I. FACTS

{¶9} Jones filed a complaint in 2013 in the Athens County Court of Common Pleas against the city of Athens. He alleged several claims, including a petition for a writ of mandamus to compel the city to commence an appropriation proceeding for its taking of Jones's property in 2011 when it entered his property, replaced a drainage pipe, and continued to use that pipe as part of the city's sewer system. The court

decided Jones's mandamus claim in a 2014 bench trial, which produced the following evidence.

{¶10} Jones testified that in 2002, he bought real property located on Columbus Road in Athens for approximately $347,000. A title examination revealed no easements for drainage pipes. Jones later discovered an 18-inch pipe that drained water from the other side of Columbus Road through the middle of his property to the river. When Jones contacted the city about the drainage pipe, the city denied ownership, but advised him that he could not build anything on top of the pipe.

{¶11} In 2007 Jones had another title examination, which again discovered no easements for drainage pipes on his property.

{¶12} In 2009, the city started excavating property adjacent to Jones's property; Jones learned that there was another drainage pipe on his property. This pipe, which was 42 inches in diameter and ran parallel to Columbus Road, was being excavated on the neighboring property because it was collapsing.

{¶13} In 2010, the city moved large sections of pipe, along with equipment, onto Jones's property. When Jones contacted the city about it, Athens stated that it was also going to replace the drainage pipe on his property. After Jones notified Athens that it did not have an easement on his property and that he did not give the city permission to enter, the city removed the pipe and equipment from his property.

{¶14} In November 2011, the city again moved pipe sections and equipment onto Jones's property even though he had not given the city permission to do so. Jones e-mailed Athens City Engineer and Director of Public Works Andrew Stone asking about the city's actions, but Stone did not respond.

{¶15} In late November 2011, the city began excavating on Jones's property, and he immediately advised the city's service safety director that the city was not permitted on his property until they could reach an agreement. The service safety director admitted to Jones that it was replacing a section of pipe on his property along Columbus Road, and that notwithstanding Jones's objection, the city would continue its work on his property because it was an emergency. After Jones objected to the city engineer, the city refused to leave his property; the city told Jones that it could not install the pipe in the city's existing right-of-way next to Columbus Road because that would be much more difficult and expensive due to other city utilities already in the right-of-way.

{¶16} Faced with the city's refusal to leave his property, Jones testified he entered into an oral agreement with the engineer. Under the agreement Jones would permit the city to continue working on his property and provide the city with an easement for the 42-inch drainage line if the city: (1) tied the 42-inch line into the 18-inch line; and (2) determined through a survey how much of Jones's property it would be taking for the easement and awarded him just compensation for the property taken.

{¶17} The city continued its work on Jones's property, which included digging a trench about 20 feet deep and 40 feet wide to tie the two drainage lines together. Jones testified this work interfered with his ability to use the property. In January 2012 the city completed its work, which included replacing between 100 to 120 feet of the 42-inch drainage pipe.

{¶18} In early 2012, Jones continued to ask the engineer about the easement and the survey because the uncertainty about the scope of the easement impeded his ability to sell or develop the property. In early 2013, the parties entered into a written

agreement in which the city agreed to waive any statute of limitations defense to Jones's takings claim. In September 2013 the city completed its survey, which showed the city's newly installed drainage pipeline outside its right-of-way and on Jones's property. Nevertheless, the city failed to commence an appropriation proceeding.

{¶19} Athens Engineer Stone testified that he believed that Jones's predecessor-in-title had originally installed the 42-inch pipeline, albeit mistakenly outside the city's right-of-way next to Columbus Road. The city engineer admitted that he ordered the moving of pipe and equipment onto Jones's property in 2010 and 2011 without Jones's permission and that he directed the work to begin in November 2011 before Jones gave the city permission to do so. According to the engineer, the subsequent oral agreement the city reached with Jones differed in that he believed that the city agreed to tie the two drainage lines together, but had not agreed to pay him for the easement, i.e., Jones would give the city an easement for the 42-inch drainage line after it tied it to the 18-inch line. The engineer acknowledged that the city intended to use Jones's property regardless of whether he had provided the city with permission to be there.

{¶20} Jones provided uncontroverted testimony that the city's actions subjected his property to a continuing public use and substantially and unreasonably interfered with his property rights. Jones claimed that his property had been for sale most of the time he owned it but that the unresolved issue with the city's easement interfered with his ability to sell and develop it, and had decreased his enjoyment of it.

{¶21} Addressing the impact on his ability to sell his property, Jones testified:

> Q. Okay. Has this issue with the easement affected your ability to sell the property?

