

Ohio Board of Tax Appeals and Court: Greenhouses Are Not Real Estate

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Jonathan T. Brollier is a member in the Columbus, Ohio, office of Epstein Becker & Green PC.

In this installment of SALT From the Swing State, Brollier examines the Ohio Board of Tax Appeals' and Ohio Court of Appeals' decisions that a large commercial greenhouse constitutes a business

fixture that is not subject to Ohio's annual ad valorem real property taxes.

The author represented the taxpayers in *Viola Associates LLC* and *Metamora Elevator Co.*, and continues to represent Green Circle Growers and its affiliates.

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Since Ohio abrogated most ad valorem real property taxes on personal property in 2009, the classification of property as real or personal ceased to be academic — aside from public utility property, if an item constitutes personal property, Ohio's real property taxes will not apply to it.¹ Under Ohio law, business fixtures are a statutory category of personal property that primarily benefits the business conducted on the real estate, not the real estate itself. Business fixtures are not

real property; therefore, they are not subject to annual ad valorem real property taxes in Ohio.²

In 2018 the Ohio Board of Tax Appeals (BTA) concluded that a large commercial greenhouse constituted a business fixture.³ The taxing authorities appealed. In early 2021 the Ohio Court of Appeals for the Ninth Judicial District affirmed the BTA's decision.⁴ Though the affected county and school board appealed the court of appeals' decision to the Ohio Supreme Court, that court recently declined to accept the decision for review.⁵ The decisions — which related to six tax years beginning with 2015 — resulted in a refund to the taxpayer of more than \$4 million.

The case, *Viola Associates LLC v. Lorain County Board of Revision* (though commonly called *Green Circle Growers*,⁶ after the largest of the affiliated property owners), has drawn interest from inside and outside Ohio, perhaps because Ohio's greenhouse and horticulture industry is large and growing. The industry employs some 12,500 Ohioans, who work at more than 1,100 farms in the state growing garden plants, flowers, nursery

² See Ohio Rev. Code sections 5701.02 and 5701.03.

³ *Viola Associates LLC v. Lorain County Board of Revision*, No. 2016-1273, et seq. (Ohio BTA July 11, 2018) (BTA Decision).

⁴ *Viola Associates LLC v. Lorain County Board of Revision*, 2021-Ohio-991, No. 18CA011386 and 18CA011387 (Lorain Cty. Ct. App. June 10, 2021) (Court of Appeals Decision).

⁵ *Viola Associates LLC v. Lorain County Board of Revision*, Entry, No. 2021-0609 (Ohio Sup. Ct. July 28, 2021).

⁶ One of the largest greenhouse operations in the United States, Green Circle Growers is a family-owned company in Oberlin, Ohio. Established in 1968, the company is continuously developing and occupies over 150 acres of greenhouse growing space and 35 acres of outdoor growing space. Originally a vegetable farm started by John van Wingerden, Green Circle Growers has been family owned and operated ever since and is now operated by the second generation of van Wingerdens. Green Circle Growers grows and distributes plants under brand names that include Just Add Ice and Wild Interiors. The company also grows bedding plants and seasonal plants like poinsettias, mums, Easter lilies, primrose, and hydrangeas. Primarily serving mass retailers, Green Circle Growers' customers are located throughout the United States and Canada.

¹ See Mark A. Engel, "The Classification of Real and Personal Property in Ohio," *State Tax Notes*, Sept. 28, 2015, p. 1081.

stock, and ornamental flowers under glass or other similar protection, making Ohio's specialty horticulture industry the 10th largest in the country.⁷

Besides garnering attention from those in the greenhouse industry, the new *Green Circle Growers* decision provides insight into the BTA's and Ohio courts' treatment of the business fixture category of property and illustrates the importance that the BTA attached to the substantial factual record developed during the case's progression.

Factual and Procedural Background

This case related to the valuation of a roughly 186-acre horticultural operation in northern Ohio, where the property owners operate a large commercial greenhouse facility that grows orchids, ground cover, succulents, and a variety of other decorative plants for sale, largely on the wholesale market.

