We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case. "No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Oregon v. Elstad,* supra at 4250.

Carbaugh's remaining contentions all relate to his robbery conviction. He argues that we erred in denying his demurrer to the evidence on the robbery charge, that the evidence of robbery was insufficient to sustain a verdict of guilty, that the verdicts of guilty to robbery and theft are inconsistent, and that we erred in our instructions to the jury on the definition of robbery.

Carbaugh argues that his statements show, at the most, that the car and the check book were stolen from the defendant after he had beat her and points out that "a person is guilty of robbery if, in the course of committing a theft, he: (a) inflicts serious bodily injury upon another," Crimes Code, 18 Pa.C.S.A. §3701(a)(1)(i). Thus, he says the Commonwealth has not shown that at the time he beat her he had formed the intent to commit the crime of theft. In Commonwealth v. Kesting, 274 Pa. Super. 79, 93 417 A.2d 1262, 1269 (1979), that precise issue was addressed. The court held an exact contemporaneity of the assault and the intent to steal was not required.

However, in *Commonwealth v. Legg,* 491 Pa. 78, 82, 83, 417 A.2d 1152, 1154-55, (1980) where the charge was felony murder, the court held that for a defendant to be guilty of that offense, he had to have formed the intent to commit the robbery prior to death, saying that where a defendant kills prior to formulating the intent to commit the underlying felony, it cannot be said that he knew or should have known death might occur from involvement in a dangerous felony because no involvement in a dangerous felony existed since the intent to commit the felony is not yet formulated.

In this case, we followed *Legg* in our charge and told the jury that as to felony murder, the intent to commit the robbery had to be formed before killing. However, we followed *Kesting* when we charged that the defendant could be found guilty of robbery even if the jury found he formed the intent to steal after the alleged killing. We do not agree with Carbaugh's contention that *Kesting* was overruled by *Legg*, for the latter concerned itself exclusively with the felony-murder rule.

Referring to *Kesting* in Criminal Offenses and Defenses, Pa. 213, Professor John M. Burkoff says "The Superior Court has also concluded that the intent to rob need not be exactly contemporaneous with an assaultive act in order to support conviction." He goes on to say: "While the Court did not explicitly mention the point, this conclusion fits squarely within the extremely broad §3701(a)(2) definition of 'in the course of committing a theft.' "

The evidence in this case establishes that the defendant inflicted serious bodily injury on the victim resulting in her death, and he took property from her. While it may be true so far as felony-murder is concerned that he was not in the process of committing a felony when he killed her, surely having killed or harmed her, and then stealing from her constitutes the crime of robbery. The taking of her property was a continuation of the episode that began with his beating her.

The Commonwealth concedes that for the purposes of sentencing, the theft offense merges with the robbery conviction. There is no need to discuss that issue.

ORDER OF COURT

July 16, 1985, Randy Scott Carbaugh's post trial motions are denied. It is ordered that a presentence investigation report be prepared by the probation department and that when the report is completed, the defendant be forthwith listed by the District Attorney for sentencing.

LEINBAUGH AND SHOCKEY V. ANTRIM TOWNSHIP ZONING HEARING BOARD, C.P. Franklin County Branch, Civil Action, Vol. Y, Page 461.

Zoning - Special Use Exception - Burden of Presentation

1. The burden of presentation usually falls on the party with the burden of proof, but it may shift through the operation of logic, presumptions, and rules of law.

2. Objectors to the granting of a special exception must prove to a high degree of probability that the proposed use will impact adversely and abnormally on the public interest.

3. The high degree of probability standard requires more than a demonstration of an apprehension of more possibility of harm.

E. Franklin Martin, Esq., Counsel for Appellants

Deborah K. Hoff, Esq., Counsel for Appellee

Stephen E. Patterson, Esq., Counsel for Intervenor

OPINION AND ORDER

KELLER, J., August 20, 1985:

On October 18, 1984, the appellants filed their application for a special use exception with the Antrim Township Zoning/Hearing Board, hereafter Board. The application alleged the proposed use on the property 3545 Barr Road, Greencastle, Pa. to be a junkyard, which is a special use in an Agricultural-Residential District. Attached to the application is what appears to be a tax assessment map on which the boundary of parcel 11 is heavily inked and the word "Junkyard" written within the inked lines.

