with its principal place of business at 603 Wayne Avenue, Chambersburg, PA 17201. The names and addresses of all persons owning or interested in said business are Marilyn D. Smith, 1838 Woodburn Drive, Hagerstown, MD 21740; Jerome Shuman, 1630 Juniper Street N.W., Washington, D.C.
(8-1)

NOTICE IS HEREBY GIVEN pursuant to the provisions of the Act of Assembly of May 24, 1945, P.L. 967 and its amendments and supplements of intention to file with the Secretary of the Commonwealth of Pennsylvania at Harrisburg and with the Prothonotary of the Court of Common Pleas of Franklin County, Pennsylvania, on August 8, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of Rich Highland Orchard with its principal place of business at 2410 Scotland Road, Chambersburg, Pennsylvania 17201. The name and address of the person owning or interested in said business is Richard I. Rotz, 2410 Scotland Road, Chambersburg, Pennsylvania 17201.

Paul F. Mower, Attorney
of MOWER and HOSKINSON
232 Lincoln Way East
Chambersburg, Pennsylvania 17201

(8-1)

NOTICE

Notice is hereby given that Articles of Incorporation have been filed with the Commonwealth of Pennsylvania Department of State at Harrisburg, Pennsylvania, on June 16, 1980, for the purpose of obtaining a Certificate of Incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law, approved May 5, 1933, P.L. 364, as amended is Upton Enterprises, Inc.

The purpose or purposes for which the corporation has been organized are: To manufacture and sell fabricated metal products and to have unlimited power to engage in and do any lawful act concerning any and all lawful business for which corporations may be incorporated under the Business Corporation Law of 1933, as amended.

Upton Enterprises, Inc.
Route 4, Buchanan Trail West
Greencastle, PA 17252

Gary Deane Wilt, Esquire
125 Lincoln Way West
McConnellsburg, PA 17233

(8-1)

LEGAL NOTICES, cont.

she said no such thing, that she sued Jim because he was the child's father.

The *Watts* rule is no longer an absolute bar to a finding that James is the father. The testimony in the case establishes that he is. As required in *Lonesome*, supra, we conclude that Tina has shown James' paternity by the preponderance of the evidence. Though she had sexual relations with others during the 220 to 330 day period, the incidents occurred after she became pregnant.

VERDICT

June 12, 1980, the verdict is for the plaintiff. The case shall be listed for a hearing to determine the amount that the defendant shall pay in support of the child.

HERR AND BAKER v. BOROUGH OF SHIPPENSBURG, C.P. Franklin County Branch, A.D. 1978 - 526, A.D. 1979 - 27

Zoning Appeal - Curative Amendment - Exclusionary Ordinance

1. Where a request for rezoning is submitted to a borough planning commission and borough council and after several hearings, the applicant states that the request has implications as a curative amendment, the request shall be considered a rezoning request in that an applicant must strictly comply with the procedure in the Municipalities Planning Code (53 P.S. Sec.11004) to assert a curative amendment.

2. There is no right of appeal from a denial of a rezoning application.

3. A zoning ordinance is not exclusionary where a considerable portion of a borough is zoned residential even if there is an absence of vacant land for development.

J. Wesley Oler, Jr., Esq., and Robert J. Yocum, Esq., Attorneys for Mayor and Town Council of Shippensburg

Richard L. Shoap, Esq., Attorney for Intervenors

Jan G. Sulcove, Esq., Attorney for Appellants

OPINION AND ORDER

EPPINGER, P.J., May 29, 1980:

On October 17, 1978, the Borough Council of Shippensburg (borough) turned down a rezoning request filed by the

B&H Investors (B&H), apparently a partnership composed Lloyd H. Herr and George W. Baker. B&H appealed to No. AD 1978-526. Shortly before October 17th, B&H, now represented by counsel, attempted to convert this rezoning request into a challenge to the borough zoning ordinance, calling this a curative amendment procedure. The borough denied the challenge and B&H appealed to No. 1979-27. We dismiss both appeals.

