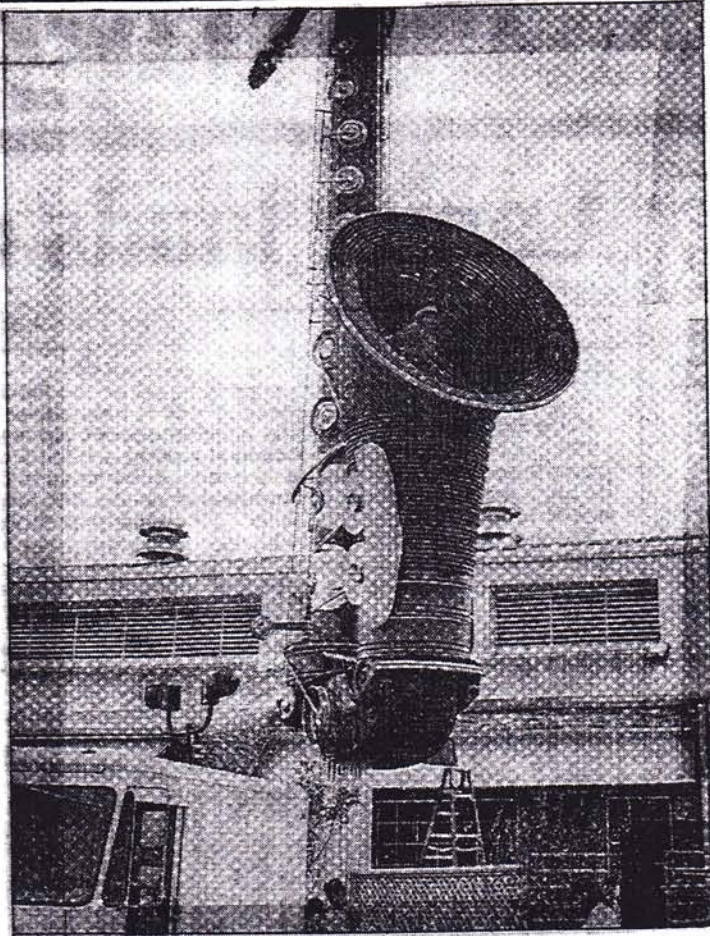


Richard Rothfelder successfully represented Billy Blues, a Houston restaurant and club, in administrative court against the City of Houston. The City had contended that a fifty foot replica of a saxophone constructed by famed Texas artist Bob "Daddy-O" Wade constituted a sign, and since it exceeded the height and size restrictions of the Houston Sign Code, the saxophone was illegal and must be removed. By producing the testimony of experts on both art and signs, Mr. Rothfelder succeeded in obtaining a unanimous ruling that the saxophone was a piece of art and not subject to the City's sign regulations, thereby "saving the sax."



Ben DeSoto / Chronicle

Billy Blues' 63-foot saxophone has been deemed art by the city appeals board. The piece will stay mounted in front of the nightclub/restaurant at 6025 Richmond.

City appeals board rules giant saxophone is art, not a sign

By STEFANIE ASIN
Houston Chronicle

The 63-foot blue saxophone outside Houston's Billy Blues club hit a high note Wednesday.

A city appeals board unanimously agreed that the impressive instrument is art, not a sign.

As a result, the saxophone — built from everyday junk — can stay on its perch in front of the nightclub and restaurant at 6025 Richmond.

"This is marvelous," said John Coleman, vice president of Billy Blues Food Corp.

The restaurant owners were cited in mid-March for violating Houston's sign ordinance, which prohibits signs taller than 40 feet. The city sign administration said the saxophone drew attention to the rhythm and

blues club, making it commercial advertising.

Defenders of the saxophone insisted the towering horn was not being used for advertising, but for cultural enjoyment.

The sign, commissioned by Billy Blues, was created by artist Bob "Daddy-O" Wade — who once said: "I don't make signs."

