Circuit Court for Caroline County
Case No. 05-C-14-017458

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 27

September Term, 2017

BILLY JESMER, JR.

v.

TOWN OF DENTON, *et al.*

Wright,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: January 24, 2019

This case exemplifies the adage that one person's rubbish is another person's treasure. It began when the Town of Denton ("Town") filed a complaint against Donald Alley ("Alley") and his stepson, appellant, Billy Jesmer, Jr. ("Jesmer"), for keeping construction equipment and various other items and materials on the exterior of Alley's property, in violation of the Town's Property Maintenance Code. The Circuit Court for Caroline County declared that the items and materials met the definition of "rubbish" under that Code and ordered Jesmer to remove them by a certain date; and, if he did not, the Town could effect their removal and storage at his cost. When Jesmer failed to remove all the materials, the Town hired contractors to remove them. Some items were disposed of, others were sold for scrap value, and what was deemed to have some value was stored at Jesmer's expense. Jesmer filed claims against the Town and other parties (collectively "appellees") for the destruction of the property. The circuit court approved the Town's actions and dismissed all the claims.

On appeal, Jesmer presented four questions[1], which we have rephrased and condensed into three:

[1] Jesmer's original questions were:

1. Did the trial judge err by not recusing himself on Jesmer's motion on the basis of his statements at the hearing on November 16, 2016, that the court intended to "put a stake in the heart of" Jesmer's claims?
2. Did the trial court err by refusing to issue the requested declaration that the Rubbish Ordinance was unconstitutional on its face and/or as applied to destroy over 20 tons of Jesmer's personal property on the basis of *res judicata*?

1. Did the trial judge err by not recusing himself on the basis of his statements at the hearing on November 16, 2016?

2. Did the trial court err by refusing on the basis of *res judicata* to declare the Property Maintenance Code unconstitutional on its face and/or as applied as it relates to rubbish?

3. Did the circuit court err when it granted the Town's motion to dismiss Jesmer's Counterclaim and Third-Party Complaint without a jury trial based on findings of facts and immunity?

For the reasons that follow, we affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Alley[2] owned a residential property at 700 Gay Street in the historical district of Denton, Maryland. The dwelling was "severely deteriorated" with multiple problems that included a leaking roof and failing structural supports. In 2011, Jesmer, who had operated a construction business in Baltimore, moved to Denton and began assisting his stepfather in the renovation of 700 Gay Street.[3] He brought construction equipment and

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3. Did the circuit court err when it granted the Town's motion to dismiss on the basis of its findings of facts on disputed evidentiary points without the requested jury?
4. Did the circuit court err when it dismissed Jesmer's Counterclaim and Third-Party Complaint on the basis of immunity where that pleading alleged that their intentional unauthorized destruction of Jesmer's substantial personal property without just compensation, was knowing, willful and malicious in violation of Jesmer's well-established constitutional rights?

[2] Alley died on July 15, 2015.

[3] Jesmer claims that, beginning around 2007, he would send an employee to Denton to help Alley with the ongoing construction and renovations. The Town contends that

materials to the site that were kept on the exterior of the residence. Although 700 Gay Street is the primary property concerned in this case, Jesmer kept some items on two adjoining properties, 12 North 7th Street[4] and 708 Gay Street.[5] Jesmer asserts that he assisted Alley in the renovation project in exchange for an "invested interest" in the property.[6]

According to the Town, its inspectors had found building code violations at 700 Gay Street as early as August 2010. The Town issued Alley a building permit on August 4, 2011 for roof work on the house. After that, Town officials met with Alley and Jesmer to discuss resolution of the continuing violations regarding "rubbish," "work without a permit," and "work without a historic commission approval." Jesmer and Alley signed a

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nothing in the record supports this claim. According to Jesmer, his business "closed"; according to the Town, it "failed."

[4] Jesmer claims that he and Elinor Taylor are joint owners of 12 North 7th Street. Ms. Taylor testified that she "bought the property," and that she never "knowingly considered [Jesmer] a co-owner." She described Jesmer as a "hoarder" who had put "garbage upon garbage upon garbage" on the property before she purchased it.

[5] This property "abutted 700 Gay Street on the opposite side of 12 North 7th Street." According to Jesmer, he stored some of his construction equipment and materials on that property with the permission of the owner.

[6] Jesmer asserts that Alley had agreed that, if Jesmer paid $5,000 and helped renovate the property, he would obtain legal title to it, and that he had paid Alley the $5,000, "was paying the mortgage," and for all the costs of the renovation.

When Alley died, he had not executed the "promised documents to convey legal title" to Jesmer. Jesmer then purchased "the secured loan that Mr. Alley had taken out on 700 Gay Street," and became "the primary secured creditor for 700 Gay Street."

The Town's counsel stated at the December 2, 2015 hearing that "we have proved that Mr. Jesmer . . . nevertheless qualifies as an owner under the definitional section [of the Town Code] . . . [because] he is obviously a person who has control of the . . . property."

memorandum of that meeting on September 13, 2011, in which they agreed to "[c]onsolidate equipment and localize to sideyard . . . and driveway by 9/21/2011" and to "[m]aintain a reasonably clean site."

On March 3, 2012, the Town cited Alley for "allowing excessive rubbish to accumulate" and assessed a $100 fine. And, on April 2, 2012, the building permit for 700 Gay Street was suspended for property maintenance violations, one of which "had to do with rubbish." When this violation was not corrected, the Town sought "abatement" and "the removal of the rubbish" in the District Court for Caroline County. On October 17, 2012, Alley was found "guilty of [a] municipal infraction" for "excessive rubbish" in violation of the Town's Property Maintenance ("PM") Code, and paid a $200 fine.

According to the Town, during the 2011-2012 period, "construction materials, trailers, old appliances and other 'rubbish'" continued to be stored at 700 Gay Street and 12 North 7th Street, despite its efforts to convince Alley and Jesmer to come into compliance with the Town Code. The Town, on November 4, 2012, extended the building permit to June 1, 2013.

On October 10, 2013, the Town adopted Town Ordinance No. 656, codified in Chapter 94 of the Town Code.[7] Under Chapter 94, § PM 202, which we will refer to as "§ PM 202" or the "Rubbish Ordinance," "rubbish" is defined as:

[7] Jesmer asserts that the Town adopted this rubbish ordinance to "address its unhappiness" with Alley and specifically to "target" him. According to Jesmer, an earlier rubbish ordinance still exists, codified in a different section of the Town Code. *See* footnote 33. We will address these assertions in our discussion on the constitutionality of the rubbish ordinance.

> Combustible and noncombustible waste materials, except garbage, including construction waste, and materials pursuant to Section PM 106.5.1 and Section PM 304.19; the term shall include the residue from the burning of wood, coal, coke and other combustible materials, vehicle tires, paper, rags, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, metal cans, metals, mineral matter, glass, crockery and dust, and other similar materials, any household furnishings and appliances not intended for exposure to the elements by the manufacturer, vehicle or machinery parts, and any construction materials stored or remaining on the property longer than 30 calendar days.

On July 25, 2014, the Town filed a Complaint to Abate Violations of Title 94 of the Denton Town Code (the "Complaint") against Alley and Jesmer in the Circuit Court for Caroline County. The Complaint alleged that "[f]or a number of years, [Alley and Jesmer] have accumulated refuse and rubbish on their property including . . . scrap material, vehicles and equipment parts, rubbish from building construction activities, unused pallets, broken or unused scaffolding, and the like." And, that the Town had requested its removal after receiving "numerous complaints" from "neighbors who are concerned about their health, safety and welfare and diminution in [property] values." Because Alley and Jesmer have failed to do so or allow the Town to do so, and given their refusal to abate the violations and the ineffectiveness of imposing fines, the Town requested that the court enter an order (1) "declaring the Defendants to be in violation of [Chapter] 94 of the Denton Town Code," and (2) "authorizing the Town Code Official to enter upon the Defendants' property for the purpose of removing all junk, refuse, and

rubbish found thereon and to restore the property to compliance with [the Town Code]." Jesmer answered the Complaint on September 5, 2014.

On January 26, 2015, the Town issued a stop work order because the previous permit extension had expired on June 1, 2013 and the foundation of the house appeared unsound, but four days later, after Town Administrator Donald L. Mulrine met with Jesmer, the permit was extended to July 31, 2015. That extension expired, and, because Jesmer did not come back to the Town officials and did not provide a construction log as requested, no further extensions were granted.

A merits hearing, at which Jesmer was self-represented, took place on the Complaint on December 2, 2015 before Judge Sidney S. Campen. The Town called Jesmer, Town Administrator Donald L. Mulrine, Senior Code Official and Director of the Planning and Codes Department Thomas Batchelor to testify. Jesmer called three neighbors, Leil Garner, Kelly Byrd, and Elinor Taylor, and two of the Town's Property Maintenance Inspectors, Robert Szabo and Gary Carpenter, to testify. At the close of the hearing, after considering testimony and other evidence, Judge Campen concluded:

> I find that . . . all of the items, because there's no building permit, come within the parameters of [§ PM 202] definition of rubbish.
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> The Town is asking for an injunction, as it is properly permitted to do when someone is violating the Code and they're asking me to prohibit the accumulation of this rubbish . . . that I see on this property at 700 Gay Street. I'm going to issue the injunction . . . as follows: Mr. Jesmer and/or the Estate of Mr. Alley will be required to remove all items. And when I say all, all items that are not attached to the building, that are not impertinent [sic] to the building itself. And when I say all items, I mean

> everything, because there's no permit to permit any of these materials on the property. They're to be removed to a site to be determined by Mr. Jesmer within forty-five (45) days of today's date. That means, Mr. Jesmer, you have until January 18, 2016, to . . . get all this material off this property, all of it.
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> If the property is not removed by January 18, I'm authorizing the Town to hire a contractor to remove the property at Mr. Jesmer's expense and at the expense of the Estate of Mr. Alley, to remove it to a site that will be rented by the Town and that rent and the cost of removing those materials will be charged to Mr. Jesmer and the Estate of Mr. Alley and will also be attached or be permitted to be attached as a lien on the property, for the value of the removal and the storage charges.