In addition to the land and greenhouses, the facility contains offices, warehouses, distribution facilities, a home, and a barn (together, the Subject Property).

Consistent with his duties as assessor, the Lorain County auditor assigned a fair market value of just over \$40 million to the Subject Property for tax year 2015. Of this value, roughly \$18 million related to the Subject Property's greenhouses; the remaining \$22 million related to the Subject Property's land, offices, warehouse space, and other buildings, which the property owners agreed constituted real property.

The property owners contested the auditor's valuation of the Subject Property, filing complaints with the Lorain County Board of Revision (BOR) under Ohio Rev. Code section 5715.19.

Maintaining that the greenhouses constituted business fixtures (a type of personal property specified in Rev. Code section 5701.03(B)), not real property, the owners' BOR complaints sought a value of about \$22 million, reflecting the auditor's original valuation of the Subject Property, less the value that the auditor had assigned to the

greenhouses. In other words, the property owners initially sought only to have the taxable value of the greenhouses removed but did not contest the auditor's valuation of the Subject Property's other components.

The BOR convened a hearing, where the owners presented the testimony of:

- their general manager of operations;
- the principal of a greenhouse vendor; and
- an independent appraiser who holds the Member of the Appraisal Institute designation.

Though they attended the hearing and cross-examined the owners' witnesses, counsel for the school board and auditor presented no independent evidence of value.

After the hearing, the BOR retained the auditor's original \$40 million valuation, and the owners appealed to the BTA.

Both sides presented written appraisal reports during a multi-day hearing before the BTA. In addition to the appraisal reports, the owners again presented their manager's testimony, together with testimony from their appraiser, Samuel D. Koon. The county presented testimony from its in-house appraiser, as well as the appraisal report and testimony of its independent appraiser, Ronald N. Geer, accredited rural appraiser.

As he had testified before the BOR, Koon said the greenhouses constituted business fixtures or personal property, not real estate. He also offered an independent evaluation of the Subject Property's FMV, which he believed was just under \$10 million. Factors that affected Koon's opinions included the mobile, temporary nature of the greenhouses; the fact that the greenhouses' useful life was less than that of buildings; the fact that there is an active secondary market for used greenhouses, which can be bought and sold, and are often taken down, transported, and reassembled; and the fact that he could identify no benefit that the greenhouses conferred upon the Subject Property separate and apart from the owners' continued operation of a horticulture business. If someone else bought the Subject Property and elected not to continue to grow flowers under glass, such a hypothetical new owner would be expected to disassemble, remove, and sell the greenhouses.

⁷ Charles R. Hall et al., "Economic Contributions of the Green Industry in the United States in 2018," 38(3) *J. Environ. Hort.* 73, 78 (Sept. 2020); 2017 Census of Agriculture — State Data, USDA, National Agricultural Statistics Service, 36 Ohio, Table 39.

In contrast, the county's independent appraiser said the greenhouses constituted real estate. He concluded that the Subject Property's true value, inclusive of the greenhouses' value, was just over \$30 million — that is, the county's outside appraiser thought that the auditor's original valuation of about \$40 million was about 25 percent too high.

Without making specific reference to the statutory definitions of real and personal property, Geer said his experience with market participants was that they treated greenhouses as permanent real estate, since the greenhouses were bolted onto concrete. In support of his reasoning, Geer analogized greenhouses to corrugated metal grain storage bins and bulk milk tanks — in his view, greenhouses, storage bins, and milk tanks should all be treated as real estate.⁸ Geer included not only the structural components of the greenhouses in his opinion of value, but also added on value he attributed to items that he termed “agricultural extras,” which included removable shade cloths, fertilization equipment, rolling tables, and computer systems. Geer also conceded that if someone who was not in the plant-growing business bought the Subject Property, they would likely take down and remove the greenhouses.

Having heard testimony over multiple days and having reviewed thousands of pages of evidence, the BTA concluded that the greenhouses constituted business fixtures, not real property. The BTA adopted most of Koon's opinion of value, concluding that the true value of the Subject Property's real estate was \$10.2 million — roughly a quarter of the value the auditor had originally assigned.⁹

Analysis of legal issues presented in the case follows.