Pursuant to notice of the Board, a hearing was held at the Antrim Township Municipal Building at 8:00 p.m. on November 8, 1984. All witnesses were sworn, evidence was received; and at the conclusion of the hearing the Board unanimously voted to deny the special exception. On December 20, 1984, the solicitor for the Board mailed a copy of the Board's decision to counsel for the appellants. The decision of the Board executed by its three members provides:

I. *Facts*

Applicants have requested a special use exception under Section 3.1-B-3 of the Antrim Township Zoning Ordinance in order to use the property at 3545 Barr Road, Antrim Township, for the operation of an auto salvage yard pursuant to the Township Junkyard Ordinance.

The property in question is bounded to the west by residential land of 8.16 acres, to the south (across Barr Road) by farm of 101 acres, and to the east and north by farmland and residences. In adjacent Washington Township, along Barr Road and its interceptor Scott Road, is a residential development.

Barr Road and Scott Road currently carry light traffic; it is anticipated that use of said roadways would increase to the extent of trucks hauling junk cars to and from the property in question.

The subject property contains approximately 8 acres; only one acre of the land, the westernmost portion, is proposed to be used for auto salvage. Business hours would be from 8 a.m. until 5 p.m.; there would be three employees of the business, and an existing building would be used as an office. An 8-foot opaque fence is proposed to surround the 1-acre yard.

Opponents to the proposed use base their objections upon the increased traffic in the area of residences (and children), the visibility of the yard and its aesthetic and economic results with respect to the area residences, and the increased probability of crime in an area heretofore considered by the residents to be safe.

II. *Discussion.*

The proposed use is set forth as a special exception to agricultural-residential zoning, Section 3.1-B-3, as a "junkyard in accordance with the Antrim Township Junkyard Ordinance." It is the burden of applicants to establish that the proposed use complies with the requirements of the Zoning Ordinance. *Atlantic Richfield Company v. City of Franklin Zoning Hearing Board,* Pa. Cmwlth., 465 A.2d 98 (1983). That burden includes in the instant case the establishment that the use complies with the Junkyard Ordinance.

Section 5 of the Antrim Township Junkyard Ordinance provides that, in determining whether or not to issue a license to operate a junkyard, the Township is to take into consideration "the suitability of the property proposed to be used for the purpose of the license, the character of the properties located nearby, and the effect of the proposed use upon the Township, both economic and aesthetic."

We believe that the applicants have not carried the requisite burden of proof with respect to these requirements of the Zoning and Junkyard Ordinances. In fact, opponents of the proposed use have shown that there is a high degree of probability that the nearby residences would be hard economically and aesthetically, and that increased traffic in the area would create risk to the area residents.

As it is incumbent upon applicants to establish the suitability of the area for the proposed use, we find that that burden has not been met, and therefore deny applicants' request for special exception.

On January 21, 1985, appellant's Notice of Appeal was filed alleging that the denial of the application was arbitrary, capricious and an abuse of discretion for various reasons specifically alleged. Transcript of the hearing was completed on February 22, 1985, and filed with the Protestant's Exhibits 1 through 6 as the record of the case. On June 6, 1985, Jack L. Annan petitioned to intervene in support of the Board's decision as a property owner in the vicinity of the subject property and an order was signed the same date granting the petition. Pursuant to Local Rules of Court counsel for appellants, appellee and intervenor exchanged briefs, and submitted them to the Court and oral arguments were heard on June 6, 1985. The matter is now ripe for disposition.

The ordinances of Antrim Township applicable to the case at bar are the Zoning Ordinance and Ordinance No. 30 approved and adopted October 2, 1967, and known as the Junkyard Ordinance.

The applicable provisions of the Zoning Ordinance are:

ARTICLE I OJBECTIVES

SECTION 1.1 OBJECTIVES.

There is hereby established a new comprehensive zoning plan for the Township which plan is set forth in the text and map that constitute This Ordinance. Said plan is adopted in the interest of protecting and promoting the public health, safety, morals, and general welfare, and shall be deemed to include the following related and specific community development objectives, among others as may be stated in the Antrim Township Comprehensive Plan:

A. To guide and regulate the orderly growth, development, and redevelopment of the Township, in accordance with a comprehensive plan of long-term objectives, principles, and standards deemed beneficial to the interest and welfare of the people.