The Final Injunction, issued on December 10, 2015, stated that "[a]ll materials, equipment, metal objects, trailers, storage containers, vehicles, machinery, parts, construction materials and all items not permanently attached to the residence, now stored on the unoccupied property at 700 Gay Street, Denton, Maryland, as well as such items stored on the adjacent occupied property at 12 North 7th Street . . . are 'rubbish,' and in violation of [§ PM 202] of the Town of Denton Property Maintenance Code." The Final Injunction further required Jesmer and the estate of Alley to "abate the violation by prompt removal" of all such "rubbish" from both properties by January 18, 2016 (about 39 days). If the "rubbish" was not removed by that date, the Town was authorized "through its employees or agents . . . to enter the property at 700 Gay Street and the property at 12 North 7th Street to effect the removal and storage of those materials" at Jesmer's expense. Jesmer did not appeal.

According to the Town, Jesmer "cherry-pick[ed]" and "carefully removed" certain trailers and other items before the deadline, but he did not remove all the materials as required by the Final Injunction. Assuming that what had been left by Jesmer as of January 18, 2016 "had been abandoned by him," the Town contracted with Rick Breeding Excavating, which, in turn, engaged Jason Rex/Rex Landscaping, and they removed the remaining materials on January 20-21, 2016.[8] Some materials were taken to a landfill, some were sold for scrap with proceeds credited to Jesmer, and the remainder was stored with Rex Landscaping & Nursery, LLC. Jesmer claims that he repeatedly requested to inspect the remainder of his property but that the Town refused his requests.[9] He admits, however, that the only thing preventing him from inspecting his property was the requirement that he "first paid the storage fees and fees associated with the disposal of his property," which he could not afford.

[8] Jesmer claims that the Town disposed "of over 20 tons" of valuable personal property from "all 3 adjoining properties," dumping 16 tons in the Mid-Shore Regional Landfill in Ridgely, selling 4.2 tons for de minimis scrap value, and keeping no inventory of the property destroyed.

In response to Jesmer's Petition for a Show Cause Order, the Town countered that it did not destroy any items of value, but only what was "obviously of no value." And, it did not enter onto or remove anything from 708 Gay Street; it disposed only 12 tons in the Mid-Shore Landfill; it sold scrap metal for $161.50 and credited those funds to Jesmer's account; and it provided an inventory, which was not required by the court, of the items in storage.

[9] The Town asserts that Jesmer was repeatedly advised of the location of the stored items, which he could retrieve when he reimbursed the Town for the costs of removal and disposal in accordance with the Final Injunction. The Town states that hauling the materials to the landfill cost about $1,100, and that it had been paying storage fees of $1,000 per month since January 2016.

On May 11, 2016, "because of the storage fees it was incurring" and because Jesmer "had made no attempt to retrieve his property," the Town filed a Motion for Supplemental Relief. It requested an order "authorizing [it] to dispose of all property currently held in storage in its sole discretion," and "approving [its] disposal of the construction debris found on 700 Gay Street and 12 North 7th Street after January 18, 2016." It further requested that the cost of such disposal be included in a lien to be applied to 700 Gay Street.

On June 30, 2016, Jesmer filed an Answer and a Petition for Show Cause Order and Finding of Constructive Civil Contempt ("Show Cause Petition") against the Town and the Town's Mayor, four Councilmembers, Town Administrator Mulrine, and Rick Breeding Excavating, Inc. and Rex Landscaping & Nursey LLC (collectively the "Individual Appellees"). Jesmer asserted that the Final Injunction did not permit the destruction of his property, damage to the house at 700 Gay Street, or entering onto the adjoining property, all of which the Town did through its agents. He requested that the parties "show cause as to why they should not be held in contempt for their willful violations of the Final Injunction in a manner that has caused significant damages and losses." In a separate filing that day, Jesmer demanded a jury trial "as to all issues to be determined in this matter."

On July 7, 2016, Jesmer, reiterating much of what was contained in the then-pending Show Cause Petition, filed a five-count "Counterclaim and Third-Party Complaint" against the Town and the Individual Appellees (the "Counterclaim"). He

requested a declaratory judgment, alleged violations of constitutional rights, conversion and trover, trespass to chattels, and negligence. He sought both compensatory and punitive damages and requested a jury trial. As to the constitutional claims, Jesmer alleged that, based on its definition of "rubbish," the Town's Property Maintenance Code was an "unconstitutionally invalid ordinance." He accused the Individual Appellees of "knowingly and willfully, acting with malice and/or with a reckless disregard for the consequences of their actions and [his] rights," and of violating the terms of the Final Injunction.

The Town and the Individual Appellees filed a Motion to Dismiss the Counterclaim and Third-Party Complaint (the "Motion to Dismiss") and opposed Jesmer's Show Cause Petition. On July 22, 2016, Judge Karen Jensen found Jesmer's Show Cause Petition "frivolous on its face for including parties that were not party to the . . . Final Injunction." She noted, however, that if Jesmer filed a show cause petition against the Town only, she would issue a show cause order with respect to the allegation that the Town destroyed "valuable construction material and/or equipment" and the allegation that "attachments to the house were removed and/or the house was damaged."[10] Jesmer submitted a revised petition, and Judge Jensen issued a Show Cause Order against the Town on August 29, 2016.

[10] The Court refused to issue a Show Cause Order regarding: (1) the removal of property from 700 Gay Street or 12 North 7th Street because the Final Injunction authorized its removal; (2) the alleged removal of equipment from 708 Gay Street because 708 Gay Street was outside the scope of the Final Injunction; (3) the allegation that the Rubbish Ordinance was unconstitutional; and (4) the allegation that the Town denied Jesmer

Jesmer filed additional motions. On August 26, 2016, he filed a "Motion for Order to Compel Town Defendants to Provide Long Overdue Required Discovery Responses with Certification Pursuant to Rule 2-431" ("Motion to Compel Discovery"), as the Town had not yet responded to his discovery requests. And, on September 5, 2016, he requested a hearing on the Town's Motion to Dismiss and filed a "Motion Pursuant to Rule 2-501(d)[11] To Deny And/Or Hold Motion [to Dismiss] In Abeyance Pending Completion of Now Pending Discovery Proceedings Should the Motion Be Considered Alternatively As A Motion For Summary Judgment."

On October 14, 2016, Judge Jonathan G. Newell denied Jesmer's Motion to Compel Discovery because the Town's "responses to the discovery requested by [Jesmer] are not due until 15 days from the date that this Court rules on [the Town's] Motion to Dismiss." On October 21, 2016, Jesmer filed a "Motion for Partial Summary Judgment As to the Constitutionality of the Town's Ordinance on Rubbish," which included a request for declaratory judgment.[12] And, on October 28, 2016, he filed a "Supplement to

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access to his stored property because the Final Injunction did not require that he be given access after removal.

[11] Md. Rule 2-501(d) provides: "If the court is satisfied from the affidavit of a party opposing a motion for summary judgment that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit, the court may deny the motion or **may order a continuance to permit** affidavits to be obtained or **discovery to be conducted** or may enter any other order that justice requires." (Emphasis added.)

[12] Jesmer wrote in his motion: "It is respectfully submitted that the Court should issue declarations as to the respective rights and responsibilities of the parties, to include the following . . . Enter a declaration that the ordinance definition of "rubbish" and the related ordinance provisions are unconstitutional with respect, *inter alia*, to its references

Motion Pursuant to Rule 2-501(d) For Extension of Response Time For Motion For Summary Judgment Pending Completion of Essential Discovery With Request for Hearing."

On November 7, 2016, the circuit court held a hearing on the Town's Motion to Dismiss and Jesmer's Show Cause Petition. At that hearing, Judge Newell recused because, as the former State's Attorney, he had been consulted regarding some of Jesmer's activities. He suggested that Judge Campen, who was already familiar with it, hear the case. Jesmer did not express any opposition to proceeding with Judge Campen presiding.[13]

A hearing on the pending motions took place on November 16, 2016 before Judge Campen. At start of the hearing, the circuit court granted the Town's Motion to Dismiss on the basis of immunity:

> Clearly, public officials enjoy statutory immunity. The Town enjoys governmental immunity for a legislative and/or police function or in the exercise of enforcing its zoning Ordinances. Therefore, this is a proper motion to dismiss . . . . I'm going to dismiss for no other reason than the

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to vehicles, machinery parts, and/or any construction materials that are viable equipment and/or materials that are being used, are needed for or are capable of being used by the owner of those materials and that owner's assignee(s) . . . that ordinance is unconstitutional both on its face and as applied in these circumstances."

[13] [Judge Newell]: All right, so you're asking to recuse myself from this case?
[Jesmer's Counsel]: I would bring it to your attention. We didn't want to file a motion to recuse.

* * *

[Judge Newell]: Judge Campen probably would be the better person to respond to some of the allegations . . . .

* * *

[Judge Newell]: I will go ahead and recuse myself.

> statutory immunity that the public officials have in this case and . . . the governmental immunity of the Town of Denton.

Judge Campen also dismissed the Counterclaim as to the two contractors.

The circuit court, based on *res judicata*, refused to consider Jesmer's challenge to the constitutionality of the Rubbish Ordinance because the issue had not been raised at the hearing on December 2, 2015:

> The Constitutional claims fail because they weren't raised below. Mr. Jesmer has no Constitutionally protected interest. There's been no taking of his property. He's had an opportunity to retrieve his property. He has violated the [Final Injunction]. . . . The failure to raise those [constitutional] issues below is fatal. I believe that the Final Injunction and the hearing was . . . a hearing on the merits. It is *res judicata*. . . . The constitutionality of the [Rubbish Ordinance] is not before me.

As to the Show Cause Order, Jesmer asserts that he testified and produced evidence that the destroyed construction materials and equipment had a value of at least $67,000; the Town argued that it was "of no value." As to value, the court concluded:

> Well, I find [Jesmer's] testimony incredible and difficult to believe. I cannot possibly take $67,000 as the value of the junk that was thrown away, or whatever you want to call it, sand, gravel, bricks or whatever, as opposed as against the inventory. . . . I'm going to take it under advisement.
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> I will tell you all this. This case is like Dracula, I'm going to put a stake in the heart of it before I reach my 80th birthday, which is not very far from now. And hopefully sooner than that.

In response to Jesmer's argument that he had presented factual issues that required a jury, the court explained, "[T]he first thing I have to do is find that they are in contempt and I haven't made that finding yet," and "show cause hearings are not jury trial matters." It

concluded that it would hold the Show Cause Petition "under advisement" and issue a written opinion.

On January 13, 2017, Jesmer filed a "Motion to Reconsider, Amend, and Recuse," in regard to the November 16, 2016 hearing. He first asked the circuit court to reconsider its dismissal of the Counterclaim. Second, he sought to amend his Counterclaim by adding a Count 6.[14] And, finally, he moved to recuse Judge Campen "with particular reference to the fact-finding functions that are required in this case," for "his patent disregard for any of the evidence presented by Mr. Jesmer as well as the [c]ourt's stated intention to summarily deny his claims."

