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## Tribute to the Honorable Irma Raker Upon Her Retirement

Barlow Burke

*American University Washington College of Law*, [bburke@wcl.american.edu](mailto:bburke@wcl.american.edu)

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**TRIBUTES:  
THE HONORABLE IRMA S. RAKER**

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Judge Raker taught us to advocate with intelligence and integrity to ensure that the judicial system and our reputations are never compromised. She continues to reach out to her students and inspire us to reach our true potential, and for this we will be forever grateful.

Judge Raker: There can be no doubt—you have touched many students' lives in a most meaningful and positive way! Thank you so much for your many long-lasting contributions.

VII. TRIBUTE TO THE HONORABLE IRMA RAKER  
UPON HER RETIREMENT

BARLOW BURKE\*

Judge Raker's name appeared in the *Maryland Law Reports* long before she became an attorney and a judge.<sup>69</sup> Her husband had been injured in an automobile accident around River Road's intersection with Seven Locks Road in Montgomery County, Maryland. Shortly thereafter, a shopping center developer proposed the construction of a center near that intersection. The developer filed for an administrative application for a special exception. This is a type of land use permitted in the county code only with the special permission of the county's Board of Zoning Appeals, with a public hearing required by the Board. The local residents were opposed, and some appeared at the hearing. Now usually the testimony of residents in such proceedings is vague, anecdotal, and politely received, with little cross-examination. After all, what land use attorney wants to be known as a person willing to harass residents volunteering their time?

But Irma Raker was one of the opponents in this case. She investigated the frequency of accidents on River Road, submitting to the board "a detailed list of accidents which occurred in the immediate vicinity of the River Road-Seven Locks Road intersection during 1966 and part of 1967."<sup>70</sup> Her list included the exact date and time, the day of the week, the location and the number of persons killed or injured in each accident, and was accompanied by a diagram of the intersection that showed the numerous cautionary traffic signs

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\* Professor of Law, American University, Washington College of Law. LL.B., University of Pennsylvania Law School, 1996. LL.M., Yale Law School, 1970. S.J.D., Yale Law School, 1977.

69. See *Eger v. Stone*, 253 A.2d 372 (Md. 1969) (discussing Irma Raker's involvement in a zoning dispute over a proposed shopping center).

70. *Id.* at 376.

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on River Road in front of the subject property.<sup>71</sup> Over the objection of the developer's counsel, the Board admitted her statistics—twenty-five accidents, seventeen injuries and one fatality, ten occurring within normal nine to five shopping hours—into evidence.

The Board denied the developer's application, disapproving it in part on the basis of Irma Raker's testimony, but the circuit court found insufficient evidence for doing so. The residents' attorney appealed, and in the court from which Judge Raker is now retiring, the circuit court's decision was reversed. In an opinion still regarded by land use attorneys as precedent in Maryland, the court held that the testimony of a traffic expert

... confirmed in part by testimony elicited on cross-examination of the experts of the applicants as well as the testimony of Mrs. Raker constituted sufficient evidence to make the matters before the Board 'fairly debatable' so that its decision denying the application for the special exception was not arbitrary and capricious and the decision of the Board could not be successfully challenged in court . . . .

This rule will be adhered to even if we were of the opinion that the administrative body came to a conclusion we probably would not have reached on the evidence. In the instant case, but for the rule, we might well have reached the conclusion reached by the learned lower court, but in enforcing the rule we are obliged to say that reasonable persons could have reached a different conclusion on the evidence so that the issues were fairly debatable, and hence, the decision of the Board must be sustained.