B&H owns land which they wanted rezoned from agricultural to residential. In their letter they said, "Accordingly, we request the Shippensburg Planning Commission and the appropriate Borough authority to change the zoning classification of the above referred to lands from (AG)-agricultural to (R3) residential." The action that followed was the usual procedure. First the planning commission held hearings and considered the request. It made no recommendation on the request to council. Shippensburg Council then held hearings, and it was at the second, held September 12, 1978, that the term "curative amendment" first surfaced. About October 12, 1978, just prior to the borough's decision on the rezoning request, B&H submitted documents purporting to be a curative amendment request and challenge to the Shippensburg Zoning Ordinance. In denying the request for rezoning, the borough stated that they were treating the request as one for routine rezoning. The borough solicitor advised B&H to submit a separate request if they wanted to pursue the curative amendment. B&H submitted nothing further, so the papers that were filed were submitted to the Franklin County and Cumberland County Planning Commissions (Shippensburg lies partly in Franklin and partly in Cumberland Counties) by the borough, who stated all the while that further proceedings on the "curative amendment" papers were not to be construed as an admission by the borough that the procedures followed by B&H were correct, complete or otherwise in conformance with statutory requirements.

January 4, 1979, after a public hearing, borough council rejected the request for a curative amendment because it lacked merit substantively and was improperly presented procedurally.

In reaching our decision, we concluded that this was an application for rezoning. Transcripts of the two hearings of the Borough Planning Commission held April 19th and 26th, and the initial public hearing held April 21, 1978 show no zoning ordinance challenge. At the second council meeting held September 12, 1978, a witness for B&H stated the application for zoning change had become "a more curative amendment application." Counsel for a group opposing the zoning change was surprised and asked B&H's attorney about it. The

attorney stated: "This is a standard rezoning request which has implications as a curative amendment." He claimed to be proceeding as though the single request was both.

If this is only a rezoning application, there is no right of appeal from a denial of such a request. See *Board of Commissioners of McCandless Township v. Beho Development Co.*, 16 Pa. Cmwlth. 448, 332 A.2d 848, allocatur refused, 332 A.2d 848 (1975); *Spencer v. Board of Supervisors*, 23 Pa. Cmwlth. 37, 350 A.2d 214 (1976); *Appeal of Merlino*, 19 Pa. Cmwlth. 143, 339 A.2d 642 (1975).

The special procedure under the Pennsylvania Municipalities Planning Code, Act of June 1, 1972, P.L. , No. 93, Sec.1004, 53 P.S. Sec.11004, for challenging the constitutionality of a zoning ordinance requires the landowner to file a challenge to the ordinance (53 P.S. Sec's.11004(1), 10609.1) together with a proposed curative amendment and request for adoption thereof (53 P.S. Sec's.11004(1) (a), (2) (d), 10609.1), plans and other materials describing the use or development proposed in lieu of a permitted use (53 P.S. Sec.11004(2) (c)), a request in writing for a hearing on the challenge (53 P.S. Sec.11004(2) (a)), and a statement detailing the matters at issue and grounds for the challenge (53 P.S. Sec.11004(2) (a)). As of October 5, 1978, the code was amended to require the landowner to submit a "certification that the landowner did not know at the time of the application(i) that the municipality had resolved to consider a particular scheme or rezoning by publication of notice of hearings on a proposed comprehensive plan or proposed zoning ordinance or otherwise, or (ii) that the scheme of rezoning would be inconsistent with the landowner's proposed use; provided that this rezoning scheme had reached sufficient particularity to disclose that, if adopted, it would cure the defect in the zoning ordinance attacked by the substantive challenge." Act of 1978, Oct. 5, P. L. 1067, No. 249 Sec.5, 53 P.S. 11004(2) (a) (1979-80 Supp.)

The curative amendment challenge is based on B&H's contention that the Shippensburg ordinance is exclusionary, making only token provision for multi-family development in the borough. While we will briefly comment on this contention later, we really are not required to reach that issue.

The first filings of a curative amendment, as contrasted with the mere mention of the fact that the rezoning application had curative amendment implications, occurred on or after October 10, 1978. In the meantime the act had been amended on October 5, 1978 and the certification required to be filed was not included. The mere mention of curative amendment implications cannot substitute for the material required in the

MPC. B&H's letter to the planning commission and borough council no more indicates a challenge to the zoning ordinance than the one at issue in *McCandless*, supra, which was held to be merely a request for rezoning.