On February 3, 2017, the circuit court issued an Opinion and Order (the "February 3rd Order"), dismissing Jesmer's Counterclaim. It also dismissed the Show Cause Order related to the destruction of Jesmer's personal property:

> The Court finds that the Town acted reasonably and responsibly under the terms and conditions of the Final Injunction [because] the materials deemed to be rubbish shown at 700 Gay and 12 North 7th streets consisted of worthless piles of construction debris . . . The Town and its agents were sufficiently competent and capable of sorting out materials of potential value . . . This Court cannot find from the evidence that the Town violated the Final Injunction in any way by removing and discarding rubbish that would not justify storage costs.

Because Jesmer failed to show that he was the title owner of 708 Gay Street or had permission to store materials there, and because the only valuable materials thereon—a

[14] The proposed Count 6 averred violations of due process, equal protection, and takings, under the Federal Civil Rights Act, 42 U.S.C. § 1983, and the Fifth and Fourteenth Amendments to the U.S. Constitution, pertaining to the same underlying facts of the Counterclaim. He sought $75,000 in compensatory damages, punitive damages as appropriate, and attorney's fees.

boat and trailer—were in storage and accessible to him, the circuit court also approved the removal of any items from that property.

The court granted Jesmer 30 days to "reclaim" and "remove all of the stored property from Rex Landscaping & Nursery, LLC," upon "payment for storage and other costs in order to obtain release of the property." Thereafter, the Town would be "authorized to dispose the remaining property in its absolute discretion, in any way it deems necessary, including having it hauled to the . . . landfill." The final costs of the initial removal, unpaid storage fees, and disposal costs were assessed as a judgment against Jesmer and the estate of Alley, and, if unpaid for more than 90 days, as a lien on 700 Gay Street, in an amount to be determined at a later hearing. It did not award the Town attorney's fees.

On February 12, 2017, Jesmer filed a Motion to Alter or Amend the Court's Final Judgment. That motion was denied on February 23, 2017, and on March 13, 2017, Jesmer appealed.

DISCUSSION

I. Jesmer's Motion to Reconsider, Amend, and Recuse

Recusal[15]

Standard of Review

Whether to recuse is a discretionary decision of a judge that "will be overturned only upon a showing of abuse of discretion." *Surratt v. Prince George's County*, 320 Md. 439, 465 (1990); *see also Nelson v. State*, 315 Md. 62, 70 (1989) ("Discretion is abused, for example, if the judge in his exercise of it is arbitrary or capricious, or without the letter or beyond the reason of the law. Of course, when a judge abuses his discretion [in refusing to recuse], the action he takes in its exercise is erroneous.").

Any party to a case has a "right to a trial in which the judge is not only impartial and disinterested, but who also has the appearance of being impartial and disinterested." *Scott v. State*, 175 Md. App. 130, 151 (2007). As the Court of Appeals stated in *Jefferson-El v. State*, 330 Md. 99, 107 (1993):

> [T]he party requesting recusal must prove that the trial judge has a personal bias or prejudice concerning him or personal knowledge of disputed evidentiary facts concerning the proceedings. Only bias, prejudice, or knowledge derived from an extrajudicial source is 'personal' . . . On the other hand, the canon recognizes that the appearance of impropriety ought to be avoided as well. In *Boyd* [*v. State*, 321 Md. 69 (1990)], we acknowledged the importance of the judicial process not only being fair, but appearing to be fair."

[15] Appellant's counsel requested, in a letter dated December 26, 2018, that we consider *Nathans Associates v. Mayor and City Council of Ocean City*, No. 1240, September Term 2017, 2018 WL 6716975, (Md. Ct. Spec. App. Dec. 21, 2018), in regard to recusal. We have done so.

In short, a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Md. Rule 18-102.11(a).

Impartiality is defined as "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Md. Rule 18-100.3(d). Information that the trial judge has acquired in a prior judicial proceeding concerning the party seeking recusal is not, standing alone, a basis for recusal. *See Boyd*, 321 Md. at 76 (holding no personal knowledge or bias requiring recusal where trial judge heard motions and tried co-defendant); *Doering v. Fader*, 316 Md. 351 (1989) (holding that trial judge would not be disqualified from a sentencing proceeding in a capital punishment case simply because he had presided at earlier trial and sentencing proceeding in the same case, and had formed and expressed an opinion concerning a death sentence under those circumstances). Nor does a negative ruling issued against the party seeking recusal by a trial judge require recusal. *See Reed v. Baltimore Life Insurance Co.*, 127 Md. App. 536, 552 (1999); *Fearnow v. Chesapeake & Potomac Telephone Co. of Maryland*, 104 Md. App. 1, 55 (1995) ("Mere bald allegations and adverse rulings are insufficient to meet [the] burden of [overcoming the presumption of impartiality]").

Judges are presumed to be impartial, and the individual alleging otherwise has the burden of presenting evidence of partiality from the record. *Boyd v. State*, 321 Md. 69, 80-81 (1990); *see also Bishop v. State*, 218 Md. App. 472, 491 (2014) (noting that "the person seeking recusal bears a heavy burden to overcome the presumption of

impartiality"). But, a "party attempting to demonstrate that a judge does not have the appearance of disinterestedness or impartiality carries a 'slightly lesser burden'" than one trying to prove an actual bias. *Scott v. State*, 175 Md. App. 130, 152 (2007). In that situation, we ask whether, objectively, a "reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned." *In re Turney*, 311 Md. 246, 253 (1987); *see also Boyd*, 321 Md. at 86.

Contentions

Jesmer contends that Judge Campen erred and abused his discretion by not recusing after his comments at the November 16, 2016 hearing. Specifically, Judge Campen, at the close of the hearing and after hearing Jesmer testify, stated, "I find [Jesmer's] testimony incredible and difficult to believe," and later, "This case is like Dracula, I'm going to put a stake in the heart of it before I reach my 80th birthday." These comments, Jesmer maintains, suggest that the circuit court's "principal concern was to summarily rid itself of [his] claims . . . without regard to [his] due process rights or the merits of those claims." And, because these statements were made "during the course of a hearing in a contentious case with material issues pending," they "might reasonably lead a litigant" in his position to question the court's impartiality.

Jesmer also refers to comments Judge Campen made at the December 2, 2015 hearing, including characterizing Jesmer's renovation efforts as the "play" of a "hobbyist," but argues that the problematic nature of those earlier comments did not

become clear until the "more troublesome comments" were made at the November 16, 2016 hearing. The "comments in the aggregate," he argues, support his contention that Judge Campen erred as a matter of law by not recusing himself.

He further contends that the judge failed to identify how or whether he exercised any discretion at all because he never expressly ruled on the motion to recuse. He argues that it was an abuse of discretion, which would warrant reversal, to not "address or provide the required reasoning for ignoring the still-pending motion to recuse which the court had ample time to address."

The Town views Jesmer's motion to recuse as a "transparent attempt to avoid Judge Campen's adverse rulings." In addition, Jesmer had, on November 7, 2016, agreed to proceed with Judge Campen presiding. And, even though his motion was based on the remarks made by the judge at the December 2, 2015 and November 16, 2016 hearings, he did not seek to recuse Judge Campen until January 13, 2017, after the judge had questioned the credibility of his testimony and had granted appellees' motion to dismiss the counterclaim based on "legal grounds."

The Town contends that Judge Campen's comments revealed neither bias nor partiality: his statement regarding the $67,000 damage claim, "I find [Jesmer's] testimony incredible and difficult to believe," was not the same as saying he *would not* believe it; and his statement that he would "put a stake in the heart" of the case simply "referr[ed] to the never-ending nature of the case and provid[ed] a time frame for a final decision." And, if Judge Campen was, in fact, biased against Jesmer, he would have

granted the attorney's fees that appellees sought for appellant's bringing a frivolous motion to recuse.

Jesmer counters that he neither requested Judge Newell's recusal nor consented to Judge Campen presiding. He merely "brought to Judge Newell's attention the fact that as the State's Attorney, he had previously advised [the Town] on related matters." Judge Newell responded by recusing and suggested that Judge Campen take over the case. According to Jesmer, he could not "choose or consent to or preemptively strike assigned judges," and he had no basis for requesting Judge Campen's recusal at that time.

He also contends that the circuit court had "ample time to address" his motion in the two and a half weeks between January 13, 2017 when he filed the motion and the court's February 3rd Order. In addition, the court did not deny his Motion to Alter or Amend the Court's Final Judgment until February 23, 2017.

Analysis

According to Jesmer, Judge Campen abused his discretion by failing to expressly rule on his Motion to Reconsider, Amend, and Recuse. It is true that "[f]ailure to exercise choice in a situation calling for choice is an abuse of discretion, because it assumes the existence of a rule that admits of but one answer." *Hart v. Miller*, 65 Md. App. 620, 627 (1985). And, "when it is not clear that discretion was exercised, reversal is required." *Scully v. Tauber*, 138 Md. App. 423, 431 (2001). However, it is also "a well-established principle that [t]rial judges are presumed to know the law and to apply it properly . . . [and] trial judges are not obliged to spell out in words every thought and step

of logic." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007) (internal quotations omitted).

Jesmer's appeal on March 13, 2017 would not have precluded the trial court from responding to the Motion to Reconsider, Amend, and Recuse filed on January 13, 2017. We recognize that its February 3rd Order did not acknowledge or expressly discuss the recusal request, but we also recognize that Jesmer did not bring the recusal issue to the court's attention again in his Motion to Alter or Amend the Court's Final Judgment on February 12, 2017. That said, it appears that Judge Campen implicitly ruled on it by proceeding to render his decision on the merits of the case. And, as we will explain, we are persuaded that the motion to recuse was both untimely and effectively waived by failure to call the concern to the court's attention in the Motion to Alter or Amend.

To obtain appellate review of a judge's conduct for bias or partiality, the record must reflect that:

> (1) facts are set forth in reasonable detail sufficient to show the purported bias of the trial judge; (2) the facts in support of the claim must be made in the presence of opposing counsel and the judge who is the subject of the charges; (3) counsel must not be ambivalent in setting forth his or her position regarding the charges; and (4) the relief sought must be stated with particularity and clarity.

Reed v. Baltimore Life Insurance Co., 127 Md. App. 536, 554 (1999). Jesmer, in a footnote, states that these factors are met in this case and therefore, "recusal was obviously warranted." We do not necessarily agree, but even if they were, their presence would merely permit our review of the recusal claim.