The lower court, in our opinion, . . . in effect, disregarded Mrs. Raker's testimony on the ground that it was 'hearsay'. We have recently decided, however, that not only is hearsay evidence admissible in administrative hearings in contested cases but that such evidence, if credible and of sufficient probative force, may indeed be the sole basis for the decision of the administrative body . . . . In our opinion the testimony of Mrs. Raker was clearly admissible in evidence and was of sufficient credibility and probative force to support, at least, Mr. Thomas' opinion that a traffic hazard would arise as a result of the granting of the special exception.<sup>72</sup>

Hearsay? How dare they? Nonetheless, the standard for credibility of lay witnesses in zoning cases, acceptance of citizen testimony as establishing the basis for an application's denial, and acceptance of

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71. *Id.*

72. *Id.* at 376–77 (cited in Marc A. Greidinger et al., *Survey: Developments in Maryland Law, 1987–1988*, 48 MD. L. REV. 785, 799 (1989)).

hearsay in an administrative forum stand today as well-established principles of land use law and procedure in the state.<sup>73</sup> This was all Judge Raker's doing, and perhaps her reason (I don't know for certain) for attending law school. She enrolled at American University the next fall, shortly after the opinion in *Egar v. Stone* was handed down.

Judge Raker was a second-year student when I began teaching at the law school. She was a student of mine in the fall of 1971, in an elective course then entitled "Modern Land Transactions." She was part of a first wave of female students to hit the law schools of this country in the wake of the women's movement. Unlike later female law students, Irma's generation had often married, started a family, and enrolled their children in elementary school. This created the conditions in which their daytime hours were then free enough for them to return to graduate and professional school. It was an exciting time to teach, just as it must have been to teach in the post-WWII period, when a wave of college bound veterans hit our campuses using the GI Bill. Irma and her generation were motivated, appreciated the opportunity to go to law school, and were eager participants in class discussions.

The academic year 1971–1972 was my second year of law teaching at American University, so I am not sure just how "modern" the transactions were that we discussed in class. In any event, in the law student parlance of the day, Irma "got the book" in the course—meaning not that she had it thrown at her, but rather that she wrote the best final examination in the course.

A Supreme Court Justice—Potter Stewart, I think—once said that the job of an appellate judge is much like that of a student. Just as students are required to take an examination after studying, an appellate judge must spend countless hours after the oral argument writing the opinion. So I am going to examine two of my former student's "examination papers" in this tribute.

Judge Raker has written brilliantly and extensively in her principled dissents on death penalty cases,<sup>74</sup> on the right to marry,<sup>75</sup>

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73. See, e.g., *Tauber v. County Bd. of Appeals*, 262 A.2d 513 (Md. 1970) (holding that hearsay evidence is admissible in administrative hearings, and may in fact serve as the sole basis for an administrative decision); Arnold Rochvarg, *Hearsay in State Administrative Hearings: The Maryland Experience and Suggestions for Change*, 21 U. BALT. L. REV. 1, 18 (1991) (discussing the role of hearsay evidence in administrative hearings, and arguing that Maryland courts should adopt a uniform approach towards the treatment of hearsay evidence).

74. See, e.g., *Evans v. State*, 886 A.2d 562, 584–85 (Md. 2005) (Raker, J., dissenting) ("We pay mere lip service to the principle that death is different and yet continue to impose a lower level of certainty in the death penalty context than we do

and in cases involving women's rights.<sup>76</sup> However, I am a teacher of property and real estate subjects, about which she has written less extensively. That's not her fault: Judge Cathell and Judge Harrell generally have the laboring oar in these cases. Nonetheless, when assigned, she performs up to their exacting standards. (Over the years, I have also learned to read the first paragraph or so of her dissents. There she always goes to the heart of the dispute with the majority and spells it out in trenchant terms.<sup>77</sup>) In addition, lest there be any doubt, let me say that I would still award Judge Raker the "best in class" award for the real estate transaction opinions I am going to discuss. However, in the tradition of professional and professorial analysis, and because she needs no more praise from me, I will be analytical as well as laudatory.

A. *Myers v. Kayhoe*<sup>78</sup>

This opinion resolved a dispute between a vendor and purchaser of real property involving an interpretation of a financing condition in a contract of sale. The Purchaser had paid a \$2,000 deposit and a date was set for closing, but time was not of the essence in the contract.