In the appeals board hearing, Billy Blues' lawyer Richard Rothfelder pointed out that the saxophone bears no arrows, logos or messages.

"I think that the saxophone sculpture is one of the most outlandish and interesting pieces of art in the city of Houston," Rothfelder said.

Ollie Schiller, acting manager of the city's sign administration, did not disagree with that point

It's unanimous — sax is safe

By DOUGLAS FREELANDER
OF THE HOUSTON POST STAFF

Famed jazz saxophonist Charlie Parker would have approved.

That huge blue saxophone will continue to make its special brand of music on Richmond as a city appeals board ruled in effect Wednesday that it is a work of art and not subject to city sign restrictions.

Fans of the 63-foot Billy Blues Smokesax in front of Billy Blues Barbecue Bar and Grill, 6025 Richmond, sounded a high note after a city appeals board overruled an earlier opinion by the city's sign administration section that it was a sign. The vote was 6-0.

"I'm totally thrilled. We knew all along that, given enough time, common sense would prevail," said

Please see **SAX, A-27**

SAX: Board rules Billy Blues horn is work of art, not a sign

From A-23

John Coleman, co-owner of the Billy Blues chain.

"Obviously we're elated that the city agreed with our interpretation that the saxophone is not a sign," said Richard Rothfelder, who displayed petitions with signatures of about 4,000 backers of the sculpture, including noted art experts.

"The saxophone is art," he said, noting that the sculpture stands in the heart of the After

Sunset Strip, a newly emerging nightlife district.

"In summary, the sax is art for the city."

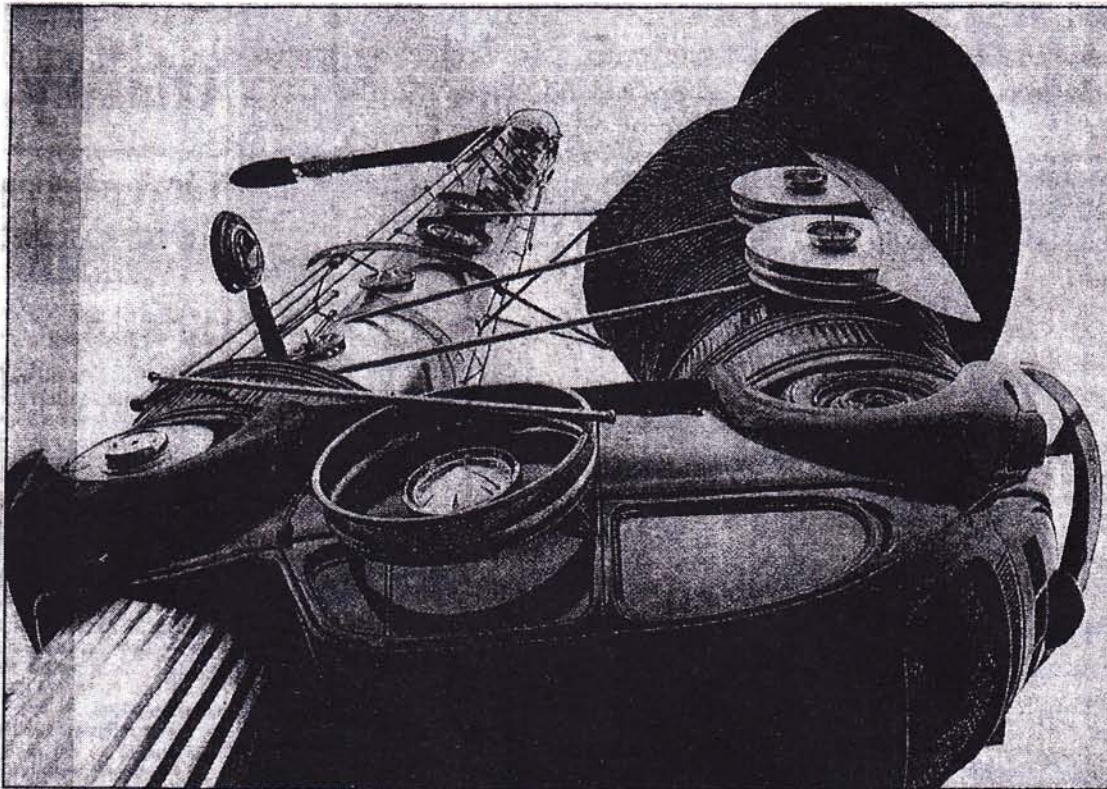
Ollie Schiller, spokesman for the sign board, told the Houston General Appeals Board board's position is that the sculpture is a sign because it attracts attention to Billy Blues.