A party must file a timely motion for recusal with the trial judge whose recusal is requested. As we explained in *Conwell Law LLC v. Tung*, 221 Md. App. 481, 516-17 (2015):

> A timely motion is one that is filed as soon as the basis for it becomes known and relevant, and is not one that represents the possible withholding of a recusal motion as a weapon to use only in the event of some unfavorable ruling. Therefore, a litigant who fails to make a motion to recuse before a presiding judge in circuit court waives the objection on appeal.

(cleaned up).

The stated basis for reversal would have been "known and relevant" at any time after Judge Campen made the statements that Jesmer contests, but Jesmer did not move to recuse Judge Campen at the November 16, 2016 hearing. *See Conwell*, 221 Md. at 516-17. He filed his recusal request as part of another motion on January 13, 2017, almost two months after the alleged triggering comments were made and after an adverse finding. He advances no "extenuating circumstances" preventing him from raising the issue earlier or for not bringing the court's failure to expressly rule on the recusal request to its attention in his Motion to Alter or Amend the Court's Final Judgment. *See Scott v. State*, 110 Md. App. 464, 486 (1996). His belated filing of the request suggests its employment "as a weapon" against an "unfavorable ruling." *Conwell*, 221 Md. App. at 516-17.

Moreover, if the recusal issue was squarely before us, Jesmer would fare no better because "[b]ald allegations and adverse rulings are not sufficient to overcome the presumption of impartiality." *Reed*, 127 Md. App. at 556. We agree with the Town that

Judge Campen's statements at the hearing on November 16, 2016 merely expressed that he did not believe Jesmer's testimony regarding the value of the removed items and his desire to wrap up an ongoing case. His comments on December 2, 2015 were based on his in-court observation that the renovation of 700 Gay Street was not proceeding in a professional and deliberate way. The court's comments during the two hearings over which the judge presided may have indicated dissatisfaction with Jesmer's action or inaction, but they do not, in our view, indicate actual or the appearance of partiality or personal bias against Jesmer.[16]

Looking objectively at the record, we are not persuaded that Judge Campen did or said anything that would overcome the presumption of impartiality or warrant recusal. Nor are we persuaded that a reasonable member of the public, knowing all the circumstances and understanding all the relevant facts, would "be led to the conclusion that the judge's impartiality might reasonably be questioned." *In re Turney*, 311 Md. at 253.

The Motion to Amend

Jesmer contends that he was entitled to amend his pleadings to add Count 6 when he filed his Motion to Reconsider, Amend, and Recuse because there was no final judgment or scheduling order. He adds that none of the appellees ever responded to Count 6.

[16] "*Not* establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as [] judges, sometimes display." *Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (emphasis in original).

The Town contends that his Motion to Reconsider, Amend, and Recuse highlights the "frivolity of Jesmer's behavior in this case," and demonstrates his lack of good faith because the court had already ruled against him on the Counterclaim.

Without leave of court, a party may only amend a pleading by "the date set forth in a scheduling order or, if there is no scheduling order, no later than 30 days before a scheduled trial date." Md. Rule 2-341(a). Maryland Rule 2-341(b) allows an amendment to a pleading after the dates specified in Md. Rule 2-341(a) "only with leave of court." Jesmer did not attempt to amend his Counterclaim until the proceedings were effectively over and the trial judge had ruled against him.

II. Constitutionality of the Rubbish Ordinance: Exhaustion of Administrative Remedies and *Res Judicata*

Standard of Review

"When the trial court's [decision] involves an interpretation and application of Maryland statutory and case law," we "must determine whether [the trial court's] conclusions are legally correct under a *de novo* standard of review." *Goff v. State*, 387 Md. 327, 338 (2005) (internal quotations omitted).

Contentions

Jesmer contends that the trial court's refusal, based on the doctrine of *res judicata*, to declare the Rubbish Ordinance unconstitutional was error. This contention is based on his argument that the destruction of any property had not occurred when the Final Injunction was issued and neither the Town nor the court even suggested that possibility. Therefore, the constitutionality of the Rubbish Ordinance *as applied to that destruction*

could not have been raised at the hearing on December 2, 2015. He asserts that his claims concerning the destruction of his property, without prior notice or an opportunity to be heard, are "wholly independent" of the earlier proceeding which related only to the "removal and storage" of the property. He further explains that claims regarding such destruction would require evidence of "the value of that property, the identity of that property, and the identity of the individuals who took, destroyed and/or misappropriated it," and such evidence was unavailable until after the Town's actions on January 20 and 21, 2016. In his words, "claim preclusion requires diligence but not clairvoyance."

Jesmer also launches a constitutional attack on the application of the Rubbish Ordinance to the materials at issue. He argues that the construction materials and items had value, and, because they remained on the property longer than 30 days, notwithstanding a "building permit for construction work," the ordinance "magically transform[ed]" them into "rubbish."[17] But, because they were "destined to be included and used in the renovation of the house," their removal and destruction were violations of his constitutional due process and property rights under Articles 24 and 26 of the Maryland Declaration of Rights[18] and the Fifth and Fourteenth Amendments to the U.S.

[17] Jesmer also asserts that the Town's reclassification of construction materials as "rubbish" specifically targeted him, and objects to the Town's characterization of his property as "a word that starts with s and ends in t and has four letters." The Town responds that it had offered substantial evidence by testimony and photographic exhibits as to the state of the 700 Gay Street property.

[18] "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life,

Constitution.[19] By its actions, the Town essentially required him to "destroy, reduce, and/or remove, at his individual expense, his own property," which constituted a taking of property without just compensation.

He also asserts that the Town's enforcement actions were solely for aesthetic reasons because there was no finding that the materials constituted a nuisance or posed a risk to the health and safety of the community.[20] Citing *Leet v. Montgomery County*, 264 Md. 606, 613 (1972), he contends that "the police power cannot interfere with private property rights for purely aesthetic purposes." He notes that the Town never argued that the removed material was "in and of itself inherently a nuisance," citing *Becker v. State*, 363 Md. 77, 90-91 (2001), and therefore, its destruction was not an "available remedy." As he sees it, the ordinance is "arbitrary and capricious because it bears no relation to the safety, health and welfare of the community [and] goes well-beyond any justifiable

liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Decl. of Rights, Art. 24.

"That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." Md. Decl. of Rights, Art. 26.

[19] "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

[20] Jesmer states that there was no finding "that the construction materials and other property destroyed was biodegradable [or] infested with rats."

exercise of the Town's police power." He also argues that the removal and destruction of his construction materials deprived him of his protected right to work in a "lawful business, trade[,] or profession," citing *Schneider v. Duer*, 170 Md. 326, 337 (1936) (holding provisions of statute regulating barbering license to be unreasonably and unconstitutionally restrictive).

In addition to his constitutional claims, Jesmer contends that the Town's actions violated the Final Injunction, which only granted it permission to "remove and store" the property.[21] In addition, Jesmer claims that the Final Injunction applied only to 700 Gay Street and that the removal of items from 12 North 7th Street was not authorized.[22]

The Town responds that the trial court did not err in refusing to reach the constitutionality of the Rubbish Ordinance and by dismissing Jesmer's constitutional tort claims. According to the Town, Jesmer's facial challenge to the constitutionality of the ordinance was barred by both *res judicata* and failure to exhaust administrative remedies. And, his applied challenge to the destruction of some of the removed materials was

[21] Jesmer acknowledges that Town Code Chapter 94, § PM 302.1.1(b), provides: "Upon the failure, neglect, or refusal of any owner so notified . . . the Code Official is hereby authorized and empowered to cause such condition to be corrected by removing and disposing of such rubbish or to order its disposal by the Town of Denton Department of Public Works."

[22] Contrary to this contention, the language of the Final Order does include 12 North 7th Street. The circuit court also made it clear that its order pertained to 12 North 7th Street because Elinor Taylor had testified that Jesmer's rubbish was on that property as well: "Well, if you have materials on . . . Mrs. Taylor's property [12 North 7th Street], you're going to have to get it off of her property, too. Your stuff has to be removed from these two properties." Judge Campen confirmed during the November 2016 hearing that "708 [Gay Street] was not included in my order."

rejected as a matter of fact by the circuit court's determination that the Town acted "reasonably and responsibly" under the Final Injunction "by removing and discarding rubbish that would not justify storage costs."

The Town points out that Jesmer could have raised a facial challenge based on the definition of "rubbish" in the Rubbish Ordinance in 2014 or 2015, or could have directly appealed the Final Injunction. But, because he did not raise a constitutional issue until his Counterclaim, any constitutional claims, including his due process, equal protection, or takings claims, related to the removal or destruction of the property, were precluded by *res judicata*.

And, even if the Town's actions had violated the Final Injunction, Jesmer no longer had a cognizable (and thus protected) property interest in the material and items when he did not appeal the court's finding that they were "rubbish" and "not lawfully stored." In other words, because he lacked a "protected property interest,"[23] Jesmer could not successfully bring due process, equal protection, or takings claims. The Town claims it had governmental authority to prevent Jesmer from using his property in an unlawful way, and that his constitutional tort claims fail because the alleged facts indicate that, at most, the Town was negligent. But, any non-intentional acts would not constitute due process violations.

[23] Jesmer questions why appellees and the circuit court frequently called the removed materials "Mr. Jesmer's property," if he did not have a protectable property interest in them. In our view, the reference to "Mr. Jesmer's property" was simply a recognition of Mr. Jesmer's ownership claim and not a determination of its legal status for the purposes of this litigation.

According to the Town, Jesmer was "repeatedly provided with ample due process, and failed to avail himself of that process." Not only were Jesmer and Alley both on notice of the alleged violations for four and a half years, Jesmer had "full access to and ample opportunity to protect his property, and abate an illegal public nuisance," but he did not do so.

Analysis

Exhaustion of Administrative Remedies

The Town also contends that Jesmer's constitutional claims were barred based on his failure to exhaust the administrative remedies. Referring to the Board of Appeals, which reviews determinations made by Town code and building officials, the Town argues that Jesmer should have availed himself of the "statutory procedure" provided by the Town Code to challenge any adverse decision by the Town's [officials]."

Jesmer counters that the Town only cited Alley and never brought him into the administrative process by a violation notice or a municipal infraction citation. There being no "administrative proceeding or determination" involving him, he did not fail to exhaust administrative remedies.