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for other lesser important interests in Maryland."); *Miller v. State*, 843 A.2d 803, 833–50 (Md. 2004) (Raker, J., concurring in part and dissenting in part) (arguing that in order to impose a death sentence, a jury must find that aggravating factors outweigh mitigating factors beyond a reasonable doubt, rather than by a preponderance of the evidence); *Oken v. State*, 835 A.2d 1105, 1158–74 (Md. 2003) (Raker, J., dissenting) ("I would hold that portion of the Maryland Code . . . that provides that punishment shall be death if the sentencing authority finds that the aggravating factors outweigh the mitigating factors by a preponderance of the evidence violates due process . . ."); *Borchardt v. State*, 786 A.2d 631, 665–84 (Md. 2001) (Raker, J., dissenting) ("Evolving standards of decency cry out that, if a society is to impose death as a penalty, it should do so on no less a standard than beyond a reasonable doubt that the sentence is fitting and appropriate for the particular offender.").

75. See *Conaway v. Deane*, 932 A.2d 571, 635–93 (Md. 2007) (Raker, J., concurring in part and dissenting in part) (distinguishing between the right to marry and an entitlement to rights created by marriage).

76. See *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 817 (Md. 1985) (involving a property tax exemption case for a country club refusing to admit women as members, heard by Judge Raker as a trial judge).

77. See *Hemming v. Pelham Wood Ltd. Liab. Ltd. P'ship*, 826 A.2d 443, 460–63 (Md. 2003) (Raker, J., dissenting) ("The entire basis of the majority opinion rests upon inadequate lighting in the rear of the apartment building. The majority holds that because the landlord provides exterior lighting . . . it had a duty to adequately maintain that lighting. From this duty . . . the majority makes the unjustified leap in logic that somehow the landlord is then responsible for violent criminal activity that occurred within the demised premises and not within the common area . . . . The only way the majority can reach their desired result is to cobble together the line of cases in Maryland imposing a duty for liability for physical harm which occurred in the common areas with the line of cases finding liability for demised premise damage resulting from a cause originating in the common area. This is a novel theory, unsupported by any authority or case law in the country.").

78. 892 A.2d 520 (Md. 2006).

The financing condition (paragraph 20 of the contract) provided:

Buyer agrees to make written application for the financing herein described [in the next paragraph (number 20) of the contract, calling for a 30 year mortgage loan for \$245,000 at 7% interest] within five (5) days from the date of Contract Acceptance. If such written financing commitment is not obtained by Buyer within thirty (30) days from the date of Contract Acceptance, this Contract of Sale shall be null and void . . . and all deposits hereunder shall be disbursed in accordance with the terms of this Contract.<sup>79</sup>

The next paragraph (numbered 21) of the contract “specified conditions under which the requirements” of the preceding two paragraphs “could be satisfied by alternate financing,” and provided that “nothing in this paragraph shall relieve Buyer of the obligation to apply for and diligently pursue the financing described” in the preceding two paragraphs.<sup>80</sup>

The purchasers filed one application, which was rejected. Purchasers thereafter claimed that they had met their obligations to pursue financing diligently and refused to go forward with the contract. When the vendors objected and refused to return the deposit, the purchasers sued for breach of contract and failure to return the deposit. On cross motions for summary judgment, the trial court granted the purchasers’ motion, ordering the return of the deposit.<sup>81</sup>

The court found that the contract was governed by an “objective theory of contract interpretation, giving effect to the clear terms of agreement, regardless of the intent of the parties at the time of contract formation.”<sup>82</sup> Here, the language that “buyer agrees to make written application” would mean that a reasonable person would assume that an indefinite article “a” was intended to precede “written application,” meaning that the purchaser would make at least one application. Therefore, the court held that the purchasers “would only need to make one written application for the financing described . . . .”<sup>83</sup>

This express language, the court said, trumped the implied obligation in every such contract condition to pursue the financing spelled out in the contract in good faith and with reasonable

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79. *Id.* at 524. This condition appears in the standard form drafted by the Maryland Association of Realtors. *Id.* at n.1.

80. *Id.* at 524.

81. *Id.* at 525.

82. *Id.* at 526.