The 1988 *Green Circle Growers* Decision and 1992 Revisions to Definitions of Real and Personal Property

A three-decade-old Ohio Supreme Court decision — relating to some of the same greenhouses as in the present case — remained a persistent feature of the taxing authorities' position in the case. In 1988 the supreme court — applying since-amended versions of the pertinent statutes — held that the greenhouses were structures that were erected on the land and attached to the realty. The court therefore classified them as real estate.¹⁰

But the General Assembly amended those statutes in 1992; indeed, before 1992 the statutes did not even contain a definition of business fixtures. The Ohio Supreme Court has explained that under the previous versions of the statutes, “the distinction between fixtures that were real property and fixtures that were personal property was elusive.”¹¹ And the General Assembly's changes to those definitional statutes were not merely cosmetic. As the supreme court explained, “In 1992, the General Assembly passed Sub. S.B. No. 272, stating in the preamble that it was ‘[t]o amend sections 5701.02 and 5701.03 of the Revised Code to revise the definitions of real and personal property for taxation purposes.’ Sub.S.B. No. 272, 144 Ohio Laws, Part I, 1528.”¹²

Those legislative changes in 1992 also added the newly defined term “business fixture,” which the General Assembly excluded from the definition of real property.¹³

As the BTA explained in the recent *Green Circle Growers* case, “it is clear that the *Green Circle Growers* case decided in 1988, which was prior to the 1992 amendment, did not consider whether the greenhouses fit any of the definitions now present in the statute.”¹⁴

⁸ Significantly, and in contrast to Geer's opinions, Ohio law classifies grain bins as business fixtures, not real estate; indeed, the statutory definition of business fixtures includes storage bins among its non-exhaustive list of examples of business fixtures. See Ohio Rev. Code section 5701.03(B). In fact, a few years before the BTA decided the present case, the Ohio Supreme Court held that grain storage bins constituted business fixtures, not real property. *Metamora Elevator Co. v. Fulton County Board of Revision*, 143 Ohio St. 3d 359, 2015-Ohio-2807; see Engel, *supra* note 1 (discussing the *Metamora* decision). Likewise, the statute includes storage tanks as examples of business fixtures. See Ohio Rev. Code section 5701.03(B).

⁹ BTA Decision, at 7.

¹⁰ *Green Circle Growers Inc. v. Lorain County Board of Revision*, 35 Ohio St. 3d 38 (1988); see BTA Decision, at 4.

¹¹ *Metamora*, 143 Ohio St. 3d 359, 2015-Ohio-2807, para. 20.

¹² *Funtime Inc. v. Wilkins*, 105 Ohio St. 3d 74, 2004-Ohio-6890, para. 17 (holding that roller coasters and their station houses, though permanently attached to the land, still constitute business fixtures because they benefit only the business conducted on the real property, not the real property itself) (quoted in BTA Decision, at 4).

¹³ BTA Decision, at 4.

¹⁴ *Id.*

Ohio's Statutory Definitions of Real Property, Personal Property, and Business Fixtures

In pertinent part, Rev. Code section 5701.02(A) defines real property to include “the land itself . . . and, unless otherwise specified in this section or [Rev. Code section] 5701.03 . . . all buildings, structures, improvements, and fixtures of whatever kind on the land.” Rev. Code section 5701.03 defines the terms “personal property” and “business fixtures,” the values of which are not included in the total true value of the real property.¹⁵

These sections of the Ohio Revised Code contain the 1992 definitions of the several statutory categories of real property: buildings, structures, improvements, and fixtures. As the BTA explained in the recent *Green Circle Growers* case, “The definitions for ‘building,’ ‘structure,’ and ‘improvement’ share an element of permanence in their fabrication or construction, while a fixture is incorporated when it is permanently attached or affixed to the real property and retains its separate identity as tangible personal property.”¹⁶

But even if an item meets one of the definitions of real property, it may still constitute personal property if it satisfies the definition of business fixture. Rev. Code section 5701.03(B) defines a business fixture as “an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty.”¹⁷

In the first major post-1992-amendment case, *Funtime*, the Ohio Supreme Court described a two-step process for determining whether an item constitutes real or personal property under these statutes: “First, determine whether the item meets the requirements of one of the definitions of real property set forth in R.C. 5701.02. If the item does not, then it is personal property. If the item fits a definition of real property in R.C. 5701.02, it is real property unless it is ‘otherwise specified’ in R.C.

