Et Al.

The perils of public art: One person's "phoenix rising from the ashes" is another person's trash

BY HOLLY METZ

In a Newark, New Jersey, parking lot stands a 28-foot high, 86-ton wooden ark. Its creator, folk artist Kea Tawana, claims it is a privately sponsored work of public art. But some city officials see it differently. Claiming that the structure violates the city's zoning ordinance, they want the ark demolished.

Although Essex County Superior Court Judge Harry A. Margolis has granted a temporary restraining order barring the city of Newark from destroying the ark, its status remains unclear pending the outcome of a tentatively scheduled November trial. "We are dealing here with a case that has no precedent as to what the ark is," Margolis said at a May hearing. "To my knowledge this is only the second ark in history."

Officials sought the ark's demolition after an inspection by the Newark Department of Engineering found the construction "unsafe." To Newark Assistant Corporation Counsel Audrey Davidson, the central legal issue is the city's ability to "demolish unsafe properties." Other city representatives, such as Pam Goldstein, spokesperson for Mayor Sharpe James, have claimed that the ark violates Newark's zoning ordinance regarding marine construction. "There is no provision for boat building in that district," Goldstein told a *Hudson Dispatch* reporter in April.

On the other side, however, is the question of artistic freedom. Located in the city's impoverished Central Ward, which still has not recovered from the 1967 riots, the unfinished ark is "a phoenix rising from the ashes," says Tawana's attorney, Fred Zemel, who notes that the ark is attracting artists, historians, and sightseers from across the country. In his brief supporting Tawana's motion for a permanent injunction preventing the ark's destruction, Zemel contends that the five-year-old construction is "a sculpture of monumental proportions" and "an artistic, sculptural manifestation" of the builder's self-expression, which is protected by the First Amendment. Appended to the brief is a certified statement by a curator from the Smithsonian Institution's National Museum of Art, attesting to the ark's value as a work of art and praising the untutored artist's visionary use of salvaged material to reflect the city's cyclical history of opulence, decay, and renewal.

Tawana says she is not trying to duplicate Noah's creation, but to create "an ark for my time"—one that she hopes will remain on the lot owned by Humanity Baptist Church, to serve as a sculptural "museum" of the Central Ward. But local developers, like New Community Corporation, which has been building condominiums across the street, and some residents complain that the ark is an eyesore that deters redevelopment. As one Newark resident bluntly told reporters: "I am tired of looking at this piece of garbage."

Does an artist's right to self-expression override the rights of the public? "Generally speaking, there's never been a recognition of a completely unrestricted First Amendment right to art," says Tim Jensen, director of legal services for Volunteer Lawyers for the Arts (VLA), a New York-based nonprofit organization that gives legal assistance to low-income artists and arts organizations problems. "You couldn't do an art piece which consisted of yelling 'Fire!' in a crowded theater, and you also can't display your art if it interrupts traffic, or inconveniences people, but it's always a balancing test. If the art which we're speaking about is on *public* property, there has to be pretty compelling state justification for preventing its display. If it's on *private* property, and the municipality seeks to restrict it, there has to be a very strong argument."

But local government has the power, if anyone wants to improve their land, to compel that individual to apply for a permit—which can be used as a censoring device, notes John Merryman, Sweitzer Professor of Law at Stanford University. Merryman, who is also the chairman of the visual arts division of the ABA's Forum Committee on the Entertainment and Sports Industries, says that zoning laws are used in this manner "even with architecture people don't like," adding that a construction can be recognized as a work of art and still be a structure or building.

Controversy over public artworks has not been limited to the creations of folk artists like Tawana. As public art programs have grown in number and size over the past two decades, the siting of commissioned sculptures by art world notables has increasingly been contested by the public. Almost since the inception of the General Services Administration's (GSA) Art in Architecture program in 1963, the federal agency has been embroiled in public debates over its commissioned works, which are financed with half of 1 percent of a government building's construction costs. GSA-approved artworks are meant to be sited at federal buildings; consequently opposition, if any, may originate with federal workers.