If the sign board's opinion had not been overruled, the saxophone would have gone before the Council.



HOUSTON/TEXAS

A-11



Address: Latiff/The Houston Post

A Volkswagen Beetle forms the base of the Billy Blues barbecue restaurant's now officially sanctioned giant saxophone.

SAX WINS APPEAL

It's an instrument of art,
not just a sign, city saysBY SUSAN CHADWICK
POST ART CRITIC

It's official: The Billy Blues saxophone is art.

That means the barbecue restaurant on Richmond won't have to take down its 63-foot blue sculpture with a Volkswagen for a base and a surfboard for a reed.

The city sign administration division notified the owners of Billy Blues in late February that the towering sculpture was in violation of the city sign ordinance and would have to be taken down. That notification set off a defiant petition drive and a raging debate on whether the structure was a sign or a piece of art.

"The informal finding is that it is art," says Dan Jones, agenda director for Mayor Bob Lanier, who says he consulted with members of the Municipal Art

Please see SAX, A-13

SAX: City finds Billy Blues' sign a work of art

From A-11

Commission on the issue. "We've stopped all enforcement and intend to do nothing further with it."

The notice came just two weeks after a dedication party that saw Eleanor Tinsley, the city councilwoman most prominently connected with the sign ordinance, ride up to the gala affair in the back of a classic Thunderbird convertible and deliver a speech on behalf of the new restaurant.

"I always felt that common sense would prevail," says John Coleman, executive vice president of Billy Blues Food Corporation.

A groundswell of public support for the sculpture — created on site out of a canoe, cattle troughs, a beer keg, electrical cable, car parts and other things by Austin-born artist Bob "Daddy-

O" Wade — helped convince the mayor that perhaps the city government was overreaching in attempting to have the artwork taken down, says Jones.

"It was difficult to figure out what it was hurting," says Jones. "We had to ask 'who are we protecting from this sax and what is the public need?'"

Jones — along with lawyers for the 2-month-old restaurant — says he couldn't see a difference between Wade's saxophone and the 53-foot abstract sculpture by Joan Miro in front of the Texas Commerce Tower downtown — or, for that matter, any of the large attention-getting works of art sitting in front of banks and office towers all over the city.

"That's my logic, 100 percent," says Jones. "The area's gray."

Jones says he's consulted with Tinsley and she considers the blue sax art.

The mayor and the sign administration division are planning to propose an amendment to the ordinance which would refer future questions about the difference between art and signs to the experts on the Municipal Art Commission.

"The definition of art is difficult," says Jones. "And I can tell you it's going to give lawyers a truckload of Maalox overload to come up with an ordinance trying to tell the definition between art and a sign."

The lawyer for Billy Blues didn't suffer any indigestion over the issue. "The saxophone does not contain any advertising," points out attorney Richard Rothfelder. And the sign code excludes any structure that contains what are called noncommercial messages. If the Billy Blues sax contains any message, he says, it would be artistic or ideological.

Art or Sign?

Houston's Billy Blues Controversy

The sax appeal of a nightclub's sculpture is artistic rather than commercial

BY RICHARD ROTHFELDER

Art has always been an integral part of signage. Nonetheless, the precise role that art plays in signage has been subject to endless debate. Anti-sign zealots coin catchy phrases like "visual pollution," "sign clutter" and "litter on a stick" to graphically describe their decidedly unartistic view of signage. In contrast, sign owners and operators declare "Beauty is in the eye of the beholder" when defending the aesthetic quality of their medium and livelihood.