> Generally, there are three categories of administrative and judicial remedies:
>
> First, the administrative remedy may be exclusive, thus precluding any resort to an alternative remedy. Under this scenario, there simply is no alternative cause of action for matters covered by the statutory administrative remedy.
>
> Second, the administrative remedy may be primary but not exclusive. In this situation, a claimant must invoke and exhaust the administrative remedy, and seek judicial review of an adverse administrative decision,

> before a court can properly adjudicate the merits of the alternative judicial remedy.
>
> Third, the administrative remedy and the alternative judicial remedy may be fully concurrent, with neither remedy being primary, and the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy.

Zappone v. Liberty Life Insurance Co., 349 Md. 45, 60-61 (1998) (cleaned up).

Denton Town Code Chapter 94, § PM 111 provides three means of appeal for "any person directly affected by a decision of the Code Official or a notice or order issued under this chapter or any applicable portion of the Denton Town Code by which a decision of the Code Official is based":

> PM 111.1(a) The owner or person affected by the decision and penalties of the Code Official pursuant to Section PM 106 **may** submit an application for appeal within 10 calendar days of the receipt of a citation to the Director of the Department.
>
> * * *
>
> PM 111.1(b) The owner or person . . . **may** submit an application for appeal within 20 days of the receipt of a ticket or citation to the Denton Town Board of Appeals.
>
> * * *
>
> PM 111.1(c) The owner or person . . . **may** request to stand trial by the appropriate Court.

(Emphasis added.)

The Town Code permits concurrent administrative and judicial remedies, including an action in an appropriate court. In this case, the Town initiated the action in the circuit court against both Jesmer and Alley for violations of the Rubbish Ordinance. We perceive no failure to exhaust administrative remedies.

Res Judicata

> The doctrine of res judicata is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to **all matters which with propriety could have been litigated in the first suit**, where the court had jurisdiction, proceedings were regular, and his [or her] omission was due to [a litigant's] own negligence.

Alvey v. Alvey, 225 Md. 386, 390 (1961) (emphasis added).

The "overarching purpose" of *res judicata* is "judicial economy." *Powell v. Breslin*, 430 Md. 52, 64 (2013); *see also Grady Management, Inc. v. Epps*, 218 Md. App. 712, 737 (2014) (res judicata "avoids the expense and vexation attending multiple lawsuits, conserves the judicial resources, and fosters reliance on judicial action by minimizing the possibilities of inconsistent decisions by preventing parties from relitigating matters" (internal quotations omitted)). But, *res judicata* "extends only to the facts and conditions as they existed at the time of the first judgment and does not bar the fresh litigation of an issue which is appropriately subject to periodic redetermination, as subsequent facts and changed conditions may alter the status of the thing being evaluated." *Towers v. Director, Patuxent Institute*, 18 Md. App. 248, 250 (1973).

We engage in a three-prong inquiry to determine whether a claim is barred by *res judicata*: "(1) [are] the parties in the present litigation [] the same or in privity with the parties to the earlier action; (2) [is] the claim in the current action [] identical to the one determined in the prior adjudication; and (3) [was] there [] a final judgment on the merits in the previous action." *Powell v. Breslin*, 430 Md. at 63-64.

Here, the earlier action was the Town's Complaint against Jesmer and Alley filed on July 25, 2014, for violations of the Rubbish Ordinance. This led to a merits hearing on December 2, 2015, during which witnesses testified and evidence was submitted, and the issuance of the Final Injunction on December 10, 2015. The Final Injunction designated "[a]ll materials, equipment, metal objects, trailers, storage containers, vehicles, machinery, parts, construction materials and all items not permanently attached to the residence, now stored on the unoccupied property at 700 Gay Street, Denton, Maryland, as well as such items stored on the adjacent occupied property at 12 North 7th Street" as "rubbish" that had accumulated in violation of the Rubbish Ordinance. It required its removal by January 18, 2016, and, if the deadline was not met, it authorized the Town to effect "removal and storage of those materials" at Jesmer's expense. That decision was not appealed, and the docket entries indicate that the case was closed.

The Town filed a Motion for Supplemental Relief on May 11, 2016, to which Jesmer responded with a Counterclaim that raised constitutional challenges to the Rubbish Ordinance and the resulting destruction of his property. At the November 16, 2016 hearing on Jesmer's Counterclaim and Show Cause Petition, the circuit court ruled:

> The Constitutional claims fail because they weren't raised below. . . . [Jesmer] has violated the [Final Injunction] . . . . The failure to raise those constitutional issues below is fatal. . . . It is *res judicata*.

The *Powell* inquiry reveals that the parties in both actions were the same. The Town's Complaint was against both Jesmer and Alley, who died on July 15, 2015. And, the non-appealed Final Injunction was a final judgment on the merits in the earlier action.

Focusing on the nature of the previously adjudicated claim (the second *Powell* factor) and asserting "subsequent facts and changed conditions," *Towers*, 18 Md. App. at 250, Jesmer argues that *res judicata* does not preclude consideration of the constitutionality of the Town's actions in the destruction of his property in January 2016 because it had not occurred when the Final Injunction issued and it was not foreseeable. In other words, the Town's disposal and sale of some of the removed materials generated new and different constitutional claims. We are not persuaded.

At no point prior to the filing of his Counterclaim did Jesmer challenge the constitutionality of any of the Rubbish Ordinance provisions facially or as applied, including the definition of "rubbish," which the materials located on 700 Gay Street and 12 North 7th Street were found to be. That, after its removal, at least some "rubbish" would not reasonably justify storage expense and would be disposed of was not, in our view, unforeseeable.[24] Jesmer could have appealed when the Final Injunction was issued, but he did not. Therefore, Jesmer's constitutional claims were barred by *res judicata*.

As to whether the destruction of the removed materials violated the Final Injunction, the circuit court, in its February 3rd Order, found that the Town had removed the materials in accordance with the injunction and had "acted reasonably and responsibly" within the scope of the injunction in the disposal "of worthless piles of construction debris" that "would not justify storage costs." The court also found that the Town agents were "sufficiently competent and capable of sorting out materials of

[24] As Jesmer recognizes, Chapter 94, § PM 302.1.1(b) of the Town Code expressly permits the removal and disposal of rubbish. *See* footnote 21.

potential value." Based on our review of the record, those findings are not clearly erroneous.

And, were we persuaded by Jesmer's "destruction" argument to consider his constitutional challenges to the Rubbish Ordinance, he would not prevail.

The Rubbish Ordinance defines rubbish as:

> Combustible and noncombustible waste materials, except garbage, including construction waste, and materials pursuant to Section PM 106.5.1 and Section PM 304.19; the term shall include the residue from the burning of wood, coal, coke and other combustible materials, vehicle tires, paper, rags, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, metal cans, metals, mineral matter, glass, crockery and dust, and other similar materials, any household furnishings and appliances not intended for exposure to the elements by the manufacturer, vehicle or machinery parts, and any construction materials stored or remaining on the property longer than 30 calendar days.

Town Code § PM 202.

In its exercise of the police power, the State and its subdivisions have the authority to abate public nuisances. *See, e.g.*, *Adams v. Comm'rs of Town of Trappe*, 204 Md. 165, 173 (1954) (holding that a gasoline supply pump erected on sidewalk without permit was a nuisance and public officials were entitled to an injunction to remove); *compare Feldstein v. Kammauf*, 209 Md. 479 (1956) (holding that a junkyard did not constitute nuisance where there were no zoning regulations and it was not located in a clearly residential community). In *Hebron Savings Bank v. City of Salisbury*, 259 Md. 294, 300-03 (1970), which involved the destruction of an unsafe building, the Court of Appeals explained:

> Under the police power the State or its authorized agency or subdivision may prevent an owner of property from using it in a manner that inflicts or threatens public harm or from permitting it to remain in a condition to inflict or threaten such harm. Every individual holds his property subject to this power and the power is fundamental and broad enough to require destruction of the property if this is reasonable necessary to insure the public health or safety. In such case the property is deemed a public nuisance and its destruction falls within the power of the State to abate such a nuisance. But as against the property rights of the owner the power to destroy the property without paying compensation for it depends on the property being in fact a nuisance. Due process of law requires that an owner be entitled to a proper hearing on the question of whether or not the property is, or was, in fact and law a nuisance subject to destruction. If it is or was, an owner is not entitled to compensation for its loss. If it is not or was not, he is entitled to compensation.

(Cleaned up.)

A public nuisance has been defined as "an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property," and may result in a civil injunction or criminal prosecution. *Public Nuisance*, Black's Law Dictionary (7th ed. 1999) at 1095. And, in general, "garbage or refuse is a nuisance per se and consequently [] its accumulation and removal are within reach of the municipal police power or the municipal power to abate nuisances." 7 McQuillin Municipal Corp. § 24:247 (3d ed.); *see also Nikolas v. City of Omaha*, 605 F.3d 539, 542 (8th Cir. 2010) ("Nebraska statutes expressly grant the City broad power to control nuisances and littering on property within three miles of the city limits.")

Whatever their similarities, the ordinary understanding of "garbage" and "refuse" differs in everyday language.[25] "Garbage" is primarily defined as "food waste." Merriam-Webster's Collegiate Dictionary (10th ed. 2000) at 479. "Refuse" is primarily defined as "the worthless or useless part of something." *Id.* at 981. And, "rubbish," like "refuse," is primarily defined as "useless waste or rejected matter: trash." *Id.* at 1019. "Trash" is primarily defined as "something worth little or nothing: as junk, rubbish." *Id.* at 1252. The Town's Complaint did not expressly used the term "nuisance," but the trial court concluded in its February 3rd Order, "the Town [] has full authority to declare what should be deemed a nuisance and to provide for the suppression of the same."

Jesmer challenges the 30 day time limit for storing construction materials, when "there is a building permit for construction work on the premises." Whatever merit that challenge might have had, it is not relevant in this case because the building permit for 700 Gay Street had expired on July 31, 2015, months before the merits hearing in December 2015. In addition, Town Code § 128-196(E)(4) provides that "[u]pon written notice by the applicant and payment of fees, the Director of the Department of Planning and Codes may grant a one-time extension of one calendar year [for a building permit], provided that the application is substantially the same and remains consistent with the

[25] A similar distinction is reflected in Chapter 64 of the Town Code related to "garbage and trash." Section 64-2 defines "rubbish" as "Combustible and noncombustible waste materials, *except garbage*; the term shall include the residue from the burning of wood, coal, coke and other combustible materials, paper, rags, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, tin cans, metals, mineral matter, glass, crockery and dust and other similar materials." (Emphasis added.) The same section defines "garbage" as "The animal and vegetable waste resulting from the handling, preparation, cooking and consumption of food."

provisions of this code." In other words, the Town provides the possibility of relief from the 30 day provision. Here, the Town had extended the building permit multiple times during the course of the renovation of 700 Gay Street. But, no permit was valid at the time of the Final Injunction or the removal of the rubbish. And, there is no evidence that Jesmer had sought extension after the permit expired.