> A. Yes. A number of times, well Liz Maule and Russell Chamberlain and most recently Don Linder have come to me and said well somebody is very interested in the property but we need to know what issues are there. So I explained to them the issue of the City's pipe and the eventual easement that would be needed before the pipe was replaced. Naturally they would want to know where and when and how big the problem was going to be. And I couldn't answer that question. I didn't know where it was. I didn't know when they were going to do it. Until the survey arrived we still didn't know. And I still don't even know what size of easement they're asking for and where it's going to be. So yeah, I mean who's going to buy something like that. It's not like it's fifty dollars. It's three hundred and forty seven thousand dollars. And not knowing whether you can use it is ridiculous.

{¶22} After the parties filed post-trial briefs, in May 2015, the trial court issued its decision denying Jones's first claim for a writ of mandamus because Jones provided "no third party proof of interference with sale and [he] was not otherwise using the land":

> As cited by Defendant/Respondent, to resolve whether a writ of mandamus should be issued the Court must decide whether there was a "substantial or unreasonable interference with (his) property rights." *State ex rel. OTR v. City of Columbus* (1976), 76 Ohio St.3d 203 at 206. Was Plaintiff/Relator being denied the use of his premises in some significant way. He argues he was trying to sell the land and could not do so because of the easement situation, the collapsed pipe, and later the litigation. No third party proof of interference with sale was provided and Relator was not otherwise using the land. The Court denies the request for mandamus relief and dismisses the First Cause of Action.

{¶23} Jones's other claims remained pending, and in January 2016, he filed a second amended complaint, which reasserted Section 1983 constitutional claims—takings, due process, and equal protection—relating to the city's alleged taking of his property resulting from its 2011 entry upon his property and replacement of the drainage pipe. Jones also raised mandamus and takings, due process, and equal protection claims based upon the city's alleged interference in 2015 with his application for a lot split after he had entered into a contract to sell a section of his property. The city

planning commission had recommended that the city approve the application with a condition that Jones grant an easement to the city for the drainage line. After various delays, including the city's notification that it would obtain the easement, it finally approved the lot split in November 2015. The second amended complaint also raised claims for breach of contract and promissory estoppel against Athens.

{¶24} The city filed a Civ.R. 12(B)(6) motion to dismiss all of the claims in Jones's amended complaint, with the exception of the breach of contract and promissory estoppel claims. The city argued that Jones's second mandamus petition — which was based on the city's 2015 interference with his potential sale of part of the property—was barred by res judicata due to the court's rejection of his first mandamus petition. The city further claimed that the constitutional claims were barred primarily because Jones could not prove that a taking of his property had occurred.

{¶25} In May 2016, the trial court granted the city's motion to dismiss, after adopting the city's arguments:

> Defendant's analyses contained in the February 29 and March 24, 2016, filings are adopted and dismissal of all counts is ORDERED. * * * [T]his decision is a final appealable order and there is no just cause for delay.

{¶26} This cause is now before the court on Jones's appeal from the trial court's rejection of his first mandamus petition after the bench trial, and its subsequent dismissal of the remaining claims in his second amended complaint.

II. ASSIGNMENTS OF ERROR

{¶27} Jones assigns the following errors for our review:

> I. THE TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING THAT THE APPELLANT HAD FAILED TO PROVE THAT APPELLEE HAD SUBSTANTIALLY OR UNREASONABLY INTERFERED WITH HIS PROPERTY RIGHTS.

II. THE TRIAL COURT ERRED IN DISMISSING THE APPELLANT'S SECOND MANDAMUS CLAIM BASED ON THE DOCTRINE OF RES JUDICATA.

III. THE TRIAL COURT ERRED IN FAILING TO TAKE ALL THE FACTUAL ALLEGATIONS CONTAINED IN APPELLANT'S SECOND AMENDED COMPLAINT AS TRUE AND FAILING TO DRAW ALL REASONABLE INFERENCES IN APPELLANT'S FAVOR.

IV. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S BREACH OF CONTRACT AND PROMISSORY ESTOPPEL CLAIMS, WHICH WERE NOT THE SUBJECT OF THE APPELLEE'S MOTION TO DISMISS.

III. LAW AND ANALYSIS

A. Jurisdiction

{¶28} Before addressing the merits of Jones's appeal, we must determine whether this appeal is properly before us. " 'An appellate court can review only final orders, and without a final order, an appellate court has no jurisdiction.' " *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 28, quoting *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 10. An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus. A final order includes an order that affects a substantial right in an action that in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1).