B. To protect the established character and the social and economic well-being of both private and public property.

C. To promote, in the public interest, the utilization of land for the purposes for which it is most appropriate, and to provide maximum protection of residential areas.

D. To secure safety from floods, water pollution, and other dangers, and to provide adequate light, air and convenience of access.

E. To encourage and facilitate the provision of adequate and efficient public facilities, service and utilities.

F. To lessen and, where possible, to prevent traffic congestion on public streets and highways so as to promote efficient and safe circulation of vehicles and pedestrians.

G. To discourage, prohibit and gradually eliminate the expansion and undue perpetuation of non-conforming uses and structures.

H. To conserve the value of buildings and to enhance the value of land throughout the Township.

I. To preserve the agricultural and rural qualities of open lands.

ARTICLE III DISTRICT USE REGULATIONS

SECTION 3.1 AGRICULTURAL RESIDENTIAL DISTRICT (AR)

B. *Special Uses*

3. Junkyards in accordance with the Antrim Township Junkyard Ordinance.

ARTICLE IX ZONING HEARING BOARD

SECTION 9.4 ZONING HEARING BOARD'S FUNCTION

D. *Special Uses*

Where the Township in This Zoning Ordinance, has stated special uses to be granted or denied by the Zoning Hearing Board pursuant to express standards and criteria, the Zoning Hearing Board shall hear and decide requests for such special uses in accordance with such standards and criteria. In granting a special use, the Zoning Hearing Board may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of This Zoning Ordinance.

1. All special use applications shall be accompanied with a Sketch Development Plan to illustrate generally the proposed project and its relation to the standards and criteria applicable to such use.

The applicable provisions of the Junkyard Ordinance are:

SECTION 2. DEFINITIONS

e. Junk — Junk shall mean . . . scrapped, abandoned or junked motor vehicles, . . . One engaged primarily in the sale of used car parts and used cars not in a condition to be driven on highways shall be classified under this Ordinance as a junk dealer.

f. Junk Dealer — Shall mean any person, as hereinafter defined, who shall engage in the business of selling, buying, salvaging and dealing in junk and who maintains and operates a junkyard within the Township of Antrim.

SECTION 3. LICENSES

No person shall engage in business as a junk dealer or maintain a junkyard without first having obtained a license from the Board, . . .

SECTION 5. ISSUANCE OF LICENSE

Upon receipt of an application by the Board, the Board shall issue a license or shall refuse to issue a license to the person applying therefor after an examination of the application and taking into consideration the suitability of the property proposed to be used for the purpose of the license, the character of the properties located nearby, and the effect of the proposed use upon the Township, both economic and aesthetic. In the event the Board shall issue a license, it may impose upon the licensee and the person applying therefor such terms and conditions in addition to the regulations herein contained and adopted pursuant to this Ordinance as may be deemed necessary to carry out the spirit and intent of this Ordinance.

SECTION 12. REGULATIONS

Every person licensed under this Ordinance shall constantly maintain the licensed premises in accordance with any special provisions imposed by the Board and in the manner prescribed by this Section and any subsequent regulations adopted by the Board.

a. Such premises shall at all times be maintained so as not to constitute a nuisance or a menace to the health of the community or of residents nearby or a place for the breeding of rodents and vermin.

b. No garbage or other offensive or unhealthful organic waste shall be stored in such premises.

c. Whenever any motor vehicle shall be received in such premises as junk, all gasoline shall be drained and removed therefrom. Gasoline in any amount not exceeding ten (10) gallons may be stored above ground in said junkyards, provided the same be placed in containers approved by the Board. All other gasoline which is kept in the premises shall be stored underground, which underground storage must be approved by the Board.

d. The manner of storage and arrangement of junk and used cars and the drainage facilities of the premises shall be such as to prevent the accumulation of stagnant water upon the premises, and to facilitate access for fire-fighting purposes.

e. All junk and used cars kept, stored or arranged on the licensed premises shall at all times be kept, stored and arranged with the junkyard as described in the application for license hereunder, and as limited under Paragraph (d) above.

g. The premises to be licensed shall be set back a minimum distance of 50 feet from the right-of-way lines on all streets or roads. The premises to be licensed shall be set back 75 feet from all other property lines unless written permission of the owner of the adjacent property is secured and filed with the Supervisors, permitting use nearer the property line than 75 feet. The area between the set-back line and the right-of-way line and all other property lines shall be at all times kept clear and vacant and planted with suitable ground cover vegetation.