Ironically, some of the bitterest campaigns have been initiated by members of the federal judiciary. When the GSA commissioned George Sugarman in 1975 to create a $98,000 sculpture for the plaza of Baltimore's federal courthouse and office building, federal judges—marshaled by Chief United States District Court Judge Edward S. Northrop—protested. At first, they claimed that the large-scale, multicol-

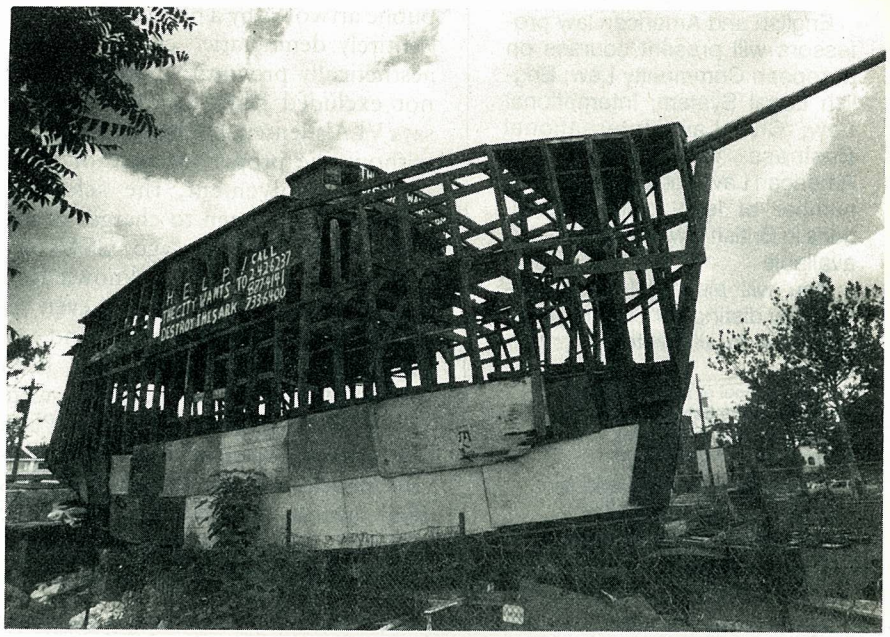
Holly Metz, a free-lance writer in Hoboken, New Jersey, reported on the necessity defense in the November issue.

ored, welded aluminum sculpture was "inappropriate," which the art community interpreted as an aesthetic judgment. Then Northrop wrote to the GSA claiming that the judges objected to the sculpture on public safety grounds—that the "geometric contours of the artwork, and its particular location after completion" created "a potential problem for all law enforcement agencies attempting to provide security to individuals who occupied or visited the building." Bombs could be secreted in its contours, the judges argued; terrorists could be sheltered there, and children could be tempted to climb on the sculpture and harm themselves.

"I've never heard of death by sculpture," was Sugarman's response, but the sculptor nevertheless adjusted the design to open the space. The judges continued to object. An unprecedented public hearing was called in Baltimore by Commissioner Nicholas A. Panuzio of the Public Building Service, to air both sides. There was overwhelming support for the sculptor. In October 1976, Commissioner Panuzio upheld the project.

Five years later, GSA was in hot water again. The ire of another judge—Edward D. Re, Chief Justice of the United States Court of International Trade—had been provoked by the 1981 installation of Richard Serra's "Tilted Arc," a huge swath of rusted steel, across Manhattan's Federal Plaza. In 1985, the GSA conducted public hearings in response to the petition Re had distributed, which had been signed by thousands of federal workers demanding the $175,000 sculpture's removal. In addition to objecting to the aesthetics of the piece—the intentionally rusted surface was peppered with the marks of vandals—federal workers argued that it made crossing the plaza almost impossible: instead of decorating the public space, it dominated it.