{¶29} Civ.R. 54(B), which applies in cases involving multiple claims or parties, requires the court to make an express determination that there is no just reason for delay to make an order adjudicating fewer than all the claims or the rights of fewer than all the parties appealable. *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-

Ohio-5315, 776 N.E.2d 101, ¶ 6-8; *Pinkerton v. Salyers*, 4th Dist. Ross No. 13CA3388, 2015-Ohio-377, ¶ 21.

{¶30} The trial court's judgment denied Jones's initial mandamus petition after a bench trial and dismissed "all counts," while specifying that "this decision is a final appealable order and there is no just cause for delay." The judgment appealed here, which dismissed Jones's first mandamus claim and all the claims in his second amended complaint, is a final order under R.C. 2505.02(B)(1) because it affected Jones's substantial rights and determined his action. The language of the trial court's final entry in this case is broad and unambiguous, dismissing "all counts" in the case.

{¶31} Although the city argues otherwise at one point in its brief, it concedes that the trial court's entry resolved all of the parties' claims in another part of its brief. *See* Aee Brief, p. 2 ("When the Trial Court dismissed Appellant's claims with its Decision issued May 20, 2015, it also dismissed Athens' counterclaim in unjust enrichment").

{¶32} Moreover, even assuming that the trial court's entry did not resolve all of the pending claims before it, it complied with Civ.R. 54(B) because the trial court made an express determination of no just cause for delay. Therefore, we have jurisdiction to address the merits of Jones's appeal.

B. First Mandamus Action

{¶33} In his first assignment of error Jones asserts that the trial court erred in denying his first mandamus petition, finding he had failed to prove that the city had substantially or unreasonably interfered with his property rights. "We review a trial court's denial of a writ of mandamus under the abuse of discretion standard." *Athens Cty. Commrs. v. Ohio Patrolmen's Benevolent Assn.*, 4th Dist. Athens No. 06CA49,

2007-Ohio-6895, ¶ 45, citing *Truman v. Village of Clay Center*, 160 Ohio App.3d 78, 83, 2005-Ohio-1385, 825 N.E.2d 1182 (6th Dist.); *see also State ex rel. Manley v. Walsh*, 142 Ohio St.3d 384, 2014-Ohio-4563, 31 N.E.3d 608, ¶ 17 (noting that the general standard of review in mandamus cases is abuse of discretion).[1]

{¶34} A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.' " *State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 7, quoting *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34. "An abuse of discretion includes a situation in which a trial court did not engage in a 'sound reasoning process'; this review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Felts*, 2016-Ohio-2755, 52 N.E.3d 1223, ¶ 29 (4th Dist.), quoting *Darmond* at ¶ 34.

{¶35} " 'Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.' " *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, 928 N.E.2d 706, ¶ 14, quoting *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 765 N.E.2d 345 (2002). To be entitled to the writ Jones had to establish a clear legal right to compel the city of Athens to commence an eminent-domain action, a corresponding clear legal duty on Athens to start the action, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Wasserman v. Fremont*, 140 Ohio

[1] We apply the abuse of discretion standard here even though the petitioner's burden of proof is by clear and convincing evidence, see ¶ 35 below. Normally, a clear and convincing burden of proof would imply our standard of review would require a manifest weight of the evidence analysis. But the Supreme Court of Ohio has consistently applied the abuse of discretion standard. *See Manley, supra* and *State ex rel. Paluch v. Zita*, 141 Ohio St.3d. 123, 2014- Ohio-4529, 22 N.E.3d 1050, ¶ 9.

St.3d 471, 2014-Ohio-2962, 20 N.E.3d 664, ¶ 22. Moreover, Jones had to establish his entitlement to the writ by clear and convincing evidence. *Id.* at ¶ 23, citing *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, paragraph three of the syllabus ("Relators in mandamus cases must prove their entitlement to the writ by clear and convincing evidence").

{¶36} "The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation." *Shemo,* 95 Ohio St.3d at 63, 765 N.E.2d 345; Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution. "The right of property is a fundamental right, and '[t]here can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.' " *Doner* at ¶ 52, quoting *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 38.

{¶37} The purpose of the Takings Clauses in the United States and Ohio Constitutions is "is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-618, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); *see also State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, 780 N.E.2d 998, ¶ 33.

{¶38} "In order to establish a taking, a landowner must demonstrate a substantial or unreasonable interference with a property right[, which] may involve the actual physical taking or real property, or it may include the deprivation of an intangible

interest in the premises." *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 206, 667 N.E.2d 8 (1996); *Bacak v. Trumbull Cty. Bd. of Commrs.*, 2016-Ohio-4737, 57 N.E.3d 1176, ¶ 57 (11th Dist.).