5701.03. If an item is ‘otherwise specified’ under R.C. 5701.03, it is personal property.”¹⁸

More than a decade later, in *Metamora*, the Ohio Supreme Court held that if an item is expressly defined as a business fixture in Rev. Code section 5701.03 — for instance, as a storage bin or tank, which are among the examples that the statute lists of business fixtures — the first step of the *Funtime* analysis is not necessarily required.¹⁹ But in the 2018 *Green Circle Growers* decision, the BTA explained that the two-step analysis “is worthwhile in the present case.”²⁰

The BTA Applies *Funtime*, *Metamora*, and 1992 Revisions

Reviewing the evidence presented at the hearing, the BTA found that “the greenhouses situated on the [Subject Property] are not buildings, structures, or improvements. The record shows that the greenhouses are designed in such a way that they are able to be constructed, deconstructed, and reconstructed, all while maintaining the integrity of the underlying parts . . . they are constructed like an erector set, where pieces are connected but not welded.”²¹

However, because the BTA found that the greenhouses were permanently attached to the real property (even though they were removable), they did meet the definition of fixtures under Rev. Code section 5701.02(C).

But the BTA continued the tax classification analysis by following the plain meaning of the statutes, as interpreted by the Ohio Supreme Court’s post-1992 decisions in *Funtime* and *Metamora*, to determine whether the greenhouses were “otherwise specified.” That is, the BTA next determined whether, even though the greenhouses met one of the definitions of real property, they might nevertheless also meet the definition of business fixture, in which case they would constitute business fixtures, causing them to be classified properly as personal property.

¹⁵ See BTA Decision, at 3.

¹⁶ *Id.* at 5.

¹⁷ Ohio Rev. Code section 5701.03(B).

¹⁸ *Funtime Inc. v. Wilkins*, 105 Ohio St. 3d 74, 2004-Ohio-6890, para. 33.

¹⁹ *Metamora*, 2015-Ohio-2807, at para. 2 of the syllabus.

²⁰ BTA Decision, at 5.

²¹ *Id.*

The factual record developed during the years-long course of the case, together with the multi-day and multi-witness hearing, provided much support for the BTA's conclusions. For instance, the BTA found it salient that the greenhouses' fine-tuned elements, "such as a retracting roof, varied styles of irrigation, [and] a complex computer system, are specifically designed to benefit the business of growing plants as opposed to enhancing the utilization or enjoyment of the land."²²

The BTA acknowledged detailed testimony that the owners' witnesses provided, observing that "elements of a greenhouse, or the greenhouse as a whole, can be removed and replaced if business needs change, and the portions that were removed remain intact and can be sold or reused elsewhere. This is particularly evident given the secondhand market for greenhouses, which does not exist for buildings."²³

Evaluating whether the greenhouses were otherwise specified as business fixtures, the BTA explained that "the greenhouses are outfitted with computer systems, shade cloths, irrigation systems, retractable roofs, and other components that are specific to the sophisticated operation taking place at the property."²⁴ Critically, neither of the taxing authority appellees identified any alternative use for the greenhouses that would benefit the land or any other occupant of the property that was not engaged in a commercial horticulture business.

Though the county appellees argued that a greenhouse might have some theoretical alternative use beyond horticulture, "such as shelter for a box of tools or a boat," the BTA weighed the factual record and concluded that "there has been no evidence to show that these hypothetical alternative uses occur in practice."²⁵

In response to the county's suggestion of hypothetical tool- or boat-storage uses, the property owners "presented testimony from multiple individuals to demonstrate that the greenhouses in question were designed especially

for growing plants, and that in their experience, even a second-hand greenhouse would be used only for horticulture."²⁶

Thus, the BTA found "that the greenhouses primarily benefit [the property owners'] horticulture business and would provide little value, if any, to another occupant of the land who was not engaged in the same or very similar business."²⁷ The BTA therefore concluded that the greenhouses constituted business fixtures, which should be excluded from the value of the real property.²⁸

Thus, the BTA largely adopted the opinion of the property owners' appraiser and reduced the Subject Property's true value for tax purposes by about 75 percent, from roughly \$40 million to about \$10 million.