The discussion of the Zoning/Hearing Board, supra, clearly demonstrates that the Board denied the appellants' application becuase they failed to sustain the burden of proof imposed upon them by the applicable ordinances of Antrim Township. Counsel for appellants, appellee and the intervenor have correctly identified the heart of this litigation to be what burden of proof is imposed upon the appellants/proponents and protestants with regard to the requirements and conditions of the applicable ordinances; and which side sustained the burden lawfully imposed. These questions of law and their application to Antrim Township Ordinances, we will now consider.

In a long line of cases including *Bray v. Zoning Hearing Board of Adjustment,* 48 Cmwlth. Ct. 523 (1980), *White Advertising Metro, Inc. v. Zoning Hearing Board of Susquehanna Township,* 70 Cmwlth. Ct. 308 (1982), *Atlantic Richfield Co. v. City of Franklin Zoning Hearing Board,* 77 Cmwlth. Ct. 302 (1983), and *Appeal of M.G.H. Enterprises from Decision of West Cocalico Township Zoning Hearing Board,* Cmwlth. Ct. , 480 A. 2d 394 (1984), our appellate courts have addressed the issue of the burdens of presentation and proof of the proponents and objectants.

By way of comment and clarification, it appears Professor Wigmore and our appellate courts have adopted and use the expressions "burden of presentation", "going forward with the evidence" and "evidence presentation duty" interchangeably. The expressions "burden of risk of non-persuasion", "persuasion burden" and "burden of proof" are also synonomous. The latter burden never shifts because it is operative only after all of the evidence is before the trier of fact; it remains where the substantive law imposes it. The burden of presentation usually falls initially upon the party with the burden of proof, but it may shift from one party to another through the operation of logic, presumptions and rules of law. 9 *Wigmore Evidence* §2485, 2489 (3rd Ed. 1979).

In *White Advertising Metro Inc. v. Zoning Hearing Board of Susquehanna Township,* supra, the Commonwealth Court held:

"At the heart of this dispute is the question of what burden is borne by each party in the proof of compliance with the conditions of the ordinance and the general considerations of the welfrare of the public. We reviewed the line of decisions on this issue in *Bray v. Zoning Board of Adjustment,* 48 Pa. Commonwealth Ct. 523, 410 A. 2d 909 (1980). In that case, we delineated the burdens of persuasion and duties to present evidence in an application for a special exception as follows:

Specific requirements, e.g., categorical definition of the special exception as a use type or other matter, and objective standards governing such matter as a special exception and generally:

The applicant has both the duty and the burden.

General detrimental effect, e.g., to the health, safety and welfare of the neighborhood:

Objectors have both the duty and the burden, the ordinance terms can place the burden on the applicant but cannot shift the duty . . . .

General policy concern, e.g., as to harmony with the spirit, intent or purpose of the ordinance:

Objectors have both the duty and the burden; the ordinance terms cannot place the burden on the applicant or shift the duty to the applicant. . . ." 70 Cmwlth. Ct. at 315, 316.

In applying the enunciated standards the court also held:

"Our cases make clear that the Board may review a proposed use with regard to its general detrimental effect and adverse impact on the welfare of the community, but the burden shifts to those objecting to the proposal to come forward and offer proof. . . . Our cases also make clear that a municipality may include consideration of aesthetic factors in the exercise of its zoning powers. . . . We note, however, that our Supreme Court has held that aesthetics alone cannot justify zoning decisions. . . . Our decisional line, consequently, links aesthetic factors with considerations of property value. (citations omitted) (70 Cmwlth. Ct. 320, 321).