83. *Id.* at 527.

promptness. An express term negates any such implied and inconsistent duty.<sup>84</sup>

*B. Cochran v. Norkunas*<sup>85</sup>

In this case, Judge Raker decided that a letter of intent was an agreement to agree and that the parties were not bound to it.<sup>86</sup> Once again, the discussion began with the rule that the contract was governed by the objective theory of contract interpretation.<sup>87</sup> Are you hearing an echo of the last case here? Three of the five paragraphs of the letter referenced the use of provisions in the standard form Maryland Association of Realtors contract of sale.<sup>88</sup> Judge Raker must be an expert on this, right? The letter called for delivery of the standard contract to the vendor within two days. That delivery occurred and the vendor signed the contract, but did not return it, leaving the letter as the cornerstone of the agreement between the parties. Noting that the letter did not contain any promise to negotiate open terms, and that it referenced at least three terms that would have to be included in a final agreement, Judge Raker found that there was no contract capable of specific performance on behalf of the prospective purchasers.<sup>89</sup> Meanwhile, instead of reviewing similar cases from other states, Judge Raker takes us on a trip through the pages of the leading treatise writers on the law of contracts—Alan Farnsworth, Samuel Williston, and Arthur Corbin—as well as the Restatement of Contracts. She provides a summary of the law in this area, dearly loved by real estate developers, though not by their counsel.<sup>90</sup>

These two cases have something in common. In each, Judge Raker invokes the objective theory of contracts. She could have expanded the duties of the purchaser in *Myers*, taking the “application” language as signifying a duty to file an application, incorporated by

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84. *Id.* Did not paragraph 21 make the implied obligation express? It referred to “financing,” not an application and commitment, so does not that imply an obligation on the purchasers to keep going, applying for another loan from another lender? At least to keep going up to the 30 day time limit for obtaining a commitment? No, Judge Raker must have thought, because the specific requirement of “an application” again trumps a general requirement for “financing.” The financing to which a good faith effort applies refers to the application’s terms. Therefore, when it is filed, it must contain reasonable, market-driven terms—an interest rate available in the market, a loan of a length offered by lenders, etc.

85. 919 A.2d 700 (Md. 2007).

86. *Id.* at 712–13.

87. *Id.* at 710.

88. *Id.*

89. *Id.* at 712–13.

90. *Id.*



reference into the contract's financing condition as representative of the type of application called for, and then required that it be filed repeated times. This is the sort of interpretation used, for example, by courts imposing an implied duty of good faith and fair dealing.<sup>91</sup> Similarly, she could have incorporated the standard form contract into the letter of intent, finding that the parties had a reasonable expectation that the letter would ripen somehow into a binding contract. She took neither course. She did what practitioners of "Modern Land Transactions" typically do—she let the documents speak for themselves. She let the documents, not the surrounding circumstances nor the expectations of the parties as they might be shown outside the four corners of the documents, control.

So Judge Raker learned something long ago, in the Modern Land Transactions course, and used her training well. No teacher could ask more of a former student! By any "objective" measure, she has been a great judge. Her law school is proud of her, and I am grateful for her service to the judiciary of Maryland and to the profession. I look forward to her sitting as a senior judge, specially assigned.

#### VIII. THE HONORABLE IRMA S. RAKER: A VALUED FRIEND

LINDA D. SCHWARTZ\*

When asked to write a few words regarding my personal reflections on the Honorable Irma S. Raker, Judge of the Court of Appeals of Maryland, in honor of her retirement from the Court, I must admit that I hesitated before accepting the opportunity. This hesitation was motivated neither by any reticence in my personal regard for her nor by any lack of admiration for her professional talent; but rather, by my heightened sense of privacy regarding our lengthy and close relationship. But then it occurred to me that the personal side of Judge Raker should be revealed and preserved along with her very considerable professional accomplishments.

I remember vividly the first time that I met Judge Raker. She was in the *Law Review* office efficiently marshalling a myriad of editorial matters, and I was a new staff member who was struggling to figure out what working on that journal was going to entail. She was welcoming and warm, but also assertive and instructive. She had a

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91. *E.g.*, *United Cal. Bank v. Prudential Ins. Co. of Am.*, 681 P.2d 390, 427 (Ariz. Ct. App. 1984) (holding that where there are no contrary intentions, there is an implied obligation to deliver marketable title on the part of the purchaser).

\* Attorney-at-Law, Paley Rothman, J.D., *American University, Washington College of Law*, 1973.