The school board and the county parties appealed the BTA's decision to the appropriate court of appeals, and then petitioned the Ohio Supreme Court to review the BTA's decision even before the court of appeals did. The supreme court declined to review the BTA's decision, and the case proceeded with briefing and oral argument before the court of appeals.

Court of Appeals Affirms BTA's Determination

Between them, the taxing authorities that appealed the BTA's decision identified 20 different assignments of error.²⁹

These assignments of error generally boiled down to disagreement with the statutes' plain meaning, and with several decades of supreme court precedent. The county and school board argued that if an item met one of the initial definitions of real property, the inquiry should end, and the "escape hatch" of the business fixture category should be unavailable. But such an interpretation would have ignored the statute's plain meaning and would have read Rev. Code section 5701.03(B) right out of the code. As the court of appeals explained, "A determination that

²⁶ BTA Decision, at 6.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Though it almost certainly did not affect the outcome, the court of appeals elected to disregard, under the authority of App.R. 12(A), several assignments of error that one of the appellants had not separately argued. See Court of Appeals Decision, at para. 75.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

property meets the statutory definition of a 'building,' 'structure,' 'improvement,' or 'fixture' is not determinative of its status as real property versus personal property because it may be 'otherwise specified' in R.C. 5701.03(B)."³⁰ In other words, "a determination that the subject property is real property under R.C. 5701.02 is not conclusive; the property may yet be found to be 'otherwise specified' under R.C. 5701.03."³¹

Though the county and school board tried to supplant the 1992 statutory amendments, the *Funtime* analysis, and the *Metamora* decision with the old 1988 *Green Circle Growers* decision, the court of appeals did not bite. The 1992 statutory changes rendered the 1988 decision obsolete; as the court of appeals explained, "Because these [statutory] definitions create a new framework for the analysis of the distinction between real property and personal property, they have superseded the analysis performed in [1988] *Green Circle*."³²

Because courts review the BTA's fact-finding — particularly its weighing of competing appraisals — under the deferential abuse of discretion standard, the court of appeals was unwilling to reverse the BTA's adoption of Koon's appraisal over Geer's.³³

Interestingly, Ohio's tax commissioner had published an information release in 2007 and 2008 that provided guidance regarding the classification of some business assets. Arguably relevant to this case, the release categorized "greenhouses attached to permanent foundations" as real property.³⁴ The court of appeals overruled the school board's assignment of error relating to this information release, explaining that the tax commissioner's information releases "have 'no force of law.'"³⁵

Deferring to the BTA's fact-finding, and adhering to the tax classification statutes'

definitions and the *Funtime* analysis, the court of appeals affirmed the BTA in a 2-1 decision.³⁶

Supreme Court Rejects Case for Review

The county and school board again petitioned the Ohio Supreme Court to take the case up for review, and several groups of school and county officials joined that request as amici. Besides rereading arguments made before the BTA and the court of appeals, the appellants argued that the state's law on property tax classification was confusing or uncertain.

But the Ohio Supreme Court, for the second time, elected not to exercise jurisdiction over the case.³⁷

Tax Classification Insights From Ohio

Since Ohio largely abrogated its ad valorem tax on tangible personal property in 2009, there have been a few BTA and court decisions touching on property tax classification. Because most personal property is no longer subject to annual ad valorem real property tax, owners probably do have an incentive to argue that their property is personal, just as taxing authorities have an incentive to argue that property in their district is real.