In addressing Jesmer's challenge, we are guided by "the principle that [we] will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality." *Yangming Transport v. Revon Products*, 311 Md. 496, 509 (1988). We read "stored" and "remaining" to refer to "construction materials" that are not being used in an ongoing and permitted project. In that context, we are not persuaded that the 30 day provision is unreasonable, especially when the Town Code allows an extension of a permit.

Local rubbish ordinances that have been challenged on constitutional grounds in other states have, more often than not, been upheld. *E.g.*, *City of Fargo v. Salsman*, 760 N.W.2d 123 (N.D. 2009) (holding that evidence was sufficient to establish that owner's property containing "trash, rubbish, junk and junk automobiles" constituted a nuisance under municipal ordinance and was not unconstitutionally vague); *Franklin v. State*, 611 S.E.2d 21 (Ga. 2005) (holding that county ordinance declaring "accumulation of litter or rubbish items on any . . . property" to be a nuisance was not unconstitutionally vague, where "rubbish" was defined as "wastepaper, cartons, boxes, wood, tree branches, yard trimmings, furniture, appliances, metal, cans, glass, packing material and similar

material");[26] *Boyles v. City of Topeka*, 21 P.3d 974 (Kan. 2001) (holding that city ordinance prohibiting the maintaining of "garbage, rubbish, trash, refuse, junk," or other listed items which create "an unsightly appearance" on private property and declaring it to be a nuisance was not unconstitutionally vague);[27] *Commonwealth (Borough of Palmyra) v. Brandt*, No. 866 C.D. 2016, 2017 WL 3643006 (Pa. Commw. Ct. 2017) (holding that local ordinance requiring exterior property and premises to be in "clean, safe and sanitary condition" was not unconstitutionally vague).[28] *But see State v. Bielski*, 5 N.E.3d 1037, 1039 (Ohio Ct. App. 2013) (holding that IPMC provision, which was not

[26] The court elaborated, "Obviously, these [definitions of rubbish and litter] are not all-inclusive . . . Rather, the definitions are instructive in nature, providing concrete examples of the type of substances that may not be accumulated on either private or public property without creating a nuisance. We believe these examples provide more than adequate guidance so that persons of common intelligence can readily ascertain without guessing whether a particular item or substance will be considered 'litter' or 'rubbish' (or both) under the ordinance. This is especially true in light of the fact that a common understanding exists in our society that certain items or substances are likely to be considered litter or rubbish." *Id.* at 23.

[27] The court noted, "[P]articularly in urban areas, offensive and unsightly conditions do have an adverse effect on people and . . . beauty and attractive surroundings are important factors in the lives of the public. The general welfare is promoted by action to insure the presence of such attractive surroundings." *Id.* at 978.

[28] This ordinance, like the Denton ordinance, was adopted from the International Property Maintenance Code ("IPMC") and provided, "All exterior property and premises shall be maintained in a clean, safe and sanitary condition." The Court explained that the words "clean," "safe," and "sanitary" can be "fairly construed, in accordance with its ordinary usage in the vernacular." *Id.* at *5. It elaborated, "Equally important, the courts have long held . . . that an ordinance requiring a landowner to maintain the premises in a 'clean' condition is not unconstitutionally vague. The underlying proposition supporting these decisions is that the term 'clean' has 'a clear ... meaning to everyone,' and is 'within the comprehension of any one,'" quoting *State v. Johnson*, 410 P.2d 423, 427 (Kan. 1966). *Id.* at *6.

properly adopted into the local law, prohibiting the "accumulation of rubbish or garbage" in both the interior and exterior of every structure was unconstitutionally vague on its face).[29] In sum, our examination of these cases indicates that the terms "rubbish," "trash," "litter," "refuse," and "junk" are used interchangeably, and that the excessive accumulation of such is a nuisance that may be abated under the police power.

While the Court of Appeals has observed that "[t]he courts of this country have with great unanimity held that the police power cannot interfere with private property rights for **purely** [a]esthetic purposes," *Leet v. Montgomery County*, 264 Md. 606, 613 (1972) (internal citations omitted) (emphasis added), we are not persuaded that the Town's Rubbish Ordinance was enacted or was being enforced for "purely aesthetic" reasons. In *Leet*, the Court of Appeals held that the presence of abandoned automobiles left on the owner's two farms by trespassers without his knowledge or consent did not pose an immediately threat to health or public safety sufficient to justify their removal at the owner's expense. *Id.* at 612-13. The *Leet* Court stated, however, that "had the property owner used the property for the accumulation of rubbish or had suffered, permitted or consented to the accumulating and dumping of rubbish on his property," or

[29] IPMC Section 307.1 provided, "All exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage." The *Bielski* Court explained, "The deputies who issued the citation could not explain what 'accumulation of rubbish' meant . . . There is no definition as to how long the rubbish must be present to be treated as an 'accumulation.'"

The Denton ordinance does not suffer from a similar temporal uncertainty. And, the 30 day limit applies to stored materials that are not being used in an ongoing, permitted construction project.

"had the accumulation of rubbish . . . , although dumped upon the property by trespassers, constituted an immediate threat to the health or safety of the surrounding residents," the county government would have been entitled to injunctive relief to abate the nuisance. *Id.* at 611-12. Here, Jesmer, not a trespasser, was the source of the accumulation of rubbish on 700 Gay Street.

Nor are we persuaded that the Rubbish Ordinance was improperly applied in this case. We recognize that "an injunctive order to abate a nuisance should go no further than necessary," and "in light of the constitutional prohibition against taking private property without paying compensation, courts have consistently held that destruction of property to abate a nuisance is a drastic remedy and may not be resorted to where the property constitutes a nuisance because of its *use*." *Becker v. State*, 363 Md. 77, 88-89 (2001) (emphasis in original). On the other hand, when the nuisance is "inherent in, or inextricable from," the property itself, courts may authorize its destruction for purposes of abatement. *Id.* at 90.

In this case, the circuit court found that items and materials accumulated and stored on 700 Gay Street and 12 North 7th Street met the Town Code's definition of rubbish and were, therefore, a nuisance that the Town could abate. For years, the Town had discussed and litigated with Jesmer and Alley various violations of the Town Code in regard to 700 Gay Street. In 2012, Alley was found guilty in the District Court of violations for excessive rubbish and paid fines. The Town engaged with Jesmer and Alley directly in efforts to attain their voluntary compliance with the Code through

letters, meetings, and the granting of permit extensions for the renovation. But, nothing changed; "construction materials, trailers, old appliances," and other personal property continued to accumulate on 700 Gay Street and adjoining properties. Its efforts having failed, the Town filed a complaint in 2014 to abate the Town Code violations.

Arguing that the destruction of the items that were removed was unforeseeable, Jesmer contends that due process required notice and an opportunity to be heard on whether the removed items would be destroyed. As previously explained, we believe that the destruction of materials, which would not justify storage costs, was foreseeable. Therefore, we are persuaded that Jesmer had an adequate opportunity to be heard prior to the removal of the accumulated rubbish. At the December 2, 2015 hearing, he and the Town called witnesses to testify as to what was being kept on 700 Gay Street and adjoining properties. Various photographs of 700 Gay Street, with dates of March-May 2012, September 2014, January 2015, and November 2015, were admitted into evidence. The Town Planning Director testified that the September 2014 photographs depicted a "substantial amount of waste and rubbish." The Town Administrator testified that, from the time of his meeting with Jesmer in January 2015 to the hearing, there had been no material change in the condition of the exterior of the property other than an addition of a filled dumpster. Jesmer, arguing that his construction materials were not rubbish, focused on the ongoing and complex nature of the construction project at 700 Gay Street.

At the close of the hearing, the trial judge found:

> [Jesmer] hasn't completed anything in almost four years of playing with this piece of property. It is simply an unprofessional effort to complete a

> house . . . and, unfortunately, he has now run afoul of the regulations and laws that apply to the construction of a piece of a property. He does not have a valid building permit. . . . [E]verything on this piece of property is, by definition, rubbish. . . . [I]ndeed there may be some building materials that can be used . . . but he has no permit. But I see things that are not possibly going to be used in the construction. I've pointed out a Bimini top on a boat.
>
> * * *
>
> There are numerous items, boxes, lawnmowers, pieces of mortar and bricks, coolers, buckets upturned on the ground, pieces of fencing, scaffolding, items that are covered up that no one seems to know what [they] may be. In short, everything that I see as represented by the most recent photographs of November 17, 2015, two weeks ago . . . .
>
> * * *
>
> I find that . . . all of the items, because there's no building permit, come within the parameters of [Town Code § PM 202] definition of rubbish. Rubbish is defined as combustible and noncombustible waste materials, except garbage, including construction waste . . . vehicle tires, which I saw in some photographs . . . cartons I saw, boxes I saw, wood I saw . . . metal cans I saw, metals I saw in the photographs, and other similar materials . . . and any construction materials stored on remaining on the property longer than 30 calendar days. Now that says to me that the Town of Denton has elected to require even one who has a building permit to have those construction materials stored no longer than 30 days on the property. In other words, use them.

Jesmer, defining "rubbish" as "useless waste or rejected matter" as found in Webster's New Collegiate Dictionary (1979), maintains that the removed materials were not rubbish. But, he did not appeal the circuit court's finding that it was. And, as previously discussed, we believe the definition of "rubbish" in the Rubbish Ordinance is constitutionally sound, and that the circuit court's factual findings in regard to the removed materials was not clearly erroneous. The testimony and the photographic

evidence in the record support the circuit court's finding that, among the accumulated materials, there were "things that are not possibly going to be used in the construction," including a part of a boat, boxes, lawnmowers, coolers, pieces of fencing, scaffolding, vehicle tires, metal objects, and other things. As to any possibly usable construction materials being stored on the property, the court determined that they were there well beyond the 30 day limit and were not being used for a permitted project.

When Jesmer failed to remove the accumulated items and materials as required by the Final Injunction, the Town, through its contractors, effected the removal. Some items and materials were stored at cost to Jesmer, but others, which were determined to be without value, were disposed of in the landfill. At the November 16, 2016 hearing, Jesmer's testimony that the materials disposed of the landfill were valued at $67,000 was the only evidence offered as to value. Finding Jesmer's testimony "incredible and difficult to believe," the circuit court determined that, weighed against the cost of storage, the Town's disposal of "piles of construction debris" was reasonable. We perceive no error.