Signshops must also debate the commercial effectiveness of art in signage. Some signs may win awards for being witty, creative or

artistic, but the true winner is the sign that effects the most sales of a given product or service.

Fundamentally, the operator must first determine whether the structure is "art" or "sign." Signs must conform to height, size, permitting and other requirements outlined by sign codes. Conversely, because "art" is not "signage," it is free from statutory restrictions and bureaucratic regulation. In many cases, the permitted existence of a structure can depend upon its legal definition.

Resolving such debate presents novel problems. Because legal tests rarely exist as precedents, subjective

and imprecise opinions expressed by people from myriad backgrounds and value systems often must suffice to establish policies.

As US Supreme Court Justice Potter Stewart explained, when making the similarly difficult distinction between art and obscenity, "I can't define it, but I sure know it when I see it." Moreover, because a bureaucrat/sign inspector's decision, which can negate a structure worth several hundred thousand dollars, can be made by someone with no education or background in art, the ensuing debate is virtually guaranteed to be emotionally charged.

PRECISELY SUCH A CONTROVERSY arose between the City of Houston's Sign Administration and Billy Blues Food Corp. The latter is a barbecue restaurant and bar located in the popular Richmond Ave. nightlife district. Like many other establishments in the area, Billy Blues also features live music, R&B specifically. However, the restaurant has never sold nor rented musical instruments, including saxophones.

When it opened in 1993, Billy Blues commissioned the creation of the "Smoke Sax" sculpture for its parking lot. The blue saxophone was fabricated on site from a canoe, cattle troughs, a beer keg, electrical cable and car parts, highlighted by an inverted Volkswagen at its base. These materials alone cost more than \$40,000. Smoke Sax is approximately 40 ft. tall, mounted on a 20-ft. stand, with an overall height of approximately 63 ft.

Artist Bob "Daddy-O" Wade created Smoke Sax. A native of Austin, TX, now residing in Santa Fe, NM, Wade is nationally recognized as a contemporary artist. His trademark is

oversized and unusual art objects — the 40-ft. "Giant Iguana" sitting atop the Lone Star Cafe in New York City, and the 8-ft. dancing frogs ("Six Frogs Over Tango") perched on the Tango Nightclub roof in Dallas, TX. Wade named the sculpture Smoke Sax and dedicated it as "a memorial to rhythm and blues."

The Smoke Sax was xzfavorably received by Houston's art community. Several local artists and galleries sent letters of congratulation and appreciation to Billy Blues for privately commissioning a high-profile artist's work for the public's enjoyment. The public certainly enjoyed the sculpture as well; it became an icon to show out-of-town guests and tourists.

The Smoke Sax contains no advertisements — no printed words, arrows nor anything that mentions or directs attention to Billy Blues. Furthermore, Billy Blues does not use the Smoke Sax, a saxophone nor any other musical instrument as a trademark or logo.

Houston's ruling

Shortly after the completion of Smoke Sax and the opening of Billy

Blues, the City of Houston ordered the saxophone's removal. More specifically, the Houston Sign Administration, which regulates signs in the city, ruled that the saxophone was a sign under the Houston Sign Code. Definitions in the code state:

"A sign shall mean any outdoor display, design, pictorial or other representation which shall be so constructed, placed, attached, painted, erected, fastened or manufactured in any manner whatsoever that the same shall be used for advertising. The term advertising shall mean to seek the attention of or direct the attention of the public to any goods, services, or merchandise whatsoever."

Thus, the Sign Administration reasoned that, because the saxophone was a "display" that "attracted or directed the attention of the public" to Billy Blues, it was a sign. Thus defined, Smoke Sax became subject to the sign code, which "applies to all signs as that term is defined herein." The sign code limits the height of all signs to 42½ ft. The saxophone's overall height was approximately 63 ft. Consequently, Billy Blues was subject to the criminal penalties man

dated for violations of the sign code, unless the Smoke Sax was removed.