But the courts have proven capable of eluding a slippery slope and have avoided the danger of the business fixture exception swallowing the real property rule. Indeed, just a couple of years before it rendered its decision in the recent greenhouse case, the BTA rejected a property owner's attempt to categorize some buildings at a defunct power plant in the same county as the Subject Property

³⁶ Court of Appeals Decision, at para. 1, 77. The dissenting judge would have reversed; she reached a factual conclusion different from the BTA's, writing that "the overall use of the land is for commercial agriculture and the use of the greenhouses extends the growing season thereby benefiting the land. Further there are tax benefits associated with the agricultural use of the land which is increased by the use of the greenhouses." *Id.* at para. 79. The dissenting judge did not expressly find that the BTA had abused its discretion, did not cite any portion of the record to support these contentions, and did not respond to the extensive testimony from lay and expert witnesses from both sides, all of whom testified that the greenhouses would be removed from the Subject Property if a new owner bought the Subject Property but chose not to continue to grow plants there.

³⁷ *Viola Associates LLC v. Lorain County Board of Revision*, Entry, No. 2021-0609 (Ohio Sup. Ct. July 28, 2021).

³⁰ Court of Appeals Decision, at para. 17, 24.

³¹ *Id.* at para. 72.

³² *Id.* at para. 28, 67.

³³ *Id.* at para. 39-45.

³⁴ *Id.* at para. 48 (noting the school board's citation of PP 2007-01 and RP 2007-01, "Classification of Certain Business Assets as Real or Personal Property," Issued Sept. 2007; Revised Jan. 2008).

³⁵ Court of Appeals Decision, at para. 49 (quoting *Renacci v. Testa*, 148 Ohio St. 3d 470, 2016-Ohio-3394, para. 3, 37).

as business fixtures.³⁸ At other times, as in *Metamora*, and now *Green Circle Growers*, the BTA weighs the evidence and finds that the evidence places an item in the realm of business fixtures. Weighing evidence and applying it to tax statutes is the usual and expected role of tax courts and specialized administrative bodies like the BTA, which have demonstrated their ability to make these distinctions.

Practitioners in Ohio may draw a few pointers from the long-lived *Green Circle Growers*:

- Testimony matters. Parties shouldn't rely merely on argument or conjecture, but should build their case with knowledgeable lay and expert witnesses.
- Build the case early. The property owners presented testimony from three witnesses at the county level, and two on appeal, together with voluminous documentary evidence and an expert report. While the BOR maintained only an audio recording of its hearing, the property owners retained a court reporter to transcribe the hearing so that the BTA and courts would have the benefit of a written record of the proceedings.
- Follow the statutes. Tie evidence to the plain language of statutes; don't rely on vitriol or conjecture, but elicit evidence that helps the fact finder contextualize the case's particulars to the text of the relevant statute.

Ohio's body of case law on property tax classification has grown slowly over time and remains tied closely to the plain meaning of Ohio's statutes. The BTA and courts have demonstrated a track record of applying testimony and other evidence to those tax statutes, in a variety of contexts, and for each decision finding a business fixture, there appear to be several countervailing decisions finding real

property. Grain bins and greenhouses remain business fixtures, while buildings at power plants, concert venues,³⁹ and other facilities appear to remain real property. The precedents provide useful guideposts, but the BTA and courts evaluate each case on its own merits, applying the evidence to the statutes. Practitioners who take the time to carefully build a case based on thoughtfully presented evidence may well succeed in achieving a favorable result for their clients; in this case, it took about six years, several days of hearings, hundreds of pages of briefing from all sides, and thousands of pages of documentary evidence.

The new *Green Circle Growers* decision provides one more cairn to guide those journeying through Ohio's classification landscape, but it's hardly a watershed, and it joins many other waypoints, each of which provides helpful guidance to observant travelers. ■

³⁸ *NRG Power Midwest LP v. Lorain County Board of Revision*, No. 2015-874 and 2015-890, 5 (Ohio BTA Sept. 20, 2016). Rejecting the owner's appraiser's argument that some buildings at the retired power plant were so specialized that they constituted business fixtures, the BTA exhibited its ability to weigh evidence and apply the *Funtime* test. The BTA explained that those buildings were not business fixtures because "the evidence does not support a conclusion that the improvements constitute tangible personal property that 'primarily' benefits the business conducted on the premises." *Id.*

³⁹ *Polaris Amphitheater Concerts Inc. v. Delaware County Board of Revision*, No. 2004-V-1294 (Ohio BTA Jan. 26, 2007).