But Serra's sculptures have been celebrated in art circles for their "challenging" relationship to their sites. Artist Richard Storr, in an article for *Art in America*, shows that "Tilted Arc" was "an intentionally disruptive presence" in the plaza, by quoting Serra's published preconstruction comments about the sculpture: "It will cross the entire space, blocking the view from the street to the courthouse, and vice versa. . . .It will be a very slow arc that will encompass the people who walk on the plaza in its volume. . . .After the piece is created, the space will be understood primarily as a function of the sculpture." In that sense, Serra's piece was an unqualified success; however, the GSA-appointed panel recommended that the work—which the sculptor says is a "site-specific" creation—be relocated, and asked the National Endowment for the Arts to establish an advisory panel regarding replacement sites.



Kea Tawana's ark: "An artistic, sculptural manifestation of the builder's self-expression"—or "a piece of garbage"?

Although John Merryman cautions that he considers the sculpture "aggressive and ugly in every sense," he did challenge the appropriateness of relocation on First Amendment grounds. In a letter to the "Tilted Arc" panel, he stated: "What is proposed here is suppression of a form of expression that people happen not to like. The First Amendment and cases decided under it embody a culturally, socially, and politically wise judgment that we are better if we tolerate unpopular expression. It is a free people's hair shirt."

Also at the hearing, attorney Alvin S. Lane asked whether public works, with their unavoidable visibility, should be judged by a criteria different than that of works slated for museum installation or private collections. Legally, says Tim Jensen, different criteria is applied because "when a private institution displays something, people can choose not to go there." But Merryman asks: "At what point in the process should these judgments be made? If Serra had applied for the commission, and been denied it, it would not be a First Amendment issue."

A major issue, brought harshly to light by the Serra case, is consideration of the public's interest in the commissioning of public artworks. To Gustave Harrow, Serra's attorney, the question is "whether art is to be determined by vote or whether there are principles of

Photograph by Robert Foster

excellence to be invoked." Choosing public artworks by a process that is not "entirely democratic" can insure that aesthetically provocative artworks are not excluded from the public arena, says VLA's Jensen, but he cautions that, without the proper measure of community involvement, the selection process can be open to charges of elitism. About five years ago, GSA's Art in Architecture program acknowledged the need for community input even *before* a work is commissioned—and certainly after. If this policy had been instituted in 1979, when artists were being considered for the Federal Plaza commission, emotional debates, advisory panels, and the lawsuit Serra has filed against the GSA for breach of contract, might have been avoided.

Serra claims that the federal agency contemplated permanent installation of his work. In his lawsuit, he is asserting his "moral right" over his sculpture, trying to protect it against the mutilation, alteration, and modification he claims will occur if it is removed from the context for which it was created. Statutory moral rights are operative in New York, California, Maine, and Massachusetts. Senator Edward Kennedy has also proposed an amendment to the Copyright Revision Act of 1976, which, if passed, would join the United States with more than sixty other countries that recognize the artist's moral right. The legislation—which also provides for the right to copyright works of "fine art" with or without a copyright notice, and requires the payment of resale royalties to the artist under certain conditions—will be reintroduced in the next session.

John Koegel, a New York arts attorney who prepared the support memorandum submitted by VLA during the 1986 hearings on the Kennedy amendment, cautions that the moral rights aspect of the bill is "not intended to give additional rights to a work" or to have preference over other laws, such as zoning ordinances. Tim Jensen, who is also in favor of the bill, says that he "worries about legislation that focuses on the differences between artists and other people," because moral rights are not presented as a property right. (That alteration of an artist's work might effect his or her pecuniary interests is not addressed by moral rights law, which basically protects reputation, a "right of personality." Other aspects of the Kennedy amendment address economic issues, however.)

Lawyers are addressing these "hot issues," says Jensen, but they don't expect the controversy over public art works to die down any time soon. "In Sioux Falls, South Dakota, they're still arguing about whether one of the world's two life-size recreations of Michelangelo's *David* should have a fig leaf over the genitals. And this was put up in a public park in the forties." ■

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