In addition, we agree with the Town that Jesmer lacked a protectable property interest in the materials once the circuit court declared that they were rubbish and unlawfully stored on 700 Gay Street and adjoining properties. Property interests are not created by constitutions, but by "existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "[W]e look outside the Takings Clause to traditional rules of property law to

determine whether a constitutionally protected property interest exists, and only when a State, through legislation, rule, decision, or other action deprives an owner of such an interest, must it provide just compensation." *Washlefske v. Winston*, 234 F.3d 179, 184 (4th Cir. 2000).

The improper disposal of or the failure to remove accumulated rubbish can be a form of abandonment, and generally, there is no protectable property interest in abandoned items. *See Roes v. State*, 236 Md. App. 569, 591-597 (2018) (holding that there was sufficient evidence to find that two sunken houseboats, attached to owner's pier and tree on his property, were abandoned, improperly disposed of, and constituted "litter," under Md. Code Ann., Criminal Law § 10-110).

In *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013), the Town of Nags Head declared several cottages along a beach that were damaged in a major storm to be nuisances and required their abatement within 18 days, which involved demolition and removal. *Id.* at 537-38. When they failed to do so, the Town imposed civil fines of $100 per day per cottage. *Id.* at 538. The cottage owners argued that the Town had violated their due process rights by taking their property rights in the cottages and fining them for their failure to remove them.[30] The *Sansotta* Court disagreed, explaining:

> The Town's actions here were all legitimate government actions intended simply to enforce its nuisance ordinances. Such regulatory actions do not constitute a deprivation of property because they represent limitations on the use of property that "inhere in the title itself, in the restrictions that

[30] Although the *Sansotta* Court recognized money as a cognizable property interest, it held that the Town never deprived owners of any money because owners never actually paid the fine and the Town never took their money. *Id.* at 540.

> background principles of the State's law of property and nuisance already place upon land ownership." *Lucas* [*v. South Carolina Coastal Council*], 505 U.S. [1003,] 1029 [(1992)].
>
> * * *
>
> By acting to abate what it believed was a nuisance, the Town simply kept the Owners from using their property in a way that was prohibited by law. Because the law prohibited such use of property, the Owners had no right to use their property in that way. The Town's actions to abate a nuisance were reasonable—if mistaken—uses of its police power that did nothing to deprive the Owners of any property right, even if the cottages were rendered valueless. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n. 22 (1987) ("Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance.").

Id. at 541.

Because their facts are different than those in this case, other cases cited by Jesmer do not support his argument that his property was taken without compensation. In *Becker*, 363 Md. at 91-93, the Court of Appeals held that a drug nuisance abatement statute did not authorize a court to order the destruction of a known drug house. That was because, although the building was being *used* for an unlawful activity, the unlawful activity did not *inhere* in the building itself. The house located at 700 Gay Street was not destroyed, and the accumulation of rubbish did not inhere in the structure. It inhered in the essential character of the items and material being unlawfully maintained on the property.

In *Stevens v. City of Salisbury*, 240 Md. 556 (1965), the city passed ordinances for purposes of traffic safety, limiting the height of fences and shrubbery to three feet prospectively and requiring removal of excess soil (or grading) above three feet of ground elevation on private properties near street intersections. The Court of Appeals

held that the prospective measures were lawful, but requiring the owners to destroy, reduce, or remove their own property at their own expense would be an unconstitutional taking. *Id.* at 568-70. The *Stevens* Court believed that a requirement of owners to "destroy or reduce customary and ordinarily harmless improvements . . . at their own expense for the public benefit" was constitutionally unsustainable. *Id.* at 573. In this case, however, Jesmer was not being asked to "destroy or reduce customary and ordinarily harmless improvements"; he was being asked to remove accumulated rubbish that violated the Rubbish Ordinance.

Jesmer also asserts that the Town specifically targeted him, Alley, and the 700 Gay Street property when, by amendment, it created a "more stringent rubbish ordinance" in 2013. According to the Town, the amendment was for the purpose of "adopting for the Town of Denton . . . [the] 2012 International Property Maintenance Code" ("IPMC"). Town Code § 94-1 now reads, "The 2015 Edition of the International Property Maintenance Code, as published by the International Code Council, Inc., which is kept and maintained by the Town Clerk, be and is hereby adopted as the 'Town of Denton Property Maintenance Code.'"[31]

"Rubbish" in both the 2012 and 2015 editions of the IPMC is defined as:

> Combustible and noncombustible waste materials, except garbage; the term shall include the residue from the burning of wood, coal, coke and other

[31] According to the Town, "[The IPMC has] since been updated to 2015 . . . [when by ordinance it] adopted the most recent version of the [IPMC]. It does not change any of the provisions of . . . the [IPMC], nor the amendments thereto in the Town Code relevant to this case."

> combustible materials, paper, rags, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, tin cans, metals, mineral matter, glass, crockery and dust and other similar materials.

The Town, in 2013, expanded the definition of rubbish from the IPMC by adding: "including construction waste, and materials pursuant to Section PM 106.5.1 and Section PM 304.19"[32] and "any household furnishings and appliances not intended for exposure to the elements by the manufacturer, vehicle or machinery parts, and any construction materials stored or remaining on the property longer than 30 calendar days." Jesmer notes that the former definition of "rubbish" is still codified in Town Code § 64-2 and is exactly the same as the IPMC definition.[33]

We perceive no illegality in the Town adopting a more expansive provision than the IPMC relating to the regulation of rubbish. And, even if the 30 day provision related to construction materials had its genesis in the Town's experience with Alley and Jesmer, the language applies to Town properties generally. In short, we are not persuaded that a 30 day limit for maintaining and storing construction materials is facially unconstitutional or as applied in this case.

[32] § PM 106.5.1 does not appear, presently or during the time of the litigation, to exist in the Town Code or the IPMC.

§ PM 304.19 concerned "eviction refuse" and, interestingly, appears to have been amended and recodified as § PM 304.20 in 2013 by Town Ordinance No. 656, which amended the Rubbish Ordinance.

[33] *See* footnote 25.

III. Dismissal of Jesmer's Counterclaim

Findings of Fact Without Jury Trial

Jesmer contends that the trial court erred when it granted the Town's Motion to Dismiss based on factual findings on disputed material evidentiary issues. More specifically, he claims that the value of the materials that were destroyed by the Town agents after removal on January 20 and 21, 2016 was disputed. The Town never corroborated its claim that the materials were worthless and that the fact that the Town sold some of the materials indicates that it could not have been worthless.

Jesmer also argues that the trial court made factual findings, disregarding his timely request for a jury trial. He asserts that, given the overlapping and virtually identical factual disputes in his Counterclaim, the jury demand overrides the trial court's jurisdiction to make its own findings in the contempt proceedings.

As he sees it, he was essentially "flying blind" at the November 16, 2016 hearing because the court ignored his motion to compel discovery responses, and he was never permitted to view the property that was stored. But, even so, he supported his case with "substantial evidence" to the best of his ability.

The Town responds that the trial court did not err by dismissing Jesmer's Counterclaim because it presented ample evidence that the property disposed of was essentially worthless. In addition, and although the court disbelieved Jesmer's testimony about the property's value, it accepted the allegations of the Counterclaim as true and dismissed the Counterclaim without making any findings of fact. According to the

Town, no discovery was necessary and Jesmer was not entitled to a jury trial in proceedings related to the Motion to Dismiss or the Show Cause Petition.

In a civil case, there is a "right of trial by Jury of all issues of fact . . . where the amount in controversy exceeds the sum of $15,000." Md. Const., Declaration of Rights, Art. 23. A party may request a jury trial "of any issue triable of right by a jury by filing a demand therefor in writing." Md. Rule 2-325(a). In this case, Jesmer's Counterclaim alleged damages "in excess of $75,000 to be determined by the jury."

The November 16, 2016 hearing was on the Town's Motion to Dismiss the Counterclaim and Jesmer's Show Cause Petition. Neither triggers a right to a jury trial. In a motion to dismiss for failure to state a claim upon which relief can be granted, the trial court "assume[s] the truth of all well-pleaded facts and allegations in the complaint, as well as all inferences that can reasonably be drawn from them" and views them in a light most favorable to the non-movant, *i.e.*, it does not pass on the merits of the claim. *Lloyd v. General Motors Corp.*, 397 Md. 108, 121-22 (2007); *see also* Md. Rule 2-322(b). And, in a show cause petition related to contempt, the trial court gives the accused contemnor an opportunity to challenge the alleged contempt and show cause why a finding of contempt should not be entered. *See Dodson v. Dodson*, 380 Md. 438, 453 (2004) ("A party in a civil contempt action . . . is not entitled to a jury trial."); *see also* Md. Rule 15-206.

As to the discovery issue, the circuit court properly denied Jesmer's Motion to Compel Discovery on October 14, 2016 because the motion was untimely. The Town

had filed its Motion to Dismiss the Counterclaim pursuant to Maryland Rule 2-322, and a hearing had been set for November 7, 2016. Maryland Rule 2-321(c) provides, "When a motion is filed pursuant to Rule 2-322 . . . the time for filing an answer is extended without special order to **15 days after entry of the court's order on the motion**." Maryland Rule 2-421(b) provides, "The party to whom the interrogatories are directed shall serve a response within 30 days after service of the interrogatories or **within 15 days after the date on which that party's initial pleading or motion is required, whichever is later**." In short, the Town did not need to respond to Jesmer's discovery requests until 15 days from the date that the circuit court ruled on the Motion to Dismiss.[34]

Immunity

Contentions

Jesmer contends that the circuit court erred in dismissing his Counterclaim based on sovereign immunity because he sued the Town and the Individual Appellees for violations of his constitutional rights under both the Takings Clause of the Fifth Amendment and its equivalent in Article 24 of the Maryland Declaration of Rights. And, he asserts that public officials who violate an individual's constitutional rights are not entitled to immunity.

[34] We perceive neither error nor abuse of discretion in the circuit court's treatment of Jesmer's Rule 2-501(d) motions because this rule gives the circuit court discretion to "order a continuance to permit . . . discovery." But, it is not mandatory. *See* footnote 11.

With regard to his non-constitutional tort claims, he contends that public official immunity is qualified, not absolute, and that an official is liable for an intentional or malicious act. In his view, the Individual Appellees' unauthorized destruction of his property without just compensation or notice was knowing, willful, and malicious. He also contends that municipal governments are liable under the *respondeat superior* doctrine "for civil damages resulting from state constitutional violations committed by their agents and employees within the scope of employment." He argues that he was entitled to discovery concerning each Individual Appellee's respective role in order to "identify the specific wrongdoers" and "to establish the personal liability of the involved town officials."