Administrative appeal

The Sign Administration's decision was vigorously opposed by several citizen and artists' groups, which organized the collection of thousands of signatures on petitions to support the sculpture. Local media roundly criticized and ridiculed what was characterized as a hyper-technical interpretation by insensitive and unsophisticated bureaucrats.

Under provisions of the sign code, Billy Blues took the decision to the city's General Appeals Board, an administrative body impaneled to adjudicate disputes involving the Sign Administration.

Billy Blues initially argued in its appeal that Smoke Sax is art, not a sign. Technically speaking, it couldn't be a "sign" because it wasn't used for "advertising," as those terms are defined in the sign code. The restaurant further argued that the saxophone was not designed to attract or direct public attention to any of its goods or services, because it does not sell or rent saxophones, nor any other musical instruments. Billy Blues also emphasized that the Smoke Sax is not a trademark or a logo of Billy Blues, and it contains no printed words, arrows or other references that direct attention to Billy Blues.

Beyond technical interpretations, Billy Blues prevailed upon the administrative judges' common sense — that the City Council never intended the sign code to apply to pieces of art such as Smoke Sax. Examples of local civic sculptures not classified as signs included "Virtuoso" by David Addicks, "Monument Au Fantome" by Jean DuBuffet and "Personage and Birds" by Joan Miro.

Like Bob Wade, these people are world-renowned artists, not sign-painters. Billy Blues further substantiated Smoke Sax' "art" definition via letters and affidavits sent by sympathetic experts from the art world, including representatives of the Menil Collection, Diverse Works Art Space and the Municipal Arts Commission.

Billy Blues also contended that the sign code already included a special exemption to insure that structures with non-advertising messages, like the saxophone, would not be regulated by the Sign Administration. Section 4619(c) provides a non-



"Smoke Sax"

exhaustive list of examples of such structures "including but not limited to political messages, religious or church-related messages, public-service, governmental and ideological messages, and other copy of a nature that is not commercial advertising because such a structure is not a sign [either on-premise or off-premise] as defined for purposes of this chapter and is not subject to regulation under this chapter."

Applying this section, Billy Blues argued that the saxophone contains no message at all, much less a commercial one. No words, arrows or anything else mounted on the saxophone, nor any trademark or logo of Billy Blues. Instead, it is simply art to be enjoyed by the beholder.

Billy Blues further contended, even if Smoke Sax was determined to display a "message," it would be considered a non-commercial one under 4916(c). The ideas, emotions or "messages" conveyed to the beholder by this piece of art would be of an ideological or artistic nature — not commercial. As such, the saxophone would fall within the exemption and not be subject to sign-code regulation.

Conclusion

Presented with this evidence, the

General Appeals Board ruled unanimously in Billy Blues' favor. Public and media support of Smoke Sax was so overwhelming that the Sign Administration was basically looking for a graceful way to save face and withdraw its opposition by the time of the hearing. Smoke Sax was officially "art," and not subject to height or any other sign-code restrictions.

In reporting Billy Blues' victory, the local newspapers enjoyed competing for the most clever headlines: "Sax Wins Appeal," "Giant Sax Attack Just a Sour Note," "Overblown Sax" and "Billy Blues Blows Sour Note as City Moves to Ax Sax." Although the dispute concluded with a happy ending — at least for Billy Blues and most of Houston's art community and general public — it graphically demonstrates the emotional and expensive confrontation that often results when attempting to distinguish between art and signage. ■

Richard L. Rothfelder is board-certified in civil trial law and a partner in the Houston law firm of Kirkendall, Isgur & Rothfelder. A 1979 cum laude graduate of the University of Houston Law School, Rothfelder is also serving his second term as a city councilman for the City of Southside Place, a suburb of Houston.