Nor did B&H include in their papers a written request for hearing (53 P.S. Sec.1104(2) (a)). With regard to the latter, B&H, in submitting their curative amendment documents, tried to give them retroactive application by stating that a hearing had been held in the matter on September 12, 1978. However the statute does not permit the hearing to precede submission and advertisement of the curative amendment. Section 609.1 of the MPC (53 P.S. Sec.10609.1), requires the governing body to commence a hearing within sixty (60) days of a landowner's request for a hearing on a zoning ordinance challenge. The amendment must be referred to planning agencies and public notice of the hearing must be published and include notice that the validity of the ordinance or map is in question and must give the place where and the times when a copy of the request (including plans and materials required to be submitted) and the proposed amendment may be examined. MPC, supra, 53 P.S. Sec.11004(2) (e) and 53 P.S. Sec.10609.1. These things were not done before the September 12th borough council meeting and that meeting could not be considered to be a hearing on the request.

Strict compliance with procedural requirements of the MPC is demanded. *McCandless* and *Spencer*, supra. The proceedings set forth in the MPC constitute the exclusive mode for securing review of any ordinance, decision, determination or order of a governing body of a municipality, its agencies or officers adopted or issued pursuant to the Act. *Merlino*, supra.

We think the borough may insist on strict compliance with the MPC in spite of the fact that the borough went ahead with curative amendment procedures after B&H was invited to submit curative amendment papers other than those which were presented in conjunction with the rezoning application but failed to do so. All along the way the borough was careful to point out that the action being taken did not waive the procedural or other errors in B&H's application.

In light of our conclusion that the attack on the Shippensburg Zoning Ordinance was procedurally improper, we need not consider the substantive merits. However, we do not consider the Shippensburg ordinance to be exclusionary. There is adequate provision in the borough for mulit-family development. Besides the many types of multi-family dwellings permitted by right or special exception in R-3 Residence Districts,

multi-family dwellings for up to twelve families are permitted in R-1 Residence Districts (Ord. 351, Sec.401, as amended, Ord. 373 Sec.1), R-2 Residence Districts (Ord. 351, Sec.501, as amended, Ord. 373, Sec.1), C-1 Commercial Districts (Ord. 351, Sec.601 (incorporation by reference of R-1 uses in C-1)) and C-2 Commercial Districts (Ord. 351, Sec.701 (incorporation by reference of C-1 uses in C-2)). Garden-type multiple dwellings unlimited as to numbers of families except by density-type regulations are also permitted in those districts.

The zoning map of the Borough reveals that a considerable portion of the Borough is zoned R-1, R-2, R-3, C-1 or C-2. This situation differs greatly from those in which ordinances have been successfully attacked as exclusionary. *See, e.g., Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970) (no apartments permitted anywhere in municipality); *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. 404, 333 A.2d 239 (1975) (ordinance totally prohibited townhouses).

Appellants argue that the areas zoned for multi-family development are too small (percentage-wise) or are already developed, but neither of these factors--even if true--would warrant our holding the ordinance unconstitutional. The absence of vacant land available for a use cannot be equated with an exclusion of the use. *Groff Appeal*, 1 Pa. Cmwlth. 439, 442, 274 A.2d 574, 575 (1971); *Benham v. Board of Supervisors*, 22 Pa. Cmwlth. 245, 349 A.2d 484 (1975). And small allotments of land for a particular use posed no constitutional problems in *Hodge v. Hearing Board of West Bradford Township*, 11 Pa. Cmwlth. 311, 312 A.2d 813 (1973), or *Honey Brook Township v. Alenovitz*, 430 Pa. 614, 243 A.2d 330 (1968). *See also BP Oil, Inc. v. Zoning Hearing Board*, 37 Pa. Cmwlth. 258, 389 A.2d 1220 (1978)(claims involving exclusion of commercial uses can seldom be sustained on percentages alone.)

A zoning ordinance is presumed valid and constitutional and anyone challenging such an ordinance has a heavy burden of proving otherwise. *Ellick*, supra, 17 Pa. Cmwlth, at 410, 333 A.2d at 243. We conclude that appellants have not met this burden.

ORDER OF COURT

May 29, 1980, the appeals of Lloyd H. Herr and George W. Baker in the above-captioned proceedings are dismissed. The costs shall be paid by appellants.