{¶39} The trial court denied Jones's first mandamus action, which alleged a taking by the city's 2011 entry on his property to replace drainage pipe the city uses as part of its sewer system. The court denied the petition because "[n]o third party proof of interference with sale was provided and [Jones] was not otherwise using the land." The trial court erred in so holding.

{¶40} First, the city's activity constituted a physical invasion of Jones's property—entering on his land, replacing drainage pipe located on his land, and continuing to use the pipe for a public purpose as part of the city's sewer system. Any direct encroachment upon land that subjects it to a public use that excludes or restricts the owner's dominion and control of the property is a taking, for which the owner is guaranteed a right of compensation under Section 19, Article I of the Ohio Constitution. *Doner*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, at paragraph four of the syllabus, citing *Shemo*, 95 Ohio St.3d 59, 63, 765 N.E.2d 345, and *Norwood v. Sheen*, 126 Ohio St. 482, 186 N.E.102 (1933). In other words, the fact that a parcel of land is vacant does not justify the city's physical intrusion.

{¶41} Although the parties' evidence conflicted on the terms of the agreement made after the city had already entered Jones's property to repair the drainage pipe, under either party's interpretation the city was to receive an easement for the sewer line on Jones's property. "An easement is 'the grant of a use on the land of another.' " *Wasserman*, 140 Ohio St.3d 471, 2014-Ohio-2962, 20 N.E.2d 664, at ¶ 28, quoting

Alban v. R.K. Co., 15 Ohio St.2d 229, 231-232, 239 N.E.2d 22 (1968). Manifestly, the creation, maintenance, and continued use of an easement on another person's property constitutes a direct encroachment on the person's land and constitutes a taking. Therefore, no additional evidence of interference with sales or other property use was required for Jones to establish a compensable taking. However, this evidence could be relevant in an appropriation proceeding to determine the amount of compensation due him.

{¶42} Second, there is no requirement that a landowner must introduce "third-party proof" or that he was "otherwise using the land" to support a takings claim in these circumstances. In fact, neither the city nor the trial court cited any authority to support this novel proposition imposing a corroborating-evidence requirement to prove an involuntary taking of private property. *Compare Doner* at ¶ 76 (lay testimony can be sufficient to establish taking warranting extraordinary relief in mandamus to compel appropriation proceeding).

{¶43} As previously noted, the issue of whether Jones agreed to grant the city an easement for its drainage line in return for the city's agreement to tie that line to another existing line impacts only the amount of compensation that Jones is due from Athens, rather than whether a taking occurred because of the city's continued use of an easement on his property.

{¶44} Jones established his entitlement to the requested extraordinary relief in mandamus. The evidence established the city's involuntary taking of his property through its entry, replacement of drainage pipe, and continued use of the line on that property for the public purpose of its sewer system. The trial court consequently

abused its discretion by rejecting his first mandamus claim. We sustain Jones's first assignment of error.

C. Second Mandamus Claim

{¶45} In his second assignment of error Jones contends that the trial court erred in dismissing his second mandamus petition based on res judicata. In his second mandamus action, which he pled in his second amended complaint, Jones requested extraordinary relief to compel Athens to commence appropriation proceedings for a taking alleged to have occurred in 2015. Jones claimed that the city interfered with his attempt to sell the property when its planning commission initially recommended that the city condition its approval of Jones's lot-split application upon Jones granting an easement to the city for the drainage line. The trial court dismissed this claim based upon the city's motion to dismiss, which argued res judicata.

{¶46} The trial court erred in dismissing Jones's second mandamus petition, which was premised on an alleged taking in 2015 that occurred after the events that formed the basis for the first petition. The doctrine of res judicata involves both claim and issue preclusion, so an existing final judgment or decree between the parties is conclusive as to all claims that were or might have been litigated in the first action. *See Brooks v. Kelly*, 144 Ohio St.3d 322, 2015-Ohio-2805, 43 N.E.3d 385, ¶ 7. But "[I]t is well settled that res judicata does not bar a subsequent action between the same parties when the facts giving rise to the second action were not in existence at the time of commencement of the first action." *See State ex rel. Dept. of Edn. v. Ministerial Day Care*, 8th Dist. Cuyahoga No. 103785, 2016-Ohio-8485, ¶ 18, and cases cited therein,

including *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009-Ohio-2461, 909 N.E.2d 597, ¶ 16.

{¶47} Moreover, in light of our earlier conclusion that the trial court erred in denying Jones's first mandamus claim, the trial court's denial of his first mandamus claim is not entitled to preclusive effect. We sustain Jones's second assignment of error.