The Commonwealth Court in *Atlantic Richfield Co. v. City of Franklin Zoning Hearing Board,* supra, further clarified the standards enunciated in *White*, supra, stating:

"An applicant for special exception must meet the burden of establishing that the proposed use complies with the specific requirements of the ordinance which expressly govern the grant of special exceptions, *Bray v. Zoning Board of Adjustment,* 48 Pa. Cmwlth. Ct. 523, 410 A. 2d 909 (1980). If that burden is satisfied by the applicant, then any objectors to the proposed use must, to be successful, satisfy their burden of showing that the proposed use is a detriment to public health, safety and welfare." 77 Cmwlth. Ct. at 105, 106.

In *Bray,* supra, the Court observed:

"However, the decisions also say that the zoning ordinance may place the 'burden of proof' upon the applicant as to the matter of detriment to health, safety and general welfare, which was the ordinance language in *Derr Flooring Co. v. Whitemarsh Township Zoning Board,* 4 Pa. Commonwealth Ct. 341, 285 A. 2d 538 (1972). It

BAR NEWS ITEM

The Federal Judicial Nominating Commission will conduct interviews in Philadelphia April 17 and 18 with candidates for a vacancy on the U.S. District Court for the Eastern District of Pennsylvania, Ronald R. Davenport, nominating commission chairman, has announced.

Those wishing to be considered for the vacancy should contact Davenport or his assistant, Mrs. Kathy Gersna, at Sheridan Broadcasting Corp., 1500 Chamber of Commerce Building, Pittsburgh, PA 15219. The vacancy was created by the decision of Judge Donald W. Van Artsdalen to assume senior status.

appears that such ordinance reference to 'burden of proof' thus places only the persuasion burden on the applicant because the same case makes clear that the objector retains the evidence presentation duty as to such matters; the opinion states:

> This is not to say, however, that the burden is such that the applicant must negate every conceivable and unvoiced objection to the proposed sale. That would be an unreasonable burden. Once an applicant has met the burden of proving his compliance with all of the specific conditions and requirements of the zoning ordinance, he has met his initial burden of proof. If the protestants to the issuance of a special exception raise specific issues concerning health, safety and general welfare, then the burden would continue to be with the applicant. The applicant would be required to come forward to meet the objections so as to show that the intended use would not violate the health, safety and general welfare of the community with relation to such objections. It would then be the duty of the Board in the exercise of its discretionary power to determine whether or not the applicant had met his burden of proof.

4 Pa. Commonwealth Ct. at 347-48, 285 A. 2d at 542. Thus *Derr* indicates, as to specific requirements of the zoning ordinance, the applicant has the persuasion burden, as well as the initial evidence presentation burden. The objectors have the initial evidence presentation duty with respect to the general matter of detriment to health, safety and general welfare, even if the ordinance has expressly placed the persuasion burden upon the applicant, where it remains if detriment is identified. Hence it appears that an ordinance provision placing the 'burden of proof' as to general police power detriment refers to the persuasion burden but, contrary to the rule that the initial evidence presentation duty follows persuasion burden, the nature of that subject matter requires that the evidence presentation duty be upon the objector in order to identify the facts-at-issue." (48 Cmwlth. Ct. 528, 529, 530).

The *Arco* court, supra, held that "objectors to the granting of a special exception bear the heavy burden of proving to a high degree of probability, that the proposed use will impact adversely and abnormally on the public interest"; and ". . . that the high degree of probability standard requires more than a demonstration of an apprehension of mere possibility of harm." 77 Cmwlth. Ct. at 106, 107.

In the case at bar there can be no doubt that the land use proposed by appellants constitutes a junkyard and that junkyards are a permitted special use in Agricultural Residential Districts if the request for such special use is granted by the Zoning hearing Board after hearing to determine if the use complies with express standards and criteria. With the exception of the requirement that the appellant's application be accompanied by a "Sketch Development Plan" the express standards and criteria here applicable appear in Sections 5 and 12 of the Junkyard Ordinance.

Applying the rules governing burdens of persuasion and presentation as enunciated in *Bray,* supra, and *White,* supra, we conclude:

1. The appellants had the dual burdens of presentation and persuasion that their proposed use was a permitted special use under the Zoning Ordinance.