The Town responds that Jesmer included the Individual Appellees without any factual basis that they acted with malice or engaged in any wrongdoing. It also argues that Jesmer misrepresented the rulings of the trial court with respect to immunity. According to the Town, only the common law torts were dismissed based on immunity, and they were properly dismissed based on governmental immunity. The constitutional tort claims were "barred for failure to state a claim and for failure to raise them previously."

Analysis

Jesmer's Counterclaim named, as defendants, several Town officials, including the Mayor, Town Councilmembers, and the Town Administrator, as well as the contractors who removed, sorted, disposed of, and stored his property. It asserted three common law

tort claims: conversion and trover, trespass to chattels, and negligence. The Town and the Individual Appellees filed a Motion to Dismiss the Counterclaim, asserting that the Counterclaim failed to state a claim against the Individual Appellees and that they are entitled to statutory public official immunity and governmental immunity.

We agree with the Town that only the common law tort claims were dismissed based on immunity, and our discussion of immunity relates only to those. The constitutional claims, as discussed previously, were dismissed based on *res judicata*.

Governmental Immunity

The doctrine of sovereign or governmental immunity is "deeply ingrained in Maryland law," *Nam v. Montgomery County*, 127 Md. App. 172, 182 (1999), and is "generally enjoyed by a municipality," *Hebron*, 259 Md. at 303. "Unlike the total immunity from tort liability which the State and its agencies possess, the immunity of . . . municipalities and local agencies is limited to tortious conduct which occurred in the exercise of a 'governmental' rather than a 'proprietary' function." *Austin v. City of Baltimore*, 286 Md. 51, 53 (1979) (internal citations omitted). The modern test of whether a function is governmental or proprietary is: "whether the act performed is for the common good of all or for the special benefit or profit of the corporate entity." *Tadjer v. Montgomery County*, 300 Md. 539, 547 (1984). An act for the common good of all is governmental.

Ordinarily, there is no recovery against a municipality or its officers for "injuries occasioned by its negligence or nonfeasance in the exercise of functions essentially

governmental in character." *Fowler v. Board of County Comm'rs of Prince George's County*, 230 Md. 504, 507 (1963). An exception to the general rule is where the General Assembly has either directly or by necessary implication waived that immunity.[35] *See Godwin v. County Comm'rs of St. Mary's County*, 256 Md. 326, 334 (1970). Another exception is the "public ways" exception. *See Anne Arundel County v. Fratantuono*, 239 Md. App. 126, 133 (2018); *Godwin*, 256 Md. at 334-36 (where liability arises out of the government's negligence in its maintenance and control of public ways); *Fowler*, 230 Md. at 507 (where liability arises out of the government's negligent failure to prevent or abate a public nuisance relating to public ways).

A municipality is entitled to governmental immunity from tort claims arising from its exercise of a governmental act. *See, e.g.*, *Zilichikhis v. Montgomery County*, 223 Md. App. 158 (2015) (holding that the local government was immune in a tort claim arising from its operation of a parking garage where a pedestrian slipped and fell); *Mayor and City Council of Baltimore v. Whalen*, 395 Md. 154 (2006) (holding that the government was immune in a tort claim arising from its maintenance of a public park where a blind pedestrian was injured falling into an uncovered utility hole in the park); *Burns v. Mayor and City Council of Rockville*, 71 Md. App. 293 (1987) (holding that the government was immune in a tort claim arising from the maintenance and operation of a civic ballet

[35] Waiver of immunity comes from legislative enactment. The Maryland Local Government Tort Claims Act ("LGTCA"), CJP §§ 5-301 *et seq.*, is not a waiver of sovereign immunity. *Williams v. Montgomery County*, 123 Md. App. 119, 129 (1998), *aff'd*, *Williams v. Maynard*, 359 Md. 379 (2000). Jesmer did not bring an action under the LGTCA.

program). In *Austin*, which concerned the death of a child at a day camp for children operated by the Department of Recreation and Parks of the City of Baltimore, the Court of Appeals discussed the policy rationale supporting immunity: "To deny the [local government] the protection of its cloak of governmental immunity in the operation of an activity necessary to the health, education and welfare . . . must have a chilling effect on the ability and willingness of the [local government] to continue to furnish that vitally needed service in the future." 286 Md. at 66.

McQuillin explains:

> The enactment and enforcement of building codes and ordinances constitutes a governmental function. The primary purpose of such codes and ordinances is to secure to the municipality as a whole the benefits of a well-ordered municipal government, or, as sometimes expressed, to protect the health and secure the safety of occupants of buildings, and not to protect the personal or property interests of individuals.

7A McQuillin Municipal Corp. § 24:502 (3d ed.). Other states have generally considered property and building code inspections and enforcement to be governmental acts, which are entitled governmental immunity. *E.g., Stemen v. Coffman*, 285 N.W.2d 305 (Mich. Ct. App. 1979) (holding that duties performed by city's housing and fire inspectors were discretionary, and they were immune from liability for injuries and losses that residents suffered in a fire); *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W.2d 158, 160 (Minn. 1972) ("[A] building inspector acts exclusively for the benefit of the public . . . and an individual who is injured by any alleged negligent performance of the building inspector in issuing the permit does not have a cause of action."); *Meadows v. Village of Mineola*, 72 N.Y.S.2d 368, 370 (N.Y. Sup. Ct. 1947) ("The enactment and enforcement

of a building code is a governmental function . . . . Neglect by the Village, its officers or employees in enforcing . . . such statutes creates no civil liability to individuals.").

Whether property code inspections and enforcement are "for the common good of all," and thus, governmental acts, appears to be a question of first impression in Maryland. We hold that they are.

Public Official Immunity

"Whether a defendant possesses a qualified immunity is ultimately an issue of law for the court to determine." *Artis v. Cyphers*, 100 Md. App. 633, 653 (1994).

Maryland has codified public official immunity:

> An official of a municipal corporation, while acting in a discretionary capacity, without malice, and within the scope of the official's employment or authority shall be immune as an official or individual from any civil liability for the performance of the action.

Md. Code Ann., Courts and Judicial Proceedings ("CJP") § 5-507(a)(1). The purpose of the statute "was to codify existing public official immunity, and not to extend the scope of qualified immunity beyond its Maryland common law boundaries." *Livesay v. Baltimore County*, 384 Md. 1, 12 (2004) ("[W]hile it did not extend the scope of the common law, it did not limit it either.").

The Mayor, Town Councilmembers, and the Town Administrator are clearly public officials. *See Biser v. Deibel*, 128 Md. App. 670, 679 (1999) (holding that the zoning administrator of Town of Bel Air was a public official entitled to immunity from negligent misrepresentation tort). A public official's act is discretionary if it "involves an exercise of [the official's] personal judgment" and "also includes, to more than a minor

degree, the manner in which the police power of the State should be utilized." *Id.* at 680 (quoting *James v. Prince George's County*, 288 Md. 315, 327 (1980)). Jesmer's Counterclaim was based on the alleged improper removal and destruction of items from the properties in January 2016. We hold that the Town officials were acting within their discretion and the scope of their duties in their enforcement of the Town's Rubbish Ordinance. *See id.* (zoning administrator acted in a discretionary capacity when she advised landowner of changes required for permission to construct a commercial building in a residential zone).

There was also no error in the circuit court's dismissal of the common law tort claims as to the two contractors. Here, there is no dispute that Rick Breeding Excavating, Inc. and Rex Landscaping & Nursey LLC were engaged by the Town to effect the removal of rubbish from 700 Gay Street and 12 North 7th Street. In his Counterclaim, Jesmer did not allege particular facts stating that the two contractors committed torts of conversion and trover, trespass to chattels, and negligence, beyond what was alleged against the Town and its public officials. In addition, the circuit court had found in the contempt proceedings that the Town and its agents had "acted reasonably and responsibly under the terms and conditions of the Final Injunction." Therefore, any error in dismissing the claims against the contractors would be harmless.

As to malice, the Counterclaim failed to allege any facts demonstrating that the Town officials or the Individual Appellees acted with "actual malice." Actual malice means that an official "intentionally performed an act without legal justification or

excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the [other person]." *Bord v. Baltimore County*, 220 Md. App. 529, 557 (2014). As we explained in *Elliott v. Kupferman*, 58 Md. App. 510, 528 (1984):

> Merely asserting that an act was done maliciously . . . does not suffice. To overcome a motion raising governmental immunity, the plaintiff **must allege with some clarity and precision those facts which make the act malicious**.

(Emphasis added.)

In short, we perceive no legal error in dismissal of the common law tort claims.

Was A Declaratory Judgment Required?

In his October 21, 2016 Motion for Partial Summary Judgment, Jesmer requested that the circuit court issue a declaratory judgment that the Rubbish Ordinance is unconstitutional. He claimed that, under CJP §§ 3-401 *et seq.*, the court was required to enter declarations responsive and appropriate to the issues he posed. Merely stating that the issue was *res judicata* did not, in his view, qualify as a declaration.

In Maryland, except for the District Court, "a court of records within its jurisdiction may declare rights, status, and other legal relations whether or not further relief is or could be claimed." CJP § 3-403(a). CJP § 3-409 explains:

> A court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:
> (1) An actual controversy exists between contending parties;
> (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or

> (3) A party asserts a legal relation, status, right or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

But, according to the Court of Appeals, "a court has no right to make a determination in declaratory judgment cases in which no justiciable issue is presented." *Reyes v. Prince George's County*, 281 Md. 279, 287-88 (1977) ("A controversy is justiciable when there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded.").

Here, Jesmer asserted a right to keep certain materials and other items on his property; the Town asserted a duty to enforce its municipal code and effect their removal. To be sure, a "justiciable issue" as to the constitutionality of the Rubbish Ordinance could have been presented when the matter was first presented in the Town's Complaint, and the circuit court had the authority to issue a declaration as to its constitutionality.[36] The question is whether the matter was justiciable after the issuance of the Final Injunction. We believe that it was not because "[o]nce a controversy has been finally adjudicated by a court with jurisdiction of the subject matter and the parties, the controversy is no longer alive and therefore is not the proper subject for a declaratory judgment action." *Fertitta v. Brown*, 252 Md. 594, 599 (1969).

JUDGMENTS OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[36] CJP §§ 3-403(a) and 3-409 use the permissive verb "may."