D. Jones's Remaining Constitutional Claims

{¶48} In his third assignment of error Jones claims that the trial court erred in dismissing the remaining constitutional claims in his second amended complaint. He raised Section 1983 takings, due process, and equal protection claims relating to the city's 2011 and 2015 actions. The trial court granted the city's Civ.R. 12(B)(6) motion to dismiss these claims for failure to state a claim upon which relief can be granted.

{¶49} "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers–Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. "In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12; *Draughon v. Jenkins*, 4th Dist. Ross No. 16CA3528, 2016-Ohio-5364, ¶ 14. " 'In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.' " *Walker v. Toledo*, 143 Ohio St.3d 420,

2014-Ohio-5461, 39 N.E.3d 474, ¶ 4, quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

{¶50} Although the city parroted this standard in its motion to dismiss, it further emphasized a fact-pleading standard, which it includes in its appellate brief here, that "unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss," citing *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989), in support of this more stringent standard. The city fails to recognize that the Supreme Court of Ohio requires fact pleading only in a few carefully circumscribed cases—like *Hickman*—because of important public policy considerations. *See York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991); *see also State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 109, 647 N.E.2d 799 (1995), and cases cited there. These cites detail special circumstances in which the court has modified its general rule of notice pleading, e.g., employee's intentional tort claim against employer, negligent hiring claim against religious institution, certain writ cases involving inmates, habeas corpus actions, and original actions filed in the Supreme Court. This case does not raise one of those recognized exceptions to the general rule of notice pleading, so the fact-pleading premise underlying the city's motion is false. *See Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 2008-Ohio-7042, 903 N.E.2d 1284, ¶ 5 ("Because Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity"); Klein and Darling, *1 Baldwin's Oh. Prac. Civ. Prac.*, § 12:9 (2016) ("A plaintiff is not required to prove his or her case in the complaint, since the plaintiff's lack of access to relevant evidence would allow dismissal of many valid claims").

{¶51} Moreover, the city's argument that Jones could prove no set of facts on which relief could be granted was premised primarily on the city's erroneous claim that he could not demonstrate a taking. Our discussion of Jones's first and second assignments of error renders this argument meritless. Athens also argues that Jones could not contend that he was denied just compensation due to an alleged taking when in the same amended complaint, he raised a breach of contract claim based on an agreement which permitted the city to enter his property to perform the repair to the drainage pipe. But Civ.R. 8(E)(2) permitted Jones to plead even inconsistent claims. *Cristino v. Bur. of Workers' Comp.*, 2012-Ohio-4420, 977 N.E.2d 742, ¶ 25 (10th Dist.), quoting *Iacono v. Anderson Concrete Corp.*, 42 Ohio St.2d 88, 92, 326 N.E.2d 267 (1975) ("Civ.R. 8(E)(2) 'permits alternative or hypothetical pleading, or even the use of inconsistent claims' "). Furthermore, the trial court's resolution of Jones's first mandamus claim could not act as res judicata on his Section 1983 constitutional claims because the quantum of proof was less for the latter claims. *See Premier Courier, Inc. v. Flaherty*, 10th Dist. Franklin No. 95APE01-34, 1995 WL 571846, *3 (Sept. 26, 1995) ("courts have refused to apply the doctrine to prevent a litigant from challenging the trial court's prior rulings, when the quantum of proof necessary to render both the original and subsequent judgment is not identical").

{¶52} After construing the material factual allegations and all reasonable inferences in Jones's favor, we agree with him that he could prove a set of facts that would entitle him to relief on his constitutional claims. The trial court thus erred in dismissing these claims for failure to state a claim upon which relief can be granted. We sustain Jones's third assignment of error.

E. Breach of Contract and Promissory Estoppel Claims

{¶53} In his fourth assignment of error Jones argues that the trial court erred in dismissing his claims for breach of contract and promissory estoppel in his second amended complaint. Although the court stated that it was dismissing "all counts" in the case, the city's motion was not directed to these claims. The city concedes that the trial court erred in dismissing these additional claims. The parties agree that Jones's second amended complaint contained sufficient allegations for these claims to withstand the city's dismissal motion. We agree and sustain Jones's fourth assignment of error.

IV. CONCLUSION

{¶54} The trial court erred in denying Jones's first mandamus claim following a bench trial and in dismissing Jones's remaining claims in his second amended complaint. Having sustained Jones's assignments of error, we reverse and remand the cause for further proceedings consistent with this opinion.

JUDGMENT REVERSED

AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.