2. The appellants had the burden of presenting evidence showing the prima facie suitability of their proposed use and the character of the properties located nearby (Sec. 5).

3. The appellants had the burden of presenting evidence that if granted a license they would comply with Sections 12 a, b and c. (We cannot envision how the appellants could do more than represent an intention to comply, for these sections appear to be only applicable to an operating junkyard.)

4. The appellants had the dual burdens of presentation and persuasion as to Sections 12 d, e and f.

5. The objectants had the dual burdens of presentation and persuasion as to any adverse affect upon the Township, both economic and aesthetic (Sec. 5).

6. The objectants had the burden of going forward with the evidence (presentation) if they desired to rebut appellants' evidence as to suitability of the proposed use and the character of the properties located nearby.

7. The objectants had the dual burdens of presentation and persuasion as to the adverse affect of the proposed special use on traffic and pedestrian safety (Zoning Ordinance Art. I Sec. 1.1 D and F).

In our judgment the Antrim Township Zoning Hearing Board correctly concluded appellants had not sustained their burden of proof and denied their application for a special exception, for:

1. Their application was fatally defective by reason of their failure to have Sketch Development Plan accompany it.

2. The appellants introduced no evidence as to the plan for storage and arrangement of junk and used cars, for drainage facilities and to facilitate access for firefighting purposes as required by Section 12 d and e; nor did they demonstrate or exhibit compliance with the property line set back requirement or proposed ground cover planting as required by Section 12 g. Had the appellants provided the Sketch Development Plan required by Article IX Section 9.4 D 1 of the Zoning Ordinance these fatal omissions might have been cured.

3. The objectants persuasively rebutted the appellants' evidence as to the suitability of their proposed use and sustained their burdens of presentation and persuasion that the granting of the special use would adversely affect this area of Antrim Township economically and aesthetically.

4. The objectants sustained their burdens of establishing that due to the narrow, hilly, curving layout of the access roads to appellants' real estate, coupled with the existence of a one-lane bridge, the proposed special use would have a serious detrimental effect on traffic and pedestrian safety.

ORDER OF COURT

NOW, this 20th day of August, 1985, the appeal of Gary Linebaugh and Dave Shockey, appellants, is dismissed.

Costs to be paid by appellants.

Exceptions are granted appellants.

VAN MATER REAL ESTATE V. SYLVANIA SHOE, C.P. Franklin County Branch, A.D. 1984 - 283

Open Listing Agreement - Agency - Identity of Purchaser

1. "Open listing" means the agent may show a property and if he affects a sale, he will be paid a commission, but if the owner effects a sale, no commission is paid the agent.

2. A broker must allege his employment, either expires or implied, or by acceptance or ratification of his acts.

3. A mere volunteer is not entitled to a commission even though he brings the parties together and is the procuring cause of the sale.

4. Where a broker deals with a prospective purchaser individually and the prospective purchaser forms a partnership which purchases the property, the broker may recover a commission if he can prove that there was an unbroken chain of events between the initial contact with the individual and the subsequent sale of the partnership.

David S. Cleaver, Esquire, Counsel for plaintiff

Michael B. Finucane, Esquire, Counsel for defendant

OPINION AND ORDER

EPPINGER, P.J., September 9, 1985:

Plaintiff, Van Mater Real Estate Services Company, Inc. (Van Mater), is a licensed real estate broker. On April 18, 1984, Van Mater and the defendant, Sylvania Shoe Manufacturing Corporation, (Sylvania), entered into an open listing agreement[1] whereby Van Mater was named agent of Sylvania for the purpose of attempting to sell real estate owned by Sylvania and located in Washington Township, Franklin County, Pennsylvania. [2]

The agreement provided for the payment of a commission of six (6%) percent of the total sales price if the real estate was sold to a purchaser originally procured by Van Mater. The agreement stated that Van Mater would like to register Tom Beck as its client on the showing of the property. On April 18, 1984, Van Mater contacted Tom Beck and showed him Sylvania's real estate in an attempt to sell the property to him. For some reason, Beck did not

[1] Plaintiff's Complaint, Exhibit B.
[2] Plaintiff's Complaint, Exhibit A.